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

CHRISTEN ROBINSON KELLEY,	:	CIVIL ACTION NO.
	:	1:19-CV-4429-WMR-JSA
Plaintiff,	:	
	:	
v.	:	
	:	
CATHERINE HOWDEN and GEMA/HOMELAND SECURITY,	:	**ORDER AND FINAL REPORT AND RECOMMENDATION ON A MOTION FOR SUMMARY JUDGMENT**
Defendants.	:	

Plaintiff Christen Robinson Kelley filed this employment discrimination action on October 1, 2019. Plaintiff claims that her employer, the Georgia Emergency Management and Homeland Security Agency ("GEMA"), and her supervisor therein, Catherine Howden, discriminated against her because of her race. Plaintiff alleges that Howden engaged in race discrimination in violation of the Civil Rights Act of 1866 ("§ 1981"), 42 U.S.C. § 1981, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and that GEMA engaged in race discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq.* Plaintiff additionally alleges that Howden and GEMA unlawfully retaliated against her in violation of § 1981 and Title VII, respectively.

The action is before the Court upon Defendant's Motion for Summary Judgment [89]. For the reasons discussed below, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment [89] be **GRANTED** and that judgment be entered in favor of Defendants on all of Plaintiff's claims. Further, the Clerk is **DIRECTED** to unseal documents [93], [94], and [95].

I. FACTS

Unless otherwise indicated, the Court draws the facts stated herein from Defendants' "Statement of Material Facts as to Which There is No Genuine Issue to be Tried" [89-2] ("Def. SMF"), Plaintiff's response thereto [97-3] ("Pl. Resp. SMF"), Plaintiff's "Statement of Additional Facts" [97-2] ("Pl. SMF"), and Defendants' response thereto [102] ("Def. Resp. SMF"). Where appropriate, the Court directly cites to underlying exhibits filed by the parties.

Under the Local Rules, the Court must deem admitted those facts submitted by Defendants that are supported by citations to record evidence, and for which Plaintiff has not expressly disputed with citations to record evidence. *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).").

Accordingly, for those facts submitted by Defendants that Plaintiff has failed to dispute with citations to record evidence, the Court must accept the facts as true, so long as the facts are supported by citations to record evidence, do not make credibility determinations, and do not involve legal conclusions. *See E.E.O.C. v. Atlanta Gastroenterology Assocs., LLC*, No. CIV. A. 1:05-CV-2504-TWT, 2007 WL 602212, at *3 (N.D. Ga. Feb. 16, 2007). The Court has nevertheless viewed all evidence and factual inferences in the light most favorable to Plaintiff, as required on a defendant's motion for summary judgment. *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).

The Court has excluded assertions of fact by either party that are clearly immaterial, or presented as arguments or legal conclusions, and has excluded assertions of fact unsupported by a citation to admissible evidence in the record or asserted only in a party's brief and not in its 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 . . . or (d) set out only in the brief and not in the movant's [or respondent's] statement of undisputed facts."); *see also* LR 56.1(B)(2)(b) (respondent's statement

of facts must also comply with LR 56.1(B)(1)). Nevertheless, the Court includes certain facts that are not necessarily material, but which are helpful to present the context of the parties' arguments. The Court will not rule on each objection or dispute presented by the parties and will discuss those objections and disputes only when necessary to do so regarding a genuine dispute of a material issue of fact.

As an initial matter, it must be noted that Plaintiff's Statements of Material Facts and her Response to Defendants' Statement of Material Facts are riddled with improprieties. Plaintiff's 188-paragraph Statement of Material Facts is filled with pages of immaterial facts that do little to clarify the focus of her claims or relevant material facts. To wit, several pages of Plaintiff's Statement of Material Facts consist simply of extensive quotes of the State Personnel Board's and GEMA's separate Performance Management Policies. *See* Pl. SMF at ¶¶ 25–90. Many of Plaintiff's factual allegations in both her Statement of Material Facts and Response to Defendant's Statement of Material Facts cite to numbered exhibits—presumably attached to her response to Defendants' Motion for Summary Judgment—that do not actually appear with any clear demarcation in her 1,571-page response filing. Worse yet, Plaintiff's Response to Defendants' Statement of Material Facts purports to deny a substantial portion of Defendants' assertions with non-sequitur assertions of additional facts that do not contradict them, or with legal arguments as to the significance of those facts. The Court will address Plaintiff's serial denials and

objections wherever possible. However, the undersigned emphasizes that purported denials of Defendants' stated facts that rely on non-sequitur assertions of other facts irrelevant to Defendants' assertion will result in the admission of Defendants' assertion. *See Nealy v. SunTrust Banks, Inc.*, 1:19-CV-2885-SDG-LTW, 2020 WL 9219293, at *1–2 (N.D. Ga. Nov. 16, 2020), *report & rec. adopted by* 2021 WL 1116004 (N.D. Ga. Mar. 23, 2021).

GEMA is an agency of the State of Georgia tasked with preparing and implementing the State's response to various threats to public safety. *See* O.C.G.A. § 38-3-20.[1] On October 17, 2016, the agency hired Plaintiff to the position of Communications Specialist I, which was housed in GEMA's External Affairs Unit, which is sometimes referred to as the Strategic Communications Unit. Def. SMF at ¶ 5. A state-prepared summary of the role noted that a Communications Specialist I generally operates "under supervision" to "assist[ ] with the planning, development and implementation of a communications program, and/or public relations plan[.]" Pl. Dep. Exh. D-4 [81-4]. Minimum qualifications for the position included a bachelor's degree in communications, or a related field, and of three years of communications-related experience. *Id.* At the time of her hiring, Plaintiff held an

[1] The undersigned takes judicial notice of this background fact pursuant to Rule 201 of the Federal Rules of Evidence.

Associate of Arts degree in Media Studies and a Bachelor of Science degree in Communications; she would go on to earn a Master's degree in Strategic Communications in December 2017. Def. SMF at ¶ 83. Plaintiff's resume listed the following relevant experience: (1) a one-year public relations internship at Wellstar Health System; (2) a five-month internship at Enchanted Branding & PR; (3) eight months as a Qualitative Assistant at Schlesinger Associates; (4) four months as a Consumer Affairs Specialist at Randstad; and (5) ten months as a journalist/news assistant at the Gainesville Times newspaper. Def. SMF at ¶ 84; Pl. Resp. SMF at ¶ 84. At the time she began the role, Plaintiff was assigned an annual salary of $36,000. Def. SMF at ¶ 5. Once she started, Plaintiff's day-to-day duties included coordinating the External Affairs Inbox and a Constituent Call Log, creating the layout of and contributing articles and photographs to a newsletter, preparing news content to be included in GEMA's Daily Digest, and monitoring social media. *Id.* at ¶ 11.

Plaintiff was interviewed, hired, and initially supervised by Catherine Howden, who joined GEMA in July 2015 as its Senior Policy and Strategic Communications Director, and who would go on to serve as the agency's Chief of Staff until March 2019. *Id.* at ¶ 2, 5, 10. During all periods relevant to this action, Homer Bryson served as GEMA's Director, and Mark Sexton served as its Deputy

Director of Administration and Finance. *Id.* at ¶ 1. Howden, Bryson, and Sexton are Caucasian; Plaintiff is African-American. *Id.* at ¶ 3.

In the spring of 2017, the External Affairs team consisted of Plaintiff, Uyen Le, Julia Regeski, Lisa Rodriguez-Presley, and Brandy Mai, all of whom worked under Howden's supervision. *Id.* at ¶ 10. Le and Regeski each occupied the roles of Communications Specialist II and Media Relations Specialist II. *Id.*[2] Rodriguez-Presley occupied the roles of Communications Specialist II and Senior Communications Strategist. *Id.* Mai occupied the roles of Communications Specialist III and Senior Communications Strategist. *Id.*

Le was initially hired as a Communications Specialist I/Media Relations Specialist I on September 16, 2016 at an annual salary of $36,000. *Id.* at ¶ 88. At the time of her hiring, she held a Bachelor of Arts degree in Journalism, with a major in Broadcast Journalism and a minor in Political Science. *Id.* at ¶ 89. She brought nearly two years of full-time professional experience and one-and-a-half years of reporting-related internship experience. *Id.* at ¶ 91. Her experience included nearly two years as a reporter for NBC/WAGT, a year as an investigative intern with Channel 2/WSB-

[2] Plaintiff purports to deny this assertion on the grounds that the positions of Communications Specialist II and Media Relations Specialist II occupy somewhat differing pay scales. Pl. Resp. SMF at ¶ 10. However, whether or not the positions' formal pay scales differed has no bearing on whether Le and Regeski occupied the positions.

TV, and four months as a general assignment intern with Cox Media Group's Washington Bureau. Pl. Dep. Exh. D-26 [81-26]. One month into her tenure at GEMA, Le was promoted to Communications Specialist II/Media Relations Specialist II, which included an annual salary of $39,600. Def. SMF at ¶ 88.[3] Howden explained that Le's promotion was the result of her "hit[ing] the ground running during her first disaster," showing strong writing skills, operating without oversight, and having videography experience. Def. SMF at ¶ 93 (citing Howden Decl. [89-5] at ¶ 46).[4] Le would receive a discretionary raise to a salary of $44,000

[3] Plaintiff purports to deny this assertion, explaining that Howden allegedly "gave Le a raise without giving her a performance evaluation." Pl. Resp. SMF at ¶ 88. Plaintiff contends that a "performance evaluation is required for all salary increases." *Id.* However, whether or not Plaintiff feels the promotion and/or raise was procedurally proper has no bearing on whether or not it occurred.

[4] Plaintiff objects to the consideration of the declaration in which Howden explains her rationale. Pl. Resp. SMF at ¶ 93. Plaintiff claims that, during discovery, she sought from Howden all documents related to Le's work assignments and that Howden did not turn them over. From here, Plaintiff makes the leap of contending that the Court must apply "Georgia's spoliation law" and make adversely inferences against them contradicting essentially all testimonial statements made about Le's work assignments and performance. *Id.*

This argument must be rejected. First, to the extent that Plaintiff's arguments depend on her lack of satisfaction with Defendants' June 2020 responses to her discovery requests, the time to raise and preserve such an argument was at that time rather than in a January 2021 response to a summary judgment motion filed well after the close of discovery. *See* L.R. 37.1(B), N.D.Ga. ("Unless otherwise ordered by the Court, a motion to compel a disclosure or discovery must be filed within the time remaining prior to the close of discovery or, if longer, within fourteen (14) days after service of the disclosure or discovery response upon which the objection is based.")

on May 1, 2017, *id.* at ¶ 94; in a contemporary memorandum, Director Bryson noted that Le was receiving the raise because took "on additional responsibilities as the newly most-senior of our Strategic Communications Strategists in training and mentoring our newest communications staff and as the expert on Ready Georgia and other technology-based media outlets," Lowe Decl. Exh. A [89-4] at 15.[5]

Regeski was hired by Howden on April 16, 2017 as a Communications Specialist II/Media Relations Specialist II at an annual salary of $42,000. Def. SMF at ¶ 97. Regeski had spent the previous three-and-a-half months as a scheduler in the

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Second, a spoliation argument requires, at a minimum, a showing that (1) "the missing evidence existed at one time"; (2) "the defendant had an obligation to preserve it"; and (3) that "it was crucial to he plaintiff being able to prove her case." *Ata v. Cisco Sys., Inc.*, 1:18-CV-1558-CC-JKL, 2020 WL 7384689, at *4 (N.D. Ga. Aug. 4, 2020), *report & rec. adopted by* 2020 WL 7022450 (N.D. Ga. Nov. 3, 2020). An adverse inference resulting from a spoliation finding requires a further showing of bad faith on the party against whom it is sought. *Id.* Other than a conclusory statement that "[s]uch documents should be in [Defendants'] custody," Plaintiff makes no showing that Defendants could have turned over the requested documents. Plaintiff makes no argument as to Defendants' bad faith.

Plaintiff's flurry of objections to Howden's declaration continue in the form of arguing that other evidence show that Le "was responsible for making newsletters like everyone else" and that she "could not have received a raise without an annual performance evaluation." Pl. Resp. SMF at ¶ 93. None of these contentions, however, contradict the factual assertions at hand as to Howden's reasons for promoting for Le or other personnel decisions.

[5] Plaintiff lodges the same objections and/or denials as above. Pl. Resp. SMF at ¶ 94. They are rejected for the same reasons.

Office of the Governor at a salary of $35,000. *Id.*[6] Before her stint as a scheduler, Regeski spent one-and-a-half years completing marketing, writing, and communications internships. Pl. Dep. Exh. D-27 [81-27]. At the time she was hired, Regeski held a bachelor's degree with a major in English and a minor in Business Administration. Def. SMF at ¶ 98. Howden explained that she valued Regeski's experience working in the Office of the Governor, which she understood to be a fast-paced environment with significant writing opportunities with high work product expectations. *Id.* at ¶ 99.[7] In addition to multiple agency-wide salary increases,

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[6] Plaintiff purports to deny the previous two sentences on the grounds that Regeski "did not qualify for the position [to which she was hired] when she was hired," because she allegedly did not have the requisite minimum experience, making an unclear citation to "Exhibit 6" without noting which document that exhibit is appended to. Pl. Resp. SMF at ¶ 97. Plaintiff's assertion has nothing to do with whether Regeski was hired as she was.

[7] Plaintiff objects to Howden's testimony indicating that she believed that the Office of the Governor was "known for being a fast paced environment offering significant writing opportunities and having the expectation of high quality work product." Howden Decl. [89-5] at ¶ 48. According to Plaintiff, Howden has no personal knowledge on which to make such a statement and her testimony as to its reputation is inadmissible under Rule 405 of the Federal Rules of Evidence because reputation testimony may only be admitted to show truthfulness. Pl. Resp. SMF at ¶ 99.

Plaintiff's objection is misplaced. The Rule she cites relates only to methods of proving character, which is not the point. Howden's testimony is not offered as to character, or as to whether the work at the Governor's office is actually fast-paced. Her testimony, rather, is offered only to prove Howden's hiring decision, that is, what Howden *believed* as to the nature of Regeski's past work and how that understanding contributed to the decision to hire Regeski. Howden plainly has personal knowledge to testify about such subjective facts. Moreover, although

Regeski would receive a raise to a salary of $45,000 in August 2018, *id.* at ¶ 100; that raise was recorded as having been conferred due to Regeski's "increased responsibilities," Lowe Decl. Exh. E [89-4] at 20.[8]

In early 2017, Howden scheduled one-on-one meetings with each member of her team to discuss expectations and performance. Def. SMF at ¶ 12. Plaintiff's meeting with Howden had to be rescheduled from its initial date; according to Plaintiff, she had to repeatedly follow up with Howden to set a new date for their meeting. Def. SMF at ¶ 12; Pl. Resp. SMF at ¶ 12. The two eventually met on May 24, 2017 and had what the parties agree to have been a positive discussion regarding Plaintiff's responsibilities. Def. SMF at ¶ 12; Pl. Resp. SMF at ¶ 12. Later, Howden asked her team to submit a list of their current and desired job duties and their strengths and weaknesses as part of an informal performance evaluation. Def. SMF at ¶ 13. Plaintiff submitted her list to Howden on July 5, 2017, stating that she needed to improve her interviewing techniques, her ability to decipher the appropriate focus of an article, and her journalistic writing style. *Id.*[9] Outside of these meetings, other

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Plaintiff does not object on grounds of hearsay, her statements as offered for the purposes of explaining her own hiring decisions are not hearsay.

[8] Plaintiff's spoliation argument and non-sequitur denial on the grounds that Regeski was tasked with making newsletters, Pl. Resp. SMF at ¶ 100, are rejected for the reasons already stated.

[9] Plaintiff objects to Defendant's assertion about Howden's informal evaluation of Plaintiff, again raising her spoliation objection. Pl. Resp. SMF at ¶ 13. She

regular meetings, and regular assignment feedback, Howden did not conduct formal performance evaluations for any member of her team in 2017 and 2018. Def. SMF at ¶ 14.[10] In August 2017, Howden tasked her team members with various projects. Def. SMF at ¶ 18. Plaintiff with responsibility for the team's Paise and Preparedness ("P&P") initiative. *Id.* Le was assigned all Private Sector projects. *Id.* Regeski took on the Volunteer Organization Active in Disasters program. *Id.*[11]

In a November 2017 meeting between the two, Howden told Plaintiff that there was room for improvement in her work and that she was not carrying an appropriate workload, but that she expected Plaintiff to improve and take on more responsibility after Plaintiff's anticipated graduation with a master's degree the following month. *Id.* at ¶ 23.[12] In response, Plaintiff stated that she felt that Howden was treating her differently from other members of the team by not including her in

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additionally denies all assertions, seemingly on the grounds that Howden's evaluation process was not in accordance with guidance from the State Personnel Board. *Id.* Her spoliation argument and inapposite, argumentative denial must be disregarded.

[10] Plaintiff's purported denial of this fact on the grounds that she was allegedly left out of meetings and emails is disregarded. Pl. Resp. SMF at ¶ 14.

[11] Plaintiff's spoliation arguments raised in objection to Defendants' assertions regarding Howden's assignments must be disregarded.

[12] Plaintiff purports to deny this characterization of her meeting with Howden, but states only that she complained to Howden that she was treating her differently than other employees by not including her in certain meetings or emails. Pl. Resp. SMF at ¶ 23. Plaintiff's assertions do not contradict Defendants' assertions.

certain meetings and emails. *Id.* at ¶ 24.[13] Plaintiff did not bring up her rate of pay or any pay discrepancy between her and her teammates, nor did she use the words "race," "discrimination," or "African-American," in her query to Howden. *Id.* at ¶ 25.[14]

On January 9, 2018, Howden advertised a job opening for a Communications Specialist II/External Affairs Specialist position with a salary range of $40,000–$46,000. *Id.* at ¶ 29.[15] Although Plaintiff was aware of the posting, she did not apply to it. *Id.* at ¶ 29.[16] The job listing noted that applicants were required to have experience with video equipment, which Plaintiff admitted to not having at the time.

[13] Plaintiff purports to deny this assertion by noting that she asked Howden why she was treating her differently but that Howden did not answer her question. Pl. Resp. SMF at ¶ 24. This assertion does not contradict Defendants' assertion.

[14] Plaintiff purports to deny this assertion, but states only that she told Howden that she believed she was being treated unfairly. Pl. Resp. SMF at ¶ 25. This purported denial is entirely consistent with Defendants' assertion. Moreover, the portion of her deposition testimony to which she cites confirms Defendants' assertion that Plaintiff did not bring up her race in her November 2017 meeting with Howden. *See* Pl. Dep. [81] at 125:5–7.

[15] Plaintiff purports to deny this assertion by arguing that Howden's public posting of the position violated GEMA's policy on filling roles through internal hiring and that many of the duties Howden listed were those that Plaintiff was already doing. Pl. Resp. SMF at ¶ 29. This does not contradict Defendants' assertion that Howden posted the job opening.

[16] Plaintiff again purports to deny Defendants' assertion without asserting or citing anything to the contrary. Pl. Resp. SMF at ¶ 29.

Id. at ¶ 30.[17] Howden states that she did not consider Plaintiff for the open position because she did not apply and because, in her view, she had not been meeting the expectations of her current job. *Id.* at ¶ 31.[18] Howden would eventually hire Kelsi Eccles, an African-American female, to the position in April 2018 at a salary of $45,000. *Id.* at ¶ 32.[19]

On January 24, 2018, Plaintiff emailed Howden and Gary Hoy, a human resources employee, with a request that she be reclassified to a Communications Specialist II position and that her salary be raised to $45,000. *Id.* at ¶ 33. She grounded her request in her recent graduation with a master's degree and an assertion that her performance exceeded her listed duties. *Id.* at ¶ 34. Although Howden admits that Plaintiff met the State's listed minimum qualifications for the similar role of Media Relations Specialist II, *see* Howden Dep. [82] at 64:19–22, Howden states

[17] Plaintiff purports to deny this assertion by stating that the job posting required applicants to have experience using Adobe Creative Suite products, which she claims to have had at the time. Pl. Resp. SMF at ¶ 30. However, this does not contradict Defendants' assertion that the posting additionally required applicants to have experience with videography equipment. *See* Pl. Dep. Exh. D-7 [81-7] at 2.

[18] Plaintiff purports to deny this assertion by quoting GEMA's internal hiring policy and by asserting that she was qualified for the position. Pl. Resp. SMF at ¶ 31. Neither contention contradicts Howden's testimony as to her own motivations in not considering Plaintiff for the position.

[19] Plaintiff purports to deny this bare assertion of fact by again quoting GEMA's internal hiring policy. Pl. Resp. SMF at ¶ 32. Plaintiff's non-sequitur quotation does not deny Defendants' assertion.

that she did not think that Plaintiff qualified for a promotion or a raise because she had not demonstrated an ability to work independently and that her obtaining of an advanced degree did not outweigh her relevant experience, Def. SMF at ¶ 35.

Before hearing back from Howden on her request for a raise, Plaintiff contacted the Office of Planning and Budget to note that she had not heard back from Howden and to ask what "protocol" should be followed on the matter. *Id.* at ¶ 45; Pl. Dep. [81] at 169:22–170:13. In response to her call, OPB's Deputy Director, Yvonne Turner, and its Director of Human Resources, Felicia Lowe, both African-American, scheduled a mediation between Plaintiff and Howden. Pl. Dep. [81] at 170:4–13. On February 8, 2018, Howden denied Plaintiff's request for a raise and instead placed her on a Performance Improvement Plan ("PIP"). Def. SMF at ¶ 36. The next day, Plaintiff, Howden, Turner, and Lowe met to discuss Plaintiff's work performance, the state of communications between Howden and Plaintiff, and an allegation by Plaintiff that she had been placed on the PIP in retaliation against her request for a raise. *Id.* at ¶ 46; Pl. Resp. SMF at ¶ 46. Plaintiff alleges that, while complaining of her treatment by Howden during the meeting, she told Turner and Lowe that she was the only African-American on her team. Pl. Dep. [81] at 173:15–21.

Howden's PIP identified four main areas of concern: technical skills, failure to complete assigned tasks, inadequate productivity, and failure to meet teleworking

requirements. Def. SMF at ¶ 38.[20] The PIP noted that the last issue area—a failure to meet teleworking requirements—concerned Plaintiff's alleged lack of communication while teleworking on February 1 and 2, 2018. Pl. Dep. Exh. 9 [81-9] at 2. Plaintiff submitted multiple rebuttals to the PIP's allegations that month in which she stated that she felt she was placed on the PIP because she had requested a raise and reclassification of her job title; none of her rebuttals asserted that the PIP was issued because of her race. Def. SMF at ¶ 47; Pl. Dep. Exh. D-10 [81-10]; Pl. Dep. Exh. D-17 [81-17]. Turner and Lowe investigated Plaintiff's allegation that the PIP was issued in retaliation against her request for a raise. Def. SMF at ¶ 48. On March 13, 2018, Lowe contacted Plaintiff to inform her that her investigation found that Plaintiff's allegations were unsupported. Def. SMF at ¶ 49.[21]

On April 3, 2018, Plaintiff submitted to the Equal Employment Opportunity Commission ("EEOC") a charge of race discrimination, which she alleged to have occurred on February 8, 2018, the date on which Howden issued the PIP. Pl. Dep.

[20] Plaintiff purports to deny Defendants' assertion as to the contents of the PIP because she "does not agree with the contents of the PIP." Pl. Resp. SMF at ¶ 38. This does not amount to a denial of the contents of the PIP.

[21] Plaintiff purports to deny the assertion that she was informed of the results of the investigation by stating that, the next month, she wrote a letter saying that Howden was discriminating against her. Pl. Resp. SMF at ¶ 49. Plaintiff's assertion that she disagreed with the results of the investigation does not amount to a denial of the results of the investigation.

Exh. D-14 [81-14] at 2. On April 5, 2018, Plaintiff submitted an internal grievance letter to Finance Director Tracey Wilson, alleging that Howden was treating her differently from her teammates because of her race and that she was placed on a PIP because she had requested a raise. Def. SMF at ¶ 52. Plaintiff's letter further alleged that Howden had made "derogatory" comments toward her, that Howden had yelled at her while she was home sick, that Howden had accused her of lying, that Howden deliberately impeded her work and excluded her from team meetings, that Howden failed to communicate with her, and that Howden generally behaved in an intimidating and disrespectful manner toward her. *Id.* at ¶ 53. The next day, Deputy Director Sexton and Wilson asked Plaintiff to meet with them and offered her a lateral transfer to the position of Grants Manager, in which Plaintiff would operate under Wilson's supervision. *Id.* at ¶¶ 54–55. Sexton and Wilson asked Plaintiff to mull the offer over the weekend. *Id.* at ¶ 55. That same day, GEMA received a notice of Plaintiff's EEOC charge. *Id.* at ¶ 55.

Plaintiff ultimately declined Sexton and Wilson's offer on April 9, 2018. *Id.* Later that day, Sexton informed Plaintiff that, moving forward, she would report to Mai rather than Howden as her immediate supervisor, but that her job title and duties would remain the same as before. *Id.* at ¶ 58. Howden was not involved in the decision to place Plaintiff under a different supervisor. *Id.* at ¶ 59.

On May 1, 2018, Mai and Sexton met with Plaintiff and provided her with a written follow up to the February 2018 PIP. Def. SMF at ¶ 62. The written follow up highlighted some improvement in Plaintiff's skills but noted continued inconsistencies in Plaintiff's layout skills, ongoing issues with her handling of External Affairs' inbox and constituent log, the need to heavily edit her written work, and a lack of attention to detail. *Id.*[22] During the meeting, Mai asked Plaintiff how she felt things were going since her supervisory change. Plaintiff responded that things were going better and that she did not have any issues that she wanted to address. *Id.* at ¶ 63.[23]

On June 26, 2018, Sexton lifted the PIP that had been placed over Plaintiff. *Id.* at ¶ 69. In a memorandum explaining his decision to lift the PIP, Sexton explained that timeliness and quality of her recent work warranted the decision. Pl. Dep. Exh. D-24 [81-24]. On August 1, 2018, Plaintiff was promoted to the positions of Communications Specialist II/Media Relations Specialist II and received a salary

[22] Plaintiff purports to deny this assertion because, in her view, the written follow up consisted of "false accusations of the work [she] produced." Pl. Resp. SMF at ¶ 62. Whatever the veracity of the contents of the writing, Plaintiff does not deny that its contents were as Defendants state.

[23] Plaintiff purports to deny Defendants' assertion as to her statements during the meeting by alleging that Mai and Sexton had ulterior motives in holding the meeting. Pl. Resp. SMF at ¶ 63. This is not a denial that Plaintiff's statements were as Defendants represent.

increase up to $45,000. *Id.* at ¶ 70. She was placed under the supervision of Deputy Director Thomas Moore. *Id.*

II. DISCUSSION

A. *Sealed Filings*

Plaintiff's evidentiary filings include three deposition transcripts which, along with their attached exhibits, she has filed under provisional seal. *See* Deps. [93][94][95].

"What transpires in the court room is public property," *Craig v. Harney*, 331 U.S. 367, 374 (1947). As such, the Local Rules of this Court do "not allow the filing of documents under seal without a Court order, even if all parties consent" to such a filing. LR App'x H(J)(1), NDGa. A party seeking to file a document under seal "must electronically file a motion to file under seal, a supporting brief," and the relevant document itself under provisional seal. *Id.* at App'x H(J)(2).

The sealed transcripts filed by Plaintiff recount the depositions of Thomas Moore, Homer Bryson, and Lauren Huff. It is unclear why Plaintiff has filed these exhibits in this manner. They neither include nor are accompanied by any statement from Plaintiff indicating why she has filed the documents under seal, let alone a proper motion and supporting brief on the matter. Further, they appear to be near-exact duplicates of the same transcripts Defendants have filed without any sealing.

See Deps. [84][85][86]. Plaintiff's provisional sealing of the documents thus runs afoul of the Local Rules. The filings must be unsealed.

B. *Motion for Summary Judgment*

1. 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 issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 175 (1970); *Bingham, Ltd. v. United States*, 724 F.2d 921, 924 (11th Cir. 1984). 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. v. Catrett*, 477 U.S. 317, 325 (1986). In making its determination, the court must view the evidence and all factual inferences in the light most favorable to the nonmoving party.

Once the moving party has adequately supported its motion, the nonmoving 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 nonmoving 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. Generally, "[t]he mere existence of a scintilla of evidence" supporting the nonmoving party's case is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

If a fact is found to be material, the court must also consider the genuineness of the alleged factual dispute. *Id.* An issue 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.* at 250. A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 242. Moreover, for factual issues to be genuine, they must have a real basis in the record. *Matsushita*, 475 U.S. at 587. The nonmoving 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 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)). 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.

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 properly preclude the entry of summary judgment. *Id.*

2. Plaintiff's Claims

Plaintiff asserts claims against Howden in her individual capacity under § 1981 and the Equal Protection Clause, which she asserts via 42 U.S.C. § 1983. She claims that Howden is liable for race discrimination and retaliation under § 1981 and denial of equal protection as guaranteed by both § 1981 and the Equal Protection Clause. *See* Am. Compl. [17] at ¶¶ 68–77. She seeks to hold GEMA liable for both race discrimination and retaliation under Title VII. *See id.* at ¶¶ 80–85.

a. Standards of Proof Under Title VII, § 1981, and the Equal Protection Clause

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). In addition to prohibiting discrimination based on an employee's race, color, religion, sex, and/or national origin, Title VII prohibits employers from retaliating

against employees because of their opposition to practices made unlawful under the statute or their participation in related investigations or enforcement proceedings. *Id.* at § 2000e-3(a).

Similarly, § 1981 provides that "[a]ll persons . . . shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens[.]" 42 U.S.C. § 1981. It is well-settled law that the statute prohibits race discrimination in both the public and private employment context. *See Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 961 (11th Cir. 1997); *Brown v. Am. Honda Motor Co.*, 939 F.2d 946, 949 (11th Cir. 1991) ("The aim of the statute is to remove the impediment of discrimination from a minority citizen's ability to participate fully and equally in the marketplace."); *see also St. Francis College v. Al-Khazraji*, 481 U.S. 604, 609 (1987) ("Although § 1981 does not itself use the word 'race,' the Court has construed the section to forbid all 'racial' discrimination in the making of private as well as public contracts."). Further, § 1981 encompasses claims of race-based retaliation as well as claims of race discrimination. *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 445 (2008); *see also Bryant v. Jones*, 575 F.3d 1281, 1301 (11th Cir. 2009).

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Violations of the clause are actionable via 42 U.S.C. § 1983, which

subjects any person acting under the color of law to liability for deprivation of another person's "rights, privileges, or immunities" secured by the Constitution. 42 U.S.C. § 1983. When a public employee challenges an employment decision as an act of discrimination on the basis of race or sex, such a claim may also violate the constitutional right of equal protection. *See Thigpen v. Bibb Cty.*, 223 F.3d 1231, 1237 (11th Cir. 2000); *see also Cross v. Alabama*, 49 F.3d 1490, 1507 (11th Cir. 1995) (citing *Davis v. Passman*, 442 U.S. 228, 235 (1979)). However, generic claims of retaliation unlinked to a plaintiff's race or gender are not cognizable under the Equal Protection Clause. *See Watkins v. Bowden*, 105 F.3d 1344, 1354–55 (11th Cir. 1997) (*per curiam*). Further, in order to prevail on a claim under § 1983, a plaintiff must demonstrate: (1) that a person deprived her of a right secured under the Constitution or federal law, and (2) that such a deprivation occurred under color of state law. *Arrington v. Cobb Cty.*, 139 F.3d 865, 872 (11th Cir. 1998) (citing *Willis v. Univ. Health Servs.*, 993 F.2d 837, 840 (11th Cir. 1993)); *Edwards v. Wallace Cmty. Coll.*, 49 F.3d 1517, 1522 (11th Cir. 1995). In this case, no party disputes that, as a state official, Howden was acting under color of state law for all relevant purposes.

In cases in which a plaintiff has asserted a claim under § 1981 in the employment context, the elements required to establish a claim under § 1981 generally mirror those required for a Title VII claim. *See Standard v. A.B.E.L. Servs.,*

Inc., 161 F.3d 1318, 1330 (11th Cir. 1998) (the same analysis applies to a Title VII race discrimination claim and a § 1981 race discrimination claim because both statutes "have the same requirements of proof and use the same analytical framework"); *see also Howard v. B.P. Oil Co.*, 32 F.3d 520, 524 n.2 (11th Cir. 1994); *Brown*, *v. Am. Honda Motor Co.*, 939 F.2d 946, 949 (11th Cir. 1991). Likewise, claims of discrimination in public employment asserted under the Equal Protection Clause are subject to the same analysis as those claims asserted under Title VII. *See Cross v. Alabama*, 49 F.3d 1490, 1508 (11th Cir. 1995) (citing *Whiting v. Jackson State Univ.*, 616 F.2d 116, 121 (5th Cir. 1980)). Accordingly, the standards of proof for Plaintiff's claims under Title VII also apply to her claims brought under § 1981 and the Equal Protection Clause.

Discrimination claims "are typically categorized as either mixed-motive or single-motive claims." *Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1235 (11th Cir. 2016). An employee can succeed on a mixed-motive claim under Title VII by showing that illegal bias was a motivating factor for an adverse employment action, even though other factors also motivated the action. *See id.* By contrast, single-motive claims, *i.e.*, pretext claims, require a plaintiff to show that bias was *the* true reason for the adverse action. *Id.* Claims of discrimination under § 1981 and claims of retaliation under Title VII may not proceed under a mixed motive theory; rather, plaintiffs asserting such claims must show that discrimination or retaliation was the

but-for cause of the adverse employment action they suffered. *See Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020) (§ 1981); *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013) (Title VII retaliation). Both single-motive and mixed-motive claims can be established with either direct or circumstantial evidence. *Id.*; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

To prevail on a claim for discrimination or retaliation, a plaintiff must prove that the defendant acted with discriminatory or retaliatory intent. *See Hawkins v. Ceco Corp.*, 883 F.2d 977, 980–81 (11th Cir. 1989); *Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525, 529 (11th Cir. 1983). Discriminatory intent may be established either by direct evidence or by circumstantial evidence meeting the four-pronged burden-shifting test set out for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Lewis v. City of Union City*, 918 F.3d 1213, 1220 (11th Cir. 2019) (*en banc*). Similarly, proof of unlawful retaliation may be in the form of direct evidence or circumstantial evidence generally governed by the *McDonnell Douglas* burden-shifting framework *See Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 600 (11th Cir. 1986); *see also Goldsmith v. City of Atmore*, 996 F.2d 1155, 1162–63 (11th Cir. 1993).

Direct evidence is evidence "that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption."

Evidence, Black's Law Dictionary 596 (8th ed. 2004); *see also Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1226 (11th Cir. 1993); *Carter v. City of Miami*, 870 F.2d 578, 581–82 (11th Cir. 1989); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 n.6 (11th Cir. 1987). Only the most blatant remarks whose intent could only be to discriminate constitute direct evidence. *Clark*, 990 F.2d at 1226; *Carter*, 870 F.2d at 581. Evidence that only suggests discrimination or that is subject to more than one interpretation does not constitute direct evidence. *See Harris v. Shelby Cty. Bd. of Educ.*, 99 F.3d 1078, 1083 n.2 (11th Cir. 1996). "[D]irect evidence relates to actions or statements of an employer reflecting a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990); *see also Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641–42 (11th Cir. 1998).

Evidence that merely "suggests discrimination, leaving the trier of fact to infer discrimination based on the evidence" is, by definition, circumstantial. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081–82 (11th Cir. 1990). Because direct evidence of discrimination is seldom available, a plaintiff must typically rely on circumstantial evidence to prove discriminatory intent, which can be done using *McDonnell Douglas* burden-shifting framework referenced above. *See Holifield v. Reno*, 115 F.3d 1555, 1561–62 (11th Cir. 1997), *abrogated on other grounds by Lewis v. City of Union City*, 918 F.3d 1213, 1226 (11th Cir. 2019) (*en banc*); *Combs*

v. Plantation Patterns, 106 F.3d 1519, 1527–28 (11th Cir. 1997). Under the *McDonnell Douglas* standard, a plaintiff may establish a *prima facie* case of discrimination by showing that (1) she is a member of a protected class; (2) she was subjected to an adverse employment action by her employer; (3) she was qualified to do the job in question, and (4) her employer treated similarly situated employees outside her protected classification (*i.e.*, those of a different race) more favorably than it treated her. *See McDonnell Douglas*, 411 U.S. at 802; *Evans v. Books-A-Million*, 762 F.3d 1288, 1297 (11th Cir. 2014); *Wright v. Southland Corp.*, 187 F.3d 1287, 1290 (11th Cir. 1999); *Holifield*, 115 F.3d at 1562. To establish a *prima facie* case of illegal retaliation, a plaintiff must show that: (1) she engaged in a protected activity or expression, (2) she received an adverse employment action, and (3) there was a causal link between the protected expression and the adverse action. *See, e.g.*, *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1454 (11th Cir. 1998); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1524 (11th Cir. 1991); *Simmons v. Camden Cty. Bd. of Educ.*, 757 F.2d 1187, 1189 (11th Cir. 1985).

Once a *prima facie* case has been established under the *McDonnell Douglas* framework, the employer must come forward with a legitimate non-discriminatory reason for its action. *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1162–63 (11th Cir. 1993); *Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 600–01 (11th Cir. 1986); *see also Weaver*, 922 F.2d at 1525–26. If the employer carries its burden of

production to show a legitimate reason for its action, the plaintiff then bears the burden of proving by a preponderance of the evidence that the reason offered by the defendant is merely a pretext for discrimination. *Goldsmith*, 996 F.2d at 1162–63; *Donnellon*, 794 F.2d at 600–01.

However, the *McDonnell Douglas* proof structure "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *see also Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 594 (11th Cir. 1987). The Eleventh Circuit has held that this framework of shifting burdens of proof is a valuable tool for analyzing evidence in cases involving alleged disparate treatment, but the framework is only a tool. *Nix v. WLCY Radio/Rahall Comm.*, 738 F.2d 1181, 1184 (11th Cir. 1984), *abrogated on other grounds by Lewis v. City of Union City*, 918 F.3d 1213, 1226 (11th Cir. 2019) (*en banc*). Indeed, "establishing the elements of the *McDonnell Douglas* framework is not, and never was intended to be, the *sine qua non* for a plaintiff to survive a summary judgment motion in an employment discrimination case." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011).

Thus, a plaintiff may also defeat a motion for summary judgment by presenting "a convincing mosaic of circumstantial evidence that would allow a jury

to infer intentional discrimination by the decisionmaker." *Id.* (internal quotation marks omitted). As such, the Eleventh Circuit has held that a "plaintiff's failure to produce a comparator does not necessarily doom the plaintiff's case." *Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019) (quoting *Smith*, 644 F.3d at 1328). "Even without similarly situated comparators," a plaintiff will survive summary judgment if they present a convincing mosaic of circumstantial evidence from which a factfinder can infer discriminatory motivation. *Lewis*, 934 F.3d at 1185. The plaintiff retains the ultimate burden of proving that the defendant is guilty of intentional discrimination. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

b. Discrimination

(1) Direct Evidence

Defendants first contend that Plaintiff cannot present any direct evidence of discrimination. Mot. Summ. J. [89-1] at 5. Plaintiff responds that the record does, in fact, contain direct evidence that Defendants intentionally discriminated against her. According to Plaintiff, Defendants were obligated to follow rules issued by Georgia's State Personnel Board when handling matters related to her employment. Resp. [97-1] at 14–16. Some of these rules, says Plaintiff, are intended to prevent employment discrimination. *Id.* at 15. Plaintiff claims that Defendants violated these rules in failing to conduct proper evaluations of her performance, and that

Defendant's departure from these rules is direct evidence of their discriminatory intent. *Id.* at 16–17.

Plaintiff is mistaken as to what constitutes direct evidence. As stated above, direct evidence is evidence that, if taken as true, establishes discriminatory intent without any additional inference or presumption. As such, evidence that "is subject to more than one interpretation" is not direct evidence. *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1189 (11th Cir. 1997) (citing *Harris v. Shelby Cty. Bd. of Educ.*, 99 F.3d 1078, 1083 n.2 (11th Cir. 1996)). Evidence that Defendants departed from its typical or otherwise required internal standard operating procedures in dealing with Plaintiff, without more, does not establish that they did so with discriminatory intent. Plaintiff does not point to any evidence evincing *why* Defendants allegedly departed from rules set by the State Personnel Board. Rather, Plaintiff makes the logical leap that Defendants' alleged failure to follow state rules is itself evidence of discriminatory intent because there is no "legitimate, nondiscriminatory reason" for such a failure. Resp. [97-1] at 16. However, this conclusory, unsupported statement does not close the gap between the evidence Plaintiff proffers and the meaning she ascribes to it. For example, Plaintiff does not explain why one could not reasonably conclude that Defendants' alleged failure to follow their rules stemmed from simple negligence.

Thus, whatever the circumstantial value of the evidence to which Plaintiff points, it is not *direct* evidence of discrimination. Without any direct evidence of discrimination, Plaintiff's claims must proceed solely with circumstantial evidence.

(2) Plaintiff's *Prima Facie* Case

Plaintiff presses her claims of discrimination based on two distinct, but related, theories. First, she argues that she was discriminatorily paid less than her co-workers. Second, she argues that Defendants' discriminatorily failed to promote her. Because Plaintiff cannot proceed with direct evidence, she must present a *prima facie* cases of discrimination with circumstantial evidence in order to proceed under either of these theories.

As applied to discriminatory wage claims, the *McDonnell Douglas* framework allows a Plaintiff to show circumstantial evidence of discrimination, and establish a *prima facie* case of discrimination, by showing the following: (1) she belongs to a protected class; (2) she received low wages; (3) similarly situated comparators outside her protected class received higher wages; and (4) she was qualified to receive a higher wage. *See Smith v. Thomasville*, 753 F. App'x 675, 697 (11th Cir. 2018) (*per curiam*); *Robertson v. Interactive Coll. of Tech./Interactive Learning Sys., Inc.*, 743 F. App'x 269, 274 (11th Cir. 2018) (*per curiam*); *Cooper v. S. Co.*, 390 F.3d 695, 734–35 (11th Cir. 2004), *overruled on other grounds by Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006). In a failure-to-promote context, *McDonnell*

Douglas permits a plaintiff to establish a *prima facie* case by establishing that: (1) she belongs to a protected class; (2) she applied for and was qualified for a promotion; (3) that she was rejected despite her qualifications; and (4) that other equally or less-qualified employees outside her class were promoted. *See Brown v. Ala. Dep't of Transp.*, 597 F.3d 1160, 1174 (11th Cir. 2010); *Collins v. Navicent Health, Inc.*, 499 F. Supp. 3d 1307, 1322 (M.D. Ga. 2020).

In *Lewis v. City of Union City*, the Eleventh Circuit clarified how the courts are to assess comparison evidence for plaintiffs proceeding under the *McDonnell Douglas* framework. 918 F.3d 1213, 1221–24 (11th Cir. 2019) (*en banc*). Evidence that an employer "has treated like employees differently" is often necessary to "supply the missing link and provide a valid basis for inferring unlawful *discrimination*" through use of the framework. *Id.* at 1223 (emphasis in original). A plaintiff is "like" other employees only when "she and her comparators are similarly situated in all material respects." *Id.* at 1224. While a plaintiff need not show that she and her comparator are "nearly identical" in their circumstances, they should be similar in the legitimate circumstances that may have factored into their employer's decision to act adversely toward them, such as their conduct or misconduct, their work histories, and the policies under which they operate. *See id.* at 1225–28. Further, proper comparators "will ordinarily (although not invariably) have been under the jurisdiction of the same supervisor as the plaintiff[.]" *Id.* at 1227–28.

Without a proper comparator, a plaintiff cannot generally establish a *prima facie* case under the *McDonnell Douglas* framework. *Id.* at 1224.

Defendants argue that Plaintiff cannot establish a *McDonnell Douglas prima facie* case of discrimination under Title VII, § 1981, or the Equal Protection Clause as those claims relate to Plaintiff's rate of pay and Defendants' initial refusal to promote Plaintiff. According to Defendants, Plaintiff cannot proffer a similarly situated employee who was treated more favorably than she was.[24] Defendants argue that Uyen Le and Julia Regeski, two other employees who worked under Howden, brought more valuable experience into their employment with GEMA, had different responsibilities from Plaintiff at GEMA, and performed their responsibilities more successfully and with less supervision. Mot. Summ. J. [89-1] at 9–11. In response, Plaintiff contends that there "are only three relevant factors" to decide whether comparator employees are similarly situated to a plaintiff: (1) whether they are subject to the same rules as the plaintiff; (2) whether they share

[24] In a footnote concerning Plaintiff's failure-to-promote claim, Defendants additionally contend that Plaintiff's *prima facie* claim fails because she did not formally apply for the position she sought and because the position ultimately was filled by an African-American woman. Mot. Summ. J. [89-1] at 7 n.4. Generally, arguments raised solely in a footnote are not properly before the Court. *See Mock v. Bell Helicopter Textron, Inc.*, 373 F. App'x 989, 992 (11th Cir. 2010) (*per curiam*). Even if properly raised, however, the Court need not consider Defendants' arguments because, as explained below, Defendants are due judgment on Plaintiff's discrimination claims on other grounds.

supervisors; and (3) whether they have the same job duties and responsibilities. Resp. [97-1] at 17. Plaintiff argues that she, Le, and Regeski all operated under the same rules, shared a supervisor in Howden, and had similar responsibilities. *Id.* at 18.

At the outset, the undersigned rejects Plaintiff's argument that she, Le, and Regeski categorically shared the same duties and responsibilities, as it rests solely on a putative adverse inference she seeks against Defendants on the subject, based on the unsupported evidentiary spoliation argument rejected above. As such, on the question of Plaintiff, Le, and Regeski's shared responsibilities, the Court is left only with evidence that all three were responsible for making newsletters but that each were assigned to different projects and that Le was additionally tasked with training newer employees. *See* Mot. Summ. J. [89-1] at 11. Further, as the Eleventh Circuit has made clear, the inquiry into whether an employee is similarly situated to a plaintiff is one that turns on all circumstances that may be material to the complained-of adverse act, rather than a checklist of formal likeness. *See Lewis*, 918 F.3d at 1227–28. Thus, Plaintiff does not show that Le and Regeski are proper comparators solely on the grounds that all three of them worked under Howden and were subject to the same general rules. Instead, Plaintiff must offer evidence that they were similarly situated with respect to circumstances relevant to Defendants' decision to pay her less than them and/or refuse to promote her to a similar position.

Plaintiff fails to do so with respect to Le. Circumstances material to an employee's rate of pay and entitlement to a promotion include an employee's previous work experience and their job duties. *See Vinson v. Tedders*, 844 F. App'x 211, 213 (11th Cir. 2021) (*per curiam*) ("[A] proffered comparator's prior work experience can strip an individual of the comparator label" for purposes of a wage discrimination claim); *Etheridge v. Bd. of Trs. of Univ. of W. Ala.*, No. 7:18-CV-00905-RDP, 2020 WL 4260598, at *10 (N.D. Ala. July 24, 2020) (finding that an employee with more work experience could not serve as a comparator in a Title VII wage discrimination case); *Vinson v. Macon-Bibb Cty.*, No. 5:18-CV-00306-TES, 2020 WL 2331242, at *4–6 (M.D. Ga. May 11, 2020) (citing *Crawford v. Carroll*, 529 F.3d 961, 974–75 (11th Cir. 2008)). Le's professional experience, both before and during her employment with GEMA, is plainly distinguishable from that of Plaintiff. Before joining GEMA as a Communications Specialist I/Media Relations Specialist I in September 2016, Le spent two years as reporter, a year as an investigative intern, and four months as a general assignment intern. *See* Pl. Dep. Exh. D-26 [81-26]. Although Plaintiff brought with her a similar amount of internship experience, she spent only ten months in a journalistic role similar to Le's. *See* Def. SMF at ¶ 84; Pl. Resp. SMF at ¶ 84. Moreover, Defendants adduce uncontroverted evidence that, unlike Plaintiff, Le was immediately responsible for responding to disasters with minimal oversight and took on responsibility to train

newer employees. *See* Def. SMF at ¶ 93; Lowe Decl. Exh. A [89-4] at 15. As such, it could reasonably be expected that Le would receive a pay raise and/or promotion more quickly than Plaintiff. In other words, a jury could not reasonably infer that Defendants' differential treatment of the two regarding their pay and job titles was because of Plaintiff's race.

The Court faces a closer question on Regeski. Defendants contend that Plaintiff had "less professional experience" than Regeski prior to their respective arrivals at GEMA. Defendants characterize Regeski as having had "over a year and a half of related professional experience" prior to being hired as a Communications Specialist II/Media Relations Specialist II, and minimize Plaintiff's prior experience as consisting of less than a year of journalistic experience "in addition to her internships[.]" Mot. Summ. J. [89-1] at 10. However, Regeski had only four months of full-time, professional experience at the time of her hiring—her experience adds up to one-and-a-half years' worth if it is considered in combination with her internships. *See* Howden Dep. Exh. 10 [82-10]. That is less full-time experience than Plaintiff had. The length of Plaintiff's internship experiences likewise exceeded Regeski's. Thus, unlike Le, it is not apparent that Regeski arrived at GEMA with more experience that Plaintiff. Further, other than briefly noting that Howden at one point assigned Regeski a different assignment than Plaintiff, Defendants do not offer evidence that Regeski's responsibilities were materially different from Plantiff's. To

the extent Defendants argue that Regeski cannot function as a comparator because Howden assigned special valuation to her experience at the Office of the Governor, or because she performed her duties in a more satisfactory manner, or because she worked on a projects Howden considered to be more important than Plaintiff's projects, *see* Mot. Summ. J. [89-1] at 10–11, the undersigned notes that, at the *prima facie* stage of a case, a court is not to consider "any subjective evaluations of [a plaintiff] or subjective criteria that may have differentiated [her] from [her] comparators," *Brown v. Wrigley Mfg. Co., LLC*, No. 2:18-CV-00141-RWS-JCF, 2021 WL 1697916, at *15 (N.D. Ga. Feb. 1, 2021), *report & rec. adopted by* 2021 WL 1696384 (N.D. Ga. Mar. 29, 2021). Rather, for purposes of evaluating the circumstances of any proffered comparators, the Court is limited to considering information that is in some sense "objectively verifiable." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 769 (11th Cir. 2005) (*per curiam*).

Accordingly, the undersigned finds that the evidence offered by Defendants as to the objective circumstances of Regeski's employment—including her previous experience, her job duties, and her operation under the same supervisor as Plaintiff—does not conclusively foreclose an argument that Regeski was similar to Plaintiff in all material respects.

(3) Legitimate Reason and Pretext

As explained above, upon the showing of a *prima facie* case of discrimination, the *McDonnell Douglas* framework requires that an employer must articulate a legitimate, nondiscriminatory reason for the adverse action of which a plaintiff complains. This is an "exceedingly light burden"—the employer's "burden is 'merely one of production, not proof.'" *Perryman v. Johnson Prods. Co., Inc.*, 698 F.2d 1138, 1142 (11th Cir. 1983) (quoting *Lee v. Russell Cty. Bd. of Educ.*, 684 F.2d 769, 773 (11th Cir. 1982)). "So long as the employer articulates a 'clear and reasonably specific' non-discriminatory basis for its actions, it has discharged its burden of production." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 769–70 (11th Cir. 2005) (*per curiam*) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254–55 (1981)).

Defendants have set forth evidence that their decisions as to Plaintiff's rate of pay and/or her request for a promotion did not stem from Plaintiff's race. Defendants contend that they paid Plaintiff a lower salary than Regeski because Plaintiff's experience was qualitatively different from Regeski's. *See* Mot. Summ. J. [89-1] at 10, 12–13. Defendants offer testimony from Howden in which she notes that she highly valued Regeski's experience working in the Office of the Governor, which she understood to be a fast-paced environment with a high expectation as to the work product of its employees, and from which Regeski came with a recommendation

from the Governor's Deputy Chief of Staff for Communications. *See* Howden Decl. [89-5] at ¶ 48. As for their initial refusal to raise Plaintiff's salary, Defendants contend that Howden observed deficiencies in Plaintiff's work product, including issues with her writing, layout, and productivity; difficulty accepting constructive feedback about her performance; and an apparent inability to take on more duties or work more independently. Mot. Summ. J. [89-1] at 12–13 (citing Howden Decl. [89-5] at ¶¶ 24–26). Defendants bolster these justifications by noting that Bandy Mai and Mark Sexton, who supervised Plaintiff after Howden was removed from her chain of command, observed similar issues, *see* Pl. Dep. Exhs. 19–21 [81-19–81-21]; Howden Dep. [83] at 31, and because Plaintiff was eventually given the raise she sought after Sexton determined that Plaintiff had improved her performance, *see* Pl. Dep. [81] at 262–65; Pl. Dep. Exhs. 24–25 [81-24–81-25].

Plaintiff thus bears the burden of showing that Defendants' proffered reasons are pretextual by showing that they have no basis in fact, that they were not the true factors motivating the decision, or that the stated reasons were insufficient to motivate the decision. *See Wisdom v. M.A. Hanna Co.*, 978 F. Supp. 1471, 1479 (N.D. Ga. 1997). She can either directly persuade the Court that a discriminatory or retaliatory reason more likely motivated the employer or show indirectly that the employer's ultimate justification is not believable. *See Burdine*, 450 U.S. at 256; *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1522 (11th Cir. 1991).

In other words, Plaintiff has the opportunity to come forward with evidence, including the previously produced evidence establishing the *prima facie* case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision. *Burdine*, 450 U.S. at 256; *McDonnell Douglas*, 411 U.S. at 804; *see also Chapman v. AI Transp.*, 229 F.3d 1012, 1024 (11th Cir. 2000) (*en banc*); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1530 (11th Cir. 1997) ("In order to establish pretext, the plaintiff is not required to introduce evidence beyond that already offered to establish the *prima facie* case."). Comparator evidence may also be considered when evaluating whether the defendant's reasons for adverse employment action were pretextual. *See Rioux v. City of Atlanta*, 520 F.3d 1269, 1276–77 (11th Cir. 2008).

But Plaintiff cannot show that Defendants' proffered reasons for paying her as they did and initially refusing to promote her were pretextual simply by "quarreling with the wisdom" of those reasons. *See Brooks v. Cty. Comm'n of Jefferson Cty.*, 446 F.3d 1160, 1163 (11th Cir. 2006) (quoting *Chapman*, 229 F.3d at 1030). She may nevertheless establish pretext by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F.3d at 1538 (quoting *Sheridan v. E.I. DuPont De Nemours & Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996) (*en banc*)).

However, "[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*, 446 F.3d at 1163 (emphasis in original) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)). Stated another way, it is not the truth of Defendants' justifications, alone, that Plaintiff is obligated to rebut. Rather, it is Plaintiff's burden to prove that Defendants did not, in fact, rely on those justifications in taking any adverse action against her.

Because Plaintiff bears the burden of establishing that Defendants' reasons are a pretext for discrimination or retaliation, she "must present 'significantly probative' evidence on the issue to avoid summary judgment." *Young v. General Foods Corp.*, 840 F.2d 825, 829 (11th Cir. 1988) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–25 (1986)). "Conclusory allegations of discrimination [or retaliation], without more, are not sufficient to raise an inference of pretext or intentional discrimination where [a defendant] has offered extensive evidence of legitimate, non-discriminatory reasons for its actions." *Young*, 840 F.2d at 830; *see also Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1228 (11th Cir. 1993).

Plaintiff offers six different arguments for why Defendants' proffered reasons for her rate of pay and initial refusal to promote her were pretextual. Plaintiff argues that she can show pretext because: (1) Defendants allegedly failed to follow Georgia law in the implementation of the PIP Howden placed over Plaintiff; (2) any disparity

between her and Regeski's work performance is not sufficiently documented; (3) Defendants were allegedly willing to "bend the rules" for non-African-American employees like Regeski in hiring and compensation matters; (4) several months elapsed between Howden's first observation of Plaintiff's performance deficiencies and her placement of Plaintiff under a PIP; (5) Howden's inquiry into Plaintiff's teleworking indicates that she placed Plaintiff "under surveillance"; and (6) Howden's opinions as to Plaintiff's work performance were subjective. *See* Resp. [97-1] at 21–30.

None suffice as evidence of pretext. Many of Plaintiff's arguments, even accepted as having evidentiary support, do nothing to evince that Defendants treated her differently than other employees or that Defendants' proffered reasons for their actions were otherwise untrue or supplemented by racial bias.

While in some cases a failure to follow disciplinary or other procedures can suggest pretext, that is not so here. While it is undisputed that Howden did not perform regular formal performance reviews as Plaintiff asserts she was required to do as a supervisor by state law, Defendants have shown without contradiction that GEMA did not consider those guidelines to be mandatory, and that Howden did not conduct such reviews or follow those guidelines as to any of the employees under her supervision. *See* Def. SMF at ¶¶ 14–15 (citing Howden Dep. [82] at 14–15; Huff Dep. [84] at 11–13). Instead, Defendants produce evidence indicating that Howden

generally managed her employees—including Plaintiff—through informal, verbal feedback rather than through formal evaluations. *See* Def. SMF at ¶ 14 (citing Howden Dep. [82] at 14–15).

Perhaps Howden should have done more under Georgia law. But even if that were so, Defendants have shown, without contradiction, that Plaintiff was not singled out for any such failure to conduct formal reviews or otherwise follow these state guidelines, and that the same omission applied equally to all other employees under Howden's supervision. In these circumstances, no inference of race discrimination can be drawn. *See Connelly v. WellStar Health Sys., Inc.*, 758 F. App'x 825, 829 (11th Cir. 2019) (*per curiam*) ("[M]ere failure to follow operating procedures, without more, does not necessarily suggest than an employer was motivated by illegal discriminatory intent or that its proffered reason for termination was pretextual.") (citing *Mitchell v. USBI Co.*, 186 F.3d 1352, 1355–56 (11th Cir. 1999); *Rojas v. Florida*, 285 F.3d 1339, 1344 n.4 (11th Cir. 2002) (*per curiam*) ("To establish pretext, a plaintiff must show that the deviation from policy occurred in a discriminatory manner.").

The same principles preclude Plaintiff's argument that Defendants did not properly document her alleged performance deficiencies. It remains that Defendants have shown, without contradiction, that Howden supervised Plaintiff via the same procedures that Howden employed with the others under her supervision. Even if

there were a deviation from some policy regarding documentation, this deviation apparently occurred across the board and not just as to Plaintiff.[25] There remains no basis to conclude that a supposed policy deviation was motivated by race.[26] *See E.E.O.C. v. Winn-Dixie Montgomery, LLC*, No. CA 09-0643-C, 2011 WL 111689, at *13 (S.D. Ala. Jan. 12, 2011) (collecting authority).

Plaintiff's argument that Defendants were willing to "bend the rules" for non-African-Americans rests on the fact that Regeski was hired to the position of Communications Specialist II/Media Relations Specialist II in 2017 despite being six months short of the role's listed two-year professional experience minimum. *See* Resp. [97-1] at 4. However, Defendants' explanation of their legitimate,

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[25] Plaintiff argues that neither Howden nor the GEMA Legal Counsel who approved of the PIP were themselves placed on a PIP for failing to comply with the applicable personnel procedures governing how they should have supervised Plaintiff, and that this discrepancy further supports Plaintiff's claims that she was placed on a PIP for discriminatory reasons. This argument is wholly meritless. First, Defendant has introduced evidence that GEMA did not perceive the personnel supervisory procedures referenced by Plaintiff to be mandatory on its supervisors. Second, how GEMA supervised Howden and its Legal Counsel as to how well they managed their personnel is a clearly different matter from how an employee in Plaintiff's position was supervised for her writing and other work product. Plaintiff, in other words, clearly was not substantially similar in all relevant respects with Howden herself.

[26] To the extent that Plaintiff argues that any lack of formal documentation of performance deficiencies renders such a justification from a defendant vulnerable to claims of pretext, Plaintiff improperly seeks to raise Defendants' burden of production at the second stage of the *McDonnell Douglas* framework. *See Hague v. Thompson Distrib. Co.*, 436 F.3d 816, 827 (7th Cir. 2006).

nondiscriminatory reasons for their actions accounted for their favorable treatment of Regeski: Howden valued her experience in the Office of the Governor and the strong recommendation she carried from a supervisor there. *See* Def. SMF at ¶ 99. Plaintiff's mere restatement of the admitted fact that Regeski was hired before meeting the minimum experience threshold does nothing to contradict Defendants' proffered nondiscriminatory justification for that treatment. Further, no party contends that Defendants justified their initial denial of Plaintiff's request for a promotion to a similar position on the grounds that she did not meet the minimum experience threshold.

Next, that several months elapsed between Howden's first notation of Plaintiff's alleged performance deficiencies and her placement of Plaintiff under a PIP is irrelevant to whether Defendants' justifications resting on Plaintiff's alleged performance deficiencies are pretextual. The sole authority to which Plaintiff cites in support of this argument does no such thing; Plaintiff relies on the Eleventh Circuit's decision in *Thomas v. Cooper Lighting, Inc.*, in which the court held that a plaintiff could not establish a causal connection between her statutorily protected activity and her termination solely by temporal proximity when "three to four month[s]" had elapsed between them. *See* 506 F.3d 1361, 1364 (11th Cir. 2007) (*per curiam*). From this statement concerning a plaintiff's *prima facie* burden when asserting a retaliation claim, Plaintiff claims that she can show that Howden lacked

a good faith reason for placing her under a PIP because several months had elapsed between Howden's notation of Plaintiff's poor work performance during the summer of 2017 and her placement of Plaintiff on a PIP in early February 2018. Putting aside that Plaintiff states in her own declaration that Howden discussed her dissatisfaction with Plaintiff's performance in November 2017, *see* Pl. Decl. [97-5] at ¶ 2, it is unclear why Howden should have been expected to immediately place Plaintiff under a PIP once she noticed any performance deficiencies, instead of first seeing whether the initial informal coaching feedback might solve the problems.

Plaintiff then argues that she can show pretext because Defendant's justifications rely on Howden's subjective evaluations of Plaintiff. Although Plaintiff concedes, as she must, that a supervisor's subjective evaluation of an employee can stand as a proper justification for an adverse action, she insists that GEMA's internal operating rules render the subjective evaluation of an employee improper. However, whether or not Howden's actions and subjective justifications were factually correct and/or consistent with internal requirements mandating objective decisionmaking is of no matter. *See Springer v. Convergys Customer Mgmt. Corp.*, 509 F.3d 1344, 1350 (11th Cir. 2007) (holding that a breach of internal policy alone does not establish pretext). This Court does "not sit as a super-personnel department" charged with re-examining a defendant's judgments and internal operating procedures. *See Jolibois v. Fla. Int'l Univ. Bd. of Trs.*, 654 F. App'x 461,

464 (11th Cir. 2016) (*per curiam*) (quoting *Chapman v. Al Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000)). Rather, what matters is whether Howden sincerely held and acted upon those justifications, as opposed to illegal discriminatory animus. That her actions may have been internally improper sheds no light on that question.

Plaintiff's argument that Howden kept her "under surveillance" also fails to show pretext. Plaintiff points to an example in which Howden asked Lauren Huff, a human resources employee, about Plaintiff's use of teleworking. According to Huff, Howden made a "big deal" out of the fact that Plaintiff was teleworking that day. Huff claims to have told Howden that other employees routinely teleworked when they were feeling sick, and that she asked Howden why she was making a "big deal" out of it when it came to Plaintiff. *See* Huff Dep. [84] at 47:4–19. Plaintiff argues that the incident "shows [Howden's] racial animus." Resp. [97-1] at 29.

Among other reasons why this incident is not sufficient to show pretext, Howden's comment to Huff was made in September 2019—over a year and a half after she denied Plaintiff's request for a raise/promotion and over a year after Plaintiff was ultimately granted that raise/promotion. Such an "isolated comment, unrelated to [the adverse actions at issue in this case], alone, is insufficient to establish a material fact on pretext." *Rojas v. Florida*, 285 F.3d 1339, 1342–43 (11th Cir. 2002) (*per curiam*); *see Chambers v. Fla. Dep't of Transp.*, 620 F. App'x 872, 877 (11th Cir. 2015) (*per curiam*) (finding that a supervisor's discriminatory

comment regarding a plaintiff made years before their alleged termination was insufficient to create an issue of material fact as to pretext); *Scott v. Suncoast Beverage Sales, Ltd.*, 295 F.3d 1223, 1229 (11th Cir. 2002) (finding a supervisor's comments about a plaintiff, which were racially prejudicial but unrelated to the termination at issue, insufficient to support a pretext argument because such comments, alone, are "usually not [ ] sufficient absent some additional evidence supporting a finding of pretext").

Plaintiff thus lacks sufficient evidence to create an issue of material fact as to the alleged pretextual nature of their justifications for Plaintiff's rate of pay and the denial of her promotion request. As the record lacks evidence from which to conclude that they acted with any discriminatory intent, Defendants are due summary judgment on Plaintiff's discrimination claims, including on her claims of mixed-motive discrimination.[27]

c. Retaliation

Defendants contend that they are entitled to summary judgment on Plaintiff's retaliation claims because she has not presented evidence that she engaged in any protected activity prior to Howden's February 8, 2018 issuance of a PIP. Plaintiff

[27] Because Plaintiff fails to present a discrimination claim, the Court need not address Defendants' argument that Howden is entitled to qualified immunity against such a claim. *See Brown v. Davis*, 684 F. App'x 928, 937 n.6 (11th Cir. 2017).

responds that she complained to Howden in November 2017 "that she was treating her differently from her teammates" and that, in January 2018, she asked Howden for a salary "equal to her coworkers." Resp. [97-1] at 13. Plaintiff argues that the February 2018 PIP is thus "nothing but retaliation for [Plaintiff] asking that her salary be equal to her comparators." *Id.*

A plaintiff alleging unlawful retaliation must show that she engaged in a protected activity or expression under Title VII or § 1981 through evidence of either opposition to a practice made unlawful under Title VII or § 1981 or participation in an investigation, proceeding, or hearing regarding such a practice. *See* 42 U.S.C. § 2000e-3(a). "To maintain a claim for retaliation [against opposition to an unlawful practice], an 'employee must, at the very least, communicate her belief that discrimination is occurring to the employer.'" *Mason v. Clayton Cty. Bd. of Educ.*, No. 1:06-CV-2761-CC, 2008 WL 11406167, at *11 (N.D. Ga. Sept. 30, 2008) (quoting *Webb v. R & B Holding Co.*, 992 F. Supp. 1382, 1389 (S.D. Fla. 1998)). Communicating a belief of discrimination is more than just complaining about general mistreatment. *See Smith v. Mobile Shipbuilding & Repair, Inc.*, 663 F. App'x 793, 800 (11th Cir. 2016) (*per curiam*) (distinguishing between complaints of racial discrimination and those of "general unfair treatment in the workplace"). An employee "'must reasonably convey that she is opposing discrimination based specifically on race, versus some other type of discrimination or injustice

generally.'" *Henley v. Turner Broad. Sys., Inc.*, 267 F. Supp. 3d 1341, 1354 (N.D. Ga. 2017) (quoting *Cochran v. S. Co.*, No. 14-cv-0569, 2015 WL 3508018, at *2 (S.D. Ala. June 3, 2015)). While there is no requirement that any specific words be used in a protected complaint, an employer should not need to infer that an employee believes that the mistreatment they are complaining of is occurring because of a protected characteristic. *See Anderson v. Dunbar Armored, Inc.*, 678 F. Supp. 2d 1280, 1323 (N.D. Ga. 2009).

Plaintiff's statements during her November 2017 meeting with Howden fall short of constituting protected activity. Plaintiff testifies that, during the meeting, she asked Howden "why she was treating [her] differently from the rest of the team." Pl. Dep. [81] at 124:15. Plaintiff asked Howden why she was being left off certain emails denied various opportunities. *See id.* at 124:22–25. She further asked Howden: "Why do you treat me differently from everyone?" *Id.* at 125:3–4. Plaintiff admits that, during the meeting, she never mentioned her race and never expressly accused Howden of discrimination. *Id.* at 125:5–7. Plaintiff's January 2018 request for a raise and/or promotion does not mention race, discrimination, mistreatment, or differential treatment. *See* Pl. Dep. Exh. D-8 [81-8].

Defendants are correct that Plaintiff has failed to carry her burden that she engaged in any protected activity that the February 8, 2018 PIP could have been retaliatory toward. Without any direct reference to race or any context making clear

that she was tying her alleged mistreatment to her race, Plaintiff's November 2017 complaints to Howden did no more than convey her belief that she was the victim of general unfair treatment which, "absent discrimination based on race . . . is *not* an unlawful employment practice[.]" *Coutu v. Martin Cty. Bd. of Comm'rs*, 47 F.3d 1068, 1074 (11th Cir. 1995) (*per curiam*) (emphasis in original). Because her November 2017 statements did not convey a belief of unlawful discrimination, it cannot constitute protected activity. *See Suber v. Lowes Home Ctrs.*, 845 F. App'x 899, 900 (11th Cir. 2021) (*per curiam*) (finding that an employee's email complaining of general mistreatment without any mention of a protected characteristic did not constitute protected activity); *Banks v. Marketsource, Inc.*, No. 1:18-CV-2235-WMR-JSA, 2019 WL 8277274, at *17–18 (N.D. Ga. Dec. 5, 2019), *report & rec. adopted by* 2020 WL 6291422 (N.D. Ga. Mar. 20, 2020) (finding that an employee's complaints about a supervisor's behavior towards her in comparison to her colleagues did not constitute protected activity under Title VII or § 1981 because she did not "reference[ ] [her colleagues'] race or ma[k]e any suggestion as to why" her supervisor was allegedly singling her out). Nor can Plaintiff's January 2018 request, which makes no complaint of any mistreatment, let alone unlawful mistreatment.

Plaintiff does not rest her retaliation claims upon any other alleged protected activities. *See* Resp. [97-1] at 12–13. Defendants are due summary judgment.[28]

III. CONCLUSION AND RECOMMENDATION

For the reasons discussed above, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment [89] be **GRANTED** and that judgment be entered in favor of Defendants on all of Plaintiff's claims. Further, the Clerk is **DIRECTED** to unseal documents [93], [94], and [95].

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.

[28] Defendant also argues that Plaintiff's purportedly protected activities in November 2017 were too remote in time from Howden's issuance of a PIP in early February 2018 so as to support an inference of causation. The chronology is a bit unclear, however, as the parties' briefs refer to the 2017 meeting as occurring generally during the month of November, without precision. It seems that the PIP was issued sometime between approximately 75 and 105 days after the meeting. Whether this imprecise range of timing is enough to support an inference of causation is unnecessary to consider, because summary judgment is due to be awarded on other grounds. *See Suber*, 845 F. App'x at 900 n.2. Nor does the Court need to address whether Howden should be afforded qualified immunity in her individual status, because the Court has already found that there is insufficient evidentiary support for any of the claims against any of the Defendants. It follows that there is no need to grant immunity from liability.

IT IS SO ORDERED AND RECOMMENDED this 8th day of July, 2021.

JUSTIN S. ANAND
UNITED STATES MAGISTRATE JUDGE