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

QUANIAH R. STEVENSON,

Plaintiff,

v.

DELTA AIR LINES, INC.,

Defendant.

CIVIL ACTION FILE NO.
1:16-cv-002571-AT-LTW

MAGISTRATE JUDGE'S FINAL REPORT AND RECOMMENDATION

This case is currently before the Court on a Motion for Summary Judgment filed by Defendant Delta Air Lines, Inc. ("Delta"). [Doc. 88]. For the reasons detailed below, the undersigned **RECOMMENDS** that the Motion for Summary Judgment be **GRANTED**. [Doc. 88].

PRELIMINARY ISSUES

The Local Rules provide that the "respondent to a summary judgment motion shall include the following documents with the responsive brief:" (a) a "response to the movant's statement of undisputed facts," and (b) a "statement of additional facts which the respondent contends are material and present a genuine issue for trial." N.D. Ga. Loc. R. 56.1(B)(2). Plaintiff did not provide a statement of additional facts and did not provide a response to Defendant's Statement of Undisputed Facts "with" her brief. See

[Doc. 96]. Instead, Plaintiff decided to "respond[ ] to Defendant's Statement of Undisputed Facts" in her brief. [Id. at 5–26]. If Plaintiff were pro se, this violation of the Court's rules would be understandable. But she is not; Plaintiff is represented by a licensed attorney. Even after Defendant pointed out the flaws with Plaintiff's response over a month ago, Plaintiff's counsel made no effort to correct the deficiencies. See [Doc. 99 at 2–5].

The Local Rules clearly state that a respondent "shall" include a "statement of additional facts which the respondent contends are material and present a genuine issue for trial." N.D. Ga. Loc. R. 56.1(B)(2)(b). That "statement of additional facts" must be a "separate statement" and "must meet the requirements" of Local Rule 56.1(B)(1). N.D. Ga. Loc. R. 56.1(B)(2)(b). Specifically, Local Rule 56.1(B)(1) confirms that the statement of material facts must be "separate" from the brief. N.D. Ga. Loc. R. 56.1(B)(1). As mentioned above, Plaintiff's counsel did not provide the required "statement of additional facts," or even a "separate statement." Instead, Plaintiff's counsel appears to have included her purported factual disputes throughout her brief. See [Doc. 96]. The Local Rules are abundantly clear that the Court "**will not** consider any fact . . . set out only in the brief and not in [a separate] statement." N.D. Ga. Loc. R. 56.1(B)(1) (emphasis added).

If this were some mere technical flaw, Plaintiff's counsel might be forgiven. But the Court cannot discern what "additional facts" Plaintiff's counsel would have included in a "separate statement." Plaintiff's brief does not contain a fact section. And, the "facts" Plaintiff intersperses in her brief fail to comply with Local Rule 56.1 in other ways as well. Statements of fact "must be numbered separately and supported by a citation to evidence proving such fact." N.D. Ga. Loc. R. 56.1(B)(1). Crucially, the facts must be "concise" and the Court "will not consider any fact" that is "supported by a citation to a pleading rather than to evidence" or is "stated as an issue or legal conclusion." Id. To the extent Plaintiff tries to include "additional facts," her brief runs afoul of all these principles. Plaintiff argues she suffered "harassment" as "set forth in detail in Plaintiff's complaint at paragraphs 20–28." [Doc. 96 at 13]. As will be discussed more below, Plaintiff cannot survive summary judgment by simply trying to "incorporate" allegations from her Complaint that are contradicted by Plaintiff's own testimony.

Plaintiff also nakedly asserts that "similarly situated employees were treated differently," but this is a mere legal conclusion that the Court need not consider. [Id. at 14]; see also N.D. Ga. Loc. R. 56.1(B)(1). And Plaintiff's argument is not properly "supported by a citation to evidence proving such fact." See N.D. Ga. Loc. R. 56.1(B)(1). Instead, Plaintiff supports her argument by citation to 40 pages from a

deposition and an exhibit containing information regarding **190 Delta employees**. [Doc. 96 at 14]. District courts are not required to "dig through volumes of documents and transcripts" to try to figure out what facts Plaintiff might think support her position. Chavez v. Sec'y Fla. Dep't of Corr., 647 F.3d 1057, 1061 (11th Cir. 2011).

When Plaintiff later cherry picks some employees for particular discussion, she fairs little better. With respect to two of her alleged comparators, Plaintiff simply lists their names with no explanation regarding how or why Plaintiff contends these individuals are comparators. [Doc. 96 at 7]. Even when Plaintiff does provide explanations, her assertions are nothing but legal conclusions and are not supported by citations to specific evidence. For example, Plaintiff argues David Bishton's brother used Mr. Bishton's travel pass "for extensive business purposes," but Plaintiff fails to provide an explanation for that statement. See [id. at 9]. Instead, Plaintiff cites to 17 pages from a deposition and nearly 60 pages of exhibits containing information regarding hundreds of flights. [Id.]; see also [Docs. 89-12, 89-13, 89-14].[1]

Plaintiff's counsel appears to leave it to the Court to sort through the record to determine which facts might support her arguments. The entire purpose of Local Rule

[1] Plaintiff also cites to a paragraph from her declaration that, as will be discussed more below, centers on her own speculation that Mr. Bishton's brother "run [*sic*] marathon's [*sic*] for prizes" and that Mr. Bishton "appears" to have been untruthful. [Doc. 96-1 ¶15].

56.1 is to get parties to "organize the evidence rather than leaving the burden upon the district judge." Reese v. Herbert, 527 F.3d 1253, 1268 (11th Cir. 2008) (quoting Alsina–Ortiz v. Laboy, 400 F.3d 77, 80 (1st Cir.2005)). Again, it is not the Court's job to "dig through volumes of documents and transcripts" to try to find facts to support Plaintiff's position. Chavez, 647 F.3d at 1061. Because Plaintiff's counsel failed to comply with Local Rule 56.1(B)(2)(b) in myriad ways, the Court will not consider the facts set out in her brief that she "contends are material and present a genuine issue for trial." See N.D. Ga. Loc. R. 56.1(B)(2)(b); see also id. 56.1(B)(1).

Plaintiff's attempt to "respond[ ] to Defendant's Statement of Undisputed Facts" is not much better. [Doc. 96 at 5–26]. The response to a statement of undisputed facts must contain "**nonargumentative** responses." N.D. Ga. Loc. R. 56.1(B)(2)(a)(1) (emphasis added). But because Plaintiff's "response" to Defendant's Statement of Undisputed Facts is the bulk of her brief, most of the responses are not nonargumentative. See [Doc. 96 at 5–26]. For example, Defendant states that its "Pass Protection Group utilized a set of objective criteria or parameters to determine which employees would have their travel pass usage reviewed." [Doc. 88-1 ¶20]. Plaintiff purports to "den[y]" this fact, but her response has almost nothing to do with Defendant's "Pass Protection Group" or what criteria it used to determine which employees it would review. [Doc. 96 at 12–18]. After one single sentence quibbling

with Kelly Nabors' testimony because "Ms. Nabors could not speak with certainty," Plaintiff goes on for **over six pages** discussing the allegations in her complaint and arguing that the "reason for her termination is pretext." [Id.]. The fact that Plaintiff was responding to never discusses the allegations in Plaintiff's complaint or the reason for Plaintiff's termination. See [Doc. 88-1 ¶20].

As the Court has explained, "a response to a statement of undisputed material facts is not an opportunity to write another brief." Walker v. U.S., I.R.S., No. 4:07-CV-0102-HLM, 2009 WL 1241929, at *3 (N.D. Ga. Feb. 26, 2009) (quoting Darnell v. Georgia Power Co., No. 4:04–CV–0166–HLM, slip op. at 8 (N.D. Ga. Dec. 21, 2005)). Or, in this case, an opportunity to write Plaintiff's initial brief. The response to the statement of undisputed facts is to be a separate document containing "**nonargumentative** responses." N.D. Ga. Loc. R. 56.1(B)(2)(a)(1) (emphasis added). Plaintiff's arguments should be reserved for her brief. Because Plaintiff's counsel failed to comply with this requirement, the Court is left to sort out what portions of her "response" are responses to Defendant's statement of undisputed facts and what portions are arguments she intends to use to support her claims.

Plaintiff's brief also violates the rule that a "response to a motion [is] limited in length to twenty-five (25) pages." N.D. Ga. R. 7.1(D). The brief itself spills over onto the 26th page, though only slightly. [Doc. 96 at 26]. But in reality, the brief is far

longer than that. Plaintiff's counsel "incorporates by reference" her responses to other paragraphs **28 times**, including 11 times where she attempts to "incorporate[ ]" responses from 4 paragraphs at once. See [Doc. 96 at 9–26]. And many of the paragraphs Plaintiff "incorporates by reference" are themselves quite long. For example, Plaintiff's response to Defendant's statement number 20, discussed above, is over six pages long. [Id. at 12–18]. Plaintiff "incorporates by reference" her response to that paragraph **18 times**. [Id. at 18–24]. By doing so, Plaintiff thus "incorporates" more than 100 extra pages into her brief through this paragraph alone. This does not include the fact that Plaintiff repeatedly attempts to incorporate the allegations from her Complaint, in contravention of the clear rule that a party cannot support her position by "a citation to a pleading." See [id. at 2, 13, 24–25]; see also N.D. Ga. Loc. R. 56.1(B)(1).

The Court could strike the response entirely for failing to comply with Local Rules 56.1 and 7.1(D). See, e.g., Ctr. Hill Courts Condo. Ass'n, Inc. v. Rockhill Ins. Co., No. 19-CV-80111, 2020 WL 442467, at *1 n.1 (S.D. Fla. Jan. 28, 2020). But "in the interest of fairness and expediency, the Court will consider [the] noncompliant brief[ ]." Id. However, as discussed above, the Court "will not consider any fact . . . set out only in the brief." See N.D. Ga. Loc. R. 56.1(B)(1). And the Court will not indulge any attempt by Plaintiff to "incorporate[ ] by reference" her responses to other

paragraphs.[2] The Court will not allow Plaintiff to file a brief that is, in effect, more than 150 pages long, even if most of those pages are Plaintiff effectively copying and pasting the same arguments over and over again.

FACTUAL BACKGROUND

Plaintiff began working for Delta in 2007. [Doc. 88-1 ¶1]. Throughout her time at Delta, Plaintiff was warned and counseled for various workplace infractions involving attendance and job performance issues. [Id. ¶3]; see also [Doc. 96 at 5–6]. In 2014, Plaintiff injured her shoulder, neck, and back at work. [Doc. 88-1 ¶48]. After a long recuperation, Plaintiff was released to full duty work with no restrictions in October 2014 and was never again restricted from performing any of her work assignments at Delta. See [id. ¶49].[3] Other than taking time off to recover, Plaintiff

[2] As will be discussed below, many of Plaintiff's responses are immaterial. This is doubly so when Plaintiff "incorporates" her responses to other paragraphs. For example, Paragraph 46 of Defendant's Statement of Material Facts says, Plaintiff "could produce no document supporting any [alleged] graduation." [Doc. 88-1 ¶46]. In response, Plaintiff simply "incorporates" her responses to four other paragraphs without pointing to contrary evidence. [Doc. 96 at 24]. Even if the Court were to consider Plaintiff's responses to these other paragraphs, none of them contain any evidence disputing Defendant's statement that Plaintiff "could produce no document supporting any [alleged] graduation." See [Doc. 88-1 ¶46]; see also [Doc. 96 at 12–21].

[3] Plaintiff purports to "Deny" this fact but, as will be discussed in the analysis below, Plaintiff's denial is based only on allegations from her Complaint and an affidavit that contradicts her own testimony. See [Doc. 96 at 24–25].

never asked for an accommodation relating to the injury. See [id. ¶50]. But at the suggestion of her supervisor, Carol Kerr, Plaintiff did receive an adjustment to her shift schedule to deal with personal problems. [Id. ¶51].

As a benefit of employment, Delta provides employees, certain of their family, and a designated "travel companion" with free and reduced-rate travel known as "travel passes." [Doc. 88-1 ¶4]. Employees also receive "buddy passes," which allow the employee to provide reduced-rate transportation to family or friends not discussed above. [Id. ¶5]. Delta has written policies regarding the use of these travel benefits that, *inter alia*, expressly prohibit their use for business travel. [Id. ¶¶6–7]; see also [Doc. 96 at 6–7]. Plaintiff is aware of this prohibition and described it as "a strict rule." [Doc. 88-4 at 100:25–101:7]. Delta's travel policy states that if an employee's "pass rider" uses a pass for business, the employee is subject to "disciplinary action, up to and including . . . termination of employment." [Doc. 88-1 ¶10].

Delta also requires its employees to keep "control" of their passes and the passes of their designated companions—including by ensuring that the employee is aware of the travel being undertaken by their companion and that the travel pass is not used for

business purposes. [Id. ¶12].[4] In early 2014, Delta became aware that some employees were misusing their travel passes in various ways, including allowing them to be used for business purposes. [Id. ¶14].[5] In April 2014, Delta issued a memo explicitly reminding its employees, "Don't share your passes with anyone who intends to use pass travel for business purposes . . . ." [Id. ¶16]. The memo states that travel pass "misconduct by any associated pass rider" could result in "termination of employment." [Doc. 88-11 at 2].

The April 2014 communication informed employees that Delta was beginning an initiative known as "Fly Right" to prevent travel abuse. [Doc. 88-1 ¶18]. Delta established a group called the Pass Protection Group ("PPG") to proactively identify cases of possible abuse and investigate them. [Id. ¶19]. The PPG focused on employees whose travel companions had very high travel pass usage and employees who shared buddy passes with individuals who received buddy passes from a

[4] Plaintiff denies she "was aware" of this policy, but that dispute is immaterial. [Doc. 96 at 10]. Plaintiff does not dispute she was required to keep control of her travel passes and to ensure they were not used for business travel. See [id.]

[5] Plaintiff purports to deny this fact, but her denial does not comply with Local Rule in 56.1(B)(2)(a)(2). [Doc. 96 at 10]. The fact is thus deemed admitted. N.D. Ga. Loc. R. 56.1(B)(2)(a)(2).

substantial number of Delta employees. [Id. ¶20].[6] Based on these criteria, the PPG began investigating five employees, including Plaintiff, who shared a buddy pass with an individual named Vendal Bailey. [Id. ¶¶21–22].[7]

While investigating Plaintiff, the PPG identified information showing that Plaintiff's designated travel companion, Jovan Dais, was frequently traveling to disparate locations in a way that reflected possible business travel. [Id. ¶23].[8] Delta's

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[6] Plaintiff purports to deny this fact because the testifying Delta employee said she "believe[d]" those were the criteria. [Doc. 96 at 12]. Plaintiff's denial fails to meet the criteria of Local Rule 56.1(B)(2)(a)(2) because it does not "directly refute[ ]" Delta's fact and Plaintiff does not demonstrate that the evidence "does not support [Delta's] fact." N.D. Ga. Loc. R. 56.1(B)(2)(a)(2). The remainder of Plaintiff's response to Paragraph 20 is not relevant, as discussed above. See [Doc. 96 at 12–18]. As such, this fact is deemed admitted.

[7] Plaintiff asserts the other employees who provided travel passes to Mr. Bailey "were not fully and carefully investigated to the extent as [*sic*] Plaintiff." [Doc. 96 at 19]. The record Plaintiff cites does not support her assertion. [Doc. 92 at 168:5–173:2]. In any event, Plaintiff's assertion is largely immaterial. Plaintiff ignores the fact that one of the individuals investigated was outside of her protected class and was terminated. See [id. at 172:10–11]; see also [Doc. 92-1 at 11]. And Plaintiff does not mention that one of the individuals who was cleared of any wrongdoing is, like Plaintiff, an African-American woman. [Doc. 92 at 172:5–17]. To the extent Plaintiff argues one of the individuals, Sidarius Johnson, is a "comparator," her arguments are discussed below.

[8] Plaintiff purports to deny this fact, but her denial does not comply with Local Rule in 56.1(B)(2)(a)(2). [Doc. 96 at 19]. Plaintiff only offers an unsupported contention that Mr. Dais's "travel does not reflect possible business travel." [Id.]. The fact is thus deemed admitted. N.D. Ga. Loc. R. 56.1(B)(2)(a)(2).

records showed Mr. Dais traveled frequently, often for short duration, to locations that included Los Angeles; Phoenix; New York; Houston; St. Louis; Pittsburgh; Dallas; New Orleans; Washington, D.C.; San Francisco; New York; Orlando; Salt Lake City; Burlington, Vt.; Cincinnati; Las Vegas; and Detroit. [Id. ¶24]; see also [Doc. 88-13].[9]

In particular, the PPG investigated a one-night trip Mr. Dais took using Plaintiff's travel pass to Los Angeles, California on June 6, 2015. See [Doc. 88-3 ¶12]. During her deposition, Plaintiff admitted that Mr. Dais and a music artist named Caleb Boyette—who goes by the "rap name" Jino—"do music together" and that the two "work together." [Doc. 88-4 at 186:15–25]; see also [id. at 187:8–12]. Delta's records showed that Mr. Dais and Mr. Boyett traveled to Los Angeles together using Plaintiff's travel pass benefits and that Mr. Dais paid Mr. Boyett's fees associated with using the Delta travel pass. [Doc. 88-3 at 4–5, ¶12]; [Doc. 88-1 ¶31]. During the investigation, the PPG uncovered social media posts in which Mr. Boyett promoted the fact he was preforming in a concert in California on June 6, 2015. [Doc. 88-12 at 5–9]. Mr. Dais posted a picture of himself with Mr. Boyett "[o]n the set" at the concert. [Id. 10–11].

[9] Plaintiff purports to deny these facts "to the extent they contradict the record." [Doc. 96 at 19]. But Plaintiff does not explain how Defendant's statement allegedly contradicts the record, and the only "evidence" she cites is a declaration by Mr. Dais saying one trip he took "was please [*sic*]." [Id.]; see also [Doc. 96-2 at 1].

The PPG decided to interview Plaintiff to discuss their suspicion that Mr. Dais was using her travel passes for his music business. [Doc. 88-1 ¶32]. During the interview, Plaintiff said Mr. Dais lives in Georgia. [Doc. 88-3 at 27]. Delta's research confirmed Mr. Dias's address and showed the business he "works for" does "music production, studio rentals," etc. [Id.]. When asked about Mr. Dias's travel, Plaintiff failed to identify the vast majority of the places where Mr. Dais traveled. [Id.]. Plaintiff admitted she "sometimes" booked flights for Mr. Dais "at his house on his computer and the computer could save her password." [Doc. 88-3 at 27]. Plaintiff claimed that she "traveled together" with Mr. Dais for a funeral, then claimed "she said they never traveled together," then "said they have traveled together but not for the funeral." [Id. at 28]. Delta's records did not show Plaintiff and Mr. Dais traveling together since he was added as a travel companion in August 2011. See [id.]. When asked why Mr. Dais traveled to Los Angles, Plaintiff stated his "children live in LA." [Id.]. When confronted with the social media posts uncovered by the PPG, Plaintiff said she "didn't know anything about that." [Id.]. The PPG members who interviewed Plaintiff decided she "was not truthful and forthcoming about her current companion pass rider Jovan Dias." [Id. at 29].

Performance leader Mark Harris recommended Plaintiff be terminated because "she was not forthcoming" and "her companion used non-revenue benefits for business

purposes." [Id. at 31]. The memo recommending Plaintiff's termination noted that Plaintiff had received two warnings for performance/attendance issues within the last five months. [Id.]. Station Manager Kelly Patton concurred with the recommendation for termination, and Human Resources manager Barbara Franz "also concurred with the termination decision" after having reviewed the investigation materials. [Id.]; see also [id. at 6, ¶16]. At no point prior to her termination did Plaintiff complain of any discriminatory conduct. [Doc. 88-1 ¶53].

Plaintiff appealed her termination and then alleged that the June 6, 2015 trip was "for [Mr. Dias's] daughter's graduation." [Doc. 88-15 at 1]. Plaintiff was asked about Mr. Dias's social media posts, and Plaintiff claimed that Mr. Dias simply "retweeted [a] friend's post." [Id. at 2]. Plaintiff was told "to provide documentation to support her claim that Mr. Dias was in [Los Angles] for his daughter's graduation" and to "ask Dias about the twitter posts." [Id.]. Plaintiff sent Delta a copy of Mr. Dias's California driver's license and a letter from Mr. Dias that said "he's not giving out his minor child's school information." See [Doc. 88-4 at 232:21–233:14].

LEGAL STANDARD

Summary judgment is appropriate when "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). The movant can discharge this burden by merely

"'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). After the movant has carried her burden, the non-moving party is then required to "go beyond the pleadings" and present competent evidence designating specific facts showing a genuine disputed issue for trial. Id. at 324.

While the court is to view all evidence and factual inferences in a light most favorable to the non-moving party, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original). A fact is material when it is identified as such by the controlling substantive law. Id. at 248.

Moreover, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citations omitted). An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." Anderson, 477 U.S. at 249-50. To the extent one party's

version of events "is blatantly contradicted by the record," the "court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 379–81 (2007).

LEGAL ANALYSIS

As an initial matter, the Court must address what claims Plaintiff brings. Plaintiff asserts Defendant did not address her "harassment" and "hostile work environment" claims. [Doc. 96 at 3].[10] Plaintiff's assertion is incorrect. Defendant correctly pointed out "Plaintiff does not assert any hostile work environment claim in her Complaint." [Doc. 88-2 at 15 n.6]; see also [Doc. 3]. And the only time Plaintiff mentions "harassment" in her claims is in the context of her retaliation claim. [Doc. 3 ¶82]. "A plaintiff may not amend her complaint through argument in a brief opposing summary judgment." Gilmour v. Gates, McDonald & Co., 382 F.3d 1312, 1315 (11th Cir. 2004). In any event, "hostile work environment" and "harassment" are different names for the same claim. See Adams v. Austal, U.S.A., L.L.C., 754 F.3d 1240, 1248 (11th Cir. 2014). Defendant correctly pointed out that the alleged "harassment" did not "remotely create a hostile work environment." [Doc. 88-2 at 15 n.6]; see also [Doc.

[10] Plaintiff also asserts Defendant did not "fully address[ ]" her "retaliation claims [*sic*] under the [Americans With Disabilities Act ("ADA")]." [Doc. 96 at 3]. Plaintiff actually did bring an ADA retaliation claim, so that claim is discussed in the analysis below.

99 at 6]. As will be discussed below, Plaintiff does not present competent evidence to support the allegations of "harassment" found in her Complaint, or evidence of the kind of harassment that would support a hostile work environment. [11]

Looking to the Complaint, Plaintiff brings five counts under three statutes. First, Plaintiff alleges violations of the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq*. ("ADA"). [Doc. 3 ¶¶42–52]. Within this count, Plaintiff alleges two kinds of ADA violations: a failure "to reasonably accommodate Plaintiff's actual or perceived disabilities" (the "failure-to-accommodate claim") and termination "because of her actual or perceived disabilities" (the "ADA discrimination claim"). [Id. ¶¶44–45]. Plaintiff's second count alleges racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.* ("Title VII") and 42 U.S.C. § 198l. [Id. ¶¶53–61]. Third, Plaintiff brings a count of gender discrimination, also in violation

[11] The only examples of harassment Plaintiff mentioned in her deposition are isolated, not severe, and have nothing to do with a protected characteristic. One time, Plaintiff was told her shoes were "[o]ut of compliance" and "that was it." [Doc. 88-4 at 118:11–119:1]. Plaintiff heavily disputes whether this incident even qualified as a verbal coaching. [Id. at 117:2–118:2]. Another time during irregularly busy operations, Plaintiff was "pushed aside" because her supervisor believed she was working "too slow." [Id. at 119:2–121:6]. One time, Plaintiff was told to take off a bracelet. [Id. at 121:12–122:6]. And one time, Plaintiff asked for a copy of an email praising "something [she] did," but Plaintiff's supervisor said, "I don't have it." [Id. at 122:15–123:11]. While Plaintiff claims her supervisor "constantly said things to" her, those are the only incidents Plaintiff could remember and she characterizes them as "the four main things." [Id. at 122:7–14; 123:12–16].

of Title VII. [Id. ¶¶62–70]. Fourth, Plaintiff brings a claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et. seq.* ("ADEA"). [Id. ¶¶72–80]. Last, Plaintiff alleges a count of retaliation under Title VII, § 198l, the ADA, and the ADEA. [Id. ¶¶81–88]. The Court discusses each of these claims in turn, but because all of Plaintiff's discriminatory termination claims require a similar prima facie showing, those counts are discussed together. See Liebman v. Metro. Life Ins. Co., 808 F.3d 1294, 1298 (11th Cir. 2015); Holly v. Clairson Indus., L.L.C., 492 F.3d 1247, 1255–56 (11th Cir. 2007); Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1331 (11th Cir.1998).

I. The Failure-to-Accommodate Claim

"To establish a prima facie case of discrimination under the ADA, a plaintiff must show: (1) he is disabled; (2) he is a qualified individual; and (3) he was subjected to unlawful discrimination because of his disability." Holly, 492 F.3d at 1255–56. The term "discrimination" as used in the ADA includes "not making reasonable accommodations to the known physical . . . limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A).

As an initial matter, Plaintiff never points to any evidence that she "is disabled" within the meaning of the ADA. See [Doc. 96]. Plaintiff simply asserts that she has an unspecified "disability." See [id. at 1–2, 12–13, 15–16, 24–25]. Plaintiff is

presumably referring to her "work injury," but the mere fact that Plaintiff missed work because of an injury does not mean she is "disabled" within the meaning of the ADA. See [id. at 1]; see also Sutton v. Lader, 185 F.3d 1203, 1209 (11th Cir. 1999) (holding that a "temporary inability to work while recuperating from surgery is not . . . a permanent or long-term impairment and does not constitute evidence of a disability" under the Rehabilitation Act).

Plaintiff also suggests that Defendant's actions "caused [her] to suffer depression" and that the condition "resulted in her taking leave including an overnight stay in the hospital." [Doc. 96 at 13]. Even if this statement is true,[12] Plaintiff's assertion that she took leave and stayed in a hospital overnight is not sufficient to show she was "disabled" within the meaning of the ADA. Garrett v. Univ. of Alabama at Birmingham Bd. of Trustees, 507 F.3d 1306, 1315 (11th Cir. 2007) ("A severe

[12] The only evidence Plaintiff cites in support of this position is her declaration, where she makes the same assertion nearly verbatim. [Doc. 96-1 ¶6]. But that declaration appears to be a sham and need not be credited. See Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc., 736 F.2d 656, 656 (11th Cir.1984) (explaining that an affidavit is a "sham" when it "merely contradicts [a party's] prior testimony without giving any valid explanation"). During her deposition, Plaintiff testified that her depression occurred because of issues with her car, her aunt, and her mother. [Doc. 88-4 at 98:9–25]. Plaintiff never asserted her depression was caused by Defendant's actions. Plaintiff also never testified that she had an overnight hospital stay because of her depression. Instead, Plaintiff testified that *after* her termination she twice stayed in the hospital overnight due to "chest pains" and "anxiety." [Id. at 32:11–34:5].

limitation that is short term and temporary is not evidence of a disability."); see also [Doc. 88-4 at 26:21–31:12] (testifying that the only psychological treatment she has received is a prescription for a medication she has taken "[m]aybe eight times"). Setting aside this flaw, Plaintiff's failure-to-accommodate claim still fails because she never requested a reasonable accommodation.

In its Motion for Summary Judgment, Defendant argues Plaintiff "made no request for reasonable accommodation relating to her injury." [Doc. 88-2 at 21]. Having pointed to this absence of evidence, the burden shifts to Plaintiff to present competent evidence showing a genuine disputed issue for trial. Celotex, 477 U.S. at 324. But Plaintiff does not meet her burden. Nowhere in her brief does Plaintiff assert that she requested any kind of accommodation for her unspecified "disability," and nowhere does she assert that any request for an accommodation was denied. See [Doc. 96]. The closest Plaintiff comes is her assertion that "Defendant *retaliated* by harassing Plaintiff for exercising her rights" under the ADA. [Id. at 4] (emphasis added). Plaintiff's retaliation claim will be discussed below, but for present purposes, it is sufficient to note that Plaintiff never explains how she "exercis[ed] her rights" under the ADA, and she does not point to any competent evidence that she requested an accommodation. [Id.].

Defendant also argues Plaintiff's failure-to-accommodate claim fails because Plaintiff "needed no accommodation to perform the essential functions of her position." [Doc. 88-2 at 21–22]. Given that Plaintiff fails to point to a request for any kind of accommodation, she nowhere argues she requested a "reasonable accommodation." See [Doc. 96]. Even if Plaintiff had a disability, she would not be entitled to whatever accommodation her heart desired. The ADA only requires employers to provide "reasonable accommodations." 42 U.S.C. § 12112(b)(5)(A). "An accommodation is 'reasonable' and necessary under the ADA only if it enables the employee to perform the essential functions of the job." Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1259–60 (11th Cir. 2001). As of October 17, 2014, Plaintiff was released to "Full duty work," regardless of whatever lingering ailment she had. [Doc. 88-14]. As Plaintiff herself testified, after her return from approved leave, she was "able to do everything that Delta required to Delta's satisfaction." [Doc. 88-4 at 105:9–15]. Thus, even if Plaintiff had requested some kind of accommodation, that accommodation necessarily would not have been a reasonable one because it was not needed for Plaintiff "to perform the essential functions of the job." See Lucas, 257 F.3d at 1259–60. Based on the foregoing reasons, Plaintiff's failure to accommodate claim fails as a matter of law.

II. The Discrimination Claims

Plaintiff alleges she was discriminated against based on her race, gender, age,

and alleged disability. [Doc. 3 ¶¶45, 53–80]. For each claim, the Court applies the McDonnell Douglas[13] burden-shifting framework. Under that framework, Plaintiff first has the burden of establishing a prima facie case of discrimination. See McDonnell Douglas, 411 U.S. at 802; Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the plaintiff meets her burden, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. at 254; Chapman v. AI Transp., 229 F.3d 1012, 1024 (11th Cir. 2000) (*en banc*). Plaintiff is then given an opportunity to show that Defendant's proffered nondiscriminatory reason was merely a pretext for discriminatory intent. Burdine, 450 U.S. at 253; Chapman, 229 F.3d at 1024. The Court addresses Plaintiff's discrimination claims under each statute separately, since the elements of each are slightly different.

A. *ADEA*

"To make a prima facie case of age discrimination, the employee must show: (1) he was a member of the protected group between the age of forty and seventy; (2) he was subject to an adverse employment action; (3) a substantially younger person filled the position from which he was discharged; and (4) he was qualified to do the job from

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

which he was discharged." Liebman v. Metro. Life Ins. Co., 808 F.3d 1294, 1298 (11th Cir. 2015). Plaintiff fails to make a prima facie showing of discrimination in violation of the ADEA. Plaintiff offers no evidence "a substantially younger person filled the position from which [s]he was discharged." Id. Plaintiff does not offer evidence that a substantially younger Delta employee was treated differently. In her response brief, Plaintiff only mentions the age of two people: herself and Vendal Bailey. See [Doc. 96]. Mr. Bailey's age is not relevant because he is simply someone who was "provided travel passes" by Delta employees. See [id. at 19]. Mr. Bailey was not a Delta employee and thus could not have been terminated by Delta for abusing travel passes. See [Doc. 92-1].

Even if Mr. Bailey were a Delta employee, Plaintiff did not show he was "substantially younger." Plaintiff simply states, she is "over the age of 40" and Mr. Bailey is "under the age of 40." [Doc. 96 at 12, 15]. Although Plaintiff is protected by the ADEA because she is over 40, she does not automatically state an ADEA claim by showing someone under 40 was treated differently. Liebman, 808 F.3d at 1299. "The proper inquiry . . . is whether [the other employee] was substantially younger than [Plaintiff]." Id. Even setting aside the fact Mr. Bailey is not a Delta employee, Plaintiff makes no showing he is substantially younger. Plaintiff just asserts, without any citation to the record, that Mr. Bailey is under 40. [Doc. 96 at 15]. Even if Plaintiff

had made out a prima facie case under the ADEA, Defendant would still be entitled to summary judgment because Plaintiff does not rebut its legitimate, non-discriminatory reason for her termination, as will be discussed below.

B. *ADA*

"To establish a prima facie case of discrimination under the ADA, a plaintiff must show: (1) he is disabled; (2) he is a qualified individual; and (3) he was subjected to unlawful discrimination because of his disability." Holly, 492 F.3d at 1255–56. As discussed above, Plaintiff has not shown she is "disabled" within the meaning of the ADA, and thus she cannot satisfy the first element of her prima facie case. Even if Plaintiff were disabled and a qualified individual, she has not shown she was subjected to unlawful discrimination because of her disability. Plaintiff points to no evidence regarding the disability status of any of her alleged comparators. See [Doc. 96]. Moreover, Plaintiff cites to no **evidence** that she was subjected to any unlawful discrimination. Plaintiff just says she suffered "harassment" as "set forth in detail in Plaintiff's complaint at paragraphs 20–28, for example." [Doc. 96 at 13].

The Local Rules are abundantly clear that a party cannot support their position at summary judgment "by a citation to a pleading rather than to evidence." N.D. Ga. Loc. R. 56(B). Even if the Court were to consider Plaintiff's declaration despite the fact that Plaintiff failed to provide an additional statement of material facts, the

declaration does not change the result. Plaintiff cannot do indirectly what she cannot do directly, and thus Plaintiff cannot just "incorporate[ ] by reference" a pleading to survive summary judgment. See [Doc. 96-1 ¶5]; see also Fed. R. Civ. P. 56(c)(4). Eleventh Circuit precedent is clear that an affidavit must contain "specific facts to show why there is an issue for trial." Leigh v. Warner Bros., 212 F.3d 1210, 1217 (11th Cir. 2000) (quoting Gossett v. Du–Ra–Kel Corp., 569 F.2d 869, 872 (5th Cir. 1978)). Furthermore, as mentioned in footnote twelve above, Plaintiff's declaration is a sham that cannot be credited. See Van T. Junkins, 736 F.2d at 656.

For example, one of the allegations from her Complaint that Plaintiff tries to "incorporate" is that "one month before her discharge, Plaintiff was required to go to the emergency room to address the debilitating pain from her injury and the severe depression caused by her supervisor's conduct" and that she "remained in the hospital overnight." [Doc. 3, ¶27]. During her deposition, however, Plaintiff testified that her depression occurred because of issues with her car, her aunt, and her mother. [Doc. 88-4 at 98:9–25]. Plaintiff never asserted her depression was caused by Defendant's actions. Plaintiff also never testified that she had an overnight hospital stay because of her depression. Instead, Plaintiff testified that *after* her termination she twice went to the emergency room and stayed in the hospital overnight due to "chest pains" and "anxiety." [Id. at 32:11–34:5]. The declaration appears to be a demonstrable sham

that simply contradicts Plaintiff's sworn testimony, without explanation. Even if Plaintiff had shown a prima facie case of disability discrimination, her claim fails because she cannot rebut Defendant's non-discriminatory reasons for her termination, as will be discussed below.

C. *Title VII*

A prima facie case of discrimination under Title VII requires the plaintiff to show: "(1) she is a member of a protected class; (2) she was subjected to adverse employment action; (3) her employer treated similarly situated employees more favorably; and (4) she was qualified to do the job." McCann v. Tillman, 526 F.3d 1370, 1373 (11th Cir. 2008) (quoting EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir. 2000)). Plaintiff never shows any of her alleged comparators were outside of her protected class because she never mentions the race or gender of any alleged comparator. See [Doc. 96 at 7–9; 14–15].[14] Even assuming that all of the alleged comparators are outside of Plaintiff's protected class, she has not shown they were "similarly situated."

[14] Again, Plaintiff does state that Vendal Bailey "is a male and under the age of 40," without citing to any record evidence. [Doc. 96 at 15]. That fact has no relevance to Plaintiff's claims because Mr. Bailey was not a Delta employee. See [id. at 19].

To be "similarly situated," an individual outside the plaintiff's protected class must be similar in "all material respects." Lewis v. City of Union City, Georgia, 918 F.3d 1213, 1227 (11th Cir. 2019). While the "similarly situated" analysis must occur "on a case-by-case basis," it generally requires that the alleged comparator: (1) "engaged in the same basic conduct (or misconduct) as the plaintiff;" (2) was "subject to the same employment policy, guideline, or rule as the plaintiff;" (3) was "under the jurisdiction of the same supervisor as the plaintiff;" and (4) "share[d] the plaintiff's employment or disciplinary history." Id. at 1227–28. Plaintiff fails to show any of her alleged comparators were "similarly situated." Plaintiff points to fourteen individuals as alleged comparators: (1) Marian Bicksler, (2) Cindy Fundala, (3) Douglas Rehm, (4) Susan Galyardt, (5) Bryan McKenzie, (6) Randolph Butcher, (7) Debra Mercer, (8) Angela Mooring, (9) Heather Cross, (10) David Bishton, (11) David Ragan, (12) Richard Service, (13) Sabrina Simmons, and (14) Sidarious Johnson. [Doc. 96 at 7–9, 14–15].[15]

[15] As Defendant correctly notes, Plaintiff's alleged comparators are a cherry-picked handful from a list of approximately 200 employees. [Doc. 99 at 9]. Plaintiff does not address the dozen young, white, male employees who were terminated and the numerous individuals in Plaintiff's protected class who were not terminated. See [id. n.5]. Pretermitting whether Plaintiff can survive summary judgment by discussing "only a tiny slice of the relevant comparators," her claims still fail for the reasons given below. See Calhoun v. EPS Corp., 36 F. Supp. 3d 1344, 1352–53 (N.D. Ga. 2014),

But Plaintiff never alleges that any of her comparators were supervised by the same decision maker(s) involved in Plaintiff's termination. See [Doc. 99 at 11]; see also [Doc. 96]. Nor does Plaintiff allege that any of her alleged comparators had a similar disciplinary history as Plaintiff, who had received two warnings in the months leading up to her termination. See [Doc. 88-3 at 31]; see also [Doc. 96]. Most importantly, none of the alleged comparators engaged in the same basic misconduct as Plaintiff. Five of the alleged comparators were cleared of any misconduct. Five engaged in some kind of misconduct but did not allow their travel passes to be used for business purposes. And the remaining four who did allow their travel passes to be used for business purposes were not dishonest when confronted. The Court discusses each category of "comparator" in turn.

i. The individuals cleared of any misconduct

Five of Plaintiff's alleged comparators (Bicksler, Fudala, Mercer, Bishton, and Simmons) were cleared of any misconduct. [Doc. 92-1 at 2–3, 9]; [Docs. 89-11, 89-12]. Plaintiff does not allege that Bicksler or Fudala allowed travel passes to be used for business purposes or that they were untruthful during their respective investigations, and Plaintiff does not point to any evidence creating a genuine issue of

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order vacated in part on other grounds, No. 1:13-CV-2954-TCB, 2014 WL 12799080 (N.D. Ga. Sept. 15, 2014).

material fact. [Doc. 96 at 7]. Plaintiff notes that Mercer's "travel pass was used for business purposes," but Mercer did not *allow* her pass to be used for business purposes. [Doc. 96 at 8]. Instead, Mercer immediately informed Delta when she learned that her "ex[-husband] might be traveling for his business." [Doc. 92-1 at 9]. The ex-husband was "removed forever" as a travel companion, but Mercer herself was cleared of any wrongdoing. [Id.].

Plaintiff's assertion that Bishton's "travel pass was used for extensive business purposes" also falls short. See [Doc. 96 at 9]. Bishton was investigated "regarding the frequent travel of his Father," who "was traveling with [h]is son Jeff to Marathons." [Doc. 89-12 at 1]. Plaintiff presents unverified evidence that Jeff participated in the Madison Marathon in 2010 and 2011. [Doc. 89-13]. Plaintiff also presents unverified evidence that the Madison Marathon offered a small prize to the top three finishers in 2020. [Doc. 89-14]. But Plaintiff offers no evidence the Madison Marathon offered prize money in 2010 or 2011. And, more importantly, Plaintiff does not point to any evidence Jeff used a travel pass to attend the Madison Marathon. Nor has the Court found any such evidence. See [Doc. 89-12]. If Plaintiff means to suggest that other marathons Jeff participated in might have offered prize money, Plaintiff's speculation is not enough to survive summary judgment. Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1181 (11th Cir. 2005). Additionally, Bishton was retired at the time of the

investigation, thus he could not have been a proper comparator even if he had been found to have engaged in misconduct. See [Doc. 89-12 at 1]. Plaintiff fails to cite *any* authority holding that an employee and a retiree can be "similarly situated" for purposes of a discriminatory termination claim. See [Doc. 96].

Last, Simmons was also cleared of any misconduct. [Doc. 89-11]. Plaintiff points to no evidence that anyone using Simmons travel pass flew for business purposes. Instead, Plaintiff simply offers her own conjecture that one of Simmons's travel pass users "appears" to have traveled for business. [Doc. 96 at 15]. Again, such speculation is not enough to survive summary judgment. Cordoba, 419 F.3d at 1181. Plaintiff asserts Simmons did not know "where her travel companion traveled," but Simmons, in fact, recalled numerous places where he traveled, although she could not "recall every one of the cities [he] traveled to, because it was a good while ago." See [id.]; see also [Doc. 89-11 at 2–3]. Plaintiff also contends Simmons "was never questioned on why her travel companions used her travel pass," but that assertion is contradicted by the record. See [Doc. 96 at 15]. The investigator's notes show that the questioning of Simmons revealed her companions traveled "due to father having cancer," "for a youth trip," and "to see [about an] ill mother." [Doc. 89-11 at 3]. Also, nothing in the record indicates Simmons was found to have been deceptive or untruthful in any way. See [Doc. 89-11].

ii. The individuals whose passes were not used for business purposes

Five of Plaintiff's other comparators (McKenzie, Butcher, Ragan, Service, and Johnson) engaged in misconduct, but did not allow their travel passes to be used for business purposes. One of these employees, McKenzie, was terminated—although he was reinstated after an appeal—and another employee, Bucher, resigned before he could be terminated. [Doc. 92 at 85:11–16]; [id. at 88:19–89:9]. Plaintiff offers no argument that she should have been allowed to retire instead of being terminated, and she offers no evidence that McKenzie was treated differently during his appeal process. See [Doc. 96]. Just like McKenzie, Plaintiff was given an opportunity to appeal. During her appeal, Plaintiff for the first time asserted that Mr. Dais's June 6, 2015 trip was so he could attend his daughter's "graduation" that was the same night as Mr. Boyett's concert. See [Doc. 88-15 at 1]. Plaintiff was told "to provide documentation to support her claim that Dias was in [Los Angles] for his daughter's graduation." [Id. at 2]. But the only "evidence" Plaintiff provided was a copy of a California driver's license and a letter from Mr. Dias stating that "he's not giving out his minor child's school information." See [Doc. 88-4 at 232:21–233:14]. Plaintiff does not discuss McKenzie's appeal process, and she does not demonstrate that McKenzie provided no "evidence" to support his appeal. See [Doc. 96].

As noted above, none of these individuals Plaintiff points to engaged in the same basic misconduct as Plaintiff. McKenzie "los[t] control of [his] buddy passes," but there was no evidence the passes were used for business purposes and McKenzie was truthful with investigators. [Doc. 92 at 84:3–88:18]; see also [Doc. 92-1 at 5]. Ragan "gave his passwords to another employee" and thus was "not able to recall" all the people who used his buddy passes. [Doc. 89 at 111:5–25]. But there was no evidence Ragan's passes were used for business travel and he freely admitted to the misconduct. [Id. at 111:5–116:15]. Ragan was given "a final corrective action notice," but apparently was not terminated. [Id. at 115:1–116:15].

During PPG's investigation of Service, he made several apparently incorrect statements, such as claiming "Stefan" and "Steffanye" were the same person and claiming to attend a particular church even though research by PPG investigators "indicated that there was not a church by that name." [Id. at 117:12–123:22]. Service was given a "corrective action" for not being honest during the investigation, but there was no evidence that his travel passes were misused in any way. [Id. at 125:7–21]. Last, Plaintiff claims Johnson "committed more egregious conduct yet was allowed to keep his job," though she provides no explanation. [Doc. 96 at 15]. The record shows that Johnson was not truthful and forthcoming, but there was no evidence that his travel

passes were used for business purposes. [Doc. 89 at 105:7–10]; see also [id. at 110:2–10]. As such, Johnson did not engage in the same basic misconduct as Plaintiff.

iii. The individuals who were truthful during their investigations

That leaves four individuals who were found to have allowed their travel passes to be used for business purposes—Galyardt, Mooring, Rehm, and Cross. Initially, the Court notes that there is no evidence any of those individuals were untruthful when confronted. One of these people, Galyardt, was retired at the time of her investigation and thus cannot be used as a comparator. [Doc. 92-1 at 5]. Plaintiff argues a permanent suspension of Galyardt's travel pass privileges "would have been analogous to termination," but this is simply Plaintiff's own conjecture. [Doc. 96 at 7–8]. As mentioned above, Plaintiff fails to cite *any* authority holding that an employee and a retiree can be "similarly situated" for the purposes of a discriminatory termination claim. In any event, Galyardt *did* receive a "pass suspension for life," just like Plaintiff says she should have. [Doc. 92-1 at 5]. That Galyardt could "appeal" is not relevant; Galyardt had an opportunity to appeal "just like a terminated employee could appeal their termination." [Doc. 92 at 81:23–82:1]. Plaintiff herself appealed. See [Doc. 88-15 at 1]. There is no evidence Galyardt ever had her travel pass privileges restored, and there is no evidence Galyardt was untruthful.

Plaintiff asserts Mooring's "travel pass was used for business purposes" but the evidence she cites does not support that position. [Doc. 96 at 8]. Mooring's companion "purchase[d] tickets in case he [could not] get on" using a travel pass. [Doc. 92-1 at 9]. This was coded as "TRAVELING FOR BUSINESS/IMPROPER PURPOSES," but contrary to Plaintiff's suggestion Delta's pass travel policy does not say the use is "business travel." See [id.]. Delta's pass travel policy explicitly discusses travel for "any business activity" or for "independent business ventures or on behalf of an external company or organization" in its "Eligibility" section. [Doc. 92-3 at 2]. The prohibition on using standby travel "on any flight for which a pass rider is holding or has held a confirmed reservation" is listed in the separate "Additional Restrictions" section. [Id.]. Thus, while Mooring's companion used the travel pass improperly, there is no evidence he used the pass for a "business activity." Even if the pass had been used for business purposes, there is no evidence Mooring was found to be untruthful during the investigation. See [Doc. 92-1 at 9]; see also [Doc. 92 at 93:18–97:12].

With regard to Rehm, his son-in-law attempted "to obtain a receipt so that he would be reimbursed" with funds held by the organization he worked for. [Doc. 96-4]. This was certainly a violation of Delta's pass travel policy ([Doc. 92-3 at 2]), however, Plaintiff's own evidence indicates the reimbursement was not for "business expenses" but rather would have been for "personal expenses" and paid out of money

the son-in-law "raised to support himself" as a ministry leader. [Doc. 96]. There is no evidence Rehm was dishonest during the investigation. Instead, Rehm wrote a letter "apologiz[ing] for this incident and the related confusion and miscommunication." [Id.]. Rehm admitted he "should have communicated much more clearly" with his son-in-law and they subsequently "discussed the proper procedures and circumstances to use a pass." [Id.].

Last, Plaintiff makes a conclusory assertion that Cross's companion used her travel pass "for extensive business purposes." [Doc. 96 at 9]. A review of the lengthy, detailed investigation file reveals that Cross's companion did, in fact, travel for "business purposes." [Doc. 96-3 at 74]. Specifically, Cross's companion traveled on behalf of a charity raising "awareness for Usher Syndrome," a disease that afflicted him. See [Doc. 96-3 at 75]. Even though Cross's companion was not paid for his speaking engagements, he still violated Delta's pass travel policy because he was traveling "on behalf of an external company or organization." [Doc. 92-3 at 2]. Delta decided not to terminate Cross, and instead gave her a "Final Corrective Action Notice" and suspended her passes for two years. [Doc. 96-3 at 74]. But Cross is not similarly situated to Plaintiff in two crucial, material respects. First, the reason Cross was not terminated was because her companion gave "recognition to Delta," publicly stating "he is able to travel" because of his use of Cross's travel passes. [Doc. 96-3 at 75–76].

This led to Delta "receiving accolades for making his travel possible" and other "good will." [Id.]. Second, there is no evidence Cross was dishonest or evasive when she was confronted about her companion's business travel. See [Doc. 96-3]; see also [Doc. 92 at 97:13–98:21]; [Doc. 92-1 at 13].

Accordingly, none of the individuals Plaintiff points to are proper comparators because they are not similarly situated in "all material respects." See Lewis, 918 F.3d at 1227. There is no evidence any of alleged comparators were investigated by the same decision makers or that they shared Plaintiff's disciplinary history. See id. at 1227–28. Five of the alleged comparators were found not to have engaged in any misconduct at all. Five were disciplined for other misconduct—including two who were to be terminated—but there was no evidence that any allowed their passes to be used for business purposes. And of the four who ostensibly allowed their passes to be used for business purposes, one received the exact sanction Plaintiff argues was appropriate and the other three engaged in demonstrably less severe conduct. More importantly, there is no evidence that any of the individuals who allowed their passes to be used for business travel were dishonest or evasive during their respective investigations.

To be sure, use of a comparator is not the only way for a plaintiff to prove a prima facie case of discrimination. King v. Ferguson Enterprises, Inc., 971 F. Supp.

2d 1200, 1216 (N.D. Ga. 2013). But Plaintiff does not argue or produce any evidence, that she can prove discriminatory animus in any other way. See [Doc. 96]. Instead, Plaintiff's brief is dedicated to arguing about "pretext," never mentioning her burden to prove a prima facie case. [Id.]. The Court does not consider whether Defendant's reasons were "pretext" until Plaintiff meets her initial burden of establishing a prima facie case. See McDonnell Douglas, 411 U.S. at 802. Because Plaintiff has not done so, Defendant is entitled to summary judgment on Plaintiff's discriminatory termination claims.

iv. Whether Delta's reasons are pretextual

Even if Plaintiff had established a prima facie case, Defendant has certainly articulated legitimate, non-discriminatory reasons for Plaintiff's termination. Specifically, performance leader Mark Harris recommended Plaintiff be terminated because "she was not forthcoming" and "her companion used non-revenue benefits for business purposes." [Doc. 88-3 at 31]. Where, as here, an employer offers more than one reason for an adverse employment action, the plaintiff must rebut "each of the proffered reasons of the employer." Crawford v. City of Fairburn, Ga., 482 F.3d 1305, 1309 (11th Cir. 2007). To rebut the employer's reason, Plaintiff must demonstrate "such weaknesses, implausibilities, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them

unworthy of credence." Jackson v. State of Ala. State Tenure Comm'n, 405 F.3d 1276, 1289 (11th Cir. 2005) (quoting Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997)). Plaintiff "cannot succeed by simply quarreling with the wisdom of [the employer's] reason[s]." Chapman, 229 F.3d at 1030.

Plaintiff lists eight reasons why she contends Delta's reasons for terminating her are pretextual, none of which are availing. [Doc. 96 at 13–18]. First, Plaintiff argues Delta "changed its reason for the termination," but she does not provide any argument to support this assertion. [Id. at 13–14]. Delta's reasons for Plaintiff's termination were outlined at the time, and they are the same reasons Delta relies on now. [Doc. 88-3 at 31]; see also [Doc. 88-2 at 11]. Plaintiff does not show Delta's reasons for her termination have ever been "fundamentally inconsistent," and thus she does not show pretext. Phillips v. Aaron Rents, Inc., 262 F. App'x 202, 210 (11th Cir. 2008). Second, Plaintiff argues "similarly situated employees were treated differently," because "[a]ll the white employees investigated were able to keep their jobs." [Doc. 96 at 14]; see also [Doc. 92-1]. To the extent Plaintiff discusses particular individuals she claims were "similarly situated," she is wrong, as discussed above.

Third, Plaintiff argues "Delta only decided to investigate" her after her "disability and after she exercised her rights under the ADA" and after she made "claims of harassment and retaliation." [Doc. 96 at 15–16]. As discussed above,

Plaintiff never "exercised her rights under the ADA" and, as will be discussed below, Plaintiff does not cite any evidence that she complained "of harassment and retaliation." Plaintiff's argument that Delta's "delay" in investigating her "suggests that Delta's reason was a pretextual afterthought" falls short. The "Fly Right" campaign did not exist until after Plaintiff's workplace injury. [Doc. 88-1 ¶¶18–19]. The suggestion that Delta invented the campaign to create a pretextual reason for firing Plaintiff more than a year later would not be believed by a reasonable jury. Delta clearly explained why Plaintiff was investigated. Every individual, including Plaintiff, who shared a buddy pass with Vendal Bailey was investigated by the PPG. [Id. ¶¶21–22]. Plaintiff offers no evidence suggesting Delta's reason for investigating her is untrue. See [Doc. 96 at 15–16].

Fourth, Plaintiff argues "it is impossible for an employee to always know the reasons someone uses a travel pass" and that "this unattainable goal is evidence of pretext." [Id. at 16]. It is, of course, not an "unattainable goal," because Delta employees are expected to have control over their passes and book the trips for their companions, thus giving the employees an opportunity to ensure that the passes are being used for a proper reason. In any event, Plaintiff's argument is irrelevant, because Plaintiff was not terminated for failing to "always know the reasons someone uses a travel pass." See [Doc. 88-3 at 31].

Fifth, Plaintiff argues "Delta deviated from its normal management procedures" and that "Delta normally takes corrective action." [Doc. 96 at 16–17]. This argument is based on Plaintiff's naked assertion that the only reason she "was terminated for loss of control." [Id.]. Plaintiff ignores that the documents she cites also say she was terminated because her companion "traveled for business." [Doc. 92-2]; [Doc. 92-13]. As the very document Plaintiff relies on explains, "Travel Companion being use [*sic*] for business purposes (results in termination)." [Doc. 92-10]; see also [Doc. 88-1 ¶10] (quoting Delta's travel policy, which states that if an employee's "pass rider" uses a pass for business the employee is subject to "disciplinary action, up to and including . . . termination of employment").

Sixth, Plaintiff argues she "had a good performance history." [Doc. 96 at 17]. Setting aside the fact that this argument is belied by Plaintiff's own admission that she received warnings for tardiness or other workplace misconduct, the argument is irrelevant. Plaintiff was not terminated for poor performance, and evidence that Plaintiff "had a good performance history" does not disprove Delta's conclusion that she allowed her passes to be used for business purposes and she as not truthful when confronted. See [Doc. 88-3 at 31].

Seventh, Plaintiff argues she was terminated for "only one alleged travel pass violation." [Doc. 96 at 17] (emphasis omitted). Plaintiff ignores the fact that she was

found to have been untruthful when confronted about the violation, which was a separate, independent reason for Delta terminating her. See Crawford, 482 F.3d at 1309 (explaining that a plaintiff must rebut "each of the proffered reasons of the employer"). Plaintiff cites no evidence that Delta had a progressive discipline policy that prohibited it from terminating an employee for "only one alleged travel pass violation." See [Doc. 96 at 17]. Plaintiff's own evidence indicates that, long before Plaintiff's investigation, Delta's policy was "Travel Companion being use [*sic*] for business purposes (results in termination)." [Doc. 92-10]; see also [Doc. 88-1 ¶10] (quoting Delta's travel policy, which states that if an employee's "pass rider" uses a pass for business the employee is subject to "disciplinary action, up to and including . . . termination of employment").

Last, the real crux of Plaintiff's argument is that she "did not violate any travel policy." [Doc. 96 at 18]. Plaintiff characterizes the social media posts showing that Mr. Dias and Mr. Boyett traveled to California so Boyett could perform in a concert as not being "credible evidence that Mr. Boyett was a client of Mr. Dias or that Mr. Dias made a profit from the travel." [Id.]. Plaintiff never addresses her own admission that Mr. Dais and Mr. Boyette "do music together" and that the two "work together." [Doc. 88-4 at 186:15–25]; see also [id. at 187:8–12]. Nor does Plaintiff address the evidence that Mr. Dias's business "is music production, studio rentals," and the like. [Doc. 88-

3 at 27]. Plaintiff simply argues Delta should have credited her assertion Mr. Dias "visited his daughter." [Doc. 96 at 18].

But the Court is not a "super personnel department that second-guesses employers' business judgments." Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991) (quoting Mechnig v. Sears, Roebuck & Co., 864 F.2d 1359, 1365 (7th Cir. 1988)). The Court's "inquiry is limited to whether the employer gave an honest explanation of its behavior," even if the ultimate conclusion was factually incorrect. Id. Plaintiff must show more than "merely that the defendant's employment decisions were mistaken." Lee v. GTE Florida, Inc., 226 F.3d 1249, 1253 (11th Cir. 2000). Thus, even crediting Plaintiff's assertion that Mr. Dias did not travel to California for business purposes, she does not show pretext. That is, Plaintiff does not show sufficient "weaknesses, implausibilities, incoherencies, or contradictions in the employer's proffered legitimate reasons." Jackson, 405 F.3d at 1289 (quoting Combs, 106 F.3d at 1538).

Given that Mr. Dias is a music producer who "work[s] together" with Mr. Boyett and that Mr. Boyett was traveling to California to perform in a concert that Mr. Dias attended, it was not surprising that Delta's investigators believed Mr. Dias was traveling for business reasons. As noted before, Delta did not believe Plaintiff was being "forthcoming" during the investigation. See [Doc. 88-3 at 31]. Plaintiff

objectively was untruthful about traveling with Mr. Dias, changing her story several times, and she could only identify a small fraction of the cities Mr. Dias flew to. [Id. at 27–28]. When asked about the California trip specifically, Plaintiff failed to mention he "attended, for leisure, a concert," like she now claims. [Id. at 28]; see also [Doc. 96 at 18]. In fact, Plaintiff claimed she "didn't know anything about that." [Doc. 88-3 at 28].

Even Plaintiff's assertion that "Mr. Dias is a residency [*sic*] of California" was dubious. See [Doc. 96 at 18]. Plaintiff provided a driver's license, which showed Mr. Dias *was* a resident of California. But Delta would rightly have been suspicious of such evidence given that it seemingly contradicted Plaintiff's own statements that Mr. Dias lives and works in Georgia. [Doc. 88-3 at 27]. Plaintiff ignores the fact that she changed her story after her termination. Plaintiff claimed Mr. Dias was attending his "daughter's graduation." See [Doc. 88-15 at 1]. Thus, Plaintiff's story became that Mr. Dias flew into LAX the afternoon of June 6, 2015, attended his daughter's graduation in the "Woodland Hills area" approximately 25 miles from LAX, and then traveled another 100 miles or so to attend his friend's opening act at the Fox Theater in Bakersfield. See [Doc. 92-8 at 2]; [Doc. 88-3 at 17–21]. Delta, understandably, wanted some "documentation" to support Plaintiff's claims. [Doc. 88-15 at 2]. But the only thing Plaintiff could provide was a letter from Mr. Dias saying he had "a 12

year old daughter [that] resides in California" and that he was not "Comfortable Exposing My Minor Childs [*sic*] Personal Information." [Doc. 92-8 at 2]. The letter conspicuously does not say the daughter had a "graduation" or that Mr. Dias attended it. [Id.].[16]

The Court assumes that Plaintiff's story is true, for purposes of this motion. But again, the Court is not tasked with deciding if Plaintiff's story is true. The Court's role is to decide if Plaintiff has shown "such weaknesses, implausibilities, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." Jackson, 405 F.3d at 1289 (quoting Combs, 106 F.3d at 1538). Even assuming Plaintiff's story is, in fact, accurate, looking at the evidence above Delta could have reasonably believed that Mr. Dias traveled for business purposes and that Plaintiff had repeatedly been untruthful about Mr. Dias's travel. The question is not whether Delta was factually right, but whether Delta "gave an honest explanation of its behavior." Elrod, 939 F.2d at 1470 (quoting Mechnig, 864 F.2d at 1365). Plaintiff has not shown that Delta's explanation is false and, just as importantly, she has not shown "that discrimination was the real reason" for her termination. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515

[16] Based on the daughter's age, the "graduation" would presumably have been for the sixth or seventh grade. See [Doc. 92-8 at 2].

(1993). As such, Plaintiff has not shown pretext—even if she had presented evidence supporting a prima facie case—and Defendant is entitled to summary judgment on Plaintiff's discriminatory termination claims.

III. The Retaliation Claims

Plaintiff also alleges a count of retaliation under Title VII, § 1981, the ADA, and the ADEA. [Doc. 3 ¶¶81–88]. To state a prima facie case of retaliation, Plaintiff must show: (1) she engaged in statutorily protected expression, (2) the employer took a materially adverse action against her, and (3) some causal relationship existed between the two events. Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008) (Title VII case); see also Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1277 (11th Cir. 2008) (holding that the elements of retaliation claims under Title VII and § 1981 are the same); Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1287 (11th Cir. 1997) (noting that the Eleventh Circuit "assess ADA retaliation claims under the same framework we employ for retaliation claims arising under Title VII"); Stone v. Geico Gen. Ins. Co., 279 F. App'x 821, 822 (11th Cir. 2008)) ("To establish a prima facie case of retaliation, Stone must show that (1) she engaged in ADEA protected expression; (2) she suffered an adverse employment action; and (3) the adverse action was causally related to the protected expression."). As Defendant notes, all of

Plaintiff's retaliation claims fail because Plaintiff did not engage in any statutorily protected activity. [Doc. 88-2 at 20].

In her response, Plaintiff fails to point to any evidence that she engaged in statutorily protected activity. The only time Plaintiff mentions "protected activity" anywhere in her brief is to assert that "protected activity *can* . . . arise when an employee requests a reasonable accommodation." [Doc. 96 at 4] (emphasis added). Plaintiff then asserts that she was retaliated against "for exercising her rights," but she never explains what rights she allegedly exercised or how she allegedly exercised them. [Id.]. More to the point, Plaintiff points to no *evidence* that she exercised any statutorily protected rights. [Id.]. At summary judgment, Plaintiff cannot just nakedly assert she "exercis[ed] her rights." She must point to *evidence*, which she fails to do. See Celotex, 477 U.S. at 324.

While an employee certainly "can" engage in protected activity under the ADA by requesting a reasonable accommodation, Plaintiff nowhere asserts she made any request for an accommodation, as discussed above. See [Doc. 96]. Even if Plaintiff had requested an accommodation, it would not have been a reasonable request because Plaintiff "needed no accommodation to perform the essential functions of her position." See [Doc. 88-2 at 21–22]. Plaintiff never engaged in any protected activity under Title VII, § 1981, or the ADEA. See [Doc. 96]. Plaintiff freely admitted during her

deposition, she never made any complaints about any of the alleged harassment or "discrimination" discussed in her Complaint. [Doc. 88-4 at 144:16–145:10].[17] As such, Plaintiff did not engage in protected activity under any of those statutes either. See Ingram v. Sec'y of the Army, 743 F. App'x 914, 918 (11th Cir. 2018) (affirming the dismissal of a retaliation claim because the plaintiff "did not communicate his belief that he was being subjected to race discrimination"); Demers v. Adams Homes of Nw. Fla., Inc., 321 F. App'x 847, 852 (11th Cir. 2009) (holding that, "to engage in protected activity, the employee must still, at the very least, communicate her belief that discrimination is occurring to the employer").

Thus, Plaintiff fails to point to evidence sufficient to support a prima facie case of retaliation under Title VII, § 1981, the ADA, or the ADEA. See Crawford, 529 F.3d at 970; Goldsmith, 513 F.3d at 1277; Stewart, 117 F.3d at 1287; Stone, 279 F. App'x at 822. Even if Plaintiff had produced evidence sufficient to support a prima facie case, her retaliation claims would be analyzed under the McDonnell Douglas framework,

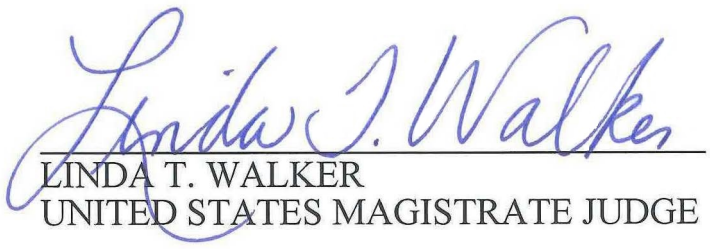
[17] Plaintiff previously made complaints to human resources about other matters that are not the subject of this lawsuit. For example, in 2010, Plaintiff argued that a group of celebrities "fabricated" a story that Plaintiff "asked them to give [Plaintiff] a shout out" to help her music career. [Doc. 88-4 at 127:16–129:12]. Plaintiff also complained to human resources that an unspecified "Red Coat . . . lied on [her]" and that he "made a couple of advances." [Id. at 141:2–143:13]. Both instances were "worked out at that time." See [id. at 142:23–143:20].

because Plaintiff points to no direct evidence of a retaliatory intent. See Gupta v. Florida Bd. of Regents, 212 F.3d 571, 587 (11th Cir. 2000). As discussed above, Defendant pointed to legitimate, non-discriminatory reasons for Plaintiff's termination, and Plaintiff does not demonstrate that Defendant's reasons are pretextual.

CONCLUSION

For the foregoing reasons, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment ([Doc. 88]) be **GRANTED**. Since this is a final Report and Recommendation and there are no other matters pending before this Court, the Clerk is directed to terminate the reference to the undersigned.

SO ORDERED AND REPORTED AND RECOMMENDED, this 12 day of April, 2021.



LINDA T. WALKER
UNITED STATES MAGISTRATE JUDGE