NO. -_____

In The
Supreme Court of the United States

NORIS BABB,
Petitioner,

v.

DOUGLAS A. COLLINS, Secretary,
DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal employees' rights are determined under statutes which require that "all personnel actions effecting employees or applicants for employment . . . in executive agencies as defined in Title 5 . . . shall be made free from any discrimination . . ." *See* 42 U.S.C. § 2000e-16(a) ("based on" race, color, religion, sex, or national origin) (emphasis added); 29 U.S.C. § 633a(a) ("based on" age). The language and syntax of these statutes differ from private sector statutes. *Babb v. Wilkie,* 589 U.S. 399, 409-413 (2020). The questions presented are:

Whether federal District Court jury instructions and decisions on motions for summary judgment must be consistent with *Babb v. Wilkie's* statutory framework and specifically:

1. As to summary judgment whether the "shall be made free from any discrimination" permits summary judgment of: (a) federal-sector adverse personnel decisions when a combination of sex and age (i.e., older female) are considered in the process of making those decisions; and (b) damages caused by consideration of EEO activity during the process of making adverse personnel actions.

2. In jury instructions, failing to instruct the jury on what constitutes differential treatment and failing to instruct on burden shifting to the defendant under *LeSage* and *Mt. Healthy*.

Subsidiary questions are whether these errors prejudiced the outcome at trial; whether *Babb v. Wilkie* is applied to federal employee Title VII claims, and whether it bans retaliation in federal employment under 42 U.S.C. § 2000e-16(a).

PARTIES

The petitioner is Noris Babb.

The respondent is the Secretary, Department of Veterans Affairs.

There are no corporate entities associated with this case.

STATEMENT OF RELATED CASES

Noris Babb v. Sloan Gibson, Secretary, U.S. Department of Veterans Affairs, 8:14-cv-01732-VMC

Noris Babb v. Denis R. McDonough, Secretary, U.S. Department of Veterans Affairs, Case No: 23-10383-C, Eleventh Circuit Court of Appeals (2023)

Noris Babb v. Denis R. McDonough, Secretary, U.S. Department of Veterans Affairs, 589 U.S. 399 (2020)

Noris Babb v. Robert McDonald, Secretary, U.S. Department of Veterans Affairs, Case No: 16-16492-FF, Eleventh Circuit Court of Appeals (2016)

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PETITION FOR WRIT OF CERTIORARI

This case presents the Court with an opportunity to provide needed coherence and clarity to the statutory framework applicable to federal-sector discrimination and retaliation claims. According to this Court, "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Assn. v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks omitted) *accord Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 168, 175 (2009). Federal employees' rights at issue in this case are determined under statutes which require that "all personnel actions effecting employees or applicants for employment . . . in executive agencies as defined in Title 5 . . . shall be made free from any discrimination based on . . ." *see* 42 U.S.C. § 2000e-16(a) (race, color, religion, sex, or national origin); 29 U.S.C. § 633a(a) (age).

At the current time, federal employees filing claims under Title VII, 42 U.S.C. § 2000e-16(a) and 29 U.S.C. § 633a(a) the Age Discrimination in Employment Act (ADEA) face inexplicably differing standards of causation than is in the language of these statutes. This Court previously clarified textual differences between private sector and federal sector age discrimination claims under 29 U.S.C. § 633a(a). *Babb v. Wilkie,* 589 U.S. 399 (2020) (hereinafter

periodically referred to as "*Babb I*"). It held that the ADEA's federal-sector provision is violated when a personnel action is tainted by discrimination based on age. 589 U.S. 402-403, 404,405-6,407-413. The Court reached that conclusion based on the plain text of Section 633a(a), which provides that all "personnel actions . . . shall be made free from any discrimination based on age." *Id.* at 402. As the Court explained, "[t]he plain meaning of the critical statutory language ('made free from any discrimination based on age') demands that personnel actions be untainted by any consideration of age." *Id.* The Court specifically defined "the important terms in the statute" and then closely examined "the way these terms relate to each other," emphasizing the provision's syntax. *Id.* at 405. In particular, it noted that "'free from any discrimination' is an adverbial phrase that modifies the verb 'made,'" and describes "how a personnel action must be 'made,' namely, in a way that is not tainted by differential treatment based on age." *Id.* at 405-406. Accordingly, the "plain meaning of the statutory text shows that age need not be a but-for cause of an employment decision in order for there to be a violation" of the ADEA federal-sector provision. *Id.* at 403.

Title VII's federal-sector provision contains the identical "critical statutory language," and uses the same "important terms" in precisely the same way as the ADEA federal-sector provision. It provides that "[a]ll personnel actions . . . shall be made free from any

discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). Indeed, the ADEA's federal-sector provision was "patterned 'directly after' Title VII's federal- sector discrimination ban." *Gomez-Perez*, 553 U.S. 474, 487 (citation omitted). Just as "'free from any discrimination' is an adverbial phrase that modifies the verb 'made'" in the ADEA provision, it performs the same function in the parallel Title VII provision and likewise describes "how a personnel action must be 'made,' namely, in a way that is not tainted by differential treatment" based on protected characteristics or activity. *Babb*, 589 U.S. 405-406. The Court's text-based holding thus applies in full to the Title VII federal-sector provision. *See also Id.* at 418 (Thomas, J., dissenting) ("Because § 633a(a)'s language also appears in the federal-sector provision of Title VII, 42 U.S.C. § 2000e-16(a), the Court's rule presumably applies to claims alleging discrimination based on sex, race, religion, color, and national origin as well.")[1]

Indeed, that is why in *Babb I* the Government took the position that because the ADEA and Title VII federal-sector provisions contain "materially

[1] The Supreme Court's decision to deny certiorari on the Title VII question does not reflect its view of the merits of that question. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 n.56 (2020) ("This Court has said again and again and again that [a denial of certiorari] has no legal significance whatever bearing on the merits of the claim." (citation omitted)); *Powell v. Barrett*, 541 F.3d 1298, 1312 n.5 (11th Cir. 2008).

identical" language, "[t]here is no apparent reason why the Court should interpret those two provisions differently." Gov't Cert. Response in *Babb I* at 22, 24; *see also* Gov't Merits Br. at 34-35 (stating that the ADEA's federal-sector provision was "modeled on" Title VII's federal-sector provision, which contains "materially identical" language). *Compare, e.g.*, (urging application of *Nassar* and the "default rule[]" of but-for causation notwithstanding the federal-sector provision's distinct text), with *Babb*, 589 U.S. 411 (holding that *Nassar* has "no application" to the "markedly different" language of the federal-sector provision and that "the traditional rule favoring but-for causation does not dictate a contrary result"). The Court's decision in *Babb* thus forecloses any argument that the "materially identical" language of the Title VII provision requires a plaintiff to prove liability by but-for causation of the ultimate personnel action when the ADEA provision does not. The two federal-sector provisions must be interpreted alike.

In *Babb v. Sec'y, Dept. of Veterans Affairs*, 992 F.3d 1193, 1199 (11th Cir. 2021), the Court examined *Babb v. Wilkie* before finding it applicable to Title VII cases. It also noted that the "free from any" language involves personnel actions citing 5 U.S.C. § 2302(a)(2), and the process of making a decision. Other circuits also apply *Babb* to Title VII. *Huff v. Buttigieg,* 42 F.4th 638, 645-6 (7th Cir. 2022); *Kocher v. Sec'y, Dept. of Veteran Affairs,* 2023WL8469762 **1,2 (3rd Cir. 2023). The Fifth and Tenth Circuits have not yet

decided this question because the parties did not ask or argue for it. *Allen v. U.S. Postal Service,* 63 F.4th 292 (fns.2,7) (5th Cir. 2023); *Nelson v. DeJoy,* 2024WL3507723 (10th Cir. 2024) (*4).

When considering Title VII federal-sector discrimination claims, including retaliation claims, before *Babb v. Wilkie,* the Equal Employment Opportunity Commission (EEOC) and the Merit Systems Protection Board (MSPB) had rejected the traditional "but-for" standard. *See Complainant v. Dept. of Homeland Sec.*, EEOC DOC 0720140014, 2015 WL 5042782, at *5-6 (Aug. 19, 2015) (retaliation under Title VII or ADEA); *Complainant v. Dept. of Homeland Sec.*, EEOC DOC 0720140037, 2015 WL 3542586, at *4-5 (May 29, 2015) (retaliation under Title VII); *see also Petitioner v. Dept. of Interior*, EEOC DOC 0320110050, 2014 WL 3788011, at *10 n.6 (July 16, 2014) (holding that the "but-for" standard does not apply in federal-sector Title VII or ADEA cases); *Savage v. Dept. of Army*, 122 M.S.P.R. 612, 634 (Sept. 3, 2015) (retaliation under Title VII); *Wingate v. U.S. Postal Serv.*, 118 M.S.P.R. 566 (Sept. 27, 2012) (concluding that a Federal employee may prove age discrimination by showing that age was "a factor" in the personnel action, even if it was not the "but-for" cause).

The EEOC and MSPB recognize that the failure of an employer to establish the same decision defense establishes but-for causation. *Wilson v. Small*

Business Administration, 2024 WL 301904 *6 (MSPB January 25, 2024) (deferred to EEOC notwithstanding noting that *Babb I* did not elaborate on the method of proving but-for causation).

We recognize that this Court has not yet addressed the statutory basis for a federal-sector Title VII retaliation claim. The same broad, general, sweeping "free from" language of § 2000e-16(a) should form the statutory basis for such a claim. *See Gómez-Pérez v. Potter*, 553 U.S. 474, 479, 487 (2008) (finding retaliation provisions embodied within the "free from any discrimination" language of 29 U.S.C. § 633a(a)).

In *Babb I*, the original panel of the Eleventh Circuit on July 16, 2018 recognized that it had not previously considered the textual differences between the private-sector and federal-sector provisions. Nevertheless, the panel determined that it was bound by a prior decision applying a *McDonnell Douglas* test and a but-for causation standard to a federal-sector retaliation case, while admitting the prior decision also did not consider said textual differences.

In *Babb v. Sec'y,* 992 F.3d 1193 (11th Cir. 2021) they changed course and accepted this Court's decision in *Babb I*. However, as this case (*Babb II)* will show, material differences exist between *Babb I's* statutory framework and the Eleventh Circuit's application of that case. For example, in *Babb II*, in oral argument and its jury instruction decision, the appellate court criticized consideration of a protected

characteristic in the process of making a decision as establishing liability. App.22a. In its jury instructions decision, the panel did not accept burden shifting after a different panel's rejection of *LeSage* and *Mt Healthy*. *Terrell v. Dept. of Veterans Affairs,* 98 F.4th 1343, 1353 fn3 (11th Cir. 2024) ("But that framework applies in constitutional cases, not Title VII cases.") Thus, express statements in emails and under oath showing consideration of older females, their discrimination claims and EEO activity, including mentioning Babb, all by decision makers during the process of making all the adverse personnel actions, were criticized as a basis for liability, i.e., differential treatment, in the process of making a decision. App.16a.

In prior cases, the Eleventh Circuit has upheld jury instructions based on *Nassar,* the very law *Babb I* overturned. *McLain v. Dept. of Veterans Affairs,* No.22-11667, (11th Cir. 2023), *cert denied* 144 S.Ct. 1353 (2024). It has also upheld summary judgment decisions primarily based on that law. *Terrell, supra, cert denied* 145 S.Ct. 273 (2024)*; Bell v. Dept. of Veterans Affairs,* No. 22-12698, (11th Cir. 2024) *cert denied* 145 S.Ct.264 (2024). In those cases and this one, the court at points correctly quoted *Babb I* but as in this case does not apply it.

All of this has created a confusing legal framework which refuses to recognize consideration or shift the burden of a same decision defense to the government and allows the district court to instruct a jury that

differential treatment needs to have "played a role in the decision". App.22a. In short, this type of differential treatment does not apply *Babb I*. It gives it little if any significance and gives the ultimate decision too much control over both liability and damages. Yet, the court accepted the errors in the MSJ decision and the jury instructions. *Id.*

In practice, *Babb I* is not being followed in the Eleventh Circuit. Consideration of protected characteristics in the process of making a decision is necessary for a "free from any" workplace. Moreover, a federal employee must bear a burden not borne by most private-sector or federal-sector claimants before the EEOC or MSPB. In private sector Title VII cases, once a motivating factor is established the burden shifts to the employer to show it would have made the same decision. This Court has repeatedly explained the need for this in many contexts, including Title VII, and the relation of burden shifting to "but-for" causation. *See e.g., Price Waterhouse v. Hopkins,* 490 U.S. 228, 246-249; 254-255; 277-279 (1989). By rejecting that, the Eleventh Circuit will cause federal employees to lose prospective relief rights they and other federal employees should have. Without an understanding (i.e., instruction) on consideration of protected characteristics and burden shifting, a jury simply cannot understand differential treatment's

significance or meaning let alone its relation to but-for causation.[2]

Petitioner Noris Babb respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on June 26, 2025 and resolve its conflicts with *Babb I.*

OPINIONS AND ORDERS BELOW

Babb I: The July 16, 2018 opinion of the court of appeals was not designated for publication. The August 23, 2016 order of the district court which was also unreported. The October 9, 2018 order of the court of appeals denied a Petition for Rehearing and Rehearing En Banc. *Babb v. Wilkie,* 589 U.S. 399 (2020) followed and led to *Babb v. Sec'y, Dept. of Veterans Affairs,* 992 F.3d 1193 (11th Cir. 2021).

Babb II: The June 26, 2025 opinion which was not designated for publication, is in Appendix pp.1a-23a. The August 19, 2022 order granting/denying summary judgment by the district court is in Appendix pp.24a-62a. The November 10, 2022 order of the district court on a motion for reconsideration is in Appendix pp.63a-67a. The September 15, 2025 order of the court of appeals is in Appendix p.68a.

JURISDICTION

[2] During oral argument Babb pointed out that we are unaware of any case finding differential treatment in the Circuit.

The decisions of the court of appeals were entered on June 26, 2025. A timely petition for rehearing and rehearing en banc was denied on September 15, 2025. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 15(a) of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 633a(a), provides in pertinent part: "All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in executive agencies as defined in section 105 of Title 5 . . . shall be made free from any discrimination based on age."

Section 717(a) of Title VII of the Civil Rights Act of 1964 (hereafter, "Title VII"), 42 U.S.C. § 2000e-16(a), provides in pertinent part: "All personnel actions affecting employees or applicants for employment . . . in executive agencies as defined in section 105 of Title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."

29 C.F.R. § 1614.105 and provides:

> (a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information must consult

a counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action. (Emphasis added).

(2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the commission. (Emphasis added).

5 U.S.C. § 6121 Provides:

For the purposes of this subchapter-

(5) "compressed schedule" means-

(A) in the case of a full-time employee, an 80-hour biweekly work requirement which is scheduled for less than 10 workdays; and

(B) in the case of a part-time employee, a biweekly basic work requirement of less than 80 hours which is scheduled for less than 10 workdays.

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

This case presents questions of fundamental importance to the resolution of the Title VII (and ADEA) cases of thousands of federal employees.

Inherent questions presented in this petition are whether the Court's decision in *Babb v. Wilkie,* 589 U.S. 399 (2020) and *Gomez-Perez v. Potter,*553 U.S. 474 (2008) should apply to the interpretation of federal sector Title VII claims under 42 U.S.C. § 2000e-16(a). If, as discussed above, those questions are answered in the affirmative, the other issues can be readily resolved.[3]

1. Gender Plus Age Claims

In *Babb II,* Babb filed complaints with gender plus age discrimination, retaliation and retaliatory hostile work environment claims. The complaint described discrete acts. Babb also presented evidence that she

[3] The Supreme Court in Part B specifically rejected the Secretary's arguments based on *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167 (2009); *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013) and *Safeco Ins. Co. of America v. Burr,* 551 U.S. 47 (2007). However, the Eleventh Circuit decision uses *Safeco* to advance its decision that differential treatment must have "played a role in the decision." App.22a.

was treated differently based on her gender and age and based on her EEO activity. The district court's decision on summary judgment was based on separate consideration of a gender and an age claim which the district court found lacking. Compare App.51a and App.52a. The panel upheld the district court's approach on much the same basis. "Babb provides no evidence that age or sex played any role in the selection of Grawe or Mack." App.17a. Neither court considered whether the combination of gender plus age tainted the process. *Jefferies v. Harris County Community Action Association,* 615 F.2d 1025, 1032-33 (5th Cir. 1980) ("The use of the word 'or' evidences Congress's intent to prohibit employment discrimination based on any or all of the listed characteristics."); *Lam v. University of Hawaii,* 40 F.3d 1551, 1561-62 (9th Cir. 1994) ("When a plaintiff is claiming race and sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, and not just whether the employer discriminates against people of the same race or of the same sex."). As to private-sector sex and age claims compare *McCreight v. Auburnbank,* 117 F.4th 1322-1352 (11th Cir. 2024) (apparently rejecting sex plus age claims based on different causation standards) with *Frappied v. Affinity Gaming Black Hawk, LLC,* 966 F.3d 1038, 1047-1049 (10th Cir 2020) (recognized sex plus age claims) (and cases and journals cited therein).

To the extent one believes the discrepancy between the Eleventh Circuit and other courts is affected by the causation standard in 29 U.S.C. § 623, *Babb I* held 29 U.S.C. § 623 does not apply to federal employee claims of age discrimination. Rather, § 633a applies. As discussed, *Babb I* recognized 633(a) contains the free from any discrimination language. There should be no causation difference between federal Title VII and age claims or impediment to gender plus age claims.

With regard to burden shifting, the Supreme Court and Congress have made clear that Title VII's federal-sector provision implements the Constitution's equal protection guarantees and displaces free-standing Constitutional remedies for equal protection violations in the federal employment context. See *Brown v. General Services Admin.,* 425 U.S. 820, 825 (1976) (citing legislative history). In *Price Waterhouse v. Hopkins,* 490 U.S. 228, 246-249; 254-255; 277-279 (1989) (a mixed motive case arising, as here, under Title VII) the Court recognized mixed motive burden shifting in a Title VII case and stated:

* * *

> ***248** B In deciding as we do today, we do not traverse new ground. We have in the past confronted Title VII cases in which an employer has used an illegitimate criterion to distinguish among employees, and have held that it is the employer's burden to justify decisions resulting from that practice. When an employer has asserted that gender is a BFOQ within the meaning of § 703(e), for

example, we have assumed that it is the employer who must show why it must use gender as a criterion in employment. (Citations omitted.)

* * *

We have reached a similar conclusion in other contexts where the law announces that a certain characteristic is irrelevant to the allocation of burdens and benefits. In ****1790** *Mt. Healthy City Bd. of Ed. v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), the ***249** plaintiff claimed that he had been discharged as a public-school teacher for exercising his free-speech rights under the First Amendment. Because we did not wish to "place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing," *id.,* at 285, 97 S.Ct., at 575, we concluded that such an employee "ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record." *Id.,* at 286, 97 S.Ct. at 575. We therefore held that once the plaintiff had shown that his constitutionally protected speech was a "substantial" or "motivating factor" in the adverse treatment of him by his employer, the employer was obligated to prove "by a preponderance of the evidence that it would have reached the same decision as to [the plaintiff] even in the absence of the protected conduct." *Id.,* at 287, 97 S.Ct., at 576. A court that finds for a plaintiff under this standard has effectively concluded that an

> illegitimate motive was a "but-for" cause of the employment decision. See *Givhan v. Western Line Consolidated School Dist.,* 439 U.S. 410, 417, 99 S.Ct. 693, 697, 58 L.Ed.2d 619 (1979). See also *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 270–271, n. 21, 97 S.Ct. 555, 566, n. 21, 50 L.Ed.2d 450 (1977) (applying *Mt. Healthy* standard where plaintiff alleged that unconstitutional motive had contributed to enactment of legislation); *Hunter v. Underwood,* 471 U.S. 222, 228, 105 S.Ct. 1916, 1920, 85 L.Ed.2d 222 (1985) (same).

We will address related issues including pretextual reasons having a legal basis beyond *Babb I* in Proceedings Below.

B. FACTUAL BACKGROUND[4]

Petitioner joined the Bay Pines VAMC in 2004 and helped to develop the Geriatric Pharmacotherapy Clinic (GPC), which serves older veterans living with disease states and disabilities common to individuals of advanced age with military service. Such individuals present special challenges when considering co-morbidities throughout the caregiving process including during the administration of medications. Babb was a highly successful pharmacist. In 2009 Babb was given an advanced scope by prior Pharmacy Management, because the

[4] Many of the earlier factual paragraphs are the same as in the Petition for Certiorari in *Babb I* except where facts relating to new issues suggest additional facts.

way GPC operated prior to 2012 necessitated that Babb have an advanced scope to prescribe medications without a physician present, as part of her disease state management (DSM) duties.

In 2010 the VA announced a nationwide treatment initiative called Patient Aligned Care Teams (PACT). The purpose of PACT was to provide veterans' healthcare through a team which follows a patient and takes care of their total aspects of health. It was similar to the way the GPC had been operating. Consistent with the purpose and aims of PACT, facilities throughout the VA made the existing primary care physicians, nurses, social workers, clerks, and other staff, such as pharmacists, permanent members of their modules' PACT.

Pharmacy management at Bay Pines VAMC rejected HR's recommendation that module pharmacists be allowed to transition into the CPS positions, except in the case of two pharmacists under the age of 40. For all three females over 50 in the modules and both female pharmacists over 50 in the in-patient setting at Bay Pines, Pharmacy denied them the opportunity to transition into PACT positions where they were already working. As a result of these actions, the older females were ultimately denied career advancement to a GS-13 grade, despite the fact that they were performing so highly in their positions that the doctors with whom they worked wanted them to remain in their positions. Yet, they were the only people denied the ability to do

that. They were denied in favor of younger men and women and older men.

Drs. Trask and Truitt, two of the female clinical pharmacists above the age of 50 when the material events occurred, were working in the Primary Care Modules at Bay Pines when PACT was announced. They filed EEOs after being denied advanced scopes of practice. Petitioner opposed management's actions, provided statements, and testified in support of Drs. Trask and Truitt's claims. Drs. Truitt and Trask contended, *inter alia*, that the VA's justification for their non-selection — their lack of advance scopes of practice – was a pretext for discrimination. They further contended, *inter alia*, that the VA's justification for denying their advance scopes and any training allegedly necessary to obtain advanced scopes, was also a pretext for discrimination.[5]

[5] Until the case of Drs. Truitt and Trask, a pharmacist would receive an advance scope when any collaborating physician signed the pharmacist's application. Multiple physicians supported Trask and Truitt and signed their advanced scopes. Other VA facilities granted advance scopes in the same way. In fact, Bay Pines had never previously denied an advance scope to a pharmacist with such an application. Nevertheless, Pharmacy management first obstructed and then denied the efforts of Drs. Trask and Truitt to obtain advanced scopes prior to the PACT selections. The Court of Appeals based its decision upon managements' asserted reason. *See Trask*, 822 F.3d 1179,1192-93, (11th Cir. 2016) *cert denied* 137 S.Ct. 1133 (2017). Drs. Truitt and Trask petitioned this Court for a writ of certiorari, not for the issues herein, but for issues related to the prima facie burden under the *McDonnell Douglas* framework because management

On April 11 and 12, 2012, Dr. Babb submitted statements maintaining Doctors Anita Truitt and Donna Trask were being discriminated against based on their sex and age (older females). On September 27, 2012 Babb was denied the opportunity to attend a GPC PACT training conference while a 31-year-old female pharmacist was allowed to attend an off-campus training conference with her PACT team. In December 2012, Babb received verbal counseling from Pharmacy Chief Wilson for conducting training with materials that had not been proved by the Education Department. She was using the same materials which Wilson knew had been used for 15 years by two older male counterparts without any counseling or reprimand. Despite this knowledge Babb was verbally counseled, and she was removed from conducting training. No one else was.

At the end of 2012, without Babb's participation, Pharmacy management rejected Geriatrics' request for 3 appointment slots and maintained that the only way Petitioner could keep her advanced scope and advance (*i.e.*, to a GS-13) was if Geriatrics agreed to 6 appointment slots, which Pharmacy knew was unworkable for Geriatrics' patients. Without telling Babb, pharmacy management falsely claimed that

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engineered its pretextual reasons into the prima facie case by allowing a young male to obtain an advance scope just before preventing Truitt and Trask from obtaining one. This resulted in the district court and Court of Appeals using the advance scope to impair Truitt and Trask's prima facie case.

without six appointment slots for her advanced scope, Babb would not want to work in the Geriatrics Clinic she helped to develop. Geriatrics wanted to maintain Babb's current schedule. Babb did too but she was out of the process. Pharmacy's false statements and separation worked by causing GPC to agree to no DSM. If Babb would not go there without 6 and GPC could not agree to 6, then without a DSM pharmacist there was no need for DSM.

Pharmacy had done this by excluding Babb from negotiating this agreement even though they let a young male and a young female participate in negotiations over their own agreements. These actions by Pharmacy management led to what Stewart admitted was the unheard of cancellation of her advanced scope before it was set to expire (October 2013), ultimately prevented Babb from performing DSM, and became an ingredient in her being denied a GS-13 just like all the other older females on March 27, 2013. Like Drs. Truitt and Trask and all female pharmacists over 50, Babb was thereby prevented from a promotion to a GS-13 and an increase in pay. Her efforts in 2012 and January 2013 and thereafter to obtain training in anticoagulation were unsuccessful and emails showed management

suspected 30 and 31-year-old female pharmacists would apply.[6]

Williams agreed to sign an agreement without any DSM only because pharmacy management claimed Babb would not want to do three DSM as she had been doing since 2009 and meet every requirement of the CPS position, including a 25% requirement. In addition to the three official slots, there had always been time for phone visits and drop-in visits in the clinic which Babb and the GPC director, (Dr. John Hull) knew. Williams was the head of Geriatrics, not the GPC. Williams admitted he wanted the clinic to be able to run the way it had been running. So did Babb. But she did not even know that this was happening for months after it happened and could not tell Williams he was being misled.

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[6] Babb suffered discrimination, opposed discrimination against other older females, filed an EEO claim, suffered retaliation, and was specifically targeted for an AIB investigation in a facility with a history of retaliation from the Director's level down against numerous employees who filed EEO claims. There was direct evidence of a scheme to destroy the careers and reputations of employees who engaged in EEO activity. The government only appealed two of the many cases filed by those employees in federal court. *See Gowski v. Peake*, 682 F.3d 1299 (11th Cir. 2012). In Babb's case the history of discrimination and retaliation against older females involved the highest levels of pharmacy. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154. F.3d 344, 354–355 (6th Cir. 1998). (Summary judgment denied noting head of an area is in a position to shape attitudes, policies and decisions of all division's managers, including where that official expresses improper bias and prejudice).

During closing argument, the Secretary acquiesced to Babb's position she could meet the 25% with the three slots both she and Williams were willing to do. Babb had records that she had been doing that for months prior to December 2012. The appellate opinion actually relied on pharmacy's disinformation to Williams after excluding Babb from the process. The court then concluded something Williams and Babb separately agreed upon (three slots) would not allow her to do 25% and therefore DSM had to come out of the agreement. App.4a-5a. Shifting burdens is important to protect against this type of error. In discovery management came up with their figures three times, Babb rebutted them and at trial the defendant caved.

Justice, Wilson, Robert Stewart and Marjorie Howard were all involved in January 2013 email exchanges tying Babb to "EEO" and to opposition to discrimination against older females. Justice and Stewart actually discussed the anticoagulation position in one stream and prejudged Babb's qualifications, said she should go to the float pool, and denied her training. Justice: made Stewart the panel lead; prepared the questions the panel asked; encouraged Stewart to deny Babb any anticoagulation training in the months before the panel interview; told Babb the interview questions would be performance based questions, a type different than the clinical ones she was asked in the interview (as did Stewart); knew, as Stewart admitted, that 99% of all residency trained

pharmacists were just out of school (i.e., young or overwhelmingly so) and that the VA Central Office issued directives that required experience to be equally considered with residency. Yet residency got a special credit in this instance. It is too far a leap for one assessing whether gender and age were considered in the process of a decision to ignore this. Justice was also at the center of discrimination against older females and these allegations had been made by pharmacists and supported PACT physicians since 2011.

In 2014, just before she and certain other older females were set to testify in Truitt and Trask's case, Babb was offered GS-13 anticoagulation or Mod B positions. One other older female witness was given a GS-13 in the same position she had for 26 years. After she started, Babb found she was being denied holiday pay because management claimed she was on a compressed schedule contrary to 5 U.S.C. §6121.

C. PROCEEDINGS BELOW

In *Babb I,* Babb commenced this action in the Middle District of Florida, alleging that she was subject to discrimination, retaliation, and a discriminatory and retaliatory hostile work environment in violation of Title VII and the ADEA.

After a period of discovery, the district court granted the VA's motion for summary judgment on all of Babb's claims.

On appeal, Babb argued that the district court erred in granting summary judgment in several respects. The Eleventh Circuit reversed the gender claim for having not applied a motivating factor test, (a decision of first occurrence for federal employees within the Eleventh Circuit) but affirmed everything else. It felt that it was bound by a decision of a different panel who heard *Trask v. Dept. of Veterans Affairs*, 822 F.3d at 1191.

The Eleventh Circuit denied petitioners' timely petition for panel rehearing or rehearing en banc.

A Petition for Writ of Certiorari was granted as to the age discrimination claim. It resulted in *Babb v. Wilkie,* 589 U.S. 399 (2020) which reversed and remanded age discrimination claims.

On remand the Eleventh Circuit reversed and remanded the age discrimination claim and the gender discrimination claim but affirmed the retaliation and hostile work environment claims. Babb petitioned for rehearing on the latter two issues.

On rehearing the Eleventh Circuit held that the Supreme Court's decision in *Babb I* undermined *Trask* to the point of abrogation and that the standard that the Supreme Court articulated now controls cases arising under Title VII's nearly identical text. It

reversed the summary judgment on retaliation and hostile work environment claims. It further held that *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855 (11th Cir 2020) clarified the law governing what it called "retaliatory-hostile-work-environment" claims. The standard for such claims is, "might have dissuaded a reasonable worker" test articulated in *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53 (2006), and *Crawford v. Carroll,* 529 F.3d 961 (11th Cir. 2008). A retaliatory hostile work environment (HWE) is a personnel action under 5 U.S.C. §2302(A)(@)(a)(xii), *Savage v. Dept. of the Army,* 122 M.S.R.P. 612, 627 ¶23 (2015); *Sistek v. Dept. of Veterans Affairs,* 955 F.3d 948, 955 (Fed. Cir. 2020). The Eleventh Circuit vacated the district court's grant of summary judgment and remanded for the district court to consider claims under the proper standards.

In the district court the defendant then moved for "supplementary" summary judgment (MSJ) based upon its original MSJ and certain additional arguments. The MSJ was granted in part and denied in part by order dated August 19, 2022. Summary judgment was granted on Count II, gender and age discrimination. The Order denied summary judgment on Count I, retaliation, and Count III, retaliatory hostile work environment.

The Eleventh Circuit and the district court seem to have felt an independent "decision" by an interviewing panel or at least statements by panel members, who were not selecting officials, could effectively prove age

was not involved in the ultimate decision. This involved misstated facts, resolution of disputed facts and violation of *Babb I.* Justice created the panel and its questions and was at the center of discrimination against older females in this and the *Trask* case since 2011.

The district court criticized Babb for complaining about "specific examples" questions when Justice developed them and she and Stewart barred her any anticoagulation training for over four months before the interview and misled her on the nature of questions. App.52a-53a. Babb thought she did well in the interview until she saw the panel members scoring and felt it was her worst interview. Training "which may have been reasonably expected to lead to an" action described in subparagraph (ix) and affects their §(xii) rights can also be an adverse personnel action under 5 U.S.C. §2302(a)(2)(A)(ix) and an event in a hostile work environment. What panel members thought and their recommendation can be considered, but not as undisputed facts. In fact, some courts look to the fact of who was selected as evidence of discrimination and the role and comments of supervisors. *See Shazor v. Preferred Transit Management, LTD.*, 744 F.3d 948, 957-958 (6th Cir. 2014) (person selected of different characteristics); *Wannamaker-Amos v. Purem Novi, Inc.,* 126 F.4th 248,259-260 (4th Cir. 2025) (supervisor's role). This is not like the Supreme Court hypothetical on p.407. This is a process set up by the discriminator, Justice,

after she "predicted" there would be an EEO claim. Babb should have the opportunity to rebut the government's effort to prove this defense.

Decision on gender plus age claims prejudiced trial.

Beyond summary judgment, the verdict was prejudiced by the MSJ decision because it led to the exclusion of evidence directly related to retaliatory intent and differential treatment. This evidence helped to prove consideration of protected characteristics during the process of making all adverse personnel actions.

On the last day of trial all retaliation damages were stricken after reconsideration of the MSJ. Paragraph 10j was specifically identified in the Third Amended Complaint as a discrete act of retaliation for, *intra alia,* opposing discrimination of older females. That claim survived a Motion to Dismiss the Third Amended Complaint and the MSJ. It provides:

> On March 27, 2013, Babb became aware that Wilson was excluding Babb from promotions by implementing new qualification standards. These qualification standards would make it easier for those remaining pharmacists to qualify with advanced scope of practice to be promoted to GS-13. This included the predominately male pharmacists selected to the PACT. This could have benefited Babb had

> her scope of practice not been taken away. As a result, plaintiff knew she could not be promoted to GS-13 which would have brought her a higher salary, pay, compensation and benefits.

The first sentence states that Dr. "Babb became aware that Wilson was excluding Babb from promotions by implementing new qualification standards on March 27, 2013." The exclusion of someone from promotion or a decision adversely affecting their pay, would necessarily be an adverse personnel action if done with retaliatory intent because promotions and pay decisions are personnel actions under 5 U.S.C. § 2302(a)(2)(A)§§(ii) and (ix). Any adverse action affecting pay or promotions based on retaliation would be an adverse personnel action. The process by which this action came about, involved a number of actions and statements about Babb's gender plus age and EEO activity. Damages were stricken without considering those facts. The Secretary, without any authority, claimed 10j cannot be a discrete act even though it never obtained its dismissal. Instead, the Secretary ignored the first sentence of paragraph 10j and focused on the denial of the advance scope management engineered without Babb's participation to claim 10j was not timely exhausted. The denial of the advance scope is alleged in paragraph 10i. The court excluded that as a discrete act even though Babb never made it a discrete act. It was part of the discrimination she suffered which led

to a pay claim in paragraph 10j which was listed as a discrete act. The MSJ decision does not strike the evidence in paragraph 10i. In paragraph 10j the advanced scope is referenced in the fourth sentence because it helps explain why Babb became aware on March 27, 2013 that Wilson was excluding her from promotions in qualification standards. Prior to this, Babb had been told Williams did not want DSM. She did not learn the truth until Williams was deposed in this case. The very unusual removal of Babb's advance scope (per Stewart no advanced scope was ever cancelled like Babb's was) and then the March 27, 2013 announcement by Wilson opened her eyes and made Babb aware that pharmacy was involved in excluding her from promotions. Any effect on her pay or promotion did not occur earlier than March 27, 2013. *Cf. Shiver v. Chertoff,* 549 F.3d 1342, 1344 (11th Cir. 2008) ("The employee must contact an EEO counselor within 45 days of the effective date of the action.") (Emphasis added.) She filed within 45 days.

The exhaustion regulation, 1614.105(a)(2), p.11 *infra* also establishes that the 45 days runs from the effective date of the action. Here that is knowledge of harm to her pay by discrimination by pharmacy management. Second, Section 1614.105(a)(2) requires an extension when an individual was "not notified of the time limits and was not otherwise aware of them." In this case, and at the administrative stage when this claim was administratively accepted, Babb testified this is when she first realized Pharmacy and not just

Williams could have been doing this to harm her like it did other older females.

With regard to all retaliation claims including anticoagulation, we had cited *Staub v. Proctor Hospital,* 562 U.S. 411 (2011) in our cat's paw argument. It is not mentioned in the decisions. Wilson admitted perceiving Babb being involved EEO activity by 2012 or early 2013. However, the appellate panel never addressed *Fogelman v. Mercy Hospital*, 238 F.3d 561, 571–72 (3rd Cir. 2002) (recognizing that a plaintiff can be perceived as engaging in protected activity). It also did not address the Supreme Court decision in *Heffernan v. City of Paterson,* 136 S.Ct. 1412, 1418-19 (2016) (A 1983 decision). The trial court rejected a jury instruction on this issue and the appellate court never considered either of these cases. If they recognized *LeSage* and *Mt. Healthy* burden shifting these errors could not have occurred.

On April 8, 2013, before the selection of the anticoagulation position, a denial of the Mod B position and the failure to give Babb holiday pay, both Wilson and Justice testified under oath before an Administrative Investigative Board (AIB). They caused the AIB to be impaneled to investigate the people they knew were making EEO claims against them: Trask, Truitt and Babb. They told the AIB investigators their names to target them for investigation. The investigation cleared them but the appellate decision implies otherwise. It is difficult to understand why this targeting was not considered by

the panel as at least as a disputed fact. More disturbing was the fact that Justice and Wilson signed sworn declarations saying they knew nothing about the EEO activity of Babb until after May 8, 2013. This was designed to get past the times when certain decisions were made. However, emails and sworn testimony show it was a false statement and under law that should be something that is considered for credibility. She knew it was false because she targeted Babb in the AIB interview, disputed claims in a conference with Babb in February and emails involving multiple managers in January 2013. *Goldsmith v. Bagby Elevator Co.,* 513 F.3d 1261, 1285 (11th Cir. 2008).[7]

As to Mod B, both Babb and another supervisor of that position knew it was available in 2012. Justice claimed Mod B was not available since 2012 until somehow it became available the week before Babb was to give a deposition in the Truitt Trask case and she was offered a GS-13 position in Mod B or anticoagulation whichever she wanted. There was no evidence submitted that Mod B positions did not exist except for Justice's highly questionable testimony. Courts will typically not consider such self-serving uncorroborated statements. Her testimony had by that point been impeached by several sources, including Babb, Williams, Trask and sworn

[7] In closing argument, defense counsel said the emails were a prediction of events to come. Yet that was not considered on May 8. In any event, it was a "consideration."

documents including Hull emails and her own testimony. In 2014 she placed Babb into a PACT position without interviewing for it.

There were several decisions that were made on the last day of the trial which literally gutted Babb's case. First, the court denied testimony by Babb, Donna Trask and another witness about older female discrimination including email admissions and the AIB sworn testimony.

Earlier in trial after Babb testified about Truitt and Trask's discrimination against them and other older females, the secretary's attorney cross-examined her by maintaining that *Trask's* decision found that there was no basis to their claims. We objected because *Trask* had been abrogated by *Babb I*. It should not have been used for purpose it was used. The court instructed the jury that the decision was abrogated. At the end of trial, the jury was told they could not consider the testimony given by Babb, Trask and the other evidence relating to older female discrimination except as evidence of a good faith belief in her retaliation claim, something that before this would not have been reasonably doubted. Had the MSJ on older female discrimination not been erroneously granted, this evidence would have been in the case. Yet it all included the very same discrimination by the same people over substantially the same positions and should have been admissible under 404(b) for the purposes of showing intent. It was

admissible because in the retaliation case this evidence can help to show motivation for retaliation. *See e.g. Whitmore v. Dept. of Labor,* 680 F.3d 1353, 1370–72 (Fed. Cir. 2012) (in case involving high level officials following (as here) an employee's protected activity, it is important to consider all the evidence of retaliatory motive). Moreover, had the court properly considered the statutory framework and realized the Secretary had a burden, this evidence at least helped to prove retaliatory intent and could have rebutted self-serving statements by Justice and Wilson. *Goldsmith v. Bagby Elevator Co.,* 513 F.3d 1261, 1285 (11th Cir. 2008); *Demers v. Adams Homes of NW Fla., Inc.,* 321 Fed. Appx. 847, 853-54 (11th Cir. 2009); *U.S. Postal Service v. Aikens,* 460 U.S. 711, 714 n.3 (1983). This evidence can be critical in discrimination and retaliation cases and was here especially because high level officials were being accused over a multiyear period of gender and age discrimination.

Finally, the striking of damages for retaliation and the summary judgment on gender and age harmed Babb's claim she was denied holiday pay after Justice gave her a Mod B Position. Defendant claimed Babb did not receive holiday pay because she was on a compressed schedule. However, 5 U.S.C. 6121 unquestionably disproved that. Other witnesses on the same schedule testified they got holiday pay.

The trial resulted in a verdict and later a judgment for the defendant on all counts.

This case helps show why Congress came up with the language it did and why this Court's settled practice of shifting the burden to employers is necessary in these cases.

REASONS FOR GRANTING THE WRIT

1. To protect federal employees in federal court cases from causation standards that are different than private-sector plaintiffs in Title VII cases and federal employees' who make Title VII and ADEA claims in the administrative process.

Neither the Secretary nor any court has offered a reason to not apply *Babb v. Wilkie* to Title VII. Indeed, the Eleventh Circuit has agreed it does apply. Yet, once liability is found the decision in this case would reject burden shifting envisioned by *Babb I* under *LeSage* and *Mt. Healthy*. Conversely, private-sector plaintiffs in Title VII cases and federal employees who make Title VII and ADEA claims in the administrative process, have a causation standard which shifts the burden to the employer. There is no rational basis for this difference and it prejudicially affects an analysis of liability by a court at the summary judgment phase and a jury at trial.

2. All federal courts need to apply the statutory framework of *Babb I* including burden shifting after liability.

Babb I held liability is differential treatment which includes consideration of a protected characteristic in the process of making an adverse personnel action. 589 U.S. at 402-403, 404, 406-408. 409-413. Both the district and appellate courts rejected gender claims because two females, (both around 30) were selected. App.51a. They both rejected age discrimination because of reasons given by a couple of panel members subordinate to Justice and Stewart which they apparently viewed as an independent basis for the decisions without discussing other roles. App.52a-53a. Yet differential treatment does not have to affect the ultimate decision. *Id.* at p.407. The appellate court went further and criticized Babb for relying on "consideration" when discussing a jury instruction dispute. App.22a. The instructions the court criticized (third) were:

> To succeed on her claim, Plaintiff must prove each of the following facts by a preponderance of the evidence:
>
> First: Plaintiff engaged in protected activity;
>
> Second: Defendant then made a materially adverse personnel action, or actions;
>
> Third: Plaintiff's protected activity was considered by the Defendant or that it played any role or part in the process of making the personnel action or actions; and

> Fourth: Plaintiff suffered damages because of the personnel action.

The instructions went on to address burden shifting, but they were not given.

Conversely, over objection the court accepted the defendant's statement of Plaintiff's claim that:

> Jury instruction Number 8: In this case, the plaintiff claims that the defendant retaliated against the plaintiff because she took steps to enforce her lawful right under Title VII and the Age Discrimination in Employment Act.
>
> Laws that prohibit discrimination in the workplace also prohibit an employer from taking any retaliatory action against an employee because the employee has asserted rights for making complaints under those laws.

The court's third element instruction stated:

> Defendant treated plaintiff differently during the process of making the adverse employment actions based on plaintiff's EEO activity.

In context of all the instructions, this allowed the Defendant to argue (Dkt.223p96:14-21):

> Did the defendant treat the plaintiff differently during the process of making the adverse employment action based on plaintiff

> EEO activity? In other words, what you'll hear in the instructions is that if you took away the EEO activity, would something different have happened during that process, like the anticoagulation process? Would she have been treated differently in some way. And there's been no evidence of that. None. Right?

The Court of Appeals upheld the instructions because Babb "must show that alleged differential treatment based on protected activity played a role in the decision." App.22a. It relied on the *Safeco* decision which *Babb I* rejected. However, that finding is necessary because the jury instructions could have caused the jury to believe that differential treatment had to affect the decision in order for something to be different. There was not only no instruction about burden shifting which would have helped the jury to understand what counsel was talking about, there was no instruction about differential treatment not having to affect the ultimate decision. Both the appellate court and the district court used a decision centric analysis that has to be used if there is no explanation differential treatment does not have to affect the decision and there is no burden shifting under *LeSage* and *Mt. Healthy*. This is a case with emails, sworn testimony and other evidence showing protected characteristics were considered and actions taken throughout the time the people writing or giving them were involved in making adverse personnel decisions. Yet there is no instruction or

analysis in the motion for summary judgment which does not play a role in the decision or more importantly one that focuses upon what was considered during the process or the way the decision was made. [8]

By not following *LeSage* and *Mt. Healthy* or seriously analyzing the consideration of protected characteristics federal employees face a task at least as difficult as *McDonnell Douglas* against an entrenched defendant. Please note how defense counsel made an argument of deflection in closing:

> Dkt.223,p72(gives personal opinion of truthfulness of Justice); Dkt223,p73 (discussed an emotion Justice supposedly feels when Babb raises a harassment claim); Dkt.223,p75 (discuss two options against proof of an evil conspiracy); Dkt.223,p78 (criticizing not showing Williams an after the fact document in his deposition which he claims could have impeached Williams testimony);[9] Dkt.223,p.80 (criticizing not

[8] Both Justice and at this time Stewart were supervisors above the pharmacists they chose to be on the panel, to record answers to questions Justice prepared and to criticize Babb for not having answers for "specific examples." App.52a-53a. However, the court does not reference that Justice in her January 2013 emails with Stewart, the panel lead, had already decided that the float pool was where Babb ought to be and Stewart agreed.

[9] Why was this inaccurate inadmissible argument even made if Williams testified he decided to deny Babb any DSM slots as

showing Stewart an email in his deposition [the defense attorney alone] claimed explains a document Stewart swore he did not like); Dkt.223,p82 (Plaintiff must prove Justice et al involved in great conspiracy, over years, and willing to commit perjury); Dkt.223pp83 ("Monsters, evil, vile"); Dkt.223,p86 (Agency attorney Burton doesn't know what she is saying when she sent these); Dkt.223,p.87 (Memos referencing EEO activity just Justice and Marjorie Howard accurately predicting what's coming); Dkt.223,p89 (discuss a performance appraisal grievance which the facility Director upheld shows that "they didn't trick Wilson [sic] at the December 12th meeting" which made no sense about evil intent or anger); Dkt.223,p93 (completely misdescribed 5 U.S.C.§6121 and holiday pay claims because Babb made more money by working weekend, cannot be evil [to help the jury ignore the statement Kimberly Shaw and other employees who received holiday pay on same schedule.] Then discusses other departments who properly paid employees as trying to be nice to employees instead of following the law in 5 U.S.C.§6121; (Changes

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the appellate panel found? Williams testified he was always agreeable to continue three. Babb proved she was able to achieve 25% with 3 slots because of drop-ins and phone visits. Pharmacy engineered no DSM slots.

> statute to claim this shows 8 nine-hour days and 2 four-hour days does not equal 10 days over two weeks but only 9 days.)[10]

None of this is a rational argument if Defendant has a burden of proof. These issues are not statutory factors that should affect a federal employee's rights.

In every brief on jury instructions, trial brief, and appellate brief, Babb and all the other plaintiffs cited the Supreme Court decisions concerning "but-for" or "because of" liability under *LeSage* and *Mt. Healthy*. Plaintiff has to show liability (here differential treatment) and the Secretary, who is in the best position to do it, has to present evidence to support a same decision defense. Its denial leaves federal employees defenseless against Justice, Stewart, Wilson and others. The government can simply ignore VA Central Office directives and how this was done in all other hospitals around the country and 20 or 30 more problems with their defenses because they have no burden to consider when deciding not to settle and to defend cases like this. The Secretary had to carry its burden.

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[10] Judicial Notice of 5 U.S.C. § 6121 was taken because it contradicted the government's claim Babb was not allowed holiday pay because she worked a compressed schedule. Section 6121 showed Babb was not working a compressed schedule. She was being denied holiday pay.

3. To remind courts to apply the holdings of *Tolan v. Cotton,* 572 U.S. 650 (2014) and this Court's decisions related to principles of statutory construction.

In *Tolan v. Cotton,* 572 U.S. 650 (2014) the Supreme Court reversed the Fifth Circuit Court of Appeals' holding that a police officer's actions did not violate clearly established law because it improperly weighed evidence and resolved disputed issues in favor of the moving party by failing to credit key evidence offered by the suspect with regard to lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting. *Id.* at 659-660. That has happened here.

In addition to the plain meaning of the words, "free from any," the laws of statutory construction also support *Babb I* and the decisions by the MSPB, and EEOC. "[W]here Congress includes particular language in one section of the statute, but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also Bailey v. United States*, 516 U.S. 137, 146 (1995) (distinction in provisions between "use" and "intended to be used" creates implication that related provisions relying on "use" alone refer to actual not intended use); *DIRECT TV, Inc. v. Brown*, 371 F.3d 814, 817-18 (11th Cir.

2004) ("[W]hen Congress uses different language in similar sections it intends different meanings.")

CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-10383

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

NORIS BABB,
Plaintiff-Appellant,

versus

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,
Defendant-Appellee.

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

(June 26, 2025)

OPINION

Before JILL PRYOR, NEWSOM, and LAGOA, Circuit Judges.

PER CURIAM:

In 2014, Norris Babb, a federal employee, sued the Secretary of the Department of Veterans Affairs, alleging sex and age discrimination, retaliation, and retaliatory hostile work environment pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e-16(a), and the Age

Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626. After a series of intervening decisions and appeals, the district court granted summary judgment in favor of the Secretary on Babb's sex and age discrimination claims. Babb's Title VII retaliation claim and retaliatory hostile work environment claim proceeded to a jury trial and the jury returned a verdict for the Secretary on both claims.

On appeal, Babb argues that the district court (1) misapplied the federal-sector employment causation standard for discrimination and retaliation claims outlined in *Babb v. Wilkie*, 589 U.S. 399 (2020) ("*Babb I*"), and *Babb v. Sec'y, Dep't of Veterans Affs.*, 992 F.3d 1193 (11th Cir. 2021) ("*Babb II*"), in its ruling on summary judgment, and (2) abused its discretion in its jury instructions. After carefully considering the parties' arguments and with the benefit of oral argument, we affirm the judgments below.

I. FACTUAL BACKGROUND

Noris Babb joined the C.W. Bill Young VA Medical Center ("VA") in 2004 as a clinical pharmacist under the auspices of the VA's Pharmacy Services division. In 2006, Babb became a pharma- cist in the Geriatrics Clinic at the VA, where she worked until June 2013. During her tenure in Geriatrics, Babb worked as a member of an "interdisciplinary team" of caregivers. Babb's role and responsibilities were governed by a service agreement between Pharmacy Services and Geriatrics. As such, Babb had two sets of supervisors: Dr. Leonard Williams, Chief of the Geriatrics Clinic, and several Pharmacy Services administrators, including (1) Dr. Gary Wilson, Chief of Pharmacy Services; (2) Dr. Marjorie Howard, Babb's Pharmacy

Services direct supervisor; (3) Dr. Keri Justice, Associate Chief of Pharmacy Services; and (4) Dr. Robert Stewart, the Clinical Pharmacy Supervisor.

In 2009, Babb obtained an "advanced scope," which meant she could practice "disease state management" ("DSM"). As a DSM practitioner, Babb could independently manage patients for certain conditions within the scope of her expertise—diabetes, hypertension, and lipids—without having to consult a physician. In 2011, the VA implemented a new nationwide patient-care system, "Patient Aligned Care Team" ("PACT"), which emphasized "continuity of care," and required each team member to "work[] at their highest...licensed capacity" to provide optimal medical care for patients. Under PACT, GS-12 pharmacists who practiced DSM at least 25% of the time would be eligible for promotion to GS-13. As a GS-12 with an advanced scope enabling her to practice DSM, Babb naturally sought promotion to GS-13.

During this period (2011–2012), Babb, along with several other women, began to suspect that Pharmacy Services was implementing the new qualification standards for promotion in a manner that discriminated on the basis of sex and age. Ultimately, two clinical pharmacist colleagues of Babb, Donna Trask and Anita Truitt, filed EEOC complaints in October 2011, which culminated in their filing an age and sex discrimination lawsuit against the Secretary in February 2013. Babb supported her colleagues' allegations, first by providing statements to an EEOC investigator in April and May of 2012, and then, by

providing deposition testimony in March 2014.[1] According to Babb, her "whole career...changed" and "took a turn in a bad direction" after "participat[ing]" in Trask and Truitt's case against the Secretary.

In June 2012, Howard, Babb's direct supervisor, asked whether Babb would consider transferring to a vacant primary care position in "Module B." Howard recommended Babb's transfer because she did not think that Babb could satisfy the 25% requirement for the GS-13 promotion if she stayed in the Geriatrics Clinic. But Babb declined. She explained that treating geriatrics was her professional calling and that she remained hopeful that she could see additional patients and thereby satisfy the new promotion criterion. Notably, around this same time, Natalia Schwartz, a younger female pharmacist, requested transfer to the Module B vacancy, but Pharmacy Services denied her request after deciding not to fill the position.

About two months later, in August 2012, the service agreement between Pharmacy Services and Geriatrics was up for renegotiation. Both Pharmacy Services and Geriatrics initially explored the possibility of having Babb remain in Geriatrics and spend at least 25% of her time using her advanced scope to practice DSM. But such an arrangement was ultimately viewed as unworkable. Babb's Geriatrics supervisor, Williams, concluded that (1) reserving

[1] In April 2016, we affirmed a federal district court's grant of summary judgment for the Secretary. *See Trask v. Sec'y, Dep't of Veterans Affs.*, 822 F.3d 1179, 1184 (11th Cir. 2016). But, as discussed below, in Babb II we held that our decision in *Trask* was abrogated by the Supreme Court's decision in *Babb I*. *See Babb II*, 992 F.3d at 1196, 1200–04 (11th Cir. 2021).

25% of Babb's time for DSM would detract from Babb's primary job as a clinical pharmacist and increase wait times for patients, and (2) DSM was not well-suited for geriatric patients. Williams determined that Geriatrics could only provide Babb with three slots per day to practice DSM, but that would fall short of the requisite 25% to receive a GS-13 promotion. Accordingly, the executed service agreement did not provide for Babb to practice DSM. Instead, Babb was to spend her time working as a clinical pharmacist as part of an integrated patient-care team, which was Williams's preference.

Because Babb would no longer practice DSM under the renegotiated service agreement, Pharmacy Services initiated the process to remove Babb's advanced scope, which was completed in February 2013.

Around the time of the renegotiation of the service agreement, Babb's increasing concern that she would not be able to practice DSM in Geriatrics led her to ask about opportunities in the VA's anticoagulation clinic. To facilitate her potential transfer, Babb requested anticoagulation training. But Pharmacy Services denied her request. Pharmacy Services explained that (1) the anticoagulation clinic was responsible for training medical residents, (2) it was understaffed and did not have the capacity to train others, and (3) such training was irrelevant to Babb's work in Geriatrics anyway. Babb was denied the same request in January 2013. Notably, Pharmacy Services denied similar requests from other pharmacists as well.

In April 2013, two positions opened in the anticoagulation clinic. Seizing on the opportunity to transfer out of Geriatrics, Babb applied. A three-member panel comprising Kim Hall, Catherine Sypniewski, and Robert Stewart conducted interviews for the two positions. The panel ultimately selected Sara Grawe (age 26) and Amy Mack (age 30), two younger female pharmacists who scored highest on the interview.

Babb admitted that her interview went poorly due to "anxiety and stress" and that it was "the worst interview of [her] life." The panel's testimony corroborates Babb's recollection. Hall remembered that Babb used unprofessional language (like "crap" and "screwed up") and harshly criticized her colleagues. This made Hall question whether Babb was a good fit for the anticoagulation clinic, which prioritized communication skills. Sypniewski explained that Grawe and Mack possessed significantly more anticoagulation experience—Babb had none—and provided better answers to difficult medical questions. And Stewart echoed Sypniewski's assessment that Babb's anticoagulation experienced was "nowhere near" the selected applicants. The panelists awarded Babb 39 points, falling far short of Grawe and Mack, who received scores of 52 points and 62 points, respectively, in part because they had a "significant amount" of training "in the anticoagulation clinic."

That same April, as Babb was interviewing for the anticoagulation position, Wilson, Chief of Pharmacy Services, received an anonymous "vulgar" letter critical of Pharmacy Services' promotion practices for employees between GS-11 and GS-13. Pharmacy

Services convened an administrative investigation board ("AIB") to investigate and uncover the letter's author. Justice, Associate Chief of Pharmacy Services, testified to the AIB that (1) Babb was one of the "mow-wows," i.e. "squeaky wheels," who are "never happy, always complaining," and (2) certain employees perceived that "they were discriminated against because they were older and female." Wilson also testified to the AIB that Babb "felt that [she was] discriminated against over age and sex." Ultimately, Babb was questioned in connection with the letter along with 25 other employees.

Around this same time, Babb also requested a transfer to the Module B position that she had declined back in June 2012, in the hope that working in Module B would allow her to once again practice with an advanced scope and achieve a GS-13 promotion. Justice denied Babb's request, explaining that (1) Pharmacy Services had decided not to fill that vacancy, and (2) she could not transfer Babb to a position with promotion potential without advertising the position and allowing for a competitive application process.

In May 2013, after failing to secure either the anticoagulation or Module B positions, Babb filed the EEOC complaint that resulted in this lawsuit. She also requested transfer to the "float pool," where she could be part of a group of rotating pharmacists filling in for absent staff. Practicing as a "floater" did not require an advanced scope and presented no promotion opportunities, but at this point Babb simply wanted out of Geriatrics. Pharmacy Services approved Babb's request, and she joined the float pool in July 2013.

After Babb spent several months working as a floater, another two GS-13 positions opened up. The first was a PACT assignment split between Module B and Module D, and the second was a half anticoagulation and half Palm Harbor clinic position. In March 2014, Babb accepted the PACT assignment, and in April 2014, Justice submitted the paperwork to facilitate Babb's GS-13 promotion. Babb's promotion was approved in August 2014.

Despite the promotion, Babb was unhappy that her new job—which consisted of four 9-hour shifts Tuesday through Friday and one 4-hour shift on Saturday mornings—only entitled her to four hours holiday pay for each of the five Monday federal holidays. The VA offered to change her schedule (by shifting her Saturday work to other days) so that she could receive a full eight hours of holiday pay on those five Mondays, but Babb declined because the Saturday hours came with additional pay.

II. PROCEDURAL HISTORY

In 2014, Babb sued the Secretary of the Department of Veterans Affairs, alleging retaliation, sex and age discrimination, a hostile work environment, and a retaliatory hostile work environment under Title VII and the ADEA. The Secretary moved for summary judgment, which the district court granted in full.

Babb appealed the district court's decision, and we reversed and remanded on Babb's sex discrimination claim but affirmed the district court's other rulings. *See Babb v. Sec'y, Dep't of Veterans Affs.*, 743 F. App'x 280 (11th Cir. 2018). We concluded that the district

court erred by applying the *McDonnell Douglas* framework to Babb's sex discrimination claim instead of the more lenient "motivating factor" standard, which we stated in *Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227 (11th Cir. 2016) applies to a "mixed-motive" claim— when a plaintiff alleges that an employer engaged in an adverse personnel action for a combination of discriminatory and non-discriminatory reasons. *Id.* at 286–87. But we rejected Babb's argument that the *Quigg* standard also applied to her age discrimination and retaliation claims. We acknowledged that "if we were writing on a clean slate, we might well agree," but that we were bound by our precedent in *Trask*, which applied the *McDonnell-Douglas* framework to such claims. *Id.* at 287–88. We also concluded that the district court properly evaluated and rejected Babb's hostile work environment claims under Gowski's "severe and pervasive" standard. *Id.* at 291–92.

Babb then petitioned the Supreme Court, which granted certiorari on one issue: whether the federal-sector provision of the ADEA required her to prove that age was a "but-for" cause of an adverse personnel action. *Babb I*, 589 U.S. at 402. The Supreme Court ruled for Babb, explaining that the plain language of § 633(a) of the ADEA, which mandates that "personnel actions...shall be made free from any discrimination based on age...", requires a plaintiff to show only that "age discrimination plays any part in the way a decision is made." *Id.* at 405–08. Imposing this looser causation standard ensures that personnel actions are "untainted by any considerations of age" regardless of whether such considerations would have changed the outcome. *Id.* at 402.

But the Supreme Court made clear that a plaintiff must still show "that age was a but-for cause of differential treatment" that ultimately played a part in the adverse employment outcome. *Id.* at 414. And the Supreme Court also explained that "plaintiffs who demonstrate only that they were subjected to [differential treatment] cannot obtain reinstatement, backpay, compensatory damages, or other forms of relief related to the end result of an employment decision." *Id.* at 413. To obtain such remedies, "plaintiffs must [still] show that age discrimination was a but-for cause of the employment outcome." *Id.*

Following the Supreme Court's decision, we reversed and remanded on Babb's age and sex discrimination claims but otherwise affirmed the district court. *See Babb v. Sec'y, Dep't of Veterans Affs.*, 802 F. App'x 548 (11th Cir. 2020). Babb petitioned for a rehearing on two issues: (1) whether the Supreme Court's decision extended to Babb's retaliation claim and (2) whether our intervening decision in *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855 (11th Cir. 2020) undermined our previous rejection of Babb's retaliatory hostile work environment claim. *Babb II*, 992 F.3d at 1195.

We granted her petition and answered in the affirmative on both issues. *Id.* at 1195–96. Because the ADEA's federal-sector provision was "nearly identical" to Title VII's retaliation provision—both containing the "shall be made free from any discrimination" language—we held that the Supreme Court's decision abrogated our holding in *Trask* and that the district court must reassess Babb's retaliation claim under the new framework outlined by the Supreme Court. *Id.* at 1199–1205. We reasoned

that "[w]ithout quite saying as much...it seems that the Supreme Court accepted Babb's argument 'that the District Court should not have used the *McDonnell Douglas* framework.'" *Id.* at 1204 (quoting *Babb I*).

As to Babb's retaliatory hostile work environment claim, we explained that our decision in *Monaghan*—which held that a retaliatory hostile work environment claim is a subset of a retaliation claim rather than of a hostile work environment claim—undermined *Gowski*, which had analyzed retaliatory hostile work environment claims under the "severe or pervasive" standard appropriate for hostile work environment claims. *Id.* at 1205–08. Instead, we held that retaliatory hostile work environment claims should be adjudicated based on the "different, less onerous standard" applied to retaliation claims: "whether the employer's complained-of action well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 1206–08. Accordingly, we reversed and remanded to the district court once again, this time to reevaluate Babb's age and sex discrimination claims, her retaliation claim, and her retaliatory hostile work environment claim. *Id.* at 1209.

After supplemental briefing to address the intervening changes of law, the district court issued a renewed opinion, granting summary judgment for the Secretary on Babb's sex and age discrimination claims, but denying summary judgment on Babb's retaliation and retaliatory hostile work environment claims. Applying the standard outlined in *Babb I* and *II*, the district court found that Babb had not shown that a reasonable jury could conclude from the

evidence presented that Babb's age or sex played any role at all in the process leading to the two alleged adverse employment decisions: (1) her non-selection for the anticoagulation position and (2) denial of her request to transfer to Module B. But applying that same "played any role in the decision-making" standard to Babb's retaliation claim, the district court found that a reasonable jury could infer a causal connection between Babb's opposition to alleged discrimination and certain differential treatment she experienced in the decision-making process for several retaliatory personnel actions, including the removal of her advanced scope, denial of her holiday pay, denial of her transfer request to Module B, and her non-selection for the anticoagulation position. As to Babb's retaliatory hostile work environment claim, the district court found that a reasonable jury could conclude that Babb's work environment "might well have dissuaded [her] from making or supporting a charge of discrimination." Babb's Title VII retaliation and retaliatory hostile work environment claims thus proceeded to trial.

Prior to trial, the Secretary moved for partial reconsideration of the district court's order, solely to address an inconsistency between the district court's ruling and one of its prior rulings in the action. In analyzing Babb's retaliation claim, the district court had listed the removal of Babb's advanced scope as one of several actionable discrete retaliatory personnel actions. However, in its prior ruling dismissing Babb's Second Amended Complaint, the district court had held that the removal of Babb's advanced scope could not constitute a discrete act of retaliation because Babb had failed to timely assert it as such to an EEO counselor within the requisite 45-

day period. Accordingly, Plaintiffs' Third Amended Complaint—the operative complaint—did not identify the removal of the advanced scope as a discrete act of retaliation. The district court agreed, holding that "[t]he...removal of Dr. Babb's Advanced Scope is...time-barred from consideration as a discrete act," alt- hough it could "serve as circumstantial evidence of...retaliatory an- imus."

An eight-day trial followed. Babb presented testimony from eleven witnesses and deposition testimony. The Secretary presented five witnesses. Collectively, the parties introduced over 100 exhibits.

As relevant to this appeal, the district court instructed the jury that testimony presented by Babb concerning age and sex discrimination experienced by Trask and Truitt was admissible "only for the limited purpose of proving Dr. Babb's good faith belief that [Trask and Truitt] had been discriminated against and not for any other purpose."

The district court also instructed the jury concerning the causation standard for Babb's retaliation and retaliatory hostile work claims. The district court's instruction for Babb's retaliation claim required proving that "Defendant treated Plaintiff differently during the process of making the adverse employment actions *based on* Plaintiff's EEO activity." Likewise, the instruction for Babb's retaliatory hostile work environment claim required proving that "Plaintiff was subjected to offensive acts or statements about or *because of* her protected EEO

activity—even if they were not specifically directed at her..."[2]

The jury returned a verdict for the Secretary on both counts, finding that (1) no one had "treated [Babb] differently during the process of making the adverse employment actions based on [Babb's] EEO activity" and (2) no one had "harassed [Babb] because of her EEO activity."

This appeal timely ensued.

III. STANDARD OF REVIEW

We review a grant of summary judgment *de novo*, "viewing all evidence and drawing all reasonable factual inferences in favor of the nonmoving party." *Terrell v. Sec'y, Dep't of Veterans Affs.*, 98 F.4th 1343, 1351 (11th Cir. 2024) (citation and quotations omitted). And we generally review a district court's refusal to give a jury instruction for abuse of discretion. *Watkins v. City of Montgomery, Ala.*, 775 F.3d 1280, 1289 (11th Cir. 2014). "A district court abuses its discretion by refusing to give a requested instruction 'only when (1) the requested instruction correctly stated the law, (2) the instruction dealt with an issue properly before the jury, and (3) the failure to give the instruction resulted in prejudicial harm to the

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[2] By contrast, Babb's rejected proposed instruction for her retaliation claim required proving that "Plaintiffs protected activity *was considered* by the Defendant or that it played any role or part in the process of making the personnel action or actions. And her proposed instruction for her retaliatory hostile work environment claim required proving that "Plaintiff's supervisors harassed her *while considering* her protected activities."

requesting party.'" *Id.* at 1291 (quoting *Burchfield v. CSH Transp., Inc.*, 636 F.3d 1330, 1333-34 (11th Cir. 2011) (per curiam)).

IV. ANALYSIS

A. Sex And Age Discrimination Claims

Prior to *Babb I* and *II*, the standard framework for evaluating federal-sector employment discrimination claims was the *McDonnell Douglas* burden-shifting framework. *See Buckley v. Sec'y of Army*, 97 F.4th 784, 794 (11th Cir. 2024). Under this framework, a plaintiff carries the initial burden of establishing a *prima facie* case of discrimination. *Id.* Once a *prima facie* case is established, the burden then shifts to the employer to provide a legitimate, nondiscriminatory reason for its actions. *Id.* Assuming it does, the burden then shifts back to the employee to show that the employer's proffered reason is mere pretext. *Id.* In short, under *McDonnell Douglas*, "the plaintiff bears the ultimate burden to show that discrimination was the but-for cause of her employer's adverse personnel action." *Id.*

We have held that application of the *McDonnell Douglas* test to Title VII and ADEA federal-sector discrimination claims does not "make sense" post *Babb I* and *II*. *Buckley*, 97 F.4th at 794. This is because Title VII's federal-sector provision no longer requires a showing of but-for causation as to the ultimate employment outcome, but "only that a protected characteristic played any part in [the] employer's process in reaching an adverse employment decision." *Id.* Thus, using the *McDonnell Douglas* framework "is like requiring the plaintiff to move a boulder when she need only push a pebble." *Id.*

The framework is "much simpler" now. *Id.* at 795. "In analyzing [a] disparate-treatment claim we return to *Babb I's* directive and simply assess whether [the plaintiff] has proffered evidence that her [protected class] 'play[ed] any part' in the...decision making process" that resulted in the adverse employment decision. *Id.*; *see Terrell*, 98 F.4th at 1352 (holding that under Title VII's federal-sector provision a plaintiff now "must proffer evidence that her race or national origin played any part in the hiring process").[3]

Here, we conclude that the district court correctly found that Babb could not establish that a protected characteristic played any part in the decision-making processes concerning (1) her non-selection for the anticoagulation position and (2) the denial of her transfer to Module B.[4] We turn first to the anticoagulation position.

1. Non-Selection For Anticoagulation Position

Babb's argument that she was subjected to differential treatment on the basis of sex or age in her non-selection for the anticoagulation position boils

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[3] To clarify, to assert a claim for injunctive relief, a plaintiff no longer needs to show but-for causation as to the ultimate employment outcome; but such a showing is still required for monetary damages. *See Babb I*, 589 U.S. at 413–14.

[4] Because Babb cannot even establish discrimination in the decision-making processes resulting in her adverse employment outcomes, Babb is not eligible for injunctive relief. *See Babb I,* 589 U.S. at 414. And it goes without saying that Babb is also not eligible for monetary relief, as such relief requires showing that alleged discrimination was the but-for cause of an adverse employment decision itself. *See id.* at 413.

down to two contentions: (1) two younger female pharmacists were selected in her stead and (2) the selection panel awarded additional points to applicants with residency training and residency-trained pharmacists tend to be younger. Neither contention evinces unlawful differential treatment on the basis of sex or age.

First, Babb provides no evidence that age or sex played any role in the selection of Grawe and Mack. Both younger pharmacists, like Babb, were female, and the record conclusively establishes that the interviewing panel selected them because they "had significantly more experience in the applied for position" and that their experience "indicated...that they should be capable of doing the job in an efficient and skilled manner [and] should require little training to practice independently." Conversely, the interviewers noted that Babb had no anticoagulation experience and had acted unprofessionally during the interview. Indeed, Babb's interview went so poorly that she acknowledged that "it was the worst interview of [her] life."

As for the choice to award additional points to applicants with residency training, the record provides no indication that privileging residency-trained pharmacists was motivated by discriminatory considerations of age or sex. *See Babb I*, 589 U.S. at 406 ("age must be a but-for cause of...differential treatment"). As one member of the selecting panel explained, "a residency should...carry higher points than a board certification [because] a residency is one year of intensive focused training, mentoring, and learning for a pharmacist where they get extensive experience in disease state management" and there is

"no substitute for the experience that someone gets in residency when it comes to disease state management advanced scope."

Contrast the panel's awarding of additional points for a residency with the hypothetical the Supreme Court used in *Babb I* to illustrate discriminatory differential treatment in the decision-making process:

> Suppose that a decision-maker is trying to decide whether to promote employee A, who is 35 years old, or employee B, who is 55. Under the employer's policy, candidates for promotion are first given numerical scores based on non-discriminatory factors. Candidates over the age of 40 are then docked five points, and the employee with the highest score is promoted. Based on the non-discriminatory factors, employee A (the 35-year-old) is given a score of 90, and employee B (the 55-year-old) gets a score of 85. But employee B is then docked 5 points because of age and thus ends up with a final score of 80. The decision-maker looks at the candidates' final scores and, seeing that employee A has the higher score, promotes employee A.

Babb I, 589 U.S. at 407.

The Supreme Court explained that even though employee A would have had the higher score regardless, docking points from employee B because of his age was still a form of unlawful differential treatment. *Id.* But here, unlike the Supreme Court's hypothetical where there was a direct connection between points awarded and age discrimination, the

connection between privileging a residency and any possible discriminatory motivation is pure speculation. And such speculation does not suffice to show that discriminatory differential treatment played a role in an adverse employment outcome per *Babb I* and *II*, which still require proving that age or gender was a "but-for cause of discrimination—that is, of differential treatment." *Babb I*, 589 U.S. at 406; *see Babb II*, 992 F.3d at 1204.

Babb also raises a third argument by pointing to allegations of gender and age discrimination by other women who worked at the VA. But Babb does not connect any of those general allegations to the specific decision-making process resulting in her non-selection for the anticoagulation position. Even taking these allegations in the light most favorable to the non-moving party, Babb's inability to tie any of them to the individuals comprising the panel that rejected her renders them immaterial. *See Buckley*, 97 F.4th at 795 (finding the discriminatory conduct of others irrelevant because they did not participate in the personnel decision and "we can't say the[ir] [actions] bear any direct connection to...the supervisors that decided to remove [plaintiff]"). Indeed, the Supreme Court stressed that any alleged discrimination must play a part "when the actual decision was made," as to hold otherwise would have "startling implications." *Babb I*, 589 U.S. at 408 n.3. Here, not only does Babb fail to connect any other alleged discrimination to the panel, she fails to show how any other alleged discrimination factored into the panel's decision.

In sum, other than her non-selection despite more qualified candidates, Babb offers no other circumstantial evidence that considerations of age or

sex played a part in the panel's decision. We thus conclude that Babb failed to establish that discriminatory differential treatment tainted the panel's decision-making in filling the anticoagulation positions. *See Terrell*, 98 F.4th at 1354 (differential treatment did not play a part in non-selection where the selectee "had fourteen years of Nurse Manager experience (compared to [plaintiff's] three) as well as the Nurse Executive certification (which [plaintiff] lacked)" and the plaintiff provided no other circumstantial evidence of discrimination). We now turn to Babb's request to transfer to Module B.

2. Denial Of Request to Transfer to Module B

On appeal, Babb fails to counter the district court's finding that Babb was not subject to any differential treatment on the basis of age or sex when Pharmacy Services denied her request to transfer to Module B for the simple reason that the Module B position did not exist at the time of Babb's request. The record evidence establishes that as early as the end of June 2012, Pharmacy Services made the decision not to replace the outgoing pharmacist in Module B and instead service the outgoing pharmacist's patients through existing staff. And further undermining Babb's assertion of discrimination, the record also shows that shortly after deciding not to fill the Module B vacancy, Pharmacy Services denied a younger female pharmacist's request to transfer to that position on the same grounds it denied Babb—the vacancy simply no longer existed.

Babb also argues that Pharmacy Services' additional justification for its denial of Babb's request—that it could not open up a position with

promotional prospects without facilitating a competitive application process—evidences differential treatment because Pharmacy Services had previously made exceptions to this rule. But as the district court found, Babb does not provide a similarly situated comparator to substantiate her argument. *See Jenkins v. Nell*, 26 F.4th 1243, 1249–50 (11th Cir. 2022). Babb's proffered comparator, Lobley, a 40-year-old male, did not transfer positions; his preexisting position simply evolved due to the implementation of the new PACT initiative in 2011. We thus conclude that Babb and Lobley are not "similarly situated in all material respects." *Lewis I*, 918 F.3d at 1226. Accordingly, we affirm the district court's grant of summary judgment on Babb's sex and age discrimination claims in favor of the Secretary.

B. The District Court's Jury Instructions

Lastly, Babb challenges the district court's jury instructions on two grounds. First, Babb argues that the district court's jury instructions misstated the causation standard articulated in *Babb I* and *II* for her retaliation and retaliatory hostile work environment claims. Second, Babb argues that the district court erred by instructing the jury not to consider testimony by Trask and Truitt concerning allegations of sex and age discrimination for any purpose other than establishing Babb's good-faith belief—an element of her retaliation claim—that her colleagues experienced discrimination.

Contrary to Babb's argument, the district court's jury instructions for the retaliation and retaliatory hostile work environment claims, unlike Babb's proposed instruction, correctly laid out the *Babb*

causation standard framework. *Babb I* explained that a plaintiff can obtain injunctive relief "if *they show* that age was a but-for cause of differential treatment in an employment decision but not a but-for cause of the decision itself." 589 U.S. at 414 (emphasis added). And we reiterated in *Babb II* that "the [Supreme] Court expressly clarified that "age must be the but-for cause of differential treatment, not that age must be a but-for cause of the ultimate decision." 992 F.3d at 1204. In other words, a plaintiff must show that alleged differential treatment "based on" protected activity played a role in the decision. *See Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 63 (2007) ("the phrase 'based on' indicates a but-for causal relationship"). That is precisely what the district court's jury instructions given to the jury did, and what Babb's proposed instructions—requiring only that the VA "considered" her protected activities—did not. Because the jury instructions given by the district court accurately stated the law, we conclude that the district court did not abuse its discretion in declining to instruct the jury as Babb requested.

As for Babb's argument that the district court erred by instructing the jury not to consider testimony by Trask and Truitt concerning allegations of sex and age discrimination for any purpose other than establishing Babb's good-faith belief—an element of her retaliation claim—that her colleagues experienced discrimination, we also conclude that the district court did not abuse its discretion in declining to instruct the jury as Babb requested. "We will not disturb the trial judge's discretion unless 'we are left with the substantial and uneradicable doubt as to whether the jury was properly guided during it deliberation.'" *Watkins*, 775 F.3d at 1289– 90 (quoting

Broaddus v. Fla. Power Corp., 145 F.3d 1283, 1288 (11th Cir. 1998)). After carefully considering the record and the parties' briefs, we are not left with any doubt let alone "substantial and ineradicable doubt" as to whether the jury was properly guided during its deliberations.

V. CONCLUSION

For the reasons stated, we affirm the district court's grant of summary judgment in favor of the Secretary on Babb's sex and age discrimination claims. We also conclude that the district court did not abuse its discretion in instructing the jury on Babb's claims.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:14-cv-1732-VMC-TBM

NORIS BABB,

v.

DENIS McDONOUGH, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(August 19, 2022)

ORDER

This matter comes before the Court upon consideration of Defendant Secretary of the Department of Veterans Affairs' Motion for Summary Judgment (Doc. # 52), filed on April 11, 2016. Defendant filed a supplemental memorandum in support of the Motion for Summary Judgment on October 14, 2021. (Doc. #124). Plaintiff Noris Babb responded on November 5, 2021. (Doc. # 127). Defendant replied on November 18, 2021 (Doc. #129), and on November 30, 2021, with leave of Court, Dr. Babb filed a Sur-Reply. (Doc. # 132). For the reasons

that follow, the Motion is granted in part and denied in part.

I Background

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

Dr. Babb is a clinical pharmacist who is currently employed at the C.W. Bill Young VA Medical Center. (Doc. # 27 at ¶ 8). At the time of the events in question, she was approximately 52 years old and was in a GS-12 position. (*Id.*). Dr. Babb worked in the geriatric primary care clinic at the VA from 2006, until June of 2013. (Babb Decl. Doc. # 68-2 at ¶¶ 1, 26). During her time in the geriatrics clinic, she was part of an "interdisciplinary team." (Hull Dep. Doc. # 54 at 8:21). One of her supervisors at the geriatrics clinic, Dr. John Hull, explained: "the interdisciplinary team is a team of caregivers that work closely together to achieve better outcomes for complex patients. . . . [T]he idea is that a group of people working together and sharing information can achieve success in complex situations much better than a solo practitioner." (*Id.* at 8:23-9:4).

Dr. Hull explained that the patients seen at the geriatrics clinic were "the oldest of the old" facing "frailty . . . usually psychosocial problems and a high rate of dementia." (*Id.* at 8:2-10). Dr. Hull noted, "we try to select patients that have multiple medical, psychosocial and functional problems, which means that our rate of death is much, much higher than a regular primary care environment, and dealing with the issues of death and dying palliative care." (*Id.* at 7:21-25).

At that time, Dr. Babb held an Advanced Scope, which means that she could perform Disease State Management. (Babb Decl. Doc. # 68-2 at ¶ 5). Disease State Management entails a pharmacist independently managing patient care for specific conditions (diabetes, hypertension, and cholesterol), including writing prescriptions for these ailments without consulting a physician. (*Id.*; Justice Decl. Doc. # 52-2 at ¶ 2).

B. Dr. Babb Experiences Tribulations at Work

Starting in 2011, Dr. Babb's clinic was part of a national "Patient Aligned Care Team" or PACT program, which resulted in many staffing changes at the VA. (Doc. # 68-2 at 22; Babb Decl. Doc. # 68-2 at ¶ 8). In 2012 and 2013, the VA was in the process of implementing national qualifications standards so that pharmacy employees who spent at least 25% of their time practicing under an Advanced Scope would be promoted to a GS-13. (Justice Dep. Doc. # 55 at 63-65; Babb Decl. Doc. # 68-2 at ¶ 11). Understandably, Dr. Babb — a GS-12 pharmacist with an Advanced Scope — sought such a promotion.

In June of 2012, Dr. Marjorie Howard, who was Dr. Babb's supervisor at that time, ask Dr. Babb whether she would consider a primary care position in "Module B" of the VA that had recently been vacated. (Howard Dep. Doc. # 57 at 52:8-10). Dr. Howard brought up the Module B position because she did not think that Dr. Babb could meet the 25% requirement for the GS-13 promotion in geriatrics. (*Id.* at 54:19-25, 55:19-20). Dr. Babb declined, even though Dr. Babb recognized that her direct supervisor said that moving to Module B

"was the only way [Dr. Babb] could get a GS-13." (Babb Dep. Doc. # 59 at 86:2-3; Doc. # 52-2 at 29). According to Dr. Babb, treating geriatric patients was her professional calling. (Babb Decl. Doc. # 68-2 at ¶ 10).

In August of 2012, the service agreement between the pharmacy and the geriatrics clinic was being renegotiated. (Williams Dep. Doc. # 56 at 6:2-5). Dr. Babb worked with Dr. Hull and others in the geriatrics clinic on a separate draft service agreement that supported Dr. Babb's use of an Advanced Scope in the geriatrics clinic performing Disease State Management. (*Id.* at 17:2-10). However, the service agreement that was ultimately signed did not call for Dr. Babb to perform Disease State Management, and in February of 2013, Dr. Babb's Advanced Scope was removed. (Babb Dep. Doc # 59 at 35:6-9; Wilson Dep. Doc. # 53 at 16:17).

Dr. Leonard Williams is the Chief of Geriatrics and Extended Care at the VA, Bay Pines. (Williams Dep. Doc. # 56 at 4:15-17). He was the person who decided that Dr. Babb should not perform Disease State Management on VA geriatric patients. (*Id.* at 18:14-19). In his opinion, Dr. Babb's role as a geriatrics pharmacist was to check for dangerous drug interactions and answer patient and caregiver questions about medications because geriatric patients are often prescribed multiple medications. (*Id.* at 13:1-7).

Dr. Williams provided several reasons for omitting Dr. Babb's provision of Disease State Management from the service agreement. As Dr. Williams explained, "[m]any times in very frail, elderly patients

we don't need to treat their hypertension or we don't need to treat it aggressively as you would through [Disease State Management] protocols, because basically the damage that was going to be done by high blood pressure by that time was done." (*Id.* at 11:22-12:1). And "it could be injurious to the patient" to try to control conditions such as high blood pressure through Disease State Management in the geriatrics department. (*Id.* at 12:3).

Dr. Williams indicated that a geriatrics pharmacist needed to be available to "let the patient know of significant potential side effects and what to look for" and "see [a] patient before they left the clinic and make sure that the patient or the caregiver understood what we were doing." (*Id.* at 13:19-24). If Dr. Babb was performing Disease State Management consultations with patients, "she wouldn't be able to work in the essential role of a clinical pharmacist or consulting pharmacist in the geriatric clinic; and that is one of seeing the patients and going over what was usually a very complicated and long list of medications, and looking to see if there were any obvious possibilities of drug/drug interactions, that the physician should have known about." (*Id.* at 12:22-13:7).

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

presented, and (3) it was too late to register for the program. (Doc. # 52-3 at 59).

In October of 2012, Dr. Howard and Dr. Babb discussed Dr. Babb's "mid-term evaluation," where Dr. Babb received "fully successful" instead of "outstanding" in mentoring. (Babb Decl. Doc. # 68-2 at ¶¶ 14-15). Dr. Babb filed a grievance with respect to her score, and eventually the "fully successful" was "upgraded" to reflect "outstanding," but Dr. Babb "felt belittled that she [was treated] this way." (Id. at ¶¶ 15-16).

C. Dr. Babb is not Selected for Anticoagulation

At the time Dr. Babb realized that her Advanced Scope was in jeopardy, she started asking for training in anticoagulation, but that training was not provided. (Babb Dep. Doc. # 59 at 9:4-7, 116:1-3). The anticoagulation clinic was understaffed, and the physician managing that clinic testified that they could never keep up with the patients' demands for anticoagulation. (Stewart Dep. Doc. # 60 at 60:2-16).

When a position was opened in anticoagulation, Dr. Babb applied. A three-member panel comprised of Dr. Kim Hall, Dr. Catherine Sypniewski, and Dr. Robert Stewart conducted the interview. Dr. Hall provided detailed testimony about the interview, remembering that Dr. Babb used unprofessional language (such as "crap" and "screwed up") and harshly criticized other medical providers, which made Dr. Hall question whether Dr. Babb would be a good fit for the busy anticoagulation department where good communications skills were a top priority.

(Doc. # 52-2 at 141). Dr. Sypniewski explained that the candidates that were selected had "significantly more experience" in anticoagulation when compared to Dr. Babb. (Doc. # 52-2 at 152). Dr. Stewart confirmed that Dr. Babb's anticoagulation experience was "nowhere near" the experience of the selected candidates. (Doc. # 52-2 at 160).

Dr. Babb interviewed poorly due to "anxiety and stress," admitting "that was the worst interview of my life." (Babb Dep. Doc. # 59 at 115:22-24, 124:23). Dr. Babb has conceded that she did not have any direct experience independently managing anticoagulation patients. (*Id.* at 119:17-19). Dr. Babb was notified that she was not selected for the anticoagulation position on April 23, 2013. (Doc. # 27 at ¶ 10(l)). Two younger pharmacists, Dr. Sara Grawe (age 26) and Dr. Amy Mack (age 30), scored highest at the interview and were selected for the anticoagulation positions. (Doc. # 52-2 at 160).

During these and other staffing changes at the VA, someone sent an anonymous and "vulgar" letter to Dr. Gary Wilson. (Babb Decl. Doc. # 68-2 at ¶ 22). An Administrative Investigation Board was initiated to determine who sent the troubling letter. On April 8, 2013, Dr. Keri Justice testified at the Administrative Investigation Board that Dr. Babb was one of the "mow-mows" – the "squeaky wheels" who are "never happy, always complaining." (Doc. # 68-2 at 140). In the same Administrative Investigation Board, Dr. Wilson testified that he believed Dr. Babb "felt that [she was] discriminated against over age and sex." (Doc. # 68-2 at 122). Dr. Babb "was really upset that anyone would think [she is] such a low person to do something like" send an anonymous letter

complaining about others in a vulgar manner. (Babb Decl. Doc. # 68-2 at ¶ 22). However, it is not disputed that 26 employees were questioned about the origins of the troubling letter, including Drs. Trask and Truitt. (Doc. # 70-1 at 15).

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

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

Dr. Babb continued in the geriatrics clinic after her Advanced Scope was removed, but she was "extremely depressed." (Babb Dep. Doc. # 59 at 46:21-23). She "had gone from being a happy team player to someone that just came in, closed the door to [her] office, and left at 4:30." (*Id.* at 47:12-15). Dr. Babb felt like she was in "a very difficult work environment" and that "[i]t was probably the lowest point of [her] professional career." (*Id.* at 47:21-48:1).

Dr. Babb requested to move to the "float pool" in April 2013 and began "floating" in June 2013. (Doc. # 52-3 at 11; Babb Dep. Doc. # 59 at 129:11-12). Around that time, Dr. Babb's then supervisor, Dr. Robert Stewart, received two complaints about Dr. Babb.

(Stewart Dep. Doc. # 60 at 52:11-12). The first complaint was that Dr. Babb was rude to a patient. (Babb Dep. Doc. # 59 at 142:21-23). The second complaint claimed that Dr. Babb was not available to her co-workers at the clinic. (*Id.* at 143:4-5). Dr. Babb learned about these complaints when she opened a sealed envelope that Dr. Stewart had mistakenly left on her desk (Stewart Dep. Doc. # 60 at 53:14-24; Babb Dep. Doc. # 59 at 141:1-19). Dr. Babb faced no discipline or counseling for these events, and she testified that these events did not affect her performance appraisal. (Babb Dep. Doc. # 59 at 140:19-20). Dr. Babb testified that she enjoyed the camaraderie of the other pharmacists in the float pool (*Id.* at 130:14-15); nevertheless, she filed an informal EEOC complaint on May 6, 2013. (Babb Decl. Doc. # 68-2 at ¶ 24).

E. Dr. Babb Applies to Two GS-13 Positions

Dr. Babb continued to apply for GS-13 positions. In late 2013, Dr. Babb applied for a GS-13 position, but it was offered to a younger pharmacist, Dr. Hetal Bhatt-Chugani. (Babb Dep. Doc. # 59 at 128:23-129:1; Doc. # 68-2 at 87:24-88:1). However, in early 2014, two GS-13 positions were posted: (1) a PACT assignment split between Modules B and D (this was the previously vacant position in Module B combined with another vacancy in Module D) and (2) a half anticoagulation and half Palm Harbor clinic position. (Doc. # 52-3 at 29; Babb Dep. Doc. # 59 at 134:11-12).

The job announcement for the PACT position split between Modules B and D stated that the position was comprised of "Four 9 hour shifts Tuesday through Friday 7:00 am – 4:30 pm with a 4 hour shift Saturday

8:00am-12:00pm [with] Nights, weekends and holiday on a fair and equitable rotation schedule." (Doc. # 52-3 at 30). In March of 2014, Dr. Babb was informed she was selected for the PACT position split between Modules B and D. (Babb Dep. Doc. # 59 at 176:17-22). On April 2, 2014, Dr. Justice submitted paperwork to facilitate Dr. Babb's promotion to GS-13. (Doc. # 52-3 at 45- 46). Dr. Justice marked "excellent" on all of the forms and made handwritten comments stating that "Dr. Babb is an excellent practitioner with a broad knowledge of clinical pharmacy. She is great with patients!" (*Id.*). A VA Director approved Dr. Babb's promotion in August of 2014. (Doc. # 52- 3 at 49-50).

After Dr. Babb started working in her new position, she felt she was being treated unfairly with respect to holiday pay. "After reviewing her time cards, later, and time cards of other employees she learned that due to the scheduling, she was only entitled to four hours Holiday pay for each of the five legal federal Holidays on a Monday . . . [h]owever, other employees were being paid the full amount of a holiday." (Doc. # 27 at ¶ 10(p)). Dr. Babb testified, "after I found out about the Monday federal holiday issue, I was very upset about that." (Babb Dep. Doc. # 59 at 139:20-21). The VA offered to permanently change her schedule such that she would receive eight hours of holiday pay for the Monday legal holidays, but Dr. Babb declined. (Doc. # 52-3 at 144).

F. Related Prior Litigation and EEOC Activity

On February 26, 2013, Donna Trask and Anita Truitt (both VA pharmacists) filed an age and gender discrimination suit against the VA. (Case No. 8:13-cv-

536-MSS-TBM (M.D. Fla. 2013)). In connection with those proceedings, Dr. Babb sent statements in support of Drs. Trask and Truitt by email to an EEOC investigator on April 26, 2012, May 10, 2012, and May 11, 2012. (Doc. # 27 at ¶ 5; Babb Dep. Doc. # 59 at 112:23-113:1). She also provided deposition testimony in support of Drs. Trask and Truitt on March 24, 2014. (Doc. # 68-2 at 38).

Dr. Babb testified in this case that "my whole career had changed after I had been a witness in the Truitt and Trask case. That up until then pharmacy administration had been in support of me." (Babb Dep. Doc. # 59 at 48:15-17). Dr. Babb specified that after she "participated in the EEO activity for Drs. Truitt and Trask, [her] career took a turn in a bad direction." (*Id.* at 112:17-19). Along the same lines, Dr. Babb testified: "Everything that happened in disqualifying me was after I testified in the Truitt and Trask case; and Truitt and Trask were discriminated against because they were older females." (*Id.* at 110:13-16).

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

Dr. Babb also participated in her own protected activity. She verbally opposed age and gender discrimination in a lengthy conversation with Dr. Justice on February 8, 2013. Dr. Babb requested that her union representative be present at the February 8, 2013 meeting where she voiced her complaints to

Dr. Justice, but the representative failed to appear. (Doc. # 68-6 at 86). In addition, Dr. Babb filed an informal EEOC complaint on May 6, 2013, and also initiated this lawsuit.

G. Comments on Age, Gender, or EEOC Activity

Dr. Babb alleges Dr. Howard asked when Dr. Babb planned to retire in March of 2012. (*Id.* at 130:19-20). Dr. Howard does not remember asking Dr. Babb this question. (Doc. # 52-3 at 57). Dr. Babb had a negative relationship with Dr. Howard and called Dr. Howard "Cruella" and other names in emails to her colleagues because Dr. Babb felt Dr. Howard was "harsh in meetings" and "wasn't gentle and friendly." (Babb Dep. Doc. # 59 at 161:9-16; Doc. # 59 at 216).

In addition, when a co-worker asked Dr. Babb if she had seen the movie "Magic Mike," Dr. Justice remarked that the movie was geared toward middle-aged women, which made Dr. Babb upset. (Babb Dep. Doc. # 59 at 62:13-19). Dr. Babb testified that she would not have been worried if Dr. Justice called the movie a "chick-flick," but she felt "middle-aged" was not an appropriate comment. (*Id.* at 62:20-24). When Dr. Justice referred to Dr. Babb as a "mow mow," Dr. Babb thought that Dr. Justice was calling her a "grandma." (*Id.* at 62:3-7).

Dr. Babb does not recall any other comments about her age or gender and she has never heard any comments about her EEOC activity. (*Id.* at 61:24-62:11, 113:15-18, 121:12-16, 132:5-7). Dr. Babb also revealed during her deposition that she "took it all

personally" and she "couldn't stop crying." (*Id.* at 183:23-184:8).

H. Dr. Babb Files Suit

Dr. Babb initiated this action on July 17, 2014. (Doc. # 1). She filed the operative complaint – the Third Amended Complaint - on December 19, 2014. (Doc. # 27). The Third Amended Complaint contains the following counts: retaliation (Count I), gender and age discrimination (Count II), a hostile work environment based on gender and age and a retaliatory hostile work environment claim(Count III), and injunctive relief (Count IV). The VA then sought summary judgment (Doc. # 52), which this Court granted on Counts I, II, and III (Doc. # 83). Relying on Eleventh Circuit precedent, this Court analyzed Dr. Babb's Title VII retaliation and discrimination claims (Counts I and II) under the *McDonnell Douglas* burden-shifting framework. This Court found that although Dr. Babb had established a prima facie case under the statute, the VA proffered non-pretextual reasons for the adverse employment actions, and Dr. Babb could not point to any weaknesses, implausibilities, or flaws in the VA's employment justifications.

This Court then analyzed Dr. Babb's hostile work environment and retaliatory hostile work environment claims (Count III) under *Gowski v. Peake*, 682 F.3d 1299 (11th Cir. 2012), which requires that a plaintiff show harassment that is "severe or pervasive" to establish either a hostile work environment or a retaliatory hostile work environment claim. Analyzing Dr. Babb's adverse employment outcomes under the *Gowksi* standard,

this Court determined that the events underlying Dr. Babb's claims were not sufficiently "severe or pervasive" to be actionable. This Court thus granted summary judgment to the VA on both Dr. Babb's hostile work environment claim and her retaliatory hostile work environment claim.

1. The First Eleventh Circuit Appeal

Dr. Babb appealed the grant of summary judgment to the Eleventh Circuit, which reversed and remanded on Babb's gender discrimination claim but affirmed on everything else. The Eleventh Circuit found that this Court erred by applying the *McDonnell Douglas* test rather than the *Quigg* motivating factor test to her "mixed motive" gender discrimination claim. *Babb v. Sec'y, Dep't of Veterans Affs*, 743 F. App'x 280, 286 (11th Cir. 2018). The Eleventh Circuit remanded the claim to this Court for evaluation under the *Quigg* motivating-factor test. *Babb*, 743 F. App'x at 286.

Reviewing Dr. Babb's age and gender discrimination claims, the Eleventh Circuit addressed Dr. Babb's contention that this Court erred in applying the *McDonnell Douglas* framework to her ADEA age-discrimination. The Court noted that if it "were writing on a clean slate, [it] might well agree." *Id.* at 287. Nevertheless, the Eleventh Circuit noted that it was bound to its decision in *Trask v. Secretary, Department of Veterans Affairs*, 822 F.3d 1179 (11th Cir. 2016), by prior-panel-precedent. *Babb*, 743 F. App'x at 287. Because the Eleventh Circuit in Trask applied the *McDonnell Douglas* standard to a federal-sector ADEA claim, the Court explained that it was bound by its determination there. *Id.* The Eleventh Circuit then reviewed this Court's findings under the

McDonnell Douglas standard, finding no reversible error and affirming the grant of summary judgment as to Dr. Babb's ADEA age discrimination claim. *Id.* at 290–291.

Finally, evaluating Dr. Babb's hostile work environment and retaliatory hostile work environment claims under the *Gowski* standard, the Eleventh Circuit found that Dr. Babb had not raised a genuine issue of material fact, thus affirming this Court's grant of summary judgment as to that claim.

2. <u>The United States Supreme Court</u>

The Supreme Court granted certiorari on the question of whether the federal-sector provision of the ADEA required Dr. Babb to prove that age was a but-for cause of a challenged personnel action.

The Supreme Court explained that Section 633a(a)'s terms required a plaintiff to show only that "age discrimination plays any part in the way a decision is made[.]" *Babb v. Wilkie*, 140 S. Ct. 1168, 1178 (2020) ("*Babb I*") (emphasis added). The Court held that the "free from any discrimination" language means that personnel actions must be made in "a way that is not tainted by differential treatment based on" a protected characteristic. *Id.* at 1174. Thus, to prevail on an age discrimination claim under the ADEA, a plaintiff must show that age is "a but-for cause of discrimination—that is, of differential treatment—but not necessarily a but-for cause of a personnel action itself." *Id.* at 1173.

3. <u>The Eleventh Circuit's Subsequent Decisions</u>

Following the Supreme Court's decision in *Babb I*, the Eleventh Circuit reversed and remanded on Dr. Babb's age and gender discrimination claims and affirmed on Dr. Babb's Title VII retaliation, hostile work environment, and retaliatory hostile work environment claims.

The Eleventh Circuit then granted Dr. Babb's petition for rehearing on the issues of (1) whether the Supreme Court's decision in *Babb I* necessitated a re-examination of the Eleventh Circuit's previous rejection of her Title VII retaliation claim and (2) whether the intervening Eleventh Circuit decision *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855 (11th Cir. 2020), undermined the previous rejection of her retaliatory hostile work environment claim. *Babb v. Sec'y, Dep't of Veterans Affs.*, 992 F.3d 1193 (11th Cir. 2021) ("*Babb II*").

Beginning with Dr. Babb's Title VII retaliation claim, the Eleventh Circuit found that the Supreme Court's decision in *Babb I* "undermined *Trask* to the point of abrogation." *Babb II*, 992 F.3d at 1200. The Eleventh Circuit explained that the Supreme Court's analysis of the ADEA's language informs its reading of Title VII. Id. (citing *Gomez-Perez v. Potter*, 553 U.S. 474, 487 (2008)). The Eleventh Circuit thus held that the *Babb I* "differential treatment" standard for evaluating the federal-sector provision of the ADEA also applied to Title VII retaliation claims. *Id.*

The Eleventh Circuit then addressed the effect of the intervening *Monaghan* decision on Dr. Babb's retaliatory hostile work environment claim. *Id.* at 1206. The Court explained that although Dr. Babb had not distinguished between her hostile work

environment claim based on age and gender and her hostile work environment claim based on retaliation, the subsequent *Monaghan* decision clarified that different standards governed each claim. *Id.* at 1206-07. As the Eleventh Circuit explained, *Gowski* had incorrectly grafted the "severe or pervasive" standard onto retaliatory hostile work environment claims by packaging it as a hostile work environment, rather than a retaliation, claim. *Id.* at 1207.

The Eleventh Circuit held that the correct standard to apply to retaliatory hostile work environment claims was that set by *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006) and *Crawford v. Carroll*, 529 F.3d 961 (11th Cir. 2008). *Burlington* and *Crawford* held that to prevail on a retaliation claim, an employee must demonstrate the complained-of action "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Crawford v. Carroll*, 529 F.3d at 974 (quoting *Burlington Northern*, 548 U.S. at 68)). The Eleventh Circuit concluded that after *Monaghan*, the "severe or pervasive" standard is no longer applicable to retaliatory hostile work environment claims and directed this Court to evaluate Dr. Babb's claim under the correct *Burlington Northern-Crawford-Monaghan* standard. *Id.* at 1209.

Now, on remand, this Court reconsiders Dr. Babb's claims under the proper standards — *Babb I* for Counts I and II and *Crawford* for Count III. Although *Babb II* only addressed Dr. Babb's Title VII retaliation claim, the *Babb I* differential treatment standard applies to claims of gender discrimination arising under the federal-sector provision of Title VII. *See*

Durr v. Sec'y, Dep't of Veterans Affairs, 843 F. App'x 246, 247 (11th Cir. 2021) (noting that the *Babb I* standard applies to Title VII discrimination claims and remanding to the district court to evaluate age and gender discrimination and retaliation claims under the *Babb I* standard). Thus, *Babb I* governs Dr. Babb's Title VII age and gender discrimination claims as well as her Title VII retaliation claim.

With respect to Count III, *Babb II* requires this Court to revisit only Dr. Babb's retaliatory hostile work environment claim, not her hostile work environment claim based on age and gender. *Gowski* is still applicable to hostile work environment claims based on age and gender post-*Monaghan* and thus *Babb II* does not disturb this Court's finding on Dr. Babb's hostile work environment claim.

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

A. Count I – Retaliation

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 Northern*, 548 U.S. at 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 I*).

Under *Babb I*, a showing of non-pretextual reasons for an employment decision is insufficient to defeat a prima facie case of retaliation. *Id.* at 1204. As the Eleventh Circuit explained, "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).

While *Babb I* lessened the burden on federal-sector plaintiffs asserting Title VII retaliation claims, Dr. Babb still must "present evidence that her protected

activity played any role in [the adverse action]." *Id.* (finding the plaintiff did not meet her burden under *Babb I* where she "presented no affirmative evidence of any kind showing that her EEOC complaint was a factor in her work reassignment" and argued that "no . . . legitimate reason for the reassignment existed").

To prove causation in a Title VII retaliation case, "[t]he plaintiff must generally establish that the employer was actually aware of the protected expression at the time it took the adverse employment action." *Debe v. State Farm Mut. Auto. Ins.*, 860 F. App'x 637, 639 (11th Cir. June 8, 2021). 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*). For example, a district court found causation where "numerous adverse events . . . occurred within weeks after each of [the plaintiff's] protected acts." *Norman v. McDonough*, No. 2:20-cv-01765-KOB, 2022 WL 3007595, at *9 (N.D. Ala. July 28, 2022).

Here, the first element of Dr. Babb's prima facie case is satisfied because Dr. Babb engaged in protected activity when she participated in Drs. Trask and Truitt's employment discrimination lawsuit. She has also pursued her own claims against the VA for discrimination and retaliation. In addition, Dr. Babb verbally opposed what she felt were discriminatory practices in a lengthy conversation with Dr. Justice on February 8, 2013.

The second element is also satisfied. Dr. Babb claims that she faced adverse employment actions when her Advanced Scope was removed, when she was not selected for the anticoagulation position, when she was denied a lateral move to Module B, when a younger pharmacist (Dr. Martinez) was given a GS-13 position that was not advertised, and when she was given lower holiday pay. (Doc. # 27 at ¶ 15). This Court previously found that Dr. Babb experienced adverse employment actions under the "serious and material change" standard articulated in *Crawford v. Carroll*, 529 F.3d 961 (11th Cir. 2008). (Doc. # 83 at 21-22). In *Babb II*, however, the Eleventh Circuit clarified that Title VII retaliation claims require only a showing that an employment action "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Babb II*, 992 F.3d at 1207. Given that this Court previously found Dr. Babb experienced adverse employment actions under the more stringent "serious and material change" standard, and that the parties do not contest that Dr. Babb experienced adverse employment actions with respect to her retaliation claim, the second element is satisfied.

As to the third element, this Court previously found that a reasonable jury could determine that Dr. Babb established causation because she participated in a protected activity and faced adverse employment actions shortly thereafter. (Doc. # 83 at 22). Dr. Babb's protected activity in the Trask and Truitt case started when she provided statements to the EEOC in April and May of 2012. Her EEOC activity in that case continued through March 24, 2014, when she testified in a deposition. (Doc. # 68-2 at 38). Dr. Babb had a pointed conversation with Dr. Justice on February 8,

2013, opposing gender and age discrimination, and she filed a complaint with the EEOC in her own case alleging discrimination on May 6, 2013.

This Court nevertheless concluded that Dr. Babb had not established a cognizable Title VII retaliation claim because the VA offered legitimate and non-retaliatory reasons for every employment action and Dr. Babb failed to establish these reasons were pretextual. Under *Babb II*, however, "the existence of non-pretextual reasons for an adverse employment decision . . . doesn't cancel out the presence, and the taint, of discriminatory considerations." *Babb II*, 992 F.3d at 1204.

In the wake of *Babb II*, this Court now concludes that a reasonable jury could find that retaliation for Dr. Babb's EEO activity tainted the decision-making regarding the adverse employment actions. Again, close temporal proximity between an employer's discovery of protected active and an adverse employment action can establish causation in a Title VII retaliation case. *Thomas*, 2021 WL 4992892, at *10. Dr. Babb verbally opposed age and gender discrimination in a 40-minute encounter with Dr. Justice on February 8, 2013 (Doc. # 59 at 203–204), and Dr. Babb's Advanced Scope was removed just days later on February 15, 2013. (Babb Decl. Doc. # 68-2 at ¶ 19). Dr. Babb's supervisors had knowledge of her participation in protected activity by February 8, 2013 at the latest. *See Debe*, 860 F. App'x at 639 ("The plaintiff must generally establish that the employer was actually aware of the protected expression at the time it took the adverse employment action.").

Not long after that, on April 24, 2013, Dr. Justice denied Dr. Babb's request for a lateral transfer (and accompanying raise to a GS-13 position). (Babb. Decl. Doc. # 68-2 at ¶ 21). Dr. Babb's unsuccessful anticoagulation interview and non-selection for that GS-13 position also occurred in April of 2013. Further, Dr. Babb submits that she gave testimony in the Trask and Truitt case on March 24, 2014, and that she was denied holiday pay during the same time frame in March of 2014.

The VA provided non-pretextual reasons for all of these employment actions. While Dr. Babb's EEO action cannot be the but-for cause of the ultimate employment outcome, *Babb II* requires inquiry into whether the EEO activity affected Dr. Babb's treatment. The removal of Dr. Babb's Advanced Scope, her non-selection for the anticoagulation position, and reduced holiday pay all occurred within a short period of time following her EEO activity. True, Dr. Babb's supervisors may have contemplated the removal of her Advanced Scope long before her conversation with Dr. Justice on February 8, 2013. Still, a reasonable jury could find that, given that the removal of Dr. Babb's Advanced Scope occurred less than a week after her conversation, Dr. Babb's EEO activity could have played a role in the removal.

Likewise, a reasonable jury could find that the two-month period between Dr. Babb's conversation with Dr. Justice and her non-selection for the anticoagulation position indicates that the two occurrences were not unrelated. And Dr. Babb's denial of holiday pay — even though she was then offered a schedule adjustment — occurred during the same month that she gave testimony in the Trask and

Truitt case, providing a basis for a jury to find that this protected activity influenced the VA's decision making.

Accordingly, the VA's Motion for Summary Judgment is denied with respect to Count I.

B. Count II – Age and Gender Discrimination

Title VII states in pertinent 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). Again, the Eleventh Circuit recently held that the Supreme Court's decision in *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. *See Babb II*, 992 F.3d at 1205 ("If a decision is not "made free from any discrimination based on" that which § 2000e-16(a) protects, then an employer may be held liable for that discrimination regardless of whether that discrimination shifted the ultimate outcome.").[1]

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[1] The parties dispute the applicability of *Quigg v. Thomas County School District*, 814 F.3d 1227 (11th Cir. 2016) to Dr. Babb's discrimination claim. Because *Babb II* clarified that the appropriate standard for federal-sector Title VII discrimination claims is whether a protected trait is the but-for cause of differential treatment, the motivating factor test of *Quigg* likely does not apply. *Babb II*, 992 F.3d at 1205; *see also Durr*, 843 F. App'x 246 at 247 (finding that *Babb I* governed the plaintiff's claims of age and gender discrimination and retaliation under Title VII). Even if *Quigg* did govern Dr. Babb's claims, the outcome would not differ because she has not provided evidence that her age or gender was a motivating factor in the adverse employment actions. *Quigg*, 814 F.3d at 1235; *see Tonkyro*, 995

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. *Babb I*, 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.

Under *Babb I*, district courts thus no longer use the *McDonnell Douglas* framework to assess discrimination claims that do not require but-for causation as to the ultimate decision. *See Babb II*, 992 F.3d at 1204 ("[I]t seems that the Supreme Court accepted Babb's argument 'that the District Court should not have used the *McDonnell Douglas* framework.'"); *see also Lewis v. Sec'y of U.S. Air Force*, No. 20-12463, 2022 WL 2377164, at *10 (11th Cir. June 30, 2022) (explaining that *Babb I* "foreclosed using the full *McDonnell Douglas* framework regarding ADEA claims and Title VII retaliation claims as to federal-sector employees").

F.3d at 836 ("We perceive no material difference between the motivating-factor standard we have applied to substantive hostile work environment claims and the standard articulated by the Supreme Court in *Babb*.").

In *Babb II*, the Eleventh Circuit explained that discriminatory considerations can give rise to a colorable Section 2000e-16(a) claim "even when there are non-pretextual reasons for an adverse employment decision" because "the presence of those reasons doesn't cancel out the presence, and the taint, of discriminatory considerations." *Babb II*, 992 F.3d at 1204. Thus, under the *Babb I* and *Babb II* framework, Babb needs to show only that her age played a part in the way an employment decision was made — that is, that the decision was "tainted" by discrimination. *Babb I*, 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 I*, "a plaintiff's claim survives if 'discrimination played any part in the way a decision was made'" (internal alterations omitted)).

While *Babb I* altered the standard for evaluating the presence of discrimination, 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. *Babb I*, 140 S. Ct. 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.

1. <u>Non-selection for Anticoagulation</u>

The Court first examines Dr. Babb's claim with respect to her non-selection for the open anticoagulation position. Dr. Babb argues that she was subject to differential treatment because of her age because (1) she was not hired for the position despite her purported qualifications and (2) the position was filled by two younger female pharmacists. (Doc. # 52-2 at 160). Dr. Babb also argues that she was subjected to differential treatment because of her gender by not being selected for the anticoagulation position. (Doc. # 27 at ¶ 23). However, because two female pharmacists were selected for the position, and because Dr. Babb does not provide any further evidence indicating gender affected her treatment during the selection process, her non-selection for the position cannot support a claim of gender discrimination.

Although *Babb I* lessened the burden that federal-sector plaintiffs must show, allegations of differential treatment must be based on more than "mere speculation." *Malone v. U.S. Att'y Gen.*, 858 Fed. App'x 296, 303 (11th Cir. 2021) (citing *Cincinnati Ins. Co. v. Metro Props., Inc.*, 806 F.2d 1541, 1544 (11th Cir. 1986)). The Eleventh Circuit has found summary judgment on a racial discrimination claim proper where the plaintiff could not "point to any record evidence that his application . . . was treated differently because he is white." *Id.* at 301; *see also Buckley v. McCarthy*, No. 4:19-CV-49 (CDL), 2021 WL 2403447, at *1, *6 (M.D. Ga. June 11, 2021) (granting summary judgment for defendant under the *Babb I* standard because the evidence did not demonstrate that race played any role in the decision to remove plaintiff from federal service even though 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"); *cf. Bernea v. Wilkie*, No. 20-cv-82459, 2021 WL 6334929, at *6 (S.D. Fla. Dec. 7, 2021) (finding circumstantial evidence sufficient to support a claim of differential treatment based on age discrimination where a supervisor stated plaintiff's "age affected his ability to complete tasks").

Here, Dr. Babb's belief that age played a role in her non-selection for the anticoagulation position rests on the fact that the two pharmacists selected for the position were younger than her and that the selected pharmacists received points for doing a residency. (Babb Dep. Doc. # 59 at 186:9-13).

The statements of the members of the panel that conducted Dr. Babb's interview demonstrate that Dr. Babb's lack of experience and poor interview, rather than age discrimination, motivated the VA's hiring decision. (Doc. # 52-2 at 140–41). Dr. Hall testified that the "selectees' prior experience indicated to the panel that they should be capable of doing the job in an efficient and skilled manner [and] should require little training to practice independently," while Dr. Babb "did not have any direct experience in anticoagulation." (*Id.* at 140). Dr. Sypniewski explained that the selected candidates "had significantly more experience in the applied for position . . . [t]hey knew and were familiar with the workings of the position to which they had applied, and their experience in anti-coag enabled them to answer the questions with examples." (*Id.* at 152).

In contrast, Dr. Sypniewski remembered that Dr. Babb appeared nervous at her interview and did not

answer the panel's questions with "specific examples." (*Id.* at 153). In his testimony, Dr. Hall remembered that Dr. Babb used unprofessional language and harshly criticized other medical providers. (*Id.* at 141). Dr. Babb admitted that the interview was "the worst interview of [her] life" and that she did not have any direct experience independently managing anticoagulation patients. (Babb Dep. Doc. # 59 at 124:23, 119:17-19).

Dr. Babb also argues that the selection process for the anticoagulation treatment subjected her to differential treatment based on age by favoring pharmacists who are residency-trained rather than those who are board-certified and trained by experience. (Doc. # 27 at ¶ 10b; Doc. # 127 at 35–36). The crux of Dr. Babb's argument is that the consideration of residency experience by the panel subjected her to differential treatment because residency-trained pharmacists tend to be younger. (Doc. # 68 at ¶ 20; Doc. # 68-3 at 75).

The selected candidates' residencies played a role in their selection as Dr. Sypniewski explained that the selected candidates "[h]ad significantly more experience in the applied for position. They had either done residencies where they were required to work in anti-coag clinic, or they actually already were processing anti-coag consults, or they had actually worked in anti-coag clinic post-residency." (Doc. # 52-2 at 152). In particular, the scoring sheet for candidates for the anticoagulation position awarded candidates three points for residency and up to five points for anticoagulation experience but provided no basis for awarding points based on general experience as a pharmacist. (Doc. # 68-6 at 100).

While the selection criteria for the anticoagulation position places a premium on residency, Dr. Babb provides no evidence from which a reasonable jury could conclude that age influenced the decision to include residency in the selection criteria. In his deposition, Dr. Stewart explained that:

> [I]t is my opinion that a residency should be considered much more and . . . carry higher points than a board certification [because] a residency is one year of intensive focused training, mentoring, and learning for a pharmacist where they get extensive experience in disease state management, and disease state management is what a PACT pharmacist would be doing a majority of their day . . . I felt that having the experience of a residency as well as providing more points on the scoring sheet for a pharmacist who was actually doing the job at the time they applied; so a pharmacist that is prescribing has an advanced scope and is conducting disease state management should get more points than someone that is not, that is my belief.

(Doc. # 68-3 at 70–71). Dr. Stewart also believed there is "no substitute for the experience that someone gets in residency when it comes to disease state management advanced scope." (*Id.* at 74).

Although Dr. Babb expressed her disagreement with the consideration of residency in the selection criteria in her deposition, she did not provide evidence that age discrimination motivated the consideration. (Doc. # 68-2 at 22). As this Court previously noted, courts should not be in the business of adjudging

whether employment decisions are prudent or fair, but should merely determine whether an unlawful animus motivates a challenged employment decision. (Doc. # 83 at 28); *see Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) ("Federal courts do not sit as a super-personnel department that reexamines an entity's business decisions.") (internal quotations omitted). Dr. Stewart's testimony indicates that the decision to consider residency as part of the selection criteria for the anticoagulation position was motivated by the belief that applicants who had completed a residency were better prepared and trained for the position.

Of course, under *Babb II*, non-pretextual reasons for differential treatment alone are insufficient to defeat an otherwise cognizable claim of discrimination under Title VII. *Babb II*, 992 F.3d at 1204. However, the party alleging discrimination must still provide evidence, whether circumstantial or otherwise, indicating that discrimination played any role in the way a decision was made.

Here, Dr. Babb has not provided any evidence that would provide a basis for a reasonable jury to determine that age influenced the decision to award points for residency. The only record evidence Dr. Babb has provided is Dr. Stewart's statement that "[a] lot" of pharmacists pursuing residencies are right out of school. (Doc. # 68-3 at 75). Although Dr. Babb alleges in her complaint that residencies are recent in pharmacy, she cites to no evidence in the record in support of this claim. "Mere conclusions and unsupported factual allegations are legally insufficient to create a dispute to defeat summary judgment." *Bald Mountain Park, Ltd. v. Oliver*, 863

F.2d 1560, 1563 (11th Cir. 1989). Even under the flexible *Babb II* standard, the "record as a whole could not lead a rational trier of fact" to find that age animated the consideration of residency by the selection panel. *Saltzman v. Bd. of Comm'rs of the N. Broward Hosp. Dist.*, 239 Fed. Appx. 484, 487 (11th Cir 2007).

Thus, Dr. Babb has not provided any evidence suggesting that the interview panel for the anticoagulation position considered age when evaluating residency. In light of Dr. Stewart's belief that residency provides the most effective training, Dr. Babb has not identified a discriminatory animus influencing the selection criteria. A reasonable jury thus could not find that but-for an improper motive, a candidate's residency would not have been given weight in the selection process. Likewise, while Dr. Babb received a lower interview score than the candidates ultimately selected for the position, this was a result of her lack of experience and poor interview performance rather than age discrimination. Dr. Babb has not pointed to any evidence suggesting that her application for the position was treated differently because of her age.

2. <u>Refusal to Transfer Dr. Babb to Module B</u>

The Court next turns to Dr. Babb's argument that she was subject to differential treatment based on age and gender when Dr. Justice denied her request for a lateral transfer to Module B in April 2013. In June 2012, Dr. Howard, who was Dr. Babb's supervisor at that time, suggested that Dr. Babb consider a primary care position in Module B of the VA that had recently been vacated. (Howard Dep. Doc. # 57 at 53:3-8). Dr.

Babb originally turned down the position because she wished to remain in geriatrics, but later requested the lateral move. (Babb Decl. Doc. # 68-2 at ¶ 10). Dr. Justice denied the transfer, and the evidence shows that the Module B position did not exist at the time that Dr. Babb requested to be transferred into Module B. (Doc. # 52-2 at 185).

The denial of transfer to a non-existent position does not form the basis of a differential treatment claim. First, Dr. Babb does not identify any differential treatment. The record shows that a younger employee (Dr. Natalia Schwartz) requested to be transferred into Module B in June of 2012, and Dr. Schwartz was also turned down because the position was not available. (Doc. # 52-2 at 185).

Dr. Babb also alleges that Dr. Justice informed her that she could not move anyone into a position without advertising, yet a male over 40 (Dr. Lobley) was moved into a PACT position without it being advertised. (Doc. # 68-2 at ¶ 21, 29). Dr. Lobley's position became a PACT position in 2011 when the PACT program began. Unlike Dr. Lobley, whose position changed due to the beginning of the PACT program, Dr. Babb is alleging differential treatment by not being moved into a position that no longer existed. The fact that the Module B position was not open at the time Dr. Babb requested the transfer distinguishes her situation from Dr. Lobley's. Even assuming that Dr. Lobley's situation is analogous, his change in position does not evince differential treatment in terms of transfer without advertising because his position became a PACT position two years earlier in 2011. (Doc. # 70 at 3). Dr. Babb has thus not presented evidence that any pharmacist,

male or female, was "moved" into a position similar to the one Dr. Babb sought.

Second, even under the *Babb II* standard, Dr. Babb points to no evidence suggesting that age or gender discrimination was the but-for cause of her treatment. As this Court previously explained, the VA was not required to create (or hold open) a position just to accommodate a disgruntled employee such as Dr. Babb. (Doc. # 83 at 32). Dr. Babb's treatment in being denied the transfer was thus similar to that of both younger and male pharmacists.

While the provision of non-pretextual reasons for an employment action is insufficient to defeat a prima facie case of age or gender discrimination, Dr. Babb has failed to meet her burden of providing evidence from which a reasonable jury could find age or gender played any role in the VA's hiring decision. Without more, a reasonable jury could not find age or gender discrimination based on the mere fact that two younger female pharmacists were selected for the job.

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

C. Count III – Retaliatory Hostile Work Environment

Dr. Babb also maintains that she was subjected to a retaliatory hostile work environment because of her engaging in EEO activity. (Doc. # 127 at 15). At the time of its first Order, the Court reviewed Dr. Babb's retaliatory hostile work environment claim under *Gowski*. Now, under *Monaghan*, "retaliatory hostile work environment claims . . . prevail if the conduct complained of 'well might have dissuaded a

reasonable worker from making or supporting a charge of discrimination.' " *Tonkyro*, 995 F.3d at 836 (quoting *Monaghan*, 955 F.3d at 862).

Thus, Dr. Babb must show that she suffered harassment that "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* In addition, to prevail on this claim, Dr. Babb must demonstrate a link between her EEO activity and the totality of events allegedly creating a hostile work environment. *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).

Unlike Title VII retaliation claims, which are based on discrete acts, the "very nature" of hostile work environment claims "involves repeated conduct." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002). Hostile work environment claims are based on the "cumulative effect of individual acts," each of which "may not be actionable on its own." *Id.*

Dr. Babb describes numerous incidents as the basis for her retaliatory hostile work environment. These include denials of training, an evaluation of "fully successful" rather than "outstanding" in mentoring, removal of educational duties, denial of participation in negotiation of the Agreements, the loss of an Advanced Scope, the loss of pay, the non-selection for the anticoagulation position, the AIB targeting, the denial of a lateral move to Module B PACT, the leaving of reports of contact on her desk, the 2014 events, and the holiday pay issue. Many of

these incidents form the basis of her Title VII retaliation and discrimination claims; specifically, the loss of an Advanced Scope, the non-selection for the anticoagulation position, the denial of a lateral move to Module B PACT, and the holiday pay issue.

Although the Court previously found that Dr. Babb's retaliatory hostile work environment claim fails under the "severe and pervasive standard," it now concludes that a reasonable jury could find that the events affecting Dr. Babb "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." (Doc. # 83 at 49); *Tonkyro*, 995 F.3d at 836. Notably, *Babb II* and *Monaghan* have rendered the standard for an adverse employment action in a retaliatory hostile work environment claim coterminous with that in a Title VII retaliation claim. *Babb II*, 992 F.3d at 1209; *Monaghan*, 955 F.3d at 862. Because each discrete act underlying Dr. Babb's Title VII retaliation claim meets the "might have dissuaded" standard, the cumulative effect of these acts also meets the standard for the purposes of Dr. Babb's retaliatory hostile work environment claim. For the same reasons the Court has denied the VA's Motion as to Dr. Babb's Title VII retaliation claim, summary judgment in favor of the VA is denied as to the retaliatory hostile work environment claim.

As this Court previously explained, Dr. Babb has described adverse employment actions directly impacting the terms of her employment — specifically, her pay (including holiday pay).

As with Dr. Babb's Title VII retaliation claim, a reasonable jury could find that the temporal proximity

between Dr. Babb's EEO activity and her adverse employment actions demonstrates a causal link. The removal of Dr. Babb's Advanced Scope, her non-selection for the anticoagulation position, and reduced holiday pay all occurred within a short period of time following her EEO activity. A reasonable jury could find that the close temporal proximity between Dr. Babb's EEO activity and the adverse actions established causation.

After due consideration, the Court denies the VA's Motion for Summary Judgment as to Dr. Babb's hostile work environment claim.

IV. Conclusion

For the reasons given above, summary judgment is denied on Counts I and III. The Motion is granted as to Count II.

Accordingly, it is

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

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

(2) Summary judgment is granted in favor of Defendant on Count II.

(3) Summary judgment is denied as to Counts I and III.

DONE and **ORDERED** in Chambers in Tampa, Florida, this 19th day of August, 2022.

Virginia M Hernandez Covington
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:14-cv-1732-VMC-TBM

NORIS BABB,

v.

DENIS McDONOUGH, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(November 10, 2022)

ORDER

This matter comes before the Court upon consideration of Defendant Secretary of Veterans Affairs' Motion for Reconsideration in Part, filed on August 29, 2022. (Doc. # 155). Plaintiff Noris Babb responded on September 1, 2022. (Doc. # 158). For the reasons that follow, the Motion is granted in part and denied in part.

I. Legal Standard

"Federal Rules of Civil Procedure 59(e) and 60 govern motions for reconsideration." *Beach Terrace*

Condo. Ass'n, Inc. v. Goldring Invs., No. 8:15-cv-1117-VMC-TBM, 2015 WL 4548721, at *1 (M.D. Fla. July 28, 2015). "The time when the party files the motion determines whether the motion will be evaluated under Rule 59(e) or Rule 60." *Id.* "A Rule 59(e) motion must be filed within 28 days after the entry of the judgment." *Id.* "Motions filed after the 28–day period will be decided under Federal Rule of Civil Procedure 60(b)." *Id.*

Here, the Motion was filed within 28 days of the entry of judgment, so Rule 59 applies. "The only grounds for granting a Rule 59 motion are newly discovered evidence or manifest errors of law or fact." *Anderson v. Fla. Dep't of Envtl. Prot.*, 567 F. App'x 679, 680 (11th Cir. 2014) (quoting *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007)).

Granting relief under Rule 59(e) is "an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *United States v. DeRochemont*, No. 8:10-cr-287-SCB-MAP, 2012 WL 13510, at *2 (M.D. Fla. Jan. 4, 2012) (citation omitted). Furthermore, "a Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Vill. of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005).

A. Removal of Dr. Babb's Advanced Scope

The VA argues that the Court erred in its summary judgment order by treating the removal of Dr. Babb's Advanced Scope as a discrete act because

it was not alleged as such in the operative complaint and is time-barred.

The VA is correct. In its January 12, 2015, order dismissing the Second Amended Complaint, the Court found that "the allegedly discriminatory actions that occurred more than 45 days prior to Babb's first contact with the EEO counselor on May 6, 2013, are time-barred from consideration." (Doc. # 22 at 11); *see* 29 C.F.R. § 1614.105(a)(1) ("An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action."). The February 15, 2013, removal of Dr. Babb's Advanced Scope is thus time-barred from consideration as a discrete act. Accordingly, in her Third Amended Complaint — which is the operative complaint — Dr. Babb did not allege the removal of her Advanced Scope as a discrete act. (Doc. # 27 at ¶ 15).

However, the Court's characterization of the removal of Dr. Babb's Advanced Scope as a discrete act is largely due to the VA's description of Dr. Babb's discrete acts in its supplemental memorandum in support of its motion for summary judgment. There, the VA specifically noted "[t]he first of Plaintiff's retaliation claims was related to the removal of the Advanced Scope of Practice." (Doc. # 124 at 12).

Regardless, the removal of Dr. Babb's Advanced Scope is not a discrete act that is, by itself, actionable. However, as the VA points out, an employee may use "[time-barred] prior acts as background evidence in support of a timely claim." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). In a case like the

one at bar, where the employer's intent is at issue, Dr. Justice's removal of Dr. Babb's Advanced Scope within days of becoming aware of Dr. Babb's protected activity may serve as circumstantial evidence of Dr. Justice's retaliatory animus.

B. Dr. Megan Martinez's GS-13 Role

The VA argues that Dr. Megan Martinez's transfer to a GS-13 position is not a discrete act because Dr. Babb previously conceded as such in a response to the VA's motion for summary judgment on May 18, 2016. (Doc. # 68). The Court does not find this argument persuasive.

The Court declines to grant a Rule 59(e) motion based on an argument "that was previously available, but not pressed." *Stone v. Wall*, 135 F.3d 1438, 1442 (11th Cir. 1998). Dr. Babb alleged that the transfer of Dr. Megan Martinez, a younger woman, to a GS-13 position, was a discrete act for the purposes of her retaliation claim in the Third Amended Complaint. (Doc. # 27 at ¶ 15). Thereafter, in response to the VA's original motion for summary judgment, Dr. Babb noted that the transfer of Dr. Martinez was "not a discrete act." (Doc. # 83 at 21; Doc. # 68 at 29).

However, in its supplemental memorandum, the VA failed to argue that Dr. Babb had previously conceded Dr. Martinez's transfer was not a discrete act. (Doc. # 124). Indeed, the VA recognized that the Court's previous summary judgment order analyzed the treatment of Dr. Martinez vis-à-vis Dr. Babb in the context of Dr. Babb's retaliation claim. (Id. at 13).

Because "[a] party cannot readily complain about the entry of a summary judgment order that did not

consider an argument they chose not to develop for the district court at the time of the summary judgment motions," the VA's Motion for Reconsideration with respect to Dr. Martinez's transfer to GS-13 is denied. *Johnson v. Bd. Of Regents of Univ. of Ga.*, 263 F.3d 1234, 1264 (11th Cir. 2001).

Accordingly, it is now

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

(1) Defendant the Secretary of Veterans Affairs' Motion for Reconsideration in Part (Doc. # 155) is **GRANTED** with respect to the Court's consideration of the removal of Dr. Babb's Advanced Scope.

(2) The Motion is **DENIED** with respect to the Court's consideration of Dr. Martinez's transfer to a GS-13 position.

DONE and **ORDERED** in Chambers in Tampa, Florida, this 10th day of November, 2022.

Virginia M Hernandez Covington
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-10383

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

NORRIS BABB,
Plaintiff-Appellant,

versus

SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,
Defendant-Appellee.

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

[Filed: September 15, 2025]

ON PETITIONS FOR REHEARING AND FOR REHEARING EN BANC

Before JILL PRYOR, NEWSOME, and LAGOA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 40. The Petition for Panel Rehearing also is DENIED. FRAP 40.