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

SHELIA WILLIAMS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No.
	:	1:18-cv-00218-SCJ-JCF
CITY OF ATLANTA, GEORGIA and DERRICK GILBERT, in his Individual Capacity,	:	
	:	
Defendant.	:	

NON-FINAL REPORT AND RECOMMENDATION

This case is before the Court on the Defendant City of Atlanta's Motion for Summary Judgment. (Doc. 92). For the reasons discussed below, it is **RECOMMENDED** that the motion be **GRANTED in part and DENIED in part**.

PROCEDURAL BACKGROUND

On January 16, 2018, Shelia Williams ("Plaintiff") filed a complaint against the City of Atlanta, Georgia ("the City") and Derrick Gilbert ("Gilbert") in his individual capacity, alleging gender discrimination under 42 U.S.C. § 1983 against the City and Gilbert, FMLA interference and retaliation against the City, assault and battery against Gilbert under Georgia law, and negligent hiring, retention, and supervision against the City under Georgia law, and seeking punitive damages under state law from Gilbert as well as attorneys' fees and expenses of litigation from the

City and Gilbert. (Doc. 1). Both defendants, represented by the same counsel at the time, filed an answer on March 29, 2018.[1] (Doc. 10). Discovery ended on May 31, 2019. (April 25, 2019 minute entry order). The City timely filed a motion for summary judgment with supporting documents on July 19, 2019. (Doc. 82). On August 26, 2019, Plaintiff filed an amended complaint restating each of the claims in her original complaint and adding claims for hostile work environment and retaliation under Title VII, both against the City. (Doc. 88). Gilbert filed his answer to the amended complaint on September 4, 2019. (Doc. 89). On September 9, 2019, the City filed its answer to the amended complaint. (Doc. 91). That same day, the City filed this motion for summary judgment. (Doc. 92). On September 30, 2019, Plaintiff filed its response in opposition to this motion. (Doc. 93). On October 15, 2019, the City filed a reply. (Doc. 105). With briefing on this motion complete, the undersigned now considers its merits.

FACTUAL BACKGROUND

The facts, for summary judgment purposes only, are derived from the City's Statement of Undisputed Material Facts (Doc. 92-1 ("Def. SMF")), Plaintiff's Statement of Additional Material Facts (Doc. 93-4 ("Pl. SMF")), and uncontroverted record evidence. The undersigned has reviewed the record, including the parties' filings, to determine whether genuine issues of material fact exist to be tried. Yet the

[1] On April 23, 2019, different counsel entered an appearance for Gilbert. (Doc. 74).

court need not "scour the record" to make that determination. *Tomasini v. Mt. Sinai Med. Ctr. Of Fla.*, 315 F. Supp. 2d. 1252, 1260 n.11 (S.D. Fla. 2004) (internal quotation omitted). In ruling on the parties' respective summary judgment motions, the facts are construed in the light most favorable to the non-movant. *See Frederick v. Sprint/United Mgmt. Co.*, 26 F.3d 1305, 1309 (11th Cir. 2001).

Plaintiff makes several factual assertions in her statement of additional material facts attached to her response that cite to her own unsworn declaration, attached as an exhibit to her response. (Doc. 93-1). Unsworn statements such as this typically "do not meet the requirements of [Federal Rule of Civil Procedure] 56" and cannot be relied upon in a summary judgment context. *Dudley v. City of Monroeville, Ala.*, 446 Fed. App'x 204, 207 (11th Cir. 2011) (unpublished opinion) (citing *Carr v. Tatangelo*, 338 F.3d 1259, 1273 n.27 (11th Cir. 2003)). Under 28 U.S.C. § 1746, an unsworn statement will be treated as a substitute for an affidavit if it is "subscribed in proper form as true *under penalty of perjury*…." Fed. R. Civ. P. 56(c)(4), 2010 advisory committee's note (emphasis added). "However, an unsworn statement in support of opposition to summary judgment when not dated and signed under penalty of perjury in compliance with 28 U.S.C. § 1746 is not evidence the Court may consider in opposition to the Motion." *Rust v. Boswell*, 1:11-CV-03404-JEC-JFK, 2013 WL 12099655, at *1 (N.D. Ga. Oct. 4, 2013) (citing *Lelieve v. Oroso*, 846 F. Supp. 2d 1294, 1299 n.2 (S.D. Fla. 2012)), *adopted by* 2014 WL 12543898

(N.D. Ga. 2014 WL 12543898) (internal quotation marks omitted). Here, Plaintiff's declaration does not state it was sworn "under penalty of perjury" as required by 28 U.S.C. § 1746. Therefore, the Court will not consider the declaration.

At all times relevant to this lawsuit, the City had a policy in place opposing sexual harassment that provided channels for employees to complain about actionable behavior. (Def. SMF ¶ 6). The City's sexual harassment policy stated:

> It is illegal and a violation of city policy for any employee, male or female, to sexually harass another employee. It is also a violation for any employee to sexually harass a non-city employee while representing the city. Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature which adversely impact one's employment status, work performance and/or work environment. Sexual harassment complaints are addressed in accordance with Sections 114-601 through 114-610 of the *City of Atlanta Code of Ordinances*. Employees determined to have committed the offense of sexual harassment will be subject to progressive discipline:
>
> First offense: Sexual harassment training and disciplinary action ranging from a ten-day suspension to dismissal
> Second offense: Dismissal
>
> The city provides a process for employees and citizens to report sexual harassment for investigation. Aggrieved individuals are encouraged to avail themselves of this process by contacting their department equal employment opportunity coordinator or the city's Office of Diversity Management unit at 404-330-6416.

(*Id.* ¶ 7).

At all times relevant to this lawsuit, the City of Atlanta's Employee Handbook contained the following anti-discrimination policy and recourse for employees:

> The City of Atlanta is an equal opportunity employer, committed to providing and nurturing a work environment free of discriminatory practices. City policy prohibits forms of discrimination covered under Title VII of the Civil Rights Act . . . Specifically, discrimination is prohibited based on race, color, religion, age, disability, gender, sexual orientation, veteran status or national origin. Atlanta's equal opportunity policy applies to recruitment, selection, hiring, compensation, promotion, training and all other conditions of employment. The city provides a process for all employees to report any conduct perceived to be discriminatory, which employees are encouraged to use. An employee should immediately report any employment action believed to be discriminatory to the equal opportunity coordinator within the employee's department or to the city's Office of Diversity Management at 404-330-6416. Employees can also make requests for workplace disability accommodations to these resources.

(*Id.* ¶ 9).

Plaintiff was aware of the City's anti-harassment policy. (*Id.* ¶ 8). Plaintiff could have complained about any sexual harassment via the channels provided by the City's policy, including to Pam Beckerman, a human resources director. (*Id.* ¶ 43). Beckerman had an open-door policy, such that employees could go to her office for anything, including lodging sexual harassment complaints. (*Id.* ¶ 44). Plaintiff knew that she could report the alleged harassment to the human resources department based on the City's policy. (*Id.* ¶ 45).

Plaintiff joined the City's Department of Watershed in November 2011. (Def. SMF ¶ 1). In September 2013, she transferred to the City's 311 Call Center. (*Id.* ¶ 2). In February 2015, she was terminated from that position for poor performance based on insubordination. (*Id.* ¶ 3). On April 29, 2015, the City reinstated Plaintiff

as a Senior Account Technician in its Finance Department. (*Id.* ¶ 4; Pl. SMF ¶1; Pl. Depo., Ex. 2). That same month, Gilbert was demoted from Senior Accountant to Accounting Technical Specialist in the Department of Finance's Office of Revenue due to unsatisfactory performance. (Pl. SMF ¶ 2; Gilbert Depo., Ex. 3). Before being employed by the City, Gilbert had never been counseled or reprimanded for sexually harassing behavior, and he had never been warned of any sexual harassment complaint against him. (Def. SMF ¶ 53).

During Plaintiff's first two months in the Revenue office, from approximately April to June 2015, Gilbert would sometimes come to her desk and massage her shoulders. (Def. SMF ¶ 11; Pl. SMF ¶ 8). During this time, Gilbert once put his hands in the back of Plaintiff's hair, rubbed her scalp and said, "Oh, you are natural." (Def. SMF ¶ 12; Pl. SMF ¶ 9). Plaintiff did not complain to Gilbert or a supervisor about the massages or Gilbert touching her hair. (Pl. Depo. at 22, 25, 27). Instead, Plaintiff decided, "I'm not going to say anything." (*Id.* at 25). On Plaintiff's lunch breaks, Gilbert would sometimes come to her desk to encourage her to get up and move. (*Id*. at 23). During those interactions, he would "always try to touch" her. (*Id.* at 23). During one of those interactions, when Plaintiff mentioned that she was cold, Gilbert responded, "Let me warm you up…." (Pl. SMF ¶ 11). Gilbert regularly referred to his penis as his "joystick" in conversations with Plaintiff. (*Id.* ¶ 12). On one occasion, Gilbert walked up to Plaintiff's chair from behind, pressed his crotch into her

shoulder, and asked her, "Oh, you feel like you like that?" (Def. SMF ¶ 15; Pl. SMF ¶ 13). Plaintiff disclosed this incident to Felicia Young ("Young"), but Young was not a supervisor. (Def. SMF ¶ 16). According to Plaintiff, during this time, Young witnessed Gilbert make comments to Plaintiff about sexual positions he wanted to perform with her and talk about his "joystick." (Pl. Depo. at 146-47). From those comments, Young gained the impression that Gilbert and Plaintiff were in a sexual relationship. (*Id.* at 146). Plaintiff informed her co-worker, Geraldine Williams ("Geraldine") of Gilbert's behavior. (Def. SMF ¶ 19). Geraldine also witnessed the incident in which Gilbert pressed his crotch against Plaintiff, saw him rub her shoulders, and heard him comment to Plaintiff about his "joystick." (Geraldine Williams Depo. at 15-17). Geraldine urged Plaintiff to tell Gilbert to "back off", but Plaintiff did not do so until at some point in 2016. (Def. SMF ¶ 20). On one occasion, sometime before March 2016, Gilbert approached Plaintiff at her desk and said, "Oh, I bet you got some good pussy." (Def. SMF ¶ 24; Pl. SMF ¶ 10). Plaintiff stated there was "no joking" and "no laughing" during this interaction. (Pl. Depo at 33). Plaintiff did not report this comment to any of the City's employees at that time. (Def. SMF ¶ 28).

Gilbert also subjected Geraldine to comments she perceived as sexual, such as telling her she was "fine" and that she had "a body" on her. (Pl. SMF ¶ 38). Gilbert asked her for her phone number and where she lived. (*Id.* ¶ 41). He once told her

that he thought her "door [was] swinging." (*Id.* ¶ 42). He also gave her unwanted shoulder massages. (*Id.* ¶ 43). In October or November 2015, Gilbert told Geraldine that she was a "fine MF." (*Id.* ¶ 39). In March 2016, he told her, "[Y]ou are a bad woman. I used to watch you. Do you have a boyfriend? Who buys yours clothes?" (Geraldine Williams Depo. at 22). Plaintiff heard Gilbert say to Geraldine "Oh, you're such a sexy woman for your age. I know you got all the men after you." (Pl. Depo. at 31). Geraldine Williams once told Fitz Bryan ("Bryan"), her supervisor at the time, that Gilbert was "nasty," but she did not explain why or how. (Pl. SMF ¶ 44; Geraldine Williams Depo. at 17). Carlisha Goode, one of Plaintiff's coworkers, testified that she heard Gilbert tell another coworker, "If I was your husband, I would do this or that." (Goode Depo. at 9-10). Gilbert told Catriena Harden, another City employee, "I know your husband happy with what he got…." (Pl. SMF ¶ 49; Harden Depo. at 11-12). Harden also described Gilbert as a flirt. (Pl. SMF ¶ 45). Tamara Williams, another employee within the Revenue office, felt Gilbert was harassing her on one occasion when he stood so close to her in the lunch line that she could feel his breath on her neck. (*Id.* ¶ 51). When Tamara asked Gilbert to move away from her, he just laughed. (*Id.* ¶ 52).

On March 16, 2016, Plaintiff was promoted to Accounting Technical Specialist. (Def. SMF ¶ 5; Pl. SMF ¶ 3). Felicia Daniel ("Daniel"), who served as Interim Chief of Revenue at the time, announced the promotion in an email to the

entire department and stated "Shelia has performed at a high level handling many aspects of daily operations and tackling special projects with little supervision. She has proven to be an exceptional addition of the Revenue team." (Pl. SMF ¶ 4).

On one occasion soon after Plaintiff's promotion, Gilbert and another employee, Jermaine McCain, a manager in Plaintiff's department, discussed their sexual histories with women they both knew. (Def. SMF ¶ 22; Pl. SMF ¶ 14). The two men carried on a long, detailed conversation about their sexual exploits, including Gilbert describing one of the girls with whom he had intercourse as "easy." (Pl. SMF ¶ 15). At one point, McCain asked Plaintiff about her sexual history, to which she replied, "Well, Jermaine, I have nothing to say. I don't feel comfortable talking like this. I never have." (Pl. SMF ¶ 16). Plaintiff did not report this conversation to anyone. (Def. SMF ¶ 23).

For the 2015-2016 performance evaluation period, the City rated Plaintiff as "meets the expected performance standards on a regular basis." (Pl. SMF ¶ 5). In her deposition, looking at that 2015-2016 evaluation, Daniel agreed with the rater's comments that "[Plaintiff] ha[d] learned to balance the demands of managing several tasks due to staff shortages experienced from January 2016 to June 2016. She was willing to carry a heavier workload to support the Office through the year's transition…[Plaintiff] is responsible for managing insurance, vending, bankruptcies, NSFs, return mail, check preparation, new apps, New Business listing subscriptions,

and escalations for P&I Waivers." (Daniel Depo. at 48; Winfield Depo., Ex. 15 at 2). Daniel also agreed with the rater's comment that "[Plaintiff] serve[d] a[s] the subject matter expert on high-tech applications and demonstrated a strong work ethic in managing her responsibilities." (Daniel Depo. at 49; Winfield Depo., Ex. 15 at 1).

In the late summer of 2016, Gilbert continued on a daily basis to make sexual comments to Plaintiff, such as, "Oh, I could bend you over," and "[Y]our man can't give it to you the way I can…." (Pl. SMF ¶ 19; Pl. Depo. at 49-50). At one point, Gilbert referred to himself as "Dr. Feelgood" as he commented on how he was gifted sexually. (Pl. SMF ¶ 20). He also stated that he wanted to "give [Plaintiff] babies…" (*Id.*), and bragged to her about the size of his penis. (*Id.* ¶ 21).

On July 21, 2016, Business License Manager Kindril Robinson ("Robinson") issued an oral admonishment to Plaintiff.[2] (Def. SMF ¶ 66). This admonishment was issued because (1) Plaintiff had engaged in a heated exchange with a coworker in front of customers and (2) refused to comply with Robinson's instructions. (Def. SMF ¶ 67; Pl. Depo., Ex. 7). Robinson determined that Plaintiff had inappropriately

[2] The City has a progressive disciplinary procedure in place. (Def. SMF ¶ 61). The City is not obligated to follow this progressive discipline procedure and may deviate as it sees fit. (*Id.* ¶ 62). The City's policy states: "Progressive discipline is a process in which disciplinary action is applied in several steps of increasing severity culminating, if warranted, in dismissal. The usual sequence of progressive discipline is as follows: 1. Oral admonishment 2. Written reprimand 3. Suspension 4. Dismissal." (*Id.* ¶ 63).

conducted herself in her interactions with her coworkers and the leadership team and had "created a distraction to the Office."[3] (Def. SMF ¶ 68).

Around September 2016, while Gilbert was carrying a heavy box for Plaintiff, he commented to her about how strong he was and what he could do to her. (Def. SMF ¶ 31; Pl. SMF ¶ 31). Plaintiff responded, "Yeah, right. Whatever." (Def. SMF ¶ 32). Gilbert then said, "You know, the last time someone [spoke] with a smart mouth like that with me? I impregnate[d] them." (Def. SMF ¶ 33; Pl. SMF ¶ 32). One of Plaintiff's supervisors, Sheherah Jefferson ("Jefferson"), was present, so Plaintiff asked Jefferson whether she had heard what Gilbert said and repeated the comment for her. (Pl. SMF ¶ 33). Jefferson laughed. (*Id.*). Plaintiff did not report this comment to anyone else at the time, despite Young telling her to do so. (Def. SMF ¶ 36).

Later in September 2016, Gilbert was promoted and became Plaintiff's supervisor. (Def. SMF ¶ 30; Pl. SMF ¶ 26). While he was her supervisor, Gilbert said to Plaintiff, "Wow, girl. You know what I could do? I could bend you over right now. Oh man, Oh, you know, just because I'm small, don't mean anything. You know, you and I could—you know, I work out. I work out. You see I do this." (Pl. SMF ¶ 27). On another occasion, while talking about working out, Gilbert told

[3] Plaintiff denied the truth of the facts underlying this admonishment. (Pl. Depo. at 82-84).

Plaintiff, "I know you're a big girl, but, you know, I can handle it. Don't let this small package fool you." (Def. SMF ¶ 35; Pl. SMF ¶ 28). In September or October 2016, Gilbert walked up behind Plaintiff as she sat at her desk, grabbed her hair, and said, "Oh, you like it rough, don't you? That's what the problem is with you. That's how I should have started in the beginning….You know what they say about those quiet girls. That's what they like. You like it rough. That's how I should handle you." (Pl. SMF ¶ 29).

Meanwhile, in the aftermath of Gilbert's "impregnation" comment, Plaintiff perceived that Jefferson and Gilbert were being "snappy" with her. (Pl. Depo. at 57). At some point in the following months, Plaintiff told her union representative about the "impregnation" comment and the stress she was feeling at work, saying "I feel like I'm about to break…I can't do this anymore." (Pl. Depo. at 57). Plaintiff's union representative recommended that she take time off. (Pl. Depo. at 57). Based on a doctor's recommendation, Plaintiff took two weeks off from work. (*Id.* at 58).

On November 14, 2016, when Plaintiff returned to the office after two weeks off, Gilbert said to her, "You need some sick time? You need poppa to make you feel good? Oh, yea. Stand up. Let me bend you over. Your leg bothering you again?" (Pl. SMF ¶ 30; Pl. Depo. at 61-62). Later in the day on November 14, 2016, Gilbert and Jefferson called Plaintiff into a meeting wherein Gilbert criticized her for not "respecting" him. (Pl. Depo. at 61-63). Plaintiff responded by bringing up the

incident in which Gilbert insinuated he would impregnate her. (*Id.* at 63). Plaintiff asked Jefferson again if she heard the "impregnation" when it was originally made in September 2016. (*Id.* at 118). Jefferson did not acknowledge whether she heard the statement when it was made, and Gilbert stated he did not recall making the comment. (*Id.*). Jefferson then left the meeting, and Felicia Winfield took her place. (*Id.*). Winfield told Plaintiff that this meeting was not about "throwing [Gilbert] under the bus" or "ratting him out." (*Id.* at 64). In this meeting, Plaintiff did not mention any of Gilbert's other comments or the times he touched her. (Def. SMF ¶ 40). Prior to Gilbert's "impregnation" comment and Plaintiff's reporting of it, Jefferson had never heard any other complaints about Gilbert's behavior towards women in the office. (*Id.* ¶ 41; Jefferson Depo. at 12).

Later that day, Plaintiff retroactively applied for intermittent FMLA leave, requesting such leave begin on September 13, 2016. (Def. SMF ¶ 54; Jefferson Depo., Ex. 4). The duration of Plaintiff's intermittent FMLA leave was from September 13, 2016 to September 13, 2017. (Def. SMF ¶ 55). The basis for her leave request was stress. (*Id.* ¶ 56). Plaintiff attributed her stress to working in a "very hectic" office and noted that the stress was "[j]ust a condition of working in the office alone." (*Id.* ¶ 57; Pl. Depo. at 49). The City approved Plaintiff's request for intermittent FMLA leave. (Def. SMF ¶ 58).

In December 2016, Plaintiff told Laurette Woods that Gilbert was generally "unprofessional," but Plaintiff did not provide specific details regarding how he was unprofessional.[4] (Def. SMF ¶ 42; Pl. Depo. at 118-19). On December 15, 2016, Plaintiff had a meeting with Revenue Director Chukwufumnanya Johnson ("Johnson"), Human Resources Director Pamela Beckerman ("Beckerman"), and her union representative, Gina Pagnotta ("Pagnotta").[5] (Pl. SMF ¶ 58; Johnson Depo. at 45). In that meeting, Plaintiff told Johnson and Beckerman that Gilbert had sexually harassed her. It is unclear whether Plaintiff gave specific details regarding Gilbert's harassing behavior in this meeting. Johnson testified that she eventually learned more details about Plaintiff's allegations, but she could not recall if she learned these details in this December 2016 meeting. (*Id*. at 47). Within days of that meeting, Johnson relayed Plaintiff's report to Daniel.[6] (Pl. SMF ¶ 60; Johnson Depo. at 48-49). On January 17, 2017, the City held a follow-up meeting about Plaintiff's sexual harassment complaint in which Plaintiff, Beckerman, Pagnotta, and Johnson

[4] Laurette Woods was the Human Resources liaison in the Finance Department. (Pl. Depo. at 106; Daniel Depo. at 26).

[5] It is unclear whether this meeting took place at all in December 2016, or whether it took place on January 17, 2017. Plaintiff did not discuss this date in her deposition. (Pl. Depo. at 119). Beckerman believes this meeting took place on January 17, 2017, but would not swear to that being the precise date. (Beckerman Depo. at 28-29).

[6] Plaintiff's cite does not support that Daniel was the Chief of Revenue in December 2016. (*See* Johnson Depo. at 48-49). Daniel testified that she was Chief of Revenue from sometime in 2015 until October 2016. (Daniel Depo. at 5). Nader Sohrab ("Sohrab") was Chief of Revenue in December 2016. (*Id.*; Pl. Depo. at 89).

were present. (Pl. SMF ¶ 61; Johnson Depo., Ex. 23, Beckerman Depo., Ex. 3). In that meeting, Plaintiff again complained that Gilbert had sexually harassed her. (Def. SMF ¶ 46; Beckerman Depo. at 22-23, 28). Beckerman notified the City's Labor Relations Department ("LRD"). (Def. SMF ¶ 47; Pl. SMF ¶ 63).

On February 1 and 2, 2017, the LRD investigated the Revenue office, interviewing employees to inquire into operational and managerial deficiencies. (Pl. SMF ¶ 64). The LRD investigated Plaintiff's allegations against Gilbert as a subpart of a broader investigation into the dysfunction of the Revenue office. (*Id.*). As a part of this investigation, the LRD interviewed twelve of the City's employees. (Def. SMF ¶ 48). During these interviews, LRD investigators asked the employees questions, and the investigators would take notes on their oral answer. (Parker Depo. at 32-33). During this investigation, when asked about potentially harassing behavior, Plaintiff noted that Gilbert had subjected her to sexual comments that "began as an almost a daily occurrence then reduced to several times a week, but since November 14th, 2016 it hasn't happened." (Def. SMF ¶ 50; Pl. Depo., Ex. 17 at 5). She also told the interviewers about the "impregnation" comment from September 2016. (Pl. Depo., Ex. 17 at 4). During her interview for this investigation, Geraldine Williams revealed the sexual harassment Gilbert had directed toward her in the office. (Pl. SMF ¶ 66; Geraldine Williams Depo. at 10-35, Ex. 1).

The LRD investigation ultimately concluded that Plaintiff's allegations against Gilbert were unsubstantiated. (*Id.* ¶ 51). However, the investigative report also advised that a separate investigation into Gilbert's conduct was warranted. (Pl. SMF ¶ 68). James Merriweather, the Labor Relations manager in charge of the investigation, personally told the Revenue Department Chief, Nadar Sohrab, in February 2017 that a separate investigation needed to be conducted into Gilbert's behavior. (Pl. SMF ¶ 69; Merriweather Depo. at 72). None was ever performed. (*Id.*). Merriweather also relayed his concerns to Daniel. (Pl. SMF ¶ 70). According to Merriweather, Daniel did not believe Plaintiff's allegations against Gilbert and expressed a belief that "her management team was under siege" and that Plaintiff and Geraldine Williams were "making these accusations [against Gilbert] because management was holding them accountable…." (Pl. SMF ¶ 71; Merriweather Depo. at 76-77). Merriweather met with the Revenue office management team several times between the February 2017 investigation until Plaintiff's termination. (Pl. SMF ¶ 85). In those meetings, he reiterated that the bad "optics" of management's contrast in their assessments of Plaintiff after her sexual harassment complaints versus those before the complaints. (*Id.* ¶ 86). During those meetings, Merriweather may have suggested that Plaintiff be moved out of the Revenue Department. (Merriweather Depo. at 83-84).

One month after Geraldine Williams participated in the LRD investigation, she was transferred out of the Revenue Department.[7] (Pl. SMF ¶ 72). Tamara Williams, who told investigators that Gilbert was always "nitpicking" Plaintiff, was terminated in 2017 by Daniel while she was on FMLA leave. (Pl. SMF ¶ 74; Tamara Williams Depo. at 19-22, 28). In February, March, and April of 2017, Gilbert submitted incorrect work under Plaintiff's name to other departments and would criticize her for not doing work that she had accomplished. (Pl. SMF ¶ 75; Pl. Depo. at 96, 115-117).

At some point in May 2017, Gilbert made two more comments to Plaintiff that she perceived as harassing. On one occasion, he told customers, referring to Plaintiff, "Oh, watch out for her. She hot. Watch out, my man. She fast, man. She fast." (Pl. SMF ¶ 34). Around the same time, Gilbert said to Plaintiff, in front of a group of coworkers at a potluck event, "Oh, that's not what you said last night. Oh, come on, girl." (*Id.* ¶ 35).

On June 15, 2017, Plaintiff received an official written reprimand for insubordination from Johnson. (Def. SMF ¶ 69). Daniel ordered Johnson to issue this reprimand. (Pl. SMF ¶ 77). The written reprimand described several instances of Plaintiff's insubordination, stretching back to the previous July 2016. (Def. SMF

[7] Geraldine Williams had also taken medical leave under the FMLA at some point before she was transferred, but that was in February of 2015. (Pl. SMF ¶ 73; Geraldine Williams Depo. at 28-29).

¶ 70). Johnson noted, "Since July 2016, [Plaintiff had] displayed an escalating pattern of workplace aggression toward Revenue's management," and her "behavior [was] uncharacteristically erratic[,] defined by mood swings," and her "frequent emotional outbursts" had "a destructive effect on workplace morale and overall productivity." (*Id.* ¶ 64; Pl. Depo., Ex. 8 at 3). The reprimand described an incident from July 21, 2016 for which Plaintiff received an oral admonishment for insubordination. (Def. SMF ¶ 71). The reprimand also noted an incident on December 21, 2016 in which Plaintiff refused to log onto the call system because she did not "feel like taking calls." (*Id.* ¶ 72). Winfield advised Revenue Director Dennis Stroud ("Stroud") of Plaintiff's refusal to take calls, so he spoke directly with Plaintiff and requested that she log into the phones. (*Id.* ¶ 73). Plaintiff accused Stroud of threatening her and told him to "get away from [her] desk." (*Id.* 74). The reprimand also details several examples from May 2017 of what Johnson describes as unacceptable behavior.[8] (Pl. Depo., Ex. 8 at 1). On May 4, 2017, Jefferson, Plaintiff's supervisor at the time, made several attempts to encourage Plaintiff to join a mandatory meeting, but Plaintiff refused to attend. (Def. SMF ¶ 75; Pl. Depo., Ex. 8 at 2). As Plaintiff did not attend the meeting, it was rescheduled to May 16, 2017.

[8] Plaintiff objects to the use of this written reprimand to establish the truth of these examples of Plaintiff's behavior in May 2017, because the reprimand is "based on hearsay." (Doc. 94 ¶¶ 75-78). The Court is not considering this reprimand for the truth of the matters asserted within it.

(Def. SMF ¶ 76; Pl. Depo., Ex. 8 at 2). On May 10, 2017, Plaintiff interrupted her manager during a meeting and asked why she had to provide information the manager had requested when the information could be obtained from another source. (Def. SMF ¶ 77; Pl. Depo., Ex. 8 at 2). On May 16, 2017, Plaintiff received a final oral admonishment for insubordination, which Daniel ordered Johnson to issue (Pl. SMF ¶ 76), because she declined an electronic invitation for the rescheduled May 4, 2017 meeting and refused to attend.[9] (Def. SMF ¶ 78; Pl. Depo., Ex. 8 at 2).

At the end of the 2016-2017 fiscal year, on June 30, 2017, Plaintiff's annual performance rating dropped to "needs improvement." (Winfield Depo., Ex. 12). On August 15, 2017, Plaintiff emailed Sarina Powell, a leave administrator for the City, asking if anyone had donated shared leave on her behalf so that she could extend her FMLA leave. (Doc. 93-2 at 2).

On August 28 or 29, 2017, the City placed Plaintiff on a 30-day performance improvement plan ("PIP"). (Pl. Depo., Ex. 12; Beckerman Depo., Ex. 6). Daniel ordered that Plaintiff be placed on the PIP. (Pl. SMF ¶ 78). Plaintiff's PIP required

[9] In May 2017, Plaintiff had an injured leg that required her to wear a walking boot, which made it much more difficult for her to move around. (Pl. Depo. at 95-98). In addition, she was regularly receiving notifications for meetings just an hour or so before they occurred. (Pl. Depo. at 95-98). Plaintiff's written reprimand from June 15, 2017 indicates that she cited her injury as the reason she could not make this rescheduled meeting, but there was no medical documentation showing that her walking boot should have prohibited attendance to the meeting. (Pl. Depo., Ex. 8 at 2).

her to attend meetings on September 1, 8, 15, 22, and 29, 2017. (Def. SMF ¶ 82). Despite being notified of the mandatory meetings, Plaintiff was unsure if the September 1, 2017 meeting would take place because her supervisor was out of the office. (*Id.* ¶ 83). As a result, the City rescheduled this meeting for Plaintiff. (*Id.* ¶ 84). Plaintiff arrived late for the rescheduled meeting. [10] (*Id.* ¶ 85). Plaintiff attended three of her PIP meetings. (Pl. SMF ¶ 80; Pl. Depo. at 203). Gilbert was present at two of PIP meetings. (Pl. SMF ¶ 81; Pl. Depo. at 123). Pagnotta, Plaintiff's union representative at the time, expressed concern about Gilbert's presence in one of Plaintiff's PIP meetings. (Pagnotta-Murphy Depo., Ex. 8 at 2). At the time, the Human Resources department explained that Gilbert was present as a "neutral party" at the request of Winfield, who was running Plaintiff's PIP meetings.[11] (*Id.*).One of Plaintiff's PIP meetings was rescheduled to October, because she was on jury duty and had taken the day off. (Pl. SMF ¶ 83; Pl. Depo. at 111-12).

In October 2017, after the PIP ended, Daniel decided to terminate Plaintiff. (Pl. SMF ¶ 88). On October 19, 2017, the City provided Plaintiff with a notice of proposed adverse action. (Def. SMF ¶ 87). The notice of proposed adverse action stated that Plaintiff had violated Section 114-528(b)(1) — negligence in performing

[10] In response to this statement, Plaintiff cited to her testimony regarding her injured leg and her receiving short notice for meetings. (Pl. Depo. at 95-96).
[11] Beckerman admitted in her deposition that it was not "best practice" to have Gilbert, Plaintiff's alleged harasser, in her PIP meetings. (Beckerman Depo. at 101-02).

assigned duties—and Section 114-528(b)(3) — failure to carry out an official directive or refusal to carry out the lawful, reasonable directions given by a supervisor or other acts of insubordination–of the City's Code of Ordinances. (*Id.* ¶ 88). The notice of proposed adverse action explained that Plaintiff had failed to comply with her PIP, and that she had only attended one of the five mandatory meetings, despite accepting the weekly electronic invitations for these meetings. (*Id.* ¶ 89). The notice of proposed adverse action stated that Plaintiff "continues to fail in meeting the objective criteria for an effective performance and the employee continues to demonstrate an overall lack of cooperation in working with her supervisor and manager toward improving performance." (*Id.* ¶ 90). The City proposed terminating Plaintiff's employment, with an effective date of November 3, 2017. (*Id.* ¶ 91). Daniel and Woods signed the notice of proposed adverse action. (*Id.* ¶ 92). According to the proposed adverse action, Plaintiff could appeal this decision by October 26, 2017. (*Id.* ¶ 93). The City also reserved October 23, 2017 at 11:00am for Plaintiff to meet with Chief Financial Officer J. Anthony "Jim" Beard to discuss the proposed adverse action. (*Id.* ¶ 94).

On October 24, 2017, Plaintiff appealed the City's proposed decision to terminate her employment and had a hearing with Beard, Woods, Pagnotta, and Anna Aboto. (*Id.* ¶ 95). Plaintiff claimed that the proposed adverse action was in retaliation for her filing grievances against the Office of Revenue management team

and for raising a sexual harassment claim approximately a year prior. (*Id.* ¶ 96). Woods and Beard upheld the City's decision to terminate Plaintiff. (*Id.* ¶ 97). In that hearing, both Woods and Beard stated they were not aware of Plaintiff's sexual harassment allegations prior to the hearing. (Pl. Depo. at 135).

On November 15, 2017, Plaintiff's termination became effective. (Pl. Depo., Ex. 15). The cited reasons for terminating Plaintiff in the "Notice of Final Adverse Action" issued to her that day were "[n]egligence in performing assigned duties", "insubordination", "fail[ure] to participate in PIP meetings", and "fail[ure] in meeting objective criteria for an effective performance." (*Id.*).

Up to the time of Plaintiff's termination, she was still working on a project for the Mayor's office, "meeting people in the community…going to Georgia Tech…going to a few of the incubators" and speaking with startup companies, "showing them how to fill out the business license [and] showing them the benefits of the City." (Pl. Depo. at 87). Gilbert remained in his role as one of Plaintiff's supervisors until her termination. (Pl. SMF ¶ 90). Beckerman stated in her deposition testimony that, if she had realized that Gilbert was still supervising Plaintiff after her allegations against him, she "would have handled it differently." (Beckerman Depo. at 94-95). Beckerman also admitted that, if the LRD investigation had corroborated Plaintiff's allegations against Gilbert, she would have ensured that Gilbert no longer managed Plaintiff. (Beckerman Depo. at 62-64).

Plaintiff filed an appeal of her termination to the City's Civil Service Board, which could provide her with due process as a civil service employee. (Def. SMF ¶ 100). The Civil Service Board had the authority to overturn Plaintiff's termination. (*Id.* ¶ 101). Plaintiff understood that the Civil Service Board had the authority to overturn her termination. (*Id.* ¶ 102). Although the Civil Service Board contacted Plaintiff with a hearing date, she was unprepared and decided not to pursue the Civil Service Board remedy further. (*Id.* ¶¶ 103, 104). Instead, Plaintiff proceeded with the instant lawsuit. (*Id.* ¶ 105).

In September 2018, Daniel promoted Gilbert to the position of Senior Accounting Manager. (Pl. SMF ¶ 94). On April 17, 2019, the City terminated Gilbert for sexual harassment. (Pl. SMF ¶ 95). It was the City's CFO's decision to terminate Gilbert. (*Id.* ¶ 96). Daniel did not know the CFO had decided to do so until shortly before the termination meeting. (*Id.*). Although Daniel was not certain that Gilbert was terminated because of Plaintiff's allegations in this case, she testified he was terminated because the City had obtained corroborating evidence of sexual harassment allegations against him. (Daniel Depo. at 38-39).

DISCUSSION

I. Summary Judgment Standard

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of

law." FED. R. CIV. P. 56(a). "A party asserting that a fact cannot be or is genuinely disputed must support that assertion by[] . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." FED. R. CIV. P. 56(c)(1). The moving party has an initial burden of informing the court of the basis for the motion and showing that there is no genuine issue of material fact. *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986); *see also Arnold v. Litton Loan Servicing, LP*, No. 1:08-CV-2623-WSD, 2009 WL 5200292, at *4 (N.D. Ga. Dec. 23, 2009) ("The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact.") (citing *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1246 (11th Cir. 1999)). If the non-moving party will bear the burden of proving the material issue at trial, then in order to defeat summary judgment, that party must respond by going beyond the pleadings, and by the party's own affidavits, or by the discovery on file, identify facts sufficient to establish the existence of a genuine issue for trial. *See Celotex*, 477 U.S. at 322, 324. "No genuine issue of material fact exists if a party has failed to 'make a showing sufficient to establish the existence of an element . . . on which that party will bear the burden of proof at trial.'" *AFL-CIO v. City of Miami*, 637 F.3d 1178, 1186-87 (11th Cir. 2011) (quoting *Celotex*, 477 U.S. at 322).

Furthermore, "[a] nonmoving party, opposing a motion for summary judgment supported by affidavits[,] cannot meet the burden of coming forth with relevant competent evidence by simply relying on legal conclusions or evidence which would be inadmissible at trial." *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991), *cert. denied*, 506 U.S. 952 (1992); *see also* FED. R. CIV. P. 56(c)(1)(B), (c)(4). The evidence "cannot consist of conclusory allegations or legal conclusions." *Avirgan*, 932 F.2d at 1577. Unsupported self-serving statements by the party opposing summary judgment are insufficient to avoid summary judgment. *See Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 714 (11th Cir. 1984).

For a dispute about a material fact to be "genuine," the evidence must be such that "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (internal citations omitted). It is not the court's function at the summary judgment stage to determine credibility or decide the truth of the matter. *Id.* at 249, 255. Rather, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [the nonmovant's] favor." *Id.* at 255.

II. Claims Based on Sexual Harassment

Pursuant to 42 U.S.C. § 1983, Plaintiff brings a claim of gender discrimination in the form of sexual harassment against the City, claiming it violated her rights

under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by failing to take reasonable preventative or corrective measures with respect to Gilbert's harassing conduct. (Doc. 88 ¶¶ 38-39, 41-47). Plaintiff also alleges the City discriminated against her because of her gender, in violation of Title VII of the Civil Rights Act of 1964, by subjecting her to a hostile work environment in the form of sexual harassment. (Doc. 88 ¶¶ 80-84).

Section 1983 of Title 42 of the United States Code provides in pertinent part as follows:

> 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[.]

A hostile working environment under Title VII is created "when the workplace is permeated with discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe or pervasive to alter the conditions of the victim's employment." *Harris v. Forklift Sys.*, 510 U.S. 17, 20 (1993) (internal citations and quotations omitted). To support a hostile work environment claim, a plaintiff must show: "(1) [s]he belongs to a protected group; (2) [s]he was subjected to unwelcome harassment; (3) the harassment was based on [her] membership in the protected group; (4) it was severe or pervasive enough to alter the terms and conditions of

employment and create a hostile or abusive working environment; and (5) the employer is responsible for that environment under a theory of either vicarious or direct liability." *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1300 (11th Cir. 2010) (citations omitted).

The analysis of discrimination claims brought under Title VII and § 1983 is the same when the claims are based on the same facts, as they are here. *Brown v. Ala. DOT*, 597 F.3d 1160, 1174 n.6 (11th Cir. 2010). However, as explained further below, the standards of liability for each cause of action is different. The Court addresses Plaintiff's Title VII claim first.

a. Title VII Hostile Work Environment Claim (Count IX)[12]

The City moves for summary judgment on Plaintiff's Title VII hostile work environment claim based on sexual harassment. (Doc. 92 at 15). The City concedes that Plaintiff is a member of a protected group who was subjected to unwelcome harassment based on her protected characteristic. (Doc. 92 at 17). However, it contends summary judgment is warranted on this claim because there is not sufficient evidence to create an issue of fact on (1) whether Gilbert's harassment was sufficiently severe or pervasive to alter the terms and conditions of Plaintiff's

[12] Plaintiff makes clear that she is not bringing a disparate treatment claim under Title VII based on her termination. (Doc. 93 at 12 n.3).

employment and (2) whether the City is liable for her work environment. (*Id.* at 17-18). The Court addresses each argument below.

i. Severe or Pervasive Harassment

"Establishing that harassing conduct was sufficiently severe or pervasive to alter an employee's terms or conditions of employment includes a subjective and an objective component." *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999). "[A] plaintiff must establish not only that she subjectively perceived the environment as hostile and abusive, but also that a reasonable person would perceive the environment to be hostile and abusive." *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 583 (11th Cir. 2000), cert. denied, 531 U.S. 1076 (2001).

The City does not dispute that Plaintiff subjectively found the harassment in her workplace to be severe or pervasive. (Doc. 105 at 9). However, the Court must still evaluate whether the harassment Plaintiff faced was objectively severe or pervasive so as to alter the terms and conditions of her employment. When evaluating this question, courts consider four factors: "(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." *Mendoza*, 195 F.3d at 1246 (internal citations omitted).

The sexual harassment Plaintiff endured during her employment in the City's Revenue office consisted of the following:

From April to June 2015, Gilbert sometimes massaged Plaintiff's shoulders (Def. SMF ¶ 11; Pl. SMF ¶ 8); once put his hands in the back of Plaintiff's hair, rubbed her scalp and said, "Oh, you are natural."[13] (Def. SMF ¶ 12; Pl. SMF ¶ 9); would "always try to touch" Plaintiff while encouraging her to get up and move during her lunch breaks (Pl. Depo. at 23); and offered to "warm [her] up" when she stated she was cold. (Pl. SMF ¶ 11). Around March 2016, while still Plaintiff's coworker, Gilbert commented to Plaintiff, "Oh, I bet you got some good pussy." (Def. SMF ¶ 24; Pl. SMF ¶ 10). Soon after that, Gilbert had a long, detailed conversation in front of Plaintiff with Jermaine McCain, a manger in Plaintiff's department at the time, in which the two men discussed sexual exploits with women they both knew, with Gilbert referring to one woman as "easy." (Pl. SMF ¶¶ 14-15). McCain asked Plaintiff about her own sexual history, but she refused to discuss the topic. (Pl. SMF ¶ 16). In the summer of 2016, Gilbert was still making sexual comments to Plaintiff daily, such as, "Oh, I could bend you over," and "[Y]our man can't give it to you the way I can…." (Pl. SMF ¶ 19; Pl. Depo. at 49-50). In early September 2016, after Plaintiff spoke to Gilbert "with a smart mouth", he told her

[13] Plaintiff's brief states Gilbert "played with and pulled Plaintiff's hair" during this incident, but the evidence does not support that characterization. (Doc. 93 at 15).

that he impregnated the last women who spoke to him like that. (Def. SMF ¶ 33; Pl. SMF ¶ 32). Additionally, on unspecified dates while Gilbert was Plaintiff's coworker, he regularly referred to his penis as his "joystick" to Plaintiff. (Pl. SMF ¶ 12); once pressed his crotch into Plaintiff's shoulder as she sat at her desk and asked her, "Oh, you feel like you like that?" (Def. SMF ¶ 15; Pl. SMF ¶ 13); referred to himself as "Dr. Feelgood" and told Plaintiff he was sexually gifted (Pl. SMF ¶ 20); stated he wanted to "give [Plaintiff] babies…" (Pl. SMF ¶ 20); and bragged to her about the size of his penis (Pl. SMF ¶ 21).

Later in September 2016, after Gilbert had become one of Plaintiff's supervisors, he said to her, "Wow, girl. You know what I could do? I could bend you over right now. Oh man…just because I'm small, don't mean anything. You know, you and I could—you know, I work out. I work out. You see I do this." (Pl. SMF ¶ 27). He later told her, "I know you're a big girl, but, you know, I can handle it. Don't let this small package fool you." (Def. SMF ¶ 35; Pl. SMF ¶ 28). Then, in either September or October, Gilbert walked up behind Plaintiff as she sat at her desk, grabbed her hair, and said, "Oh, you like it rough, don't you? That's what the problem is with you. That's how I should have started in the beginning….You know what they say about those quiet girls. That's what they like. You like it rough. That's how I should handle you." (Pl. SMF ¶ 29). On November 14, 2016, after Plaintiff had returned from a few weeks off, Gilbert said to her, "You need some sick time?

You need poppa to make you feel good? Oh, yea. Stand up. Let me bend you over." (Pl. SMF ¶ 30; Pl. Depo. at 61-62).

From April 2015 until November 14, 2016, sexual comments such as the ones listed above were "an almost daily occurrence", then were reduced to "several times a week", and did not occur again after November 14, 2016 until some months later. (Def. SMF ¶ 50; Pl. Depo., Ex. 17 at 5). At some point in May 2017, Gilbert stated in front of customers, referring to Plaintiff, "Oh, watch out for her. She hot. Watch out, my man. She fast, man." (Pl. SMF ¶ 34). Around the same time, Gilbert said to Plaintiff, in front of a group of coworkers at a potluck event, "Oh, that's not what you said last night. Oh, come on, girl." (*Id*. ¶ 35). After those comments in May 2017, Gilbert's did not harass Plaintiff again until she was terminated in November of that year. The Court analyzes each of the "severe or pervasive" factors below.

Looking at this evidence in the light most favorable to Plaintiff, a reasonable jury could find she was subjected to frequent unwelcome harassment during her employment with the City. Plaintiff testified to approximately nineteen specific unwanted comments or touchings over the course of her two-year, eight-month employment, with approximately seventeen of those coming in the first twenty months, from April 2015 to November 2016. That rate of harassment alone is not frequent enough to constitute pervasive harassment. *Guthrie v. Waffle House, Inc.*, 460 Fed. App'x 803, 807 (11th Cir. 2012) (unpublished opinion) (holding a few

dozen vulgar or obscene comments over an eleven-month period was not frequent enough to create an issue of fact on the "severe or pervasive" element of the plaintiff's hostile work environment claim); *Mitchell v. Pope*, 189 Fed. App'x 911, 913-14 (11th Cir. 2006) (per curiam) (unpublished) (holding sixteen specific incidents of offensive conduct over a four-year period not frequent enough to create an issue of fact on the "severe of pervasive" element of a hostile work environment claim). However, there is additional evidence here that, at least for a portion of Plaintiff's tenure with the City, Gilbert's harassment was nearly constant. (Pl. Depo., Ex. 17 at 5). Plaintiff does not specify when the comments transitioned from "almost daily" to several times a week, but she did testify that Gilbert was still making sexual comments to her daily in the summer of 2016. (Pl. Depo. at 49-50). Where there are allegations of daily or almost-daily harassment coupled with specific details of that harassment, this circuit has found harassment sufficiently frequent to deny summary judgment on a hostile work environment claim. *Compare Reeves v. C.H. Robinson Worldwide, Inc.* 594 F.3d 798, 804 (11th Cir. 2010) (11th Cir. 2010) (reversing a grant of summary judgment for an employer on a hostile work environment claim, noting evidence that the plaintiff was subjected to obscene and derogatory comments about her "on a daily basis"), *and Dees v. Johnson Controls World Servs. Inc.* 168 F.3d 417, 418 (11th Cir. 1999) (reversing summary judgment for an employer where the plaintiff alleged "almost-daily abuse" and supported her allegations with specific

evidence describing the abuse), *with Benson v. Solvay Specialty Polymers USA, LLC*, 1:16-CV-4638-CAP-RGV, 2018 WL 5118615, at *14 n.31 (N.D. Ga. July 3, 2018), *adopted by* 2018 WL 5118601 (N.D. Ga. Sept. 7, 2018) (refusing to credit a plaintiff's general allegation that a harasser's behavior occurred every time they were on shift together), *and Godoy v. Habersham Cnty.*, 211 Fed. App'x 850, 853-54 (11th Cir. 2006) (unpublished opinion) (affirming grant of summary judgment to employer on hostile work environment claim based on race where plaintiff alleged he was subjected to racial slurs "almost every shift" but did not provide specific evidence to prove those allegations).

It is worth noting that Gilbert's harassing conduct effectively ceased after November 14, 2016, as there were only two arguably sexual comments made to Plaintiff after that date. Plaintiff's employment continued for about a year after the bulk of Gilbert's harassment ceased. The Eleventh Circuit, in affirming summary judgment for an employer on a Title VII hostile work environment claim based on race, has recently held that twelve incidents of harassment spanning seven months of a plaintiff's two-and-one-half years of employment was not frequent enough to constitute severe or pervasive harassment. *Fortson v. Carlson*, 618 Fed. App'x 601, 608 (11th Cir. 2015) (unpublished opinion). The plaintiff there did not experience harassment for the last five months of his employment. *Id.* at 603-04. The undersigned does not read this case to stand for the idea that a months-long gap in

workplace harassment should prevent a plaintiff's harassment from being considered frequent. In *Fortson*, the harassment was not frequent during the seven-month time frame it occurred. Here, on the other hand, the harassment was frequent over the first twenty months of Plaintiff's employment. Therefore, a reasonable jury could find that Gilbert's harassment of Plaintiff was frequent. *See Williams v. United Launch alliance, LLC*, 286 F. Supp. 3d 1298 (N.D. Ala. Feb. 6, 2018) (granting summary judgment on sexual harassment hostile work environment claim despite fact that harassment ceased six months before harasser was eventually fired).

A reasonable jury could also conclude Gilbert's harassing conduct was severe. Most of the offending conduct here consists of sexual comments that, although boorish and lewd, would not by themselves constitute severe harassment. *See Mitchell*, 189 Fed. App'x at 913-14 n.3 (holding sexual comments such as "your ass sure does look fine", "you can just walk into the room and I'd get an erection", and asking the plaintiff over an office phone whether she was dressed or naked were not severe enough to support a hostile work environment claim). However, when considered with the few instances of unwanted physical contact from Gilbert, a reasonable jury could find the totality of the conduct Plaintiff endured to be severe. The comments Plaintiff endured, coupled with Gilbert's unwanted shoulder massages, rubbing of her scalp, grabbing her hair and asking if she liked rough sex, and pressing his crotch into her, is more severe than the conduct in *Johnson v. Booker*

T. Washington Broadcasting Service, Inc., 234 F.3d 501, 509 (11th Cir. 2000). There, the Eleventh Circuit held there was an issue of fact on the severity of the harassing conduct, which including unwanted massages, the harasser standing so close to the plaintiff that he touched her from behind, and once pulling his pants tight to reveal the imprint of his penis. *Id.* at 509. The physical conduct in this case, when coupled with the barrage of sexual comments Plaintiff faced, is more severe than the conduct in *Johnson*.

Furthermore, some of Gilbert's conduct was physically threatening and humiliating. In *Johnson*, a court held that the same conduct listed above could have been physically threatening and humiliating. *Id.* In this case, some of Gilbert's actions were more threatening than what the *Johnson* plaintiff endured. A jury could find Gilbert's statement to Plaintiff that he had impregnated the last woman that spoke to him with a smart mouth to be threatening or humiliating. In context, that statement could be perceived as a threat to impregnate Plaintiff against her will if she spoke to Gilbert in a way that offended him. Furthermore, this statement could have been humiliating to Plaintiff, considering that it was said in front of at least one other employee. Additionally, Gilbert's sudden grabbing of Plaintiff's hair from behind while asking her if she "like[d] it rough" could be interpreted by a reasonable jury as physically threatening. Moreover, a reasonable jury could find Gilbert's

pressing of his crotch against Plaintiff, which was witnessed by at least one coworker, to be humiliating.

On the final factor, Plaintiff argues that dealing with Gilbert's misconduct affected Plaintiff's job performance, but there is evidence that Plaintiff's yearly performance evaluation for the 2015-2016 fiscal year was generally positive. (Pl. SMF ¶ 5; Daniel Depo. at 48; Winfield Depo., Pl. Ex. 15 at 2). She was also promoted in March 2016. (Def. SMF ¶ 5; Pl. SMF ¶ 3). However, "[t]he Supreme Court has cautioned that harassment need not be shown to be so extreme that it produces tangible effects on job performance in order to be actionable." *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1277 (11th Cir. 2002). In *Fortson*, a lack of evidence that the plaintiff's performance was impacted in any way by the racial harassment he was enduring at work "weigh[ed] strongly against finding that [plaintiff] presented sufficient evidence for a reasonable jury to find a hostile work environment." *Fortson*, 618 Fed. App'x at 608. However, there, none of the other factors in the severe or pervasive analysis had been satisfied. *Id.* at 607-08. That is not the case here.

Looking at all the above factors together, given the frequency, severity, and threatening nature of some of Gilbert's conduct, a reasonable jury could find that it was severe or pervasive enough to support Plaintiff's hostile work environment claim.

ii. Defendant's Liability Under Title VII

Plaintiff still must create an issue of fact regarding the City's liability for Gilbert's harassing conduct under Title VII to avoid summary judgment on this claim. In Title VII sexual harassment claims, there are different standards for liability depending on whether the harasser was the plaintiff's coworker or supervisor. Both standards are implicated here, because Gilbert's actions spanned time in which he was Plaintiff's coworker and supervisor. The Court analyzes the City's liability under each standard below.

1. Liability for Gilbert's Actions as Coworker

The standard for imposing employer liability in cases of coworker harassment has been articulated by the Eleventh Circuit as follows: "When . . .the alleged harassment is committed by [a] co-worker[] . . . , a Title VII plaintiff must show that the employer either knew (actual notice) or should have known (constructive notice) of the harassment and failed to take immediate and appropriate corrective action." *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003) (*citing Breda v. Wolf Camera & Video*, 222 F.3d 886, 889 (11th Cir. 2000)). "Actual notice is established by proof that management knew of the harassment." *Watson*, 324 F.3d at 1259 (citing *Miller*, 277 F.3d at 1278). To establish constructive notice, a plaintiff must show that "the harassment was so severe and pervasive that management reasonably should have known of it." *Watson*, 324 F.3d at 1259 (citing *Miller*, 277

F.3d at 1278). "The question of constructive knowledge is an issue of fact." *Allen v. Tyson Foods, Inc.* 121 F.3d 642, 647 (11th Cir. 1997) (citations omitted). Defendant asserts that Plaintiff did not notify the City of Gilbert's harassment while he was her coworker, and therefore cannot be held liable for that conduct. (Doc. 92 at 21). In response, Plaintiff argues that the City had actual and constructive notice of Gilbert's harassment of her as her coworker. (Doc. 93 at 17-20).

There is no issue of fact regarding whether the city had *actual* notice of Gilbert's harassment of Plaintiff while they were coworkers. First, Plaintiff argues the City had actual notice of Gilbert's conduct when Geraldine Williams, another coworker, told her supervisor, Fitz Bryan around May 2016 that Gilbert was "nasty." (Doc. 93 at 17-18). Plaintiff does not explain how this should have given the City knowledge that Gilbert was sexually harassing Plaintiff. Additionally, this circuit has said that a similar comment was insufficient to put an employer on notice and create liability for an employee's sexual harassment. *See Madray v. Publix Supermarket, Inc.*, 208 F.3d 1290, 1300 (11th Cir. 2000) (employee's complaint that her supervisor harasser "made [her] sick", without more, was insufficient notice because it did not "disclose[] the extent or precise nature" of the harassment). Thus, this argument fails. Second, Plaintiff argues the City was put on actual notice of Gilbert's harassment against her in September 2016 when Gilbert made the "impregnation" comment in the presence of one of Plaintiff's supervisors. (*Id.*). This

incident certainly gave the City knowledge of this one comment. However, this circuit has said that knowledge of one harassing act by a coworker does not give an employer actual knowledge of the full extent of the coworker's harassing behavior and therefore does not create liability. *See Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1365 (11th Cir. 1999) (holding an employer in a Title VII sexual harassment claim did not have actual notice of sexual harassment when plaintiff showed her supervisor a sexually suggestive note from a coworker because the one note did not apprise the supervisor of "the dimensions of the problem or even that there *was* a problem that required his attention…."). Therefore, Jefferson's knowledge of the "impregnation" comment did not give the City actual notice of Gilbert's harassment as Plaintiff's coworker.[14]

Plaintiff also argues the City had constructive notice of Gilbert's harassment as her coworker because his conduct was "open and obvious…." (Doc. 93 at 18-20). The City does not address this issue in its brief accompanying its motion or its reply brief. (*See* Docs. 92 and 105).

[14] Plaintiff also argues the City had actual notice of Gilbert's harassment when Plaintiff told one of her supervisors, Kindril Robinson, in the summer of 2016 that she did not want to be paired with Gilbert on a project because she had refused his sexual advances, which made him harass her even more. (Id. at 18). Furthermore, Plaintiff asserts that, by that time, Robinson had witnessed two of Gilbert's sexual comments towards Plaintiff. (Id.). All the facts supporting this argument are derived from Plaintiff's declaration, which the Court will not consider. Therefore, this argument fails as well.

When analyzing whether sexual harassment is so pervasive as to provide constructive notice to an employer, courts in this circuit consider: "the remoteness of the location of the harassment as compared to the location of management, whether the harassment occurs intermittently over a long period of time, whether the victims were employed on a part-time or full-time basis, and whether there were only a few, discrete instances of harassment." *Allen*, 121 F.3d at 647 (citing *Faragher*, 111 F.3d at 1538). When looking at the facts in this case and the *Allen* factors, a reasonable jury could conclude that the City should have known about Gilbert's harassment of Plaintiff while the two were coworkers.

First, there is evidence that Gilbert's harassment was not intermittent, but nearly constant from April 2015 until November 2016, which would have encompassed the entire timeframe in which he and Plaintiff were coworkers. (Def. SMF ¶ 50; Pl. Depo., Ex. 17 at 5). Moreover, there were more than a few, discrete instances of harassment, as evidenced by the frequency of Gilbert's conduct, discussed *supra*. There is no affirmative evidence regarding whether Plaintiff was a part-time or full-time employee. Additionally, there is not much evidence regarding the remoteness of the location of Gilbert's harassment as compared to the location of management. In that sense, this case is unlike *Morgan v. Fellini's Pizza, Inc.*, 64 F. Supp. 2d 1304, 1313-14 (N.D. Ga. 1999), cited by Plaintiff, where this Court said there was an issue of fact on whether the defendant employer, a pizza establishment,

had constructive notice of the harassment in that case, because there was evidence that most of the harassing conduct was committed within feet of supervisors, due to the very close quarters that all the restaurant's employees worked in at all times. There is no such evidence here. However, there is evidence that at least two specific instances of arguable harassment occurred in the presence of management, including Gilbert's statement to Plaintiff shortly before he was promoted that he had impregnated the last woman who spoke to him "with a smart mouth" and the long, detailed conversation Gilbert held with McCain in front of Plaintiff about his sexual exploits.[15]

In addition, there is evidence that Gilbert was subjecting multiple women to unwanted comments and actions while harassing Plaintiff. Before he became a supervisor, Gilbert told Geraldine Williams she was "fine" and had "a body" on her (Pl. SMF ¶ 38), asked Geraldine for her phone number and where she lived (*Id.* ¶ 41), told her he thought her "door [was] swinging" (*Id.* ¶ 42), rubbed her shoulders (*Id.* ¶ 43), told her she was a sexy woman for her age (Pl. Depo. at 31), and called her a "fine MF" and a "bad woman." (Pl. SMF ¶ 39; Geraldine Williams Depo. at 22). Additionally, Carlisha Goode, a coworker, testified that she heard Gilbert tell

[15] To support her argument on this issue, Plaintiff again attempts to use her statements from her declaration, that one of her managers, Robinson, was present for two of Gilbert's harassing comments, and that she had previously told Robinson about Gilbert's harassment in the summer of 2016. (Pl. Decl. ¶¶ 6-7). However, the undersigned does not consider Plaintiff's declaration for the reasons stated above.

another coworker, "If I was your husband, I would do this or that." (Goode Depo. at 9-10). Gilbert told Catriena Harden, another coworker, "I know your husband happy with what he got…." (Harden Depo. at 11-12). Finally, he once stood close to Tamara Williams, another coworker, in the lunch line that she could feel his breath on her neck, making her uncomfortable. (Pl. SMF ¶ 51). Moreover, as Plaintiff points out, there is evidence that Gilbert often committed his misconduct in open areas, such that Plaintiff and other female coworkers witnessed each other being harassed. Geraldine Williams witnessed Gilbert press his crotch against Plaintiff's shoulder, massage Plaintiff's shoulders, and talk to Plaintiff about his "joystick." (Geraldine Williams Depo. at 15-17). Plaintiff overheard Gilbert refer to Geraldine Williams as a sexy woman for her age. (Pl. Depo. at 31). Goode overheard Gilbert make a sexual comment to another female coworker. (Goode Depo. at 9-10). Finally, Plaintiff testified that Felicia Young, a coworker, overheard Gilbert make so many sexual comments to Plaintiff that she believed Gilbert and Plaintiff had a sexual relationship. (Pl. Depo. at 146-47).

Looking at the above evidence in the light most favorable to Plaintiff, there is a genuine issue of material fact regarding whether Gilbert's harassment during his time as Plaintiff's coworker was so frequent and nondiscrete that "it would not easily go unnoticed by [] supervisors or others in managerial positions who interacted with [Plaintiff] and her coworkers on a regular basis." *Mills v. Amoco Performance*

Products, Inc., 872 F. Supp. 975, 987 (S.D. Ga. 1994); *see also Simon v. Morehouse School of Medicine*, 908 F. Supp. 959, 970 (N.D. Ga. 1995) (holding that a reasonable jury could conclude that the defendant's management in that case should have known about the harassment because there was evidence of frequent and nondiscrete sexual advances toward the plaintiff in front of other coworkers).

That being said, "an employer is insulated from liability under Title VII for a hostile environment sexual harassment claim premised on constructive knowledge of the harassment when the employer has adopted an anti-discrimination policy that is comprehensive, well-known to employees, vigorously enforced, and provides alternate avenues of redress." *Morgan*, 64 F. Supp. 2d at 1315 (citing *Farley v. Am. Cast Iron Pipe Co.*, 115 F.3d 1548, 1554 (11th Cir. 1997)). As explained below in the discussion of the City's affirmative defense to its liability for Gilbert's conduct as a supervisor, there is a genuine issue of fact regarding whether the City "vigorously enforced" its anti-harassment policy once Plaintiff finally complained about Gilbert's harassment via the channels described in the policy. Therefore, this defense to the City's constructive knowledge fails.

2. <u>Liability for Gilbert's Actions as Supervisor</u>

Next, the undersigned analyzes whether there is an issue of fact regarding the City's liability for Gilbert's harassment of Plaintiff as her supervisor. There is an issue of fact here as well.

"An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise . . . ." *Burlington Indust., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *see also Faragher v. Boca Raton*, 524 U.S. 755, 807-08 (1998). The City argues that it is not liable for Gilbert's harassment to "the extent [he] engaged in actionable conduct while Plaintiff's supervisor," because the City can avail itself of the *Faragher/Elerth* affirmative defense. (Doc. 92 at 21-22).

Looking at the first prong of this defense, there is no issue of fact regarding whether the City took reasonable care to *prevent* Gilbert's sexual harassment of Plaintiff as a supervisor. Although the presence of a sexual harassment policy does not automatically satisfy the first element of the *Faragher/Ellerth* defense, "the presence of such a policy is nevertheless a highly relevant factor," and this circuit has consistently held that an employer has satisfied its burden on the prevention prong of the first element of this defense when there is evidence that the employer

had a comprehensive anti-harassment policy that is effectively communicated to its employees and contains reasonable complaint procedures. *Minix v. Jeld-Wen, Inc.*, 237 Fed. App'x 578, 584 (11th Cir.2007) (unpublished opinion) (citing *Frederick v. Sprint/United Management Co.*, 246 F.3d 1305, 1315 (11th Cir. 2001)). Here, the City had a comprehensive anti-harassment policy of which Plaintiff admitted she was aware. (Def. SMF ¶¶ 6-9). That policy created multiple avenues through which Plaintiff could report this harassment (*Id.* ¶ 7), and Plaintiff was also aware that she could complain to her human resources director, Pam Beckerman, about sexual harassment concerns. (*Id.* ¶¶ 43-45). As a result, no reasonable jury could conclude that the City failed to take reasonable care to prevent the harassment Plaintiff endured.

Defendant still must show there is no dispute of fact regarding whether it took reasonable care to *correct promptly* Gilbert's harassment once it gained knowledge of it. Defendant argues that it promptly investigated Gilbert's alleged misconduct once Plaintiff finally notified the City of his harassment. (Doc. 92 at 21-22). In response, Plaintiff argues that the City failed to take prompt remedial action once it was notified of Gilbert's harassment because it took the City "months" to investigate Gilbert, it "ignored corroborating evidence to falsely exonerate [him], the City's investigation was a "sham", and the City eventually terminated Gilbert because of Plaintiff's allegations, but not until April 2019. (Doc. 93 at 20-22). In making this

argument, Plaintiff states she began taking advantage of formal reporting routes when she asked Jefferson if she heard Gilbert's "impregnation" comment in September 2016. (*Id.* at 20).

In applying the *Faragher/Ellerth* affirmative defense, the Eleventh Circuit has noted that "the employer's notice of the harassment is of paramount importance [because] if the employer had notice of the harassment ... then it is liable unless it took prompt corrective action." *Dees*, 168 F.3d at 422. For the purposes of this defense, when an employer's sexual harassment policy clearly specifies the steps an employee should take to notify the employer of sexual harassment, the employer has "itself answered the question of when it would be deemed to have notice of the harassment sufficient to obligate it or its agents to take prompt and appropriate remedial measures." *Coates*, 164 F.3d at 1364; *see also Madray*, 208 F.3d at 1300.

Defendant asserts that Plaintiff did not properly complain according to its anti-harassment policy until a meeting on January 17, 2017 involving Plaintiff, her union representative Pagnotta, Johnson, and Beckerman. (Doc 92 at 22; Def. SMF ¶ 46). However, Plaintiff presents evidence that the January 17, 2017 meeting was simply a follow-up meeting from a December 15, 2016 meeting between the same parties in which Plaintiff officially complained about Gilbert's sexual harassment. (Johnson Depo. at 45-52). Johnson testified that Plaintiff may have gone into specific details about Gilbert's harassment at that meeting, even though she was not entirely positive

of that fact. (*Id.* at 47). Looking at the evidence in the light most favorable to Plaintiff, a jury could conclude that Plaintiff officially reported Gilbert's sexual harassment under the City's anti-harassment policy on December 15, 2016 when she made an allegation against him in a meeting that included Beckerman, who was a designated person to whom Plaintiff could report under the City's policy. (Def. SMF ¶¶ 43-45).

The City did not investigate Plaintiff's allegations until February 1 and 2, 2017, when its LRD launched an investigation into the overall dysfunction of the Revenue office. (Pl. SMF ¶ 64). If Plaintiff officially reported Gilbert's harassment to the City on December 15, 2016, then the City took approximately seven weeks to act on her allegations. There is no bright-line rule in this circuit for what constitutes a prompt action in response to a sexual harassment complaint. *Wilcox v. Corrections Corp. of Am.*, 892 F.3d 1283, 1288 (11th Cir. 2018). In *Wilcox*, the Eleventh Circuit founds that six weeks between a victim's complaint and the employer's investigation of that complaint was reasonably prompt in light of evidence that there were "a lot of moving parts in the company's investigation, and each of those workings took time." *Id.* Here, the City took longer than six weeks to investigate Plaintiff's complaint, and neither party has presented evidence to explain that delay. Viewing this evidence in the light most favorable to Plaintiff, a reasonable jury could find that the City did not act promptly to take action that would make it "reasonably likely to

prevent [Gilbert's] misconduct from recurring." *Id.* (citing *Kilgore v. Thompson & Brock Mgmt., Inc.* 93 F.3d 752, 754 (11th Cir. 1996)). The Court acknowledges that Gilbert's harassment had effectively ceased on November 14, 2018, a month before Plaintiff finally complained. However, there is no evidence that the City knew that fact before February 2017 or that it relied on that fact in determining how promptly to investigate Plaintiff's allegations. Therefore, it does not impact the Court's analysis.

Even if the City could meet its burden of demonstrating that its investigation was reasonably prompt, Plaintiff argues that the investigation does not constitute prompt corrective action because it "was a sham" and incorrectly concluded Plaintiff's allegations against Gilbert were unsubstantiated. (Doc. 93 at 21). There is evidence that Geraldine Williams revealed Gilbert's harassment of her to LRD investigators (Geraldine Williams Depo. at 10-35) and that Tamara Williams told investigators Gilbert was always "nitpicking" Plaintiff. (Tamara Williams Depo. at 27-28). Plaintiff told the investigators about Gilbert's "impregnation" comment and that Gilbert's sexual comments to her had been an "almost daily occurrence then reduced to several times a week" from April 2015 until November 14, 2016. (Pl. Depo., Ex. 17 at 4-5). The City's LRD investigators concluded that Plaintiff's allegations against Gilbert were unsubstantiated because they could not be confirmed by anyone other than Plaintiff and Geraldine Williams. (Merriweather

Depo., Ex. 28 at 7). Nevertheless, the summary report of the investigation also stated that the "detailed level of testimony provided does warrant additional review, and a separate, independent investigation is recommended." (*Id.* at 9). Merriweather, the LRD manager in charge of the investigation, relayed this same recommendation to the Revenue office chief at the time, but his recommendation was not followed. (Merriweather Depo. at 72). Furthermore, there is evidence that the City eventually terminated Gilbert for sexual harassment on April 17, 2019. (Pl. SMF ¶ 95). Although Daniel was not certain that Gilbert was terminated because of Plaintiff's allegations in this case, she testified he was terminated because the City had obtained corroborating evidence of sexual harassment allegations against him. (Daniel Depo. at 38-39).

A reasonable jury could conclude from this evidence that the City did not take reasonable care to promptly correct Gilbert's alleged harassment after its February 2017 investigation. A jury could conclude that it was unreasonable for the City to not investigate further into Gilbert's misconduct after its initial investigation, considering that the manager leading the initial investigation recommended the City do just that. The City states that it did not feel a separate investigation was necessary at the time, because Gilbert's harassment had ceased for almost three months at that point, leaving the City with nothing to remedy. (Doc. 105 at 20). However, there is no evidence that its decisionmakers relied on this fact to conclude that another

investigation was unnecessary at any time relevant to this case. Thus, the defense has not met its burden of demonstrating that it took reasonable care to correct promptly Plaintiff's allegations of sexual harassment in the workplace.

Because there is an issue of fact regarding whether the City took prompt corrective action after it learned of Plaintiff's allegations, the City cannot establish its affirmative defense to its vicarious liability for Gilbert's harassing actions as Plaintiff's supervisor. Therefore, the City may potentially be held liable for Gilbert's actions while he was Plaintiff's supervisor.

In sum, there are genuine issues of material fact regarding whether the City can be held liable for Gilbert's sexual harassment of Plaintiff while he was her coworker and while he was her supervisor. Additionally, as stated above, there is a genuine issue of material fact regarding whether Gilbert's harassment of Plaintiff was severe or pervasive. For those reasons, it is **RECOMMENDED** that the City's motion for summary judgment on Plaintiff's Title VII hostile work environment claim be **DENIED**.

b. <u>Gender Discrimination under § 1983 (Count I)</u>

The Court now addresses Plaintiff's § 1983 gender discrimination claim, which is also based on the sexual harassment she faced in her workplace. As mentioned above, Plaintiff's complaint alleges "Defendant City violated Plaintiff's rights to equal protection by failing to take reasonably preventative or corrective

measures with respect to [Gilbert's] unlawful harassing conduct. (Doc. 88 ¶ 41). Alternatively, Plaintiff alleges that the City acted recklessly when it failed to prevent or correct her harassment. (*Id.* ¶ 47). Plaintiff also alleges that Gilbert violated her "rights to equal protection…subjecting her to a sexually harassing and hostile working environment" and "by taking adverse employment actions against [her] for her refusal to acquiesce to sexual advances, for reporting such harassment, and because of her gender." (*Id.* at 40).[16]

As discussed *supra*, there is an issue of fact on whether the City discriminated against Plaintiff because of her sex based on a sexually hostile work environment, pursuant to Title VII. Since § 1983 and Title VII discrimination claims are analyzed under the same framework, there is also an issue of fact regarding whether Plaintiff was discriminated against under § 1983. However, the standard for municipal liability under § 1983 is different than the standards of liability under Title VII. Even though Plaintiff created a genuine issue of material fact under the Title VII liability standards, she cannot do the same under § 1983.

"The law is clear that a municipality cannot be held liable for the actions of its employees under § 1983 based on a theory of respondeat superior." *Howard v.*

[16] Plaintiff clarifies in her response that she is not asserting a § 1983 discrimination claim based on her termination or based on any theory of retaliation. (Doc 93 at 12 n.3). Rather, this claim is based only on Gilbert's alleged sexual harassing conduct. (*Id.*).

City of Robertsdale, 168 Fed. App'x, 883, 890 (11th Cir. 2006) (quoting *Griffin v. City of Opa–Locka*, 261 F.3d 1295, 1307 (11th Cir.2001)). To the extent Plaintiff's claim is based on the City's vicarious liability for any of Gilbert's actions, this claim fails. "Instead, liability arises when a municipal 'custom' or 'policy,' either formal or informal, condones employee misconduct". *Id.* (citing *Griffin*, 261 F.3d at 1307). The Eleventh Circuit has held that an informal custom or policy arises when (1) a practice "is so permanent and well settled as to constitute a 'custom or usage' with the force of law" or (2) "when a municipality tacitly authorizes employee misconduct or displays deliberate indifference towards it." *Id.* (citing *Griffin*, 261 F.3d at 1308).

The City argues in its motion that Plaintiff cannot create an issue of fact on whether the sexual harassment she suffered while employed by the City resulted from a custom or policy of the City. (Doc. 92 at 5-8). In her response brief, Plaintiff offers no arguments or explanations as to how the City could be held liable under § 1983.[17] (*See* Doc. 93). Looking at the evidence, no reasonable jury could find that Plaintiff was sexually harassed because of a custom or policy of the City.

First, at all times relevant to this case, the City had an anti-sexual harassment policy of which Plaintiff was fully aware. Second, there is no evidence of a practice

[17] Plaintiff's only mention of an indifference standard of liability are two Title VII cases from other circuits that discuss "reckless indifference" in the context of punitive damages awards, not § 1983 claims. (Doc. 93 at 21).

of sexual harassment throughout the City that was so well-settled and widespread that it carried the force of law. *See Griffin*, 261 F.3d at 1308 (finding "without any question that sexual harassment was the on-going, accepted practice at the City and that the City Commission, Mayor, and other high ranking City officials knew of, ignored, and tolerated the harassment."). Last, there is not enough evidence to create an issue of fact on whether the City was deliberately indifferent towards Plaintiff's sexual harassment. As discussed *supra,* there is evidence the City should have known of the harassment Plaintiff was enduring throughout the first twenty months she was in the Revenue office. While it may have been unreasonable for the Revenue office's management team to not take more action to learn of Gilbert's harassment, there is no evidence that Plaintiff's managers were deliberately indifferent toward the harassment she was enduring. Additionally, there is evidence that the City finally gained actual notice of Gilbert's misconduct on December 15, 2017, but did not take reasonably prompt action to correct it thereafter. However, while it might be unreasonable for the City to wait seven weeks to investigate Plaintiff's allegations, fail to credit her investigation testimony, and fail to transfer Gilbert away from her to ensure he did not harass her again, Plaintiff presents no evidence that any of those actions, or inactions, reflected deliberate indifference. Because Plaintiff presents no evidence of deliberate indifference by the City, her § 1983 claim fails. *Avirgan v.*

Hull, 932 F.2d 1572, 1577 (11th Cir. 1991) (a party may not defeat summary judgment by relying on conclusory allegations).

For the reasons stated above, it is **RECOMMENDED** that the City's motion for summary judgment on Plaintiff's § 1983 gender discrimination claim be **GRANTED**.

III. Title VII Retaliation (Count X)

Plaintiff also claims the City unlawfully retaliated against her, in violation of Title VII, by "taking adverse actions against her because she opposed and/or reported Defendant Gilbert's sexual harassing behavior." (Doc. 88 ¶¶ 85-89).

Title VII makes it unlawful for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). A plaintiff alleging a Title VII retaliation claim has the initial burden of establishing a *prima* facie case. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *see also Little v. United Tech., Carrier Transicold Div.*, 103 F.3d 956, 959 (11th Cir. 1997) (citing *Coutu v. Martin Cnty. Bd. of Cnty. Comm'rs*, 47 F.3d 1068, 1074 (11th Cir. 1995)). To demonstrate a *prima facie* case of retaliation in the absence of direct evidence, a plaintiff must show that she (1) engaged in statutorily protected activity; (2) suffered an adverse employment

action; and (3) there is a causal connection between the protected activity and adverse action. *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1021 (11th Cir. 1994). If the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, non-retaliatory basis for the action. *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001). If the defendant does so, then in order to avoid summary judgment, the plaintiff must point to evidence from which reasonable jurors could conclude that the employer's proffered explanations are a pretext for retaliation. *See id*. The ultimate burden of proving pretext remains on the plaintiff. *Id*.

a. Plaintiff's Prima Facie Case

The City concedes that Plaintiff engaged in statutorily protected activity when she told the LRD investigators in February 2017 that Gilbert had been sexually harassing her and that Plaintiff suffered an adverse employment action when she was terminated in November 2017. (Doc. 92 at 25). The City argues that Plaintiff cannot establish a causal connection between the two because of the lack of temporal proximity between those two events. (*Id.* at 25-26).

Plaintiff asserts she engaged in protected activity under Title VII (1) in September 2016 when she alerted Jefferson to Gilbert's "impregnation" comment, (2) on November 14, 2016 when she brought that comment up again in a meeting with Jefferson, (3) in December 2016 when she told Johnson and Beckerman that

Gilbert had been harassing her, (4) in January 2017 when she had a follow-up meeting with Johnson and Beckerman, and (5) on February 1 and 2, 2017 when she interviewed with LRD.[18] (Doc. 93 at 24-25). Plaintiff also asserts that she suffered an adverse employment action as early as the May 16, 2017 oral admonishment she received from Johnson, pursuant to Daniel's order. (*Id*. at 28; Pl. SMF ¶ 76; Pl. Depo., Ex. 8 at 2).

Even taking Plaintiff's arguments regarding her protected activity and the adverse actions against her as true, there is no genuine issue of fact on whether there was a causal connection between her protected activity and the City's adverse actions against her. Three-and-one-half months passed between Plaintiff's latest protected activity, her conversation with the LRD on February 1 and 2, 2017, and the earliest adverse action she faced, the oral admonishment on May 16, 2017. In this circuit, three-and-one-half months is not close enough temporal proximity to create a causal connection between these two events. *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007) (noting that "mere temporal proximity, without more, must be 'very close'" to create an issue of fact regarding a causal

[18] She also asserts she had "multiple meetings with the City's Labor Relations Department in which she discussed Gilbert's misconduct" and the Revenue management team's "retaliatory tactics" from February 2017 through the month she was terminated. (*Id.* at 25). Her cite does not support this statement. (Pl. Depo. at 204). Additionally, the Court "will not consider any fact…set out only in the brief" and not in a numbered statement of additional facts as required by NDGa LR 56.1(B)(1)(d) & (2)(b), such as this one.

connection, and holding that the three months between the protected activity and adverse action in that case was too much time to create an issue of fact regarding causal connection) (citing *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001)). Plaintiff does not present any additional evidence of a causal connection between her alleged protected activity and any adverse action she faced. Therefore, no reasonable jury could conclude the city retaliated against Plaintiff under Title VII.

Defendant offers legitimate, nonretaliatory reasons for the adverse actions taken against Plaintiff (Doc. 92 at 27-28), and Plaintiff argues that they were pretextual. (Doc. 93 at 34-39). However, because Plaintiff could not create an issue of fact on each element of her *prima facie* case, the Court need not address these arguments. The City is entitled to summary judgment on this claim as to each distinct adverse action it took against Plaintiff.

b. <u>Retaliatory Hostile Work Environment</u>

Plaintiff also asserts in her response brief that she was subjected to a retaliatory hostile work environment based on the sum of the disciplinary procedures she faced after she participated in protected activity. (Doc. 93 at 30-31). In a retaliatory hostile work environment claim, a plaintiff must show that: "(1) she engaged in protected activity, (2) after doing so, she was subjected to unwelcome harassment, (3) her protected activity was a "but for" cause of the harassment, and (4) the harassment was sufficiently severe or pervasive to alter the terms of her

employment." *Baroudi v. Secretary, U.S. Dept. of Veterans Affairs*, 616 Fed. App'x. 899, 904 (11th Cir. 2015).

Assuming Plaintiff engaged in protected activity, she does not demonstrate that the disciplinary actions she faced from May 2017 until she was terminated were even arguably severe or pervasive enough to support a retaliatory hostile work environment claim. In evaluating the severity and pervasiveness of actions in a retaliatory hostile work environment claim, the same four factors apply as in a traditional hostile work environment claim: (1) frequency; (2) severity; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the plaintiff's job performance. *Gowski v. Peake*, 682 F.3d 1299, 1312 (11th Cir. 2012). "Discrete acts cannot alone form the *basis* of a hostile work environment claim." *Id.* (internal citations omitted) (emphasis in original). However, "[a] jury could *consider* discrete acts as part of a hostile work environment claim." *Id.* (internal citations omitted) (emphasis in original). Here, Plaintiff's claim is based on nothing but discrete acts of discipline. Furthermore, there are only four discrete acts on which she bases this retaliatory hostile work environment claim: the oral admonishment she received in May 2017, the written reprimand she received in July 2017, her placement on a PIP in August 2017, and her termination in October 2017. Four discrete acts in six months is not frequent enough harassment to support a hostile work environment

claim. Furthermore, there is no evidence that any of the disciplinary actions she faced involved physically threatening or humiliating conduct or that they interfered with her ability to do her job, until she was eventually terminated. The facts here are unlike those in *Gowski* where, over several years, the administration at the hospital where those two plaintiffs worked spread rumors about the plaintiffs, damaged their reputations, and engaged in a "targeted campaign to force them to resign by limiting their privileges and their access to positions within the hospital." *Id.* at 1313-14. There is no evidence of such a pattern of conduct here, so no reasonable jury could conclude that Plaintiff faced severe or pervasive harassment constituting a hostile work environment.

Moreover, Plaintiff cannot create an issue of fact regarding whether her protected activity was the "but for" cause of any of the adverse actions she faced from May 2017 through her termination. The causation element here fails for the same reason that it failed in her *prima facie* case of retaliation. Plaintiff cannot demonstrate temporal proximity between her protected activities and any adverse action she faced or produce any evidence whatsoever of a causal connection between the two. Therefore, the City is entitled to summary judgment on this Title VII retaliation claim to the extent it is based on Plaintiff's retaliatory hostile work environment theory.

For the reasons stated above, it is **RECOMMENDED** that the City's motion for summary judgment on Plaintiff's Title VII retaliation claim be **GRANTED**.

IV. FMLA Interference and Retaliation Claims (Counts VII and VIII)

Plaintiff claims the City *interfered* with her right to take leave under the Family and Medical Leave Act of 1993 ("FMLA") "by terminating [her] employment despite the existence of a valid reason for her alleged work absences and her request for medical leave." (Doc. 88 ¶¶ 66-72). Plaintiff also claims the City *retaliated* against her for taking FMLA leave "by, among other things, terminating Plaintiff's employment despite the existence of a valid reason for her alleged work absences and her request for medical leave." (Doc. 88 ¶¶ 73-79). The Court analyzes each of these in turn.

a. Interference Claim

"To prove FMLA interference, an employee must demonstrate that he was denied a benefit to which he was entitled under the FMLA." *Martin v. Brevard Cnty. Pub. Sch.*, 543 F.3d 1261, 1266-67 (11th Cir. 2008) (citing 29 U.S.C. § 2615(a)(1) and *Strickland v. Water Works and Sewer Bd. of Birmingham*, 239 F.3d 1199, 1206-07 (11th Cir. 2001)). The employee must also demonstrate that he "has been prejudiced by the violation in some way." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89, 122 S.Ct. 1155, 152 L.Ed.2d 167 (2002). "Interfering with the exercise of an employee's 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).

The City argues it is entitled to summary judgment on Plaintiff's interference claim because it presented evidence that it would have terminated Plaintiff even if she had not taken FMLA leave. (Doc. 92 at 32). Plaintiff argues summary judgment should be denied on her interference claim because she was subjected to repeated reprimands and placed on a PIP while she was on intermittent FMLA leave, and because she was terminated "while she was communicating with the Benefits Department" about her need for more leave. (Doc. 93 at 32). Additionally, Plaintiff argues that the City cannot meet its burden of demonstrating that the adverse actions she faced throughout 2017 were "wholly unrelated" to her FMLA leave. (*Id.* at 32 (citing *Strickland*, 239 F.3d at 1208)). The City counters this argument by pointing out that it began implementing its progressive disciplinary procedure against Plaintiff in July 2016, when it issued an oral reprimand to Plaintiff two months before her intermittent FMLA leave term began. (Doc. 105 at 23).

Because the City does not argue that it did not interfere with Plaintiff's rights under the FMLA when it disciplined and terminated her in 2017, the Court will not analyze that issue. Instead, the Court will analyze whether the City can demonstrate that it disciplined and terminated Plaintiff for reasons wholly unrelated to her use of intermittent FMLA leave. "If the employer interfered with the plaintiff's FMLA

rights, the employer can escape liability by showing that it would have interfered with the plaintiff's FMLA rights for reasons unrelated to any FMLA leave." *Jones v. Aaron's Inc.*, 748 Fed. App'x 907, 919 (11th Cir. 2018) (unpublished opinion) (citing *Parris v. Miami Herald Publ'g Co.*, 216 F.3d 1298, 1301 n.1 (11th Cir. 2000)). The City can make this showing, entitling it to summary judgment on this clam.

Felicia Daniel made the decision to terminate Plaintiff. (Pl. SMF ¶ 88; Pl. Depo., Exs. 13, 15). The notice of proposed adverse action Plaintiff received on October 19, 2017 stated that she was being terminated for "[n]egligence in performing assigned duties", failure to carry out supervisor directives, and "other acts of insubordination." (Pl. Depo., Ex. 13). Specifically, Daniel explained that Plaintiff had been placed on a PIP due to her poor performance rating for the 2016-2017 fiscal year, that Plaintiff had not participated in all of the scheduled PIP meetings, and that Plaintiff had continued to fail to meet performance standards and "demonstrated an overall lack of cooperation in working with her supervisor and manager toward improving performance." (*Id.*) The notice of final adverse action given to Plaintiff on November 15, 2017 echoed those reasons and clarified that Plaintiff had failed to carry out the supervisor directives outline in her PIP. (Pl. Depo., Ex. 15).

It is undisputed that the City began disciplining Plaintiff in July 2016, when one of Plaintiff's supervisors at the time issued Plaintiff an oral admonishment for refusing to comply with her instructions. (Def. SMF ¶¶ 66-67; Pl. Depo., Ex. 7). That took place before Plaintiff's leave retroactively began in September 2016. From there, the City followed its progressive disciplinary policy closely (Def. SMF ¶¶ 61-63), giving Plaintiff another oral admonishment in May 2017 for insubordination (Pl. SMF ¶ 76) and a written reprimand in June 2017 for insubordination (*Id.* ¶ 69). The written reprimand documented in detail Plaintiff's alleged pattern of insubordination. (*Id.* ¶ 64; Pl. Depo., Ex. 8). Plaintiff disputes the truth of the facts underlying that document, but she does not dispute that Daniel honestly believed the acts of insubordination described in the written reprimand had taken place when relying on them as a contributing factor in her decision to terminate Plaintiff. Additionally, it is undisputed that Plaintiff's performance dipped in the 2016-2017 fiscal year leading up to her being placed on a PIP. (Pl. Depo., Ex. 11). Furthermore, it is undisputed that Plaintiff did not attend all her PIP meetings. (Pl. SMF ¶ 80; Pl. Depo. at 123). Even still, it is undisputed that her performance did not improve during her PIP because she was not complying with her managers' instructions on how to improve her work. (Beckerman Depo., Ex. 6). That evidence demonstrates that the City's decision to terminate Plaintiff was the culmination of its progressive disciplinary policy, which was implemented against Plaintiff because of disciplinary

and performance issues that unfolded over the year prior to her termination, not Plaintiff's use of FMLA leave. As explained *infra* in the "pretext" discussion of Plaintiff's FMLA retaliation claim, she has not presented evidence sufficient to cause the Court to doubt the City's stated reasons for Plaintiff's discipline and termination. Therefore, the City has met its burden of demonstrating that Plaintiff was terminated for reasons wholly unrelated to her FMLA leave.

For the reasons stated above, it is **RECOMMENDED** that the City's motion for summary judgment on Plaintiff's FMLA interference claim be **GRANTED**.

b. Retaliation Claim

As for Plaintiff's retaliation claim, the FMLA provides that "[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title...." 29 U.S.C. § 2615(a)(2). Where, as here, a plaintiff does not point to direct evidence of an employer's intent, FMLA retaliation claims are governed by the *McDonnell Douglas* burden-shifting framework. See *Morgan v. Orange Cnty., Fla.*, 477 Fed. App'x. 625, 628 (11th Cir. 2012) (citing *McDonnell Douglas Corp.*, 411 U.S. at 802-04). Under the *McDonnell Douglas* analysis, the plaintiff first must establish a prima facie case of retaliation by showing that "(1) he availed himself of a protected right under the FMLA; (2) he suffered an adverse employment decision; and (3) there [was] a causal connection between the protected activity and the adverse employment decision."

Wascura v. City of South Miami, 257 F.3d 1238, 1248 (11th Cir. 2001). "An employee asserting a retaliation claim has the added burden of 'showing that his employer's actions were motivated by an impermissible retaliatory or discriminatory animus.'" *Gutter v. GuideOne Mut. Ins. Co.*, 17 F.Supp.3d 1261, 1272 (N.D. Ga. 2014) (quoting *Martin v. Brevard Cnty. Pub. Sch.*, 543 F.3d 1261, 1267 (11th Cir. 2008)). Finally, "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions[.]" 29 C.F.R. 825.220(c). If the plaintiff

> establishes a prima facie case, the burden then shifts to the employer to rebut the presumption by producing sufficient evidence to raise a genuine issue of fact as to whether the employer retaliated against the employee. This may be done by the employer articulating a legitimate, non-retaliatory reason for the employment decision, which is clear, reasonably specific, and worthy of credence.

Walker v. Elmore Cnty. Bd. of Educ., 223 F.Supp.2d 1255, 1261 (M.D. Ala. 2002) (citing *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817). "If the employer does so, the plaintiff must demonstrate that the employer's proffered reason is a pretext for retaliation." *Morgan*, 477 Fed. App'x. at 628 (citing *Chapman v. AI Transp.*, 229 F.3d 1012, 1024 (11th Cir. 2000) (en banc)).

The City does not appear to dispute that she can establish a *prima facie* case of FMLA retaliation. (*See* Docs. 92, 105). Instead, the City relies on the arguments it made in its discussion of Plaintiff's FMLA interference claim to show that Plaintiff was disciplined and terminated for legitimate, nonretaliatory reasons. (Doc. 92 at

34). Plaintiff attempts to convince the Court that the City's stated reasons for disciplining and terminating her were pretextual. (Doc. 93 at 34-39).

As stated above, the reasons given for Plaintiff's termination were "[n]egligence in performing assigned duties", failure to carry out supervisor directives, and "other acts of insubordination." (Pl. Depo., Ex. 13). Specifically, Plaintiff received a poor performance review in the 2016-2017 fiscal year that led to her being placed on a PIP. (*Id.*). Daniel did not believe Plaintiff was participating enough in her PIP, and noted that Plaintiff continued to fail to meet performance standards and "demonstrated an overall lack of cooperation in working with her supervisor and manager toward improving performance." (*Id.*) The notice of final adverse action given to Plaintiff on November 15, 2017 echoed those reasons and clarified that Plaintiff had failed to carry out the supervisor directives outline in her PIP. (Pl. Depo., Ex. 15). The directives in Plaintiff's PIP included improving her productivity and communicating constructively with management. (Pl. Depo., Ex. 12). Additionally, the reasons for the discipline Plaintiff faced in May and June 2017 were outlined in the written admonishment she received on June 15, 2017. (Pl. Depo., Ex. 8).

Plaintiff does not specifically argue that the reasons for her discipline in May and June 2017 were a pretext for retaliating against her for taking FMLA leave. If she had, such an argument would fail. According to a written admonishment given

to Plaintiff on June 15, 2017, Plaintiff received an oral admonishment on May 16, 2017 for failing to attend a mandatory meeting that had been rescheduled from May 4, 2017 after Plaintiff refused to attend the original meeting. (Pl. Depo., Ex. 8 at 2). She then received a written reprimand documenting the May incident and Plaintiff's pattern of insubordination stretching back to July 2016. (*Id.* at 2-3). This written reprimand was issued by Johnson at the direction of Daniel. (Pl. SMF ¶ 76). Even though Plaintiff disputes some of the underlying factual content of the written reprimand, there is no evidence that Johnson or Daniel, the managers issuing these disciplinary measures, had any reason to believe the facts underlying the reprimands were not true. Therefore, no jury could find that their decision to discipline Plaintiff was a pretext for punishing her for being on FMLA leave.

Plaintiff also cannot create an issue of fact regarding whether the stated reasons for her termination were pretextual. Plaintiff's first argument that the City's reason for her termination was pretextual is that there is "substantial evidence that the City's contention that [Plaintiff's] performance was suffering is nonsense." (Doc. 93 at 35). Plaintiff points to evidence that her performance prior to her application for FMLA leave in November 2017 was celebrated. Specifically, Plaintiff was promoted in March 2016. (Pl. SMF ¶¶ 3-4). Additionally, she received a generally positive rating in her performance review for the 2015-2016 fiscal year, which ended on June 30, 2016. (*Id.* ¶ 5; Pl. Depo., Ex. 9). In her deposition testimony, Daniel

agreed with the positive comments in Plaintiff's performance review for the 2015-2016 fiscal year. (Daniel Depo. at 48-49). There is also evidence that, up until her termination, Plaintiff was still representing the Revenue office on a project for the Mayor's office and interacting with startup companies who sought guidance in filling out business license forms with the City. (Pl. Depo. at 87). Plaintiff argues that a reasonable jury could conclude from this evidence that her job performance had not declined in the time between her taking FMLA leave and her termination. The Court disagrees. Plaintiff's promotion in March 2016 and generally positive performance review for the 2015-2016 fiscal year does not negate the evidence that her performance in the 2016-2017 fiscal year had declined, causing her performance rating for that year to drop to "needs improvement." (Winfield Depo., Ex. 12). Plaintiff's performance issues are well-documented and supported by explanations in her 2016-2017 review. (*Id.*). That her performance was praised more than a year prior to her placement on a PIP does not mean her performance could not have declined over the next twelve months. Plaintiff argues that the alleged decline in performance could have been the result of Gilbert submitting incorrect work under her name in the months following her participation in the LRD investigation. (Pl. SMF ¶ 75; Pl. Depo. at 96, 115-17). Assuming this is true, there is no evidence that the person rating Plaintiff's performance, Winfield (Winfield Depo., Ex. 12), or the person making the ultimate decision to terminate Plaintiff, Daniel, had knowledge

of Gilbert submitting incorrect work under Plaintiff's name. Thus, Plaintiff cannot create an issue of fact regarding Winfield or Daniel's honest beliefs that her performance leading up to her placement on a PIP had declined. Additionally, the fact that Plaintiff was still performing her job duties until her termination, by continuing to work on a project for the Mayor's office and helping small businesses fill out business license forms, does not negate that she could have been doing her job poorly. Therefore, no jury could conclude from these facts that the City's assertion regarding her declining performance was pretextual.

Plaintiff also argues that the City's assertion that she was terminated for a failure to participate in her PIP process was "bogus." (Doc. 93 at 37). Plaintiff presents evidence that she attended three of her PIP meetings, not one, as the City asserts. (Pl. SMF ¶ 80). While that may be true, it does not negate that she missed multiple PIP meetings. She also presents evidence that she missed one of her PIP meetings because she was on jury duty. (*Id.* ¶ 83). However, Plaintiff also testified that meeting was rescheduled to October to accommodate her. (Pl. Depo. at 111-12). Moreover, Plaintiff presents evidence that Gilbert, her alleged harasser, was at two of her PIP meetings. (Pl. SMF ¶ 81). However, she does not present evidence that Gilbert was going to be at the meetings she failed to attend or that his presence was the reason she missed meetings. Finally, Plaintiff claims that her union representative, whose presence Plaintiff desired at these meetings, could not always

attend the scheduled meetings. (Beckerman Depo. at 22, 83-84). However, the deposition testimony to which Plaintiff cites does not support her assertion that her union representative was missing Plaintiff's *PIP meetings*. Beckerman testified that she and the Revenue management team had difficulty scheduling meetings in December 2016 and June and July 2017. (*Id.*). Plaintiff's PIP meetings occurred in September and October 2017. Therefore, Plaintiff's evidence does not create an issue of fact regarding whether the City's stated reason for her termination, her lack of participation in her PIP, was pretextual.

Even if Plaintiff's evidence did create an issue of fact as to whether she was terminated for failing to attend her PIP meetings, she cannot create an issue of fact regarding the other stated reasons for her termination. She does not produce any evidence to show that her performance improved during her PIP. In fact, there is evidence that Plaintiff was not following directives given to her by supervisors during her PIP meetings in an effort to improve her performance and was insubordinate during the final PIP meeting she attended. (Beckerman Depo., Ex. 6).

Plaintiff also points to evidence that Daniel transferred or terminated other employees that took FMLA leave as evidence that her own termination was pretext for retaliation. (Doc. 93 at 37-38). There is evidence that Geraldine Williams was transferred from the Revenue team more than two years after she took FMLA leave to recover from surgery on her toe. (Geraldine Williams Depo. at 28). Geraldine

Williams's adverse action took place too long after her FMLA leave to establish a causal connection between the two. There is also evidence that Tamara Williams was terminated by Daniel while on FMLA leave. (Tamara Williams Depo. at 19-22). However, there is no evidence as to when this happened, but there is evidence that Tamara had also received a poor performance evaluation right before she went out on leave. (*Id.* at 21). Therefore, no reasonable jury could conclude, based on this evidence, that the City's reasons for terminating Plaintiff were pretextual.

Finally, Plaintiff states that Gilbert's continued supervision over her after she made sexual harassment allegations against him could help create an issue of fact regarding whether the City's reasons for terminating her were pretextual. (Doc. 93 at 38-39). There is no connection between Plaintiff's FMLA leave and Gilbert's continued supervisory role over her. Even though Gilbert was present for two of Plaintiff's PIP meetings (Pl. SMF ¶ 81) and remained one of Plaintiff's supervisors until her termination (*Id.* ¶ 90), there is no evidence that he played a part in any decision to discipline her.

Plaintiff cannot create an issue of fact regarding whether any of the articulated legitimate, nonretaliatory reasons for her discipline and termination in 2017 were a pretext for retaliating against her for taking FMLA leave. Therefore, the City is entitled to summary judgment on her FMLA retaliation claim.

For the reasons stated above, it is **RECOMMENDED** that the City's motion for summary judgment on Plaintiff's FMLA retaliation claim be **GRANTED**.

V. State Law Claims

"[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). This Court has original jurisdiction over Plaintiff's Title VII hostile work environment claim, because it arises from federal law. 28 U.S.C. § 1331. Plaintiff's negligence claim under Georgia law below is so related to Plaintiff's hostile work environment claim that they form part of the same case or controversy, because it is based on the same facts. Therefore, this Court has supplemental jurisdiction over Plaintiff's negligence claim. The Court analyzes the City's motion on that claim below.

a. Negligent Hiring, Retention and Supervision (Count IV)

Plaintiff claims the City breached its duty to exercise reasonable caution when hiring Gilbert so as to avoid hiring a man who could "be reasonably foreseen to sexually harass, assault, or otherwise endanger female employees" by "failing to perform reasonable pre-employment investigation and inquiry concerning Defendant Gilbert, and by otherwise failing to exercise reasonable caution and

diligence when hiring him." (Doc. 88 ¶¶ 57-58). Additionally, Plaintiff claims the City breached its continuing duty to exercise reasonable care in "retaining, supervising, and training Defendant Gilbert to avoid reasonably foreseeable conduct amounting to sexual harassment" by "failing to intercede despite actual and/or constructive knowledge making it reasonably foreseeable" that Gilbert would sexually harass female employees. (*Id.* ¶¶ 60-61). The City moves for summary judgment on this claim. (Doc. 92 at 28).

"A claim for negligent hiring, retention or supervision brought pursuant to Georgia law arises when an employer negligently hires, retains or supervises an employee and that employee subsequently harms the plaintiff." *Farrell v. Time Serv., Inc.*, 178 F. Supp. 2d 1295, 1300 (N.D. Ga. April 3, 2001) (internal quotations omitted). "To establish a negligent retention or supervision claim, the plaintiff must show that the employer knew or should have known it was 'foreseeable from the employee's tendencies or propensities that the employee could cause the type of harm sustained by the plaintiff.'" *Dehaan v. Urology Center of Columbus, LLC*, No. 4:12–CV–06 (CDL), 2012 WL 1300554, at *2 (M.D. Ga. Apr. 16, 2012) (quoting *Drury v. Harris Ventures, Inc.*, 302 Ga.App. 545, 548, 691 S.E.2d 356, 359 (Ga. Ct. App. 2010) (internal quotation marks omitted)). "A claim of negligent retention[, supervision, or hiring] is derivative of an underlying tort claim." *Canty v. Fry's Electronics, Inc.*, 736 F. Supp. 2d 1352, 1379 (N.D. Ga. Sept. 1, 2010).

Plaintiff's negligent hiring, retention, and supervision claim cannot survive summary judgment, because it is a derivative claim which depends on the existence of a viable underlying state tort claim. *See Jones v. Nippon Cargo Airlines Co., Ltd.*, No. 1:17-CV-TWT-JKL, 2018 WL 1077355, at *13 (N.D. Ga. Jan. 12, 2018) ("[T]here must also be an underlying state law tort alleged that forms the basis of the injury against the plaintiff, because negligent retention is a 'derivative' claim that can only survive to the extent that the underlying state tort claim survives.") (citing *Metro. Atlanta Rapid Transit Auth. v. Mosley*, 280 Ga. App. 486, 489 (2006) and *Phinazee v. Interstate Nationalease*, 237 Ga. App. 39, 41 (1999)), *adopted by* 2018 WL 1071166 (N.D. Ga. Feb. 27, 2018). "Title VII claims for sexual harassment and/or retaliation will generally not support a claim under Georgia law for negligent supervision and retention." *Id.* (citing *Canty*, 736 F. Supp. 2d at 1379 ("There is no distinct tort in Georgia law for harassment, retaliation, or discrimination."), and *Orquiola v. Nat'l City Mortg.*, 510 F. Supp. 2d 1134, 1140 (N.D. Ga. Jan. 16, 2007) ("Like there is no distinct tort in Georgia law for 'sexual harassment,' there is no separate tort under Georgia law for 'retaliation.' Georgia courts have described negligent retention as a 'derivative' claim thus requiring an underlying tort of which Plaintiff has none in state law."); *see also Griffith v. Exel, Inc.*, No. 1:14-CV-1754-ODE-JSA, 2016 WL 8938585, at *31-32 (N.D. Ga. Feb. 5, 2016) (granting summary judgment for defendant employer on plaintiff's Georgia negligent retention and

supervision claim because there was no underlying state law tort and the Court would not allow it to be derived from a Title VII retaliation claim), *adopted by* 2016 WL 8938512 (N.D. Ga. Mar. 25, 2016). Plaintiff does plead claims of battery and assault under Georgia law against Gilbert. (Doc. 88 ¶¶ 48-55). However, she does not argue that these claims are the basis of her negligent hiring, retention, and supervision claim. (*See* Doc. 93). Therefore, there is no genuine issue of material fact regarding whether the City was negligent in hiring, retaining, or supervising Gilbert under Georgia law.

For the reasons stated above, it is **RECOMMENDED** that the City's motion for summary judgment on Plaintiff's negligent hiring, retention, and supervision claim be **GRANTED**.

b. <u>Attorneys' Fees and Expenses of Litigation (Count VI)</u>

Finally, Plaintiff claims she is entitled to expenses of this litigation and attorneys' fees from the City, pursuant to Georgia law, including but not limited to O.C.G.A. § 13-6-11, because the City has "acted in bad faith, been stubbornly litigious, and/or caused Plaintiff unnecessary trouble and expense in litigating this case…." (Doc. 88 ¶ 65). Defendant moves for summary judgment on this claim. (Doc. 92 at 31-32).

"Section 13-6-11 allows a plaintiff to recover his litigation expenses 'where the plaintiff has specially pleaded and has made prayer therefor and where the

defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense.'" *Clarke v. Fid. Bank,* No. 1:14-CV-3287-AT-ECS, 2015 WL 11549240, at *5, (N.D. Ga. June 4, 2015) (quoting O.C.G.A. § 13-6-11). Plaintiff does not point to any facts in the record to demonstrate how the City has acted in bad faith in litigating this case. (*See* Doc. 93 at 39-40). The record contains no such facts. *Lewis v. D. Hays Trucking, Inc.*, 701 F. Supp. 2d 1300, 1313 (N.D. Ga. Mar. 22, 2010) (explaining that "[b]ad faith requires more than 'bad judgment' or 'negligence' "); *David G. Brown, P.E., Inc. v. Kent*, 274 Ga. 849, 561 S.E.2d 89, 90-91 (Ga. 2002) (holding that an award of attorney's fees and expenses is warranted where "there exists no bona fide controversy or dispute regarding liability for the underlying cause of action"). As a result, Plaintiff has failed to create an issue of fact on this claim.

For the reasons above, it is **RECOMMENDED** that the City's motion for summary judgment on Plaintiff's claim for attorneys' fees and expenses of litigation be **GRANTED**.

SUMMARY

It is **RECOMMENDED** that the City's motion for summary judgment be **DENIED** as to Plaintiff's Title VII hostile work environment claim; **GRANTED** as to her § 1983 gender discrimination claim; **GRANTED** as to her Title VII retaliation claim; **GRANTED** as to her FMLA interference claim; **GRANTED** as to her FMLA

retaliation claim; **GRANTED** as to her negligent hiring, retention, and supervision claim under Georgia law; and **GRANTED** as to her claim for attorneys' fees and expenses of litigation under Georgia law.

IT IS SO REPORTED AND RECOMMENDED this 4th day of February, 2020.

/s/ J. Clay Fuller
J. Clay Fuller
United States Magistrate Judge