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

LAURA E. ALKINS, **Plaintiff,** **v.** **BUTCH CONWAY,** ***in his official capacity,*** **Defendant.**	**CIVIL ACTION NO.** **1:20-CV-5-WMR-CCB**

FINAL REPORT AND RECOMMENDATION

This matter is before the Court for consideration of Defendant Butch Conway's motion for summary judgment. (Doc. 75). In this action, Plaintiff Laura E. Alkins asserts a claim for retaliation under the opposition clause of Title VII of the Civil Rights Act of 1964. (Doc. 27 at ¶¶ 1, 29–30). For the reasons set forth below, the undersigned **RECOMMENDS** that Defendant's motion for summary judgment, (Doc. 75), be **GRANTED**.

I. FACTS

A. Standards for Presenting Facts at Summary Judgment

Unless otherwise indicated, the Court draws the following facts from Defendant's Statement of Undisputed Material Facts, (Doc. 75-19); Plaintiff's

Response to Defendant's Statement of Undisputed Material Facts, (Doc. 94); Plaintiff's Statement of Material Facts, (Doc. 95); and Defendant's Response to Plaintiff's Statement of Material Facts, (Doc. 102). Additionally, as indicated and as needed, the Court draws some facts directly from the record. *See* Fed. R. Civ. P. 56(c)(3). ("The court need consider only the cited materials, but it may consider other materials in the record.").

For those facts submitted by Defendant that are supported by citations to record evidence, and that Plaintiff has not specifically disputed and refuted with citations to admissible record evidence showing a genuine dispute of fact, the Court deems those facts admitted, under Local Rule 56.1B. *See* LR 56.1(B)(2)(a)(2), NDGa. ("This Court will deem each of the movant's facts as admitted unless the respondent: (i) directly refutes the movant's fact with concise responses supported by specific citations to evidence (including page or paragraph number); (ii) states a valid objection to the admissibility of the movant's fact; or (iii) points out that the movant's citation does not support the movant's fact or that the movant's fact is not material or otherwise has failed to comply with the provisions set out in LR 56.1(B)(1).").

The Court has excluded assertions of fact by either party that are immaterial, presented as arguments or legal conclusions, unsupported by a citation to admissible evidence in the record, or asserted only in the party's brief and not the statement of facts. *See* LR 56.1(B)(1), NDGa. ("The Court will not consider any fact: (a) not supported by a citation to evidence . . . (c) stated as an issue or legal conclusion; or (d) set out only in the brief and not in the movant's [or respondent's] statement of undisputed facts."). The Court has also viewed all evidence and factual inferences in the light most favorable to Plaintiff, as required on a defendant's motion for summary judgment. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *McCabe v. Sharrett*, 12 F.3d 1558, 1560 (11th Cir. 1994); *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 469 (11th Cir. 1993). Plaintiff disputes some of Defendant's proffered facts, but many of those objections are over matters that are not necessarily material to the disposition of this case. Accordingly, the Court will not rule on each objection or dispute presented and will discuss those objections and disputes only when necessary to do so regarding a genuine dispute of a material issue of fact.

B. Material Facts

Plaintiff was employed by the Gwinnett County Sheriff's Office from 1999 until her termination on February 23, 2018. (Doc. 75-18 at 1–2; Doc. 77 at 22:7–9; Doc. 94 at ¶ 28). Prior to her termination, Plaintiff was called into Major Raymond Pelis's office on February 2, 2018, to speak with him about her upcoming routine transfer to the jail for work. (Doc. 75-2 at ¶ 5; Doc. 94 at ¶ 1). Major Pelis was Plaintiff's supervisor. (Doc. 94 at ¶ 2; Doc. 75-2 at ¶ 4). During the conversation, Plaintiff told Major Pelis that she was kissed without her permission by Captain Jon Spear in 2010. (Doc. 94 at ¶¶ 6, 8; Doc. 102 at ¶ 35). Plaintiff was concerned that she would have to work for Captain Spear if she were transferred to the jail. (Doc. 75-2 at ¶¶ 7–8).

In Plaintiff's deposition testimony, Plaintiff stated the alleged kiss occurred in the following manner: "[Plaintiff] was sitting in the office between Unit A, alpha, and E, echo, . . . [in] a sergeant's office[,] . . . [and Plaintiff] got a call on the phone . . . it was Captain Spear, and he asked [Plaintiff] to meet with him." (Doc. 77 at 147:21–25, 148:1). Plaintiff met with Captain Spear, followed him into a room, where, "without saying a word, he just stepped toward [Plaintiff] and just started

kissing [Plaintiff] with his mouth open. And [Plaintiff] was in utter shock. [Plaintiff] didn't know what . . . to say. [Plaintiff] . . . didn't react. [Plaintiff] didn't kiss him back. [Plaintiff] just kind of stood there, frozen. And once he realized [Plaintiff] was not participating, he stopped and he immediately just walked out of the room, . . . and the door shut behind him. And [Plaintiff] followed him out, and . . . he didn't say anything . . . and [Plaintiff] just kind of tagged along . . . maybe eight feet behind. [And Plaintiff] went back to . . . Unit A, . . . into the sergeant's office where [Plaintiff] was previously sitting when he called [Plaintiff]." *Id.* at 149:3–25, 150:10–15, 150:22–25, 151:1–18. "[Captain Spear] didn't touch—he didn't fondle [Plaintiff] in any way. He didn't touch . . . [Plaintiff's] rear end. . . . [H]e just kissed [Plaintiff]." *Id.* at 152:10–14. Plaintiff testified she told her husband about this kissing incident. *Id.* at 130:16–18. After the kissing incident, Plaintiff was promoted to the rank of Sergeant in 2011 and then to the rank of Lieutenant in 2014. (Doc. 102 at ¶ 9; Doc. 75-16 at 2). Plaintiff's superior officers had no criticisms of her performance over the course of her career, and she received commendations—including the most recent one in December of 2017. (Doc. 102 at ¶ 11).

Major Pelis reported Plaintiff's statements regarding the kiss to his chain of command. (Doc. 94 at ¶ 9; Doc. 75-2 at ¶¶ 10–13). Plaintiff's allegations about the kiss were referred to the Professional Standards Unit for an administrative investigation. (Doc. 94 at ¶ 12). As part of the investigation into the alleged kiss, Plaintiff took a polygraph test and was placed on administrative leave. (Doc. 94 at ¶ 18; Doc. 75-16 at 19, 62; Doc. 102 at ¶ 53). The investigation determined that Plaintiff's allegations could not "be proved or disproved." (Doc. 94 at ¶ 21; Doc. 75-16 at 69).

A subsequent investigation occurred into statements Plaintiff allegedly made during the course of the initial investigation into the alleged kiss, and the subsequent investigation resulted in Plaintiff's demotion on February 20, 2018 for the alleged violation of Sheriff's Office Policy Manual Chapter 13A, Section 42 Truthfulness/Cooperation. (Doc. 94 at 22, 24; Doc. 75-17 at 2, 4).

During a subsequent meeting on February 20, 2018, Plaintiff stated that Major Pelis had told her that Captain Spear was caught on video having sexual intercourse in the jail with a health care worker. (Doc. 94 at ¶ 25; Doc. 75-18 at 2). An investigation occurred regarding this statement, and Plaintiff's accounts of the

incident were found to be inconsistent. (Doc. 94 at ¶ 26; Doc. 75-18 at 2). The investigation resulted in Plaintiff's termination on February 23, 2018, for the alleged violation of Sheriff's Office Policy Manual Chapter 13A, Section 42 Truthfulness/Cooperation. (Doc. 94 at ¶ 28; Doc. 75-18 at 2, 5).

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is authorized when the pleadings, the discovery and disclosure materials on file, and any affidavits show "that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Baas v. Fewless*, 886 F.3d 1088, 1091 (11th Cir. 2018). The movant carries this burden by showing the court "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325. In making its determination, the court must view the evidence and all factual inferences in the light most favorable to the non-moving party. *See Crane v. Lifemark Hospitals, Inc.*, 898 F.3d 1130, 1134 (11th Cir. 2018).

Once the moving party has adequately supported its motion, the non-moving party must come forward with specific facts that demonstrate the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The non-moving party is required "to go beyond the pleadings" and to present competent evidence designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (internal quotation marks omitted). Generally, "[t]he mere existence of a scintilla of evidence" supporting the non-moving party's case is insufficient to defeat a motion for summary judgment; rather, there must be evidence on which a jury could reasonably find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The non-moving party cannot defeat summary judgment by relying upon conclusory assertions. *Holifield v. Reno,* 115 F.3d 1555, 1564 n. 6 (11th Cir. 1997). Rather, "[a] party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record." Fed. R. Civ. P. 56(c)(1); *see also Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) (*en banc*) ("There is no burden upon the district court to distill

every potential argument that could be made based upon the materials before it on summary judgment.").

If a fact is found to be material, the court must also consider the genuineness of the alleged factual dispute. *Anderson,* 477 U.S. at 249–50. A factual dispute is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." *Id*. A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. at 248. Moreover, for factual issues to be genuine, they must have a real basis in the record. *Matsushita*, 475 U.S. at 587. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id*. at 586. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Id*. at 587 (internal quotation marks omitted). Thus, the standard for summary judgment mirrors that for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 259 (internal quotation marks omitted).

When considering motions for summary judgment, the court does not make decisions as to the merits of disputed factual issues. *See id*. at 249; *Ryder Int'l Corp. v. First Am. Nat'l Bank*, 943 F.2d 1521, 1523 (11th Cir. 1991). Rather, the court only determines whether there are genuine issues of material fact to be tried. Applicable substantive law identifies those facts that are material and those that are irrelevant. *Anderson*, 477 U.S. at 248. Disputed facts that do not resolve or affect the outcome of a suit will not preclude the entry of summary judgment. *Id.*

B. Motion for Summary Judgment

In the only count in the complaint, Plaintiff alleges that Defendant retaliated against her in violation of Title VII by "forcing a polygraph on Plaintiff, placing Plaintiff on leave, demoting her[,] and terminating her." (Doc. 27 at ¶ 30). Defendant moves for summary judgment as to this claim. (Doc. 75 at 1).

1. Defendant's Argument for Summary Judgment and Plaintiff's Response

In his brief, Defendant argues that Plaintiff cannot make out a *prima facie* claim of retaliation in violation of Title VII. (Doc. 75-1 at 9–11). Defendant argues that Plaintiff cannot show that she engaged in a statutorily protected activity—the

first component of a *prima facie* case of retaliation—because her complaint of a "secret kiss years ago from a co-worker . . . cannot create an unlawful employment practice." *Id.* at 14. Defendant also argues that the actions of being "forced to take a polygraph test" and being "forcibly placed on administrative leave" are incorrect because Plaintiff "gave her written consent" and "clearly agreed to the polygraph test," and Plaintiff "requested to be put on administrative leave." *Id.* at 10. Defendant then argues that even if Plaintiff could make a *prima facie* case of retaliation, Defendant had a legitimate, non-discriminatory reason for the materially adverse actions of demotion and termination. *Id.* at 15–16. Defendant states that these actions occurred because Plaintiff "twice violat[ed] the Truthfulness/Cooperation policy of the Sheriff's Office." *Id*. Defendant also argues that the record is "void of any evidence to support a pretext argument," and states that although "Plaintiff may argue . . . the decision[s to demote and terminate were] . . . not 'prudent or fair,' . . . she cannot offer any evidence to establish that the reason[s] were a pretext for discrimination." *Id.* at 18.

In response, Plaintiff argues that she has made a *prima facie* showing of retaliation. (Doc. 96 at 2–3). Plaintiff argues that she has engaged in a protected

activity—the first element of her *prima facie* case—because "[c]omplaining about a supervisor's conduct is recognized as protected activity, even when done internally," and the conduct itself "is the type of conduct that would constitute actionable harassment against the employer had it continued . . . [and] Plaintiff believed that the conduct she was seeking to prevent was unlawful." *Id.* at 4–5. Plaintiff then claims that Title VII's "participation clause protection applied to Plaintiff" as well. *Id.* at 6. Plaintiff argues that she has shown causation—the third element of her *prima facie* case—between the protected activity of complaining "of the unwanted conduct" and being placed on administrative leave, being demoted, and being terminated, because all occurred within four, fourteen, and seventeen days, respectively, after her complaint. *Id.* at 7–8. Plaintiff argues that Defendant's reasons for the adverse actions were pretextual and maintains that Defendant's reason for the administrative leave creates a material issue of fact because "Plaintiff did not consent to the [administrative] leave." *Id.* at 9. Plaintiff argues that because Defendant has "asserted multiple reasons for Plaintiff's demotion [that] [t]his fact alone indicates pretext," and explains why the facts do not support the reasons offered for her demotion. *Id.* at 9–11. Plaintiff also "disputes that

Defendant has a good faith belief she was untruthful," and that a "material issue of fact exists whether Defendant knew that Plaintiff was telling the truth in the statement which they claim is a lie requiring a demotion." *Id.* at 11, 14. Plaintiff then argues that "subjecting only the complaining individual to a polygraph and not the alleged harasser" constituted an adverse action. *Id.* at 14–15. Plaintiff argues that "the reason for requiring Plaintiff to take a polygraph was pretextual." *Id.* at 19. Plaintiff argues that "Defendant cannot show that the stated reason for termination is not directly related to the initial claim of unwanted conduct and the investigation." *Id.* at 21.

In reply, Defendant argues that Plaintiff still has not shown that she has made a *prima facia* showing of retaliation because she "has completely failed to demonstrate that she opposed an unlawful employment practice." (Doc. 101 at 2). In response to Plaintiff's argument that complaining about a supervisor's conduct is a recognized protected activity, Defendant states that the individual who "attempted to kiss" Plaintiff "was not, and never has been, Plaintiff's supervisor." *Id.* Defendant argues that even if the individual was Plaintiff's supervisor, "there is absolutely no evidence in the record that Defendant was ever made aware of an

attempted kiss eight years prior to Plaintiff's claim." *Id.* at 3. Defendant argues that the facts of the present case are similar to Eleventh Circuit caselaw where the plaintiff was found to have not engaged "in statutorily protected activity that would establish a *prima facie* case of retaliation under Title VII" when a plaintiff "report[ed] an isolated incident involving another employee to his/her employer." *Id.* at 5. Defendant states that the "alleged isolated attempted kiss, even if it did occur, cannot in any way be attributable to Defendant as an unlawful employment practice. Thus, Plaintiff's reporting of this alleged attempted kiss is not protected activity under Title VII." *Id.* at 7. Defendant responds to Plaintiff's claim that the conduct also violated the participation clause of Title VII by stating that the complaint only contains a claim of retaliation in violation of the opposition clause of Title VII, and Plaintiff listed only the issue of whether "Defendant retaliated against here for engaging in protected activity under the Opposition Clause of Title VII" in the Joint Preliminary Report and Discovery Plan. *Id.* Therefore, Defendant states, "Plaintiff may not raise this new [participation clause] claim at the summary judgment stage" and such claim "should be dismissed." *Id.* Defendant then states that "[b]ecause Plaintiff has failed to make a *prima facie* case

of retaliation in violation of Title VII, the Court does not need to analyze the issue of pretext." *Id.* at 8.

2. Prima Facie *Case of Retaliation Under Title VII*

Title VII acts to shield employees from retaliation for certain protected practices. Specifically, the statute provides, in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). To state a *prima facie* case of retaliation, a plaintiff must ultimately show that: (1) she engaged in a protected activity or expression; (2) she suffered an adverse employment action, and (3) there was a causal link between the protected expression and the adverse action. *See, e.g., Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1363 (11th Cir. 2007). "To establish a causal connection, a plaintiff must show that the decisionmaker was aware of the protected activity and that there is a close temporal proximity between this awareness and the

adverse action." *Walton-Horton v. Hyundai of Ala.*, 402 F. App'x 405, 408-09 (11th Cir. 2010) (internal quotation marks and alterations omitted).

After a *prima facie* case of retaliation is established, the *McDonnell Douglas*[1] burden-shifting framework applies. *See Bryant v. Jones*, 575 F.3d 1281, 1308-09 (11th Cir. 2009). Namely, after Plaintiff establishes a *prima facie* case, Defendant must articulate a legitimate, non-discriminatory reason for the challenged employment action. *Id.* at 1308. If Defendant puts forth a legitimate, non-discriminatory reason, Plaintiff may come forward with evidence sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were merely a pretext to mask discriminatory actions. *Id.*

As previously stated, for Plaintiff to make out her *prima facie* case for retaliation, she must show that she engaged in a statutorily protected activity. *See Thomas*, 506 F.3d at 1363. "Under the opposition clause, an employer may not retaliate against an employee because the employee 'has opposed any practice made an unlawful employment practice by this subchapter.'" *EEOC v. Total Sys.*

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

Servs., Inc., 221 F.3d 1171, 1174 (11th Cir. 2000) (quoting 42 U.S.C. § 2000e-3(a)). "And, under the participation clause, an employer may not retaliate against an employee because the employee 'has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.'" *Id.* (quoting 42 U.S.C. § 2000e-3(a)). Plaintiff must pursue, and is pursing, her retaliation claim under the opposition clause of Title VII because her alleged retaliation claim relates to her internal complaint of sexual harassment, and not a charge under Title VII. *See id*.

When a plaintiff proceeds under the opposition clause, she must show that she had a "good faith, reasonable belief" that the employer's conduct about which she complained was unlawful under Title VII in order to make out the first element of her *prima facie* case for retaliation. *Weeks v. Harden Mfg. Corp*., 291 F.3d 1307, 1311 (11th Cir. 2002) (internal quotation marks omitted). "The objective reasonableness of an employee's belief that her employer has engaged in an unlawful employment practice must be measured against existing substantive law." *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999). Where, as here, the complaint is about alleged sexual harassment, the plaintiff does not have to prove that the

employer's conduct legally constituted harassment, only that her "'good faith, reasonable belief' that she was the victim of [sexual harassment] led her to report [the alleged illegal] conduct." *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1187 (11th Cir. 2001).

Regarding the subjective, good-faith component, Plaintiff testified that the kiss caused her "utter shock," (Doc. 77 at 150:24–25), and although she waited eight years to inform Major Pelis of the alleged kiss, Plaintiff thought it was an incident that needed to be brought to Pelis's attention. (Doc. 94 at ¶¶ 2, 6, 8; Doc. 75-2 at ¶ 4; Doc. 102 at ¶ 35). Plaintiff's reaction to the alleged kiss and informing her supervisor of the incident, even with the lengthy, many–year delay, shows that Plaintiff subjectively believed that the alleged kiss constituted actionable sexual harassment. *Cf. Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997) (finding subjective, good-faith belief not met when plaintiff "never voiced his concern over Wilmot to a supervisor or management-level employee at Carrier and reported the comment for the first time in a team meeting held approximately eight months after the remark was made").

Even with a subjective belief, however, Plaintiff cannot show that her belief that the alleged kiss constituted actionable sexual harassment under Title VII was objectively reasonable. To prove the objective component, Plaintiff must show "that the harassment occurred because of her sex and that the conduct in question was severe or pervasive enough that a reasonable person would find it hostile or abusive." *Tatt v. Atlanta Gas Light Co.*, 138 F. App'x 145, 148 (11th Cir. 2005) (internal quotation marks and brackets omitted) (quoting *Clover*, 176 F.3d at 1351).

First, Plaintiff must show the alleged kiss occurred because of her sex. There are no specifically pled facts about the sex of either Plaintiff or Captain Spear, but information contained in the Gwinnett County Sheriff's Department Professional Standards Unit Investigation shows Plaintiff's sex listed as "Fe…", which would be short for "Female," and shows Captain Spear's sex listed as "Male." (Doc. 75-15 at 2, 4). When an alleged harasser is male and the victim is female, and the alleged act is sexual in nature, it can be assumed that such an act occurred because of the victim's gender. *See Smith v. Pefanis*, 652 F. Supp. 2d 1308, 1325 (N.D. Ga. 2009) ("Indeed, a harasser may well make sexually demeaning remarks and putdowns to the plaintiff for sex-neutral reasons . . . but he is far less likely to make

sexual advances without regard to sex." (quotation marks and brackets omitted) (quoting *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 480 (5th Cir. 2002)); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) ("Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex."). Here, because the alleged harasser is male, and the victim is female, and the alleged act was sexual in nature—an alleged kiss on the mouth—the facts show the alleged kiss occurred because of Plaintiff's gender. Therefore, Plaintiff can show the first element of the objective component.

Second, Plaintiff must show that "the conduct in question was severe or pervasive enough that a reasonable person would find it hostile or abusive. To determine whether the conduct is sufficiently severe or pervasive, we 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." *Tatt*, 138 F. App'x at 147–48 (internal quotation marks and brackets omitted) (quoting *Clover*, 176 F.3d at 1351; and then quoting *Mendoza*, 195 F.3d at 1246). "One isolated incident of sexually inappropriate behavior will not amount to actionable sexual harassment unless the incident is extremely serious." *McMillian v. Postmaster Gen., U.S. Postal Serv.*, 634 F. App'x 274, 277 (11th Cir. 2015) (internal quotation marks omitted). Here, the alleged conduct was a kiss, that occurred once, without force, unknown to other employees, and which did not unreasonably interfere with Plaintiff's job performance.

First, regarding the frequency, Plaintiff has shown that the only conduct complained of was one incident of an alleged kiss. (Doc. 94 at ¶¶ 6, 8; Doc. 102 at ¶ 35). Although one incident of alleged sexual harassment may rise to the level of severe or pervasive conduct, the alleged kiss, without any other incident in the eight subsequent years, was not frequent and this factor does not show the conduct was severe or pervasive. *See Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501, 509 (11th Cir. 2000) (finding alleged conduct was frequent when plaintiff "point[ed] to roughly fifteen separate instances of harassment over the course of four months"); *Mendoza*, 195 F.3d at 1249 (finding alleged conduct was not

frequent when plaintiff "established a single instance of slight physical contact, one arguably inappropriate statement, and three instances of [the alleged harasser] making a sniffing sound . . . [that] occurred over an eleven-month period").

Second, the conduct—which caused Plaintiff "utter shock," (Doc. 77 at 150:24–25)—was not severe, as the alleged kiss was not violent, overpowering, or overtly sexual in nature. Plaintiff testified that Captain Spear "stepped toward [Plaintiff] and just started kissing [Plaintiff] with his mouth open. . . . [Plaintiff] . . . didn't react. [Plaintiff] didn't kiss him back. [Plaintiff] just kind of stood there, frozen. And once he realized [Plaintiff] was not participating, he stopped and he immediately just walked out of the room, . . . and the door shut behind him." (Doc. 77 at 150:23–25, 151:1–7). The alleged kiss did not involve the use of force by either party, and the only conduct that occurred was the alleged kiss—Plaintiff was not groped or touched in any other way. *Id.* at 152:10–14 ("And he didn't touch—he didn't fondle me in any way. He didn't touch my—you know, my rear end. He didn't—you know, and I was very clear about that with Major Pelis because they all wanted to know did he touch me. No, he just kissed me."). Nor did Captain

Spear engage in any sexual banter or sexually charged comments with Plaintiff. *See id.*

"All the sexual hostile work environment cases decided by the Supreme Court has involved patterns or allegations of extensive, long lasting, unredressed and uninhibited sexual threats or conduct that permeated the plaintiff's work environment." *Webb-Edwards v. Orange Cnty. Sheriff's Off.*, 525 F.3d 1013, 1028 (11th Cir. 2008) (internal quotation marks and alteration omitted). This is not such a case. Instead, the conduct alleged is an isolated incident of an unwelcomed kiss, which does not amount to severe conduct. *See Spears v. Kaiser Found. Health Plan of Ga., Inc.*, No. 1:17-CV-02102-TCB-RGV, 2019 WL 1225214, at *17–18 (N.D. Ga. Jan. 30, 2019) (finding that infrequent incidents of unwanted physical touching were not sufficiently severe and collecting cases), *adopted by* 2019 WL 1225199 (N.D. Ga. Feb. 14, 2019); *see also Benson v. Solvay Specialty Polymers USA, LLC*, No. 1:16-cv-4638-CAP-RGV, 2018 WL 5118615, at *14-15 (N.D. Ga. July 3, 2018) (finding that allegations of "two specific incidents of alleged inappropriate touching when [a coworker] picked [the plaintiff] up, unspecified incidents of [a coworker] touching her buttocks and breasts, and one incident of [a coworker] showing her his

erection" along with offensive comments, were not sufficiently severe to be actionable) *adopted by* 2018 WL 5118601 (N.D. Ga. Sept. 7, 2018); *Baldelamar v. Jefferson S. Corp.*, No. 4:15-CV-209-HLM-WEJ, 2016 WL 9330869, at *13–14 (N.D. Ga. Oct. 13, 2016) (finding comments soliciting plaintiff to have sex, among other comments and uncouth non-verbal communications, coupled with one act of touching plaintiff's buttocks and one act of hugging plaintiff from behind and pulling her close, fell well short of the severe threshold), *adopted by* 2016 WL 9331114 (N.D. Ga. Dec. 5, 2016); *cf. Johnson*, 234 F.3d at 509 (finding alleged conduct was severe when it included fifteen separate instances of "behavior [that] included giving [plaintiff] unwanted massages, standing so close to [plaintiff] that his body parts touched her from behind, and pulling his pants tight to reveal the imprint of his private parts"); *Jackson v. Hennessy Auto*, No. 1:03-CV-0934-TWT-AJB, 2005 WL 8155542, at *5 (N.D. Ga. Nov. 4, 2005), *adopted by* 2005 WL 8155743 (N.D. Ga. Dec. 12, 2005), *aff'd*, 190 F. App'x 765 (11th Cir. 2006) (finding alleged conduct was severe when the following conduct occurred: "(1) slapping [plaintiff's] buttocks on the sales floor once; (2) touching her breast once; (3) making daily phone calls in a 30-day period in August and September to say [the alleged harasser] was

thinking about her; (4) waiting outside her apartment to see if she arrived home from work at least 10 times; (5) telling her that he loved her 15 times; (6) asking her to go to a hotel with [the alleged harasser] so they could talk; and (7) knocking on [plaintiff's] door at 10:30 P.M., demanding to be let in and, telling [plaintiff] that he loved her"). The one kiss, while inappropriate, was not severe in nature, and this factor does not show the conduct was severe or pervasive.

Third, the alleged kiss was not objectively physically threatening or humiliating. As previously discussed, Plaintiff testified that she was not physically touched during the incident, except for the alleged kiss, and she does not testify that anyone else saw the conduct or learned of the conduct before she told Major Pelis, besides Plaintiff testifying that she had told her husband. (Doc. 77 at 130:16–18); *see Long-Hall v. USA Ready Mix*, No. 1:08-CV-1546-CAP-AJB, 2010 WL 11496945, at *25 (N.D. Ga. Feb. 2, 2010) (concluding that the unwanted conduct could be objectively viewed as humiliating, "especially the touching and sexual statements in front of coworkers"), *adopted by* 2010 WL 11507392 (N.D. Ga. Mar. 3, 2010). Therefore, the alleged kiss was not physically threatening or humiliating, and this factor does not show the conduct was severe or pervasive.

Fourth, the conduct did not unreasonably interfere with Plaintiff's job performance. Notably, after the alleged kiss occurred in 2010, Plaintiff was promoted to the rank of Sergeant in 2011 and then to the rank of Lieutenant in 2014. (Doc. 102 at ¶ 9; Doc. 75-16 at 2). Plaintiff's superior officers did not criticize her performance over the course of her career and she received commendations. (Doc. 102 at ¶ 11). Therefore, the alleged kiss did not unreasonably interfere with Plaintiff's job performance, and this factor does not show the conduct was severe or pervasive.

It is true that "[s]exual harassment in the workplace is a serious matter." *Mendoza*, 195 F.3d at 1252 n.10. But courts must be careful not to hold that anything less than severe and pervasive conduct constitutes "sexual harassment actionable under Title VII [as this] would trivialize true instances of sexual harassment." *Id.* Here, the alleged kiss was not severe or pervasive enough that a reasonable person would find it hostile or abusive, thereby making it actionable sexual harassment under Title VII, because the conduct occurred only once, was not severe in nature, was not physically threatening or humiliating, and did not unreasonably interfere with Plaintiff's job performance.

Although Plaintiff may be able to make a subjective, good-faith showing that the alleged kiss she complained of was sexual harassment, she cannot make out the objective component to show the alleged kiss constituted actionable sexual harassment under Title VII. Therefore, Plaintiff did not engage in a statutorily protected expression when she complained of the conduct, which is the first element in making out a *prima facie* showing of retaliation under Title VII. As such, summary judgment is proper, and the undersigned **RECOMMENDS** that Defendant's motion be granted.[2]

3. Claim of Violation of the Participation Clause of Title VII

In Plaintiff's response brief to Defendant's motion for summary judgment, Plaintiff appears to claim that Defendant has violated the participation clause of

[2] Because Plaintiff cannot establish a *prima facie* case of retaliation, the Court need not address Defendant's legitimate, non-retaliatory reasons for the adverse actions and Plaintiff's claim of pretext. *See Jackson v. B&L Disposal, Inc.*, No. 4:09-CV-141-HLM-WEJ, 2010 WL 11493652, at *10 (N.D. Ga. July 1, 2010) ("Given plaintiff's inability to establish a prima facie case [of retaliation], the undersigned need not address defendant's legitimate, non-retaliatory reason for terminating plaintiff nor plaintiff's pretext burden."), *adopted by* 2010 WL 11493676 (N.D. Ga. July 21, 2010), *aff'd*, 425 F. App'x 819 (11th Cir. 2011).

Title VII. (*See* Doc. 96 at 6). As noted above, a Title VII retaliation claim can be brought under the opposition clause or the participation clause. "Under the opposition clause, an employer may not retaliate against an employee because the employee 'has opposed any practice made an unlawful employment practice by this subchapter.'" *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000) (quoting 42 U.S.C. § 2000e-3(a)). "And, under the participation clause, an employer may not retaliate against an employee because the employee 'has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.'" *Id.* (quoting 42 U.S.C. § 2000e-3(a)). The complaint in this case, however, very clearly alleges a violation of Title VII's opposition clause only. (Doc. 27 at 1, 29–30 ("This is an employment law case alleging retaliation under the Opposition Clause of Title VII . . . .")). "Despite the liberal pleading standard for civil complaints, plaintiffs may not raise new claims at the summary judgment stage." *White v. Beltram Edge Tool Supply, Inc.*, 789 F.3d 1188, 1200 (11th Cir. 2015) (internal quotation marks omitted). Because the complaint explicitly brings only an opposition clause claim, and does not bring a

participation clause claim, Plaintiff's summary judgment arguments about the participation clause fail to carry the day.

III. CONCLUSION

For the reasons stated above, the undersigned **RECOMMENDS** that Defendant's motion for summary judgment, (Doc. 75), be **GRANTED**.

Because this case presents no other issues referred to Magistrate Judges under Standing Order 18-01, the Clerk is **DIRECTED** to terminate the reference to the undersigned.

IT IS SO RECOMMENDED, this 30th day of July, 2021.

CHRISTOPHER C. BLY
UNITED STATES MAGISTRATE JUDGE