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

NADIYAH F. MUHAMMAD,

Plaintiff pro se,

v.

CITY OF ATLANTA,

Defendant.

CIVIL ACTION FILE

NO. 1:19-CV-2537-AT-WEJ

FINAL REPORT AND RECOMMENDATION

Plaintiff pro se, Nadiyah F. Muhammad, alleges that her former employer, the City of Atlanta, discriminated on the basis of her disability and retaliated against her, all in violation of the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. ("ADA"). (See Compl. [2] 1-9.) After a period of discovery, defendant filed an Amended Motion for Summary Judgment [49]. For reasons explained below, the undersigned **RECOMMENDS** that defendant's Motion be **GRANTED**.

I. STATEMENT OF FACTS

In support of its Motion for Summary Judgment, defendant as movant filed a Statement of Undisputed Material Facts ("DSUMF") [49-8].[1] See N.D. Ga. Civ. R. 56.1(B)(1). As required by Local Rule 56.1(B)(2)(a), plaintiff submitted a response to those proposed facts. (See Pl.'s Resp. in Opp. to Def.'s Stat. of Undisputed Mat. Facts [58-1] ("PR-DSUMF").) Plaintiff elected not to file her own statement of additional facts.

The Court uses the parties' proposed facts and responses as follows. Where one side admits a proposed fact, the Court accepts it as undisputed for purposes of this Motion and cites only the proposed fact. Where one side denies a proposed fact, the Court reviews the record cited and determines whether a fact dispute exists. If the denial is without merit, and the record citation supports the proposed fact, then the Court deems it admitted and includes it herein.[2] The Court excludes any

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[1] Defendant proposes fifty-nine (59) facts. (See DSUMF.) In an Order [13] dated October 28, 2019, the Court limited the parties to fifty (50) numbered facts consisting of one sentence each. DSUMF does not comply with this Order. Nevertheless, the Court will consider all of defendant's proposed facts given its de minimis deviation and because plaintiff responded substantively to every fact.

[2] Plaintiff frequently denies proposed facts without citing to the record in support of her denial. For this reason, DSUMF ¶¶ 14, 27, 33, 37, 43, and 54 are deemed admitted. See N.D. Ga. Civ. R. 56.1(B)(2)(a)(2).

proposed facts that are stated as issues or legal conclusions.[3] The Court also excludes any facts that are immaterial.[4] Finally, the Court considers all proposed facts in light of the standards for summary judgment, set out infra Part II.

A. Plaintiff's Employment

On March 22, 2001, the City of Atlanta Department of Watershed Office of Watershed Protection ("Watershed") hired plaintiff as a laboratory tech. (DSUMF ¶¶ 1-2.) Throughout plaintiff's employment with Watershed, she received grade and pay increases so that her final position was senior laboratory tech with grade 14 classification, with an accompanying annual salary of $41,059.06. (Id. ¶ 3.)

Plaintiff's position required her to perform wastewater analyses, sometimes in the field, using a variety of analytical laboratory support activities, chemicals, chemical reagents, and scientific instruments. (DSUMF ¶ 5.) As a laboratory tech senior, plaintiff's job required her to maintain a high level of knowledge concerning laboratory tests and wastewater analyses; knowledge of laboratory skills, experiences, and technical expertise; and to perform chemical tests on a variety of

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[3] DSUMF ¶¶ 27 and 39 are excluded as a legal conclusions. DSUMF ¶ 21 is excluded as a statement of an issue.

[4] DSUMF ¶ 4 is excluded as immaterial.

samples. (Id. ¶ 6.) Additionally, the role required certain job functions including standing, lifting, and sensory capabilities to perform the job successfully. (Id. ¶ 7.)

B. Plaintiff's Reassignment to an Administrative Position

Sometime in 2013, plaintiff expressed that she no longer wanted to work as a laboratory tech due to "fibromyalgia flare-ups." (DSUMF ¶ 8.) Plaintiff asserted that, due to these "flare-ups," she was unable to lift over 50 pounds, unable to stand for long periods, and intolerant to the smell of the chemicals involved in the wastewater analysis process. (Id. ¶ 9.) Because of these restrictions, plaintiff requested a less physically demanding administrative position. (Id. ¶ 10.) Plaintiff reported these concerns in March 2013 to the Deputy Commissioner of Watershed, Margaret Tanner. (Id. ¶ 11.) On March 26, 2013, after presenting documentation of a fibromyalgia diagnosis, Watershed and plaintiff agreed that she would be transferred to the compliance group (on a trial basis), and given an assignment handling light-duty responsibilities and administrative tasks for Ms. Tanner. (Id. ¶ 12.[5]) Plaintiff would continue to receive her regular salary commensurate with her laboratory tech position. (Id.)

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[5] Plaintiff disputes this proposed fact. (PR-DSUMF ¶ 12.) Plaintiff adds that she was sent on three informal interviews with various managers within Watershed, expressed a preference in working with Kristin Garcia's compliance

Plaintiff went from performing laboratory and field work to internal administrative work reporting on FEMA floodplains, remote monitoring of Atlanta streams, analyzing physical and/or chemical changes in streams, copying, filing, and delivering mail to the post office. (DSUMF ¶ 13.[6]) Plaintiff was supervised by Kristin Garcia and tasked with providing regular updates on these assigned projects and other administrative tasks under Ms. Tanner. (Id. ¶ 14.) Sometime in August 2014, plaintiff received a workplace evaluation from Ms. Garcia. (Id. ¶ 15.) Plaintiff disagreed with this evaluation. (Id. ¶ 16.) Plaintiff initially disputed the evaluation in an August 2014 letter to Ms. Tanner. (PR-DSUMF ¶ 16.) She then disputed the evaluation through Human Resource Director, Sherri Dickerson. (DSUMF ¶ 16; PR-DSUMF ¶ 16.) A portion of this evaluation was eventually rescinded, and plaintiff's score improved. (DSUMF ¶ 17.)

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group, and was never assigned to work directly under Ms. Tanner. (Id.) Plaintiff cites to an email exchange between her and Ms. Tanner. (Pl.'s Ex. 1 [58-2], at 18.) This email exchange implies plaintiff did interview for other positions, but ultimately supports that plaintiff was transferred to a lateral position on a trial basis under Ms. Tanner.

[6] Plaintiff disputes this proposed fact. (PR-DSUMF ¶ 13.) However, plaintiff's response only elaborates on her job duties rather than taking issue with defendant's characterization of them. Thus, DSUMF ¶ 13 is deemed admitted.

On January 20, 2015, Ms. Tanner accepted a lateral position as Deputy Commissioner for the Department of Watershed Management's Office of Water Treatment and Reclamation ("OWTR") and plaintiff continued in her position under Ms. Tanner. (DSUMF ¶ 18.) In mid-December 2015, Ms. Tanner announced her plan to retire. (Id. ¶ 19.) Effective December 31, 2015, Ms. Tanner retired, and this effectively ended plaintiff's assignment. (Id. ¶ 20.[7])

C. Plaintiff's Move Back to Laboratory Tech

On January 26, 2016, Watershed informed plaintiff that she would be reassigned to her original position as a laboratory tech. (DSUMF ¶ 22.) Plaintiff objected to this reassignment and spoke to Human Resource Representative Erica Roberts about the possibility of assuming an administrative role. (Id. ¶ 23.[8]) Watershed offered plaintiff an administrative position, but she declined the role. (Id. ¶ 24.[9]) This was the only administrative position available at the time. (Id.)

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[7] Plaintiff denies this proposed fact. (PR-DSUMF ¶ 20.) She claims that Kristen Graham was her supervisor and that her secretarial position was not contingent on Ms. Tanner's employment. However, the email that plaintiff cites does not support her denial. (See Pl.'s Ex. 1 [58-2], at 18.)

[8] Plaintiff denies this proposed fact. (PR-DSUMF ¶ 23.) However, the letter plaintiff cites does not support her denial. (Pl.'s Ex. [58-2], at 34-35.)

[9] Plaintiff disputes this proposed fact. (PR-DSUMF ¶ 24.) She claims that Ms. Graham, whom plaintiff alleges was her supervisor, informed her of a

On January 28, 2016, plaintiff provided Ms. Roberts with a letter from her primary care physician stating that she had been diagnosed with multiple medical conditions and suffered complications. (DSUMF ¶ 25.[10]) The letter advised that plaintiff avoid standing too long, outdoor exposure, lifting heavy objects, and exposure to chemicals and toxins because it would aggravate her medical condition. (Id. ¶ 26.) At the time of the letter, there were no available administrative positions in Watershed or outside the department matching plaintiff's skillset. (Id. ¶ 28.[11])

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secretarial position in December 2015, not Human Resources. She further says that Ms. Graham gave her the choice to take the secretarial position or be transferred back to Watershed. In support, plaintiff cites an email from Ms. Graham confirming her transfer to back to Watershed from OWTR and two letters sent by plaintiff to Ms. Williams and Ms. Graham. However, none of this evidence refutes the fact that plaintiff was offered a secretarial position and declined it.

[10] Plaintiff disputes this proposed fact. (PR-DSUMF ¶ 25.) Plaintiff states that Ms. Roberts requested a medical evaluation after plaintiff objected to returning to the lab due to her medical conditions. (Id.) However, plaintiff only cites to the letter sent by her physician to Ms. Roberts. This letter does not indicate that Ms. Roberts requested the letter.

[11] Plaintiff denies this proposed fact. (PR-DSUMF ¶ 28.) Plaintiff shows that on January 15, 2016, Ms. Graham emailed her regarding a transfer back to Watershed from OWTR. (Pl.'s Ex. 3 [58-4], at 7.) Plaintiff further claims that on January 26, 2016, Ms. Roberts informed her that the City would not honor her reassignment. However, the record cited by plaintiff does not support her denial. Moreover, defendant shows that as of January 28, 2016, there were no available administrative positions available in Watershed. PR-DSUMF ¶ 28 does not refute this proposed fact.

Plaintiff returned to her laboratory tech position in February 2016. (DSUMF ¶ 29.) Because plaintiff could no longer work as a laboratory tech, Ms. Roberts offered her an opportunity to interview for a secretarial data analyst position. (Id. ¶ 30.) Plaintiff interviewed for this position on February 6, 2016. (Id. ¶ 31.) However, she received a low score and was not amongst the most qualified candidates for that administrative role. (Id.) Ms. Roberts also offered plaintiff a position as a secretary, but plaintiff declined this position. (Id. ¶ 32.)

D. Plaintiff's Medical Evaluations

Because there were no other positions open at this time, and plaintiff's restrictions rendered her incapable of performing the functions of her laboratory tech position, she was directed to participate in a Fitness for Duty Evaluation pursuant to Atlanta Municipal Code Section 114-380. [12] (DSUMF ¶ 33.) The evaluation took place on February 29, 2016 at Caduceus Occupational Medicine and was conducted by Dr. Alton Greene. (Id. ¶ 34.) The physician determined that, due to her fibromyalgia, plaintiff should avoid prolonged standing, walking,

[12] Atlanta Municipal Code § 114-380 provides for an arbitration process if there is a dispute as to whether a person has the physical or mental fitness to be restored to a former position. As part of this process, the City selects a physician, the employee selects a physician, and the physicians selected choose a physician. (Muhammad Dep. Ex. 2, at 55-56.)

bending, and lifting on a repetitive basis because it could exacerbate her condition, but that she could perform all other duties of a laboratory tech. (Id. ¶ 35.) Dr. Greene also stated that plaintiff raised additional concerns about working in an environment that "exposed her body to chemicals and presumed toxins." (Id. ¶ 36.)

On May 5, 2016, Ms. Roberts received plaintiff's selection of Dr. William E. Richardson from the American Clinics for Preventative Medicine. (DSUMF ¶ 37.) On May 9, 2016, Dr. Richardson determined that plaintiff's limitations included no lifting greater than ten (10) pounds, no climbing/working at heights, no prolonged standing, no squatting, no crawling/kneeling, no stooping/bending, no chemical exposure, no fieldwork, and he opined that she must work in administration only. (Id. ¶ 38.)

E. Plaintiff's Car Accident

On or around May 23, 2016, plaintiff was involved in a car accident. (DSUMF ¶ 40.) On July 7, 2016, Chief Medical Officer Dr. Stephen A. Dawkins was selected to review the recommendations provided by Drs. Richardson and Greene. (Id. ¶ 41.) On July 8, 2016, following his review, Dr. Dawkins conducted a conference call with Dr. Richardson and plaintiff and uncovered that there was no medical basis for plaintiff to be excluded from chemical exposure (Id. ¶ 42.) However, Dr. Dawkins did find cause for the "musculoskeletal restrictions" based

on plaintiff's fibromyalgia diagnosis. (Id.[13]) Dr. Dawkins further discovered the "other limitations" listed by Dr. Richardson were requested by plaintiff herself. (Id. ¶ 43.) Dr. Dawkins acknowledged that an "administrative work only" restriction was probably not necessary, but did recommend plaintiff see an allergist for a sensitivity to mold test based on reported findings of Stachybotrys mold in a 2013 Indoor Air Quality study (plaintiff showed no signs of this sensitivity according to Dr. Dawkins). (Id. ¶ 44, modified per PR-DSUMF ¶ 44.)

F. Plaintiff's Leave and Termination

On August 11, 2016, plaintiff took leave from July 28, 2016 to October 19, 2016. (DSUMF ¶ 45.) Plaintiff was due to return from leave on October 19, 2016, but her physician extended her leave an additional eight weeks due to a blood clot. (Id. ¶ 46, modified per PR-DSUMF ¶ 46.) Defendant did not object to plaintiff's request to extend her leave. (PR-DSUMF ¶ 46.) On November 28, 2016, plaintiff's physician issued her a return to work release with the following restrictions: no lifting greater than ten pounds, no prolonged standing, no squatting, no

[13] Plaintiff asserts that Dr. Dawkins's finding that she was not physically impacted by chemical and toxic exposure in the lab is unfounded. (PR-DSUMF ¶ 42.) While plaintiff may personally disagree with Dr. Dawkins's finding, the portion of the record she cites merely contains his findings. Thus, DSUMF ¶ 42 is deemed admitted.

climbing/working at heights, no crawling/kneeling, she must work in administration only, and no exposure to chemicals or fieldwork. (DSUMF ¶ 47.) Some of these restrictions were identical to previous restrictions suggested by plaintiff to Dr. Richardson and subsequently deemed unnecessary by Dr. Dawkins. (Id.[14]) Plaintiff's physician indicated she could return to work on December 10, 2016. (Id. ¶ 48.)

On December 5, 2016, Watershed informed plaintiff that, due to her restrictions from the non-work-related accident, she needed to obtain a full duty release from a doctor to return to her laboratory tech position. (DSUMF ¶ 49.[15]) From May 23, 2016 to December 8, 2017, plaintiff did not work and exhausted all

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[14] Plaintiff disputes this proposed fact. (PR-DSUMF ¶ 47.) Plaintiff states that Dr. Dawkins agreed with Dr. Richardson that the musculoskeletal restrictions made sense based on her diagnosis of fibromyalgia. (Id.) While this is supported by the record cited, it does not refute defendant's proposed fact.

[15] Plaintiff disputes this proposed fact by asserting that "[o]n December 05, 2015, plaintiff was informed [that] because [her] injuries were not work-related, she would not be accommodated and allowed to return to work until [she] had full duty release." (PR-DSUMF ¶ 49.) Plaintiff cites to a December 5, 2016 email from Requish Simmons. The email states "because this is not a work related [sic] injury we cannot allow you to return until you have a full duty release." (Pl.'s Ex. 1 [58-2], at 3.) Because this email supports DSUMF ¶ 49, the Court deems it admitted.

accrued leave time. (Id. ¶ 53.[16]) During this extended absence from work, on May 25, 2017, plaintiff filed a charge of disability discrimination and retaliation with the EEOC. (Id. ¶ 55.[17])

On December 8, 2017, Human Resource Manager Janine Williams mailed plaintiff a leave status update request letter and followed up with a telephone conversation. (DSUMF ¶ 50.) During that conversation, Watershed informed plaintiff of an available Administrative Assistant Senior position in Site Development and that, to ensure she met the qualifications, she should apply by December 18, 2017. (Id. ¶ 51.) Watershed informed plaintiff that if she did not apply for the position, she would be dismissed because all available options had

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[16] Plaintiff disputes DSUMF ¶ 53. (PR-DSUMF ¶ 53.) She asserts that she attempted to return from leave but was told that she needed a full duty release to return. Thus, she claims it was defendant who caused her excessive absence from work. In support of her denial, plaintiff cites to an October 12, 2016 letter from Requish Simmons to "Whom It May Concern" verifying that plaintiff is an employee of the City of Atlanta and has been off work from May 24, 2016 to the date of the letter. (Pl.'s Ex. 1, at 37.) She also cites to a December 5, 2016 email from Requish Simmons informing her that she cannot return to her laboratory tech position until she has a full duty release because she was injured in a non-work-related event. (Id. at 3.) While this denial provides context to plaintiff's absence, it does not refute DSUMF ¶ 53.

[17] Plaintiff denies DSUMF ¶ 55. (PR-DSUMF ¶ 55.) However, the record plaintiff cites does not support her denial. Further, her EEOC charge indicates it was filed May 25, 2017. (Pl.'s Ex. 1 [58-2], at 13; Compl. 11.)

been exhausted. (Id. ¶ 52.) Plaintiff did not apply for the vacant position by December 18, 2017. (Id. ¶ 54.)

On December 29, 2017, defendant issued plaintiff a Notice of Proposed Adverse Action for dismissal effective January 15, 2018. (DSUMF ¶ 56.) On January 10, 2018, defendant mailed a letter to plaintiff's residence along with a Notice of Final Adverse Action for dismissal effective as of January 15, 2018. (Id. ¶ 57.) The EEOC mailed its Notice of Right to Sue to plaintiff on March 5, 2019. (Id. ¶ 58, modified per record cited.) Plaintiff then filed this action on June 3, 2019. (Id. ¶ 59; Compl. [1].)

II. SUMMARY JUDGMENT STANDARD

A "court shall grant summary judgment 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." See Fed. R. Civ. P. 56(a). The party moving for summary judgment bears the initial burden of "informing the court of the basis for its motion and of identifying those materials that demonstrate the absence of a genuine issue of material fact." Rice-Lamar v. City of Fort Lauderdale, 232 F.3d 836, 840 (11th Cir. 2000) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Those materials may include "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the

motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

The non-moving party is then required "to go beyond the pleadings" and present competent evidence "showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. Generally, "[t]he mere existence of a scintilla of evidence" supporting the non-movant's case is insufficient to defeat a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). If in response the non-moving party does not sufficiently support an essential element of his case as to which he bears the burden of proof, summary judgment is appropriate. Rice-Lamar, 232 F.3d at 840. "In determining whether genuine issues of material fact exist, [the Court] resolve[s] all ambiguities and draw[s] all justifiable inferences in favor of the non-moving party." Id. (citing Anderson, 477 U.S. at 255).

In deciding a summary judgment motion, the court's function is not to resolve issues of material fact but rather to determine whether there are any such issues to be tried. Anderson, 477 U.S. at 250. The applicable substantive law will

identify those facts that are material. Id. at 248. Facts that are disputed, but which do not affect the outcome of the case, are not material and thus will not preclude the entry of summary judgment. Id. Genuine disputes are those in which "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. For factual issues to be "genuine," they must have a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). When the record as a whole could not lead a rational trier of fact to find for the non-movant, there is no "genuine issue for trial." Id. at 587.

III. DISCUSSION

The Complaint alleges disability discrimination under the ADA based on defendant removing plaintiff from her accommodated position in January 2016 and failing to accommodate her thereafter. Plaintiff also alleges that defendant failed to engage in the interactive process to determine a reasonable accommodation. (Compl. 4-6.) Plaintiff also alleges that, on December 5, 2016, defendant required plaintiff to obtain a "full duty release" before it would allow her to return to work. (Id. at 5-6.)

The Complaint also alleges that defendant retaliated against plaintiff in violation of the ADA through three actions. First, plaintiff alleges that defendant removed her from her accommodated secretarial position in January 2016 in

retaliation for disputing a work evaluation. Plaintiff also contends that defendant retaliated against her by requiring her to obtain a "full duty release" before she could return to work. Finally, plaintiff alleges that defendant terminated her on January 15, 2018 in retaliation for her filing a charge with the EEOC against defendant. (Compl. 6-8.)

A. Certain Retaliation Claims are Barred

Defendant first argues generally that plaintiff's claims are untimely because she filed her charge with the EEOC outside of the 180 calendar days from the date any alleged discrimination took place. (Def. Br. [49-1] 8-9.) Plaintiff responds that her claims are timely because she filed her Complaint within 90 days of receiving her Notice of Right to Sue from the EEOC. (Pl.'s Br. [58] 13-14.) Plaintiff's response does not address defendant's argument. "Because plaintiff has failed to respond to this argument or otherwise address this claim, the Court deems it abandoned." Bute v. Schuller Int'l, Inc., 998 F. Supp. 1473, 1477 (N.D. Ga. 1998); see also Burnett v. Northside Hosp., 342 F. Supp. 2d 1128, 1140 (N.D. Ga. 2004). However, the undersigned addresses defendant's argument on the merits.

Any employee who intends to sue for discrimination or retaliation under the ADA must first file an administrative charge with the EEOC within 180 days after

the alleged unlawful employment practice occurred.[18] Bost v. Fed. Express Corp., 372 F.3d 1233, 1239 (11th Cir. 2004); Zillyette v. Capital One Fin. Corp., 179 F.3d 1337, 1339 (11th Cir. 1983) (Title VII's exhaustion requirements to apply to ADA claims). Filing a charge of discrimination with the EEOC initiates an integrated, multi-step enforcement procedure that gives the EEOC the opportunity to detect and remedy various discriminatory practices. Bost, 372 F.3d at 1238. The exhaustion requirement gives the EEOC the first opportunity to investigate the alleged discriminatory practices, allows it to perform its role in obtaining voluntary compliance, and promotes conciliation efforts. Gregory v. Ga. Dep't of Hum. Res., 355 F.3d 1277, 1279 (11th Cir. 2004) (per curiam).

Plaintiff filed her EEOC charge on May 25, 2017. (Compl. 11 (EEOC Charge of Discrimination).) Based on this date, any alleged unlawful employment practice must have occurred on or after November 26, 2016 to be timely. Most of plaintiff's claims of discrimination took place before that date. (Compl. 4-5.) In her EEOC charge, plaintiff alleges that she was granted an accommodation in 2013. (Compl. 11.) She further alleges that Watershed removed her from her

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[18] An exception to this requirement exists under the "continuing violation" doctrine. See e.g., Gonzalez v. Firestone Tire & Rubber Co., 610 F.2d 241, 249 (5th Cir. 1980). However, plaintiff does not argue that this doctrine applies.

accommodated position in January 2016, and never gave her another reasonable accommodation. Finally, plaintiff alleges that, after an accident, she went on extended medical leave on May 23, 2016, and that the most recent discriminatory act took place on December 5, 2016, when she was told she would not be allowed to work at her laboratory tech position until she obtained a full duty release. (Id.)

Plaintiff elaborates on the above-stated claims in the Complaint, which alleges that plaintiff's removal from the accommodated position in January 2016 was in retaliation for her disputing a 2014 work evaluation. The Complaint also alleges that plaintiff's termination on January 15, 2018 was retaliatory. (Compl. 8.)

To the extent that plaintiff bases a retaliation claim on her removal from her secretarial (i.e. accommodated) position in January 2016, this claim is time barred. This employment action did not occur within 180 days of plaintiff's EEOC charge. Bost, 372 F.3d at 1239.

Moreover, plaintiff's retaliatory termination claim is barred by her failure to exhaust administrative remedies. "'[A] plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can be reasonably expected to grow out of the charge of discrimination.'" Duble v. FedEx Ground Package Sys., Inc., 572 F. App'x 889, 892 (11th Cir. 2014) (per curiam) (quoting Gregory, 355 F.3d at

1280). Because a district court has ancillary jurisdiction to hear a claim that grows "out of an earlier charge," it is unnecessary for a plaintiff to exhaust administrative remedies when this is the case. Duble, 572 F. App'x at 892. This exception does not apply when no other properly raised judicial claims exist to which the claim may attach. Id. at 892-93.

In Duble, the court explained its decisions in both Baker v. Buckeye Cellulose Corp., 856 F.2d 167 (11th Cir. 1988), and Gupta v. East Texas State University, 654 F.2d 411 (5th Cir. 1981), as follows:

> In Gupta, we determined the plaintiff could proceed on retaliation claims growing out of EEOC charges that already were before the district judge. See Gupta, 654 F.2d at 414 ("[T]he district court has ancillary jurisdiction to hear a claims when it grows out of an administrative charge that is properly before the court."). In Baker, we did not state whether the administrative charge already had to be before the district judge, but noted the "complaint had been pending for four months in the district court," when the plaintiff filed a motion for preliminary injunction. Baker, 856 F.2d at 168-69.

Duble, 752 F. App'x at 893.

In contrast to the claims in those two cases, Mr. Duble's termination claims related to a discrete act of alleged discrimination that occurred after he filed his initial charge pertaining to FedEx's purported failure to accommodate. Duble, 572 F. App'x at 893 (citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002) ("Each incident of discrimination and each retaliatory adverse employment

decision constitutes a separate actionable 'unlawful employment practice.'")). According to Duble,

> Because this case is factually distinguishable from Gupta and Baker, we conclude the Gupta rule does not apply. Duble's EEOC claim was still pending, when he was terminated, ostensibly for violating FedEx's email policy, and he had the opportunity to amend his EEOC charge or file a new charge relating to his termination. Duble, however, chose not to amend or file a new charge. Therefore, Duble failed to exhaust his administrative remedies regarding his termination claims.

Duble, 572 F. App'x at 893.[19]

In this case, plaintiff filed her EEOC charge nearly seven months before her termination, which was effective January 15, 2018. The EEOC charge did not mention termination. At the time of her termination, plaintiff's EEOC charge was still pending. Moreover, the EEOC did not dismiss plaintiff's charge until March 5, 2019, and she did not file suit until June 3, 2019. Plaintiff thus had over a year

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[19] The Eleventh Circuit noted that FedEx terminated Mr. Duble in November 2009, and that he did not file suit until September 2011. Duble, 572 F. App'x at 893. In other words, he had plenty of time to amend or supplement the initial EEOC charge to include the discrete acts of retaliation and discrimination which he claims led to this discharge. See Robinson v. Koch Foods of Ala., No. 2:13-CV-557-WKW, 2014 WL 4472611, at *2 (M.D. Ala. Sept. 11, 2014) ("[T]he court in Duble held that Baker and Gupta do not apply where retaliatory action occurs after the filing of the first EEOC charge but long enough before the filing of the lawsuit to give the plaintiff an opportunity to amend or to file a new EEOC charge to add a retaliation claim.").

to amend or file a new charge related to her alleged retaliatory termination but failed to do so. For these reasons, the undersigned **RECOMMENDS** that summary judgment be **GRANTED** to defendant on plaintiff's retaliation claims based on her January 2016 reassignment to laboratory tech and her January 2018 termination.

However, some claims are timely and properly before the Court. Plaintiff bases a retaliation claim on the fact that defendant told her on December 5, 2016 that she could not return to work until she obtained a physician's note granting her a full duty release. (Compl. 7, 11.) Plaintiff also alleges that, between May 23, 2016 and December 5, 2016, defendant refused to engage in the "interactive process" to accommodate her disability. (Id. at 6.) Based on these dates, these claims are within 180 days of the date plaintiff filed her EEOC charge and are thus timely.

Although the undersigned recommends dismissal of the above retaliation claims, in the interest of submitting a thorough Report and Recommendation, the undersigned analyzes below whether plaintiff can establish a prima facie retaliation case under the ADA regardless of whether the claim is time barred or not administratively exhausted.

B. Plaintiff Cannot Establish a Prima Facie Disability Discrimination Case

Disability discrimination can include either disparate treatment or failure to accommodate. Holly v. Clairson Indus., LLC, 492 F.3d 1247, 1261-62 (11th Cir. 2007). "Disparate treatment involves discriminatory animus or intent and occurs when a disabled individual is treated differently than a non-disabled or less disabled individual because of [her] disability." Nadler v. Harvey, No. 06-12692, 2007 WL 2404705, at *4 (11th Cir. Aug. 24, 2007) (citing 42 U.S.C. § 12112(b)) (unpublished). Plaintiff does not allege disparate treatment, so the Court will address her failure to accommodate claim.

The ADA defines a "disability" as "(A) a physical or mental impairment that substantially limits one or more major life activities of [an] individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). "[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." Id. § 12102(2)(A).

Utilizing these statutory principles, courts have outlined what a plaintiff must establish to succeed on a "failure to accommodate" claim. "To establish a prima facie claim for failure to accommodate, [plaintiff] must show that (1) she is

disabled; (2) she was a 'qualified individual' at the relevant time, meaning she could perform the essential functions of the job in question with or without reasonable accommodation; and (3) she was discriminated against by way of the defendant's failure to provide a reasonable accommodation." Solloway v. Clayton, 738 F. App'x 985, 987 (11th Cir. 2018) (per curiam).[20] If plaintiff establishes all three elements, then the burden shifts to the employer to prove that the plaintiff's requested accommodation imposes an undue hardship. Terrell v. USAir, 132 F.3d 621, 624 (11th Cir. 1998).

Defendant concedes that plaintiff can satisfy element (1) of her prima facie case, but contends that plaintiff cannot satisfy elements (2) or (3). (Def. Br. 9-10.) The Court addresses elements (2) and (3) below.

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[20] When a plaintiff contends that her employer failed to accommodate her disability, the McDonnell Douglas burden-shifting framework adopted from Title VII cases is inapplicable. See Nadler, 2007 WL 2404705, at *8 ("An employer *must* reasonably accommodate an otherwise qualified employee with a *known* disability unless the accommodation would impose an undue hardship in the operation of the business. . . . Thus, applying McDonnell Douglas to reasonable accommodation cases would be superfluous, since there is no need to prove discriminatory motivation."); see also Harris v. Atlanta Indep. Sch. Sys., No. 1:07-CV-2086-RWS-AJB, 2009 WL 10665027, at *32 (N.D. Ga. Aug. 9, 2009) ("In failure to accommodate cases . . . the McDonnell Douglas framework is inapplicable.").

1. Plaintiff is a Qualified Individual

A "qualified individual" is one who, with or without reasonable accommodation, can perform the essential functions of the job that she holds or desires. 42 U.S.C. § 12111(8). Whether a certain job function is essential is "evaluated on a case-by-case basis by examining a number of factors." D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1230 (11th Cir. 2005) (quotations omitted). These factors can include, inter alia, the employer's judgment, written job descriptions prepared before advertising or interviewing applicants, or the amount of time on the job performing the function. 29 C.F.R. § 1630.2(n)(3). The relevant time for this inquiry is at the time of termination. See Paleologos v. Rehab Consultants, Inc., 990 F. Supp. 1460, 1466 (N.D. Ga. 1998) (plaintiff could not show she was a qualified individual at time of termination).

In this case, the parties do not dispute that plaintiff was not a qualified individual with respect to the laboratory tech position. (Pl.'s Br. 8-9.) Plaintiff's accommodation in 2013 is evidence that the parties recognized this fact. Despite its apparent recognition of this fact, defendant does not address whether plaintiff could perform the job she had been performing for three years after her accommodation—her administrative position.

Although defendant argues that plaintiff's accommodated position was temporary because she was reassigned on a trial basis, plaintiff had been performing this position for close to three years before the position was eliminated. Plaintiff's "trial" only ended when the position was eliminated following Ms. Tanner's retirement. It is thus difficult to see how this was a "temporary" position as defendant asserts.

Moreover, it is unclear how plaintiff could be considered to have been a laboratory tech at the time of termination. See Paleologos, 990 F. Supp. at 1466. While plaintiff may have been designated as a laboratory tech at the time she was terminated, she had not actually performed the duties of this position since 2013. From the time plaintiff's administrative role was eliminated to the time of her termination, plaintiff was on leave and neither party believed she could perform the essential functions of a laboratory tech. Thus, the issue is whether plaintiff could perform the essential functions of her administrative position.

As previously stated, defendant does not argue that plaintiff was not a qualified individual with respect to her administrative position. Moreover, the undisputed facts show that plaintiff was a qualified individual with respect to an administrative position. Dr. Richardson opined that plaintiff could only work in an

administrative role[21] and plaintiff's physician echoed this opinion in November 2016 after plaintiff was involved in a car accident. Thus, plaintiff is a qualified individual for purposes of the ADA. However, her failure to accommodate claim fails for additional reasons.

2. Plaintiff Cannot Establish Element (3)

Element (3) requires plaintiff to show that she was discriminated against by way of defendant's failure to provide a reasonable accommodation. Solloway, 738 F. App'x at 987. "What constitutes a reasonable accommodation depends on the circumstances, but it may include 'job restructuring, part-time or modified work schedules, [and] reassignment to a vacant position' among other things." Frazier-White v. Gee, 818 F.3d 1249, 1255 (11th Cir. 2016) (quoting 42 U.S.C. § 12111(9)(B)). The ADA requires at least (1) a modification of the particular job performed by the employee, or (2) reassignment to another job that can be performed with or without the first type of accommodation. See 42 U.S.C. § 12111(9)(B).

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[21] Dr. Dickerson later discovered that plaintiff requested these restrictions. However, he agreed with the "musculoskeletal restrictions" recommended by Dr. Richardson.

Under the ADA, reassignment to another position is a reasonable accommodation only if there is a vacant position available for which the employee is otherwise qualified. Willis v. Conopco, Inc., 108 F.3d 282, 284 (11th Cir. 1997) (per curiam). The ADA does not require employers to create a position or promote an employee as an accommodation. Terrell, 132 F.3d at 626 (noting no duty to create a part-time position as an accommodation); Lucas v. W.W. Grainger, Inc., 256 F.3d 1249, 1256 (noting no duty to promote individual with disability as an accommodation). In addition, "a qualified individual with a disability is 'not entitled to the accommodation of her choice, but only to a reasonable accommodation.'" Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1286 (11th Cir. 1997) (quoting Lewis v. Zilog, Inc., 908 F. Supp. 931, 948 (N.D. Ga. 1995)).

Furthermore, the regulations state than an employer may in some circumstances need to "initiate an informal, interactive process" with a disabled employee to determine the appropriate reasonable accommodation. 29 C.F.R. § 1630.2(o)(3). However, there is no basis for imposing liability where any failure in the interactive process is attributable to the plaintiff. See Gee, 818 F.3d at 1257.

In 2013, plaintiff informed defendant that she was suffering from "fibromyalgia flare-ups" and requested a reassignment to an administrative

position that was less physically demanding. (Williams Aff. ¶ 6; Muhammad Dep. 33:21-34:11.) Defendant granted plaintiff's request and reassigned her to a secretarial position on a trial basis under Ms. Tanner. (Def. Ex. 2 [49-3], at 2.) Plaintiff's secretarial position was eliminated when Ms. Tanner retired in December 2015. (Williams Aff. ¶ 9.) Plaintiff was subsequently reassigned to her laboratory tech position on January 26, 2016. (Id. ¶ 11.) Plaintiff objected to this reassignment and requested an administrative position.

Plaintiff alleges that defendant failed to accommodate her when it returned her to the laboratory tech position from her secretarial position in January 2016. (Compl. 5.) She also alleges that defendant failed to engage in the interactive process to determine a reasonable accommodation. Defendant refutes this argument. (Def. Br. 13-14.)

Defendant demonstrates that it continued its efforts to accommodate plaintiff when her original accommodated position was eliminated. After plaintiff objected to being returned to the laboratory tech position in January 2016, defendant offered plaintiff the only administrative position available. (Muhammad Dep. 41:22-25, 46:7-16, 48:10-49:12.) Plaintiff declined this position, citing her desire for a position that was more suited to her "education and preparation." (Id. at 48:10-49:1.) In February 2016, defendant requested that plaintiff apply to a data analyst

position.[22] Plaintiff did apply, but was not selected due to her low interview score. (Id. at 57:4-7.) Defendant again offered plaintiff a lateral transfer to a secretarial position in February 2016. (Williams Aff. ¶ 14.) Plaintiff again declined because she believed the position didn't "reflect [her] training and preparation." (Muhammad Dep. 56:15-24.) Finally, on December 8, 2017, defendant advised plaintiff of an open administrative position and requested that she apply for the position by December 18, 2017. (Williams Aff. ¶ 19.) Plaintiff failed to do so. The fact that plaintiff was not personally interested in the positions offered to her is irrelevant to whether the reassignment was reasonable. See Stewart, 117 F.3d at 1286 (qualified individual with disability not entitled to accommodation of her choice).

Further, any failure in the interactive process is attributable to plaintiff. See Gee, 818 F.3d at 1257. Defendant has presented evidence that it continually offered plaintiff administrative positions as an accommodation or requested plaintiff to interview for vacant positions. Thus, plaintiff has failed to show that defendant

[22] Defendant required plaintiff to interview because this was not a lateral transfer.

failed to accommodate her or engage in the interactive process to determine a reasonable accommodation.

For these reasons, plaintiff cannot establish element (3) of a prima facie case of disability discrimination. Thus, the undersigned **RECOMMENDS** that summary judgment be **GRANTED** for defendant on plaintiff's failure to accommodate claim. See Nix v. WLCY Radio/Rahall Comms., 738 F.2d 1181, 1187 (11th Cir. 1984); Pace v. S. Ry. Sys., 701 F.2d 1383, 1391 (11th Cir. 1983) (failure to establish a prima facie case warrants entry of summary judgment).

C. Plaintiff's Cannot Establish a Prima Facie Retaliation Case

Plaintiff's retaliation claims are analyzed under the burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1311 (11th Cir. 2002). To establish a prima facie case of retaliation, plaintiff must show that: (1) she engaged in statutorily protected expression; (2) she suffered a materially adverse employment action; and (3) there was some causal connection between the two events. Id.

Once a plaintiff establishes a prima facie case of retaliation, the employer must articulate a legitimate, nondiscriminatory reason for the challenged action. Wascura v. City of S. Miami, 257 F.3d 1238, 1242 (11th Cir. 2001). If an employer

articulates one or more reasons, the presumption of retaliation is eliminated, and the plaintiff has the opportunity to present evidence that the offered reason is pretextual. See id. at 1243.

Plaintiff alleges that defendant engaged in three retaliatory acts: (1) removing plaintiff from her temporary position after she disputed a work evaluation in 2014; (2) requiring plaintiff to provide a full duty release in December 2016 after her non-work-related injury; and (3) terminating plaintiff because she filed an EEOC charge against defendant.

1. Act (1) Cannot Establish a Prima Facie Case of Retaliation

Although act (1) is barred because it is untimely (see supra Part III.A), it fails for additional reasons. Plaintiff has failed to show a causal connection between her 2014 evaluation dispute and her 2016 reassignment to laboratory tech. "The burden of causation can be met by showing close temporal proximity between the statutorily protected activity and the adverse employment action." Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007) (per curiam) The Eleventh Circuit has held that "[a] three to four-month disparity between the statutorily protected expression and the adverse employment action is not enough" to show causation. Id. "Thus, in the absence of other evidence tending to show

causation, if there is a substantial delay between the protected expression and the adverse action, the complaint of retaliation fails as a matter of law." Id.

Plaintiff disputed her employee evaluation in August 2014, but she was not reassigned to her laboratory tech position until February 2016. Plaintiff's alleged protected activity occurred over a year before the alleged retaliation. Because plaintiff has not shown other evidence probative of causation, her claim fails as a matter of law. See Thomas, 506 F.3d at 1364.

2. Act (2) Did Not Violate the ADA

Turning to act (2), defendant argues that its policy of obtaining full duty releases from employees involved in non-work-related accidents is universal and "serves to ensure [defendant] is aware of any potential issues the employee may have in re-assuming their role." (Def. Br. 19-20 (quoting William Aff. ¶ 18).) Plaintiff argues that this requirement violated the ADA and constituted retaliatory discrimination.

Several Circuit Courts of Appeal have found that employer policies requiring an injured or sick employee to be completely healed or recovered in order to return to work are unlawful. See e.g., Hohider v. United Parcel Serv., 574 F.3d 169, 194-96 (3d Cir. 2009) (holding that a 100% healed policy violates the ADA if it has the effect of discriminating against an otherwise qualified individual with a disability);

McGregor v. Nat'l R.R. Passenger Corp., 187 F.3d 1113, 1116 (9th Cir. 1999) (same). However, these Circuits were concerned with facts that are not present in this case.

As defendant demonstrates, the full duty release form specifically releases the patient back to their assigned duty and includes a space for restrictions applicable to the patient as it relates to that specific position. (Williams Aff. ¶ 18.) Thus, requiring plaintiff to obtain a full duty release was neither retaliatory nor in violation of the ADA. Defendant applies its full duty release policy universally when employees are involved in non-work-related accidents and was concerned with whether plaintiff could perform her work duties, not if she was "100% healed.[23]" See Stewart, 117 F.3d at 1286 (employer not obligated to engage in generalized negotiations concerning employer's workplace rules and policies for all employees). Regardless of what position defendant was evaluating plaintiff's ability to perform, it did not violate the ADA by requiring plaintiff to adhere to its full duty release policy.

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[23] Furthermore, the ADA allows employers to conduct medical examinations where the examination "is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). Plaintiff does not advance a claim or argument that defendant was requiring her to undergo an improper medical examination by requiring her to obtain a full duty release.

Plaintiff has also not shown that defendant's reason for requiring the fully duty release is pretextual. As defendant argues, the full duty release is required for every employee who experiences a non-work-related accident and serves to ensure employees can safely perform their job. Plaintiff does not point to evidence that that defendant's true purpose was discriminatory.

3. Plaintiff Cannot Show Causation with Act (3)

Finally, plaintiff alleges that her termination was in retaliation for her filing of a charge with the EEOC. (Compl. 7-8.) For reasons previously stated supra Part III.A, this claim is barred because plaintiff failed to exhaust her administrative remedies. However, this claim also fails for additional reasons.

As discussed supra Part III.C.1, temporal proximity may be used to show causation between protected activity and a materially adverse employment action. See Thomas, 506 F.3d at 1364. A three to four-month disparity between the protected activity and the materially adverse employment action is generally not enough to show causation. Id. Further, temporal proximity alone may be insufficient. See Singleton v. Public Health Trust, 725 F. App'x 736, 739 (11th Cir. 2018) (per curiam).

Plaintiff's EEOC charge was filed approximately seven months before her termination. This statutorily protected activity was not "very close" to the

termination—and certainly not within three to four months. See Thomas, 506 F.3d at 1364; see also Callahan v. City of Jacksonville, Fla., 805 F. App'x 749, 753 (11th Cir. 2020) (per curiam). Defendant also continued its attempts to accommodate plaintiff during this time period. Without more evidence tending to show causation, plaintiff's retaliatory termination claim fails as a matter of law. Id.

For these reasons, the undersigned **RECOMMENDS** that summary judgment be **GRANTED** in defendant's favor on all of plaintiff's ADA retaliation claims.

IV. CONCLUSION

For the foregoing reasons, the undersigned **RECOMMENDS** that defendant's Motion for Summary Judgment [49] be **GRANTED**.

The Clerk is **DIRECTED** to terminate the reference to the Magistrate Judge.

SO RECOMMENDED, this 15th day of April, 2021.

Walter E. Johnson

WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE