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

NATASHA GRIMES,

Plaintiff,

v.

TECHNICAL COLLEGE SYSTEM OF GEORGIA, *doing business as Ogeechee Technical College*; LORI DURDEN, *President, Ogeechee Technical College*; and RYAN FOLEY, *Executive Vice President for Academic and Student Affairs, Ogeechee Technical College*,

Defendants.

CIVIL ACTION FILE NO.:

1:20-cv-1017-WMR-JKL

FINAL REPORT AND RECOMMENDATION

Plaintiff Natasha Grimes worked as an Assistant Dean of Academic Affairs at Ogeechee Technical College, which is part of Defendant Technical College System of Georgia ("TCSG"). She alleges that TCSG discriminated against her on the basis of her disability and retaliated against her in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, and the Rehabilitation Act (the "Rehab Act"), 29 U.S.C. § 701, *et seq*. She also brings a claim for gender and race discrimination in violation of 42 U.S.C. § 1983 against defendants Lori

Durden, the President of Ogeechee Technical College, and Ryan Foley, the Executive Vice President for Academic and Student Affairs of Ogeechee Technical College in their official and individual capacities. The case is before the Court on Defendants' Motion for Summary Judgment. [Doc. 47.] For the following reasons, it is **RECOMMENDED** that Defendants' motion be **GRANTED**.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Facts

In setting out the facts of this case, the Court has considered Defendants' Statement of Material Facts as to Which There is No Genuine Issue to be Tried ("DSUMF" [Doc. 47-1]), Grimes's Statement of Additional Material Facts ("PSAMF" [Doc. 53]), and the parties' responses thereto ("R-DSUMF" [Doc. 51]; "R-PSAMF" [Doc. 55]). The Court also has conducted its own review of the record. *See* Fed. R. Civ. P. 56(c)(3). The Court takes the facts in the light most favorable to Grimes as the non-moving party.

TCSG is an agency of the state of Georgia that supervises and manages Georgia technical colleges, including Ogeechee Technical College ("Ogeechee"), a public technical college in Statesboro, Georgia. (DSUMF ¶ 2.) During the time relevant to this case, Defendant Lori Durden was the President of Ogeechee (Decl.

of Lori Durden ("Durden Decl.") [Doc. 47-18] ¶ 2), and Defendant Ryan Foley served as its Executive Vice President for Academic and Student Affairs (Decl. of Ryan Foley ("Foley Decl.") [Doc. 47-19] ¶ 2).

In July 2014, Grimes, an African-American woman, was hired as Ogeechee's first and only Assistant Dean for Academic Affairs. (PSAMF ¶¶ 1, 8.) In that position, she worked under three Deans of Academic Affairs: John Groover, Jennifer Witherington, and Kelly Kringy. (*Id.* ¶¶ 13, 14.) Grimes worked closest with Groover, who was also her primary supervisor. (Dep. of Natasha Grimes ("Pl. Dep.") [Doc. 45] at 34.) At the time, Dr. Charlene Lamar, the Vice President of Academic Affairs, told Grimes that she would be "groomed" to be a Dean and take over Groover's Dean position when he retired. (*Id.* at 34-35.)

During the 2014-2015 school year, Grimes's first year of employment, she was responsible for (1) conducting faculty observations, which took the majority of her time; (2) teaching a computer applications class; and (3) completing faculty improvement plans, which consisted of reviewing each faculty's course evaluations, providing feedback, and, if they got lower scores on certain indicators, deciding whether the faculty member needed to go on an improvement plan. (Pl.

Dep. at 36-37.) For her 2014-2015 annual performance review,[1] Groover gave Grimes an overall rating of 3.0 in job and individual responsibilities and 3.0 in terms and conditions, indicating that she consistently met all requirements and was

[1] Ogeechee conducts annual employee performance reviews, which are memorialized in Performance Management Forms ("PMFs"). (PSAMF ¶ 16.) PMFs are completed by the employee's supervisor by July 1 each year. (*Id.* ¶ 18.) Employee performance is scored in two categories: (1) job and individual responsibilities, which are specific to each employee and (2) terms and conditions of employment, which apply to all employees. Employees are evaluated on a sliding scale:

- 1 – Unsatisfactory Performer;
- 2 – Successful Performer Minus – "Employee met most (more than 50%), but failed to meet some performance expectations. Employee needs to further improve in one or more areas of expected job results or behavior competencies";
- 3 – Successful Performer – "Employee met all performance expectations and may have exceeded some (less than 50%). Employee was a solid contributor to the success of his/her department";
- 4 – Successful Performer Plus – "Employee met all and exceeded most (more than 50%) of the established performance expectations"; and,
- 5 – Exceptional Performer.

(Pl. Dep. Ex. 11 [Doc. 45-11] at 1.) Individual scores in each of the two categories are averaged to generate two overall ratings—one for job and individual responsibilities, and the other for terms and conditions of employment. Employees must score above 2.5 in each of the two categories to be eligible for a performance-based increase in salary. (*See* Aff. Natasha Renée Grimes ("Pl. Aff.") Ex. 4, 2014-2015 PMF [Doc. 53 at 150]; *id.* Ex. 5, 2015-2016 PMF [Doc. 53 at 158]; *id.* Ex. 9, 2016-2017 PMF [Doc. 53 at 180]; *id.* Ex. 33, 2018-2019 PMF [Doc. 53 at 266]; Pl. Dep. Ex. 11, 2017-2018 PMF [Doc. 45-11 at 6].)

eligible for a performance-based salary increase. (Pl. Aff. Ex. 4, 2014-2015 PMF [Doc. 53 at 150].)

During her second year as Assistant Dean, Grimes became the primary contact person for the "dual enrollment"[2] instructors; created schedules for the dual enrollment instructors; observed classes; interviewed teachers; covered classes when teachers were absent; got textbooks for teachers; and was the first point of contact when students needed to withdraw or had behavioral issues. (Pl. Dep. at 39-41.) In 2015, Lamar became Grimes's supervisor, and in her 2015-2016 PMF, Grimes received an overall rating of 4.33 in job and individual responsibilities and 5.0 in terms and conditions, indicating that she exceeded all requirements and was again eligible for a performance-based salary increase. (*Id.* at 43; Pl. Aff. Ex. 5, 2015-2016 PMF [Doc. 53 at 158].)

In April 2016, Groover retired, and his position of Dean of Academic Affairs became vacant. (PSAMF ¶ 23.) Grimes applied and interviewed for the vacancy; however, Paul Mizell, a Caucasian man, was selected for the position.[3] (*Id.* ¶ 24;

[2] The dual enrollment program provides an opportunity for high school students to earn high school and college credits at the same time. (Pl. Dep. at 41-42.)

[3] In her complaint, Grimes alleged that Mizell's selection was an adverse employment action that formed the basis of her race and gender discrimination

Pl. Dep. at 58.) Following Mizell's hiring, Lamar requested that Grimes continue to perform the dual enrollment duties and responsibilities so that Mizell could focus on general education duties and responsibilities. (PSAMF ¶ 30.) During Mizell's first year on the job, however, Grimes spent time teaching and training him about dual enrollment, general education, and other administrative duties because, she says, she was the only person who could address his questions about the position. (*Id.* ¶ 31.)

In June 2016, Foley tasked Grimes with distributing textbooks to dual enrollment students at Ogeechee and high schools in multiple counties. (PSAMF ¶ 34; Pl. Dep. at 150-51.) Grimes's textbook distribution responsibilities—what she refers to as her "manual labor tasks"—included loading and boxing textbooks, driving to high school campuses, labeling the textbooks, and shelving them in the library. (Pl. Dep. at 150.) In the fall of 2016, Grimes developed health issues related to distributing textbooks, and as a result, in December 2016, she was relieved from "loading them to the high school." (*Id*. at 152.) Even so, through

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claims; however, the Court dismissed as time-barred Grimes's claims predicated on conduct that took place before February 22, 2018. [Doc. 23 at 33-41; Doc. 38 (adopting this Court's report and recommendation).] Because Mizell's hiring took place in 2016, any discrimination claim related to it is time-barred.

2017, she continued to have some textbook distribution responsibilities involving small amounts of manual labor—namely, "lift[ing] them and giv[ing] them to students." (*Id.*) For her 2016-2017 PMF, Mizell gave Grimes an overall rating of 4.67 in job and individual responsibilities and 4.6 in terms and conditions, once again indicating that she exceeded all requirements and was eligible for a performance-based salary increase.[4] (PSAMF ¶ 39.)

In May 2017, a position opened up for a Distance Education Support Specialist. (PSAMF ¶ 40.) Instead of hiring a new employee, Foley offered to reassign the duties of the position to Grimes and to increase her salary by $5,000. (*Id.*) Grimes rejected the offer and countered with a demand of a $10,000 raise and a change in title to Dean; however, her counteroffer was refused. (*Id.* ¶ 41.) Foley went on to divide the responsibilities for the Distance Education Support Specialist position between two other employees. (*Id.* ¶ 44.)

On June 15, 2017, using an "Employee Complaint Resolution Form," Grimes made a formal internal complaint that Foley and Durden (and unspecified "others") discriminated against her on the basis of her race and gender by failing to

[4] It is not clear the exact time or the reason why Lamar stopped being Grimes's supervisor.

select her to fill the Dean position when Groover retired, and then, for not giving her the salary increase and change in title to Dean she had requested when the Distance Education Support Specialist duties had been offered to her. (Pl. Dep. Ex. 20 [Doc. 45-20].) As relief, Grimes asked for "Promotion to Dean or Director of Distant Education/Learning w/ comparable salary." (*Id.* at 1.) On June 28, 2017, Courtney Ware, the Director of Human Resources for TCSG, concluded that there was no evidence to support the complaint and no remedial action was taken. (*Id.* at 140; PSAMF ¶ 48.)

In October 2017, Grimes met with Mizell and Foley to discuss changing her duties and to "revise [her] 2017-2018 PMF."[5] (Pl. Aff. ¶ 24; *see* Pl. Dep. at 54, 80, 91.) Foley asked that Grimes return to teaching a course; and separately, informed her that she would no longer perform the textbook distribution duties, but would remain as the "back-up" person for them.[6] (Pl. Aff. ¶ 24.)

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[5] In her affidavit, Grimes states that she met with Mizell and Foley in October 2017 to "revise my 2017-2018 PMF." (Pl. Aff. ¶ 24.) To be clear, Grimes did not receive her performance scores for the 2017-2018 PMF until May 2018. (Pl. Dep. Ex. 11 [Doc. 45-11] at 7). Presumably, what Grimes means to say is that she met with Mizell and Foley in October 2017 to talk about what would be expected of her performance-wise for the 2017-2018 evaluation period.

[6] It is not clear from the record what Foley meant by "back-up" person or what duties the position of a "back-up" person entailed. As best the Court can tell, Foley intended that Grimes assist *as she was able to* with textbook distribution.

In January 2018, Foley announced the creation of six department chair positions which, Grimes says, were all filled by Caucasian instructors. (Pl. Dep. at 88.) Grimes speculates generally that sometime after she filed her grievance, Foley gradually re-assigned her duties to the department chair positions with the goal of eventually eliminating her position. (*Id.* at 89-91.) Grimes testified that reassignment took place gradually over two years, but that during that time, she was never interested in filling a department chair position. (*Id.*)

In Grimes's PMF for the 2017-2018 year, which she received on May 17, 2018, Mizell gave her slightly lower ratings of 3.33 in job and individual responsibilities and 3.6 in terms and conditions; nonetheless, she remained eligible for a performance-based salary increase. (PSAMF ¶ 72; Pl. Dep. Ex. 11 [Doc. 45-11] at 7.)

On May 31, 2018, Mizell resigned his position, and in June 2018, Foley appointed LeAnne Robinson as interim Dean of Academic Affairs. (PSAMF ¶¶ 74, 75.) The permanent Dean position was "openly posted to internal and external candidates." (Foley Decl. ¶ 6; PSAMF ¶ 55.) Despite the position being available, Grimes did not apply for the job. (Pl. Aff. ¶ 34.) Eventually, Robinson was

selected as a permanent Dean of Academic Affairs, effective November 1, 2018. (Pl. Dep. at 85-86.)

On June 11, 2018, Grimes requested to work from home for 12 weeks as an accommodation for a medical condition, which she indicated was related to her involvement with the textbook distribution duties. (Pl. Dep. Ex. 24 [Doc. 47-24] at 1.) Her request was approved for a six-week period, from June 18, 2018 through July 31, 2018. (*Id.* Ex. 25 [Doc. 47-25] at 1.) On July 17, 2018, Grimes requested a six-week extension of her medical leave until September 11, 2018, which was also granted. (*Id.* at 166; *id.* Ex. 26 [Doc. 47-26] at 1.)

In June 2018, when Grimes was working from home, Foley became her supervisor. (PSAMF ¶ 82.) On August 9, five months into her six-month leave, Stephen Miller, Ogeechee's Director of Human Resources, emailed Grimes to notify her that they "need to have a plan to get [her] visible on campus every week," even if only "for a small amount of time just in case other people may need to meet with [her] or . . . to meet with the Deans to review faculty credentials" during her leave. (PSAMF Ex. 26 [Doc. 53 at 241-42].) Instead of returning to campus part time, on August 21, Grimes filed a charge of discrimination with the EEOC, alleging race and disability discrimination and retaliation, in violation of Title VII

and the Americans with Disabilities Act of 1990 ("ADA"), against TCSG.[7] [Doc. 45-2 (2018 charge of discrimination).]

On September 5, 2018, Grimes requested FMLA leave starting on September 10, 2018, and continuing until November 30, 2018. (Pl. Dep. Ex. 30 [Doc. 45-29] at 1.) Her request for FMLA leave was approved.

On December 13, 2018, in preparation for returning to campus following her FMLA leave, Grimes asked to continue working from home 50 percent of the time and to work a 32-hour workweek. (Pl. Dep. at 172-73.) Her request to work from home half the time was approved; however, she was not granted permission to work a reduced number of hours. (*Id.* at 173-74.) On January 2, 2019, Grimes returned to campus following expiration of her FMLA leave and the holidays. The next day, Foley sent Grimes an email instructing her to "see what [she] can do to help" the high school coordinator in the library "during th[e] peak time getting ready for [the distant education] textbook distribution." (*Id*. Ex. 23 [Doc. 45-23].) Although Grimes contacted the coordinator and went to the library, she refused to physically handle any textbooks and instead just "stood around a little bit and kind of directed

[7] On August 31, 2018, the EEOC issued notice of right to sue. (PSAMF Ex. 30 [Doc. 53 at 253].) Grimes did not file a lawsuit within 90 days of receiving the notice, however.

the students." (*Id.* at 158, 159.) Grimes's participation, as limited as it was, does not appear to have caused any concern with her supervisors.

In February 2019, Grimes requested a six-month performance review meeting with her supervisor, Robinson, who responded that there were no performance-related concerns.[8] (PSAMF ¶ 94.) However, four months later, on June 3, 2019, in her 2018-2019 PMF, Grimes received an overall rating of 2.67 in job and individual responsibilities and 3.0 in terms and conditions—her lowest scores during her tenure at Ogeechee. (Pl. Aff. ¶ 40; *id.* Ex. 33, 2018-2019 PMF [Doc. 53 at 266].) Grimes met with Robinson to discuss the scores. (PSAMF ¶ 96.) Robinson acknowledged that there was an error in the score, and increased Grimes's job and individual responsibilities rating to 2.83. (*Id.*) Under either score, Grimes remained eligible for a performance-based increase in salary.[9]

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[8] Presumably, Robinson became Grimes's supervisor on November 1, 2018, when Robinson became the permanent Dean of Academic Affairs.

[9] The parties contend, at various points in their briefs, that based on Grimes's 2018-2019 PMF scores, she was not eligible for a performance-based raise [*ex.*, Doc. 47-2 at 10], however, the Court's own review of the record shows that for the 2018-2019 school year, as with all previous years relevant here, employees were eligible for a raise if their two average scores were above 2.5. (Pl. Dep. Ex. 14, 2018-2019 PMF [Doc. 45-14 at 6] (Section 6: Overall Ratings "**Note: Average must be at least 2.5 to be eligible for a Performance Based Increase*") (emphasis in original).) Here, Grimes was eligible for a performance-based raise because her two averaged scores were above 2.5. (*Id.*) Indeed, in Section 7 of the form, titled

Also in early 2019, Durden determined that the gradual decrease in the number and substance of responsibilities of the Assistant Dean position had rendered the position mostly administrative in practice. (Durden Decl. Ex. A [Doc. 47-18 at 11-12].) As a result, on February 11, 2019, Durden requested approval from the Commissioner of TCSG, Matt Arthur, for a Reduction-in-Force ("RIF") Plan, effective July 1, 2019, that would eliminate the one (and only) Assistant Dean of Academic Affairs position, then occupied by Grimes. (*Id.*). In the application, Durden explained that the position had become redundant and that Ogeechee could better utilize its resources by eliminating the position and redirecting the funds to hire faculty for a newly-approved Cybersecurity program. (*Id.*) On May 9, 2019, Miller emailed Durden to tell her that the request had been denied out of concern that Grimes might take legal action against TCSG, given that Grimes had only recently returned from FMLA leave, had been granted an accommodation of working from home 50 percent of the time, and had filed an EEOC charge as recently as 2018. (PSAMF Ex. B [Doc. 53 at 313].)[10]

"Increase Recommendation," the evaluating supervisor, presumably Robinson, checked the box for "Eligible for Performance based Increase." (*Id.* at 7.)

[10] The parties do not specify when Durden found out about Grimes's 2018 EEOC charge.

In August 2019, Durden renewed her request for the RIF, and on August 26, 2019, Commissioner Arthur approved the request. (Durden Decl. Ex. E [Doc. 47-18 at 19].) On September 9, 2019, Miller notified Grimes of the plan, including that it would eliminate her position effective Friday, November 1, 2019. (Pl. Dep. at 124-25; *id.* Ex. 16 [Doc. 45-16] at 1.) On September 16, 2019, Grimes filed a request for review of the RIF with Commissioner Arthur, essentially appealing the decision to eliminate her position. (PSAMF ¶ 105.) Commissioner Arthur responded that Grimes needed to wait until after the RIF plan was implemented to renew her request for review. (*Id*.) The position was eliminated on November 1, and on November 7, Grimes re-submitted her request for review to Commissioner Arthur. (*Id.* ¶ 108.) On November 18, he responded that the RIF was carried out in accordance with the approved plan and that her separation from her employment would stand. (*Id.*; Pl. Dep. Ex. 18 [Doc. 45-18] at 1.)

On December 3, 2019, Grimes filed a second charge of discrimination with the EEOC, alleging that she was terminated in retaliation for her "complaints about unlawful employment practices." (PSAMF ¶ 117.) On December 5, 2019, the EEOC issued a notice of right to sue. (*Id.* ¶ 118.)

B. Procedural Posture

On March 5, 2020, Grimes filed this action, asserting eight claims against Defendants. [Doc. 1.] Specifically, she alleged claims for retaliation in violation of Title VII; retaliation and discrimination in violation of the Rehab Act; gender and race discrimination in violation of Section 1983; retaliation in violation of her First Amendment right to free expression; violation of the Georgia Whistleblower Act; and state law tort claims for intentional infliction of emotional distress and negligent supervision and retention. [*Id.*] Following the Court's order on Defendants' partial motion for judgment on the pleadings, the majority of Grimes's claims were dismissed as untimely or unsupported by her allegations, and Grimes was limited to proceeding on the following claims:

- retaliation under Title VII against TCSG for conduct that occurred on or after February 22, 2018 (Count I);
- discrimination and retaliation under the Rehab Act for conduct that occurred on or after March 5, 2018 (Counts IV and V) [11]; and

[11] The Court found that Grimes's Title VII, Rehab Act, and Section 1983 claims are partially time-barred under the statutes of limitation applicable to each claim. Specifically, Grimes's Title VII retaliation claim is limited to actions that occurred on or after February 22, 2018, *i.e.*, 180 days before she filed her EEOC charge and that the Section 1983 and Rehab Act claims are limited to actions that occurred on or after March 5, 2018, *i.e.*, two years before Grimes filed this action.

- race and gender discrimination against Durden and Foley, in their individual and official capacities, under Section 1983, for conduct that occurred on or after March 5, 2018 (Count II).[12]

[Doc. 38.] As noted, Defendants now move for summary judgment on all of Grimes's remaining claims.

II. DISCUSSION

The Court first summarizes the applicable standard on a motion for summary judgment, then addresses Grimes's retaliation claims, followed by her disability discrimination claims, her Section 1983 claim, and finally her assertion that she can demonstrate a convincing mosaic of discrimination or retaliation.

A. Applicable Standard

A court should grant summary judgment when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The movant bears the initial burden of showing that it is entitled to summary judgment. *Id.* ("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."); *Celotex Corp. v. Catrett*, 477

[12] Grimes has not raised any arguments that conduct alleged amounts to hostile workplace harassment or a continuing violation that would allow the time-barred conduct back into the case.

U.S. 317, 323 (1986) ("Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact."); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991) (holding that *Celotex* did not change the rule that the movant bore the initial burden, and stating, "Even after *Celotex* it is never enough simply to state that the non-moving party cannot meet its burden at trial"). The movant may carry its burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325.

"Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark*, 929 F.2d at 608. The nonmovant is then required "to go beyond the pleadings" and to present competent evidence in the form of affidavits, answers to interrogatories, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (quotation omitted); *see* Fed. R. Civ. P. 56(c). "[M]ere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion." *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005).

Resolving all doubts in favor of the nonmoving party, the court must determine "whether a fair-minded jury could return a verdict for the Grimes on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In evaluating a summary judgment motion, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [the non-movant's] favor. *Id.* at 255.

B. Retaliation Claims Against TCSG

As discussed, Grimes's claim for retaliation under Title VII remains pending for conduct that occurred on or after February 22, 2018, as does her claim for retaliation under the Rehab Act for conduct that occurred on or after March 5, 2018. In her response to the motion for summary judgment, Grimes predicates her retaliation claims on the following actions: the failure to promote her to Dean in 2018, when Mizell's position became vacant; the reassignment of textbook distribution duties to her after she returned from FMLA leave; the purported reassignment of Assistant Dean duties to the department chairs that Foley created in January 2018; paying instructors more than Grimes; Mizell's and Robinson's assessment of Grimes in the 2017-2018 and 2018-2019 PMFs; Miller's and Durden's statements in early August 2018 that she needed to be visible on campus

and could not work from home full time; and the termination of her employment in November 2019. [Doc. 52 at 4-6.]

1. Title VII Retaliation

Title VII prohibits retaliation against an employee "because [s]he has opposed any practice made an unlawful employment practice by [Title VII], or because [s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). The first portion of Title VII's anti-retaliation provision is commonly referred to as the "opposition clause"; the second is known as the "participation clause." The opposition clause protects activity which occurs prior to the filing of a formal charge with the EEOC, such as filing an internal complaint of discrimination with the employer or complaining of discrimination to one's supervisors, *Rollins v. Fla. Dep't of Law Enforcement*, 868 F.2d 397, 400 (11th Cir. 1989); and the participation clause protects "proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC," *E.E.O.C. v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000). Because Grimes filed an

internal complaint in June 2017, and a charge with the EEOC in August 2018,[13] her retaliation claim arises under both the opposition and participation clauses.

In determining whether an employer has retaliated against an employee for engaging in protected activity, the Court analyzes the claim using the familiar *McDonnell Douglas* burden-shifting framework. *Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501, 511 n.10 (11th Cir. 2000) (*McDonnell Douglas* burden-shifting framework applies to retaliation claims.) First, the employee must show that: (1) she engaged in a statutorily protected activity; (2) the employer took a materially adverse action against her, and (3) some causal relationship existed between the two events. *Anderson v. Dunbar Armored, Inc.*, 678 F. Supp. 2d 1280, 1322 (N.D. Ga. 2009). "The adverse employment action must be material, meaning it must be one that 'could well dissuade a reasonable worker' from engaging in protected activity." *Wood v. Gilman Bldg. Prod. Inc.*, 769 F. App'x 796, 802 (11th

[13] To the extent that Grimes bases her retaliation claim on her December 2019 EEOC charge, the claim fails. Her employment was terminated on November 1, 2019, and she did not file a charge with the EEOC until December 3, 2019 (PSAMF Ex. A [Doc. 53 at 22-23]). Grimes has not alleged that any unlawful conduct occurred following her separation. Because the 2019 EEOC charge was filed *after* the alleged retaliatory conduct took place, she cannot establish any causal connection between her protected activity and any earlier retaliation. *Total Sys. Servs. Inc.*, 221 F.3d at 1174 n.2.

Cir. 2019) (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)).

Once the employee establishes a prima facie case of retaliation, the burden shifts to the employer to articulate a nonretaliatory reason for its treatment of the employee. *Pennington v. City of Huntsville,* 261 F.3d 1262, 1266 (11th Cir. 2001). If the employer presents a legitimate explanation for its actions, the burden then returns to the employee to show that the explanation is pretextual. *Id.* "A reason is not pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." *Brooks v. Cnty. Comm'n of Jefferson Cnty., Ala.,* 446 F.3d 1160, 1163 (11th Cir. 2006) (internal quotation omitted). The employee can meet her burden "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* (quotation omitted). However, "[p]rovided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." *Chapman v. AI Transp.,* 229 F.3d 1012, 1030 (11th Cir. 2000).

TCSG argues that Grimes's Title VII retaliation claim fails for several reasons. First, it argues that to the extent she alleges that she was denied a promotion or assigned textbook distribution duties in retaliation for engaging in protected activity, the claim fails because neither incident qualified as an adverse employment action. Second, TCSG argues that Grimes cannot establish a prima facie case of retaliation because she cannot show a causal connection between her complaint and any later adverse employment actions, including the termination of her employment. Third, even if she could establish a prima facie case, TCSG offers legitimate, non-retaliatory reasons for the complained-of conduct. [Doc. 47-2 at 3-12.] In response, Grimes argues that (1) the failure to promote her and the assignment of textbook distribution responsibilities were adverse employment actions, as were a laundry list of "other adverse employment actions" about which she complains; (2) that TCSG engaged in a "campaign of systematic retaliation" immediately following Grimes's complaints[14]; and (3) TCSG's reasons for the adverse employment actions were pretextual. [Doc. 52 at 4-13.] On reply, TCSG

[14] The Court once again notes that despite Grimes's argument that she was subject to a "campaign of systemic retaliation," she has not raised any arguments that any of the conduct amounts to hostile workplace harassment or that Defendants' conduct should be considered under some sort of continuing violation theory.

contends that (1) only Grimes's discharge and "perhaps" Ms. Robinson's assignment of lower annual PMF scores constitute adverse employment actions, but the rest are not actionable; (2) Grimes still cannot show any causal relationship between her complaints and either her termination or her lower PMF ratings; and (3) she has not shown that the proffered reasons for terminating her position were pretext for retaliation. [Doc. 54 at 2-8.]

The Court organizes its discussion below around each of the alleged adverse employment actions.

a) Failure to Promote

As discussed above, in November 2018, Robinson was hired to fill the Dean position that Mizell vacated. Grimes did not apply for that position. (Pl. Dep. at 85.) According to Grimes, the failure to select her was an adverse employment action because she "repeatedly discussed and expressed a desire to become a Dean." [Doc. 52 at 4.] The Court disagrees.

As a general matter, an employee who does not apply for a position cannot be heard to argue that her non-selection was an adverse employment action.[15]

[15] Even if the non-selection of an applicant *who did not apply* to a position were an adverse employment action for Title VII purposes, the Supreme Court has held that a plaintiff bringing a Title VII retaliation claim "must establish that his or her protected activity was a but-for cause of the alleged adverse action by the

Vaughn v. Louisville Water Co., 302 F. App'x 337, 348 (6th Cir. 2008) ("Not receiving a promotion for which one did not apply would not dissuade a reasonable worker from engaging in protected conduct, and accordingly does not constitute a materially adverse action."). There are two exceptions: (1) if an employee can show that an application would have been futile due to the employer's discriminatory practices, *E.E.O.C. v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1274 (11th Cir. 2002), or (2) if an employee can show that the position was not advertised and that the employer had some reason to consider her for the position, *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 768 (11th Cir. 2005). Neither applies here.

Under the first exception Grimes must demonstrate: (1) that she had a real and present interest in the job for which the employer was seeking applications; and (2) that she would have applied for the job but effectively was deterred from doing so by the employer's discriminatory practices. *Joe's Stone Crabs*, 296 F.3d at 1274. An employee can show that she was effectively deterred by showing that

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employer." *See Stacey-Suggs v. Bd. of Regents of Univ. Sys. of Ga.*, 44 F. Supp. 3d 1262, 1284 (N.D. Ga. 2014) (quoting *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013)). Here, Grimes has offered no evidence or argument that she would have applied for the position but for some conduct by TCSG in response to her protected activity, and therefore, she cannot establish a causal connection between her protected activity and the failure to promote her (into the position to which she did not apply).

the employer had a reputation for employing discriminatory hiring practices and the reputation was caused or perpetuated by the employer. *Id.* at 1275. An employer causes or perpetuates a reputation for discriminatory hiring practices when there is evidence of "deliberately and systematically excluding" members of a protected class from certain positions. *Id.* Here, Grimes has not pointed to evidence showing any deliberate or systematic exclusion of persons who engaged in protected activity, only that she simply "chose" to not apply.[16] (Pl. Dep. at 85.)

Under the other exception, meanwhile, Grimes would have to show that TCSG "di[d] not formally announce [the] position, but rather use[d] informal and subjective procedures to identify a candidate." *Vessels*, 408 F.3d at 768. The Eleventh Circuit "ha[s] not given a precise definition or test for what constitutes an informal hiring process, but [the Circuit has] rejected an argument that a hiring process was informal when the employer had formally posted the position[ ] . . . and required candidates to file an application, and the plaintiff knew about the position but chose not to formally apply." *Williams v. VWR Int'l, LLC*, 685 F. App'x 885, 887 (11th Cir. 2017) (citing *Smith v. J. Smith Lanier & Co.*, 352 F.3d

[16] In other words, Grimes has admitted that TCSG's actions were not the but-for reason she was not promoted.

1342, 1346 (11th Cir. 2003). Here, Grimes contends that the interim position was not posted[17] [Doc. 52 at 23], and Defendants concede that interim positions were not posted due to their temporary nature (R-PSAMF ¶¶ 54-55). Grimes, however, has not presented any evidence to show that the permanent (as opposed to the interim) position was not posted and accessible for applications. To the contrary, in her Statement of Additional Material Facts, she states that "[o]nce a person is appointed interim Dean . . . the vacant position is posted and/or advertised through OTC's job center." (PSAMF ¶ 55.) Thus, Grimes has failed to show that she applied for the position, or that the position was not posted but her employer still had a reason to consider her for it.

In sum, because Grimes's non-selection for the Dean position to which she never applied is not an adverse employment action, it cannot form the basis of her Title VII retaliation claim.

[17] The Court notes that Grimes does not predicate her Title VII retaliation claim on Defendants' not appointing her to the interim position; she does not argue that the interim position qualifies under the second exception; and although she argues that she expressed interest in becoming a Dean, she does not present any arguments or evidence that she expressed interest in an interim appointment as a Dean.

b) Reassignment of Textbook Distribution Duties

Grimes contends that she suffered an adverse employment action when Foley reassigned to her textbook distribution responsibilities upon her return from FMLA leave in January 2019. TCSG, however, argues that the assignment of these tasks does not constitute an adverse employment action because Grimes did not actually handle the textbooks. [Doc. 47-2 at 7.] TCSG has the better of the arguments.

The record shows that on January 3, 2019, Foley informed Grimes that the high school coordinator "needs some help during this peak time getting ready for . . . textbook distributions," and asked Grimes to "[p]lease make contact with her and see what [Grimes] can do to help." (Pl. Dep. Ex. D-23 [Doc. 45-23 at 1].) Grimes characterizes Foley's request as a demand that she physically handle the textbook distribution despite her health problems. But no reasonable juror could interpret Foley's instructions that way. Foley's email simply directed her to go to the library and "see what [she] can do to help." (*Id.*) It did not instruct her to engage in any manual labor or even touch the textbooks in any way that might hurt her—only to see what she could do to help. Indeed, at the time Foley made the request, even Grimes herself did not take it to mean that she was required to physically handle textbooks. Grimes testified that when she went to the library as

instructed, she "stated plainly to [the high school coordinator] that [she] would not be handling any textbooks" and instead did "something on the computer . . . [and] kind of just stood around a little bit and . . . directed the students." (*Id.* at 159.) Grimes points to no evidence that she was reprimanded or disciplined for using the computer and vaguely directing the students rather than assisting in the physical distribution of textbooks. Simply put, Foley did not instruct her to engage in manual labor, she did not do so, and she faced no repercussions for not doing so. As a result, the Court concludes that Foley's request for Grimes to assist in the library would not have dissuaded a reasonable worker from engaging in protected activity.[18] Thus, the assignment of textbook distribution responsibilities cannot give rise to a retaliation claim.

c) Unfavorable PMF Ratings

Grimes also contends that she suffered an adverse employment action when Mizell gave her lower ratings in her 2017-2018 PMF and when Robinson gave her unfavorable ratings in the 2018-2019 PMF. [Doc. 52 at 6.] TCSG counters that

[18] To the extent that Grimes contends that Foley's request in October 2017 that she serve as "back up" for the manual labor tasks was an act of retaliation for filing her first EEOC charge, the argument fails because that conduct is time-barred. [*See* Doc. 38.]

Grimes cannot establish that the ratings were causally related to any protected activity, and even if she could, she is unable to show that the proffered reasons for assigning her those scores are pretext for retaliation. [Doc. 54 at 4-7.] The Court agrees with TCSG.

With respect to the 2017-2018 PMF, Plaintiff has not presented evidence that establishes a causal connection between Mizell's assessment and her internal complaint concerning discrimination in July 2017. While close temporal proximity between the protected activity and the adverse employment action may help establish a causal connection, the Supreme Court has stated that without other evidence, the "mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action . . . must be 'very close.'" *Clark Cnty. Sch. Dist. v. Breedon*, 532 U.S. 268, 273 (2001) (citations omitted) (three-month period insufficient); *see also Porter v. Am. Cast Iron Pipe Co*., 427 F. App'x 734, 737-38 (11th Cir. 2011); *Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004). "If there is a substantial delay between the protected expression and the adverse action in the absence of other evidence tending to show causation, the complaint of retaliation fails as a matter of law." *Higdon*, 393 F.3d at 1220. A period of three or more months between the protected activity and the adverse

action has been found to be insufficient by itself to establish a causal connection. S*ee, e.g., Clemons v. Delta Air Lines Inc.*, 625 F. App'x 941, 945 (11th Cir. 2015) (collecting cases finding "three months between the protected activity and an adverse employment action to have been insufficient to establish causation"); *see also Brown v. Ala. Dep't of Transp.*, 597 F.3d 1160, 1182 (11th Cir. 2010) (three-month interval too long).

Here, Grimes received the 2017-2018 performance review in May 2018. (Pl. Dep. Ex. 11 [Doc. 45-11] at 7.) At that point nearly ten months had passed since she had complained internally about discrimination in June 2017. (*Id.* Ex. 20 [Doc. 45-20].) Because there is almost a year's gap between her protected activity and her performance review, and she has not set forth any other evidence of retaliation during that intervening period sufficient to separately establish a causal connection, she has not established a causal connection between protected activity and her 2017-2018 PMF scores.

As for the 2018-2019 PMFs, TCSG proffers that her scores were not the product of retaliatory intent, but rather a reflection of her deteriorating performance. [Doc. 47-2 at 10; Doc. 54 at 6.] Since TCSG has articulated a legitimate nondiscriminatory reason for her scores, the burden shifts to Grimes to show that

the proffered reason is pretext for retaliation. Grimes attempts to make this showing by arguing that Robinson appeared unfamiliar with the ratings in the PMF, that Mizell's name appeared on the form as her supervisor even though he was no longer her supervisor at the time the PMF was issued, and that, perhaps, Foley actually gave her the unfavorable ratings. (PSAMF ¶ 95; Pl. Dep. at 121.)

To show pretext, an employee must show by preponderance of the evidence the legitimate reasons offered by the employer for taking the adverse action were pretext for unlawful retaliation. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). A proffered reason is not pretext, however, unless it is shown both that the stated reason is false and that retaliation was the real reason. *Butterworth v. Lab'y Corp. of Am. Holdings*, 581 F. App'x 813, 816 (11th Cir. 2014) (citing to *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)). A plaintiff must meet the proffered reason for the adverse action "head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." *Chapman*, 229 F.3d at 1030.

Here, Grimes does not argue that her performance during the 2018-2019 school year warranted better ratings than she received, and her speculation[19] that someone other than Robinson completed her 2018-2019 PMF does not show that the reason for her "unfavorable" scores is not true and that the real reason is retaliation. To the extent that she contends it was actually Foley who completed her 2018-2019 PMF and gave her the lower scores, the record shows that Foley was her supervisor for a portion of 2018, at least from June, when Mizell left, until November, when Robinson officially took the permanent position of Dean. So even if there were some evidence to suggest that Foley was involved in rating Grimes's performance for the 2018-2019 PMF, it would not have been inappropriate for Foley to do so. And more to the point, Grimes has not offered any evidence that Foley's unfavorable ratings were animated by retaliatory intent. As to Grimes's assertion that Mizell's name still appeared on the form as her supervisor, even if this was inconsistent with internal procedures, it is too isolated to give rise to a reasonable inference of retaliatory animus. *See Boykin v. Bank of Am. Corp.*, 162 F. App'x. 837, 839 (11th Cir. 2005) (finding that a failure to follow

[19] And to be clear, it is speculation based entirely upon Robinson's unfamiliarity with the ratings and the presence of Grimes's former supervisors' name on the PMF. (Pl. Dep. at 113-121); [Doc. 52 at 12].

internal procedures is insufficient to suggest [retaliatory] motive); *Mitchell v. USBI Co.*, 186 F.3d 1352, 1355-56 (11th Cir. 1999) ("[S]tanding alone, deviation from company policy does not demonstrate [retaliatory] animus."). Because Grimes has failed to meet TCSG's legitimate, non-discriminatory reasons "head on," she has failed to create any genuine issue with regard to pretext.

d) Termination of Employment

Next, TCSG argues that Grimes cannot establish a causal link between her protected activity in filing the August 2018 EEOC charge and the elimination of her position a year later. TCSG also submits that even if Grimes could establish a prima facie case for retaliation, she cannot show that its proffered reasons for the RIF are pretext for retaliation. [Doc. 47-2 at 7-11.] Grimes counters that the RIF was part of a systemic campaign of retaliation, and, thus, she can establish causation. [Doc. 52 at 9-10.] She also contends that TCSG's reasons for the RIF are pretextual because internal communications among TCSG personnel, including that Miller, Durden, and Ware, made reference to her FMLA leave and the desire to avoid the appearance of retaliation in the context of seeking approval for the RIF. [*Id.* at 9-10, 12-13.]

Even if the Court assumes that Grimes can demonstrate a prima facie case of retaliatory discharge, her claim fails because she cannot show that TCSG's

reasons for terminating her were pretext for retaliation. TCSG has provided legitimate nondiscriminatory reasons for the RIF—*i.e.*, the position of Assistant Dean was eliminated because the duties associated with it became more administrative and clerical over time and because the resources allocated to the position could be better utilized in hiring faculty for the newly approved Cybersecurity Program. [Doc. 47-2 at 10-11.] Therefore, the burden shifts back to Grimes to demonstrate pretext.

Grimes contends that this explanation is pretextual because TCSG had a surplus for the fiscal year 2020. [Doc. 52 at 13.] But as before, this argument does nothing but quibble with the wisdom of TCSG's decision; Grimes does not attack it directly or provide any inference of retaliatory intent. This is because Grimes's contention that Ogeechee operated with a surplus (1) does not show that the reasons offered by TCSG are false or (2) that the real reason her job was eliminated was in retaliation for engaging in protected activity. Whether or not TCSG was running a surplus does not determine whether the Assistant Dean position had become largely administrative and whether the position's resources could be better allocated in the Cybersecurity Program. As for her contention that TCSG personnel referred to her taking medical leave and discussed the desire to avoid the appearance of retaliation,

those communications do not show pretext. Rather, they show that TCSG was evaluating the risk of litigation if it were to proceed with eliminating the Assistant Dean position, in light of the fact that Grimes had recently returned from FMLA leave. The fact that TCSG assessed the potential risk of litigation in connection with a personnel decision does not undermine its stated reasons for eliminating Grimes's position.[20]

In the absence of evidence showing that TCSG's reasons for elimination of Grimes's position are not true or that retaliation was the real reason, its stated reason for eliminating Grimes's position stands unrebutted.

e) Remaining Alleged Adverse Employment Actions

In addition to her primary complaints about retaliation, Grimes also makes passing reference to the following: (1) "Defendants refused to permit Grimes to continue working from home simply because Durden wanted Grimes to be 'visible'"; (2) instructors were paid more than her; and (3) Foley re-assigned her

[20] Grimes asserts that the reassignment of her duties to department chairs was retaliatory, and therefore also evidence of pretext as to the termination of her employment. However, Grimes fails to direct the Court to any responsibility that she contends was reassigned in a retaliatory fashion [*see* Doc. 52 at 5-6], and without something to tie the purportedly reassigned duty to retaliatory animus, that same evidence cannot demonstrate pretext as to the termination decision.

duties to department chair positions he created in January 2018. [Doc. 52 at 6.] None of these is actionable.

First, Miller's and Durden's position that Grimes needed to be "visible" on campus and could not work remotely full-time is not actionable because Grimes has not shown a causal relationship between those statements and any protected activity. Grimes was told in early August 2018 that Durden and Miller expected her to be physically present on campus and, thus, she could not work from home full-time. (*See* Pl. Dep. at 168-69; *id.* Ex. 29 [Doc. 45-28].) That was over a year after she made the internal complaint concerning race and gender discrimination in July 2017. (Pl. Dep. Ex. 20 [Doc. 45-20].) In the absence of any other evidence of retaliation during that intervening period sufficient to separately establish a causal connection, that gap in time is too long. Therefore, Grimes cannot be heard to complain that statements that she should be visible on campus and could not work remotely one hundred percent of the time were retaliatory.[21]

[21] The Court also notes that the statements that Grimes needed to be present on campus appears to simply be part of the interactive process about determining the reasonableness of Grimes's accommodation. The Court is not aware of any case in which an employer's communications with an employee about the reasonableness of an accommodation has been held to constitute an adverse employment action in the context of a retaliation claim. It cannot be the law that every statement that an employer makes to an employee about possible

Second, Grimes's complaint that she was paid less than instructors is completely undeveloped. She presents no evidence from which a reasonable finder of fact could conclude that the decision relating to the compensation was causally related to protected activity. She also presents no evidence as to when her compensation was set, who made the decision, what her compensation was, or even who was, in fact, paid more than her. This is insufficient to sustain a claim at summary judgment. "There is no burden upon the district court to distill every potential argument that could be made based upon the materials [in the record] . . . on summary judgment." *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *see also Blue Cross & Blue Shield of Ala. v. Weitz*, 913 F.2d 1544, 1550 (11th Cir. 1990) (rejecting proposition that the court must comb through "declarations or affidavits related to summary judgment ... [for information] which might form the basis of an argument . . . [when] the party fails to articulate such an argument").

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accommodations can give rise to a retaliation claim if the employee does not care for the proposed accommodation; otherwise, it would have a chilling effect on the ability of employers and employees to communicate openly in an effort to determine a reasonable accommodation. Indeed, Grimes admitted that the 50 percent remote work accommodation was sufficient to address her needs. (Pl. Dep. at 174.)

Finally, her assertion that Foley assigned her duties to department chairs is also completely undeveloped. She points to no evidence about what duties were reassigned, when those duties were reassigned, or to whom they were assigned. As such, she has not presented sufficient evidence from which a reasonable trier of fact could conclude that she suffered an adverse employment action that was causally related to her engaging in protected activity.

In conclusion, it is **RECOMMENDED** that summary judgment be **GRANTED** as to Grimes's Title VII retaliation claim.

2. Rehab Act Retaliation

The Rehab Act prohibits federal agencies from discriminating and retaliating against otherwise qualified individuals with a disability. *Sutton v. Lader*, 185 F.3d 1203, 1207 (11th Cir. 1999); *see also Burgos-Stefanelli v. Sec'y, U.S. Dept. of Homeland Sec.*, 410 F. App'x 243, 245 (11th Cir. 2011). Retaliation claims under the Rehab Act are assessed using the same framework as Title VII retaliation claims. *Sutton*, 185 F.3d at 1207*; Ball v. Bd. of Regents of Univ. Sys. of Ga.*, No. 1:20-CV-00012-SDG-LTW, 2021 WL 2471293, at *10 (N.D. Ga. May 5, 2021) (applying *McDonnell Douglas* burden-shifting framework and analysis to retaliation claims under the Rehab Act). Because Grimes's Rehab Act retaliation

claim is predicated on the same protected conduct and adverse employment actions as her Title VII retaliation claim; her Rehab Act claim fails for the same reasons spelled out the preceding section. Therefore, it is **RECOMMENDED** that Defendants' motion for summary judgment be **GRANTED** as to Grimes's Rehab Act retaliation claim as well.

The Court now turns to Grimes's discrimination claims, starting with her Rehab Act claims.

C. Disability Discrimination Under Rehab Act

There are two types of discrimination claims under the Rehab Act: disparate treatment discrimination and the failure-to-accommodate a disability. *See Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997); *see also Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1366 (11th Cir. 2000).[22] Here, Grimes asserts claims for both.

[22] Rehab Act claims are analyzed under the same framework as ADA claims. *Cash v. Smith*, 231 F.3d 1301, 1305 (11th Cir. 2000) (stating that the Rehab Act is governed by the same standards used in ADA cases); *see also* 29 U.S.C. § 794 (d) ("The standards used to determine whether this section has been violated . . . shall be the standards applied under [the ADA.]").

1. Disparate Treatment Under the Rehab Act

Grimes first contends that TCSG discriminated against her on the basis of disability by (1) continuing to assign her textbook distribution responsibilities upon returning to work from FMLA leave; and (2) terminating her employment. [Doc. 1 ¶¶ 139-44; Doc. 52 at 16-21.] "To prevail on a disparate treatment claim, a plaintiff must generally demonstrate that an employer intentionally discriminated against her on the basis of a protected characteristic." *See Gooden v. Internal Revenue Serv.*, 679 F. App'x 958, 964 (11th Cir. 2017) (citing *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009)). Because Grimes's Rehab Act disparate treatment claim rests on circumstantial evidence of discrimination, it is analyzed under the *McDonnell Douglas* burden-shifting framework. *See Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1193 (11th Cir. 2004) (applying *McDonnell Douglas* burden-shifting framework to ADA discrimination claim).

Generally, to establish a prima facie case of disparate treatment in a disability discrimination case, the plaintiff must show that: "(1) she is a member of a protected class; (2) she was subjected to an adverse employment action; (3) her employer treated similarly situated employees outside of her protected class more favorably than she was treated; and (4) she was qualified to do the job." *Gooden*,

679 F. App'x at 964 (quoting *Trask v. Sec'y, Dep't of Veterans Affairs*, 822 F.3d 1179, 1191 (11th Cir. 2016)). As to Grimes's assertion that she suffered discrimination when she was assigned textbook related tasks, as discussed in the retaliation section above,[23] Foley never instructed her to engage in manual labor, and Grimes, in fact, did not do so. She fails to point to any evidence that she suffered any physical harm when she used the computer and directed students (rather than assisting in the physical distribution of textbooks) or that she suffered any professional consequences for not doing more. As a result, the Court concludes that Foley's request for Grimes to assist, as best she could, with textbook distribution did amount to a material change her employment, and therefore does not constitute an adverse employment action, as Grimes argues. As a result, Grimes's disparate treatment claim with regard to Foley's request is subject to summary judgment.

The analysis is somewhat different in relation to the end of Grimes's employment. Grimes appears to contend both that the RIF was discriminatory and

[23] Grimes presents no new arguments for why the analysis should change in the context of a disability claim. [*See* Doc. 52 at 18 ("However, for the reasons previously discussed, *supra*, the manual labor tasks clearly constitute an adverse employment action.").]

that, separately, the refusal to consider her for other roles, such as a faculty position in Cybersecurity, was as well. [Doc. 52 at 16-18.] Defendants have offered legitimate non-discriminatory reasons for the RIF—that is, that the duties assigned to it had deteriorated and because its resources were better used elsewhere. As discussed above, the burden shifts to Grimes to show that the stated reasons are mere pretext for disability discrimination. *Banim v. Fla. Dep't of Bus. & Pro. Regul.*, 689 F. App'x 633, 636 (11th Cir. 2017). While Grimes points back to the budget surplus again to argue pretext in relation to the RIF, she does not attack TCSG's stated reasons or offer any evidence whatsoever that disability played any role [*see* Doc. 52 at 19], and as a result, TCSG's stated reasons for eliminating Grimes's position remain unrebutted.

As for the Cybersecurity role, Defendants argue that Grimes was not considered for the Cybersecurity role because she was not qualified for it, and, therefore, she cannot establish even a prima facie case of disability discrimination. [Doc. 54 at 9-10.] Although Grimes suggests that she could have *become qualified* for the position through additional credentialing [*see* Doc. 52 at 17], she does not dispute that she did not (and does not) have the requisite credentials for the position, as TCSG maintains. As a result, Grimes cannot establish a prima facie case that

the failure to consider, much less hire, her for the Cybersecurity position was discriminatory.[24]

For these reasons, it is **RECOMMENDED** that Defendants' motion for summary judgment be **GRANTED** as to Grimes's disparate treatment claim under the Rehab Act.

2. Failure to Accommodate

Defendants next argue that Grimes's failure-to-accommodate claim fails because Defendants granted Grimes all the reasonable accommodations she requested—she worked remotely for the duration of her medical leave, Miller approved her FMLA leave request, and, after her return from FMLA leave, she continued to work from home 50 percent of the time. To the extent that Grimes now contends that her request to continue working remotely 100 percent of the time was unreasonably denied,[25] Defendants submit that this request would have imposed an undue hardship and that Grimes admitted that a 50 percent remote schedule would suffice. [Doc. 47-2 at 18-20.] In response, Grimes argues that

[24] Grimes asserts that she would also have been qualified to fill the Department Chair positions that Foley created in January 2018 [Doc. 52 at 18]; however, she cites no evidence indicating that any of those positions were available at the time her job was eliminated.

[25] This was not included among the allegations in Grimes's complaint.

TCSG denied her previously approved accommodation when Foley asked her to provide backup for the textbook distribution, and that a 100 percent remote work schedule was a reasonable accommodation that was denied to her. [Doc. 52 at 20-21.]

To establish a prima facie claim for failure to accommodate, a plaintiff must show that (1) she is disabled; (2) she was a "qualified individual" at the relevant time, meaning she could perform the essential functions of the job in question with or without reasonable accommodations; and (3) she was discriminated against by way of the defendant's failure to provide a reasonable accommodation. *See Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11th Cir. 2001); *see also Solloway v. Clayton*, 738 F. App'x 985, 987 (11th Cir. 2018). An accommodation is reasonable if it enables the employee to perform the essential functions of the job. *Lucas*, 257 F.3d at 1255. "[T]he burden of identifying an accommodation that would allow a qualified individual to perform the job rests with that individual, as does the ultimate burden of persuasion with respect to demonstrating that such an accommodation is reasonable." *Stewart*, 117 F.3d at 1286. Significantly, "an employer is not required to accommodate an employee in any manner in which the employee desires." *Id.*

Here, Grimes fails to show how Foley's decision to place her in a backup role assisting the main textbook distributor was not a reasonable accommodation of her disability.[26] Grimes acknowledges that on the one occasion she was asked to do anything in this backup role, she was able to fulfill the functions of the role by sitting at a computer and directing students. And she has not pointed to any evidence to suggest that she suffered any injury or aggravation of her disability as a result of sitting at a computer and speaking to students. As a result, Grimes fails to demonstrate that TCSG's accommodation was not reasonable.

As to Grimes's request to work remotely on a full-time basis, Grimes has admitted that working from home 50 percent of the time—which was the accommodation granted by TCSG—was sufficient for her needs. (Pl. Dep. at 174.) As noted above, an employer's proffered accommodation need not match what "the employee desires," but merely accommodate the employee's disability while allowing her to perform the essential functions of her job. *Stewart*, 117 F.3d at 1286; *see also*, *Sutton*, 185 F.3d at 1211 (holding that an employer is not required

[26] Although Grimes continues to complain that her original role contributed to her disability, Foley's request that Grimes to perform actual physical tasks is not actionable because the only time she was asked to do so was in 2016, well outside of the limitations period.

to create a light duty or other special position in response to an employee's request if none presently exists or is available). That Grimes admits that she was accommodated by her 50 percent remote schedule ends the inquiry. But even if it did not, Grimes's only line of attack now is to argue that TCSG's *basis* for denying her request to work remote full-time—namely that she needed to be "visible" and available to meet with administrators, faculty, and other constituencies—was somehow pretextual. But whether or not Grimes's requested accommodation would have allowed her to fulfill the "visibility" requirements of the role, and whether those visibility requirements were essential requirements of the role, need not be litigated where an offered accommodation is already determined to be reasonable. *Terrell v. USAir*, 132 F.3d 621, 626 (11th Cir. 1998) (holding that a plaintiff's burden is not met "by simply naming a preferred accommodation"); *see also Umbarger v. Ga. Dep't of Revenue*, No. 1:05-CV-1881-CC, 2007 WL 9700751, at *21 (N.D. Ga. Mar. 30, 2007) (granting summary judgment claim on a failure-to-accommodate claim where employer accommodated employee, though not in plaintiff's preferred fashion), *aff'd*, 262 F. App'x 982 (11th Cir. 2008). Grimes admits as much, making summary judgment appropriate.

Considering the foregoing, it is **RECOMMENDED** that Defendants' motion for summary judgment be **GRANTED** as to Grimes's reasonable accommodation claim under the Rehab Act.

D. Section 1983 Discrimination Claim Against Durden and Foley

Grimes's sole claim against Durden and Foley is that they "consistently denied Grimes opportunities to serve as a Dean of Academic Affairs due to her gender (female) and race (African American) while instead filling the position with Caucasian and male candidates with significantly inferior qualifications and experience." [Doc. 1 ¶ 105.] She contends that Durden and Foley "intentionally discriminated against Grimes on the basis of her race by continuously and repeatedly failing to promote [her] and by denying [her] the same opportunities as lesser qualified, similarly-situated non-African American administrators and instructors." [*Id.* ¶ 111.][27]

[27] Grimes's Section 1983 claim is solely based on the failure to promote her to the position Mizell vacated and not on her termination from employment. [Doc. 1 ¶¶ 105, 111.] However, Defendants argue that even if Grimes predicated her Section 1983 claim on her discharge, the claim fails because Grimes has not shown that the reasons for the elimination of the position were pretext for unlawful discrimination. [Doc. 47-2 at 21, n.7.] The Court agrees. As discussed earlier, Grimes cannot establish that the reasons for the elimination of her position are pretext for discrimination. Thus, to the extent that her Section 1983 claim is predicated on the elimination of her position, the claim fails.

Disparate treatment claims brought under the Fourteenth Amendment require proof of discriminatory intent and are subject to the same standards of proof and analytical framework as Title VII disparate treatment claims. *Ezell v. Wynn*, 802 F.3d 1217, 1226 (11th Cir. 2015). Under the *McDonnell Douglas* burden-shifting framework, a plaintiff must first establish a prima facie case of discrimination by demonstrating that she (1) is a member of a protected class, (2) was qualified and applied for the position, (3) suffered an adverse employment action, and (4) was replaced by someone outside of her protected class or otherwise received less favorable treatment than a similarly situated person outside of her protected class. *Vessels*, 408 F.3d at 768. If the plaintiff makes out her prima facie case, the burden shifts to the employer to articulate a legitimate reason for the adverse action. *Id*. If the employer does so, the burden shifts back to the plaintiff to come forward with evidence sufficient for a reasonable factfinder to conclude that any reasons given were a pretext for discrimination. *Id.*

Grimes's Section 1983 discrimination claim fails because her non-selection for Mizell's position was not an adverse action. To prevail on a disparate treatment claim, an employee must show she suffered an adverse employment action, which is defined as "a decision of the employer impacted the terms, conditions, or

privileges of [her] job in a real and demonstrable way" and that it had an "tangible adverse effect on the plaintiff's employment." *Jefferson v. Sewon Am., Inc*., 891 F.3d 911, 921 (11th Cir. 2018) (citations omitted; alterations adopted). This is a higher bar than what an employee must show to bring a retaliation claim, which, as discussed above, only requires a showing that the employer's action could well dissuade a reasonable employee from engaging in protected activity. Since the failure to promote Grimes to Mizell's position is not an adverse employment action sufficient to support a retaliation claim, it follows that is also not an adverse employment action for purposes of her gender and race disparate treatment claim.

Grimes's claim also fails because she cannot establish the fourth prong of the prima facie case—that someone outside her protected class received more favorable treatment—as Robinson, who was ultimately selected for Mizell's position, is an African-American woman and, thus, is not outside of Grimes's protected class.[28]

[28] Grimes argues that although Robinson is within Grimes's protected class, the "other positions Grimes sought or expressed an interest in were filled by males." [Doc. 52 at 24.] Grimes, however, does not specify which other positions she refers to and the only other position that she applied for was the Groover's former position that Mizell filled. But, as discussed above, Mizell succeeded Groover in 2016, outside the statute of limitations period.

Accordingly, it is **RECOMMENDED** that Defendants' motion for summary judgment be **GRANTED** as to Grimes's Section 1983 claim against Foley and Durden.[29]

E. Convincing Mosaic

Grimes finally argues that she has presented a convincing mosaic of evidence that "clearly establishes discriminatory/retaliatory intent, systematic better treatment of similarly-situated employees, and pretext[.]" [Doc. 52 at 30.] To support this assertion, she simply provides a five-page, bullet-point laundry list of facts, without any legal argument as to ***why*** these facts demonstrate a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination or retaliation. [Doc. 52 at 30-34.] Grimes also does not attempt to untangle conduct she contends was racist, from that which she says was sexist or retaliatory. [*Id.*]

In *Smith v. Lockheed-Martin Corp.*, the Eleventh Circuit held that "the *McDonnell Douglas* framework is not, and never was intended to be, the *sine qua*

[29] Durden and Foley alternatively argue that they are entitled to qualified immunity as to the Section 1983 claim. [Doc. 47-2 at 23-25.] The Court need not, and does not, address that issue, however, because the claim against them is without merit.

non for a plaintiff to survive a summary judgment motion in an employment case," and that a plaintiff can survive summary judgment if she "presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory [or retaliatory] intent." 644 F.3d 1321, 1328 (11th Cir. 2011). The Eleventh Circuit has recognized three categories of circumstantial evidence that may be relevant under the convincing mosaic approach:

> (1) suspicious timing, ambiguous statements, and other bits and pieces from which an inference of discriminatory intent might be drawn, (2) systematically better treatment of similarly situated employees, and (3) that the employer's justification is pretextual.

Lewis v. City of Union City, Ga., 934 F.3d 1169, 1185 (11th Cir. 2019).

Typically, this approach allows the plaintiff to bypass the presentation of a prima facie case. *See Rioux v. City of Atlanta*, 520 F.3d 1269, 1277 (11th Cir. 2008). However, because it is not clear that the convincing mosaic approach differs meaningfully from the standard pretext analysis, in circumstances when a plaintiff's claims fail at the pretext stage, utilizing the convincing mosaic approach does not normally lead to a different outcome. *See El-Saba v. Univ. of S. Ala.*, 738 F. App'x 640, 647-48 (11th Cir. 2018) (holding that plaintiff's "failure to rebut [defendant]'s asserted legitimate, nondiscriminatory reason for his termination is fatal to his "convincing mosaic" theory); *see also Connelly v. WellStar Health Sys.,*

Inc., 758 F. App'x 825, 831 n.2 (11th Cir. 2019) (holding that district court did not err in declining to consider "convincing mosaic" theory because when "the district court assumed without deciding that [plaintiff] could set out a prima facie case of [] retaliation, the *McDonnell Douglas* framework had no ill effect—regardless of the standard used"); *cf. Scott v. Soc. Involvement Missions, Inc.*, No. 1:17-cv-4963-AT-CCB, 2020 WL 7237702, at *4 (N.D. Ga. Dec. 9, 2020) (citing *Chapter 7 Trustee v. Gate Gourmet*, Inc., 683 F.3d 1249 (11th Cir. 2012)).

Here, Grimes fails to point to any of the type of evidence laid out in *Lewis*. She does not identify any particular ambiguous statement and explain how it might be evidence of discriminatory or retaliatory intent; does not highlight any suspicious timing and explain how it contributes to a mosaic of other facts; fails to point to any systematically better treatment of similarly situated individuals, and as explained repeatedly above, fails to show that TCSG's proffered non-discriminatory reasons for its decisions were pretextual. In other words, Grimes's bullet-point parade of horribles cannot begin to tile a mosaic of discrimination or retaliation, much less a convincing one. [Doc. 52 at 30-34.]

Based upon the foregoing, Grimes has failed to demonstrate a convincing mosaic of disability discrimination, race discrimination, sex discrimination, or retaliation, and cannot resuscitate her claims in this manner.

III. CONCLUSION

For the foregoing reasons, it is **RECOMMENDED** that Defendants' motion for summary judgment [Doc. 47] be **GRANTED**.

As this is a final report and recommendation, there is nothing further in this action pending before the undersigned. Accordingly, the Clerk is **DIRECTED** to terminate the reference of this matter to the undersigned.

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

JOHN K. LARKINS III
United States Magistrate Judge