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

KAREN HEARD,	:	CIVIL ACTION NO.
	:	1:19-CV-5486-TCB-JSA
Plaintiff,	:	
	:	
v.	:	
	:	
GEORGIA'S OWN CREDIT UNION,	:	**ORDER AND FINAL REPORT**
	:	**AND RECOMMENDATION ON A**
Defendant.	:	**MOTION FOR SUMMARY JUDGMENT**

Plaintiff Karen Heard filed this employment discrimination action on December 5, 2019. Plaintiff claims that Defendant Georgia's Own Credit Union unlawfully retaliated against her for engaging in activity protected by the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601, *et seq.*, and discriminated against her because of her race in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981.

The action is before the Court upon Defendant's Motion for Summary Judgment [32] and Motion to Strike Portions of Plaintiff's Errata Sheet [34]. For the reasons discussed below, Defendant's Motion to Strike [34] is **DENIED**. The undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment [32] be **GRANTED** and that judgment be entered in favor of Defendant on all of Plaintiff's claims.

I. FACTS

Unless otherwise indicated, the Court draws the facts stated herein from Defendant's "Statement of Undisputed Facts in Support of its Motion for Summary Judgment" [32-2] ("Def. SMF") and Plaintiff's "Responses to Defendant's Statement of Undisputed Facts in Support of its Motion for Summary Judgment" [36] ("Pl. Resp. SMF"). Where appropriate, the Court directly cites to underlying exhibits filed by the parties.

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

Accordingly, for those facts submitted by Defendant that Plaintiff has failed to dispute with citations to record evidence, the Court must accept the facts as true, so long as the facts are supported by citations to record evidence, do not make

credibility determinations, and do not involve legal conclusions. *See E.E.O.C. v. Atlanta Gastroenterology Assocs., LLC*, No. CIV. A. 1:05-CV-2504-TWT, 2007 WL 602212, at *3 (N.D. Ga. Feb. 16, 2007). The Court has nevertheless viewed all evidence and factual inferences in the light most favorable to Plaintiff, as required on a defendant's motion for summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *McCabe v. Sharrett*, 12 F.3d 1558, 1560 (11th Cir. 1994); *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 469 (11th Cir. 1993).

The Court has excluded assertions of fact by either party that are clearly immaterial, or presented as arguments or legal conclusions, and has excluded assertions of fact unsupported by a citation to admissible evidence in the record or asserted only in a party's brief and not in its statement of facts. *See* LR 56.1(B)(1), NDGa ("The court will not consider any fact: (a) not supported by a citation to evidence . . . or (d) set out only in the brief and not in the movant's [or respondent's] statement of undisputed facts."); *see also* LR 56.1(B)(2)(b) (respondent's statement of facts must also comply with LR 56.1(B)(1)). Nevertheless, the Court includes certain facts that are not necessarily material, but which are helpful to present the context of the parties' arguments. The Court will not rule on each objection or dispute presented by the parties and will discuss those objections and disputes only when necessary to do so regarding a genuine dispute of a material issue of fact.

Plaintiff is a human resources professional with years of experience. Def. SMF at ¶ 2. She holds herself out to be an expert in compliance with employment laws, including the FMLA. *Id.* at ¶ 3. Representing herself as having extensive experience in managing and resolving employee relations issues after over 10 years of human resources work, Plaintiff sought employment with Defendant, a credit union. *Id.* at ¶¶ 3, 5–7. Defendant hired Plaintiff as a Human Resources Business Partner on February 5, 2019, a position in which she was charged with providing HR support for several business units. *Id.* at ¶¶ 1, 8, 10. Specifically, Plaintiff was tasked with partnering with managers and heads of business units on employee issues, interpreting policies, providing coaching and support to managers regarding employee performance and discipline issues, and coordinating employee investigations. *Id.* at ¶ 11. The core purpose of Plaintiff's job was "to ensure alignment with business objectives and HR regulatory compliance." *Id.* at ¶ 12. As such, Plaintiff was expected to have "excellent judgment in conflict management skills," an "excellent ability to communicate," and to maintain an appearance of integrity and trust. *Id.* at ¶ 13. Plaintiff was additionally expected to have substantive expertise on Defendant's FMLA policy and the ability to render advice on employees' options for any leaves of absence. *Id.* at ¶ 14.

In May 2019, Lia Bowers, a credit union employee, emailed Plaintiff to ask her about the process for applying for FMLA leave. *Id.* at ¶¶ 16, 18–19. Plaintiff

informed Bowers and her supervisors of the FMLA leave certification process, which Defendant largely outsourced to Georgia Greater Life ("GGL"), a third-party vendor. *Id.* at ¶¶ 20–21. Plaintiff coached Bowers and her supervisors on how to process her leave and record her time off, on medical documentation she may need to provide, and on scheduling any leave to avoid undue hardship to Bowers' department. *Id.* at ¶¶ 23, 25–26. Bowers began her FMLA leave in May after GGL approved her request. *Id.* at ¶ 27.

Three weeks into her leave, Bowers's boss, unit Vice President Nathan McManus, became suspicious. *Id.* at ¶¶ 10, 28. According to McManus, Bowers did not request FMLA leave until after a request of hers for time off to take a Memorial Day trip to Daytona Beach, Florida was denied. *Id.* at ¶ 29; Pl. Resp. SMF at ¶ 29. After viewing social media postings purporting to depict Bowers at Daytona Beach while on FMLA leave, McManus relayed his suspicions to Plaintiff. Def. SMF at ¶ 30. Plaintiff thanked McManus for bringing the matter to her attention and stated that she would undertake "due diligence" on the matter, but that they would "have to be careful" in addressing any issue. *Id.* at ¶ 31; Pl. Resp. SMF at ¶ 31. Plaintiff states that her "due diligence" into the matter constituted contacting GGL to re-verify Bowers's FMLA leave certification, a task which she delegated to fellow HR employee Amanda Watkins. Pl. Dep. [33] at 98:1–25. Watkins informed Plaintiff that Bowers' leave documentation appeared to be facially legitimate. Def. SMF at

¶ 32; Pl. Resp. SMF at ¶ 32. In an errata sheet purporting to amend her deposition testimony, Plaintiff states that she "accepted [ ] Watkins' finding and considered it a closed matter." Errata Sheet [34-2] at 3. As such, Plaintiff cautioned McManus against using Bowers' social media content to dispute the legitimacy of her FMLA leave. Def. SMF at ¶ 33; Pl. Resp. SMF at ¶ 33.

However, Plaintiff informed McManus that, if he was insistent in disputing Bowers' leave, she could arrange a meeting with Bowers upon her return from leave. Def. SMF at ¶ 34. McManus requested such a meeting; he and Plaintiff then discussed a plan for their meeting with Bowers. *Id.* at ¶¶ 35–36; Pl. Resp. SMF at ¶ 36. According to Plaintiff, their plan was to discuss the "timing of her FMLA [leave], but nothing beyond that." Pl. Dep. [33] at 124:15–22. Plaintiff states that she told her supervisor, Vice President of Human Resources Kim Duffy, of the plan and that Duffy approved of it. *Id.*; Def. SMF at ¶ 9. Following their own June 17 discussion of the plan, Plaintiff and McManus had no further communication until July 14, one week after Bowers returned from leave. Def. SMF at ¶¶ 36, 38; Pl. Resp. SMF at ¶ 36. Notwithstanding Plaintiff's concern that a meeting with Bowers could constitute a "slippery slope," a concern which she states she communicated to McManus, Plaintiff reached out to McManus on July 14 to schedule a meeting with Bowers, which they set for July 15. Def. SMF at ¶¶ 39–41; Pl. Resp. SMF at ¶¶ 39–41.

The trio met on July 15. During the meeting, McManus did not say anything. Def. SMF at ¶ 42. In her deposition testimony, Plaintiff purports not to recall what she said to Bowers during the meeting, either, except for telling her that the purpose of the meeting was to discuss the purpose and timing of her FMLA request. Pl. Dep. [33] at 159:11–13, 163:17–23. After the meeting, Bowers filed a complaint against Plaintiff alleging discrimination, harassment, hostile work environment, and retaliation in light of what Bowers characterized as accusatory language and pressure to disclose medical information. Def. SMF at ¶¶ 45, 47. Bowers made no such accusations against McManus. *Id.* at ¶ 46. In an email summary of the meeting she sent to Duffy later that day, Plaintiff states that the meeting was simply a "conversation to gain understanding around the genesis of her FMLA" and to address time-off issues; Plaintiff states that "at no time did [she] ask specific questions around [Bowers'] medical condition or the validity of her FMLA leave" or engage with Bowers in a hostile or accusatory manner. Pl. Dep. Exh. 12 [33-1] at 71. However, in the same summary, Plaintiff recounted evidence supporting McManus's suspicions about the validity of Bowers' FMLA leave. *Id.*; Def. SMF at ¶ 49. As such, Plaintiff stated that she "remain[ed] steadfast in [her] decision to speak with [Bowers]." Pl. Dep. Exh. 12 [33-1] at 71.[1]

[1] Plaintiff purports to deny that she made this written statement, which can be found in her email to Duffy, as filed by Defendant. However, she does not claim, and does

Assistant General Counsel Nickolas Kitchens and Principal Risk Officer/General Counsel Matthew Havice began to investigate the meeting between Plaintiff, McManus, and Bowers. Def. SMF at ¶ 52. Their investigation would include meetings with Plaintiff, McManus, Duffy, and Bowers's immediate supervisor, Brittany Pedersen. *Id.* at ¶¶ 52, 61. At some point during the investigation, Plaintiff stated that, during her meeting with Bowers, she told Bowers that Defendant was well within its rights to deny her FMLA leave request until her unit was appropriately staffed. *Id.* at ¶ 54.[2] Kitchens concluded that this statement to Bowers exposed Defendant to liability under the FMLA. *Id.*[3] Kitchens also concluded that several of Plaintiff's statements during the meeting, including those relating to trust and the timing of Bowers's FMLA leave, was—contrary to Plaintiff's July 15 statement to Duffy—an attempt to question the legitimacy of

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not cite any evidence indicating, that the email filed by Defendant is inauthentic. *See* Pl. Resp. SMF at ¶ 51.

[2] In her response to Defendant's Statement of Material Facts, Plaintiff purports to deny that she stated this, but cites no evidence indicating otherwise. Pl. Resp. SMF at ¶ 54. The Court thus deems admitted Defendant's assertion that Plaintiff made such a statement to Bowers during their meeting.

[3] Despite purporting to deny Defendant's assertion of this fact, Plaintiff fails to cite any evidence rebutting the notion that Kitchens came to this conclusion. Pl. Resp. SMF at ¶ 54.

Bowers's leave. *Id.* at ¶ 56.[4] Moreover, Kitchens concluded that Plaintiff was never opposed to the meeting with Bowers but was rather a key driver in its planning. *Id.* at ¶ 58.[5] Kitchens believed that Plaintiff, as an experienced human resources professional, should have handled the matter differently and that her statements to Bowers were inappropriate and displaying a lack of judgment. *Id.* at ¶¶ 57, 59.[6] In a July 18, 2019 Investigation Report addressed to Havice, Kitchens accordingly concluded that Defendant should terminate Plaintiff. *Id.* at ¶ 62; Kitchens Decl. Exh. 1 [32-12] at 8–12. For his role in the incident, Kitchens concluded that McManus should be subject to coaching on employment law and employee investigations. Def. SMF at ¶ 62.

Based on Kitchens' recommendations, Chief Talent Officer Cindy Boyles terminated Plaintiff's employment on July 19, 2019. *Id.* at ¶¶ 64, 65, 67. Plaintiff was told that the reason for her termination was her "mishandling" of the Bowers

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[4] Despite purporting to deny Defendant's assertion of this fact, Plaintiff fails to cite any evidence rebutting the notion that Kitchens came to this conclusion. Pl. Resp. SMF at ¶ 56.

[5] Despite purporting to deny Defendant's assertion of this fact, Plaintiff fails to cite any evidence rebutting the notion that Kitchens came to this conclusion. Pl. Resp. SMF at ¶ 58.

[6] Despite purporting to deny Defendant's assertion of this fact, Plaintiff fails to cite any evidence rebutting the notion that Kitchens came to this conclusion. Pl. Resp. SMF at ¶¶ 57, 59.

situation. *Id.* at ¶ 68. At no point before the termination did Kitchens or Havice tell Boyles that Plaintiff claimed to have opposed the July 15 meeting with Bowers. *Id.* at ¶ 66.

II. DISCUSSION

A. *Motion to Strike*

Defendant requests that the Court strike an errata sheet purporting to correct portions of Plaintiff's deposition testimony from the record. In an errata sheet prepared 43 days after her September 11, 2020 deposition, Plaintiff purports to correct her answers to "questions that [she] partially understood or where upon reflection [her] responses were incomplete and not a full description of events or information responsive to the question." Errata Sheet [34-2] at 5. Defendant takes issue with four of the changes Plaintiff attempts to make. The first of these changes is to what was Plaintiff's original response to Defendant's question on whether she took "any action in opposition to what [McManus] was doing[.]" Pl. Dep. [33] at 97:14–15. Plaintiff originally responded "No I did not take any—no, I did not," *id.* at 97:16; she purports to change her answer to a lengthy exposition of her actions and mindset toward McManus's suspicions about Bowers, *see* Errata Sheet [34-2] at 3. The second change is to Plaintiff's response to Defendant's question about what was said in her meeting with Kitchens and Havice. Plaintiff originally answered "I don't recall," Pl. Dep. [34] at 170:14–15; in her errata sheet, she offers a detailed

statement as to what was said in the meeting, *see* Errata Sheet [34-2] at 3–4. Similarly, Plaintiff's original response to Defendant's question on why she believed McManus received a lesser punishment than she did was that she "did not know." Pl. Dep. [33] at 174:5. Plaintiff's errata sheet offers an array of explanations, including that McManus is white. *See* Errata Sheet [34-2] at 4. Finally, Plaintiff's original response to Defendant's question on whether she "handle[d]" the meeting between her, McManus, and Bowers was "I do not deny that." Pl. Dep. [33] at 176:3–9. Plaintiff's errata sheet purports to change this answer to a description of the meeting and a definition of the term "handling" as it relates to FMLA leave, followed by the statement "That does not constitute me (Plaintiff) handling her (Bowers's) FMLA." *See* Errata Sheet [34-2] at 4.

Defendant argues that these changes to Plaintiff's original deposition testimony are substantive and go beyond the scope of alterations authorized by Rule 30(e) of the Federal Rules of Civil Procedure, which governs changes to deposition testimony. Defendant thus requests that the Court strike the above changes from the record. However, the Court will not do so, as it "has repeatedly explained that a motion to strike is not the proper vehicle for challenging matters not contained in pleadings, which [are defined] to include complaints, answers and court-ordered replies to answers, but not briefs or supported exhibits." *Chavez v. Credit Nation Auto Sales, Inc.*, 966 F. Supp. 2d 1335, 1344 (N.D. Ga. 2013); *see S. River*

Watershed All., Inc. v. DeKalb Cty., 484 F. Supp. 3d 1353, 1362 (N.D. Ga. 2020); *Edwards v. Publix Supermarkets, Inc.*, No. 1:19-cv-00339-MLB-RDC, 2020 WL 6600984, at *5 (N.D. Ga. July 31, 2020), *report & rec. adopted by* 2020 WL 5525478 (N.D. Ga. Sept. 15, 2020). Parties disputing the propriety of exhibits used in support or in opposition to a motion should object to their consideration rather than move to strike them from the record.

To the extent Defendant seeks that the Court simply decline to consider Plaintiff's errata sheet for purposes of its summary judgment motion, the Court finds no occasion to make a determination as to whether the portions of Plaintiff's errata sheet to which Defendant objects are within the scope of authorized changes under Rule 30(e). This is because the Court's treatment of the errata sheet is ultimately immaterial to the disposition of Defendant's summary judgment motion. As explained below, Defendant is due summary judgment whether or not the Court considers the errata sheet's changes to Plaintiff's testimony as to whether she took any act in opposition to McManus, as to what was said during her meeting with Kitchens and Havice, as to her opinion on whether race factored into her termination, and her characterization of her role in "handling" Bowers's leave. Accordingly, Defendant's Motion to Strike [34] is **DENIED**.

B. *Motion for Summary Judgment*

1. Summary Judgment Standard

Summary judgment is authorized when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 175 (1970); *Bingham, Ltd. v. United States*, 724 F.2d 921, 924 (11th Cir. 1984). The movant carries this burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In making its determination, the court must view the evidence and all factual inferences in the light most favorable to the nonmoving party.

Once the moving party has adequately supported its motion, the nonmoving party must come forward with specific facts that demonstrate the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving party is required "to go beyond the pleadings" and to present competent evidence designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324. Generally, "[t]he mere existence of a scintilla of evidence" supporting the nonmoving party's case is insufficient to

defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

If a fact is found to be material, the court must also consider the genuineness of the alleged factual dispute. *Id.* An issue is not genuine if it is unsupported by evidence or if it is created by evidence that is "merely colorable" or is "not significantly probative." *Id.* at 250. A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 242. Moreover, for factual issues to be genuine, they must have a real basis in the record. *Matsushita*, 475 U.S. at 587. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* at 587 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)). Thus, the standard for summary judgment mirrors that for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 259.

When considering motions for summary judgment, the court does not make decisions as to the merits of disputed factual issues. *See id.* at 249; *Ryder Int'l Corp. v. First Am. Nat'l Bank*, 943 F.2d 1521, 1523 (11th Cir. 1991). Rather, the court only determines whether there are genuine issues of material fact to be tried. Applicable

substantive law identifies those facts that are material and those that are irrelevant. *Anderson*, 477 U.S. at 248. Disputed facts that do not resolve or affect the outcome of a suit will not properly preclude the entry of summary judgment. *Id.*

2. Plaintiff's Claims

a. FMLA Retaliation

In Count I of her Complaint, Plaintiff alleges that her termination constituted unlawful retaliation under the FMLA.

(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).

To establish a claim for retaliation under the FMLA, an employee must present evidence that her employer subjected her to an adverse employment action and intentionally intended to discriminate against her for having exercised her rights under the FMLA. *Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1207 (11th Cir. 2001) (citing *King v. Preferred Tech. Grp.*, 166 F.3d 887, 891 (7th Cir. 1999)). Unlike a plaintiff asserting a claim of interference, a plaintiff bringing a retaliation claim under the FMLA faces the increased burden of showing that the adverse employment action was "motivated by an impermissible retaliatory or discriminatory animus." *Id*. In the absence of direct evidence, a claim that an employee has been retaliated against for attempting to exercise her rights under the FMLA is analyzed using the *McDonnell Douglas* framework applied to retaliation

claims brought under Title VII of the Civil Rights Act of 1964. *Munoz v. Selig Enters., Inc.*, 981 F.3d 1265, 1280 (11th Cir. 2020); *Brungart v. BellSouth Telecomm., Inc.*, 231 F.3d 791, 798 (11th Cir. 2000).

A plaintiff asserting a *prima facie* case of retaliation under the FMLA must demonstrate that: (1) she engaged in a statutorily protected activity; (2) she suffered an adverse employment decision, and (3) the decision was causally related to the protected activity. *Jones*, 854 F.3d at 1271; *see also Brungart*, 231 F.3d at 798; *Parris v. Miami Herald Pub. Co.*, 216 F.3d 1298, 1301 (11th Cir. 2000). If a plaintiff meets this burden, the defendant must come forward with a legitimate non-discriminatory reason for its action. The burden then shifts back to the plaintiff to demonstrate that the employer's asserted reason is pretextual. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973).

(2) Plaintiff's *Prima Facie* Case

As an initial matter, Plaintiff disputes whether the *McDonnell Douglas* burden shifting standard should be applied to her FMLA claim. Plaintiff states that Assistant General Counsel Nickolas Kitchens's internal report recommending that she be terminated constitutes direct evidence of retaliation, and that her claim is thus not reliant on circumstantial evidence. Plaintiff characterizes the report as directly stating that she should be terminated for her "participation in her FMLA administrative duties involving Plaintiff's alleged conduct in the FMLA meeting

with Lia Bowers and McManus." Resp. [35] at 8. However, Plaintiff cites to no portion of the report that she characterizes as such. Further, Plaintiff's meeting with Bowers is not the protected activity for which she claims, or could claim, that she was retaliated against. Rather, as explained below, the protected activity that Plaintiff alleges, and over which Plaintiff may claim protection, was her alleged opposition to McManus's hostility to Bowers's leave. Thus, Kitchens's report's conclusion that Plaintiff should be terminated in part because of her actions in that meeting does not constitute direct evidence that Plaintiff's termination was in retaliation to her participation in a protected activity, and her claim must be analyzed as any claim reliant on circumstantial evidence.

Defendant argues that Plaintiff cannot establish such a *prima facie* circumstantial case of retaliation because she did not engage in any protected activity and that, even if she did engage in a protected activity, she cannot show any causal link between it and her termination. In her Complaint, Plaintiff identifies her opposition to McManus's desire to investigate the veracity of Bowers's FMLA leave based on social media posts as the protected expression in which she engaged and for which she was terminated. Compl. [1] at ¶¶ 50–53. Citing Plaintiff's deposition testimony, Defendant contends that Plaintiff was, at the time, indisputably aware that employers are permitted to inquire into whether employees are appropriately engaging in FMLA leave. Mot. Summ. J. [32] at 13 (citing Pl. Dep. [33] at 95:7–9).

Although Defendant does not clearly state as such, the Court presumes that, in raising this point, Defendant attempts to argue that Plaintiff did not subjectively believe that McManus's desire to initiate an investigation based on Bowers's social media posts violated the FMLA, and/or that any such belief would have been objectively unreasonable and, thus, unprotected. Further, Defendant contends that, notwithstanding any belief by Plaintiff that McManus's proposed course of action would have violated the FMLA, she did not actually engage in any act opposing them that would trigger protection from retaliation. Mot. Summ. J. [32] at 13–14 (citing Pl. Dep. [33] at 97:14–16). Finally, Defendant argues that Plaintiff cannot establish a causal link between her opposition to McManus's putative investigation and her termination, both because the employee who terminated her was unaware of such activity and because any temporal inference of causation is broken by Plaintiff's intervening misconduct in her execution of her and McManus's meeting with Bowers. Mot. Summ. J. [32] at 14–16.

Plaintiff, for her part, does not substantively respond to any of Defendant's arguments as to her ability to raise a *prima facie* case of retaliation other than to quibble over the admissibility of the affidavit and report of Nickolas Kitchens, the Assistant General Counsel who recommended her termination. *See* Resp. [35] at 8–14. Nevertheless, because Defendant bears the burden of establishing that the

evidence of record is insufficient to establish a claim, the Court will evaluate the substance of its arguments.

Defendant's argument is unavailing as to whether Plaintiff engaged in a protected activity in expressing opposition to McManus's attempted investigation of Bowers. An employment practice need not actually be unlawful for opposition thereto to be protected from retaliation. Rather, opposition to an employment practice is protected from retaliation if the opposing individual subjectively believes it to be unlawful and if the facts and circumstances surrounding them render that belief objectively reasonable. *See Munoz v. Selig Enters., Inc.*, 981 F.3d 1265, 1280 (11th Cir. 2020). A belief in the illegality of a practice is unreasonable when "binding precedent squarely holds that particular conduct is not an unlawful employment practice by the employer, and no decision of [the Eleventh Circuit] or of the Supreme Court has called that precedent into question or undermined its reasoning[.]" *Butler v. Ala. Dep't of Transp.*, 536 F.3d 1209, 1214 (11th Cir. 2008).

In this case, there is evidence that Plaintiff did, at least initially, subjectively believe McManus's push for an investigation of Bowers based on her social media posts to be unlawful under the FMLA. *See* Pl. Dep. [33] at 132:14–15 ("I certainly communicated to [McManus] that this was a slippery slope[.]); Exh. 10 [33-1] at 65 (in which Plaintiff responds "we have to be careful" to McManus's forwarding of Bowers's social media posts). Defendant's citation to Plaintiff's testimonial

agreement with its counsel's legal conclusion that the FMLA permits an employer's investigation into an employee's FMLA use does not conclusively establish otherwise. Rather, Plaintiff's June 4, 2019 email to McManus and her testimony that she told McManus that an investigation could be a "slippery slope," if credited, are sufficient to establish that she subjectively believed it to be unlawful.

Moreover, no binding precedent conclusively establishes that an investigation of an employee's FMLA leave based on suspicious vacation-related social media posts is generally lawful. While employers are certainly entitled to latitude in investigating employee misconduct, *see Prichard v. Hyundai Motor Mfg. of Ala., LLC*, 418 F. Supp. 3d 930, 938 (M.D. Ala. 2019), binding Eleventh Circuit precedent holds that social media photos of vacations taken while on FMLA leave can be "murky at best" as evidence of FMLA misuse, *see Jones v. Gulf Coast Health Care of Del., LLC*, 854 F.3d 1261, 1275 (11th Cir. 2017), rendering reasonable any concern that personnel actions taken based on such posts could expose an employer to interference liability, whether or not the specific circumstances would actually establish liability.

Further, Defendant's argument that Plaintiff took no act in opposition to McManus's suggestion to investigate Bowers based on her social media presence is contrary to its own acknowledgement that, because of her wariness as to the legal implications of doing so, Plaintiff limited the initial re-inquiry into Bowers's leave

to a re-certification of her leave with Defendant's third-party FMLA servicer. *See* Def. SMF at ¶¶ 32–33. An employee's "passive" refusal to engage in an activity they believe to be discriminatory can be protected activity, so long as they communicate their belief. *See Lowe v. STME, LLC*, 354 F. Supp. 3d 1311, 1316 (M.D. Fla. 2019) (citing *Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 277 (2009)). Thus, because of her communications to McManus, Plaintiff's investigative forbearance is an "action" that can be protected, regardless of whether Plaintiff came to the legal conclusion in her deposition that this was not "an act in opposition" to an activity she believed to be unlawful.

However, Defendant is correct that Plaintiff cannot establish any causal connection between her initial reluctance to investigate Bowers and her termination. As an initial matter, and as Defendant appears to acknowledge, the six-week proximity between Plaintiff's initial limiting of the investigation into Bowers and her termination is close enough to establish an initial inference of causal connection between the two. *See Jones*, 854 F.3d at 1273 (because a plaintiff was terminated approximately five weeks after the last day of his FMLA leave, he "met his burden of raising a genuine dispute as to whether his taking of FMLA leave and his termination were [causally] related"); *Morgan v. GEO Grp, Inc.*, No. 18-62774-CIV-ALTMAN/Hunt, 2020 WL948466, at *9 (S.D. Fla. Feb. 5, 2020) (finding a gap

of six weeks between an employee's protected FMLA activity and termination sufficient to trigger an inference of causation).

But an employer can negate the presumption of causal connection created by the temporal proximity of an adverse action to a protected activity "by presenting 'unrebutted evidence that the decision maker did not have knowledge that that the employee engaged in protected conduct.'" *Campbell v. Northway Health & Rehab., LLC*, 41 F. Supp. 3d 1313, 1320 (N.D. Ala. 2014) (quoting *Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F.3d 1286, 1298 (11th Cir. 2006)). For example, an employer is entitled to summary judgment on an FMLA interference claim where they present "unrebutted evidence that the decision maker was not aware, at the time of the decision to terminate [the employee], of her request to commence FMLA leave," as such evidence "establishes as a matter of law that [the employee's] termination was for reasons other than her requested leave." *Krutzig v. Pulte Home Corp.*, 602 F.3d 1231, 1236 (11th Cir. 2010). Further, generally, "knowledge on the part of persons other than a decision maker cannot be imputed from other supervisors to the decision maker for purposes of an FMLA retaliation claim." *Id.*; *see also Lubetsky v. Applied Card Sys., Inc.*, 296 F.3d 1301, 1305 (11th Cir. 2002) (stating that "a *prima facie* case is established if the plaintiff demonstrates the challenged employment decision was made by someone who was aware of" the plaintiff's protected characteristic or activity); *Goldsmith v. City of Atmore*, 996 F.2d 1155,

1163 (11th Cir. 1993) ("At a minimum, a plaintiff must generally establish that the employer was actually aware of the protected expression at the time it took adverse employment action."); *Johnson v. Autozone, Inc.*, 768 F. Supp. 2d 1124, 1155 (N.D. Ala. 2011).

Unrebutted by Plaintiff, Defendant contends that the decision to terminate Plaintiff's employment was made by Chief Talent Officer Cindy Boyles alone. Def. SMF at ¶ 65. Further unrebutted by Plaintiff, Defendant contends that Boyles was never made aware of Plaintiff's alleged opposition to investigating Bowers for FMLA misuse. *Id.* at ¶ 66. Defendant thus argues that Plaintiff cannot establish any causal connection between her opposition and her termination. The undersigned agrees, on the facts presented here. That is, because of Boyles' undisputed lack of knowledge as to Plaintiff's opposition to McManus's putative investigation, Plaintiff cannot establish a causal connection between that act and her termination and Defendant is entitled to summary judgment.

Moreover, the evidence is insufficient to show causation for another reason. Defendant additionally argues that Plaintiff cannot show causation because her meeting with Bowers amounted to an intervening act of misconduct between her protected activity and her termination. *See, e.g., Henderson v. FedEx Express*, 442 F. App'x 502, 506–07 (11th Cir. 2011) (*per curiam*) (finding that an employee's undisputed falsification of timecards broke the causal chain between protected

activity and termination). In this case, Plaintiff was terminated only after she herself spoke to Bowers, Bowers made complaints about Plaintiff's conduct in that meeting, and Kitchens investigated that meeting and concluded that Plaintiff had mishandled it. This chronology does not support the conclusion that Plaintiff was fired because of anything Plaintiff had previously said to McManus. Summary judgment is appropriate.

(3) Legitimate Reason and Pretext

Even assuming Plaintiff can establish a *prima facie* case of retaliation under the FMLA, Defendant is nonetheless due summary judgment because it has offered a legitimate, nondiscriminatory reason for her termination that Plaintiff has failed to rebut.

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

(11th Cir. 2005) (*per curiam*) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254–55 (1981)).

Defendant has set forth evidence that its decision to terminate Plaintiff was based on reasons other than her opposition to McManus's push for an investigation of Bowers. Defendant adduces evidence that, after her meeting with Bowers and before her termination, she was subject to investigation by Principal Risk Officer/General Counsel Matthew Havice and Assistant General Counsel Nickolas Kitchens. *See* Kitchens Decl. [32-12] at ¶ 3; Pl. Dep. [33] at 169:23–170:21. Kitchens stated in his report to Havice that Plaintiff's statement to Bowers that her FMLA leave could be delayed until the company was appropriately staffed was incorrect and exposed Defendant to FMLA interference liability. *See* Kitchens Decl. Exh. 1 [32-12] at 11–12. Because of this "fail[ure] to recognize any legal concerns," Kitchens concluded that Plaintiff "improperly handled the [Bowers] matter" and that she should be terminated. *Id.* at 12. It is undisputed that Boyles terminated Plaintiff because of these findings. This evidence not only suggests that Defendant did not terminate Plaintiff for protecting Bowers's FMLA rights, but that Defendant terminated Plaintiff for precisely the opposite reason—that she potentially violated Bowers's FMLA rights and exposed Defendant to liability for doing so. Defendant has thus met its light burden of articulating a legitimate, nondiscriminatory reason for Plaintiff's termination.

Plaintiff challenges the admissibility of the evidence Defendant uses to articulate its proffered legitimate, nondiscriminatory justification. Specifically, Plaintiff argues that substantial portions of Kitchens's Declaration and his internal report recommending Plaintiff's termination contain inadmissible hearsay. Further, Plaintiff contends that Kitchens's internal report should be disregarded because Defendant has redacted a portion of it that it contends is protected by attorney-client privilege.

Plaintiff's argument fails for several reasons. Most basically, to the extent these documents recount out-of-court statements by witnesses interviewed by Kitchens, and subsequent discussions between Kitchens, Boyles and others as to the results of that investigation, these statements are not hearsay as they are not offered from the truth of the matters asserted. Rather, these statements are relevant to explain the reasons for Defendant's personnel decision. In other words, "[t]he import of the report lies in the fact that it is offered to show that the decision to terminate [Plaintiff] was not premised on retaliation, but upon the belief that she had engaged in misconduct." *United States ex rel. Aquino v. Univ. of Miami*, No. 14-20372-CIV-WILLIAMS, 2018 WL 3814517, at *2 n.3 (S.D. Fla. Aug. 10, 2018).

As for the redacted investigation report, Plaintiff's objections to the admissibility of the document are arguably waived, because she herself relies on the redacted report as allegedly presenting direct evidence of FMLA retaliation. *See*

Resp. [35] at 8. In any event, Defendant's motion does not turn on the admissibility of that document. Indeed, the declaration testimony of Kitchens and Boyles would constitute sufficient evidence of the reasons and factual basis for terminating Defendant.

Further, the Court cannot adjudge the propriety of Defendant's redactions without an *in camera* review along with copies of the relevant privilege log entries. But Plaintiff never timely challenged Defendant's assertion of privilege as to the redacted portions of the report, so the Court has not had the opportunity to undertake this exercise. Generally, the remedy for a party who wishes to challenge information withheld on grounds of privilege is to move to compel production. *See, e.g., McGrath v. Nassau Cty. Health Care Corp.*, 204 F.R.D. 240 (E.D.N.Y 2001) (compelling production of internal investigation report in response to a plaintiff's discovery request). The Local Rules, however, require that motions to compel be made before the expiration of the discovery period or within fourteen days of receiving the offending production. LR 37.1(B), NDGa. Part of the reason for that rule is so that discovery challenges can be resolved prior to summary judgment briefing or trial, and at a time when any deficiencies in discovery can be resolved by measures less severe than exclusion of the evidence. It is too late to ask the Court to undertake this exercise now for the first time in the context of summary judgment briefing. Thus, the Court overrules any objection to the use of this redacted

document, although as explained above this issue does not affect the ultimate result of the motion.

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

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

evaluating whether the defendant's reasons for adverse employment action were pretextual. *See Rioux v. City of Atlanta*, 520 F.3d 1269, 1276–77 (11th Cir. 2008).

But Plaintiff cannot show that an employer's proffered reasons for terminating her were pretextual simply by "quarreling with the wisdom" of those reasons. *See Brooks v. Cty. Comm'n of Jefferson Cty.*, 446 F.3d 1160, 1163 (11th Cir. 2006) (quoting *Chapman*, 229 F.3d at 1030). A plaintiff may nevertheless establish pretext by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F.3d at 1538 (quoting *Sheridan v. E.I. DuPont De Nemours & Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996) (*en banc*)). However, "[a] reason is not pretext for discrimination unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Brooks*, 446 F.3d at 1163 (emphasis in original) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)). Stated another way, it is not the truth of Defendant's allegations of misconduct, alone, that Plaintiff is obligated to rebut. Rather, it is Plaintiff's burden to prove that the employer did not, in fact, rely on those false allegations in taking an adverse action against her.

Because Plaintiff bears the burden of establishing that Defendant's reasons are a pretext for discrimination or retaliation, she "must present 'significantly probative' evidence on the issue to avoid summary judgment." *Young v. General*

Foods Corp., 840 F.2d 825, 829 (11th Cir. 1988) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–25 (1986)). "Conclusory allegations of discrimination [or retaliation], without more, are not sufficient to raise an inference of pretext or intentional discrimination where [a defendant] has offered extensive evidence of legitimate, non-discriminatory reasons for its actions." *Young*, 840 F.2d at 830; *see also Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1228 (11th Cir. 1993).

As explained above, Defendant has presented evidence that it terminated Plaintiff's employment because of what it perceived to be general mismanagement of the Bowers situation and for potentially exposing the company to FMLA liability, rather than for any oppositional protection of Bowers's FMLA rights. It is unclear from her summary judgment briefing whether Plaintiff even disagrees that this motivated her termination. In her opposition to Defendant's summary judgment motion, Plaintiff expressly concedes that she "is not arguing that the employer was wrong." Resp. [35] at 15. Rather, other than a sole conclusory sentence stating that Defendant's proffered reason is pretextual, *see id.* at 3, Plaintiff's sole argument is that a lack of admissible evidence establishing Defendant's proffered reason renders it pretextual, *see id.* at 15. But, as explained above, Plaintiff's inadmissibility argument is meritless. As such, so is any perceptible argument she makes as to pretext.

Accordingly, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment [32] be **GRANTED** as to Plaintiff's claim of retaliation under the FMLA.

b. Race Discrimination

In Count II of her Complaint, Plaintiff asserts a claim of race discrimination under § 1981.

(1) Standards of Proof Under § 1981

§ 1981 provides as follows:

> **(a) Statement of equal rights**
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> **(b) "Make and enforce contracts" defined**
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> **(c) Protection against impairment**
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981.

It is well-settled law that § 1981 prohibits race discrimination in both the public and private employment context. *See Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 961 (11th Cir. 1997) ("It is well-established that § 1981 is concerned with racial discrimination in the making and enforcement of contracts."); *Brown v. Am. Honda Motor Co.*, 939 F.2d 946, 949 (11th Cir. 1991) ("The aim of the statute is to remove the impediment of discrimination from a minority citizen's ability to participate fully and equally in the marketplace."); *see also St. Francis College v. Al-Khazraji*, 481 U.S. 604, 609 (1987) ("Although § 1981 does not itself use the word 'race,' the Court has construed the section to forbid all 'racial' discrimination in the making of private as well as public contracts.").

In cases in which a plaintiff has asserted a claim under § 1981 as a remedy for race discrimination in the employment context, the elements required to establish a claim under § 1981 generally mirror those required for a Title VII claim. *See Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (the same analysis applies to a Title VII race discrimination claim and a § 1981 race discrimination claim because both statutes "have the same requirements of proof and use the same analytical framework"); *see also Howard v. B.P. Oil Co.*, 32 F.3d 520, 524 n.2 (11th Cir. 1994); *Brown*, 939 F.2d at 949. Accordingly, the standards of proof set forth above for Plaintiff's claim of race discrimination under Title VII also apply to his claim of race discrimination brought under § 1981.

To prevail on a claim for discrimination or retaliation based on disparate treatment, a plaintiff must prove that the defendant acted with discriminatory or retaliatory intent. *See Hawkins v. Ceco Corp.*, 883 F.2d 977, 980–81 (11th Cir. 1989); *Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525, 529 (11th Cir. 1983). Discriminatory intent may be established either by direct evidence or by circumstantial evidence meeting the four-pronged 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).

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, like Plaintiff's FMLA claim, can be done using *McDonnell Douglas* burden-shifting framework outlined above. *See Holifield v. Reno*, 115 F.3d 1555, 1561–62 (11th Cir. 1997), *abrogated on other grounds by Lewis*, 918 F.3d at 1226; *Combs v. Plantation Patterns*, 106 F.3d 1519, 1527–28 (11th Cir. 1997).

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. The plaintiff retains the ultimate burden of proving that the defendant is guilty of intentional discrimination. *Burdine*, 450 U.S. at 253.

(2) Plaintiff's *Prima Facie* Case

Plaintiff alleges that her termination was a racially discriminatory act. Plaintiff does not contend that she has produced direct evidence of any racially discriminatory intent. Thus, Plaintiff's claim of race discrimination rests purely on circumstantial evidence and will be analyzed under the *McDonnell Douglas* framework. When

bringing a disparate treatment claim, a plaintiff can generally establish a *prima facie* case of unlawful 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.

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

1225–28. Without such a comparator, a plaintiff cannot generally establish a *prima facie* case under the *McDonnell Douglas* framework. *Id.* at 1224.

The parties do not dispute whether Plaintiff can establish the first three elements of a *prima facie* case of race discrimination. Plaintiff argues that she meets the final element—that her employer treated a similarly situated employee of a different race better than it treated her—because Defendant did not terminate McManus, who is white, for his role in the Bowers investigation. Defendant contends, however, that McManus is not similarly situated to Plaintiff because he, unlike Plaintiff, is not a human resources professional tasked with implementing Defendant's leave policies, and because it is undisputed that McManus did not speak during the meeting with Bowers, which is significant given that Plaintiff's statements to Bowers during the meeting were a stated rationale for her termination. Mot. Summ. J. [32] at 21–24. In other words, Defendant argues that McManus's role in the company and conduct at issue was fundamentally different from that of Plaintiff's. As such, Defendant states that McManus does not meet the standard the Eleventh Circuit set for proper comparators in *Lewis*.

Plaintiff offers virtually no argument for the proposition that the circumstances surrounding McManus's lesser punishment are so similar to Plaintiff's that he may be used as a comparator. Plaintiff makes no mention of the comparator standard set forth in *Lewis*, let alone does she argue that McManus meets

it. Were the Court not to consider the issue conceded, it would nevertheless find that McManus's circumstances are too different from Plaintiff's to function as a comparator. Plaintiff and McManus occupied entirely different roles in the company, which is material because Defendant's stated contemporary rationale for terminating Plaintiff—that she mishandled an employee's leave—is far more relevant to a human resources professional tasked with handling employee leave, such as Plaintiff, than a business unit employee, such as McManus. Further, Defendant cited statements made to Bowers during her meeting with Plaintiff and McManus as potentially exposing the company to FMLA liability. As Plaintiff concedes, McManus did not say anything during the meeting, meaning that the statements about which Defendant was concerned came from Plaintiff, not McManus. It thus cannot be claimed that Plaintiff and McManus engaged in the same material conduct. Because McManus, Plaintiff's sole proffered comparator, was not similarly situated to her in all material respects, Plaintiff cannot establish a *McDonnell Douglas prima facie* case of race discrimination. *See Gilliam v. U.S. Dep't of Veterans Affairs*, 922 F. App'x 985, 991 (11th Cir. 2020) (*per curiam*) (finding that a comparator's fundamentally different job and different alleged misconduct than that of the plaintiff disqualified their use as a comparator); *Menefee v. Sanders Lead Co., Inc.*, 786 F. App'x 963, 968 (11th Cir. 2019) (*per curiam*) (same).

To be sure, the Eleventh Circuit has reiterated that a "plaintiff's failure to produce a comparator does not necessarily doom the plaintiff's case." *Lewis v. City of Union City* ("*Lewis II*"), 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 II*, 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)). While the "convincing mosaic" method bears similarities to the *McDonnell Douglas* method, it operates as a totality-of-circumstances test rather than a rigid step-by-step analysis.

However, the convincing mosaic theory is inapplicable here. Plaintiff has not even raised the convincing mosaic theory, giving the Court no occasion to properly consider whether it is satisfied. *See Bailey v. Metro Ambulance Servs., Inc.*, 992 F.3d 1265 (11th Cir. 2021) (*per curiam*) (finding that a plaintiff forfeited their right to proceed on a "convincing mosaic" theory by failing to raise such a theory in their summary judgment briefing). Nor is any critical mass of circumstantial evidence that

could suffice under the theory apparent from the record. As a result, Plaintiff cannot establish a *prima facie* case of race discrimination based on the termination of her employment.

Moreover, as set forth above regarding Plaintiff's FMLA claims, Defendant has presented evidence that it had a legitimate reason to terminate Plaintiff's employment that had nothing to do with her race, in that it believed she mishandled the investigation of Bowers and potentially exposed the company to FMLA liability. As with her FMLA claim, Plaintiff has failed to cite to any record evidence suggesting that her race had anything to do with the decision to terminate her employment, or any other evidence that suggests that Defendant's reason for terminating her employment was a pretext to disguise unlawful race discrimination. Instead, Plaintiff appears to rely on meritless evidentiary arguments to claim that Defendant cannot present evidence articulating any nondiscriminatory reason for her termination, arguments which the undersigned rejected above. Thus, even if Plaintiff had presented a *prima facie* case of race discrimination, Defendant would be entitled to summary judgment on this claim.

Accordingly, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment [32] be **GRANTED** as to Plaintiff's claim of race discrimination.

III. CONCLUSION AND RECOMMENDATION

For the reasons discussed above, Defendant's Motion to Strike [34] is **DENIED**. The undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment [32] be **GRANTED** and that judgment be entered in favor of Defendant on all of Plaintiff's claims.

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 ORDERED AND RECOMMENDED this 29th day of April, 2021.

JUSTIN S. ANAND
UNITED STATES MAGISTRATE JUDGE