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

TAMARA BAINES,	:	CIVIL ACTION NO.
	:	1:19-CV-0279-TWT-JSA
Plaintiff,	:	
	:	
v.	:	
	:	
CITY OF ATLANTA, GEORGIA and ROBIN SHAHAR in her Individual Capacity,	:	**FINAL REPORT AND RECOMMENDATION ON MOTIONS FOR SUMMARY JUDGMENT**
Defendants.	:	

Plaintiff Tamara Baines filed this employment discrimination action on January 15, 2019. Plaintiff asserts a claim under 42 U.S.C. § 1983 alleging that Defendants City of Atlanta (the "City") and Robin Shahar harassed her and discriminated against her because of her sex in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. She alleges further that the City discriminated and retaliated against her in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq.* and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, *et seq*. Finally, she alleges that the City unlawfully interfered with her rights under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601, *et seq.* and retaliated against her for attempting to exercise those rights.

The action is before the Court on Plaintiff's Motion for Summary Judgment [246], the City's Motion for Summary Judgment [248], and Shahar's Motion for Summary Judgment [250]. In their respective motions, the City and Shahar request summary judgment on all claims asserted against them. Plaintiff seeks partial summary judgment related to her ADA and FMLA claims. For the reasons discussed below, the undersigned **RECOMMENDS** that Shahar's Motion for Summary Judgment [250] be **GRANTED**. The undersigned **FURTHER RECOMMENDS** that the City's Motion for Summary Judgment [248] be **GRANTED IN PART, DENIED IN PART**. The Motion should be **DENIED**, and should proceed to trial, on Plaintiff's claim under Title VII that she was subject to unlawful harassment (Count II), and her FMLA interference claim to the extent it rests on allegations that she was required to perform substantive work while on protected medical leave (Count VII). The undersigned **RECOMMENDS** that the City's Motion [248] be **GRANTED** as to all remaining claims. Finally, the undersigned **RECOMMENDS** that Plaintiff's Motion for Summary Judgment [246] be **DENIED**.

I. SUMMARY JUDGMENT STANDARDS

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.*

Accordingly, in the following discussion, the Court must deem admitted those facts submitted by the moving party that are supported by citations to record

evidence, and for which the nonmoving party 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).").

For those facts submitted by a moving party that a nonmoving party 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 nonmoving parties, as required on motions 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.

II. DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Defendants have moved for summary judgment as to all of Plaintiff's claims asserted against them. Defendants both seek summary judgment as to Plaintiff's discrimination claims asserted under § 1983, which is Plaintiff's sole claim against Shahar. The City separately seeks summary judgment as to Plaintiff's discrimination claim asserted under Title VII, her ADA claims, and her FMLA claims, which constitute the remainder of Plaintiff's claims.

A. *Facts*

Unless stated otherwise, the following facts are drawn from the City's Statement of Undisputed Facts Supporting Summary Judgment ("City SMF") [248-2]; Plaintiff's response thereto ("Pl. Resp. SMF-City MSJ") [264-1]; Plaintiff's Statement of Additional Disputed Material Facts to Which there Exist Genuine Issues to be Tried ("Pl. SMF-City MSJ") [264-2]; the City's response thereto ("City Resp. SMF") [279-1]; Shahar's Statement of Undisputed Material Facts ("Shahar SMF") [250-2]; Plaintiff's response thereto ("Pl. Resp. SMF-Shahar MSJ") [263-1]; Plaintiff's Statement of Additional Disputed Material Facts to Which there Exist Genuine Issues to be Tried ("Pl. SMF-Shahar MSJ") [263-2]; and Shahar's response thereto ("Shahar Resp. SMF") [276]. When appropriate, the Court directly cites to relevant exhibits filed by the parties.

Plaintiff began her employment with the City's Law Department in October 2004. Pl. SMF-City MSJ at ¶ 1. An LGBTQ employee of the City, Plaintiff ultimately held the rank of Senior Assistant City Attorney. *Id.* at ¶¶ 2–3. During periods relevant to this action, Plaintiff's colleagues at the Law Department included Maiysha Rashad, a fellow attorney, and Robin Shahar, who supervised Plaintiff and served as the Law Department's Chief Counsel and as the LGBTQ advisor to the Mayor. *Id.* at ¶¶ 23, 25, 39. Plaintiff also reported to then-Deputy City Attorney Kimberly Patrick and City Attorney Cathy Hampton. City SMF at ¶¶ 39, 41. During

the relevant period, Yvonne Yancy served as the City's Human Resources Commissioner. *Id.* at ¶ 26.

In 2006, Plaintiff was diagnosed with bipolar disorder; during her employment with the City, Plaintiff also suffered from panic disorder, major depressive disorder, and anxiety disorder. Pl. SMF-City MSJ at ¶¶ 9–10. Among other symptoms, these disorders caused Plaintiff to experience sleeping issues, anxiety, panic, uncontrollable thoughts, and extreme mood swings. *Id.* at ¶ 12. During her employment with the City, she received psychotherapy treatment for her conditions. *Id.* at ¶ 13. In 2016, however, Plaintiff's psychotherapist, Dr. Torre Prothro-Wiley, generally did not observe psychotic features while treating her. *Id.* at ¶ 15. Nevertheless, Dr. Prothro-Wiley recommended that Plaintiff take a two-week medical leave between August 26, 2016 and September 9, 2016 after Plaintiff suffered from anxiety symptoms such as insomnia, sadness, racing heart palpitations, and a lack of concentration. *Id.* at ¶ 18.

Underlying much of Plaintiff's claims in this action are her interactions with Rashad and Shahar, two of her Law Department colleagues. Between April and June 2016, Plaintiff and Rashad engaged in ongoing mutual text message conversations concerning various topics, such as their reactions to news events and other personal matters. *Id.* at ¶¶ 27–29. In June of that year, however, Plaintiff and Rashad each accused each other of inappropriate conduct. City SMF at ¶ 3; Pl. SMF-City MSJ at

¶ 25. Plaintiff claims that Rashad touched her leg near her groin. Pl. SMF-City MSJ at ¶ 26. Rashad claims that Plaintiff romantically propositioned her and that Plaintiff "freaked out" when she (Rashad) rebuffed her overture. City SMF at ¶¶ 4–5. Rashad informed City Attorney Hampton of the issue, and outside counsel David Gevertz was retained to investigate the matter. *Id.* at ¶¶ 6, 19. Gevertz's investigation concluded with a mutual "no-contact" rule put in place between Plaintiff and Rashad, under which each was required to avoid contact with the other. Pl. SMF-City MSJ at ¶¶ 32–33. Plaintiff claims that despite this instruction, Rashad and Keisha Burnette, a fellow co-worker, "stalked" her. *Id.* at ¶ 34. Plaintiff testifies that Rashad would stalk her by, "among other things," parking near her, looking inside her car, hacking into one of her social media accounts, taking pictures and videos of her, walking closely behind her, waiting outside her car until she was forced to walk closely by, walking by her office, and making false accusations against her. *Id.* at ¶ 35. Rashad likewise accused Plaintiff of violating the no-contact rule. City SMF at ¶¶ 22–23.

In late 2015 and early 2016, and again in the summer of 2016, Plaintiff and Shahar were assigned to work on cases together. Shahar SMF at ¶ 5. After beginning to work on cases together, Plaintiff and Shahar began to meet alone in Shahar's office. *Id.* at ¶ 7. Plaintiff testifies that, during those meetings, Shahar repeatedly touched her thigh and moved her hand closer to her "private area." Pl. SMF-Shahar

MSJ at ¶¶ 42–43. In all, Plaintiff claims, Shahar touched her thigh approximately twice a week, combining for a total of more than 20 incidents. *Id.* at ¶ 40. Plaintiff further testifies that she would jump up and object when Shahar would allegedly touch her. *Id.* at ¶ 44. Plaintiff contends that, during the summer of 2016, she complained about Shahar to both Deputy City Attorney Karen Thomas and City Attorney Hampton. Pl. SMF-City MSJ at ¶¶ 62, 66. Notwithstanding a City ordinance requiring "managers and supervisors who are informed of possible sexual harassment [ ] to take appropriate, prompt action, including investigating the matter," and notwithstanding that Thomas and Hampton were the appropriate persons to whom Plaintiff could report incidents of harassment under the City's ordinance, Plaintiff testifies that Thomas did not respond to her complaints about Shahar and that Hampton—despite claiming she would investigate the matter—did not refer Plaintiff to the Human Resources department or otherwise advise her of her rights under the City's ordinance. *Id.* at ¶ 63–64, 68–69. Plaintiff states that she reported "four or five [more] times" to Thomas that she was being harassed, and that she requested of Thomas that she no longer meet alone with Shahar. *Id.* at ¶¶ 71–72. Nevertheless, Plaintiff contends, Thomas continued to require her to meet alone with Shahar, ostensibly because "Hampton directed [Thomas] to do so at [ ] Shahar's request." *Id.* at ¶¶ 73–74.

Following another complaint by Plaintiff that Shahar continued to touch her, City Attorney Hampton told Plaintiff that she would no longer be required to meet with Shahar alone. *Id.* at ¶ 75. However, Hampton's directive lasted approximately one week; Thomas later told Plaintiff that she would have to continue meeting with Shahar alone, and that Hampton was "aware" of the new direction Plaintiff was being given. *Id.* Plaintiff attempted to meet with Hampton about the situation, but Hampton would not schedule a time for them to meet. *Id.* at ¶ 77.

On December 6, 2016, Plaintiff received a voice message instructing her to report to the City's Human Resources department. *Id.* at ¶ 85. Because the message was generic, Plaintiff did not know why she was being summoned. *Id.* While Plaintiff was making her way to the Human Resources office, Shahar summoned Plaintiff into her office. *Id.* at ¶ 86. In her office, Shahar told Plaintiff that she (Plaintiff) was being summoned to Human Resources for reasons related to an investigation into incidents involving Plaintiff and Rashad. *Id.* at ¶ 87; Pl. SMF-Shahar MSJ at ¶ 70.[1] However, Shahar allegedly told Plaintiff that she could "make

[1] Shahar objects to the admission of her alleged statement to Plaintiff as evidence, arguing that Plaintiff's testimony as to Shahar's alleged statement constitutes inadmissible hearsay. Shahar Resp. SMF at ¶ 70. Shahar argues that Plaintiff's proffered statement "does not fall within an exception" to the prohibition on the admission of hearsay statements as evidence. *Id.* Whether or not Shahar's statement concerning why Plaintiff was being called to human resources fits into an "exception" to the rule against hearsay under Rule 803 of the Federal Rules of Evidence, Shahar's statement is plainly an opposing-party statement that is excluded

it all go away." Pl. SMF-City MSJ at ¶ 89; Pl. SMF-Shahar MSJ at ¶ 72.[2] Plaintiff asked Shahar what she (Plaintiff) would have to do to "make it all go away." Pl. SMF-City MSJ at ¶ 90; Pl. SMF-Shahar MSJ at ¶ 73. Plaintiff asserts that Shahar replied, "you know." Pl. SMF-City MSJ at ¶ 90; Pl. SMF-Shahar MSJ at ¶ 73.[3] Plaintiff responded, "you people are fucking killing me." Pl. SMF-City MSJ at ¶ 91. Contrary to Shahar's account of the incident, Plaintiff testifies that, while she was in Shahar's office on December 6, she never threatened to commit suicide or state that she had or wanted to get a gun. *Id.* at ¶ 92.

Plaintiff then began to cry, had trouble breathing, and began having a panic attack. *Id.* at ¶ 93. Plaintiff left Shahar's office and headed to Human Resources; Shahar followed her there. *Id.* at ¶ 95. At the Human Resources office, Plaintiff had a breakdown in which she "couldn't breathe . . . was crying uncontrollably . . . [and] was just panicking." *Id.* at ¶ 97. Plaintiff was eventually able to meet with Angela Addison and Catherine LeMay at the Human Resources office. *Id.* at ¶ 98. Addison testified that, during this meeting, Plaintiff threatened to kill herself, Addison Dep.

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altogether from the rule against hearsay under Rule 801. *See* Fed. R. Evid. 801(d)(2). Shahar's objection is accordingly **OVERRULED**.

[2] Shahar's hearsay objection to the admission of this statement, *see* Shahar Resp. SMF at ¶ 72, is **OVERRULED** for the reasons explained above.

[3] Shahar's hearsay objection to the admission of this statement, *see* Shahar Resp. SMF at ¶ 73, is **OVERRULED** for the reasons explained above.

at 38, although Plaintiff denies this. Pl. SMF-City MSJ at ¶ 98. Plaintiff then separately met with Commissioner Yancy, to whom she reported Shahar's alleged harassment of her and Rashad and Burnette's alleged stalking of her. *Id.* at ¶¶ 102–103. In this meeting, according to Yancy, Plaintiff again threatened to kill herself, although Plaintiff again denies making such statements. City SMF ¶¶ 27, 29, Yancy Dep. at 63; Pl. SMF-City MSJ at ¶ 29.

After telling Plaintiff that her concerns would be investigated, Commissioner Yancy contacted Dr. Adrienne Bradford, the Director of the City's Employee Assistance Program, to assist her. Pl. SMF-City MSJ at ¶ 108. Dr. Bradford arrived at Yancy's office to speak with Plaintiff. *Id.* at ¶ 109. Although Dr. Bradford had heard from a City employee that Plaintiff had threatened to commit suicide, she did not hear from Plaintiff that she intended to do so or that she possessed a gun. Dr. Bradford was "not sure" that Plaintiff was actually a threat to herself. *Id.* at ¶¶ 111-15. With Plaintiff's permission, Dr. Bradford called Dr. Prothro-Wiley, Plaintiff's therapist. *Id.* at ¶¶ 116–17. Dr. Prothro-Wiley states that she was informed that the City believed that Plaintiff was suicidal and that, at Plaintiff's request, the City was sending Plaintiff to her. City SMF at ¶ 32. City employee Derris Mitchell then drove Plaintiff directly to Dr. Prothro-Wiley's office to drop Plaintiff off; when he arrived, he told Dr. Prothro-Wiley that Plaintiff had made a statement about "shooting herself." *Id.* at ¶ 33. Dr. Prothro-Wiley concluded that Plaintiff "was fine"

after having an "emotional moment." Pl. SMF-City MSJ at ¶ 121. In a voice message, Dr. Prothro-Wiley then informed Shahar that Plaintiff "denied everything pertaining to owning a gun and claiming to take her life." *Id.* at ¶ 122. Nonetheless, Dr. Prothro-Wiley recommended that Plaintiff take medical leave. City SMF at ¶ 35. Plaintiff then began what was initially two weeks of FMLA medical leave. *Id.*

Later that afternoon, City police officer Shaun Houston was called to Commissioner Yancy's office. *Id.* at ¶ 36. There, Houston was told that Plaintiff wanted to buy a gun and shoot herself. *Id.* Houston and his lieutenant suspended Plaintiff's access to the City's office building and parking deck for two weeks. *Id.* at ¶ 38. City Attorney Hampton was also brought up to speed on the episode involving Plaintiff. *Id.* at ¶ 39. Based on her conversation with Yancy on the matter, Hampton stated that "[t]here was a real concern for not just the safety of [Plaintiff] but the safety of others," given the "threat for [Plaintiff] to shoot herself" and "the concern about a gun." *Id.* at ¶ 40. Plaintiff denies that she ever communicated an intent to hurt others. Pl. Resp. SMF-City MSJ at ¶ 40.

On December 16, 2016, while Plaintiff was on her initial two-week medical leave, Dr. Prothro-Wiley recommended that her leave be extended through January 26, 2017. Pl. SMF-City MSJ at ¶ 132. The City accordingly agreed to extend Plaintiff's leave under the FMLA through January 26, 2017. *Id.* at ¶ 135. In a form that she submitted to the City that month, Plaintiff listed her essential job function

as "analyz[ing] complex legal issues" and that her work hours were generally Monday through Friday between 8:30 AM and 5:30 PM, or "full-time." City SMF at ¶¶ 52–53. As a result of Plaintiff's condition, however, Dr. Prothro-Wiley noted in a submission to the City that Plaintiff could not "cognitively process for her legal cases due to stress, fatigue, insomnia and acute anxiety." *Id.* at ¶ 54. After being contacted by Commissioner Yancy on January 25, 2017, Dr. Prothro-Wiley again recommended that Plaintiff's leave be extended, this time through February 24, 2017. Pl. SMF-City SMF at ¶¶ 138–139. The City again approved the recommendation and extended Plaintiff's FMLA leave accordingly. *Id.* at ¶ 155.[4] In its February 1, 2017 letter to Plaintiff approving the FMLA leave extension, the City noted that Plaintiff would "be required to present a fitness to return to work from a mental health care provider with insight into [her] condition no later than 24 hours in advance of [her] return, in accordance with Sec. 114-380 of the City Code." *Id.* at ¶ 141.

Plaintiff testified, however, that, despite the leave she was granted, she nonetheless performed work on behalf of the City at the direction of Deputy City Attorney Patrick, who was her immediate supervisor, and Shahar. *Id.* at ¶ 149. In all,

[4] Plaintiff claims that the City further adopted a return-to-work date of February 27, 2017, as recommended by Dr. Prothro-Wiley. Pl. SMF-City MSJ at ¶ 155. However, as the City notes, none of the documents she cites for this assertion demonstrates the City adopting a specific return-to-work date.

Plaintiff claims, she spent time during her leave working on motions *in limine*, a response in opposition to a motion *in limine*, a proposed consolidated pretrial order, a witness list, jury charges, direct and cross-examination questions for trial, preparing a client for a deposition, and providing advice about cases to co-workers. *Id.* at ¶ 150. Although she was never directly instructed by Patrick or Shahar to perform work while on leave, Plaintiff alleges that she received their instructions through an intermediary, Veronica Hoffler, her co-worker. *Id.* at ¶ 151. On "multiple occasions," Patrick allegedly told Hoffler that she was to give assignments from her and Shahar to Plaintiff. *Id.* at ¶ 152. In addition, while Plaintiff was on leave, Patrick admits to asking Hoffler to provide Plaintiff with an attorney's contact information to facilitate a presentation, although Patrick states that she did so with the idea that Plaintiff would make this presentation after returning from leave, and that Plaintiff would be able to choose whether to make the presentation or not. *Id.* at ¶ 154; City SMF at ¶¶ 45–48. Plaintiff further asserts that, on January 18 and February 9, 2017, Shahar filed Notices of Withdrawal removing Plaintiff from two cases in which she had previously appeared. Pl. SMF-Shahar MSJ at ¶¶ 119, 139.

Plaintiff ultimately requested to return to work on February 24, 2017, submitting a form signed by Dr. Prothro-Wiley directing that Plaintiff "return to work . . . with restrictive conditions (15 to 25 hours) per week until 1 month assessment." City SMF at ¶ 56. In response, that same day, Commissioner Yancy

sent Plaintiff a letter restating that Plaintiff would be required to submit to a fitness-for-duty exam before returning to work, that the City would pay for the exam, and that Plaintiff would be on a paid leave in the meantime. *Id.* at ¶ 64. Should the results of the exam be satisfactory, Yancy said, Plaintiff would be reinstated to her prior position. *Id.* Otherwise, the City would reassess Plaintiff's employment status. *Id.*

On March 3, 2017, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"), in which she stated that she "believe[s] [she] was discriminated against in violation of the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964." Pl. SMF-City MSJ at ¶ 180. Plaintiff explained in the Charge that "harassment at the workplace trigger[ed] effects of [her] disability." *Id.* at ¶ 181. On March 7 and 9, 2017, Plaintiff wrote to Commissioner Yancy to follow up on sexual harassment complaints she claims to have shared with Yancy on December 6, 2016, and additionally to let Yancy know of alleged disability-based harassment she faced from colleagues. *Id.* at ¶¶ 182–84. On March 6, 2017, outside counsel Gevertz wrote to Plaintiff and stated that he had "been hired to look into [her] allegations concerning an alleged hostile work environment and FMLA interference." *Id.* at ¶ 186. As part of his investigation, Gevertz interviewed several of Plaintiff's colleagues later that month, although he did not interview Plaintiff. *Id.* at ¶¶ 190, 196.

On March 28, 2017, Plaintiff received a fitness-for-duty examination from Dr. Ifetayo Ojelade, a licensed counseling psychologist selected by the City. City SMF at ¶ 65. After examining Plaintiff and reviewing records provided by the City, Dr. Ojelade concluded that Plaintiff was "not fit to return to her current work environment. Given her current symptom severity . . . it is unlikely that [Plaintiff's] functioning will improve . . . . This is not to suggest that [Plaintiff] is unfit to function as an attorney, but rather she does not possess the psychological resources to function optimally in her current work environment." Pl. SMF-City MSJ at ¶ 212. Because Dr. Ojelade did not determine that she was fit to work, Plaintiff remained on administrative leave and was not reinstated to her position as Senior Assistant City Attorney. *Id.* at ¶ 215.

On May 25, 2017, Director of Human Resources Pam Beckerman sent Plaintiff a letter explaining the results of Dr. Ojelade's exam and stating that Plaintiff would accordingly remain on administrative leave with pay. City SMF at ¶ 74. The letter offered Plaintiff two options: (1) work with Beckerman to identify other City positions for which Plaintiff was qualified, and/or (2) seek a second fitness-for-duty exam to be completed by a psychologist of Plaintiff's choosing. *Id.* at ¶ 75. Plaintiff chose to seek a second exam from Dr. Mark Ackerman, to whom the City provided Plaintiff's records as he requested. *Id.* at ¶ 76–77.

On July 10, 2017, Deputy City Attorney Patrick received a call from attorney Jordan Aldridge, who asserted that Plaintiff had entered an appearance on behalf of a plaintiff in the Magistrate Court of Clayton County on June 30, 2017, while she was on paid leave. *Id.* at ¶ 79. The City had been unaware of Plaintiff's appearance, which occurred while Plaintiff was on paid leave. *Id.* at ¶ 80. The City generally prohibits its lawyers from practicing law externally without permission. *Id.* at ¶ 81. Patrick notified City Attorney Jeremy Berry, who began working for the City in May 2017, of Plaintiff's appearance. *Id.* at ¶¶ 82–83. At the time, all that Berry knew about Plaintiff was that she was an attorney on administrative leave; Berry was unaware of her allegations of harassment and of her Charge of Discrimination filed with the EEOC. *Id.* at ¶¶ 84–85; Pl. SMF-City MSJ at ¶ 226.

The next day, City Attorney Berry reached out to Gevertz to discuss Plaintiff's alleged representation of a client. Pl. SMF-City MSJ at ¶ 221. Berry relied on Gevertz to investigate Plaintiff's conduct. *Id.* at ¶ 222. While investigating Plaintiff's conduct, Berry learned on July 11, 2017 that, in addition to representing a client in court, Plaintiff had incorporated her own law firm during the previous month. City SMF at ¶ 93. Relying on Gevertz's advice, Berry then decided that Plaintiff's employment should be terminated. *Id.* at ¶ 95; Pl. SMF-City MSJ at ¶ 225.

On July 12, 2017, Gevertz reached out to Plaintiff to ask about her representation of a client. City SMF at ¶ 87; Pl. SMF-City MSJ at ¶ 229. A lawyer

representing Plaintiff responded and explained that, as a favor to her therapist, Plaintiff was assisting one person in their pursuit of a protective order. City SMF at ¶ 88. In their response to Gevertz, Plaintiff's counsel identified three City attorneys who allegedly engaged in similar external practice of law: Veronica Hoffler, Lashawn Terry, and Akua Coppock. *Id.* Notwithstanding Plaintiff's counsel's message to Gevertz, City Attorney Berry testifies that he did not learn of any alleged comparators before deciding to terminate Plaintiff on July 11, 2017. *Id.* at ¶ 91. On July 18, 2017, the City terminated Plaintiff's employment. *Id.* at ¶ 96; Pl. SMF-City MSJ at ¶ 235. On November 3, 2017, Plaintiff amended her EEOC Charge of Discrimination to state that her concerns include "sexual harassment, disability discrimination, and retaliation." Pl. SMF-City MSJ at ¶ 237.

B. *Discussion*

1. § 1983 and Title VII Sexual Harassment/Discrimination Claims

Plaintiff asserts claims of "Sexual Harassment/Gender Discrimination" against both the City and Shahar under § 1983, and additionally under Title VII against only the City.

a. § 1983 Sexual Harassment/Discrimination Claim

§ 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or

> other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

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). The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution 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. When a public employee challenges an employment decision as an act of discrimination on the basis of race or sex, such a claim may 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) (there is a constitutional right to be free from unlawful sex discrimination and sexual harassment in public employment) (citing *Davis v. Passman*, 442 U.S. 228, 235 (1979)).

Defendants both seek summary judgment as to Plaintiff's § 1983 claims on the grounds that they are untimely under the applicable two-year statute of limitations; the City separately argues that it cannot be subject to municipal liability under the statute, while Shahar separately argues that she is entitled to qualified immunity from suit as to certain allegations at the core of Plaintiff's claim against her.[5]

Any action involving a constitutional claim brought under § 1983 is a tort action that is subject to the statute of limitations governing personal injury actions in the state in which the action has been brought. *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008). Thus, actions brought in a federal district court in Georgia pursuant to § 1983 are governed by the two-year statute of limitations period for personal injuries provided in O.C.G.A. § 9-3-33. *See Crowe v. Donald*, 528 F.3d 1290, 1292-93 (11th Cir. 2008); *Williams v. City of Atlanta*, 794 F.2d 624, 626 (11th Cir. 1986). Federal law, however, governs the date that the claim accrues, and provides that "the statute of limitations begins to run when 'the facts which would support a cause of action are apparent or should be apparent to a person with a

[5] In addition to its arguments on the matter, the City purports to rely on arguments raised in Shahar's summary judgment briefing to the extent Shahar likewise argues that Plaintiff's § 1983 claims are time-barred. *See* City Br. [248-1] at 20.

reasonably prudent regard for his rights.'" *Betts v. Hall*, 679 F. App'x 810, 812 (11th Cir. 2017) (quoting *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987)).

Because Plaintiff did not file her § 1983 claims until January 15, 2019, Defendants argue that she cannot assert claims under § 1983 because they rest solely on conduct that occurred before January 15, 2017. *See* City Br. [248-1] at 20–21; Shahar Br. [250-1] at 9–14. Defendants contend that no actionable incident relating to Plaintiff's hostile work environment claim occurred after December 6, 2016, and that, to the extent Plaintiff alleges incidents occurring after that date, those incidents were either unrelated to the alleged hostile work environment or they were not sufficiently sex-related and/or severe or pervasive enough to constitute part of an actionable sexually hostile work environment.

In response, Plaintiff argues that Shahar took actions "to exert sex-based power" over her well after January 15, 2017, and that these actions "were taken in the same vein as the physical sexual harassment" to which she says Shahar subjected her throughout much of 2016 and the alleged lie that Shahar told about Plaintiff's possession of a gun on December 6, 2016. Resp. [264] at 5–6. Plaintiff points to the following discrete actions taken by Shahar: (1) Shahar's withdrawal of Plaintiff's appearance in two cases on January 18, 2017 and February 9, 2017, respectively, "despite [Plaintiff] remaining employed with the City at that time"; (2) Shahar's alleged suggestion "to [Deputy City Attorney] Patrick that [Plaintiff] be assigned

work during [her] FMLA recovery period"; and (3) Shahar's March 2017 interview with outside counsel Gevertz, in which Plaintiff implies that Shahar may have repeated her alleged December 2016 lie that Plaintiff possessed a gun. *Id.* at 5–6, 10. Further, Plaintiff argues that her "rejection" of Shahar's harassing conduct during 2016 culminated in the City's February 2017 rejection of her return-to-work request and her ultimate termination on July 18, 2017. *Id.* Thus, Plaintiff contends that her § 1983 claims against Defendants are not barred by the statute of limitations.

When a plaintiff alleges that she was subjected to unlawful discrimination as a result of a hostile work environment, she may state a viable claim based on acts outside of the applicable statute of limitations, so long as "an act contributing to the claim occurs within the filing period." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002). The Supreme Court explained in *Morgan* that "[p]rovided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." *Id.* at 117. The principle expounded in *Morgan* "applies the same to Title VII hostile work environment claims as it does to such claims brought under section 1983." *Heath v. Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731, 739 (5th Cir. 2017); *see also Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008) (noting that the standards for employment discrimination claims under Title VII are generally identical to those brought under § 1983).

Under the Eleventh Circuit's framing of *Morgan*, a court may consider untimely acts if they are "sufficiently related" to a timely hostile work environment claim that they "may be fairly considered part of the same claim." *See Chambless v. Louisiana-Pacific Corp.*, 481 F.3d 1345, 1350 (11th Cir. 2007). In *Chambless*, the plaintiff sued her employer for sexual harassment, but her allegations of sexually harassing conduct such as sexual touching, jokes, propositioning, ridicule for pregnancy, and social isolation were all found to be untimely. *See id.* at 1347. The plaintiff nevertheless had timely claims for sex discrimination based on the defendant's failure to promote her, and for retaliatory discharge. *See id.* The Eleventh Circuit held that the discrete acts of failure to promote and discharge were not sufficiently related to the earlier incidents of sexual harassment—that is, they were not the "same type of 'discriminatory intimidation, ridicule, and insult' that characterized the untimely allegations," and could not save her untimely acts from the statute of limitations. *See id.* at 1350 (quoting *Harris*, 510 U.S. at 21). The following year, the Eleventh Circuit clarified that under *Morgan*, "discrete acts" of discrimination and retaliation cannot be combined with allegations of harassment as part of the same harassment claim and cannot save untimely allegations of harassing conduct. *See Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 970–72 (11th Cir. 2008); *McCann v. Tillman*, 526 F.3d 1370, 1379 (11th Cir. 2008). Thus, to combine untimely acts with timely acts under *Morgan*, the untimely acts must be

"sufficiently related" to the timely acts so as to form part of the same hostile work environment claim, and both the timely and untimely acts must be acts of *harassment* contributing to a hostile work environment, not discrete employment actions such as termination.

However, Plaintiff's post-January 15, 2017 allegations bear little relation to the hostile work environment she alleges prior to that date and, in any event, are not the type of severe or pervasive intimidation, ridicule, or insult that may form the basis of a hostile work environment claim. As an initial matter, Plaintiff was not part of any "work environment" at all on or after January 15, 2017, as it is undisputed that Plaintiff never reported back to work after December 6, 2016. *See Stewart v. Jones Utility & Contracting Co.*, 806 F. App'x 738, 742 (11th Cir. 2020) (*per curiam*) (finding that a plaintiff who alleged a hostile work environment was no longer part of a "'work' environment" after termination).

Shahar's withdrawal of Plaintiff from two cases in January and February 2017 and her interview with Gevertz in March 2017—two of the three post-January 15 incidents which Plaintiff alleges to form part of the alleged hostile work environment—did not occur within Plaintiff's presence and were not directed toward her. *See O'Neal v. Se. Ga. Health Sys.*, No. 2:19-cv-067, 2021 WL 141236, at *8 (S.D. Ga. Jan. 14, 2021) (noting that arguments between employees outside of a plaintiff's presence were not actionable "discriminatory intimidation, ridicule, [or]

insult"). Nor was Shahar's assignment of work tasks to Plaintiff during Plaintiff's FMLA leave remotely similar to the groping and sexual advances that make up the bulk of Plaintiff's 2016 allegations against Shahar. The Court cannot fairly consider Shahar's 2017 conduct to be so related to Shahar's alleged sexual acts in 2016 so as to extended the limitations period.

Moreover, the 2017 incidents simply do not amount to actionable acts of sex-based intimidation, ridicule, or insult. Merely assigning or withdrawing assignments of work tasks is a commonplace office event. While these assignments might have technically intruded into Plaintiff's protected medical leave, the assignments are not, by themselves, insulting or hostile on the basis of gender.[6] Indeed, it appears undisputed that Shahar did not even have direct contact with Plaintiff during this time. *See Wynn v. Paragon Sys., Inc.*, 301 F. Supp. 2d 1343, 1352 (S.D. Ga. 2004) (finding that a plaintiff's co-worker's aggressive behavior toward her did not form part of an actionable hostile work environment because there was no indication he engaged in such behavior because of the plaintiff's sex).

And, assuming that Shahar's alleged December 2016 lie about Plaintiff's gun and suicidal ideations was a sex-motivated act, Plaintiff presents no evidence that

[6] Plaintiff's concern about having been withdrawn from cases while she was on leave is particularly perplexing, since she elsewhere complains that she was asked to do too much case-related work while on leave.

Shahar repeated that statement in her March 2017 meeting with Gevertz, nor, in any case, was a single comment made by Shahar in a single meeting, not initiated by Shahar, in which Plaintiff was not present, "objectively hostile or abusive" enough to constitute actionable harassment. *See Fleming v. Boeing Co.*, 120 F.3d 242, 245 (11th Cir. 1997). It is also mere speculation that any such possible statement by Shahar in March 2017 was material, given that multiple other witnesses (including Addison and Yancy) not accused of sexual harassment all separately reported that Plaintiff threatened to kill herself during the events of December 6, 2016. *See* Yancy Dep. at 63; Addison Dep. at 38.[7]

[7] Plaintiff passingly asserts that her § 1983 claims may alternatively proceed under a "disparate treatment" and/or "*quid pro quo*" theory of liability. *See* Resp. [263] at 12, 16–17. Plaintiff does not explain the precise basis of any disparate treatment claim beyond the single use of the phrase "disparate treatment," but the Court assumes that Plaintiff is suggesting that Shahar's statements to Gevertz in March 2017 resulted in Plaintiff's termination and that this could be considered *quid pro quo* harassment or perhaps "disparate treatment." Even assuming that this argument had been properly presented, which it has not, it would fail for the same reasons discussed above. To establish a claim of *quid pro quo* harassment, a plaintiff must show that "submission to sexual conduct is either explicitly or implicitly a term or condition of an individual's employment, or when submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual." *Miles v. City of Birmingham*, 398 F. Supp. 3d 1163, 1177–78 (N.D. Ala. 2019) (internal quotation omitted). Again, there is no evidence as to what Shahar said to Gevertz or that whatever she may have said was used as a basis for terminating Plaintiff or refusing to allow her to return on the half-time basis she requested. Indeed, as explained further below, Plaintiff was not fired for four months after the March 2017 interview, and only after Plaintiff indisputably engaged in independent misconduct by engaging in the private practice of law while on the City's payroll. Further, as noted above, Shahar was not the only City employee to

Accordingly, because Plaintiff presents no evidence of actionable conduct taking place within the applicable two-year limitations period, that is, on or after January 15, 2017, both Defendants are entitled to summary judgment on Plaintiff's § 1983 claims.[8]

(1) Title VII Sexual Harassment/Discrimination Claim

As for Plaintiff's Title VII harassment/discrimination claim, the City argues that she failed to exhaust her administrative remedies by failing to adequately raise the claim in her EEOC administrative charges.

Plaintiffs bringing claims of employment discrimination under Title VII generally must file a charge of discrimination before they may pursue their claims in federal court. *See Stamper v. Duval Cty. Sch. Bd.*, 863 F.3d 1336, 1339 (11th Cir. 2017). The administrative charge requirement serves the important purpose of giving the charged party notice of the claim and narrowing the issues for prompt adjudication. *See Wade v. Sec'y of Army*, 796 F.2d 1369, 1377 (11th Cir. 1986) ("The

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report that Plaintiff threatened to kill herself in December 6, 2006. And the City's refusal to allow Plaintiff to return on the provisional half-time basis she requested, and its insistence on an independent fitness-to-work clearance instead, pre-dated the Shahar-Gevertz interview.

[8] The Court notes that Defendants also seek summary judgment as to the § 1983 claims based on qualified immunity (for Shahar) and the lack of any municipal policy or notice (for the City). Because Defendants are due summary judgment on Plaintiff's § 1983 claims on timeliness grounds, these additional arguments are moot.

court must keep in mind that the purpose of exhaustion is to give the agency the information it needs to investigate and resolve the dispute between the employee and the employer. Good faith effort by the employee to cooperate with the agency and EEOC to provide all relevant, available information is all that exhaustion requires.") (citations omitted). Thus, a plaintiff must have complained to the EEOC of the conduct underlying the civil complaint before filing a lawsuit. *See Booth v. City of Roswell*, 754 F. App'x 834, 836 (11th Cir. 2018) (citing *Wu v. Thomas*, 963 F.2d 1543, 1547 (11th Cir. 1989)).

A plaintiff who then files a lawsuit asserting claims of employment discrimination cannot bring any claim that was not included in their EEOC complaint. *See Wu*, 963 F.2d at 1547; *Zellars v. Liberty Nat'l Life Ins. Co.*, 907 F. Supp. 355, 358 (M.D. Ala. 1995) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)). In determining the permissible scope of an employment discrimination complaint, the Court must first look to the EEOC complaint and investigation. *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 929 (11th Cir. 1983). A plaintiff is precluded from pursuing any claims in a federal court action that are not "like or related" to the claims asserted by the plaintiff in their EEOC complaint or that could not reasonably be expected to arise during the course of the EEOC investigation. *See Coon v. Ga. Pac. Corp.*, 829 F.2d 1563, 1569 (11th Cir. 1987); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970); *see also*

Griffin v. Carlin, 755 F.2d 1516, 1522 (11th Cir. 1985); *Evans*, 696 F.2d at 928; *Buffington v. Gen. Time Corp.*, 677 F. Supp. 1186, 1192 (M.D. Ga. 1988). Additional charges in the civil complaint which do not arise naturally and logically from the facts presented to the EEOC cannot be pursued in a civil action.

Nevertheless, courts "have been 'extremely reluctant to allow procedural technicalities to bar claims brought under [anti-discrimination statutes].'" *Batson v. Salvation Army*, 897 F.3d 1320, 1327 (11th Cir. 2018) (quoting *Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1280 (11th Cir. 2004)). "As such . . . 'the scope of an EEOC complaint should not be strictly interpreted.'" *Gregory*, 355 F.3d at 1280 (quoting *Sanchez*, 431 F.2d at 460).

In her March 3, 2017 Charge of Discrimination filed with the EEOC, Plaintiff explained her claim as follows:

> I. I work for the City of Atlanta Law Department as an attorney. On December 6, 2016, I went out on medical leave due to harassment at the workplace triggering effects of my disability. When I was out on leave, the City required me to work on cases, threatening that I would be fired if I did not. When I attempted to return to work, the City would not let me.
>
> II. The employer stated that I was not allowed to return to work because it did not believe my doctor that I was fit to return to work.

III. I believe I was discriminated in violation of the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964.

Norman Decl., Exh. B [249-1] at 9. The charge form further provided Plaintiff boxes to check to indicate the bases on which the alleged discrimination occurred, with options including, *inter alia*, race, color, sex, and/or disability. *Id.* Plaintiff checked only the box labeled "disability." *Id.*

The City argues that Plaintiff's March 3 charge "*did not* allege sexual harassment." City Br. [248-1] at 24 (emphasis in original). The City bases its argument on the fact that Plaintiff checked only the box for "disability," and not "sex," when prompted to note the grounds on which she believed she was discriminated against despite the form noting that claimants may check multiple boxes. The City further contends that Plaintiff's description of her claim did not indicate that it was based on sexual harassment. The City concedes that Plaintiff did, in fact, use the word "harassment" in her description, but contends nonetheless that the word was only "included as background information (not a substantive claim), and there is no indication that Plaintiff referred to *sexual* harassment (as opposed to disability or general harassment)." *Id.* at 25 (emphasis in original). Finally, the City claims that Plaintiff's November 3, 2017 amendment to her EEOC charge does not cure any deficiencies in her March 3 charge, notwithstanding any clearer statement of Plaintiff's allegations of sexual harassment, because it was filed more than 180 days after the end of any harassment and because it alleges "brand new causes of

action" that do not relate back to the allegations in her March 3 charge. *Id.* at 26–27. Plaintiff responds that her use of the word "harassment" in her March 3 charge was "enough information [with which the EEOC could] investigate a possible Title VII investigation[.]" Resp. [264] at 14. Plaintiff argues further that her November 3 amendment served only to clarify, rather than substantively enlarge, the allegations in her March 3 charge. *Id.* at 14–15.

Given Plaintiff's claims in this action and what she stated in her EEOC charge, the Eleventh Circuit's decision in *Batson v. Salvation Army* is instructive. In that case, a plaintiff alleged in a civil complaint, *inter alia*, that her employer had failed to accommodate her and retaliated against her in violation of the ADA, on the latter claim arguing that her termination was retaliatory against her request for an accommodation. *See Batson*, 897 F.3d at 1326. Her EEOC charge included her allegation that she had requested an accommodation and that she had been terminated at some point later. *Id.* at 1328. However, she failed to "mark the retaliation box" on the form. *Id.* The court nevertheless accepted the plaintiff's argument that the failure-to-accommodate claim in her EEOC charge was "inextricably linked" to her retaliation claim "because her accommodation request was the basis for [her employer's] retaliation against her, and her termination, mentioned in the Charge, was the specific form the retaliation took." *Id.*

Batson illustrates the well-settled principle that "a plaintiff's failure to check a particular box on her EEOC Charge form is neither dispositive nor conclusive as to the exhaustion requirement." *Payne v. Navigator Credit Union*, No. 19-0003-WS-MU, 2019 WL 1586763, at *2 (S.D. Ala. Apr. 12, 2019). Put another way, a plaintiff need not flesh out every one of their legal theories in their EEOC charge in order to preserve those claims for a later lawsuit. Rather, in their EEOC charge, an employment discrimination plaintiff need only lay out the factual bases underpinning their later lawsuit in such a manner that they could reasonably be read as asserting the claims brought in the later lawsuit. *See Boothe v. Circle K Stores, Inc.*, No. 2:20-cv-01804-SGC, 2021 WL 1338280, at *4 (N.D. Ala. Apr. 9, 2021) (finding that a plaintiff who "did not select the box indicating disability as a basis on which she alleged discrimination, use the word 'disability' in her narrative statement, or explicitly reference the ADA" could nonetheless assert a claim for disability discrimination under the ADA in a later lawsuit because her charge noted that she suffered "complications . . . because of her pregnancy," which can be actionable under the ADA).

Following such principles, the Court concludes that Plaintiff in this case has sufficiently exhausted her administrative remedies by filing her March 3 EEOC charge insofar as she seeks to assert a sexual harassment claim against the City under Title VII. The factual basis for Plaintiff's Title VII claim against the City—the

"harassment" she suffered during her employment—straightforwardly appears in her EEOC charge through her statement that she suffered from "harassment." Although the City attempts to minimize her assertion by relegating it as mere "background information" for her disability discrimination allegation, the City cites no authority contemplating any distinction between operative facts and purportedly non-operative "background information" included in an EEOC charge for purposes of determining whether a claim has been administratively exhausted. Even assuming such a distinction exists, the argument that Plaintiff's use of the word "harassment" could only be read as inoperative "background information" posited solely to advance a disability discrimination claim is put to rest by Plaintiff's narrative allegation that she believed the City discriminated against her in violation of *both* the ADA and Title VII. Title VII, of course, provides no protection against disability discrimination, but does provide protection against sex discrimination. The only facts alleged in the March 3 charge that could be tied to Plaintiff's express Title VII allegation, then, is the general "harassment at the workplace" Plaintiff described. An investigation into such "harassment" alleged to violate Title VII could reasonably uncover the allegations Plaintiff asserts here, that is, that her interactions with Shahar and/or Rashad and Burnette constituted unlawful harassment under Title VII.

The undersigned accordingly finds that Plaintiff has sufficiently exhausted her administrative remedies for purposes of her Title VII harassment claim against the

City. As the City offers no further properly-submitted arguments for summary judgment on this claim, it should proceed to trial.[9]

[9] The City appears to suggest that it is alternatively due summary judgment on Plaintiff's Title VII claim on timeliness grounds. City Mot. Summ. J. [248] at 3. However, the City's brief fails to expand upon this single-sentence conclusory assertion. Rather, the City purports to rely on Shahar's briefing on the limitations issues. Shahar, however, only argues that Plaintiff's *§ 1983 claim* is untimely. Shahar is not facing the Title VII claim and thus makes no statute of limitations argument under that separate statute.

Section 1983 and Title VII have different limitations periods. *See Cornett v. Ala. Dep't of Transp.*, 828 F. App'x 565, 567 (11th Cir. 2020) (*per curiam*) (recognizing different statutes of limitations for § 1983 and Title VII claims); *Richie v. Mitchell*, No. 5:14-CV-2329-CLS, 2015 WL 3616076, at *5 (N.D. Ala. June 9, 2015) (same). Indeed, the Title VII claim in this case covers more than three months of additional conduct pre-dating the § 1983 limitations period. Specifically, the Title VII claim covers all acts that occurred within 180 days prior to the filing of Plaintiff's March 3, 2017 EEOC charge complaining of harassment, that is, from approximately September 4, 2016 onwards. *See* 42 U.S.C. § 2000e-5(e)(1). Seemingly misunderstanding this distinction between the two statutes, the City conclusorily argues that "any alleged activity that occurred *after* December 6, 2016 . . . was either not based on sex or not 'severe or pervasive' even when aggregated and, therefore, not actionable." City Br. [248-1] at 21 (emphasis added). This throw-away statement is entirely inapposite to the Title VII claim, as to which the limitations period dated back to September 4. The City omits any argument as to how the events during this earlier period—including on December 6, 2016 itself—would not constitute actionable harassment under Title VII. The undersigned thus deems the City to have waived any timeliness argument as to the Title VII claim for summary judgment purposes and recommends that this ground for summary judgment be denied.

b. ADA Failure-to-Accommodate Claim

The City argues that it is due summary judgment on Plaintiff's failure-to-accommodate claim asserted under the ADA, arguing that Plaintiff cannot present a *prima facie* claim.

(1) Failure-to-Accommodate Standards

The ADA was "designed to prohibit discrimination against disabled persons and enable those persons 'to compete in the workplace and the job market based on the same performance standards and requirements expected of persons who are not disabled.'" *Paleologos v. Rehab Consultants, Inc.*, 990 F. Supp. 1460, 1464 (N.D. Ga. 1998) (quoting *Harding v. Winn-Dixie Stores, Inc.*, 907 F. Supp. 386, 389 (M.D. Fla. 1995)). Title I of the ADA prohibits covered employers from discriminating "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a); *see also Wascura v. City of S. Miami*, 257 F.3d 1238, 1242 (11th Cir. 2001).

The definition of "discriminate" includes a failure to make reasonable accommodations to the limitations of that individual with a disability. 42 U.S.C. § 12112(b)(5)(A) ("the term 'discriminate against a qualified individual on the basis of disability' includes . . . not making reasonable accommodations to the known

physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."). For those cases in which an employee claims that an employer violated the ADA by failing to provide a reasonable accommodation for the employee's disability, the Eleventh Circuit has held that the burden-shifting framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), does not apply. *Nadler v. Harvey*, No. 06-12692, 2007 WL 2404705, at *9 (11th Cir. Aug. 24, 2007) ("An employer *must* reasonably accommodate an otherwise qualified employee with a known disability unless the accommodation would impose an undue hardship in the operation of the business. . . . Thus, applying *McDonnell Douglas* to reasonable accommodation cases would be superfluous, since there is no need to prove discriminatory motivation.") (emphasis in original); *see also Holly v. Clairson Indus., LLC*, 492 F.3d 1247, 1262 (11th Cir. 2007) (in an ADA failure-to-accommodate case, there are no additional burdens on defendant to show that it had a legitimate nondiscriminatory reason for terminating plaintiff, or on plaintiff to establish that defendant's proffered reasons were pretextual); *Jones v. Ga. Dep't of Corrs.*, No. 1:07-CV-1228-RLV, 2008 WL 779326, at *6 (N.D. Ga. Mar. 18, 2008) ("The Eleventh Circuit came to the logical conclusion that the *McDonnell Douglas* test

does not apply to reasonable accommodation claims in [*Nadler*], but it inexplicably did not publish the opinion and provide trial courts with a clear answer to this previously unaddressed issue.").

To show discrimination based on a failure to accommodate, then, Plaintiff must demonstrate that: (1) she is disabled; (2) she was a "qualified individual" when she suffered the adverse employment action; and (3) that she was discriminated against because of her disability by being denied a reasonable accommodation to allow her to keep working. *See Lucas v. W.W. Grainger, Inc*., 257 F.3d 1249, 1255 (11th Cir. 2001); *Hilburn*, 181 F.3d at 1226; *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1526 (11th Cir. 1997); *Harris v. H & W Contracting Co*., 102 F.3d 516, 519 (11th Cir. 1996); *Morisky v. Broward Cty*., 80 F.3d 445, 447 (11th Cir. 1996).

As noted above, the ADA expressly provides that an employer unlawfully discriminates against a qualified individual with a disability when the employer does not make "reasonable accommodations" for the employee, unless "the accommodation would impose an undue hardship" on the employer. 42 U.S.C. § 12112(b)(5)(A); *see also Anderson v. Embarq/Sprint*, 379 F. App'x 924, 927 (11th Cir. 2010) ("An employer impermissibly discriminates against a qualified individual when the employer does not reasonably accommodate the individual's disability."). A "reasonable accommodation" may include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or

modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9)(b).

But "an employer is not required to accommodate an employee in any manner in which that employee desires." *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1367 (11th Cir. 2000) (quoting *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997)). Unless the appropriate accommodation is obvious to both parties,[10] EEOC interpretive guidance recommends a "flexible, interactive process" between the employer and employee in which the employer considers factors such as the limitations faced by the employee and how an accommodation might overcome those limitations. *See* 29 C.F.R. pt. 1630 App. § 1630.9.

Although the ADA lists examples of possible accommodations, the listed accommodations are not necessarily "reasonable" under the statute. *See Terrell v. USAir*, 132 F.3d 621, 624 (11th Cir. 1998). The accommodation must be reasonable based on the specific facts and circumstances of the case. *Id.*; *Stewart*, 117 F.3d at 1285. "An accommodation is 'reasonable' and necessary under the ADA only if it

[10] "In many instances, the appropriate reasonable accommodation may be so obvious to either or both the employer and the individual with a disability that it may not be necessary to proceed in this step-by-step fashion." 29 C.F.R. pt. 1630 App. § 1630.9.

enables the employee to perform the essential functions of the job." *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1259–60 (11th Cir. 2001). "In other words, the ADA does not require the employer to eliminate an essential function of the plaintiff's job." *Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1256 (11th Cir. 2007) (internal citation and quotation omitted).

An employer may need "to initiate an informal, interactive process" with the employee to identify his or her limitations and possible accommodations. 29 C.F.R. § 1630.2(o)(3). But when a plaintiff fails to demonstrate the existence of a reasonable accommodation, "the employer's lack of investigation into reasonable accommodation is unimportant." *Earl*, 207 F.3d at 1367 (quoting *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997)). As such, it is the employee's burden to establish that a reasonable accommodation exists before an employer has any duty to engage in an "interactive process" or establish that it could not provide an accommodation because of undue hardship. *Id.* at 1367; *see also Knowles v. Sheriff*, 460 F. App'x 833, 835 (11th Cir. 2012) ("[W]here the employee failed to identify a reasonable accommodation, the employer had no affirmative duty to engage in an interactive process") (citation and internal quotation marks omitted).

If an employee is unable to perform the essential functions of the position with reasonable accommodations, the employer has no duty to essentially eliminate the essential functions of the position. *See* 29 C.F.R. 1630.2(n); *Holbrook v. City of*

Alpharetta, 112 F.3d 1522, 1527 (11th Cir. 1997); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1124 (10th Cir. 1995); *Larkins v. CIBA Vision Corp.*, 858 F. Supp. 1572, 1583 (N.D. Ga. 1994). Essential functions are the fundamental job duties of the employment position and do not include marginal functions. *See* 29 C.F.R. § 1630.2(n); *see also Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1258 (11th Cir. 2001). Evidence of whether a particular function is essential includes: (1) the employer's judgment as to what functions of a job are essential; (2) written job descriptions; (3) the amount of time spent performing the particular function; and (4) the consequences of not requiring the job holder to perform the function. *See* 29 C.F.R. § 1630.2(n)(3); *see also Lucas*, 257 F.3d at 1258; *Earl*, 207 F.3d at 1365.

In determining what functions of a given job are deemed to be essential, "consideration shall be given to the employer's judgment . . . and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." *Holbrook*, 112 F.3d at 1526 (citation omitted); *see also Lucas*, 257 F.3d at 1258; *Earl*, 207 F.3d at 1365. The regulations also state three factors that make it more likely that a specific duty is an essential function of the job: (1) the reason the position exists is to perform the function; (2) there are a limited number of employees available among whom the performance of the job function can be distributed; and (3) the function is highly specialized so that the person holding the

position was hired for his or her ability to perform the particular function. *See Holbrook*, 112 F.3d at 1526 (citing 29 C.F.R. § 1630.2(n)(2)(i)–(iii)).

The Court must accord substantial weight to Defendant's job description of the essential duties of the position. *See* 42 U.S.C. § 12111(8); *Holly*, 492 F.3d at 1258. The Court is not required to accept all functions in the job description, however, because it must weigh the Defendant's job description against all other relevant factors, including the amount of time spent on the job performing the function; the consequences of not requiring the employee to perform the function; the terms of any collective bargaining agreement; the work experience of past employees in the job; and the current work experience of employees in similar jobs. *See* 29 C.F.R. § 1630.2(n)(3)(ii)–(vii).

Thus, it is not enough for an employer to merely label a function essential; the employer must instead actually require employees in the position at issue to perform those functions that the employer claims are essential to the position. *See* 29 C.F.R. § 1630.2(n). If a plaintiff cannot perform the essential functions of the position without a reasonable accommodation, she must make a *prima facie* showing that a reasonable accommodation is possible, and that such an accommodation would enable her to perform those essential functions. *See Lucas*, 257 F.3d at 1255–56; *Jackson v. Veterans Admin.*, 22 F.3d 277, 281 (11th Cir. 1994). If a plaintiff can meet this burden, the defendant must produce evidence of an affirmative defense

that the accommodation requested is unreasonable or that it would cause an undue hardship on the employer. *See Shiring v. Runyon*, 90 F.3d 827, 831 (3d Cir. 1996). The plaintiff, however, retains the burden to identify an available reasonable accommodation and show that the accommodation would allow her to perform the essential functions of the job. *See Lucas*, 257 F.3d at 1255–56; *Holbrook*, 112 F.3d at 1527; *Moses v. Am. Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996).

(2) Plaintiff's Failure-to-Accommodate Claim

The City first argues that Plaintiff fails to present a *prima facie* case of a failure-to-accommodate claim because, it argues, she was not a "qualified individual" capable of performing the essential functions of a Senior Assistant City Attorney at the time she sought an accommodation and, relatedly, that no reasonable accommodation existed that would have allowed her to perform the essential functions of the role notwithstanding her disabilities. According to the City, Plaintiff's conditions in 2017 presented an obstacle to her ability to "process cognitively" as needed for her job, and presented a threat to "the safety of Plaintiff's co-workers [and] . . . the general public," issues which could not be addressed via an accommodation. City Br. [248-1] at 33. Although Plaintiff's therapist recommended that she be permitted to work part-time, the City claims that working full-time is an essential function of a Senior Assistant City Attorney, and that such an accommodation for Plaintiff would thus have eliminated an essential function of

Plaintiff's role. *Id.* at 33–34. Further compelling a finding that Plaintiff was not qualified, the City argues, is that Dr. Ojelade allegedly concluded that Plaintiff was not fit to return to work. *Id.* at 31. Even assuming that Plaintiff was a qualified individual, the City argues that it reasonably accommodated her by granting FMLA leave, offering to find her alternative jobs, and placing her on paid administrative leave pending receipt of a fitness-for-work clearance. City Br. at 33.

Plaintiff responds that she was, in fact, qualified for her position when she requested to return to work. Plaintiff argues that the questions of whether or not she possessed or had indicated that she possessed a gun, or whether she posed a threat to others, are disputed questions of fact not capable of resolution via summary judgment. Resp. [264] at 28–29. Further evidencing her qualification for her job, Plaintiff argues, is that she allegedly was performing work for the City while she was on leave and that her therapist, Dr. Prothro-Wiley, released her to return to work on at least a part-time basis. *Id.* at 24, 28. As for whether a part-time restriction could be considered reasonable, Plaintiff contends that there is evidence that working full-time is not an essential function of a Senior Assistant City Attorney, pointing to the lack of any such notation in the City's job description for the position. *Id.* at 25.

As to whether working full-time is an essential function of a Senior Assistant City Attorney, Plaintiff has presented a disputed issue of fact incapable of summary adjudication. Although the City has presented evidence that at least one attorney had

been terminated for her inability to work full time, thus corroborating its position that full-time work was essential, Plaintiff also points to competent evidence pointing the other way. In a form entitled "Senior Assistant City Attorney Skills and Competency Expectations," the City purports to list all of the "Essential Duties & Responsibilities" and "Essential Capabilities and Work Environment" standards expected of a Senior Assistant City Attorney. *See* Pl. Exh. 61 [247-17] at 1–3. At no point in either of those sections, or anywhere else in the form, does the City note that the role must be performed full-time or that doing so is essential to successful performance. *See id.* Because an employer's written description of a position "shall be considered evidence of the essential functions of the job" for purposes of determining whether an individual is qualified, 42 U.S.C. § 12111(8), the undersigned cannot recommend summary judgment on the basis that Plaintiff's inability to work full-time at the time she requested to return to work rendered her unqualified for her position. *See D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1231 (11th Cir. 2005) (finding that an employer was not entitled to summary judgment on the question of whether a certain task was an essential function of a plaintiff's position because its job description did not list the task, and noting that courts "are statutorily bound to consider [written descriptions] as evidence of whether a job function is essential").

The City also contends that Plaintiff was unqualified because of Dr. Ojelade's conclusion that she was unfit to return to the workplace after conducting a fitness-to-work examination of Plaintiff. Dr. Ojelade's conclusion is not so simple, and does not necessarily indicate that Plaintiff was unable to perform the essential functions of her job. Her report concluded only that Plaintiff was "not fit to return *to her current work environment*," not that there was no work environment in which she could perform the essential functions of her job. Pl. SMF-City MSJ at ¶ 212. Indeed, Dr. Ojelade specifically noted in her report that she was not finding Plaintiff to be generally unfit to be an attorney. *See id.* A jury could thus reasonably conclude that Dr. Ojelade had not foreclosed the possibility that arguably reasonable adjustments to Plaintiff's "current workplace," such as scheduling accommodations, or even a transfer, could have rendered Plaintiff fit to return. The jury thus could potentially conclude that Plaintiff was "qualified" for purposes of the ADA.

The problem with Plaintiff's claim, however, is that she was not entitled to demand the specific accommodation that she wanted. Plaintiff insists that the City should have allowed her to return to work on the specific terms suggested by her own doctor, Protho-Wiley, who cleared Plaintiff to return on a significantly reduced basis (15-25 hours per week), "until 1 month assessment." City SMF at ¶ 56. In other words, Protho-Wiley suggested that the City allow Plaintiff to come back half-time on a provisional basis for a month. While this may have been a potentially reasonable

solution, the ADA did not compel the City to accept this specific preferred accommodation.

While the City chose not to allow Plaintiff to simply cut her hours in half pending some vague "1 month assessment," it offered an alternative. The City continued Plaintiff on *paid* administrative leave to allow further recovery and/or give Plaintiff an opportunity to demonstrate recovery in the form of a fitness-for-work clearance, and alternatively also offered to facilitate applications for job transfer. The ADA provides that a "'reasonable accommodation' may include ... reassignment to a vacant position." 42 § 12111(9)(B). Further, "a leave of absence might be a reasonable accommodation in some cases." *Wood v. Green*, 323 F.3d 1309, 1314 (11th Cir. 2003). To facilitate ongoing medical leave, the employer may need to allow "the use of accrued paid leave or providing additional unpaid leave." 29 C.F.R. pt. 1630, App'x. But the City here went a step even further, that is, it provided Plaintiff with additional *paid* administrative leave pending completion of the fitness-for-work evaluation process.

Indeed, the City's approach may very well have ultimately facilitated a return to work, or transfer, after the additional period of paid leave. After all, Plaintiff was still in the process of being considered for a second fitness-for-work clearance that, depending on the result, could have returned her to the office or could have identified specific measures that could be taken to allow her return. However, before this

process could be completed, Plaintiff was caught moonlighting in the private practice of law against City rules and was terminated. In the end, we do not know how the interactive process would have ended, whether Plaintiff could have returned to work after the examination, what transfer options may have existed, and how long the paid leave may have lasted, because Plaintiff was terminated in the meantime.

On this record, Plaintiff has not adduced proof that she was denied a reasonable accommodation. Indeed, Plaintiff does not even respond to Defendant's argument that she was provided alternative reasonable accommodations, even if not the ones that she demanded. Summary judgment is therefore appropriate. *See Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1367 (11th Cir. 2000) (*per curiam*) (a disabled employee is not entitled to the accommodation of his choice, but only to a reasonable accommodation); *Dalton v. Sebelius*, 1:11-CV-3392-MHS-JCF, 2014 WL 11460778, at *16 (N.D. Ga. Feb. 19, 2014) (report and recommendation) (recommending summary judgment as to failure accommodate claim when defendant was denied her requested accommodation of a transfer and instead the employer "allowed her to report to a different supervisor, avoid communications with [ ] and work on a different floor").

c. Title VII, ADA, and FMLA Retaliation Claims and ADA Disability Discrimination Claims

The City also seeks summary judgment on Plaintiff's retaliation claims brought under Title VII, the ADA, and the FMLA, and as to Plaintiff's disparate treatment disability discrimination claim brought under the ADA. Because these claims all turn on the operation of the same burden-shifting framework, they are discussed together.

(1) The *McDonnell Douglas* Framework

To prevail on a claim for discrimination or retaliation, a plaintiff must prove that the defendant subjected her to an adverse employment action with unlawful 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 or retaliatory 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 generally establish a *prima facie* case of disparate treatment 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 under the *McDonnell Douglas* framework, a plaintiff generally must show that: (1) she engaged in a protected activity or expression, (2) she suffered an adverse employment action, and (3) there was a causal link between the protected expression and the adverse action. *See, e.g.*, *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.

Claims of disability discrimination under the ADA, and retaliation claims under the ADA, Title VII, and the FMLA are all subject to the *McDonnell Douglas* burden-shifting framework to the extent that they rely solely on circumstantial evidence. *See Todd v. Fayette Cty. Sch. Dist.*, 998 F.3d 1203, 1219 (11th Cir. 2021) (ADA retaliation); *Tolar v. Bradley Arant Boult Commings, LLP*, 997 F.3d 1280, 1289 (11th Cir. 2021) (Title VII retaliation); *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1193 (11th Cir. 2004) (ADA discrimination); *Brungart v. BellSouth Telecomm., Inc.*, 231 F.3d 791, 798 (11th Cir. 2000) (FMLA retaliation).

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*, 918 F.3d at 1226. 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. This can "be shown by evidence that demonstrates, among other things, (1)

'suspicious timing, ambiguous statements . . ., and other bits and pieces from which an inference of discriminatory intent may be drawn,' (2) systematically better treatment of similarly situated employees, and (3) that the employer's justification is pretextual." *Id.* (quoting *Silverman v. Bd. of Educ. of City of Chi.*, 637 F.3d 729, 733–34 (7th Cir. 2011)). 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).

(2) Plaintiff's Discrimination and Retaliation Claims

The City argues that Plaintiff cannot establish a *prima facie* case of disability discrimination under the ADA or of retaliation under the ADA, Title VII, and the FMLA. Regarding Plaintiff's retaliation claims, the City argues that Plaintiff's *prima facie* case fails because she cannot point to evidence establishing a causal link between any protected activity and adverse action she suffered. *See* City Br. at 27-29. Even if Plaintiff can establish a *prima facie* case for each of her claims, the City argues, it has put forth a legitimate, nondiscriminatory reason for each of the adverse actions of which she complains. As for its denial of Plaintiff's request to return to work and requirement that she undergo a fitness-for-duty exam, the City contends that it was motivated by concern for Plaintiff's safety and the safety of others. *Id.* at 29–30. As for her ultimate termination, the City states that it was motivated by Plaintiff's practice of law outside the scope of her employment with the City. *Id.* at

31–32. The City argues that Plaintiff cannot proffer evidence to show that these were pretextual justifications.[11]

Plaintiff responds that the City's refusal to allow her to return to work on a provisional half-time basis at her request and to instead continue her on paid leave pending a successful fitness-for-duty exam were, in fact, adverse employment actions. Plaintiff argues that she can establish *prima facie* cases of retaliation because of the "close temporal proximity between her protected activities" and the City's refusal to let her return to work and her termination. Resp. [264] at 35. Plaintiff contends that she can show that the City's decision to subject her to a fitness-for-duty exam was not based on legitimate safety concerns because, she argues, "the exam was not job related or consistent with business necessity as required by the ADA." *Id.* at 28. In other words, Plaintiff contends that there was no objective evidence that such an exam was necessary to address safety concerns. Plaintiff argues so because of her testimony that she never mentioned to anyone at the City that she was suicidal or that she possessed a gun, and because Commissioner

[11] The City also argues that Plaintiff cannot present a *prima facie* case of disability discrimination under the ADA because her conditions rendered her unqualified for her position. Having already found this to be a disputed issue of fact for purposes of Plaintiff's failure-to-accommodate claim, *see supra*, Part II-B-2-b-(2), the undersigned will not discuss it here.

Yancy and City Attorney Hampton—who directed her to submit for an exam—knew of her denials of being suicidal and/or having a gun.

Further showing that the City's safety concerns were mere pretext, Plaintiff argues, is that the City's own psychologist, Dr. Bradford, recommended that the City contact Plaintiff's therapist, Dr. Prothro-Wiley, about its concerns rather than direct an exam by another provider. *Id.* at 28–30. Thus, Plaintiff argues, "the City subjected her to this exam because of misperceptions, stereotypes, and fears about her mental health related disability" rather than legitimate safety concerns. *Id.* at 22. As for her termination, Plaintiff does not clearly state the grounds on which she contends that the City's justifications were pretextual. However, she appears to argue that the City's proffered reason is insufficient "because she would not have taken the [outside legal] matter" had she been allowed to return to work "because she would have been employed as a Senior Assistant City [A]ttorney[.]" *Id.* at 20–21. She further appears to contend that the City did not terminate her for taking on an outside legal matter because then-City Attorney Berry, who made the decision to terminate her, relied on the advice of outside counsel Gevertz in doing so, and Gevertz had knowledge of Plaintiff's disability, her complaints of discrimination, and her exercise of her FMLA rights, and had also once interviewed Shahar during his investigation of Plaintiff's complaints. *Id.* at 10, 18–19.

The Court is skeptical that merely refusing to grant Plaintiff's request to return to work on a provisional half-time basis, and to instead continue her on *paid* leave pending a fitness-to-work evaluation, was in itself a material adverse employment decision. After all, Plaintiff continued to receive her pay during this time and any decision to require an independent medical clearance to return to the office was not punitive or the equivalent of a demotion or disciplinary action. *See, e.g., Breaux v. City of Garland*, 205 F.3d 150, 157-158 (5th Cir. 2000) (placement on paid administrative leave pending psychological examination for fitness for work was not an adverse employment action); *Nichols v. Southern Illinois University-Edwardsville*, 510 F.3d 772, 786-787 (7th Cir. 2007) (same). Nevertheless, the City does not clearly make this argument and so the Court assumes, *arguendo*, that this action would suffice for purposes of establishing a *prima facie* case of retaliation.

Plaintiff's termination in mid-July 2017 was clearly an adverse employment action. The City nevertheless argues that Plaintiff cannot establish a *prima facie* showing of causation between her protected activity and her termination, principally because the City Attorney at the time of the termination (Berry) attested to being unaware of Plaintiff's earlier protected activity. Plaintiff argues, however, that others who advised Berry on this decision, including Gevertz, were clearly aware of Plaintiff's protected activity, and their animus can be attributed to Berry. Plaintiff

also argues that the "close" temporal proximity between her protected activity and her termination satisfies the causation element.

The Court is unpersuaded by Plaintiff's somewhat conclusory reference to there being a "close" temporal proximity linking her protected activity with her termination. After all, she was terminated in July 2017, which was approximately 6-7 months after she first took FMLA leave, more than four months after her request for accommodation (in the form of Protho-Wiley's suggestion that Plaintiff be allowed to return at half-time, pending a "1 month assessment"), and also more than four months after she filed an EEOC charge in early March. In the absence of any other evidence of causation, the Eleventh Circuit has stated that a three and one-half month proximity between a protected activity and an adverse employment action is insufficient to create a jury issue on causation. *See Wascura v. City of South Miami*, 257 F.3d 1238, 1248 (11th Cir. 2001). Here, the gap between any of her protected activities and her termination was even longer.

Nevertheless, the burden to show a *prima facie* case is not onerous. Plaintiff's theory is that Gevertz may have harbored some retaliatory animus influencing his advice to Berry on the issue of termination in July 2017, and although many months had passed since any protected activity, this may have been the first opportunity for Gevertz to act on this animus. While this theory is thin, the Court finds it more productive to assume, *arguendo*, that Plaintiff has met her low burden at the *prima*

facie stage and proceed to discuss the issue of pretext. As explained below, the issue of pretext is not close and clearly warrants summary judgment for the City especially as it relates to the termination decision.

As noted above, to the extent Plaintiff establishes a *prima facie* case of retaliation or discrimination, the burden shifts to Defendant to articulate a legitimate non-retaliatory and non-discriminatory reason for the adverse employment actions. The City easily meets that burden. It explains that it required Plaintiff to obtain a fitness-for-work clearance before returning to work as a precaution to ensure workplace safety, given the reports from the December 6, 2016 incident that Plaintiff threatened to kill herself. The City also explains that it terminated Plaintiff because it discovered that she was violating City rules by engaging in the private practice of law on the side, while ostensibly employed as a lawyer for the City.

The burden thus shifts back to Plaintiff to show significantly probative evidence to rebut the City's justifications for its actions and reveal them to be pretext. The Court agrees with the City that Plaintiff fails to do so.

Plaintiff argues that a fitness-for-duty clearance was not reasonably job-related and consistent with business necessity. This argument is meritless. Even putting aside Plaintiff's ability to handle complex legal analysis and work in the inherently stressful job of being a lawyer, the reports about her potential suicide threat raised a legitimate concern about workplace safety. In a case involving even

potential threats to workplace safety, an employer obviously must have substantial leeway in deciding what measures are necessary to protect its staff. The Court cannot find a triable issue of fact as to whether the City's decisions here exceeded the reasonable bounds of business judgment in this regard.

In *Todd v. Fayette County School District*, 998 F.3d 1203 (11th Cir. 2021), under facts similar to those in this case, the Eleventh Circuit considered whether an employer could prevent an employee from returning to work based on evidence that she had threatened to kill herself and her son, among other potentially dangerous behavior related to the plaintiff's mental illnesses. The court assumed to be true the employee's testimony that she did not, in fact, make any such threats or engage in dangerous behavior, but noted that "the dispute about whether that underlying conduct occurred is not enough for [the employee] to carry her burden for the pretext inquiry." *See Todd*, 998 F.3d at 1218. The court "recognize[d] that [the employee's alleged] behavior, including the threats she allegedly made, likely stemmed from her major depressive order," but emphasized that "[w]hatever the cause" of the alleged behavior, the employer was not acting out of animus toward the employee's disability when it raised concerns about behaviors allegedly resulting from it. *Id.* at 1217. The court concluded that employers have the right to take action motivated by

a sincere belief that an employee may engage in dangerous behavior, "even if a mental illness caused or contributed to that behavior." *Id.* at 1221.[12]

As did the plaintiff in *Todd*, Plaintiff in this case denies that she ever threatened to commit suicide or ever possessed a gun or claimed to possess one. Nevertheless, numerous City employees (at least Shahar, Addison and Yancy) reported that Plaintiff threatened to kill herself on December 6, 2016, and at least Shahar stated that Plaintiff claimed to possess a gun. While this certainly presents a factual dispute, similarly to *Todd*, it is not one that tends to show that the City's actions in insisting upon an independent fitness-to-work clearance were a pretext for discrimination. Put simply, the City was not required to ignore a potential threat, just because Plaintiff may have denied making these statements. Rather, the City was

[12] *See also Scott v. Allied Waste Serv. of Bucks-Mont*, 2010 U.S. Dist. LEXIS 136202, *14-16 Civil Action No. 10-105 (E.D. Pa. Dec. 23, 2010) (when faced with even disputed reports that an employee threatened suicide, it was permissible and "job-related and consistent with business necessity" for the employer to require employee to submit to a psychological examination before returning, and summary judgment on employee's ADA and FMLA claims was due to the employer); *Lopez-Lopez v. Robinson School Dist*., 958 F.3d 96 (1st Cir. 2020) (affirming summary judgment to an employer as to ADA discrimination claim premised on a requirement that an employee who had expressed suicidal intentions after being disciplined at work undergo a medical examination before returning); *Rodriguez v. School Bd*, 60 F. Supp. 3d 1273 (M.D. Fla. 2014) (fitness for duty exam requirement for employee who stated she had previously contemplated suicide was job related and consistent with business necessity).

entitled to err on the side of caution given statements by numerous employees that Plaintiff threatened violence at least to herself.

Notably, Dr. Prothro-Wiley's February 27, 2017, conclusory, one-sentence clearance for work on "restrictive conditions… until 1 month assessment," did not itself expressly address whether Plaintiff posed a threat to herself or her co-workers. *See* Pl. Ex. [270-30] at 1. Of course, it could be assumed that a competent mental health practitioner would not have released a patient to return at all if he or she perceived a threat. Nevertheless, that the City wanted a more formal and specific evaluation directly addressing these issues was not improper and not evidence of pretext.

Plaintiff suggests that the City should have simply reached out to Plaintiff's doctor, Dr. Protho-Wiley, to inquire as to whether Plaintiff was a threat. Indeed, the City's psychiatrist, Dr. Bradford, apparently suggested that Dr. Protho-Wiley's conclusion on this point might be sufficient. But that the City may have been extra cautious in insisting on an *independent* fitness-for-work clearance was not evidence of pretext. As an employer balancing numerous considerations in a complex situation such as this, including keeping employees safe and feeling safe, and managing risks and liability exposure, the City was entitled to be extra cautious. In other words, the City's choice to ask for an independent assessment, and not just ask

for Plaintiff's own doctor's statement, does not show that the City's motivation was based on something other than safety.

Plaintiff likewise fails to refute that the City's proffered justifications for terminating her employment are mere pretext for a discriminatory and/or retaliatory motivation. Plaintiff does not dispute that the ultimate decision to terminate her employment came from then-City Attorney Berry, that she engaged in legal practice for a client that was not the City, that she incorporated her own law practice, that attorneys employed by the City are generally not permitted to engage in the outside practice of law, and that Berry's stated purpose for termination was his determination that Plaintiff violated those rules. Pl. Resp. SMF-City MSJ at ¶¶ 79, 81, 93, 95. Plaintiff does not directly address this issue in her argument, but rather only passingly states that "[h]ad Baines been reinstated, she never would have been terminated in July 2017." Pl. Br. [264] at 30. This does not address the point, because it does not show that the termination decision itself was for any reason other than the anti-moonlighting violation. Moreover, regardless of whether Plaintiff should or should not have been re-instated back in February, it remains that her intentional decision to engage in the private practice of law on the side, while still drawing pay

as a City employee, was an intervening, unrelated act. The City's interpretation and enforcement of its rules in these circumstances do not suggest pretext.[13]

Nor does Plaintiff's assertion that Berry relied on Gevertz's advice in deciding to terminate Plaintiff constitute evidence of pretext. As noted above, the Court assumes, *arguendo*, that this fact may help Plaintiff make her relatively light showing of causation for purposes of the *prima facie* case. But Plaintiff faces a higher burden to rebut Defendant's showing of its non-discriminatory reasons for termination, that is, Plaintiff must show significantly probative evidence of pretext. That Gevertz once interviewed Shahar in March 2017, over four months prior to the termination decision, in the course of investigating Plaintiff's unrelated EEOC claim, does not establish that the City acted for pretextual reasons when terminating Plaintiff in July.

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[13] It is also speculative for Plaintiff to suggest that "[h]ad Baines been reinstated, she never would have been terminated in July 2017." Presumably, Plaintiff is suggesting that had she been allowed to return in February 2017, on the provisional half-time basis that she requested, she never would have had the time or motivation to moonlight in the private practice of law several months later. But there is no reason to assume that any provisional month-long trial period in February 2017 would have necessarily succeeded, and/or that Plaintiff would have been in a position after this period to be reinstated to (or even that she would ask to be reinstated to) full-time work. Particularly if she were still only working 15 hours a week, Plaintiff may still very well have been in a position to accept legal work on the side by June and July 2017. In the end, Plaintiff's decision to engage in private legal work was not caused by the City's refusal to reinstate her on the specific basis that she requested. It was caused by Plaintiff's intentional choice to open up her own law practice and accept outside work.

Thus, Plaintiff cannot show that the City's reasoning for either its imposition of leave and/or a fitness-for-duty exam, or for her termination, were pretextual. The City is accordingly due summary judgment on her claims that those actions were unlawfully discriminatory under the ADA, and unlawfully retaliatory under the ADA, Title VII, and the FMLA.

d. FMLA Interference Claim

(1) Standards of Proof Under the FMLA

The FMLA entitles employees to a series of benefits, most notably "the right to 'a total of 12 workweeks of leave during any 12-month period' for a number of reasons, including a 'serious health condition that makes the employee unable to perform the functions of the position of such employee.'" *Jones v. Gulf Coast Health Care of Del., LLC*, 854 F.3d 1261, 1267 (11th Cir. 2017) (quoting 29 U.S.C. § 2612(a)(1)(D)). The statute provides that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2615(a)(1). It is also "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter." 29 U.S.C. § 2615(a)(2).

An employee alleging that her rights under the FMLA have been violated by an employer may assert two types of claims: interference claims, in which the

employee asserts that her employer refused to provide her with the rights granted under the FMLA, and retaliation claims, in which the employee alleges that her employer retaliated against her for exercising her rights under the FMLA or for opposing any activity made unlawful under the FMLA. *Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1206 (11th Cir. 2001); *see also Drago v. Jenne*, 453 F.3d 1301, 1305–08 (11th Cir. 2006); *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1352 (11th Cir. 2000).

The FMLA makes it unlawful "for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" by the FMLA. 29 U.S.C. § 2615(a)(1). "Interfere" is not defined in the FMLA, but regulations promulgated by the Department of Labor explain that "interference" with an employee's FMLA rights "would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave." 29 C.F.R. § 825.220(b). Although "the FMLA does not create an absolute right to be left alone," *Simmons v. Indian Rivers Med. Health Ctr.*, 652 F. App'x 809, 819 (11th Cir. 2016) (*per curiam*), requiring an employee to perform work while on FMLA leave can also constitute actionable FMLA interference. *See O'Neal v. City of Hiram*, No. 4:19-CV-0177-TWT-WEJ, 2021 WL 1178075, at *20 (N.D. Ga. Feb. 19, 2021), *report & rec. adopted by* 2021 WL 1171930 (N.D. Ga. Mar. 26, 2021); *Moore v. GPS Hosp. Partners IV, LLC*, 383 F. Supp. 3d 1293, 1311 (S.D.

Ala. 2019). Further, an employee who takes protected leave under the FMLA has the right to be reinstated "to the position she held when her leave began." *Schaaf v. Smithkline Beecham Corp.*, 602 F.3d 1236, 1241 (11th Cir. 2010). "[H]owever, this reinstatement right is not absolute; rather, 'an employer can deny reinstatement if it can demonstrate that it would have discharged the employee had [s]he not been on FMLA leave." *Id.* (quoting *Martin v. Brevard Cty. Pub. Schs.*, 543 F.3d 1261, 1267 (11th Cir. 2008)). It is the employer's burden to show that they would have discharged a plaintiff regardless of their leave. *See id.*

For a plaintiff to establish a claim based on alleged interference with her rights under the FMLA, the employee must demonstrate that she was denied a benefit to which she was entitled under the FMLA, and that she "has been prejudiced by the violation in some way." *Evans v. Books-a-Million*, 762 F.3d 1288, 1295 (11th Cir. 2014) (quoting *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002)); *Martin*, 543 F.3d at 1266–67; *see also McFadden v. Ballard Spahr Andrews & Ingersoll, LLP*, 611 F.3d 1, 7 (D.C. Cir. 2010) ("[Plaintiff's] burden is to show both that her employer interfered with . . . the exercise of or the attempt to exercise, any right provided by the FMLA . . . and that she was prejudiced thereby." (internal citation and punctuation omitted)). "[A]n employee need only demonstrate by a preponderance of the evidence that [she] was entitled to the benefit denied." *Strickland*, 239 F.3d at 1206-07.

In asserting a *prima facie* interference claim, the employee need not allege that her employer intended to deny the benefit because "the employer's motives are irrelevant." *Id.* at 1208. Nevertheless, an employer accused of terminating an employee after her FMLA leave rather than restoring her to her previous position may raise as an affirmative defense that it would have terminated the employee for reasons unrelated to her FMLA leave. *See Spakes v. Broward Cty. Sheriff's Office*, 631 F.3d 1307, 1310 (11th Cir. 2011) (*per curiam*); *Krutzig v. Pulte Home Corp.*, 602 F.3d 1231, 1236 (11th Cir. 2010) ("[I]f an employer can show that it refused to reinstate an employee for a reason unrelated to FMLA leave, the employer is not liable for failing to reinstate the employee after the employee has taken FMLA leave.").

(2) Plaintiff's FMLA Interference Claims

The City argues that it is entitled to summary judgment on Plaintiff's FMLA interference claims. The City contends that Plaintiff was never asked to do any work while she was on FMLA leave, claiming that Deputy City Attorney Patrick never contacted Plaintiff while she was on leave and, instead, assigned her work to others. City Br. [248-1] at 34. The City highlights that only Hoffler, a colleague of Plaintiff's without power to assign her work, contacted Plaintiff during her leave about work. *Id.* The City diminishes Hoffler's testimony that Plaintiff was asked to do so by Patrick and Shahar by pointing out that Hoffler is a friend of Plaintiff's. *Id.*

The City further contends that, at most, the only work Plaintiff engaged in while on leave was sending a few emails, which it contends does not rise to an actionable interference with her leave. *Id.* at 34–35. And, as noted above, the City contends that it was within its rights to ask for a fitness-for-duty exam upon Plaintiff's request to return from FMLA and that it had a legitimate reason to eventually terminate her employment before allowing her to return.

In response, Plaintiff points to evidence that Hoffler was directed by Patrick and Shahar to contact her and assign her work throughout her leave. Pl. SMF at ¶¶ 149–154. Plaintiff contends that, during her leave, she worked on "motions *in limine*, a response in opposition to a motion *in limine*, a proposed consolidated pretrial order, a witness list, jury charges, direct examination questions for trial, and cross examination questions for trial; she prepared for the deposition of one of her clients; and she provided advice on her cases to her coworkers." *Id.* at ¶ 150. Performing this work, says Plaintiff, "denied [her] the benefit of the leave." Resp. [264] at 32. Further, Plaintiff argues that the City's denial of her request to return after she completed her FMLA leave interfered with her right to be restored to her previous position, claiming that the City had no legitimate reason to condition her return upon the successful completion of a fitness-for-duty exam. *Id.* at 32–33.

(a) *Interference Based on Work Assignments*

As for whether the City unlawfully interfered with Plaintiff's FMLA leave by assigning her work during her leave, the undersigned finds disputed issues of fact precluding summary judgment in the City's favor. Although the City adduces evidence that Plaintiff was never asked to perform work, Plaintiff counters with Hoffler's testimony that the City did so by routing Patrick and Shahar's instructions through Hoffler. Pl. SMF at ¶ 151. Although the City attempts to diminish Hoffler's testimony that she assigned Plaintiff work during Plaintiff's FMLA leave at the direction of Patrick and Shahar by claiming that Hoffler and Plaintiff are friends and "former lovers," City Resp. SMF at ¶ 151, such credibility assessments are entirely irrelevant at the summary judgment stage. The Court must assume, then, that Patrick and Shahar assigned Plaintiff work while she was on FMLA leave. Further, the City's argument that the work Plaintiff may have performed while on FMLA leave was so insubstantial as to not have interfered with her FMLA rights is unavailing. The City premises its argument on the assertion that there is no evidence that Plaintiff did any work while on leave beyond "a few emails Plaintiff sent . . . allocating assignments to others." City Br. at 34. However, Plaintiff testifies to doing far more—she claims, *inter alia*, that she worked on several motions, prepared cases for trial, and advised colleagues on other cases. Pl. SMF at ¶ 150. On these facts, the City's citation to the Eleventh Circuit's unpublished decision in *Simmons v. Indian*

Ricers Mental health Ctr., 652 F. App'x 809 (11th Cir. 2016) (*per curiam*), offers no support. In *Simmons*, the Eleventh Circuit considered whether an employer that "occasional[ly] and brief[ly]" called an employee while they were on FMLA leave unlawfully interfered with their FMLA rights in doing so. *See* 652 F. App'x at 818-19. The court held that the employer did not violate the FMLA, in part because the employee "was not required to perform work during her FMLA leave." *Id.* at 819. Because Plaintiff has offered evidence that she was required to perform work while on leave, *Simmons* is readily distinguishable. Moreover, *Simmons* itself stated flatly that "[a]n employer violates the FMLA by requiring an employee to perform work during FMLA leave." *Id.* at 818. As such, the Court cannot determine, as a matter of law, that the City did not violate the FMLA in assigning Plaintiff work while she was on FMLA leave.

In a final effort toward summary judgment in its favor on Plaintiff's FMLA claim as it pertains to interference with her leave, the City argues in its reply brief that Plaintiff's Amended Complaint did not give adequate notice that she would base her FMLA interference claims on the work she performed while she was on leave, and thus that any such factual predicate for her claim is waived. City Reply Br. [279] at 8–9. This argument is meritless. To begin with, the City did not raise this argument until its reply brief—meaning that it is, itself, waived. *See Kellner v. NCL (Bahamas), LTD.*, 753 F. App'x 662, 667 (11th Cir. 2018) (*per curiam*); *Super98,*

LLC v. Delta Air Lines, Inc., 309 F. Supp. 3d 1368, 1381–82 (N.D. Ga. 2018). The City attempts to explain its delay in raising the argument by stating that "hindsight" illuminated Plaintiff's alleged failure to plead this theory. City Reply Br. [279] at 9. But there is no "hindsight" exception to the rule that arguments that could have been raised at the time of an initial brief cannot then be raised for the first time in a reply brief. More importantly, the City is simply incorrect when it claims that the Amended Complaint fails to give notice that Plaintiff's FMLA interference claims may be based on the work she was assigned while on leave. The Amended Complaint offers multiple paragraphs of factual allegations detailing the work Plaintiff was allegedly assigned while on leave. *See* Am. Compl. [48] at ¶¶ 106–10. Those paragraphs are then expressly incorporated into the Amended Complaint's FMLA interference count. *Id.* at ¶ 193. The count asserted, broadly, that the "City prevented [Plaintiff] from exercising the rights provided to her under the FMLA." *Id.* at ¶ 197. No more is needed to put the City on notice that Plaintiff's alleged work assignments could factor into her FMLA interference claim. Indeed, the City appears to have understood Plaintiff's pleadings quite well even before the benefit of "hindsight," given that its initial summary judgement brief itself offered arguments against this particular theory of FMLA liability. City Br. [248-1] at 34–35.

Accordingly, the City's Motion for Summary Judgment [248] is due to be denied as to Plaintiff's FMLA interference claim, at least to the extent it is based on Plaintiff's allegedly being assigned work while she was on FMLA leave.

(b) *Interference Based on Failure-to-Restore*

However, whether Plaintiff can sustain an FMLA interference claim based upon the City's failure to restore her to her previous position is a different matter. Two barriers to such a claim are apparent. First, under the FMLA, the City owed Plaintiff no duty to reinstate her to her previously full-time job on the half-time basis that she demanded. Plaintiff asserts not that she requested to return to work as she did before she went on FMLA leave, but rather with a restriction limiting her to working 15–25 hours per week. While that may have been a reasonable accommodation under the ADA, no such accommodation was required under the FMLA. In regulations describing the interplay between the FMLA and the ADA when an employee on protected leave requests to return to work, the Department of Labor notes that "[at] the end of the FMLA leave entitlement, an employer is required under [the] FMLA to reinstate the employee in *the same or an equivalent* position . . . to that which the employee held when leave commenced." 29 C.F.R. § 825.702(c)(4) (emphasis added). To the extent that an employee is owed reinstatement to an accommodated version of their previous job, the regulations state that that requirement stems from the ADA. *See id.* It follows, then, that as far as the

FMLA is concerned, the City was not under any duty to reinstate Plaintiff to a part-time version of her previous position. *See O'Haver v. Orthopaedic Assocs. of Wis., S.C.*, No. 15-CV-240, 2015 WL 5714231, at *3 (E.D. Wis. Sept. 29, 2015) (dismissing an FMLA interference claim grounded in an employer's failure to restore a previously full-time employee to a part-time position after taking leave because "[o]nly if the [ADA] applied might [the employee] be entitled to the reasonable accommodation to a part-time position").

Further, the City has demonstrated that it was motivated to refuse Plaintiff's reinstatement request and to terminate her employment for reasons independent of her FMLA leave. Although the City's motive for terminating Plaintiff is irrelevant to her establishment of a *prima facie* case of FMLA interference, it is relevant to its affirmative defense that it terminated her employment for reasons unrelated to her FMLA leave. *See Krutzig v. Putte Home Corp.*, 602 F.3d 1231, 1236 (11th Cir. 2010); *see also Herren v. La Petite Academy, Inc.*, 820 F. App'x 900, 905 (11th Cir. 2020) (*per curiam*). As discussed above, Plaintiff has not offered evidence rebutting the City's proffered motivations for refusing to reinstate her when she requested to return, subjecting her to a fitness-for-duty exam, and/or terminating her employment. *See* discussion *supra*, Part II-B-2-c-(2).

As a result, Plaintiff cannot prevail on a claim that the City's refusal to reinstate her after her FMLA leave constituted actionable interference, and the City is due summary judgment on this claim.

C. *Plaintiff's Partial Motion for Summary Judgment*

In her partial Motion for Summary Judgment, Plaintiff seeks summary judgment on two issues pertaining to the claims she asserts and on one claim in and of itself. First, she seeks summary judgment in her favor as to whether she is disabled for purposes of her ADA claims. Pl. Mot. Summ. J. [246] at ¶ 3. Second, she seeks summary judgment in her favor as to whether she engaged in protected activity for purposes of her FMLA retaliation claim. *Id.* at ¶ 4. Finally, she seeks summary judgment in her favor on her claim that the City unlawfully interfered with her FMLA rights in failing to reinstate her to her previous position when she requested to return to work. *Id.* at ¶ 5. The City concedes that Plaintiff is disabled for purposes of her ADA claims, but opposes the remainder of Plaintiff's motion.

While Plaintiff would be entitled to summary judgment on the limited issue of whether she was "disabled" under the ADA, this issue is moot because, as explained above, her ADA claims are otherwise subject to dismissal. Moreover, for the reasons discussed above, the City is due summary judgment on Plaintiff's FMLA interference claim to the extent it rests on its failure to restore Plaintiff to her previous position, and on her FMLA retaliation claim. Plaintiff's attempt to

repackage her opposition to the City's motion on those issues in the form of her own affirmative summary judgment motion also fails.[14] Thus, the remainder of Plaintiff's motion, which seeks summary judgment for the purposes of advancing those particular claims, should be denied.

III. RECOMMENDATION

For the reasons explained above, **IT IS RECOMMENDED** that Shahar's Motion for Summary Judgment [250] be **GRANTED**.

IT IS FURTHER RECOMMENDED that the City's Motion for Summary Judgment [248] be **GRANTED IN PART, DENIED IN PART**. **IT IS RECOMMENDED** that the City's Motion [248] be **DENIED** as to Plaintiff's claim under Title VII that she was subject to unlawful harassment (Count II), and as to her FMLA interference claim to the extent it rests on allegations that she was required to perform substantive work while on protected medical leave (Count VII), and that this action proceed to trial on those two counts. **IT IS RECOMMENDED** that the City's Motion [248] be **GRANTED** as to all remaining claims.

[14] Even if issues of fact were found to preclude summary judgment in the City's favor on these issues, the record would still not support awarding summary judgment to the Plaintiff. At a minimum, for all of the reasons discussed above, the record at least shows that the City possesses factual points in its favor from which a jury could find in its favor at trial.

IT IS FURTHER RECOMMENDED that Plaintiff's Motion for Summary Judgment [246] be **DENIED**.

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 20th day of September, 2021.

JUSTIN S. ANAND
UNITED STATES MAGISTRATE JUDGE