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

DAWN M. CLARK,

Plaintiff,

v.

ALLOY WHEEL REPAIR SPECIALISTS, LLC, and ROB WHEELEY,

Defendants.

CIVIL ACTION NO.
1:18-cv-04746-MLB-RDC

FINAL REPORT AND RECOMMENDATION

This action is before the Court on Defendants Alloy Wheel Repair Specialists, LLC ("AWRS") and Rob Wheeley's Motion for Summary Judgment. (Doc. 87). Plaintiff brings claims of sexual harassment and retaliation against AWRS under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*; a battery claim against Wheeley under Georgia law; and a claim for negligent retention and supervision against AWRS under Georgia law. For the reasons provided in this Report and Recommendation, the undersigned Magistrate Judge **RECOMMENDS** that the Defendants' motion be **GRANTED IN PART** and **DENIED IN PART**.

I. BACKGROUND

A. Procedural History

Clark opened this employment action in October 2018 by filing a complaint against AWRS, Wheeley, and Soundcore Capital Partners, LLC ("Soundcore Capital"). (Doc. 1). After the Defendants moved to dismiss the initial complaint, Clark filed the Amended Complaint, which is the operative pleading before the Court. (Doc. 12). In the amended complaint, Clark alleged that she was hired by AWRS in September 2014 and worked primarily as the Director of Strategic Partnerships, a sales position. (Doc. 12 ¶ 19). Although she generally worked from her home in Augusta, Georgia, Plaintiff frequently traveled to franchise locations in other cities, and she trained and sold products to local car dealerships. (*Id.* ¶¶ 22, 53).

Clark met Wheeley in March 2015, when he was the owner of an AWRS franchise in Baltimore, Maryland. (*Id.* ¶ 23). In late November 2015, Wheeley became the Chief Executive Officer ("CEO") of AWRS after Soundcore Capital purchased it. (*Id.* ¶ 27). According to the amended complaint, Wheeley had taken an interest in Clark after they met. (*Id.* ¶ 23). During a corporate trip in December 2015, Plaintiff and Wheeley began a sexual relationship that lasted until 2017. (*Id.* ¶¶ 23, 27–30, 34–51). The amended complaint alleged that Plaintiff was a reluctant

participant in that relationship, as it was largely the product of Wheeley's advances and his role as CEO. (*See id.* ¶¶ 29–30, 34, 40)

In August 2016, Plaintiff informed Ginny Nye, her direct supervisor, about the relationship. (*Id.* ¶¶ 32–33, 45). Nye reported the relationship to Tammey Sigmon, the Vice President of Human Resources ("HR") in November 2017. (*Id.* ¶ 55). In March 2017, Plaintiff injured herself from a fall and took medical leave until May 25, 2017. (*Id.* ¶¶ 53, 56). On May 25, 2017, Plaintiff met with Sigmon and Duane Coad, the Director of Sales and Plaintiff's new supervisor, who informed her that she could no longer work remotely from her home in Augusta. (*Id.* ¶¶ 51, 53, 56). Later that day, Plaintiff called Wheeley and told him that she was aware that the decision was related to the fact that she wanted to end their sexual relationship, which Wheeley confirmed. (*Id.* ¶ 59). On May 27, 2017, Plaintiff and Coad discussed her options, and Coad told her that "he would work with her on her travel, and that everything would be okay." *Id.* Plaintiff then attempted to end her relationship with Wheeley, who refused. *Id.*

In September 2017, Hurricane Irma moved through Georgia, damaging Plaintiff's house, closing AWRS's Norcross office, and forcing Plaintiff to cancel a work trip to Connecticut. (*Id.* ¶¶ 61–63). Coad and Nye blamed Plaintiff for the cancellation. (*Id.* ¶¶ 63–64). In October 2017, Plaintiff received an e-mail from the

HR department about her work travel, and before she could formalize her decision to resign, AWRS terminated her. (*Id.* ¶¶ 70–74, 78–79).

Relevant here, Plaintiff asserted Title VII claims against AWRS and Wheeley for *quid pro quo* sexual harassment (Count I), retaliation (Count II), and hostile work environment (Count III). (*Id.* ¶¶ 80–114). Plaintiff asserted claims under Georgia law against the same Defendants for sexual battery (Count IV), intentional infliction of emotional distress ("IIED") (Count V); retaliation (Count VI); and negligent retention (Count VII). (*Id.* ¶¶ 116–34).

In January 2019, Defendants again moved for dismissal. (Docs. 18, 19). Magistrate Judge Janet King entered a Non-Final Report and Recommendation ("R&R") on the motions to dismiss. (Doc. 26). First, Judge King determined that Plaintiff had failed to show that the Court had personal jurisdiction over Soundcore Capital and recommended that the Court dismiss it from this action. (*Id.* at 7–24, 47). Second, Judge King found that Plaintiff's Title VII claims against Wheeley and the state-law retaliation claim in Count VI were foreclosed as a matter of law. (*Id.* at 28–29).

Judge King then considered the timeliness of Plaintiff's Title VII claims based on the filing of her complaint with the Equal Employment Opportunity Commission and found that all claims based on discrete employment actions occurring before August 6, 2017, were time-barred. (*Id.* at 35). As to Count III, Judge King found

that, because the Amended Complaint failed to allege that Wheeley's harassment continued after May 27, 2017, Plaintiff's general hostile work environment claim was untimely. (*Id.* at 36–37). However, Judge King recommended that Count I be allowed to proceed on the theory that Wheeley's *quid pro quo* sexual harassment resulted in tangible employment actions that occurred after August 6, 2017, including her termination. (*Id.* at 37).

As to Plaintiff's state-law claims, Judge King recommended that the Court dismiss the IIED claim in Count V for failure to state a claim against either Wheeley or AWRS. (*Id.* at 39–43). Judge King also recommended that the Court dismiss the sexual battery claim against AWRS because Plaintiff failed to provide facts showing that AWRS was vicariously liable for Wheeley's alleged conduct. (*Id.* at 43–44). Judge King noted that, assuming the Court adopted her recommendations, Plaintiff's remaining claims were Counts I and II against AWRS, Count IV against Wheeley, and Count VII against AWRS and Wheeley. (*Id.* at 49). The District Court overruled Plaintiff's objections and adopted the R&R as to the findings discussed here.[1] (Doc. 31).

[1] District Judge Brown noted that Judge King had, at one point in the R&R, recommended dismissing Plaintiff's negligent retention claim in Count VII but rejected that recommendation after finding that the R&R's analysis on that count was incomplete. (Doc. 31 at 22–23 & n.3).

In February 2020, this action was reassigned to the undersigned Magistrate Judge and proceeded to discovery on Plaintiff's remaining claims. (*See* Dkt. entry from February 3, 2021; Doc. 44). Discovery concluded in October 2020. (*See* Doc. 80).

Defendants then filed the instant motion for summary judgment, seeking dismissal of all claims against AWRS and Wheeley. (Doc. 87). Plaintiff filed a response in opposition to the motion, and Defendants have replied. (Docs. 90, 92). Accordingly, the undersigned finds that the instant motion is ripe for review.

B. Facts[2]

Clark started working for AWRS in September 2014. (Doc. 87-4 ("Clark Dep.") at 23). Nye, a personal friend who had worked with Clark previously at another company, hired her to fill the role of Director of Strategic Partnerships, a national sales position. (Clark Dep. at 24, 37; Doc. 87-9 ("Nye Dep.") at 32–33).

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[2] Defendants argue that Plaintiff's factual citations and the attached declarations should not be considered because Plaintiff failed to file a separate statement of material facts pursuant to Local Rule 56.1B(2)(b). *See* LR 56.1B(2)(b), NDGa. Although the undersigned will not exclude Plaintiff's evidence from consideration, the facts here have come primarily from Defendants' statement, Plaintiff's response, and the uncontroverted record evidence. Moreover, the undersigned has not scoured the record for evidence that might support Plaintiff's claims. *See BFI Waste Sys. v. DeKalb Co.*, 303 F.Supp.2d 1335, 1342 n.5 (N.D. Ga. 2004) ("[I]t is not the Court's duty to comb the record to attempt to find reasons to deny a motion for summary judgment." (citation omitted))*; see also Tomasini v. Mt. Sinai Med. Ctr. of Fla., Inc.*, 315 F.Supp.2d 1252, 1260 n.11 (S.D. Fla. 2004) (stating that the court is not obligated to "scour the record" to determine whether triable issues of fact exist).

Nye recalled that she had a "very high opinion of [Clark's] skill set and of her abilities" because Clark had been the top national salesperson at their previous company for multiple years. (Nye Dep. at 35).

The stated goals for Clark's new job were to develop a relationship with other companies who would eventually use AWRS to process claims for vehicle wheel repair and replacement. (Nye Dep. Exs. 1 & 2, Doc. 87-9 at 203–05). Clark's starting salary was $65,000 per year, supplemented by sales commissions and a bonus. (Clark Dep. at 44–45). The position required extensive travel, and when she was not traveling, Clark worked primarily from her home near Augusta, Georgia. (*Id.* at 16–17, 40, 54; Nye Depo. at 38–39; *see* Clark Dep. Ex. 5, Doc. 87-4 at 279). Clark and Dan Beck, another sales employee, reported directly to Nye at the beginning of Clark's employment. (Clark Dep. at 38).

Although there were some early disputes with Nye about the amount of travel and the level of industry-related training she needed, Clark generally had a good working relationship with Nye in 2014 and 2015. (Clark Dep. at 58–61). However, both Clark and Nye acknowledged that Clark's roles and responsibilities seemingly changed "all the time." (Nye Dep. at 42–43; *see* Clark Dep. at 59). Although Clark was hired to handle national accounts, she apparently spent much of her time "in the field" selling to local accounts, such as franchisees and car dealerships. (Nye Dep. at 44–45; *see* Clark Dep. at 59)

In March 2015, Clark met Rob Wheeley for the first time at a work convention in Atlanta.[3] (Clark Dep. at 66). Wheeley attended as the owner of an AWRS franchise in Baltimore, Maryland. (*Id.* at 66). According to Clark, the two flirted, hugged, and possibly kissed during that trip, and Clark found Wheeley charming. (*Id.* at 66; Doc. 90-1 ("Clark Decl.") ¶¶ 6–8). According to Clark, Wheeley repeatedly sent her text messages and called her after the convention, which she mostly ignored. (Clark Decl. ¶ 12). At some point though, these initial flirtations "fizzled out." (Clark Dep. at 72–73).

In late 2015, Soundcore Capital, a private equity firm, purchased AWRS from the prior owner. (Doc. 87-6 ("Sigmon Dep.") at 25). Soon after, Wheeley became CEO of AWRS. (Clark Dep. at 62; Doc. 87-5 ("Wheeley Dep.") at 12). Clark had a negative reaction to the news because she had previously ignored his advances. (Clark Dep. at 74). However, on December 17, 2015, she met with Wheeley again in person in Atlanta, which is when their relationship became intimate.[4] (*Id.* at 74,

[3] The undersigned notes that AWRS's corporate office is in Norcross, Georgia, but following the parties' lead, uses Atlanta here.

[4] Whether Clark and Wheeley had an affair at all is a hotly disputed topic in this case. However, because the parties' testimonies are inconsistent with one another, the undersigned relies primarily on Clark's version of events without drawing conclusions about either party's credibility. *See Miller v. Harget*, 458 F.3d 1251, 1256 (11th Cir. 2006) ("Even if the district court believes that the evidence presented by one side is of doubtful veracity, it is not proper to grant summary judgment on the basis of credibility choices." (citations omitted)); *Skelly v. Okaloosa Cnty. Bd. of Cnty. Comm'rs*, 415 F. App'x 153, 155 (11th Cir. 2011) (stating that,

87–88). From that date until January 2017, Clark and Wheeley met somewhere between seven and twelve times to continue their affair—mostly during business trips. (*See id.* at 87–91, 102–07). However, after Clark met Wheeley's wife in Baltimore in March 2016, she started to question why she was having an affair in the first place. (*Id.* at 107). Clark testified that, even though she was a "willing participant" in these encounters, she feared for her job if the affair ever became public or if she rejected Wheeley. (*Id.* at 88–89, 90, 103–04; Clark Decl. ¶¶ 18, 23). Then, sometime in May 2016, Clark first expressed hesitancy about the relationship to Wheeley, stating in some form that they "needed to chill" because it was putting pressure on her. (Clark Dep. at 92–94). According to Clark, Wheeley did not try to convince her or pressure her to continue the relationship during this conversation, and "he understood." (*Id.* at 93). Apparently, Clark did not broach the subject again, but the relationship somehow ended in January 2017.[5] (*Id.* at 109–10).

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where the opposing parties' testimonies are inconsistent at summary judgment and the non-moving party's testimony is not inherently fantastic or internally inconsistent, the court must accept the non-moving party's version of events).

[5] The circumstances of how the relationship ended is not entirely clear from Clark's testimony. She stated in her declaration that the two met at a company management convention in early January 2017, but when she saw him on a different trip later that month, Wheeley did not make any advances toward her. (Clark Decl. ¶¶ 42–43). She also testified that there was no explicit "breakup" conversation, text, or e-mail. (Clark Dep. 110–11).

Around this time, Clark and Nye started to experience some tension in their work relationship, and Nye noticed that Clark "became a difficult employee to work with." (Nye Dep. at 66–67). Nye particularly had problems with Clark's communicating information about her sales activities. (*Id.* at 63). Nye noticed that, in 2016, Clark started to act "strange, defensive, short, argumentative, and very serious," where before she had been "funny and lighthearted." (Doc. 90-3 ("Nye Decl.") ¶ 6; *see* Nye Dep. Ex. 4, Doc. 87-9 at 207). For her part, Clark was frustrated with Nye because the directives coming from AWRS management seemed to change from day to day. (Clark Dep. at 63–64). Clark also complained about the fact that she was not doing the job that she was hired for, which was developing national accounts that would have affected her sales commissions. (Nye Dep. at 45).

Later in the summer of 2016, Clark told Nye, who was still her supervisor, about her affair with Wheeley. (Clark. Dep. at 67; Nye Dep. at 67). According to Clark, she "broke down to [Nye] because there was so much tension on [her] being . . . in the Atlanta market." (Clark Dep. at 67–68). She also told Nye that she did not want to have to see Wheeley while she was in Atlanta because, if she came to Atlanta, Wheeley would pursue her. (Nye Dep. at 68; Nye Decl. ¶ 6). When Nye asked Clark why she had the affair, Clark responded that Wheeley made her feel good and she did not want to lose her job. (Nye Dep. at 73–74). Nye was upset by the news because she knew that the affair placed her in a bad position as Clark's

supervisor and Wheeley's subordinate. (*Id.* at 69–71). However, Clark insisted that Nye not tell HR about it so that she and Nye could "do our jobs and move on." (*Id.* at 70). According to Nye, Wheeley also became more interested in Clark's work, consistently asked Nye in what city Clark would be, and had access to a shared calendar for Clark's travel schedule. (Nye Decl. ¶ 7).

Nye was under the impression at the time that Clark and Wheeley's affair had ended, but at a work conference in Las Vegas in August 2016, she saw Clark and Wheeley holding hands. (Nye Dep. at 77–79; Nye Decl. ¶¶ 8, 9). Later in 2016, Nye and Clark discussed the affair in person, and Clark showed Nye text messages from Wheeley arranging for the two of them to meet. (Nye Dep. at 81–82). When Nye pressed Clark about why the affair was still happening, Clark stated that, even though she wanted to, she never felt like she could "totally end it," as Wheeley was "very persuasive." (*Id.* at 82–83).

Nye also told Sigmon, who was responsible for AWRS's HR policy and receiving complaints, about Clark and Wheeley's relationship.[6] (Sigmon Dep. at 48; Nye Dep. at 74, 87). Nye had previously complained about Clark's poor performance to Sigmon, including that she needed Clark in Atlanta to be productive.

[6] Sigmon was the only HR employee in AWRS's corporate office, and for the most part, she handled all of the company's HR matters in addition to other responsibilities. (Sigmon Dep. at 29–31).

(Sigmon Dep. at 48–49; Nye Dep. at 75). Nye added that Clark was refusing to come to Atlanta because of Wheeley. (Sigmon Dep. at 49).

Later that week, Sigmon reported the affair to Wheeley's superior at Soundcore Capital and informed him that she would ask Wheeley about the affair. (*Id.* at 51–54). A few days later, Sigmon had a private meeting with Wheeley in his office and told him about her conversation with Nye. (*Id.* at 58–59). Wheeley denied the affair and asked if he needed to hire an attorney. (*Id.* at 59–60). Sigmon stated that she did not know but that she would find out how the company needed to proceed. *Id.* Sigmon then discussed the matter with an outside HR consultant and contacted an attorney, but she never told Clark that she was aware of the affair. (*Id.* at 41, 60–61). Instead, Sigmon urged Nye in a later conversation to convince Clark to tell her directly or to make a formal complaint. (*Id.* at 62). However, because Clark had been calling Sigmon frequently about other issues, Sigmon asked her open-ended questions as an opportunity to come forward, which never happened. (*Id.* at 62–66). Other than these conversations, Sigmon did not conduct any further investigation into the matter. (*Id.* at 66–67).

In November 2016, AWRS hired Duane Coad to work in sales.[7] (Clark Dep. at 117–18). Like Clark, Coad also noted that the company operated with unclear

[7] There is a mixed record over what Coad's job title was and whether Clark's title also changed in 2016. (Clark Dep. at 39–40, 118; Coad Dep. at 13, 37–28). Wheeley terminated Coad in late 2017 or early 2018. (Coad Dep. at 14–15).

directions and goals that seemed to change at will. (Doc. 87-10 ("Coad Dep.") at 33–34, 36–37). Although AWRS's offer was conditioned on Coad moving to Atlanta from Florida, Coad resided in Florida, never intended to move to Atlanta, and instead made trips to AWRS's Atlanta office. (Coad Dep. at 16–17). At the beginning of his employment, Coad also stayed at a corporate apartment with Wheeley near AWRS's Atlanta office. (*Id.* at 43; Wheeley Dep. at 56). According to Nye, she mentioned Clark and Wheeley's relationship to Coad when he joined AWRS. (Nye Dep. at 90).[8] Nye also suspected that Wheeley was aware that she knew about the affair because he became increasingly hostile toward her. (*Id.* at 88–89, 91–94).

Clark began to gain weight during this time, experienced higher blood pressure and depression, and "felt nauseated all the time." (Clark Dep. at 94–95; Clark Decl. ¶ 40; Nye Dep. at 74–75). On November 24, 2016, Clark took medical leave for a surgical procedure. (Clark Dep. at 104). By this time, Clark and Nye's working relationship had effectively deteriorated, and Nye believed that, if Clark continued her pattern of poor behavior at work, she would eventually be fired.[9] (Nye Dep. at 122–31, 137–38).

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[8] Coad testified that Nye never told him about the affair, but he heard rumors of it sometime in the middle of his employment with AWRS. (Coad Dep. at 49–53).

[9] Nye testified that Clark also attained some important achievements at this time, including closing a major account with Hertz. (Nye Dep. at 139–40; Ney Dep.

Clark took time off work again in March 2017 after a fall at work. (Clark Dep. at 120). Because Clark was unable to travel while she was injured, Sigmon gave her the option of either taking unpaid medical leave or filing a workman's compensation claim. (*Id.* at 120–21; Clark Dep. Ex 9, Doc. 87-4 at 328–31). Although Clark insisted that she could work from her home in Augusta, Sigmon and Nye instructed her not to perform any work until she could resume full duty. (Clark Dep. at 122).

While Clark was on leave, Coad changed roles and handled all national account sales for AWRS. (*Id.* at 123; Clark Dep. Ex. 9, Doc. 87-4 at 329). Wheeley transitioned Nye to managing the Claims Division, which she considered a demotion. (Nye Dep. at 56–57). Nye and Sigmon attributed the changes to be, at least in part, because Nye did not manage Clark correctly. (Clark Dep. at 127; Sigmon Dep. at 91–92, 101–02). From that point onward though, Clark reported to Coad as her direct supervisor. (Clark Dep. at 123–24, 134; Nye Dep. at 57). From the start, Coad and Clark had a volatile working relationship, (Clark Dep. at 135–37), and according to Coad's testimony, he was not a good fit for the company, (Coad Dep. at 14–15).

Ex. 27, Doc. 87-9 at 268–69). However, Nye stated that Clark's performance never "dramatically improve[d]." (Nye Dep. at 109).

During this period, Clark sent numerous text messages to Wheeley, stating that she was sorry that she got hurt, that she hoped that Nye's demotion was not her fault, and that she was working on her sales accounts. (Clark Dep. Ex. 13, Doc. 87-4 at 338–47). Wheeley assured her that she was a valued employee, that she should focus on her health, and that she was not the source of Nye's changed role. *Id.*

Nye also sent a review of Clark's performance for the first quarter of 2017 to Sigmon and Coad via e-mail, detailing her amount of travel and her sales work on national accounts. (Clark Dep. Ex. 10, Doc. 87-4 at 333–34). Nye recommended that Clark be required to book travel to specific markets three weeks in advance, to change her compensation plan to provide commissions for closed business, to set a specific revenue quota for Clark once she returned to work, and to require her to be in the Atlanta office to oversee sales reporting on national accounts. (*Id.* at 334).

Clark returned to work on or around May 23, 2017. (*See* Clark Dep. Ex. 11, Doc. 87-4 at 335). On May 30, 2017, Coad e-mailed Clark stating that "[i]t would be in her best interest to be in [Atlanta] today," which Clark took as a threat. (Clark Dep. Ex. 12, Doc. 87-4 at 336–37). Clark sent text messages to Wheeley stating that Coad had disrespected her and asking Wheeley to "get [Coad] off [her] ass" because she could "only take so much." (*Id.* at 347–49). She also threatened, at one point, to turn in her company-owned belongings and hire a lawyer, but stated that, despite

Coad, her sales numbers were good and she "believe[d] in" Wheeley "from day one." (*Id.* at 352–53).

Clark eventually reported to Atlanta on May 31, 2017, for a meeting with Sigmon and Coad. (Clark Dep. at 145–46). At that meeting, Coad expressed concerns about her job performance, that Clark was not working full days from her home in Augusta, and that she may have been drinking on company time. (*Id.* at 146–48). Coad gave Clark three options: (1) she could move to Atlanta, (2) she could report directly to the Atlanta office any time when was not traveling, or (3) she could receive extra pay for three-to-four months of work while they trained a replacement for her job. (*Id.* at 148–49). Clark did not provide an answer that day and instead went to Nye to discuss her options. (*Id.* at 150–52).

Clark also called Wheeley and told him that she believed that Coad's ultimatum was part of a strategy to get rid of her because of the affair. (*Id.* at 152–53; *see* Clark Dep. Ex. 13, Doc. 87-4 at 353–54). Over the phone, Wheeley tried to calm Clark down, told her that he knew nothing about Coad's ultimatum, and hung up to call Coad. (Clark Dep. at 154–55). Wheeley assured her that she and Coad could work out an agreement because the company needed her. (*Id.* at 155; Clark Dep. Ex. 13, Doc. 87-4 at 356). Wheeley also came to the lobby of Clark's Atlanta hotel to tell her the same, but Wheeley made no attempt to engage her physically. (Clark Dep. at 158–59).

Clark and Wheeley continued to exchange messages over the following days, where she said that she and Coad had agreed to "give it until the end of the year and see where we are at." (Clark Dep. Ex. 13, Doc. 87-4 at 357–61). Wheeley again assured her that she could salvage her working relationship with Coad. (*Id.* at 361). However, Clark's problems with Coad continued, as she texted Wheeley on June 6, 2017, that Coad was "not it" and she believed he had been interviewing her replacement. (*Id.* at 362–63). She also believed that Coad was telling Wheeley lies about her and the company's sales while Wheeley and Coad shared the company apartment. (*Id.* at 367–69). Wheeley told Clark that he could not fire Coad merely because Clark did not like him and that the two of them were responsible for building a sales team. (*Id.* at 378–79). Over the following weeks, Clark and Wheeley continued to exchange messages about Coad, her sales activity, and the stress she experienced. (*Id.* at 379–89).

On September 11, 2017, a hurricane came through Georgia, damaging Clark's home in Augusta and closing AWRS's Atlanta office. (Clark Dep. at 179–80, 1290–91; Clark Dep. Ex. 13, Doc. 87-4 at 394–95). Coad had asked Clark to make a business trip to Connecticut to train a sales representative. (Clark Dep. at 180–81). However, Clark delayed booking a flight because she knew that the Augusta airport would close for inclement weather. *Id.* Although she eventually purchased a ticket, she cancelled it, and when she told Coad, he "freaked out." (*Id.* at 182). That night,

Clark sent messages to Wheeley explaining that her house had no power or water. (Clark Dep. Ex. 13, Doc. 87-4 at 395–96). Clark apologized the next day, explained the damage that her home had sustained, and said that she was upset because she had been shown "no empathy" when she could not travel. (*Id.* at 396–401). Wheeley eventually replied that he would be in Atlanta the following day if she needed to talk. (*Id.* at 401).

On September 13, 2017, Coad sent an e-mail to Clark stating that Clark had never made any plans to get to Connecticut and that he was going to write her up for not providing any flight information to HR or himself. (Clark Dep. Ex. 14, Doc. 87-4 at 403–04). Clark responded with information about flights that had been cancelled throughout Georgia, and Coad replied that she still had not provided any proof that she had ever booked a flight or made any effort to travel to Connecticut after the hurricane had passed. (*Id.* at 402–03).

Sometime in September 2017, AWRS terminated Nye. (Nye Decl. ¶ 13). Nye immediately hired an attorney, who sent a demand letter to AWRS disclosing Clark and Wheeley's affair.[10] (Nye Dep. at 191–92).

On October 9, 2017, Coad sent an e-mail to Clark stating that she was supposed to be in South Florida that week and asking where she was. (Clark Dep.

[10] Nye's termination is the subject of parallel litigation in this district. *See Nye v. Allow Wheel Repair Specialists*, No. 1:18-cv-05622-JPB-JKL.

Ex. 17, Doc. 87-4 at 409). Apparently, Clark had not gone to Florida that week, and Coad stated that she could not decide to change her plans without discussing it with him. (Clark Dep. Ex. 18, Doc. 87-4 at 410). He also instructed her that she could not work from home that week and would need to book a flight for Florida as soon as possible. (*Id.* at 410–411). Coad added that he would also write her up for not following instructions again. (*Id.* at 411).

Clark responded, stating that Coad had never brought up a trip to South Florida and that the trip was her suggestion. (*Id.* at 410). She also complained that she was spending most of her time training sales representatives for Coad, which prevented her from earning her own sales commissions. *Id.* She repeatedly complained that Coad was "harassing [her] about helping [him] with company owned locations" and that she "had to deal with the daily stress/borderline [sic] of ongoing daily harassment." *Id.* She also forwarded Coad's e-mails to Sigmon, stating that she would not sign any disciplinary write-up about the matter. (Clark Dep. Ex. 22, Doc. 87-4 at 417).

The two continued to argue over their responsibilities until Sigmon sent Clark an e-mail on Tuesday, October 10, 2017, detailing her work schedule for the next two weeks. (Clark Dep. Exs. 23, 24, Doc. 87-4 at 418–22). Sigmon instructed Clark to be in the Atlanta office from Wednesday to Friday and in South Florida from Monday to Thursday the following week. (Clark Dep. Ex. 24, Doc. 87-4 at 421).

Clark replied that she had already booked a rental car to attend an auto auction in South Carolina, a project for which she would receive a commission. (Clark Dep. Ex. 25, Doc. 87-4 at 423–24). The following day, Clark and Sigmon continued to trade e-mails, and eventually, Clark sent a reply stating, "Due to the harassment I will not be in the Atlanta office." (Clark Dep. Ex. 26, Doc. 87-4 at 428–31).

Sigmon then explained that she did not know what Clark was referring to when she used the term "harassment" and that, if she had a complaint, the company's employee handbook outlined the reporting process. (*Id.* at 426–27). As for Clark's schedule, Sigmon said that she had provided the schedule as a way to mediate the communication issues between Clark and Coad and that Clark had explicit instructions to report to Atlanta. (*Id.* at 427). After Clark sent an e-mail asking when an employee handbook had been "drafted and sent to the field," Sigmon again told Clark to cancel her other travel plans and asked her if she was refusing to follow the instructions in the provided schedule. (*Id.* at 425–26).

On October 12, 2017, Clark sent a lengthy response to Sigmon that she was "not refusing to do anything" and that she had been "singled out" for working from home, which all her male counterparts (including Coad) were allowed to do. (Clark Dep. Ex. 29, Doc. 87-4 at 447–48). She stated that the company had questioned her honesty, detailed the work she had done attempting to save sales accounts with clients, and reiterated that she would be going to South Carolina as planned. *Id.* She

also stated that the "ongoing non-stop harassment has taken a serious toll" on her, which included a loss of sleep, poor health, and feeling undervalued as an employee.[11] (*Id.* at 448).

Sigmon sent another e-mail to Clark stating that Clark had refused to explain any alleged harassment, that asking her to follow the instructions of her supervisor was not harassment, and that Clark's refusal to report to the Atlanta office for two days was "clear insubordination." (Clark Dep. Ex. 29, Doc. 87-4 at 447–48). She added that AWRS would not reimburse her for her business travel and that, if Clark did not come to the Atlanta office, AWRS would be "forced to consider next steps regarding her employment." (*Id.* at 447).

On the morning of Friday, October 13, 2017, Sigmon sent Clark an e-mail to cancel any travel plans for Florida and that Sigmon would be in touch about "next steps." (Clark Dep. Ex. 30, Doc. 87-4 at 456). The following Monday, Coad continued to question Clark about her plans to come to Atlanta for an in-person meeting. (Clark Dep. Exs. 32, 33, 34, Doc. 87-4 at 456–64). Although Clark

[11] Clark explained in her deposition that the harassment she experienced came primarily from Coad, who would send her text messages and leave her "nasty voice mail[s]." (Clark Dep. at 237). She also felt that she had been harassed about how Coad and Sigmon had treated her following the hurricane in September 2017. (*Id.* at 241–42). Clark stated that, once Sigmon intervened, she felt it was "obvious" that her termination was only a matter of time. (*Id.* at 238–40).

continued to accuse Coad of lying about their prior interactions, she never attended a meeting in Atlanta and never addressed whether she intended to do so. (*See id.*).

On October 25, 2017, Sigmon sent an e-mail to Clark, stating that she had refused to provide any details or basis for her harassment allegations and that she had refused to make any plans for an in-person meeting. (Clark Dep. Ex. 35, Doc. 87-4 at 466). Sigmon stated that, because Clark had refused to perform her basic responsibilities and to follow instructions from management, AWRS assumed that she had abandoned her position and terminated her immediately. *Id.* According to Clark, she intended to resign the same day but received Sigmon's termination e-mail before she submitted her resignation letter. (Clark Dep. at 240–41). The undersigned adds facts below where relevant to the disputed issues.

II. SUMMARY JUDGMENT STANDARD

Under Federal Rule of Civil Procedure 56(a), the 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). A material fact is any fact that "is a legal element of the claim under the applicable substantive law which might affect the outcome of the case." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). A genuine dispute exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When evaluating

the merits of a motion for summary judgment, the court must "view the evidence and all factual inferences raised by it in the light most favorable to the non-moving party, and resolve all reasonable doubts about the facts in favor of the non-moving party." *Comer v. City of Palm Bay, Fla.*, 265 F.3d 1186, 1192 (11th Cir. 2001).

A party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion." *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986). A moving party meets this burden merely by "'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325.

If the moving party provides a basis for summary judgment, the nonmoving party must respond with record evidence showing a genuine dispute, as mere conclusions and unsupported statements by the nonmoving party are insufficient. *Id.* at 324; *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005). Similarly, "[s]peculation or conjecture cannot create a genuine issue of material fact." *S.E.C. v. Monterosso*, 756 F.3d 1326, 1333 (11th Cir. 2014). "[A] plaintiff's failure to support an essential element of her case renders all other facts immaterial and requires the court to grant summary judgment for the defendant." *Celotex Corp.*, 477 U.S. at 322–23.

III. DISCUSSION

A. Defendants' Objections

In opposition to summary judgment, Plaintiff submits her own affidavits and affidavits from non-parties Burnell Guyton and Virginia Nye. (Docs. 90-1, 90-2, 90-3). Defendants object to portions of these affidavits as inadmissible hearsay, conclusory testimony, and testimony not based on personal knowledge. They also ask the Court to apply the "sham affidavit" rule to portions of the affidavits that conflict with the witnesses' prior deposition testimony.

"The purpose of summary judgment is to separate real, genuine issues from those which are formal or pretended." *Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir. 1986). The Federal Rules of Civil Procedure provide that, at summary judgment, evidence "must be made on personal knowledge" and must "set out facts that would be admissible in evidence" if offered at trial. Fed. R. Civ. P. 56(c)(4); *see Pace v. Capobianco*, 283 F.3d 1275, 1279 (11th Cir. 2002). The affiant must provide a basis for her testimony, and an affidavit or declaration based on anything less than personal knowledge is insufficient. *Duke v. Nationstar Mortg., LLC*, 893 F. Supp. 2d 1238, 1244 (N.D. Ala. 2012). Moreover, "conclusory allegations without specific supporting facts have no probative value." *Leigh v. Warner Bros, Inc.*, 212 F.3d 1210, 1217 (11th Cir. 2000) (quotations omitted).

Because parties may try to escape summary judgment by using affidavits to create disputes on the material facts, the Eleventh Circuit also allows an affidavit to be disregarded as a "sham" if it is inconsistent with earlier deposition testimony in a manner than cannot be explained. *Van T. Junkins & Assoc. v. U.S. Indus.*, 736 F.2d 656, 657 (11th Cir. 1984) ("When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony."). However, courts must carefully apply the sham affidavit rule because "every discrepancy contained in an affidavit does not justify a district court's refusal to give credence to such evidence." *Tippens v. Celotex Corp.*, 805 F.2d 949, 954 (11th Cir. 1986) (alterations, quotation marks, and citations omitted). "A definite distinction must be made between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence." *Id.* at 953. Where an affidavit conflicts with these rules, the Court may disregard the improper testimony at summary judgment and consider the remaining statements. *Haynes v. Twin Cedars Youth & Family Servs.*, No. 5:10-cv-00321 (CAR), 2012 WL 895699, at *5 (M.D. Ga. Mar. 15, 2012) (citing *Lee v. Nat'l Life Assurance Co. of Canada*, 632 F.2d 524, 529 (5th Cir. 1980)); *Brassfield v. Jack McLendon Furniture, Inc.*, 953 F. Supp. 1424, 1430 (M.D. Ala. 1996) ("Only those affidavit statements which are

inherently inconsistent with earlier deposition testimony should be stricken." (quotation marks and citations omitted)).

i. Clark Affidavit

As to Clark's declaration, Defendants object primarily to Clark's statements that (1) she knew Sigmon was trying to fire her to protect Wheeley, (2) Sigmon covered up her complaint to Nye about the affair, (3) Wheeley believed that she was a liability after the affair ended, and (4) Wheeley was involved in "every decision [a]ffecting my employment." (Clark Decl. ¶¶ 46, 61). Plaintiff spends much of her argument focusing on the hearsay rules and does not squarely address Defendants' objections about speculative and conclusory testimony. Although she argues that the declaration "provides opinions based on personal knowledge," she does not cite any factual basis for the generalizations she makes in her affidavit. (*See* Doc. 100 at 4). Moreover, in her deposition, Clark admitted that she did not know anything about who was involved with the termination decision. (*See* Clark Dep. at 260). To the contrary, many of these statements appear to be derived from information she has learned from this litigation and not personal knowledge about the particular events in dispute. (*See* Clark Decl. ¶¶ 50 ("I told Tammey that I was going to quit. In retrospect, that is exactly what Tammey and Duane wanted me to do."), 60 ("Tammy knew WHY I did not want go into the Atlanta office.")). This testimony cannot be considered at summary judgment, and therefore, the undersigned has

excluded these statements for the purposes of Defendants' motion. *See Leigh*, 212 F.3d at 1217; *Duke*, 893 F. Supp. 2d at 1244.

Defendants also object to Clark's statements in her affidavit that she consistently tried to avoid Wheeley and end the affair but Wheeley told her that "the affair would end when he said it was over." (Clark Decl. ¶ 30). The Court agrees that this statement is irreconcilable with Clark's prior deposition where she provided clear testimony that Wheeley never pressured her directly to continue the affair.[12] (*See* Clark Dep. at 93, 110).

Finally, Defendants object to Plaintiff's statement in the last paragraph of her declaration that "Wheeley made sexual overtures in the hotel lobby in May 2017 but I told him it was over." (Clark Decl. ¶ 61). Clark testified in her deposition that Wheeley came to her hotel lobby after Coad and Sigmon had given her an ultimatum in May 2017 about working in the Atlanta office. (Clark Dep. at 158–59). As part of that testimony, counsel asked whether there was any physical intimacy between her and Wheeley on that date and whether Wheeley made "any overture" or "suggestion of any . . . physical intimacy." (*Id.* at 159). Clark responded "No"

[12] In her deposition, Clark stated that she "tried at times in the middle of May [2016] to kind of cut it off with Rob" and that, even though he never explicitly said anything to her, his behavior changed and he was more interested in what she was doing at work. (Clark Dep. at 91–92). She also noted that, after her May 2016 conversation with Wheeley, the two had no further conversations about ending the affair. (*Id.* at 109–11).

multiple times to this line of questioning, and at other points in her deposition, she was clear that, after the relationship ended in January 2017, Wheeley never acted inappropriately with her and she never felt threatened or harassed by him. (*Id.* at 159, 171–72, 179). There is no way to square these portions of Clark's deposition testimony and her affidavit, and where the two conflict, Clark's deposition controls. Therefore, to the extent these statements are relied upon to create a genuine issue of material fact, the Court disregards them, and Defendants' objections to them are **SUSTAINED**.[13]

ii. Nye Affidavit

Defendants object to Nye's statements about who made the decision to terminate Clark and about conversations for which she was not present. (Nye Decl. ¶¶ 9, 11, 15). Plaintiff's response does not address Nye's personal knowledge of

[13] Defendants also object to Paragraphs 31, 37, 38, 51, 52, 55, and 58 on hearsay grounds, but there is no need for the undersigned to parse each individual paragraph for its admissibility. Although the parties spend much of their briefs arguing over the rules of evidence, evidence need not be presented in admissible form at summary judgment, as long as it could be reduced to an admissible form at trial. See *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293–94 (11th Cir. 2012) (addressing consideration of hearsay); *McMillian v. Johnson*, 88 F.3d 1573, 1584 (11th Cir.1996) (same); *Prince Hotel, S.A. v. Blake Marine Grp.*, No. 11–0537–WS–M, 2012 WL 4711897, at *1 n.5 (S.D. Ala. Oct. 2, 2012) (addressing consideration of unauthenticated exhibits). The undersigned has considered the hearsay rules regarding each of the challenged portions of Clark's, Nye's, and Guyton's affidavits, and addresses them below only where relevant.

these incidents or her declaration's consistency with her deposition testimony. (Doc. 100 at 4–5). Nonetheless, the undersigned agrees with the Defendants.

Nye was terminated in September 2017 and stated explicitly that she was not involved in the termination decision. (Nye Dep. at 22, 64). She also testified that her only basis for this knowledge was her belief that "there's nobody going to be fired in that company unless Rob blesses it." (Nye Dep. at 191). To the extent that Nye attested that, in her experience as a AWRS employee, Wheeley's practice was to approve termination decisions, that testimony is proper. (*See* Nye Decl. ¶ 12 ("I worked with Rob Wheeley for almost three years when he was the CEO at [AWRs], and Rob always had to give the okay to fire someone . . . that didn't report to him.")). However, because there is no independent factual basis provided in the affidavit for Nye's statements about the particular circumstances of Clark's termination, which occurred after Nye left AWRS, the undersigned disregards that portion of the affidavit. Accordingly, Defendants' objections to Nye's affidavit are **SUSTAINED IN PART** and **OVERRULED IN PART**.

iii. Guyton Affidavit & Nye Demand Letter

In opposition to summary judgment, Plaintiff submits the declaration of Burnell Guyton, a former employee at AWRS who reported to Wheeley in 2017, (Doc. 90-2 ("Guyton Decl.")), and a draft copy of the demand letter that Nye's attorney sent to AWRS in September 2017, (Doc. 90-3 at 13–18). As to the

declaration of Burnell Guyton, Defendants object to his testimony that "Wheeley made the decision to terminate Plaintiff" as speculative and contradictory to his deposition testimony. (Doc. 93 at 5, 7–8 (citing Guyton Decl. ¶¶ 7, 8)). They also ask the Court to disregard a draft of the demand letter from Nye's attorney on hearsay and authentication grounds. (*See* Doc. 90-3 at 13–18).

First, Defendants argue that the Court should not consider Guyton's testimony that "Wheeley made the decision to terminate Plaintiff," but Guyton made no such statement in his affidavit. (Doc. 93 at 5; *see* Guyton Decl. ¶¶ 7, 8). Instead, Guyton merely recounts his recollection of Clark, Wheeley, and Coad, and testifies to overheard conversations between Coad and Wheeley about Clark prior to her termination. (Guyton Decl. ¶ 7). He also states that he overheard Wheeley and Coad discussing the demand letter from Nye's attorney before Clark's termination. (*Id.* ¶ 8). Guyton plainly provides this testimony based on the fact that he worked at AWRS at the time and "in close proximity to Coad." (*Id.* ¶ 8). Accordingly, the testimony is within Guyton's personal knowledge and cannot be excluded on that basis.

Turning to Defendants' objection based on Guyton's prior deposition testimony, Guyton testified that, in October 2017, he overheard Wheeley and Coad discussing Clark. According to Guyton, Wheeley stated that he "was going to fire her," and Coad responded, "You should get rid of the bitch." (Guyton Dep. at 91–

92). He stated that he only heard the two discussing Clark on one occasion, and otherwise, Coad was one who made disparaging comments about Clark. (*Id.* at 67–68). In his declaration, though, Guyton said he heard Wheeley and Coad discussing Clark on "numerous occasions" and, at some other point, Wheeley was the one who said that he "was going to get rid of that bitch." (Guyton Decl. ¶ 7). Although there are certainly discrepancies between the two accounts, Guyton's declaration is not a "flat contradiction" of his deposition testimony. *See Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir. 1986). Instead, the general substance of the conversations is consistent, and the inconsistencies relate to the number of conversations and whether Coad or Wheeley made the particular statements. Excluding Guyton's declaration testimony on this basis would be improper, as resolving the inconsistencies in Guyton's testimony is beyond the Court's purview at summary judgment.[14]

The parties also vigorously dispute the admissibility of the demand letter from Nye's attorney and Guyton's testimony that he heard Wheeley and Coad discussing the letter in October 2017. As to Defendants' objection on authentication grounds, Defendants have not provided any reason why the authenticity of Nye's final demand letter could not be established at trial through Nye's testimony. *See Rowell*

[14] In any event, the inconsistent details between the two are not material to the instant motion, discussed below with respect to Clark's Title VII harassment claim.

v. BellSouth Corp., 433 F.3d 794, 800 (11th Cir. 1999) ("On motions for summary judgment, we may consider only that evidence which can be reduced to an admissible form."); *Abbott v. Elwood Staffing Servs., Inc.*, 44 F. Supp. 3d 1125, 1133–35 (N.D. Ala. 2014) (discussing the 2010 amendments to Fed. R. Civ. P. 56 and concluding that the current rule does require authentication at summary judgment).

As to Defendants' issue that the letter is inadmissible hearsay, the Court has not considered the letter for the veracity of its contents. *See United States v. Valdes-Fiallo*, 213 F. App'x 957, 960 (11th Cir. 2007) ("Evidence that is not offered to prove the truth of the matter asserted is not hearsay."). Rather, Plaintiff offers the letter to establish that AWRS—and particularly Wheeley and Sigmon—had knowledge of the potential for litigation over Nye's termination and Clark and Wheeley's affair and motivation to terminate Clark. (*See* Doc. 90 at 10). Regardless, the same evidence is available from Nye's testimony that her attorney sent a demand letter to AWRS within weeks of her termination. (Nye Dep. at 191–92; Nye Decl. ¶ 14). Therefore, the undersigned declines to exclude the demand letter here.

Turning back to Guyton's declaration and Defendants' hearsay objection, Guyton attested that, sometime in early 2017, he "overheard Wheeley and Coad discussing an attorney demand letter Wheeley received from a lawyer representing

Ginny Nye." (Guyton Decl. ¶ 8). Guyton stated that Wheeley was "fuming and again said I will fire [] Clark." *Id.* To the extent Defendants object to this testimony on hearsay grounds, it is admissible as an opposing party's statement. Fed. R. Evid. 801(d)(2)(D). Under Rule 801(d)(2)(D), statements of a company's employees may be admissible if there is evidence showing that the employee had some kind of participation in the employment decision or policy of the employer. *See Kidd v. Mando American Corp.*, 731 F.3d 1196, 1208–09 (11th Cir. 2013) (citing *Rowell*, 433 F.3d at 800–01); *Yates v. Rexton, Inc.*, 267 F.3d 793, 802 (8th Cir. 2001) (stating that, for the purposes of determining whether employees were "agents" under Rule 801(d)(2)(D), the plaintiff only needed to show that they were significantly involved in the challenged decision).

Plaintiff's sexual harassment claim is premised on the theory that Wheeley as the CEO of AWRS was the actual source of her termination. Guyton's testimony, if true, is probative of that issue, as it speaks directly to whether Wheeley made the ultimate decision or influenced Coad's decision. Therefore, the Court cannot exclude Guyton's testimony on hearsay grounds. Accordingly, Defendants' objections to Guyton's affidavit and Nye's demand letter are **OVERRULED**.

B. *Quid Pro Quo* Harassment

Courts recognize two forms of sexual harassment: *quid pro quo* harassment and hostile work environment harassment. *Steele v. Offshore Shipbuilding*, 867 F.2d

1311, 1315 (11th Cir. 1989). Title VII's prohibition against *quid pro quo* harassment is straightforward, in theory. "An employer may not require sexual consideration from an employee as a *quid pro quo* for job benefits." *Henson v. City of Dundee*, 682 F.2d 897, 908 (11th Cir. 1982) (citations omitted).

The *prima facie* elements for *quid pro quo* sexual harassment are (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment was based on sex; and (4) the employee's reaction to the unwelcome behavior caused an adverse change to the terms, conditions, or privileges of employment. *Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1361 (11th Cir. 1994). In this case, only the second and fourth elements—the welcomeness of Wheeley's alleged conduct and whether it caused Plaintiff's termination—are in dispute. Therefore, the undersigned proceeds directly to the question of whether Plaintiff was subject to unwelcome sexual harassment.

i. Welcomeness

As to whether Clark experienced unwelcome harassment, Defendants argue that Clark's deposition testimony shows that her sexual relationship with Wheeley was consensual and that, after the relationship ended, Wheeley did not engage in any offensive conduct and made no unwelcome sexual advances. (Doc. 87-2 at 3–4). In response, Plaintiff argues that Wheeley was the instigator of the relationship and that she submitted to his requests out of fear of losing her job. (Doc. 90 at 3–5). She

also asserts that Wheeley continued to make sexual advances after their last sexual encounter. (*Id.* at 5–6). She argues that, in this case, the conflicting testimony about the affair requires a jury to consider whether Wheeley's alleged conduct was unwelcome. (*Id.* at 6–7).

"The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986) (citation omitted). "[T]he fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII." *Id.* "The correct inquiry is whether the [plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." *Id.*; *see also Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982) ("In order to constitute harassment, this conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive." (citations omitted)). In determining whether conduct was unwelcome, the Court must consider the nature of the alleged harassment and the context in which it occurred under a totality of the circumstances. *Mangrum v. Republic Indus., Inc.*, 260 F. Supp. 2d 1229, 1248 (N.D. Ga. 2003) (citing *Morgan v. Fellini's Pizza, Inc.*, 64 F. Supp. 2d 1304, 1309 (N.D. Ga. 1999)).

Here, Clark's declaration states repeatedly that, during Clark and Wheeley's initial meetings and the sexual relationship itself, Wheeley was the instigator and repeatedly pursued her, despite her hesitancy. (Clark Decl. ¶¶ 6–13, 17–20, 28–35, 39–40, 42; *see* Clark Dep. at 66). According to Clark, she initially rebuffed these advances even though she found him charming, and when Wheeley became the CEO of AWRS, she was "in complete shock" because she had previously ignored him. (Clark Dep. at 66, 74; *see* Clark Decl. ¶¶ 12–15). In December 2015, Clark and Wheeley had their first explicitly sexual encounter, which Clark maintains was a product of Wheeley's new title as CEO and her fear over losing her job. (Clark Decl. ¶¶ 16–19; Clark Dep. at 87–89). According to her deposition, she began to seriously question the relationship in March 2016 after meeting Wheeley's wife. (Clark Dep. at 107). After another encounter in May 2016, Clark told Wheeley, in some form, that the affair was "putting a lot of pressure on [her]" and that they "needed to chill." (Clark Dep. at 92–93). Around the same time, Clark told Nye about the affair and asked Nye to "protect her and not come to Atlanta." (*See* Nye Dep. at 67–70; Nye Decl. ¶ 6).

With this background in mind, there are essentially two ways to read Clark's testimony in this case. On one hand, a fair reading of Clark's deposition testimony and other evidence suggests that she was an equal contributor in the affair, and that the affair itself—rather than Wheeley's unwelcome advances or implicit threats—

placed pressure on her at work. On the other, Clark's deposition testimony and her affidavit suggest that she was driven into the affair because of Wheeley's new role as CEO, his persistence in pursuing her, and her fear of reprisal and shame that might follow if the affair ever became public. Defendants ask the Court to side with the first interpretation of the evidence, citing Clark's deposition testimony showing (1) that the relationship was consensual, (2) that Wheeley never conditioned her employment on the continuance of the affair, and (3) that Wheeley never engaged in any unwelcome conduct after the affair ended. (Doc. 87-2 at 4). However, several facts in this case prevent the undersigned from doing so.

First, the crux of this inquiry is welcomeness, not voluntariness. *See Meritor*, 477 U.S. at 68. Although Clark testified that she was a "willing participant" in each sexual encounter with Wheeley, the fact that the alleged sex was consensual is not dispositive. *See id.* Even on this point, though, Clark's testimony was equivocal. When Clark was asked whether the sex was consensual, she responded, "I guess, yes," and she stated that she believed that she might have been "[e]motionally" coerced into it. (Clark Dep. at 90–91). The same holds for Defendants' argument that Wheeley did not explicitly condition her employment on continuing the affair, as explicit threats are not required. *See Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1312 (11th Cir. 2001) (reaffirming the "longstanding rule" that "a victim need not provide evidence of a direct and express sexual demand to make a claim");

29 C.F.R. § 1601.11 (stating that conduct of a sexual nature constitutes sexual harassment when submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment).

In any event, the main question for the Court is whether Clark's conduct indicated that Wheeley's alleged advances were ever unwelcome. *Meritor*, 477 U.S. at 68. Viewing all reasonable inferences in Clark's favor, her testimony that she repeatedly tried to avoid Wheeley, (Clark Decl. ¶¶ 12–13, 31); asked Nye to protect her from coming to Atlanta where she might see Wheeley, (Clark Decl. ¶ 36; Nye Dep. at 70); and feared that rejecting Wheeley would cost her her job—before and after she told Nye that she wanted the relationship to end, (Clark Decl. ¶ 35–36; Clark Dep. at 91)—all suggest that she found Wheeley's conduct as unwelcome at some point. Even if Clark welcomed the conduct initially, this testimony strongly suggests that Wheeley's conduct may have become unwelcome as the affair progressed. Given this disputed evidence, a reasonable jury could believe Clark's version of events and conclude that Clark believed that Wheeley's alleged sexual advances were unwelcome but Wheeley persisted. *See Otu v. Papa John's USA, Inc.*, 400 F. Supp. 2d 1315, 1326 (N.D. Ga. 2005) (finding that a reasonable jury could find that supervisor's conduct was unwelcome because the plaintiff testified that he was offended by the supervisor's advances, told her to stop on one occasion, and did not want to reject the supervisor outright to protect his job).

As to Wheeley's alleged conduct after the affair ended in January 2017, Defendants cite *Green v. Adm'rs of Tulane Educ. Fund*, 284 F.3d 642 (5th Cir. 2002), *overruled on other grounds*, *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 66 (2006), and *Babcock v. Frank*, 729 F. Supp. 279 (S.D.N.Y. 1990), for the proposition that a plaintiff can show unwelcome harassment "only where following the termination of the consensual relationship the supervisor engages in conduct that is unwelcome." (Doc. 87-2 at 5). However, *Green* and *Babcock* contain no such holding. In *Green*, the Fifth Circuit concluded that the fact that a supervisor started his harassment after a sexual relationship with the plaintiff had ended was sufficient to support a jury inference that he harassed her because she refused to continue the relationship. 284 F.3d at 657. However, concluding that the supervisor's conduct in that case was *sufficient* to support a jury finding of harassment is not the same as concluding that a plaintiff can *only* show a Title VII violation if the unwelcome conduct persisted after the end of an affair.

In *Babcock*, the district court rejected the defendant's argument that the plaintiff's consensual sexual relationship with her supervisor foreclosed her Title VII claim. 729 F. Supp. at 287–88. The court actually concluded that Title VII's protection "ought not be withdrawn merely upon a showing that the victim of harassment had in the past entered into a consensual sexual relationship with the perpetrator." *Id.* at 287. Again, the fact that the *Babcock* court found that the

supervisor had engaged in unwelcome conduct after a consensual affair ended does not equate to a rule that such a finding is the only way for a plaintiff to show unwelcome harassment under Title VII.

Here, Plaintiff's evidence, outlined above and viewed in her favor, supports a reasonable inference that Wheeley's conduct before January 2017 was unwelcome. On this record, Wheeley's conduct after January 2017 does not negate that evidence directly. Accordingly, the undersigned proceeds to the next issue—causation.

ii. Causation

Even if a plaintiff establishes that the she was subject to unwelcome sexual harassment, "[t]here also must be a causal link between the tangible employment action and the sexual harassment." *Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1231 (11th Cir. 2006) (citing *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1312 (11th Cir. 2001)). A plaintiff need not produce direct evidence of causation. *See Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1246 (11th Cir. 1998) ("It is an extraordinary case in which a defendant employer admits it has taken an adverse employment action against a plaintiff employee 'because of' the employee's sex."). Instead, "courts must rely on inferences drawn from the observable facts to determine whether a Title VII violation has occurred." *Id.*

The timing between the alleged harassment and a tangible employment action can give rise to an inference of causation between the two. *Cotton*, 434 F.3d at 1232. The shorter the period between the two events, the stronger the inference that the adverse action was improperly motivated. *Fields v. Atl. Indep. Sch. Sys.*, 916 F. Supp. 2d 1348, 1364 (N.D. Ga. 2013). Without more evidence of causation, the timing must be "very close." *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001). Generally, a temporal proximity within a few weeks can create an inference of causation, but where the gap is longer, more evidence is needed. *See, e.g.*, *Drago v. Jenne*, 453 F.3d 1301, 1308 (11th Cir. 2006) (holding that a three-month period between the filing of an internal complaint and the adverse employment action was insufficient); *Wascura v. City of S. Miami*, 257 F.3d 1238, 1248 (11th Cir. 2001) (holding that a three and one-half month proximity between a protected activity and an adverse employment action is insufficient to create a jury issue on causation).

In addition to timing, the identity of the decisionmakers for an employment decision is highly relevant to causation. Where a plaintiff attempts to draw a causal connection from circumstantial evidence, "the act of sexual harassment itself creates an inference that the harasser harbors a sexually discriminatory animus towards the plaintiff." *See Llampallas*, 163 F.3d at 1246. When the alleged harasser is the decisionmaker for a plaintiff's termination, the court may also draw an inference that the termination was taken because of the plaintiff's sex. *Id.* at 1247.

However, under a "cat's paw" theory of discrimination, the harasser need not be the direct decisionmaker in an employment decision. *See id.* at 1249 (citations omitted). Where the harasser is not a direct decisionmaker in a termination decision, a plaintiff may still survive summary judgment if she shows that the harasser somehow influenced the decision. *See Sparks v. Pilot Fright Carriers, Inc.*, 830 F.2d 1554, 1564–65 (11th Cir. 1987). "In this situation, the plaintiff must establish the requisite causal link by showing that the decisionmaker, without having independently evaluated the plaintiff's situation, acted in accordance with the harasser's wishes in taking the tangible employment action against the plaintiff." *Arnold v. Tuskegee Univ.*, 212 F. App'x 803, 808 (11th Cir. 2006) (citing *Llampallas*, 163 F.3d at 1249).

Defendants make three arguments on this issue. First, Defendants argue that the gap between the end of Clark and Wheeley's alleged affair in January 2017 and Plaintiff's termination in October 2017 is too great to infer any causal link between the two. (Doc. 87-2 at 5–6). Second, they argue that the evidence establishes that Wheeley was not involved in the termination decision. (*Id.* at 6–8). Third, they assert that Clark's poor performance was an intervening cause of her termination. (*Id.* at 8–10).

Plaintiff contends that Guyton's affidavit testimony rebuts all three points because it is direct evidence of Wheeley's involvement in her termination. (Doc. 90

at 9–10). Plaintiff also notes that Nye and Guyton testified that Wheeley was involved in all employee discipline issues and that the evidence shows his involvement in the ultimatum that Clark received from Coad and Nye in May 2016. (*Id.* at 10–11). On the final point, Plaintiff argues that her own poor performance in 2017 was traceable to the alleged harassment. (*Id.* at 11–12).

In reply, Defendants argue that, even if Wheeley was somehow involved in the termination, Sigmon and Coad's independent reasons for her termination severed any causal link. (Doc. 92 at 3–5). Relatedly, they assert that Plaintiff cannot rebut the legitimate reasons for her termination: her insubordination and poor performance.[15] (*Id.* at 6–7).

As a starting point, Plaintiff does not dispute that the period between the end of the alleged affair in January 2017[16] and her termination in October 2017 is too great for the Court to infer causation on timing alone. Therefore, the Court must

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[15] The undersigned notes that the analysis of causation also governs whether Defendants have provided legitimate, non-discriminatory reasons for Plaintiff's termination. The very conduct that Defendants rely upon as an intervening cause is the same conduct that they use to justify Clark's termination. Therefore, if the Court finds that Defendants' reasons for terminating Plaintiff were an intervening cause, then it has also implicitly found that Defendants' legitimate reasons were supported by evidence. However, if the Court finds that Clark's poor performance, insubordination, or some other reason was not an intervening cause, then it has also found that Plaintiff has rebutted those reasons.

[16] As noted above, Plaintiff's statement in her declaration that Wheeley made sexual advances during their meeting in the hotel lobby in May 2017 is not considered for the purposes of summary judgment.

look to the other evidence of causation and briefly recites the material evidence. From March to May 2017, Clark took partially-paid medical leave to recover from a fall at work. (Clark Dep. at 120–22; Clark Dep. Ex 9, Doc. 87-4 at 328–31). When she returned, Coad—her new supervisor—and Sigmon presented her with the ultimatum that she either work from Atlanta full-time whenever she was not traveling or, alternatively, that she receive extra compensation while they readied a replacement. (Clark Dep. at 145–49). Between that meeting and the following day, Coad had a change of heart and decided to work out a compromise with Clark after being overruled by Wheeley. (Coad Dep. at 85). Although they agreed to work together for the remainder of the year, similar problems arose following the hurricane that passed through Georgia in September 2017. (Coad Dep. at 85–86). After several days of disputes about Clark's plans to meet with Sigmon and Coad in Atlanta, Sigmon sent the termination letter to Clark on October 25, 2017. (Clark Dep. Ex. 35, Doc. 87-4 at 466).

Defendants cite to Sigmon's deposition testimony, her declaration, and Wheeley's declaration to assert that the decision was only Sigmon's to make, but the record is not so clear. Coad testified that he "made the decision to terminate [Clark] at one point," but he did not know whether the decision was made by him, Sigmon, or Wheeley. (Coad Dep. at 82, 87). However, Coad testified that Wheeley was consulted about the decision beforehand, as Sigmon and Wheeley had adjoining

offices and the three briefly discussed the matter. (*Id.* at 83). Although Sigmon testified that Wheeley was not involved in the termination decision itself, she kept Wheeley apprised of the situation as CEO. (*See* Sigmon Dep. at 102–06).

The undersigned notes that three issues are particularly material to causation in this case. First, the record shows indisputably that, by the time Clark was terminated, all of the main characters in this case—Clark, Nye, Sigmon, Coad, and Wheeley—either knew about the alleged affair or had heard rumors of its existence. (Sigmon Dep. at 48, 59–60; Nye Dep. at 74, 87; Coad Dep. at 49–53). By 2017, Sigmon had tried repeatedly through indirect means to get Clark to report any alleged sexual harassment about Wheeley and even disclosed her conversation with Nye to Wheeley's superior at Soundcore Capital. (Sigmon Dep. at 51–54, 62–66).

Second, there is a clear inference from the evidence that Wheeley was directly involved in the other decisions affecting her employment. In May 2017, Clark relayed Coad's ultimatum to Wheeley and told him that she believed that the ultimatum was part of a strategy to get rid of her. (Clark Dep. at 152–53; *see* Clark Dep. Ex. 13, Doc. 87-4 at 353–54). Wheeley assured her that she and Coad could come to an agreement, and almost immediately, Coad changed his position because Wheeley told him not to fire Clark. (Clark Dep. at 155; Clark Dep. Ex. 13, Doc. 87-4 at 356; Coad Dep. at 85).

Third, although Defendants point to Sigmon's and Wheeley's statements about Wheeley's level of involvement in Clark's termination decision, a reasonable jury could choose not to believe their account based on the surrounding circumstances. Although the timing between Clark and Wheeley's last intimate encounter in January 2017 is too attenuated to draw any conclusions on causation, Clark's termination and Nye's termination were, at most, a little more than one month apart, and Nye was the only person to whom Clark had disclosed the relationship. Moreover, Guyton testified that he heard Coad and Wheeley discussing how they needed to "fire that bitch" sometime in 2017. (Guyton Dep. at 27–28, 67, 92).

Further, given the complete incompatibility of Wheeley's testimony and Clark's testimony about the alleged affair itself, a jury could readily discredit Wheeley's testimony about how the termination unfolded. (*Compare* Clark Dep. at 88–90, 106–107, *with* Wheeley Dep. at 29–31, 41). A jury could also discredit Sigmon's account because Wheeley reversed the previous ultimatum decision, he was her direct superior, and the allegations about the affair had placed her in a compromised position. Thus, even if Wheeley did not give the order, a reasonable jury could also conclude that he implicitly influenced the decision.

To be sure, Clark's performance deficiencies—especially in 2017—are well-documented. Clark attributed those deficiencies to Wheeley's unwelcome

advances, the stress of affair, and her fear of Wheeley if it ended. In contrast, AWRS attributed her deficiencies only to her poor communication and refusal to follow the instructions to report to Atlanta in October 2017. However, given the evidence before the Court, a reasonable jury could conclude that Sigmon and Coad terminated Clark because of Wheeley's animus toward her and the affair, her performance and personality conflicts notwithstanding. Accordingly, the undersigned **RECOMMENDS** that the Court **DENY** Defendants' motion for summary judgment as to Plaintiff's Title VII harassment claim.

C. Retaliation

Defendants argue that Plaintiff cannot show a genuine issue of material fact related to her Title VII retaliation claim because she did not engage in any protected activity such as making a complaint of harassment, there is no causal link between any protected activity and her termination, and she cannot show that AWRS's non-discriminatory reasons were pretextual. (Doc. 87-2 at 10–20). Title VII prohibits employers from retaliating against employees for reporting or opposing discrimination. 42 U.S.C. § 2000e-3(a); *Clark v. S. Broward Hosp. Dist.*, 601 F. App'x 886, 896 (11th Cir. 2015). A plaintiff establishes a *prima facie* case of retaliation by showing that (1) the plaintiff engaged in "protected activity," (2) the plaintiff suffered a materially adverse action, and (3) there was a causal connection

between the protected activity and the adverse action. *Chapter 7 Trustee v. Gate Gourmet, Inc.*, 683 F.3d 1249, 1258 (11th Cir. 2012).

As to the first element of the *prima facie* case, Defendants argue that (1) Clark's reporting the affair to Nye in May 2016 was not protected activity because she only reported the affair itself, not any discriminatory action, (2) her repeated references to "harassment" in 2017 were directed toward Sigmon and Coad's actions, not Wheeley's sexual conduct, and (3) Clark cannot rely on Nye's demand letter as a form of protected activity. (Doc. 87-2 at 10–14; Doc. 92 at 8–10). In her response, Plaintiff makes two arguable references to the protected-activity element of her retaliation claim. First, she appears to argue that her May 2016 conversation with Nye qualifies as protected activity under Title VII because she was distraught and asked Nye not to tell anyone about her relationship with Wheeley. (Doc. 90 at 12). Second, she references Nye's demand letter but fails to offer any argument about why the demand letter constitutes protected activity on Clark's behalf. (*Id.* at 13).

"The law is well settled in this circuit that a legal claim or argument that has not been briefed is deemed abandoned and that mentioning an issue without providing specific argument in support is not sufficient." *Nzekwe v. Marta*, 2015 WL 12851537, at *6 (N.D. Ga. Aug. 18, 2015) (citing *Dawkins v. Glover*, 308 F. App'x 394, 395 (11th Cir. 2009); *Seay v. United States*, 166 F. App'x 422 (11th

Cir. 2006)); *see also* LR 7.1B, NDGa (stating that a failure to respond to a motion "shall indicate that there is no opposition"). "Rule 7.1B requires not just that a party generally 'respond' to a motion but mandates that a party respond to each portion of a motion. Consequently, a party's failure to respond to any portion or claim in a motion indicates such portion, claim or defense is unopposed." *Kramer v. Gwinett Cnty., Ga.*, 306 F. Supp. 2d 1219, 1221 (N.D. Ga. 2004) (citations omitted). To adequately raise a claim or issue, a party "must plainly and prominently so indicate," for instance by "devot[ing] a discrete section of [her] argument to" the issue. *United States v. Jernigan*, 341 F.3d 1273, 1283 n. 8 (11th Cir. 2003); *see also Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir.2004) (stating that a party adequately raises an issue when the party has "specifically and clearly identified it"). Passing references to an issue without further development are insufficient. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681–82 (11th Cir. 2014).

Here, Plaintiff has failed to offer any substantive argument on the issue of protected activity, and her two passing references to the May 2016 conversation and Nye's demand letter are not sufficient responses to Defendants' arguments on this claim. Because Defendants raised the element of protected activity by devoting a section their argument to the issue, citing to applicable law, and referring the Court to specific portions of the factual record in support, Plaintiff's responsibility was to

rebut that argument in kind. *See Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986) (stating that the nonmoving party must respond with record evidence, as conclusory or unsupported statements are not sufficient). However, other than her two passing references, Plaintiff provides no explanation as to why those incidents are protected activity, and she cites neither legal authority nor supporting portions of the factual record that support the proposition that she engaged in protected activity. (*See* Doc. 90 at 12–13); *see Powrzanas v. Jones Util. & Cont. Co., Inc.*, No. 2:17-cv-00975-GMB, 2019 WL 4305612, at *8 (N.D. Ala. Sept. 11, 2019) ("[P]assing references are not equivalent to argument." (citation omitted)). Accordingly, the undersigned deems the issue waived for the purposes of summary judgment. *See* LR 7.1B, NDGa.

Regardless, the undersigned addresses this element briefly. Informal complaints of discrimination to an employee's superior can qualify as protected activity under Title VII. *Rollins v. State of Fla. Dep't of Law Enforcement*, 868 F.2d 397, 400 (11th Cir. 1989). In general, a complaint about an employment practice constitutes protected opposition only if the individual explicitly or implicitly communicates a belief that the practice constitutes unlawful employment discrimination. *Hamilton v. Sheridan Healthcorp Inc.* 602 F. App'x 485, 489 (11th Cir. 2015). For an employee complaint to be considered protected activity, the subject of the employee's complaint of discrimination need not, in fact, violate Title

VII. Rather, the employee merely needs to have a reasonable belief that the employer has engaged in unlawful employment practices. *Anderson v. Dunbar Armored, Inc.*, 678 F. Supp. 2d 1280, 1322-23 (N.D. Ga. 2009). At the very least though, the employee must communicate her belief that discrimination is occurring. It is not enough for the employee merely to complain about a certain policy or certain behavior of co-workers and rely on the employer to infer that discrimination has occurred. *Id.* (citation omitted). As the Eleventh Circuit has stated, "a plaintiff's burden under this standard has both a subjective and an objective component. A plaintiff must not only show that [s]he subjectively (that is, in good faith) believed that [her] employer was engaged in unlawful employment practices, but also that [her] belief was objectively reasonable in light of the facts and record presented." *Little v. United Techs.*, 103 F.3d 956, 960 (11th Cir. 1997).

First, the May 2016 conversation with Nye was not protected activity under Title VII. The undisputed account of Clark and Nye's conversation does not provide any basis for the Court to infer that Clark was complaining of discrimination or harassment, rather than merely disclosing the affair itself. (*See* Nye Dep. at 67–70; Clark Dep. at 67–68, 96–98). According to Nye, Clark stated that she did not want to get Wheeley in trouble and did not want Nye to tell HR about it, but there is no evidence that she described the affair as harassment, discrimination, or any other improper conduct from Wheeley. (Nye Dep. at 69–72; Clark Dep. at 94–96). Thus,

the only inference from Clark's and Nye's testimonies is that Clark was disclosing the relationship to a friend. Under these circumstances, the undersigned cannot find that Clark was making a complaint of discrimination—however informal—to Nye.

Second, reviewing Clark's repeated references to harassment in 2017, the record is clear that Clark used the term generally in response to Sigmon and Coad's demands, not Wheeley's sexual conduct. Critically, Sigmon repeatedly asked Clark to explain her use of the term harassment in conversations leading up to her termination, but she never did. (*See* Clark Dep. Ex. 25, Doc. 87-4 at 423–24). In her deposition, Clark explained that these references to "harassing" conduct were directed toward what she believed to be Coad and Sigmon's unreasonable requests, not sexual harassment. (Clark Dep. at 198–200, 225–29, 235–39).

Finally, as to the demand letter, the undersigned agrees with Defendants that Plaintiff cannot rely on the letter to support a claim of third-party retaliation because she pleaded no such claim in her Amended Complaint. Plaintiff made no references to a demand letter in the Amended Complaint, although she did state that "the Defendants may have engaged in other discriminatory practices against her that are not yet fully known." (Doc. 12 ¶ 102). In the event that those practices were revealed in discovery, Plaintiff represented that she would "seek leave of Court to amend this Complaint in that regard." *Id.* However, at no time in this case has Plaintiff sought leave to add a claim that AWRS retaliated against her for Nye's

demand letter, and Plaintiff cannot rely on the arguments in her response as justification for such an amendment. *See* Fed. R. Civ. P. 15(a); *Rosenberg v. Gould*, 554 F.3d 962, 967 (11th Cir. 2009) (stating that, where a request for leave to amend is "imbedded in an opposition memorandum, the issue has not been raised properly" (quotation omitted)); *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 545 (11th Cir. 2002) (*en banc*) (holding that a district court is not required to provide an opportunity to amend a complaint *sua sponte* when the plaintiff "never filed a motion to amend nor requested leave to amend before the district court"). Accordingly, the undersigned **RECOMMENDS** that Plaintiff's Title VII retaliation claim be **DISMISSED WITH PREJUDICE**.

D. Sexual Battery

Defendants argue that Plaintiff cannot establish a battery claim under Georgia law. In their motion, Defendants point to Clark's admissions in her deposition that that any touching by Wheeley was consensual, that Wheeley did not touch her in any manner that made her feel threatened or fearful, and that he did not touch her in anger. (Doc. 87-2 at 24–25). In response, Plaintiff cites to Nye's testimony that she was distraught when she revealed the relationship to Nye and that she conceded to Wheeley's demands out of fear for losing her job. (Doc. 90 at 14–15). She also points to her declaration statements that (1) Wheeley initiated all kissing, phone calls, text messages, and the sex acts themselves, (2) Wheeley frequently

commented on his position as CEO, and (3) Wheeley "took advantage of Clark's emotional vulnerability and arranged his schedule (and Clark's) . . . for his after-hours sexual demands."[17] *Id.*

Under Georgia law, a person commits a battery when he either "[i]ntentionally makes physical contact of an insulting or provoking nature with the person of another," or "[i]ntentionally causes physical harm to another." O.C.G.A. § 16-5-23; *see* O.C.G.A. §§ 51-1-13; 51-1-14 (creating private right of action for the tort of assault and battery); *see also Elliott v. RE/MAX of Ga., Inc.*, No. 1:05-cv-1236-RWS, 2007 WL 9700772, at *18 (N.D. Ga. Feb. 7, 2007). "Any unlawful touching—even minimal contact—is actionable." *Hiltibrand v. Lynn's Hallmark Card Shop*, No. 4:03-CV-192(CDL), 2005 WL 2387611, at *5 (M.D. Ga. Sept. 28, 2005) (citing *Darnell v. Houston Cnty. Bd. of Educ.*, 234 Ga. App. 488, 490 (1988)). "Under Georgia law, 'unlawful' contact is 'offensive' contact, and 'offensive' contact is contact that 'proceeds from anger, rudeness, or lust.'" *Id.* (quoting *Newsome v. Cooper-Wiss, Inc.*, 179 Ga. App. 670, 672 (1986)). "The test for offensiveness is 'what would be offensive to an ordinary person not unduly sensitive as to [her] dignity.'" *Id.* (quoting *Newsome*, 179 Ga. App. at 672).

[17] Plaintiff also cites to her declaration testimony that, when she tried to end the relationship, Wheeley told her that "the affair would end when he said it was over." (Clark Decl. ¶ 30; Doc. 90 at 15). However, as discussed above, the undersigned has disregarded this testimony at summary judgment.

The undersigned finds that a reasonable jury could not find that Plaintiff was subjected to battery under Georgia law. In substance, Georgia law requires Plaintiff to show that there was offensive *contact*.[18] On that point, her deposition testimony is dispositive. After discussing the various instances of sexual encounters with Wheeley, Clark was asked whether she was "ever physically touched in a way by Mr. Wheeley that made [her] feel threatened or fearful" and whether Wheeley "ever touch[ed] [her] in anger." (Clark Dep. at 105). To both questions, Clark answered, "No." *Id.* Plaintiff has not identified any particular instance of contact that would satisfy the test for battery, and her testimony in her declaration about her generalized fear of Wheeley was not tied any instance of unlawful touching under Georgia law.[19]

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[18] For legal authority, Plaintiff cites only to an unpublished opinion from a federal court in Kansas and a footnote from a Third Circuit opinion. (Doc. 90 at 15–17). However, neither of these cases discusses battery under Georgia law, and at best, these cases are minimally persuasive. *See Walls v. MiraCorp, Inc.*, No. 09-2112-JAR, 2011 WL 3651346, at *3 (D. Kansas Aug. 18, 2011); *Minarksy v. Susquehanna Cnty.*, 895 F.3d 303, 313 n.12 (3d Cir. 2018).

[19] The undersigned distinguishes the analysis of this claim with the analysis of welcomeness for Plaintiff's harassment claim under Title VII, which is much broader. Georgia law requires a plaintiff to establish an instance of offensive touching without consent. *See Fogal v. Coastal Rest. Mgmt., Inc.*, 452 F. Supp. 2d 1286, 1300 (S.D. Ga. 2004) (citing *Ga. Law of Torts* § 2-2 (2003 ed.) ("Consent has been defined as voluntarily yielding the will to the proposition of another; acquiescence or compliance therewith."")). In contrast, Title VII prohibits any sex-based discrimination based on *unwelcome* harassment, and a defendant can be liable even if the harassing employee engaged in no instances of *physical* harassment. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–81 (1998) ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a

Accordingly, the undersigned **RECOMMENDS** that Plaintiff's claim for state-law battery be **DISMISSED WITH PREJUDICE**.

E. Negligent Retention

Defendants argue that the Court should dismiss Plaintiff's claim for negligent retention under Georgia law because AWRS had no reason to believe that Wheeley would engage in sexual harassment and because this claim is "derivative" under Georgia law. (Doc. 87-2 at 24–26). They assert that, because there is no underlying state law tort, Wheeley's negligent retention claim fails as a matter of law. *Id.* Plaintiff responds only to the first argument, asserting that AWRS had knowledge of the affair in 2016 and failed to take reasonable remedial measures in response. (Doc. 90 at 17 n.1).

Georgia law recognizes a claim in tort for an employer's negligent hiring, retention or supervision of an employee who subsequently harms the plaintiff. *See* O.C.G.A. § 34-7-20 (stating that an "employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency"); *Farrell v. Time Serv., Inc.*, 178 F. Supp. 2d 1295, 1300 (N.D. Ga.

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simple recitation of the words used or the physical acts performed."); *see, e.g.*, *Massey v. Dorning*, ___ F. Supp. 3d ___, 2020 WL 607573, at *5 (N.D. Ala. 2020) (finding that the plaintiff established actionable harassment based on allegations that sheriff's office had a male-dominated culture, male employees openly discussed their sexual relationships with female employees, and employees frequently used crude and derogatory epithets for female employees).

2001). To establish such a claim, a plaintiff must show that the employer knew or should have known of an employee's tendencies to engage in certain behavior relevant to the plaintiff's alleged injuries. *Id.*; *see also Leo v. Waffle House, Inc.*, 298 Ga. App. 838, 841 (2009); *H.J. Russell & Co. v. Jones*, 250 Ga. App. 28, 30 (2001).

Courts have uniformly found that this claim is "derivative," or in other words, the plaintiff must assert another actionable claim under state law to support a claim for negligent supervision or retention. *See, e.g.*, *Metro. Atlanta Rapid Transit Auth. v. Mosley*, 280 Ga. App. 486, 489 (2006); *Phinazee v. Interstate Nationalease*, 237 Ga. App. 39, 41 (1999). "[F]ederal claims for employment discrimination or retaliation will generally not support a claim under Georgia law for negligent supervision and retention." *Jones v. Nippon Cargo Airlines Co.*, No. 1:17-cv-1589-TWT-JKL, 2018 WL 1077355, at *13 (N.D. Ga. Jan. 12, 2018), *adopted*, 2018 WL 1071166 (N.D. Ga. Feb. 27, 2018) (citing *Canty v. Fry's Elecs., Inc.*, 736 F. Supp. 2d 1352, 1379 (N.D. Ga. 2010) ("There is no distinct tort in Georgia law for harassment, retaliation or discrimination."); *Orquiola v. Nat'l City Mortg.*, 510 F. Supp. 2d 1134, 1140 (N.D. Ga. 2007) ("Like there is no distinct tort in Georgia law for 'sexual harassment,' there is no separate tort under Georgia law for 'retaliation.' Georgia courts have described negligent retention as a 'derivative' claim thus requiring an underlying tort of which Plaintiff has none in state law.")).

Here, the undersigned has already found that Plaintiff has not shown a genuine issue of material fact for her battery claim, which is her sole remaining claim under state law. Because negligent retention is a derivative claim that requires an underlying tort to hold an employer liable, Plaintiff's claim here necessarily fails based on the insufficiency of her battery claim. Accordingly, the undersigned **RECOMMENDS** that Plaintiff's claim for negligent retention be **DISMISSED WITH PREJUDICE**.

IV. CONCLUSION

For the reasons stated above, the undersigned **RECOMMENDS** that the District Court **GRANT IN PART** and **DENY IN PART** Defendants' motion for summary judgment. As to Plaintiff's Title VII claim for *quid pro quo* harassment, the undersigned recommends that the motion be **DENIED**. As to Plaintiff's Title VII retaliation claim, state law claim for battery, and state law claim for negligent retention, the undersigned recommends that Defendants' motion be **GRANTED** and those claims **DISMISSED WITH PREJUDICE**.

All pretrial matters have concluded with the issuance of this Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1), Local Rule 72.1, and

Standing Order 18-01. Therefore, the Clerk is **DIRECTED** to terminate the referral to the undersigned Magistrate Judge.

IT IS SO **ORDERED** AND **RECOMMENDED** on this 21st day of June 2021.

R. Cannon

REGINA ~~D.~~ CANNON
United States Magistrate Judge