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

KELLEY DENISE ALEXANDER,

Plaintiff,

v.

GEORGIA STATE UNIVERSITY,

Defendant.

CIVIL ACTION NO.
1:19-cv-02023-ELR-RDC

FINAL REPORT AND RECOMMENDATION

Plaintiff Kelley Denise Alexander filed this employment-discrimination action against Defendant Georgia State University[1] ("GSU") under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.* (Doc. 1). GSU has moved for summary judgment as to all claims (Doc. 70).

[1] As a preliminary matter, GSU points out that it is operated as a unit of the Board of Regents of the University System of Georgia ("BOR"), which is the proper party defendant in this action. (Doc. 70-1 at 3); *see, e.g., Bd. of Regents of the Univ. Sys. of Ga. v. Doe*, 278 Ga. App. 878, 878 (2006); Ga. Const. art. VIII, § 4, para. I. Accordingly, insofar as the District Judge declines to adopt the principal recommendation set forth herein and allows this matter to proceed, the undersigned **RECOMMENDS** that the BOR be substituted for GSU as the proper defendant pursuant to Federal Rule of Civil Procedure 21. *See Walsh v. Chubb*, Case No. 4:20-cv-00510-HNJ, 2020 WL 8175594, at *8 (N.D. Ala. Oct. 21, 2020) (noting that Rule 21 permits "the mere formality of substituting a juridical entity . . . when the new party had prior notice of the claims against it, no prejudice will result, and the technical change in party names will ensure the case proceeds with the real parties in interest.").

For the reasons below, the undersigned **RECOMMENDS** that GSU's Motion for Summary Judgment be **GRANTED**.

I. BACKGROUND

A. Factual Background

The relevant background is principally drawn from GSU's Statement of Material Facts[2] (Doc. 70-2, "Def. SMF"). After a quick summary of the term and nature of Ms. Alexander's employment, the presentation that follows will center, successively, on the specific facts and circumstances surrounding the conduct in which each of her distinct claims are rooted.

Ms. Alexander, an African-American female, served as the Ombudsperson for GSU from September 2009 through January 31, 2018, the effective date of her resignation. (Def. SMF ¶ 1). The Ombudsperson's office provides informal conflict-resolution services and related training to GSU faculty, staff, and students. (*Id.* ¶ 3). During the relevant time period, the office was a small one, growing to no more than four individuals—Ms. Alexander, two Assistant Ombudspersons, and an administrative assistant. (*Id.* ¶ 4; Doc. 70-6 ¶ 6). Ms. Alexander headed the office

[2] Ms. Alexander only disputes two paragraphs included in GSU's Statement of Material Facts, and in each instance the dispute is immaterial to the recommended disposition. *See* (Doc. 74-1 at 1–2). Moreover, she has only submitted two additional facts of her own, which have been incorporated below as applicable. (*Id.* at 2–3). Any unrebutted facts set forth in GSU's Statement are deemed admitted under Local Rule 56.1(B)(2). *See* LR 56.1(B)(2)(a), N.D. Ga.

and reported directly to GSU's Provost, Dr. Risa Palm. (Def. SMF ¶ 2).

In line with professional standards of practice, the GSU Ombudsperson's office plays a neutral and impartial role within the larger university organization.[3] That means that it operates independent of GSU's other academic and administrative offices. Accordingly, in terms of qualifications, duties, responsibilities, and requisite skills, the role of Ombudsperson is unique. (*Id.* ¶ 48). Indeed, Ms. Alexander herself testified that "[t]here's no one at [GSU] who had similar job duties to me except for the people who reported directly to me." (*Id.* ¶ 47).

i. No Written Performance Evaluations

During her eight plus years as Ombudsperson at GSU, Ms. Alexander never received a formal written performance evaluation from Dr. Palm, her direct supervisor. (Doc. 74-2 ¶ 7). By contrast, at least occasionally, Dr. Palm did provide some form of written evaluation to Dr. Edgar Torbert, a white male and GSU's former Assistant Provost. (Doc. 74-1, "Pl. SMF," ¶ 2; Doc. 74-8). Although GSU policy mandated such written evaluations, the omission was not unique to Ms. Alexander as there were other administrative staff members reporting to Dr. Palm who either did not receive written evaluations, or did not receive them consistently. (Def. SMF ¶¶ 40–41; Doc. 74-2 ¶ 5).

Specifically as to Ms. Alexander, Dr. Palm explained that, given the

[3] *See* https://ombuds.gsu.edu/.

independent nature of the Ombudsperson's office and Ms. Alexander's insistence on privacy and confidentiality of operations, the inner workings of the office were largely unknown to her. (Def. SMF ¶ 39). As a result, according to Dr. Palm, there was not enough information available to genuinely assess Ms. Alexander's work and complete corresponding written performance evaluations. (*Id.*). But Dr. Palm nevertheless met with Ms. Alexander at least once per year to discuss the status and activity of the Ombudsperson's office. (Doc. 70-5 ¶ 22). And Dr. Palm testified that she did not rely on written performance evaluations to make salary and merit-increase decisions for any of her direct reports, including Ms. Alexander. (Def. SMF ¶ 37). Indeed, Dr. Palm awarded Ms. Alexander merit increases for each year that funds were available. (*Id.* ¶ 38).

ii. Failure to Promote

As described above, Ms. Alexander was employed by GSU as Ombudsperson for more than eight years. (*Id.* ¶ 1). During that time, she never applied for any other positions at GSU. (*Id.* ¶ 34). And because she was the head of her own independent office, there was no room for promotion within that office. (*Id.* ¶ 35).

iii. Wage Discrimination

When Ms. Alexander resigned from GSU her annual salary was $84,624. (Doc. 70-5, Exh. 1). She received merit raises each year between 2015 and 2018, ranging from 2.00% to 5.00%. (*Id.*). By point of comparison, GSU's Assistant

Provost—which position was filled serially by two different white males (Dr. Torbert and Chip Hill) between 2015 and 2018—was paid $175,950 in 2018 and was awarded annual merit raises ranging from 3.50% to 5.00% over the same period. (*Id.*). For ease of reference and comparison, annual merit raises for Ms. Alexander, Dr. Torbert, and Mr. Hill are shown below:

	Annual Year-Over-Year Raise							
	2011	2012	2013	2014	2015	2016	2017	2018
Kelley Denise Alexander, Ombudsperson	n/a	0.00%	0.00%	0.00%	5.00%	3.00%	3.00%	2.00%
Edgar Torbert, Asst. To Provost (through 2014)	n/a	0.00%	0.00%	0.00%				
Edgar Torbert, Asst. Provost (2015-2017)					n/a	4.00%	5.00%	n/a
Chip Hill, Dir. Budget & Planning (through 2011)	n/a							
Chip Hill, Asst. Dean for Finance & Admin. (2012-2016)		n/a	0.00%	0.00%	4.00%	5.75%		
Chip Hill, Asst. Provost (2017-2018)							n/a	3.50%

(*Id.*). While recognizing the uniqueness of her position as Ombudsperson, Ms. Alexander nevertheless contends that as the head of her own office she was similarly situated to Dr. Torbert and Mr. Hill, insofar as each served in the role of Assistant Provost. (Def. SMF ¶ 49; Doc. 74 at 10).

GSU's Associate Vice President of Human Resources, Linda Nelson, explained that the university compensates employees competitively based on the job market for their relevant career fields. (Def. SMF ¶¶ 60–61). She added that the Assistant Provost was paid differently than the Ombudsperson based on different responsibilities, duties, tasks, and required skill sets. (*Id.* ¶ 61). To illustrate, the Assistant Provost position at GSU is tasked with handling finances and other business matters related to academic affairs. (*Id.* ¶ 50). That includes oversight of the Provost's budget and the budgets for all of GSU's colleges, in addition to

responsibilities related to classroom space allocation, renovation, and development. (*Id.*). By contrast, as Nelson testified and Ms. Alexander acknowledged at her deposition, with its focus on independent and informal conflict resolution, the position of Ombudsperson does not have similar job responsibilities or perform the same types of tasks as the Assistant Provost. (*Id.* ¶¶ 47–48, 62). In particular, the Ombudsperson does not have large-scale business and financial oversight responsibilities. (*Id.* ¶ 51).

iv. Hostile Work Environment

Ms. Alexander testified that she was harassed on three separate occasions by Chris Vermillion, one of the two Assistant Ombudspersons under her supervision. (*Id.* ¶ 43). The incidents all occurred during meetings that were held in the wake of a performance improvement plan that Ms. Alexander issued to Mr. Vermillion in August 2017. (*Id.*; Doc. 74-2 ¶ 21). Two of the meetings were one-on-one, while the third was also attended by another university official. (Doc. 71, "Pl. Dep." at 100–01). According to Ms. Alexander, during the first two meetings, Vermillion became "really angry," pointed his finger at her, accused her of lying, and raised his voice. (Def. SMF ¶ 43). In the last encounter in October 2017, Vermillion cried "hysterically" and became loud, aggressive, and accusatory, but later apologized and ended the meeting by hugging Ms. Alexander. (*Id.* ¶ 44).

v. Termination

In August 2017, Mr. Vermillion filed a complaint with GSU's human resources department alleging, among other things, that Ms. Alexander had violated the university's conflict-of-interest policy by hiring her spouse to perform certain temporary assignments on behalf of the Ombudsperson's office. (*Id.* ¶ 6). The complaint was reported to GSU attorney Kerry Heyward, who then consulted with Ms. Nelson regarding the appropriate university response. (*Id.* ¶ 7). Ms. Heyward forwarded the matter to GSU's auditing office for investigation. (*Id.* ¶¶ 8–9).

The ensuing audit investigation revealed that between 2012 and 2016, Ms. Alexander authorized seven payments of university funds totaling $4,267.50 to Miriam Phields, Ms. Alexander's domestic partner, to perform photography and other services for the Ombudsperson's office. (*Id.* ¶ 10). In October 2017, GSU's audit chief consulted with the Director of Ethics & Compliance for the Board of Regents of the University System of Georgia ("BOR"), which oversees GSU, who stated that an employee's selection of a photographer with close personal ties "would raise the appearance of a conflict of interest." (*Id.* ¶ 12).

In November 2017, the audit team located Service Provider Classification Worksheets ("SPCW") authorizing four of the payments to Ms. Phields, each of which was signed by Ms. Alexander. (*Id.* ¶ 14). Each SPCW asks, "*Do GSU employees have a relationship, financial or otherwise, with a party involved in this*

transaction?" (*Id.*). On one SPCW form, the response to this question was marked "*No.*" (*Id.* ¶ 15). On the other three SPCW forms, the answer was marked "*Yes*" and was accompanied by explanations that described Ms. Phields variously as either "*a trusted colleague and associate*," or a "*vendor*" with a "*personal*" but "*not financial*" relationship. (*Id.* ¶ 16).

Ms. Heyward personally reviewed all of the SPCW forms and found them to be "misleading because they did not disclose Ms. Alexander's relationship with Ms. Phields or that they were living together." (*Id.* ¶ 17). When presented with the audit findings, Ms. Alexander acknowledged that she was in a personal relationship with Ms. Phields—the two married in 2014—at the time she was hired to perform work for the Ombudsperson's office. (*Id.* ¶ 18). In a November 9, 2017 letter to GSU, Ms. Alexander apologized for "paying friends and family members to do work for the Office of the Ombudsperson," and explained that "diligent questioning and oversight of the process did not happen by me as it should have. I did not pay much attention to the forms other than the signature line on the back side." (*Id.* ¶ 19).

Ms. Heyward later conferred with Dr. Palm and Ms. Nelson about the audit findings, and they all agreed that termination was the appropriate decision. (*Id.* ¶ 20). Dr. Palm later testified that, at a public institution like GSU, "it is important to avoid even the appearance of a conflict of interest. GSU has several photographers on staff that can be used for university events. Ms. Alexander could have used a university

photographer. The notion of her going outside of the university, hiring her spouse, paying her generously with university funds, then not disclosing the relationship is unacceptable." (*Id.* ¶ 22).

On or around December 8, 2017, Dr. Palm and Ms. Nelson met with Ms. Alexander and presented her with a termination letter outlining the reasons for their decision. (*Id.* ¶ 26). The letter explained that Ms. Alexander was being terminated for violating GSU and BOR ethics policies requiring all employees to disclose and avoid improper conflicts of interest, as well as GSU and BOR conflict-of-interest policies which require employees to make every reasonable effort to avoid even the appearance of a conflict of interest. (*Id.* ¶ 27). The letter stated: "[Y]ou were not completely forthcoming that [Ms. Phields] was your spouse. Furthermore, the [audit] investigation showed that you directly controlled and supervised the work performed. Based on the facts gathered during the investigation, the University has found the allegations to be with merit." (*Id.* ¶ 28).

Ms. Alexander was given the option to resign in lieu of termination, which she accepted, resigning effective January 31, 2018. (*Id.* ¶ 29). She was over the age of 50 at the time. (Doc. 1 ¶ 13; Doc. 74-2 ¶ 2). Notably, around the same time period, another GSU employee, a white female, was also terminated for authorizing more than $3,000 in payments to a family member for graphic design services without disclosing the nature of their relationship. (Def. SMF ¶ 30).

Ms. Alexander filed a charge of discrimination with the EEOC on April 2, 2018, in which she claimed that she was denied performance evaluations, advancement opportunities, and salary increases offered to younger white male coworkers, and that she was ultimately forced to resign.[4] (*Id.* ¶ 32; Doc. 1 ¶¶ 12–14). The EEOC issued a right-to-sue letter on February 6, 2019. (Doc. 1 at 15).

B. Procedural History

On May 6, 2019, less than 90 days after she received her right-to-sue letter from the EEOC, Ms. Alexander initiated the instant action. (Doc. 1). In her Complaint, she alleges violations of Title VII, the EPA, and the ADEA based on her race, sex, and age, respectively, insisting that GSU unlawfully failed to provide written performance evaluations, failed to promote her, failed to award merit increases commensurate with other white male GSU employees, subjected her to harassment, and terminated her employment. (*Id*. ¶¶ 1, 12–14).

GSU has moved for summary judgment as to all claims, submitting a

[4] In her EEOC charge, Ms. Alexander also claimed that she was "retaliated against, in violation of Title VII," and she references retaliation from Mr. Vermillion again in her Complaint. (Doc. 1 at 12, 20). However, Ms. Alexander did not plainly indicate on the face of her Complaint that she intended to assert a retaliation claim, *see* (Doc. 1 ¶ 12), she filed no objections to the earlier Magistrate Judge's Report and Recommendation that construed her Complaint without a retaliation claim, *see* (Docs. 12, 21), and in her opposition to GSU's motion for summary judgment she again asserts no retaliation claim, *see* (Doc. 74). Accordingly, insofar as Ms. Alexander initially asserted a retaliation claim, any such claim has been abandoned before this Court. *See McMaster v. United States*, 177 F.3d 936, 940–41 (11th Cir. 1999) (noting that a claim may be considered abandoned when the allegation is included in the complaint, but the plaintiff fails to present any argument concerning the claim to the district court).

Statement of Material Facts and various evidentiary materials in support. (Docs. 70, 70-2–70-17). Ms. Alexander opposes the motion in limited respects, but has largely conceded the undisputed facts set forth by GSU. *See* (Docs. 74, 74-1). The motion is now ripe for review.

II. LEGAL STANDARD

A reviewing 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." Fed. R. Civ. P. 56(a). The party moving for summary judgment "bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *accord 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*, 929 F.2d at 608.

If the moving party meets its burden, 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). In other words, if the non-moving party does not sufficiently support an essential element of its case as to which it bears the burden of proof, summary judgment is appropriate. *Celotex*, 477 U.S. at 323.

Genuine issues in dispute are those for which "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. In determining whether genuine issues of material fact exist, the reviewing court "resolve[s] all ambiguities and draw[s] all justifiable inferences in favor of the non-moving party." *Rice-Lamar v. City of Ft. Lauderdale, Fla.*, 232 F.3d 836, 840 (11th Cir. 2000). However, when the record "taken as a whole" could not support a reasonable finding for the non-movant, there is no "genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The Federal Rules of Civil Procedure state that a party asserting that a fact is genuinely disputed must cite to specific materials in the record, and a failure to do so allows the district court to consider the fact as undisputed for purposes of the motion for summary judgment. Fed. R. Civ. P. 56(c)(1)(A), (e)(2). Similarly, Northern District of Georgia Local Rule 56.1(B) provides, in relevant part, that a district court will deem the movant's statement of material facts as admitted unless

the non-movant's response "contain[s] individually numbered, concise, nonargumentative responses corresponding to each of the movant's numbered undisputed material facts," and "(i) directly refutes the movant's fact with concise responses supported by specific citations to evidence." LR 56.1(B)(2)(a)(1), (2), N.D. Ga.

Failure by the non-moving party to comply with Local Rule 56.1 is "the functional analog of an unopposed motion for summary judgment," but the district court must nevertheless review the movant's citations to the record to determine if there is, indeed, no genuine issue of material fact before granting summary judgment. *Reese v. Herbert*, 527 F.3d 1253, 1268–69 (11th Cir. 2008). A district court applying Local Rule 56.1 must "disregard or ignore evidence relied on by the respondent—but not cited in its response to the movant's statement of undisputed facts—that yields facts contrary to those listed in the movant's statement." *Id.* at 1268.

III. DISCUSSION

As a preliminary matter, GSU correctly points out that Ms. Alexander has abandoned several of her claims. (Doc. 75 at 3). The reason being that, in response to the pending motion for summary judgment, she has offered only partial opposition—specifically, with respect to her claims regarding omitted performance evaluations, discriminatory merit increases, and harassment. She presents no

argument in support of her failure-to-promote and wrongful-termination claims under Title VII, or her ADEA claims. *See generally* (Doc. 74). Absent any such support, the latter claims are abandoned. *See Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) ("[T]he onus is upon the parties to formulate arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned.").

In any case, the undersigned concludes that all of Ms. Alexander's claims ultimately fail on the merits. The following discussion will address each of those claims—even those abandoned, albeit in somewhat abbreviated fashion—and explain why. Ms. Alexander's claims arise under three separate statutory regimes—Title VII, the EPA, and the ADEA—and they will be discussed accordingly.

A. Title VII Claims

Ms. Alexander asserts two species of Title VII disparate-treatment claims—first, the more traditional variety, which includes alleged discrimination with respect to performance evaluations, pay increases, promotion, and termination; and second, a hostile work environment claim premised on alleged workplace harassment. (Doc. 1); *see Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 807 (11th Cir. 2010) (discussing categories of Title VII claims). These claims will be reviewed in turn.

Title VII prohibits workplace discrimination on the basis of, among other things, an individual's race or sex. 42 U.S.C. § 2000e-2(a). A plaintiff asserting a

Title VII disparate-treatment claim must show the defendant acted with discriminatory intent. *E.E.O.C. v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1273 (11th Cir. 2000). "In order to show discriminatory intent, a plaintiff must demonstrate that the decisionmaker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects on an identifiable group." *Id.* (cleaned up).

When a plaintiff asserts a traditional disparate-treatment claim on the basis of circumstantial evidence, as is the case here, a reviewing court generally applies the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).[5] Under this framework, the plaintiff bears the initial burden of establishing a prima facie case of discrimination by showing (1) that she belongs to a protected class, (2) that she was subjected to an adverse employment action, (3) that she was qualified to perform the job in question, and (4) that her employer treated "similarly situated" employees outside her class more favorably. *Lewis v.*

[5] The undersigned recognizes that, as an alternative to the *McDonnell Douglas* framework, a plaintiff can survive summary judgment if she can "present[] circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011). Under the *Smith* framework, "[a] triable issue of fact exists if the record, viewed in a light most favorable to the plaintiff, presents a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." *Id.* (quotation and citation omitted). However, because Ms. Alexander made no argument to this effect in her response, she forfeited it. *See Bailey v. Metro Ambulance Servs., Inc.*, 992 F.3d 1265, 1274 (11th Cir. 2021). Nevertheless, even if Ms. Alexander had invoked the *Smith* framework in her response, the undersigned finds that GSU is entitled to summary judgment because the totality of the evidence presented here cannot support a reasonable inference that Ms. Alexander was discriminated against based on her race or sex.

City of Union City, Ga., 918 F.3d 1213, 1220–21 (11th Cir. 2019). If the plaintiff makes this showing, the burden shifts to the defendant employer to present a legitimate, nondiscriminatory reason for its actions. *Id.* at 1221.

If the defendant meets its burden, the plaintiff "must then demonstrate that the defendant's proffered reason was merely a pretext for unlawful discrimination, an obligation that merges with the [plaintiff's] ultimate burden of persuading the [factfinder] that she has been the victim of intentional discrimination." *Id.* (quotation and citation omitted). "The inquiry into pretext requires the court to determine, in view of all the evidence, whether the plaintiff has cast sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable factfinder to conclude that the employer's proffered legitimate reasons were not what actually motivated its conduct." *Crawford v. Carroll*, 529 F.3d 961, 976 (11th Cir. 2008) (quotation and citation omitted). A pretextual reason must both be false *and* hide an actual, underlying discriminatory reason. *Brooks v. County Comm'n of Jefferson Cnty., Ala.*, 446 F.3d 1160, 1163 (11th Cir. 2006).

i. No Written Performance Evaluations

Ms. Alexander first claims that her direct supervisor, GSU Provost Dr. Palm, discriminated against her by failing to issue written performance evaluations at any time during her employment. (Doc. 1 ¶ 14; Doc. 74 at 7–8). And, according to Ms. Alexander, she was injured by that failure because it precluded her from receiving

merit raises like those issued to her white male counterparts. (*Id.*). By comparison, she maintains that Dr. Torbert, a white male, received such performance evaluations and corresponding merit raises. (Doc. 74 at 7–8; Pl. SMF ¶ 2). In its motion for summary judgment, GSU insists that Ms. Alexander has neither established a prima facie case of discrimination nor rebutted its legitimate nondiscriminatory explanation. (Doc. 70-1 at 7–10).

The undersigned agrees with GSU that Ms. Alexander has not made out a prima facie case. Having said that, it is undisputed that Ms. Alexander belongs to a protected class and that she was qualified to serve as Ombudsperson. Moreover, with respect to this specific claim, the undersigned finds that Dr. Torbert is a suitable comparator. The touchstone of Title VII comparator analysis is similarity in "all material respects," *Lewis*, 918 F.3d at 1227–29, and given that written performance evaluations appear to have been mandated for all GSU employees, the relevant likeness here is simply employment by GSU. In other words, with respect to the bare fact of employment alone—on which the relevant employer action in this instance hinged—Ms. Alexander and Dr. Torbert "cannot reasonably be distinguished." *Id.* at 1228 (quotation and citation omitted).

The issue, then, is whether the omission of written performance evaluations constitutes an adverse employment action for Title VII purposes. "Not all employer actions that negatively impact an employee qualify as adverse employment actions."

Howard v. Walgreen Co., 605 F.3d 1239, 1245 (11th Cir. 2010) (quotation and citation omitted). Instead, only employment actions resulting in "a serious and material change in the terms, conditions, or privileges of employment so that a reasonable person in the circumstances would find the employment action to be materially adverse" will qualify. *Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 921 (11th Cir. 2018) (cleaned up). Such actions involve "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). Although an adverse employment action "does not require proof of direct economic consequences in all cases, the asserted impact cannot be speculative and must at least have a tangible adverse effect on the plaintiff's employment." *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1239 (11th Cir. 2001).

Generally speaking, a poor performance evaluation—or the lack of a performance evaluation—rarely constitutes an adverse employment action. *See Davis*, 245 F.3d at 1240–42; *Gonzalez v. Florida Dept. of Highway Safety and Motor Vehicles Div. of Fla. Highway Patrol*, 237 F. Supp. 2d 1338, 1357 (S.D. Fla. 2002) ("[T]he absence of a positive performance evaluation is not actionable unless the absence either prevents the plaintiff from obtaining a serious and material improvement in the terms, conditions, or privileges of employment or results in

serious and material action taken against the plaintiff. The plaintiff has presented no evidence that the absence of these evaluations has or will prevent . . . him from obtaining a serious and material improvement in the terms, conditions, or privileges of employment or has resulted in actions taken against him."). Indeed, "[a] lower score on [a] performance evaluation, by itself, is not actionable under Title VII unless [the plaintiff] can establish that the lower score led to a more tangible form of adverse action, such as ineligibility for promotional opportunities." *Brown v. Snow*, 440 F.3d 1259, 1265 (11th Cir. 2006); *accord Johnson v. Miami-Dade Cnty.*, 948 F.3d 1318, 1326–27 (11th Cir. 2020) (finding that a series of "negative monthly evaluations were not material adverse employment actions" where the employee failed to show how they amounted to "changes in the terms and conditions of his employment").

That said, when a plaintiff's performance evaluation and compensation are "inextricably intertwined," the results of a performance evaluation can constitute an adverse employment action in the Title VII context. *Crawford*, 529 F.3d at 971–72 (citation omitted). But to reiterate, when a performance evaluation does not result in a "loss of pay or benefits or further discipline," it does not constitute an adverse employment action. *Davis*, 245 F.3d at 1240.

Here, Ms. Alexander has not introduced sufficient evidence to show that she suffered an adverse employment action. Although Dr. Palm never issued her a

written performance evaluation during her employment, and Dr. Palm did at least occasionally provide such evaluations to Dr. Torbert, a white male colleague, Ms. Alexander has not shown that she suffered any significant change in employment status as a result. *See Davis*, 245 F.3d at 1239. She insists that without written performance evaluations she was ineligible for merit increases like those issued to her white male counterparts, but the evidence does not back her up. To start, records show that Ms. Alexander actually received merit increases each year that Dr. Torbert did. (Doc. 70-5, Exh. 1). And while Dr. Torbert received larger raises—4.00% versus 3.00% in 2016, and 5.00% versus 3.00% in 2017—Dr. Palm testified that she did not rely on written performance evaluations when awarding annual merit increases. (Def. SMF ¶ 37). Ms. Alexander has not introduced or pointed to any evidence to controvert or discredit Dr. Palm's affirmation. In sum, there is no indication in the evidence that annual merit raises were inextricably linked with written performance evaluations such that the omission of such evaluations disentitled Ms. Alexander to any raises or other employment benefits. *See Davis*, 245 F.3d at 1240; *Gonzalez*, 237 F. Supp. 2d at 1357.

In any event, GSU has proffered an unrebutted nondiscriminatory explanation. An employer's burden to articulate a nondiscriminatory reason is a burden of production, not of persuasion—and it is "exceedingly light." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 769–70 (11th Cir. 2005). In this regard, it is

not the Court's role to question the wisdom of an employer's decisions or underlying rationales—after all, "federal courts do not sit as a super-personnel department that reexamines an entity's business decisions." *See Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (*en banc*) (cleaned up). Indeed, an employer may act "for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." *Flowers v. Troup Cnty., Ga., Sch. Dist.*, 803 F.3d 1327, 1338 (11th Cir. 2015) (quotation and citation omitted). So long as the employer articulates a "clear and reasonably specific" non-discriminatory basis for its actions, it has discharged its burden of production. *Chapman*, 229 F.3d at 1034. GSU has done so. Here, a nondiscriminatory reason explains the omission as to Ms. Alexander—namely, given the independent and confidential nature of the Ombudsperson's office, Dr. Palm lacked sufficient knowledge to prepare such evaluations. (Def. SMF ¶ 39). She did, however, meet with Ms. Alexander annually to discuss the office's activity. (Doc. 70-5 ¶ 22).

In light of Dr. Palm's testimony, the burden shifts back to Ms. Alexander to demonstrate "that the reasons given by the employer were not the real reasons for the adverse employment decision." *Chapman*, 229 F.3d at 1024. When—as in this case—the employer's "proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." *Id.* at 1030.

To satisfy her burden, Ms. Alexander must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence." *Furcron v. Mail Ctrs. Plus, LLC*, 843 F.3d 1295, 1313 (11th Cir. 2016) (quotation and citation omitted). She has not done so. Rather, she acknowledges the uniqueness of her prior institutional role and responsibilities as Ombudsperson, and she has not introduced evidence to discredit Dr. Palm's testimony that such uniqueness inhibited the completion of written performance evaluations. Nor has she alerted the Court to any other evidence in the record to plausibly suggest that Dr. Palm's explanation is merely pretextual.[6] Notably, Ms. Alexander was not the only employee under Dr. Palm's supervision who did not receive written performance evaluations. (Def. SMF ¶ 40).

Accordingly, the undersigned finds that Ms. Alexander has failed to establish a prima facie case of discrimination with respect to the lack of written performance evaluations, and further, that she has failed to rebut GSU's nondiscriminatory explanation with sufficient indicia of pretext. GSU is therefore entitled to summary

[6] Although she does not include it in her response to GSU's Statement of Material Facts or her own rebuttal statement, Ms. Alexander attempts to show pretext by pointing to her affidavit testimony that she alerted Dr. Palm to the issue "in 2012/2013 by sending [Dr. Palm] a salary comparison of [ombudspersons] across the country and in the southeast." (Doc. 74-2 ¶ 13). While crediting Ms. Alexander's testimony, the undersigned concludes that this lone act from nearly a decade ago does not sufficiently discredit or undermine GSU's proffered rationale so as to raise a genuine question of fact. *See Furcron,* 843 F.3d at 1313.

judgment on this claim.

ii. Wage Discrimination

Ms. Alexander also claims that GSU unlawfully awarded her lower annual merit raises than her white male colleagues. (Doc. 1 ¶ 14; Doc. 74 at 11). GSU argues that it is entitled to judgment as a matter of law because the claim is administratively barred; moreover, Ms. Alexander has not established the corresponding prima facie case. (Doc. 70-1 at 18–21).

The undersigned finds that Ms. Alexander's Title VII wage-discrimination claim is not administratively barred. A plaintiff must file an administrative charge with the EEOC before filing a Title VII claim in court. 42 U.S.C. § 2000e-5(e)(1), (f)(1); *see Fort Bend Cnty., Tex. v. Davis*, 139 S.Ct. 1843, 1846–51 (2019) (discussing Title VII's non-jurisdictional charge-filing requirement). Further, a "plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Gregory v. Georgia Dept. of Human Resources*, 355 F.3d 1277, 1280 (11th Cir. 2004) (quotation and citation omitted). However, because courts are "extremely reluctant to allow procedural technicalities to bar claims brought under [Title VII]," "the scope of an EEOC complaint should not be strictly interpreted." *Id.* (quotations and citations omitted). The key question is whether a plaintiff's claim is "like or related to, or grew out of, the allegations contained in her EEOC charge." *Id.* Here,

construing Ms. Alexander's EEOC charge broadly, her Title VII wage-discrimination claim "grew out of" the allegations therein. In her EEOC charge, Ms. Alexander alleged that she was denied performance evaluations on the basis of her race and/or sex, and her wage-discrimination claim is premised on such denial and the corresponding impact on her annual pay raises. (Doc. 1 at 12). That will do. *See Gregory*, 355 F.3d at 1280.

Nevertheless, because Ms. Alexander has not identified a suitable comparator, she has not established a prima facie case of wage discrimination. *See Lewis*, 918 F.3d at 1227–29. To explain why, there is a wrinkle in Ms. Alexander's claim that must be ironed out. According to Ms. Alexander, "the basis of her wage disparity claim is the lack of performance evaluations that she did not receive." (Doc. 74 at 11). That means that her wage-discrimination claim—presently under consideration—threatens to collapse into her claim premised upon the denial of performance evaluations—addressed immediately above. Insofar as that threat is carried out and the two claims are in fact coterminous, the discussion above is controlling for the reasons stated, and Ms. Alexander's claim fails.

Insofar as Ms. Alexander means to assert a standalone claim for wage discrimination, however, she must separately identify another GSU employee who was similarly situated in all material respects but awarded larger annual merit raises. *See Lewis*, 918 F.3d at 1220–21. She has failed to do so. She names two white male

comparators—Dr. Torbert and Mr. Hill, in their respective capacities as Assistant Provost—but neither fits the requisite mold. To be sure, Dr. Torbert and Mr. Hill are outside of Ms. Alexander's protected classes and each was given larger annual merit raises than she received in her position as Ombudsperson. But the meaningful similarities between the two positions at issue—Assistant Provost versus Ombudsperson—seem to begin and end with their direct supervision by the GSU Provost.

In terms of skills and responsibilities, the positions at issue are very different. To illustrate, undisputed evidence shows that the GSU Assistant Provost manages financial and business affairs for the Provost's office, which itself is responsible for the academic operation of the entire university. That includes budget oversight for the Provost's office as well as each of the many colleges in the university system. (Def. SMF ¶ 50). By contrast, the Ombudsperson's office is charged with providing informal dispute resolution services to certain university stakeholders. The office has no large-scale financial or business planning and management role. (*Id.* ¶¶ 3, 51). So, one position plans and manages university-wide business and financial affairs; the other facilitates informal conflict resolution between individuals. Each would appear to serve very important university functions—they are further similar in that respect—but there is very little kinship between the actual skill, effort, and responsibility required to discharge those functions. *See Lewis*, 918 F.3d at 1227–

29. In short, the respective positions are decidedly not so similar in an objective sense that they "cannot reasonably be distinguished." *Id.* at 1228 (quotation and citation omitted). Ms. Alexander herself acknowledged as much. (Def. SMF ¶ 47) ("There's no one at [GSU] who had similar job duties to me except for the people who reported directly to me."). Further, she has identified no evidence to suggest that, notwithstanding the significant variance in their respective work duties, her performance as Ombudsperson was materially equivalent to that of Dr. Torbert and Mr. Hill as Assistant Provost so as to merit equivalent annual raises.

Therefore, the undersigned concludes that GSU is entitled to summary judgment as to this claim.

iii. Failure to Promote

Ms. Alexander next claims that GSU unlawfully refused to promote her. (Doc. 1 ¶¶ 12, 14). As noted at the outset, she abandoned this claim by failing to brief it. *See generally* (Doc. 74). Regardless, the claim fails. As part of her prima-facie burden, a plaintiff alleging discriminatory failure to promote generally must show that she in fact applied for a promotion. *See Denney v. City of Albany*, 247 F.3d 1172, 1183 (11th Cir. 2001); *accord Giles v. BellSouth Telecomms., Inc.*, 542 F. App'x 756, 760–61 (11th Cir. 2013) ("Generally, a plaintiff cannot claim an employer discriminatorily failed to give a promotion when the employee never applied for the position."). That is not the case here. There is no evidence that Ms. Alexander—who

was the head of her own office—sought or applied for any other position at GSU, or that she was inhibited or deterred from doing so. For that reason, GSU is entitled to summary judgment on this claim.

iv. Termination

Ms. Alexander also abandoned her discriminatory termination claim, but this claim too fails on the merits. To start, Ms. Alexander has not made out a prima facie case because the only comparators she has identified to the Court—namely, Dr. Torbert and Mr. Hill, whom she referenced in connection with her wage-discrimination claim—are, for reasons already stated above, not "similarly situated in all material respects." *See Lewis*, 918 F.3d at 1227–29. Further, GSU has submitted evidence showing that Ms. Alexander was terminated because she violated GSU and BOR ethics and conflict-of-interest policies when she failed to fully disclose the nature of her personal relationship with Ms. Phields, whom she hired several times to perform work on behalf of the Ombudsperson's office. (Def. SMF ¶¶ 27–28). And Ms. Alexander has done nothing to discredit or undermine the legitimacy of that decision, which was made by consensus after an audit investigation. (*Id.* ¶¶ 24–26). Accordingly, GSU is entitled to summary judgment on this claim.

v. Hostile Work Environment

In her final Title VII claim, Ms. Alexander maintains that GSU is responsible

for an allegedly hostile work environment created by her subordinate, Mr. Vermillion. (Doc. 1 ¶ 12; Doc. 74 at 13–14). GSU argues that this claim is administratively barred and, moreover, that it lacks merit. (Doc. 70-1 at 20–23).

Pretermitting the question of administrative exhaustion, the undersigned finds that Ms. Alexander has not adduced sufficient evidence to support her claim. An employer is responsible for a hostile work environment, and therefore violates Title VII, when "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment." *Fernandez v. Trees, Inc.*, 961 F.3d 1148, 1152 (11th Cir. 2020) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). A plaintiff makes out a prima facie case for a hostile-work-environment claim when she establishes that: (1) she belonged to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on a protected characteristic; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of his employment and create an abusive working environment; and (5) a basis exists for holding the employer liable. *See id.* at 1153.

Importantly, it is a "bedrock principle that not all objectionable conduct or language amounts to discrimination under Title VII." *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 809 (11th Cir. 2010) (*en banc*). To be actionable, the complained of behavior must result in "an environment that a reasonable person

would find hostile or abusive and an environment that the victim subjectively perceives to be abusive." *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1276 (11th Cir. 2002) (cleaned up). In determining whether the conduct was objectively severe, a reviewing court will consider (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance. *See id.*

The alleged harassment in this case was not sufficiently severe or pervasive enough to constitute a hostile work environment, nor is there any indication that Mr. Vermillion's actions were motivated by Ms. Alexander's race or sex. The Supreme Court has noted that teasing, offhand comments, and isolated incidents do not constitute discriminatory changes in the terms and conditions of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). In other words, the "standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a general civility code." *Id.* (quotation and citation omitted).

Here, Ms. Alexander complains of just three isolated incidents involving a subordinate employee, all of which took place within a short window after the subordinate was placed on a performance improvement plan. Tensions between the two were, no doubt, pitched at that time. The incidents involved shouting, finger pointing, and accusations of misconduct directed at Ms. Alexander—conduct which,

to be sure, Ms. Alexander may have subjectively perceived as hostile. However, she was never physically threatened, and there is no indication that the incidents interfered with Ms. Alexander's job performance. Further, there is no hint in the record that Mr. Vermillion's conduct, coarse as it may have been, was motivated by Ms. Alexander's race or sex. To the contrary, Ms. Alexander herself suggested that Mr. Vermillion's conduct was prompted by the performance improvement plan she issued shortly beforehand. *See* (Doc. 1 at 20; Pl. Dep. at 81–83, 102). The evidence thus shows no more than a "personal feud" born of raw sentiments, which is not enough to sustain a hostile work environment claim. *See McCollum v. Bolger*, 794 F.2d 602, 610 (11th Cir. 1986); *Faragher*, 524 U.S. at 788.

Accordingly, GSU is also entitled to summary judgment on this claim.

B. EPA Claim [7]

As already described above, Ms. Alexander insists that she received lower annual raises than her equivalent male counterparts, which also serves as the basis for her EPA claim. (Doc. 1 ¶¶ 1, 14; Doc. 74 at 8–10). In its motion for summary judgment, GSU again argues that Ms. Alexander's EPA claim fails because she

[7] GSU points out that the EPA's limitations period delimits the range of conduct covered by Ms. Alexander's claim. (Doc. 70-1 at 17–18); *see* 29 U.S.C. § 255(a) (providing that an EPA claim is "forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued . . . ."). As explained, regardless of the limitations period, Ms. Alexander's EPA claim is meritless.

cannot make out a prima facie case—specifically, due to a lack of suitable male comparators. Moreover, GSU contends that evidence shows the pay disparity at issue was based on job function rather than sex, and that Ms. Alexander has presented no counter-evidence showing otherwise. (Doc. 70 at 12–17).

The EPA generally prohibits employers from paying different wages to employees on the basis of sex. 29 U.S.C. § 206(d)(1). To establish a prima facie case of discrimination under this statute, a plaintiff must show that the employer paid employees of opposite sexes different wages for equal work for jobs requiring "equal skill, effort, and responsibility, and which are performed under similar working conditions." *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir.1995) (quotation and citation omitted). The initial burden to demonstrate job likeness is "fairly strict." *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1526 (11th Cir. 1992). Although the jobs compared need not be identical, a plaintiff must demonstrate "that she performed substantially similar work for less pay." *Id.*; *see also Waters v. Turner, Wood & Smith Ins. Agency, Inc.*, 874 F.2d 797, 799 (11th Cir. 1989) ("The standard for determining whether jobs are equal in terms of skill, effort, and responsibility is high."). The focal point of comparison is the "primary duties of each job." *Miranda*, 975 F.2d at 1533.

Ms. Alexander's EPA claim is closely related to her Title VII wage-discrimination claim, and it fails for the same reasons. Those reasons, detailed above,

need not be recounted here. In short, for lack of a suitable comparator, Ms. Alexander cannot make out a prima facie case.[8] In her brief, Ms. Alexander candidly acknowledges that, given the uniqueness of her role as Ombudsperson, the "tricky part" of her EPA claim is to find a suitable male comparator. (Doc. 74 at 9). She correctly identifies the challenge, but fails to meet it.

Accordingly, the undersigned finds that Ms. Alexander has not satisfied the "fairly strict" comparator standard required under the EPA, *Miranda*, 975 F.2d at 1526, and that, as a result, she has failed to make out a prima facie case of EPA discrimination. Summary judgment is appropriate.

C. ADEA Claims

Lastly, Ms. Alexander has asserted claims under the ADEA, alleging that at least some of the alleged misconduct took place on account of her age. (Doc. 1 ¶¶ 1, 13). She was 49 to 57 years old during her employment with GSU. (*Id.* ¶¶ 6, 13).

The ADEA prohibits workplace discrimination against individuals at least 40 years of age. 29 U.S.C. § 623(a)(1). Importantly, however, the United States Supreme Court has held that "the ADEA does not validly abrogate the States'

[8] The standard for establishing comparator "similarity" in Title VII cases is relaxed as compared to the EPA, *see Miranda*, 975 F.2d at 1529 n.15, so given that Ms. Alexander has not met that standard under the former, it follows that she cannot do so under the latter.

sovereign immunity" as recognized under the Eleventh Amendment.[9] *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 92 (2000). In other words, the States—and agencies and instrumentalities thereof—are generally immune to ADEA claims under the aegis of sovereign immunity. *Id.*; *accord Duva v. Bd. of Regents of the Univ. Sys. of Ga.*, 654 F. App'x 451, 453 (11th Cir. 2016) (holding that plaintiff's ADEA claims against the Board of Regents were barred by Eleventh Amendment sovereign immunity).

Here, it is undisputed that (i) GSU is not a separate or distinct legal entity from the BOR, *see Bd. of Regents of the Univ. Sys. of Ga. v. Doe*, 278 Ga. App. 878, 878 (2006) ("Georgia Tech is not a separate or distinct legal entity from the Board [of Regents] and, therefore, cannot . . . be sued in its own capacity."); Ga. Const. art. VIII, § 4, para. I, and further, that (ii) as an instrumentality of the State of Georgia, the BOR itself is not amenable to suit under the ADEA, *see Duva*, 654 F. App'x at 453; Ga. Const. art. I, § 2, para. IX (addressing waiver of sovereign immunity).

Accordingly, even if Ms. Alexander had not abandoned her ADEA claims, the undersigned concludes that the claims are nevertheless disallowed by Eleventh Amendment sovereign immunity. Therefore, GSU is entitled to summary judgment.

[9] The Eleventh Amendment prohibits the "Judicial power of the United States" from reaching "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." U.S. Const. amend. XI.

IV. CONCLUSION

For the reasons stated above, the undersigned **RECOMMENDS** that Defendant Georgia State University's Motion for Summary Judgment (Doc. 70) be **GRANTED**. The Clerk is **DIRECTED** to terminate the reference to the undersigned Magistrate Judge.

IT IS SO **RECOMMENDED** on this 3rd day of June 2021.

REGINA D. CANNON
United States Magistrate Judge