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

MARGARET RICHARDSON, Plaintiff, v. MARIETTA FIRE DEPARTMENT, et al., Defendants.	CIVIL CASE NO. 1:17-CV-0223-LMM-LTW

MAGISTRATE JUDGE'S FINAL ORDER AND REPORT AND RECOMMENDATION

Pending before the Court is Defendants City of Marietta, Georgia and Marietta Fire Department's Motion for Summary Judgment. (Doc. 24). For the reasons outlined below, Defendants' Motion for Summary Judgment should be **GRANTED IN PART AND DENIED IN PART**. (Doc. 24).

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On January 19, 2017, Plaintiff Margaret Richardson ("Plaintiff") filed the instant lawsuit alleging Defendants City of Marietta, Georgia ("the City") and Marietta Fire Department ("MFD") (collectively "Defendants") discriminated against her on the basis of her gender when they subjected her to hostile work environment, gave credit for her award-winning grant work to her male colleague, denied her requests for training, and refused to promote her in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. ("Title VII"). (Compl. ¶¶ 25, 31, 35). Plaintiff also

contends that Defendants retaliated against her by threatening her, denying her training requests, denying her promotions, and giving credit for her award-winning grant work to a male colleague in violation of Title VII. (Compl. ¶ 35).

In Defendants' Motion for Summary Judgment, Defendants contend that summary judgment should be granted as to (1) all of Plaintiff's claims against Marietta Fire Department because it is not an entity capable of being sued; (2) all of Plaintiff's claims occurring before July 30, 2014, because they are time-barred; (3) claims occurring after Plaintiff filed a charge of discrimination ("EEOC Charge") with the Equal Employment Opportunity Commission ("EEOC") on January 26, 2015, such as several promotion decisions that occurred from June 2015 through January 2017 and several decisions to deny her requests for training between April 2015 and May 2016, because Plaintiff failed to exhaust her administrative remedies as to them; (4) Plaintiff's hostile work environment claim because she failed to exhaust her administrative remedies, she failed to show that Defendants subjected her to severe or pervasive harassment, and the City acted reasonably and promptly to cure harassment once harassment allegations were called to its attention; (5) Plaintiff's gender discrimination claims concerning her transfer to another division in 2009, her non-selection for a non-monetary award for her work on a grant project in 2011, the failure to promote her to commander in 2012, 2015, and 2017, and the denial of her requests for training in 2015 and 2016 because Defendants have articulated legitimate, non-discriminatory reasons for their employment decisions and Plaintiff cannot show that the reasons were pretextual; (6) Plaintiff's

claims concerning her transfer in 2009 and the failure to recommend her for an award because she cannot show they were adverse employment actions; (7) Plaintiff's gender discrimination claim concerning Defendants' failure to select her for a promotion in July 2015, because the selectee was a female; (8) all of Plaintiff's promotion claims because she cannot show that she was equally or more qualified than all of the selected candidates; (9) the denial of her requests for training because she cannot show that similarly-situated male employees were treated more favorably; (10) Plaintiff's retaliation claim relating to her transfer to the Training Division in 2009 because the transfer was not an adverse employment action, she did not engage in protected activity prior to the transfer, and she cannot demonstrate a causal connection between the alleged protected activity and her transfer; (11) the remainder of Plaintiff's retaliation claims because she cannot demonstrate a causal connection between her protected activity and the adverse employment actions the City took against her; (12) all of Plaintiff's retaliation claims because she cannot show that a retaliatory motive was the but-for causation of each of the challenged employment actions; and (13) Plaintiff's punitive damages request because government agencies cannot be liable for punitive damages.

FACTUAL BACKGROUND[1]

[1] All facts taken directly from Defendant's Statement of Material Facts (hereinafter "DSUF") remain undisputed. This Court must accept as admitted those facts in the moving party's statement that have not been specifically controverted with citation to the relevant portions of the record by the opposing party. LR 56.1B.2(2), (3), NDGa. Subjective perceptions, conclusory allegations, or allegations that are

The City hired Plaintiff as a firefighter for the MFD on February 17, 1997. (DSUF ¶ 1). Jackie Gibbs became fire chief for the MFD on December 12, 1999. (DSUF ¶ 2). In 2002, Chief Gibbs promoted Plaintiff to firefighter engineer, and in 2007, to fire lieutenant medic. (DSUF ¶¶ 3-4). Plaintiff retired from MFD effective March 1, 2017. (DSUF ¶ 85).

I. Plaintiff Complains to Chief Gibbs About Assistant Chief Bishop

On February 13, 2009, Plaintiff complained in writing to Chief Gibbs that her supervisor at that time, Assistant Chief Thomas Bishop, had repeatedly communicated to her and others in an aggressive and contentious matter and had acted unprofessional with her during a fire call earlier that day. (DSUF ¶ 5). Plaintiff states that after the incident, Chief Gibbs asked her and Assistant Chief Bishop whether they could continue to work together for the rest of the shift.[2] (Pl.'s Decl. ¶ 15). Plaintiff responded that she

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otherwise unsupported by record evidence do not create genuine issues of material fact in order to withstand summary judgment. See Chapman v. AI Transp., 229 F.3d 1012, 1051 n.34 (11th Cir. 2000) (en banc); Holifield v. Reno, 115 F.3d 1555, 1564 n.6 (11th Cir. 1997); Carter v. City of Miami, 870 F.2d 578, 585 (11th Cir. 1989). Thus, this Court will not consider any fact (1) not supported by citation to evidence (including a page or paragraph number); or (2) stated as an issue or legal conclusion. Additionally, this Court will assess any objections to the admissibility of any evidence presented through declarations as part of its assessment of Defendant's Motion for Summary Judgment. The Court will then rule on the evidence implicitly or explicitly in the consideration of the motion. See Linscheid v. Natus Med. Inc., No. 3:12-CV-67-TCB, 2015 WL 1470122, at *1 (N.D. Ga. Mar. 30, 2015) (considering objections when the challenged evidence became relevant to the decision on the motion); Smith v. Se. Stages, Inc., 479 F. Supp. 593, 594-95 (N.D. Ga. 1977).

[2] Plaintiff cites to her Declaration in support of her statement. Defendant argues that the Court should not consider Plaintiff's Declaration because she filed it one day late. (Doc. 35). Defendant does not demonstrate any real prejudice by Plaintiff's

was a professional and that she could continue to work with Assistant Chief Bishop, but Assistant Chief Bishop indicated that he could not. (Pl.'s Decl. ¶ 15). At no point did Plaintiff allege Bishop was discriminating against her or harassing her because of her sex. (DSUF ¶¶ 6, 10; Pl.'s Dep. 55-56).

The MFD conducted an investigation into the incident and interviewed Plaintiff and Assistant Chief Bishop. (Decl. of Chief Jackie Gibbs, hereinafter "Gibbs Decl.," ¶ 7). MFD also interviewed and collected statements from others Plaintiff identified as having knowledge of the incident. (Gibbs. Decl. ¶ 7, Exs. G-K; Pl.'s Dep. 66). According to Gibbs, no one substantiated Plaintiff's allegation that Assistant Chief Bishop treated her in an unprofessional manner and in fact, some witnesses stated that Plaintiff yelled at Bishop. (Gibbs Decl. ¶ 8). Plaintiff testified that the investigation was not handled in a professional manner because the investigation was not kept confidential, Chief Gibbs only spoke with one person who was on her crew, and then spoke to others who were not assigned to her crew. (Pl.'s Dep. 59). Plaintiff maintains that Chief Gibbs did not talk to anyone who was within earshot of the incident. (Pl.'s Decl. ¶ 19).

On March 15, 2009, Chief Gibbs informed Plaintiff that the investigation could not corroborate her complaint of unprofessionalism against Assistant Chief Bishop. (DSUF ¶ 15; Gibbs Decl. ¶ 8). Chief Gibbs subsequently transferred Plaintiff to the

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tardiness, as Plaintiff filed the Declaration well before Defendant's Reply was due. Accordingly, the Court will consider Plaintiff's Declaration.

Training Division in March 2009. (Gibbs Decl.¶ 9). Chief Gibbs stated that he transferred Plaintiff because she previously requested a transfer in fall of 2008 and because she did not want to work with Assistant Chief Bishop anymore. (Gibbs Decl. ¶ 9; Pl.'s Dep. 76-77 (admitting that Plaintiff requested a transfer away from Assistant Chief Bishop six months before)). Plaintiff testified that she was pleased that she was transferred to the Training Division. (Pl.'s Dep. 76). There was no change in Plaintiff's salary, benefits, or pay grade.[3] (DSUF ¶ 20).

According to Plaintiff, sometime in 2008, Assistant Chief Bishop gave her an apron with a shirtless fireman on it as a gift. (DSUF ¶ 28). Plaintiff did not mention the gift during her February 13, 2009 discussion with Chief Gibbs or with anyone else at the

[3] As a preliminary matter, as Defendants point out, Plaintiff opposes many of the facts in Defendants' Statement of Undisputed Facts by making contrary statements without providing evidence which supports her statements. As noted above, Plaintiff's allegations that are otherwise unsupported by record evidence do not create genuine issues of material fact in order to withstand summary judgment. See Chapman, 229 F.3d at 1051 n.34; Holifield, 115 F.3d at 1564 n.6; Carter, 870 F.2d at 585. Additionally, Plaintiff cannot use her response to Defendants' Statement of Undisputed Facts as an opportunity to argue additional facts which are not related to the facts in Defendants' Statement of Undisputed Facts. The Local Rules of this Court allow Plaintiff the opportunity to submit her own statement of facts in support of her opposition to Defendants' Motion, but Plaintiff has not prepared such a statement. LR 56.1B(2)(b), NDGa. In response to fact number 20 in Defendants' Statement of Undisputed Facts, Plaintiff argues the new position (in the Training Division) resulted in a change in her responsibilities because she was removed from her former supervisory role, her ability to lead was questioned, and she no longer handled incidents in the field. (Pl.'s Resp. to DSUF ¶ 20). Plaintiff's citation for this proposition, however, does not support her assertion. As discussed above, this Court will not consider any fact not supported by citation to evidence (including a page or paragraph number). Because Plaintiff failed to support her factual allegations with evidence, many of Plaintiff's factual allegations have not been considered.

City. (DSUF ¶ 30). Assistant Chief Bishop retired on May 30, 2009. (DSUF ¶ 21).

II. Plaintiff Complains to Human Resources Regarding Instances of Sexually Harassing Behavior in the Fire Department

On March 23, 2009, Plaintiff complained to Miriam Corbin, an Employment Manager with the Human Resources Department, that some incidents of sexual harassment had occurred within the MFD. (Decl. of Miriam Corbin, hereinafter "Corbin Decl.," ¶¶ 2, 3). Specifically, Plaintiff alleged that (1) a male employee drew on a female employee's underwear with a red magic marker to depict blood in 2001; (2) a young woman was seduced by the former Assistant Chief; and (3) Chief Gibbs did not like women and used the term "lesbian" in her presence. (Corbin Decl. ¶ 3; Pl.'s Dep. 89, 255). Plaintiff states that in March of 2009, she had attended a women's conference and purchased a bumper sticker which said, "My other vehicle is a fire truck." (Pl.'s Dep. 96). According to Plaintiff, Gibbs asked her where she bought the bumper sticker, and Plaintiff answered that she purchased it at a gay and lesbian bookstore at the women's firefighter conference. (Pl.'s Dep. 96). Plaintiff testified that Chief Gibbs responded, "Imagine that. A female firefighter lesbian."[4] (Pl.'s Dep. 96). Corbin investigated Plaintiff's allegations and learned that (1) the MFD investigated the incident regarding the female employee's underwear back in 2001 and took appropriate corrective action; (2) that the former Assistant Chief who Plaintiff accused of seducing

[4] Plaintiff also states that after she purchased a Subaru in 2013 or 2014, Chief Gibbs also referred to her as "having some diesel in [her]" and asked her, "Don't you have to be a lesbian to drive a Subaru?" (Pl.'s Dep. 96).

a young woman was deceased; and (3) there was no evidence to support Plaintiff's conclusory assertion that Chief Gibbs said inappropriate words to her. (Corbin Decl. ¶ 7).

III. Plaintiff Spearheaded a Successful Grant Project

In January 2011, Fire Marshal Scott Tucker assigned Plaintiff to write a grant while she was placed on light duty. (DSUF ¶ 31). Plaintiff researched and wrote the grant, and after it was awarded, she managed the grant project for most of 2011. (DSUF ¶ 32; Pl.'s Decl. ¶ 24). Fire Marshal Tucker states that he became concerned towards the end of 2011 that Plaintiff would not be able to manage the project once she returned to full-duty service. (Decl. of Scott Tucker, hereinafter "Tucker Decl.," ¶ 3). Tucker states that as a result, he assigned Lieutenant Patrick Stewart to assist Plaintiff in managing the grant project. (Tucker Decl. ¶ 3). According to Tucker, Plaintiff was involved in the grant project until its completion in May 2012 even after she was placed back on full-duty service. (Tucker Decl. ¶ 3). Plaintiff states that because the grant had strict rules, she continued to manage the program even after Stewart advised her that Tucker told him to take over the project. (Pl.'s Decl. ¶ 25). In Spring 2013, Assistant Chief Chris Whitmire recommended Lieutenant Stewart for an award at the Cobb Leadership Conference due to all of his achievements. (Decl. of Chris Whitmire, hereinafter "Whitmire Decl.," ¶ 7). According to Chief Gibbs, Stewart's work on the grant was part of the reason he was nominated for the award, but that the award was for Stewart's performance in the fire department. (Gibbs Dep. 80).

IV. Chief Gibbs Selects Others to Fill Commander Positions between January 2015 and January 2017 and Plaintiff Files an EEOC Charge

On November 10, 2014, Chief Gibbs informed MFD personnel that all individuals holding the rank of lieutenant for a minimum of one year as of December 8, 2014, were eligible to apply for the position of Commander. (DSUF ¶ 39). The position of commander is a senior level position which reports directly to the Assistant Fire Chief. (DSUF ¶ 40). A Commander was required to have, among other qualities, maturity, high-level decisionmaking skills, and the ability to learn, interpret, and implement all related City and MFD policies and procedures. (DSUF ¶ 41). The final decisionmaker for the Commander position was Chief Gibbs. (DSUF ¶ 42). Twelve candidates, two females and ten males, submitted promotional packets expressing their interest in the position. (DSUF ¶ 43). Chief Gibbs, Deputy Chief Danny Rackley, Assistant Chief J.D. Hill, and Commander Brinson Williams interviewed all twelve candidates using the same questions. (DSUF ¶ 44). Assistant Chief Hill and Commander Williams each ranked their top five candidates and they both ranked Lieutenant Walter McDaniel as either their first or second choice due to his thirty-one years of experience with the MFD and his expansive institutional knowledge. (DSUF ¶ 45). Gibbs selected Lieutenant McDaniel for the Commander position, effective January 25, 2015.[5] (DSUF ¶ 46).

On November 25, 2014, Plaintiff submitted a letter to the EEOC. (Pl.'s Dep. 312,

[5] Plaintiff states in response to Defendant's Statement of Undisputed Facts No. 45 that Chief Gibbs asked McDaniel to apply even though McDaniel did not want the job, but does not cite evidence in support of this proposition.

Def.'s Ex. 37). In the letter, Plaintiff stated that Chief Gibbs created a hostile work environment by referring to female firefighters as lesbians and engaging in extreme aggression and threats. (Id.). Plaintiff also stated that anyone making a complaint to the personnel director, would see a sudden and violent stop to the progression of his or her career. (Id.). On January 26, 2015, Plaintiff filed an EEOC Charge. (Pl.'s Dep., Def.'s Ex. 39). Therein, Plaintiff alleged that the MFD discriminated against her on the basis of her sex and retaliated against her when she was not selected for the available Commander position in January, 2015. (Id.). Plaintiff again noted that during her tenure, she was subjected to derogatory and sex stereotyping comments by Chief Gibbs, such as referring to female firefighters as lesbians and referring to her internal complaint as being a "hysterical outburst." (Id.). Plaintiff did not file any other EEOC charges against the City. (DSUF ¶ 91).

Another Commander position became available in summer 2015, and Chief Gibbs used the same list of ranked applicants from the 2014 opening. (DSUF ¶ 49). Lieutenant Christi Cronin was promoted to the position effective June 28, 2015. (DSUF ¶ 51). Plaintiff, without explanation, states in her Declaration that Cronin was unqualified, but was a friend of Fire Chief Gibbs. (Pl.'s Decl. ¶ 38). Plaintiff did not file a charge of discrimination with the EEOC concerning this promotion selection. (DSUF ¶ 52).

On September 15, 2016, Chief Gibbs announced the initiation of procedures for the MFD to identify qualified candidates for a Commander position. (DSUF ¶ 53).

Plaintiff and eleven other candidates submitted promotional packets expressing interest in the position. (DSUF ¶ 54). Chief Gibbs, Deputy Chief Danny Rackley, Assistant Chief Chris Whitmire, and Commander Cronin interviewed all of the candidates using the same interview questions. (DSUF ¶ 55; Gibbs Decl. ¶ 14). After interviewing the candidates and reviewing their promotional packets, Assistant Chief Whitmire and Commander Cronin ranked Lieutenant Jeff Guest as their top choice due to his extensive leadership skills and training.[6] (Gibbs Decl. ¶ 14; Whitmire Decl. ¶ 3; Decl. of Christi Cronin, hereinafter "Cronin Decl.," ¶ 5). After consulting with Rackley, Whitmire, and Cronin, Chief Gibbs selected Guest for the position, effective January 8, 2017. (DSUF ¶ 57). Chief Gibbs indicated that the candidates were assessed based on their resume, the packages they submitted, their training, and their work record. (Gibbs Dep. 66). Gibbs states that Guest was selected because he was a great employee, he had done a lot of training, his "education is great," and he was very well respected by his peers and subordinates. (Gibbs Dep. 67). Plaintiff did not file a charge of discrimination with regard to the January 2017 promotional decision. (DSUF ¶ 58). Plaintiff also applied for a Commander position on February 17, 2012, but was not selected. (DSUF ¶ 61).

[6] Plaintiff states in response to DSUF ¶ 56 that she was more qualified, had more experience, and had more seniority than Guest, but does not cite to a portion of the record which supports her assertion. Although Plaintiff asserts she was more qualified than Guest in her Declaration, the Court notes that Plaintiff's assertions are far too conclusory to meet her burden of raising a genuine issue of material fact. Matthews v. City of Mobile, 702 F. App'x 960, 965 (11th Cir. 2017); Thomas v. Moody, 653 F. App'x 667,673 (11th Cir. 2016) (explaining that mere conclusions and unsupported factual allegations are not sufficient to create a genuine issue of material fact).

Plaintiff did not file an EEOC charge with regard to the MFD's failure to select her for the 2012 position. (DSUF ¶ 63).

V. Supervisors Denied Plaintiff's Requests for Training Between 2015 Through 2016

MFD supervisors have discretion to grant employee requests for training. (DSUF ¶ 67). It is within MFD supervisors' discretion to deny employee requests for training for various reasons, including budget or staffing issues. (DSUF ¶ 67). Plaintiff requested to attend a Managing Officer Training Program, a year-long program that met four times per year, starting on April 1, 2015. (Pl.'s Dep. 223). Plaintiff's request was denied due to staffing concerns.[7] (Whitmire Decl. ¶ 5). No other lieutenant was permitted to attend. (Whitmire Decl. ¶ 5).

In August 2015, Plaintiff requested permission to attend a three-day Georgia Highway Safety Task Force conference in Savannah, Georgia. (DSUF ¶ 71). Plaintiff's request was denied for budgetary reasons. (DSUF ¶ 72). Commander Whitmire, as a member of the MFD command staff, attended the conference. (DSUF ¶ 73). Plaintiff admits that she was unaware of any lieutenants who were authorized to attend the conference. (DSUF ¶ 74).

In December 2015, Plaintiff requested that the MFD pay tuition expenses so she could attend a Fire Officer III class. (DSUF ¶ 75). On December 28, 2015, Kelly Caldwell, the Chief of Training, denied Plaintiff's request for tuition expenses because

[7] Plaintiff indicates that Chief Whitmire did not give a reason for the denial of her request, but does not provide a citation to evidence supporting her assertion.

the funds were not in the budget. (DSUF ¶ 76). Nevertheless, Plaintiff attended the Fire Officer III course, and submitted a request for reimbursement of the costs of her attendance. (DSUF ¶ 77). Plaintiff's request for reimbursement was denied because the funds were not in the budget. (DSUF ¶ 78). Plaintiff admitted that she was the only MFD employee who attended the Fire Officer III course. (DSUF ¶ 79). Plaintiff was also denied reimbursement for attendance at a Fire Officer IV class, because the money was not in the budget. (DSUF ¶ 78).

In addition, Plaintiff requested permission to attend a Peachtree City Fire-Rescue Leadership Conference that met for one day on May 11, 2016. (DSUF ¶ 80). Plaintiff's request was denied due to manpower. (DSUF ¶ 81). Plaintiff admits that she was unaware of any other employee of the MFD who attended the conference. (DSUF ¶ 82).

LEGAL ANALYSIS

I. Summary Judgment Standard

Summary judgment is appropriate when "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). The movant bears the initial responsibility of asserting the basis for her motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Apcoa, Inc. v. Fid. Nat'l Bank, 906 F.2d 610, 611 (11th Cir. 1990). The movant is not required, however, to negate her opponent's claim; the movant may discharge her burden by merely "'showing'-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325. After the

movant has carried her burden, the non-moving party is then required to "go beyond the pleadings" and present competent evidence designating specific facts showing that there is a genuine disputed issue for trial; the non-moving party may meet its burden through affidavit and deposition testimony, answers to interrogatories, and the like. Id. at 324 (quoting Fed. R. Civ. P. 56(e)).

While the court is to view all evidence and factual inferences in a light most favorable to the non-moving party, Nat'l Parks Conservation Ass'n v. Norton, 324 F.3d 1229, 1236 (11th Cir. 2003), "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original). A fact is material when it is identified as such by the controlling substantive law. Id. at 248. Moreover, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citations omitted). An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." Anderson, 477 U.S. at 249-50. Thus, the Federal Rules mandate the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of *every* element essential to that party's case on which that party will bear

the burden of proof at trial. Celotex, 477 U.S. at 322.

II. The MFD Is Not an Entity Capable of Being Sued

Defendants first contend that the MFD should be dismissed because it is not a legal entity capable of being sued. Plaintiff does not respond to Defendants' argument.[8] Accordingly, Plaintiff has abandoned her claims against the MFD. When a party fails to respond to an argument or otherwise address a claim before the district court, the district court may properly deem the claim abandoned. Jones v. Bank of Am., N.A., 564 F. App'x 432, 434 (11th Cir. 2014); see also Clark v. City of Atlanta, 544 F. App'x 848, 854-55 (11th Cir. 2013) (agreeing with the district court's determination that plaintiffs' failure to respond to defendants' summary judgment arguments with respect to excessive force and state law claims meant that the plaintiffs abandoned their claims); Brooks v. Branch Banking and Trust Co., No. 1:15-CV-00186-SCJ, 2015 WL 3478169, at *4 (N.D. Ga. May 28, 2015) (explaining that plaintiff abandoned her claim when she failed to address defendant's argument for its dismissal).

Additionally, even if Plaintiff had not abandoned her claims against the MFD, her claims against the MFD would still fail as a matter of law. Defendants correctly argue

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[8] Plaintiff, instead of structuring her brief to respond specifically to each of Defendants' arguments in organized sections, fashioned her brief in a very amorphous fashion. Plaintiff basically told the story of what occurred during her employment from her own perspective, never addressing a single point of law throughout. In order to adduce whether Plaintiff responded to an argument, the Court had to review Plaintiff's brief over and over again because if Plaintiff responded to Defendants' argument at all, her response would appear at may different areas within her brief. Thus, Plaintiff's methodology was not persuasive and required additional hours to decipher.

the MFD is not an entity capable of being sued. The capacity to be sued is determined by the law of the state in which the district court is held. Lovelace v. DeKalb Cent. Prob., 144 F. App'x 793, 795 (11th Cir. 2005). The Georgia Supreme Court has held that Georgia only recognizes three classes as legal entities: (1) natural persons; (2) an artificial person (a corporation); and (3) such quasi artificial persons as the law recognizes as being capable to sue. Lovelace, 144 F. App'x at 795. Local government entities such as county fire departments have been found to lack capacity to be sued under Georgia law because they are merely a part of the City government and the vehicle by which the City fulfills firefighting functions. Enfinger v. Decatur Cty., Ga., No. 1:07-CV-145 (WLS), 2008 WL 11338807, at *6 (M.D. Ga. Sept. 30, 2008) (fire department not capable of being sued); Buford v. City of Atlanta, No. 1:06-CV-3089-TWT, 2007 WL 1341115, at *2 (N.D. Ga. Apr. 30, 2007) (Atlanta fire department did not fall within any of the categories of legal entities subject to suit); see also Foley v. Savannah Fire Dep't, No. CV412-236, 2012 WL 7620863, at *1 (S.D. Ga. Oct. 22, 2012); Alford v. Columbus, Ga. Consol. Gov't, No. 4:10-CV-38 (CDL), 2010 WL 4048324, at *1 n.1 (M.D. Ga. Oct. 14, 2010). That position is consistent with the Marietta City Charter which shows the City's retention of control of the MFD. The City Charter creates and maintains a fire department for the City, creates a civil service board to oversee the fire department, and provides procedures for employees who work in the fire department to be dismissed from their service with the City. 1977 Ga. Laws 3541, 3560, 3569, 3579. Accordingly, summary judgment should be **GRANTED** as to

Plaintiff's claims against the MFD.

III. Exhaustion of Administrative Remedies

A. Claims Arising Prior to Plaintiff's January 2015 EEOC Charge

Defendants contend that summary judgment should be granted as to Plaintiff's claims concerning the following incidents and employer actions because Plaintiff failed to timely exhaust her administrative remedies with regard to: (1) the use of the word lesbian in Plaintiff's presence in 2008 and again in Spring of 2014[9]; (2) her transfer to the Training Division in 2009; (3) her supervisor's failure to recommend her in Spring 2013 for an award based on her 2011 work on the grant project; and (4) the denial of a promotion to a Commander position in 2012. Defendants contend that such claims are time-barred because Plaintiff filed her charge of discrimination on January 26, 2015, more than 180 days after each of these incidents occurred. Plaintiff does not respond to Defendants' arguments and thus, has abandoned her claims. Jones, 564 F. App'x at 434 (explaining that a party's failure to respond to any portion or claim in a motion indicates such portion, claim, or defense is unopposed); Clark, 544 F. App'x at 854-55.

Before filing a private civil action under Title VII, a plaintiff must satisfy certain statutory prerequisites such as timely filing an EEOC charge "within one hundred and

[9] The Court has not addressed Defendants' exhaustion argument with respect to Plaintiff's gender discrimination claim relating to Chief Gibbs' alleged use of the word "lesbian" in Plaintiff's presence, because the Court has addressed it in the context of the hostile work environment claim below and has found that summary judgment is due to be granted as to the merits of Plaintiff's hostile work environment claim.

eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109 (2002); Pijnenburg v. W. Ga. Health Sys., Inc., 255 F.3d 1304, 1305 (11th Cir.), reh'g denied, 273 F.3d 1117 (11th Cir. 2001). "[I]f a plaintiff fails to file an EEOC charge before the 180-day limitations period expires, the plaintiff's subsequent lawsuit is barred and must be dismissed for failure to exhaust administrative remedies." Stewart v. Booker T. Washington Ins., 232 F.3d 844, 850 (11th Cir. 2000) (holding that because the employee waited more than 180 days after the decision to transfer her, the employee's sex and race discrimination claims in connection with her transfer were untimely); Thomas v. Ala. Council on Human Relations, Inc., 248 F. Supp. 2d 1105, 1114-16 (M.D. Ala. 2003) (citing Brewer v. Ala., 111 F. Supp. 2d 1197, 1204 (M.D. Ala. 2000)).

Here, Plaintiff failed to demonstrate that her claims concerning her transfer to the Training Division, the failure to recommend her for a non-monetary award, and the denial of promotion to the 2012 Commander position are timely. Plaintiff filed multiple documents with the EEOC. In November 25, 2014, Plaintiff wrote a letter to the EEOC advising it of various actions Defendants took that she believed were discriminatory. (Pl.'s Dep., Ex. 37, Doc. 26-3, at 77). The letter has a date-stamp indicating that the EEOC received the letter on December 4, 2014. (Id.). On the first page of the letter, Plaintiff indicates that she is requesting that the EEOC "investigate years of gender, racial, and religious bias and discrimination in the Marietta Fire Department." (Id.). On January 26, 2015, Plaintiff completed an intake questionnaire with the EEOC. (Pl.'s

Dep., Ex. 38, Doc. 26-3, at 81). Plaintiff checked a box at the end of the intake questionnaire indicating that she wanted "to talk to an EEOC employee before deciding whether to file a charge." (Pl.'s Dep., Def.'s Ex. 39, Doc. 26-3, at 81). On January 26, 2015, Plaintiff also signed a charge of discrimination complaining that the MFD discriminated against her on the basis of her sex and retaliated against her when she was not selected for the available Commander position in January 2015. (Pl.'s Dep., Def.'s Ex. 40, Doc. 26-3, at 85). Even if the Court were to assume that Plaintiff's earliest filed document with the EEOC, that is her letter date-stamped by the EEOC on December 4, 2014, was a charge, the aforementioned employment actions occurred outside of the 180-day limitations period. Based on the December 4, 2014 date, employer actions occurring on or before June 6, 2014, would be time-barred. Here, it is undisputed that Plaintiff was transferred to the Training Division in March of 2009, Whitmire recommended Stewart for the non-monetary award in Spring 2013, and Chief Gibbs did not select Plaintiff for promotion to a Commander position in 2012. (Gibbs Decl. ¶ 9; Whitmire Decl. ¶ 7; DSUF ¶¶ 61-62; Pl.'s Resp. to DSUF ¶ 62; Pl.'s Dep. 113). Accordingly, these claims occurred well outside the 180-day limitations period and summary judgment should be **GRANTED** as to these because they are time-barred.

B. Claims Accruing After Plaintiff Filed Her January 2015 EEOC Charge

Defendants further contend that summary judgment should be granted as to discriminatory and retaliatory actions occurring after Plaintiff filed her January 26, 2015

EEOC Charge, including the promotional decisions in June 2015 and January 2017,[10] as well as the denied training requests in April 2015, August 2015, December 2015, and May 2016. Plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of her EEOC charge. Penaloza v. Target Corp., 549 F. App'x 844, 848-49 (11th Cir. 2013); Mulhall v. Advance Sec., 19 F.3d 586, 589 n.8 (11th Cir. 1994). Although new acts of discrimination not raised in the charge are not appropriate for judicial review, "claims are allowed if they 'amplify, clarify, or more clearly focus' the allegations in the EEOC complaint." Gregory v. Ga. Dep't of Human Res., 355 F.3d 1277, 1279-80 (11th Cir. 2004). The purpose of this requirement is to give the EEOC "the first opportunity to investigate the alleged discriminatory practices to permit it to perform its role in obtaining voluntary compliance and promoting conciliation efforts." See Gregory, 355 F.3d at 1279.

1. Gender Discrimination Claims Stemming From Denial of Plaintiff's Requests for Training

This Court concludes that Plaintiff's gender discrimination claims concerning the denial of her requests for training also do not grow out of her January 2015 EEOC Charge. In her January 2015 EEOC Charge, Plaintiff alleged she was not selected for the Commander position filled in January 2015. (Doc. 26-3, at 85-86). Plaintiff also

[10] Rather than address the exhaustion of administrative remedies question in connection with Plaintiff's gender discrimination claims concerning the denial of promotions in June 2015 and January 2017, the merits of these claims are addressed below.

alleged that during her tenure she was subjected to derogatory and sex stereotyping comments, such as Chief Gibbs' reference to female firefighters as lesbians and his referring to her internal employment discrimination complaint as a hysterical outburst. (Id.). Plaintiff did not mention the denial of her requests for training opportunities within her EEOC Charge. (Pl.'s Dep., Def.'s Exs. 37-39, Doc. 26-3, at 77-86). Furthermore, Plaintiff was required to exhaust her administrative remedies as to the denial of her requests for training postdating her January 2015 EEOC Charge because they were discrete acts which were required to be challenged separately, and thus, did not grow out of her EEOC Charge. See Freeman v. City of Riverdale, 330 F. App'x 863, 866 (11th Cir. 2009) (explaining that denials of training were discrete acts that were required to be challenged separately from hostile work environment claim); Goldman v. City of Hueytown, No. 2:07-CV-1883-TMP, 2009 WL 10687988, at *13 n.23 (N.D. Ala. Sept. 4, 2009) (explaining that "each denial of a training opportunity or a promotion constitutes a 'discrete' act and must be encompassed within a timely-filed EEOC charge"). Moreover, nothing in Plaintiff's EEOC Charge would have put the EEOC on notice to investigate her training-related claims. The facts which accompany the denial of a promotion in January 2015 do not bear any relationship to the denial of Plaintiff's requests for training starting in April 2015. Chief Gibbs' selection of others for the position in 2015 and the comparative qualifications between the selectee and Plaintiff have nothing to do with the denial of her requests for training. Although Chief Gibbs determined who would be promoted in January 2015, there is no indication that

he played any role in the decisions to deny Plaintiff's requests for training. Additionally, the reasons provided for the decisions to deny Plaintiff's request for reimbursement of or leave to attend training do not resemble the reason for the decision to deny her a promotion in January 2015, as the decisions concerning her training were based on budgetary or staffing concerns. (DSUF ¶¶ 72, 76-78, 81; Whitmire Decl. ¶ 5). Accordingly, summary judgment should be **GRANTED** as to Plaintiff's claims that Defendants discriminated against her when they denied her requests to attend training because she has failed to exhaust her administrative remedies as to such claims. See, e.g., Jerome v. Marriott Residence Inn Barcelo Crestline/AIG, 211 F. App'x 844, 846-47 (11th Cir. 2006) (explaining that claim that employer paid white employees less than black employees did not grow out of denial of promotion claim because comparative qualifications between selectee and plaintiff for promotion did not encompass facts that would also support a disparate pay claim); Buzzi v. Gomez, 62 F. Supp. 2d 1344, 1352 (S.D. Fla. Feb. 12, 1999) (concluding that allegations of denied promotions and training were discrete acts which occurred subsequent to the filing of the plaintiff's EEOC charge for harassment and involuntary transfer and did not arise out of the charge).

2. Retaliation Claims Arising After Plaintiff Filed Her January 2015 EEOC Charge

It is unnecessary for a plaintiff to exhaust administrative remedies prior to raising a claim of retaliation that grows out of an earlier charge that is properly before the court. Basel v. Sec'y of Defense, 507 F. App'x 873, 876 (11th Cir. 2013); Thomas v. Miami

Dade Pub. Health Tr., 369 F. App'x 19, 23 (11th Cir. 2010) (explaining that a district court could properly consider claims accruing following the charge to the extent the plaintiff alleged they were caused by the filing of her charge). That being said, a "district court . . . may not consider a retaliation claim that was not first administratively exhausted where no other properly raised judicial claim exists to which the retaliation may attach." Basel, 507 F. App'x at 876. Here, Plaintiff timely filed her EEOC Charge in January 2015 with respect to the promotion she was denied in January 2015. Thus, there is a properly raised judicial claim to which Plaintiff's retaliation claims may attach. Plaintiff argues her training opportunities were reduced after her EEOC Charge and that her non-selection for the Commander positions were not fair and impartial because they "followed on the heels of [her] EEOC charge." (Pl.'s Resp. to DSUF ¶¶ 51, 66; Pl.'s Br. 16-17). Because Plaintiff alleges she was not selected for subsequently filled Commander positions and her opportunities for training were reduced because she filed her January 2015 EEOC Charge, Plaintiff's retaliation claims can be said to grow out of her January 2015 charge. See, e.g., Thomas, 369 F. App'x at 23; Frazier v. City of Mobile, No. 1:16-00400-KD-MU, 2018 WL 692933, at *12 (S.D. Ala. Feb. 1, 2018); Jones v. Nippon Cargo Airlines Co., No. 1:17-CV-1589-TWT-JKL, 2018 WL 1077355, at *8 (N.D. Ga. Jan. 12, 2018) (explaining that the Eleventh Circuit has held when retaliation claims are "based on adverse actions taken after an EEOC charge is filed, they may be said to grow out of the previously filed charge, and it is not necessary for a plaintiff to file a second charge alleging specific examples of further retaliation");

Barnwell v. McDonald, No. 16-23194-Civ-COOKE/TORRES, 2017 WL 4286853, at *3 (S.D. Fla. Sept. 27, 2017) (explaining that it is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge and that the district court can properly consider such subsequent claims if the plaintiff contends that they were caused by the filing of her EEOC charge) (citing Thomas, 369 F. App'x at 23). Accordingly, this Court does not find that Plaintiff failed to exhaust her administrative remedies as to her retaliation claims following her 2015 EEOC Charge.

IV. Plaintiff's Hostile Work Environment Claim

Plaintiff contends that Defendants subjected her to a hostile work environment when (1) Plaintiff's supervisor, Assistant Chief Bishop, on at least one occasion commented to her that women should not be in the fire service, playfully shoved her in the back, hit her, and mocked her on one occasion after they had a dispute, gave her an apron with a depiction of a scantily clad male firemen as a gift, and had a loud disagreement with her in February 2009, in which Bishop angrily and loudly chastised her for failing to go through command to call for more resources at the scene where she was rendering aid to an unconscious man in a smoky apartment; (2) Chief Gibbs referred to women he did not like as "lesbians"; (3) a male used a red magic marker to draw on a female recruit's underwear in a manner that suggested blood; (4) Assistant Chief Whitmire ordered Plaintiff to assist his secretary with filing, causing her to have to cancel meetings with leaders from other local agencies who were meeting with her about

a six-day emergency drill; (5) Assistant Chief Whitmire ordered her to clean a smelly gym where male coworkers worked out in response to Plaintiff's explanation that she does not exercise in the gym at work because male colleagues play loud music, curse, take of their shirts, and bleed on the equipment; (6) Assistant Chief Whitmire credited a male colleague for his work on a grant project when it was Plaintiff who performed the lion's share of the excellent work on the grant project; and (7) Assistant Chief Whitmire wrote in his notes during Plaintiff's interview for one of the Commander positions that he could not trust her to be a Commander because she had "poor judgment regarding PPE" even though he never counseled her about it.[11] (Compl. ¶¶ 17, 20, 22; Pl.'s Dep. 96, 273, 277, Ex. 36; Pl.'s Decl. ¶¶ 6, 22, 23, 27-28, 38; Pl.'s Br. 12-15, 18). Defendants contend that summary judgment should be granted as to Plaintiff's hostile work environment claim because (1) she failed to show that Defendants subjected her to severe or pervasive harassment; and (2) the City acted reasonably and promptly to cure harassment, once harassment allegations were called to its attention.

This Court finds summary judgment is due to be granted as to Plaintiff's hostile

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[11] Although Plaintiff references other incidents of alleged harassment in her brief, she does not direct the Court to evidence which supports her allegations. Often Plaintiff cites to evidence, but the evidence does not support her allegations. This Court is not required to cull the record in order to locate evidence which supports Plaintiff's claims. Johnson v. City of Fort Lauderdale, 126 F.3d 1372, 1373 (11th Cir. 1997); Oden v. Lockheed Martin ASCO, Civ. A. No. 1:06-CV-1343 TWT, 2008 WL 542676 (N.D. Ga. Feb 22, 2008) (noting that "[p]laintiff's counsel should not expect the Court to nose around among the evidence for something that might appear to support Plaintiff's arguments, and then conclude that such a fact is admissible without offering Defendant an opportunity to respond.").

work environment claim because she does not present evidence of severe or pervasive harassment. Title VII makes it unlawful for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of the individual's gender. 42 U.S.C. § 2000e-2(a)(1); Jones v. UPS Ground Freight, 683 F.3d 1283, 1292 (11th Cir. 2012); Hulsey v. Pride Rests., LLC, 367 F.3d 1238, 1244 (11th Cir. 2004). A discriminatory hostile work environment is a prohibited alteration of the terms and conditions of an employee's employment under Title VII. Jones, 683 F.3d at 1292; Hulsey, 367 F.3d at 1244. To prove hostile work environment harassment, the plaintiff must show that (1) she belongs to a protected group; (2) she has been subjected to unwelcome harassment; (3) the harassment was based on a protected characteristic; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of her employment and create a discriminatory abusive work environment; and (5) a basis for holding the employer liable exists. Jones, 683 F.3d at 1292; Hulsey, 367 F.3d at 1245; Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).

Defendants challenge the fourth element–claiming that the alleged gender-based harassment suffered by Plaintiff was not sufficiently severe or pervasive to alter the terms and conditions of her employment. To establish the "severe or pervasive" element, a plaintiff must show not only that she subjectively perceived the working environment to be abusive, but also that a reasonable person would view the environment as hostile and abusive. Miller, 277 F.3d at 1276; see also Faragher v. City

of Boca Raton, 524 U.S. 775, 787 (1998). In evaluating whether the harassment was objectively severe, the Court considers the totality of the circumstances and, among other things, "(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." Id. In analyzing these factors, it is important to remember that workplace conduct is not to be viewed in isolation, but rather, is to be viewed cumulatively, and a plaintiff can prove a hostile work environment by showing severe or pervasive harassment directed against her protected group, even if she is not personally singled out in the offensive conduct. Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 807-08 (11th Cir. 2010) (en banc).

While Plaintiff alleges a number of incidents, these incidents span over at least several years of her employment and are thus, not shown to be frequent. While some of the conduct is arguably humiliating, such as the incident where a coworker used a magic marker to depict blood on a female recruit's underwear, the incidents to which the Plaintiff directs the Court are too far and few between to amount to actionable harassment. Additionally, the conduct was not physically threatening. Although Plaintiff testified that Assistant Chief Bishop shoved her in the back and hit her, Plaintiff testified that he did so as "his way of trying to buddy up after he got angry." (Pl.'s Dep. 273). Plaintiff also testified that such incidents occurred after Bishop expressed anger when disputes arose between them. Plaintiff further testified, "[Bishop]

would allege that he was joking, attempt to laugh it off, and shove me like this, on the back. Come on, Meg, and just hit me. It was - - it was his way of trying to buddy up after he got angry." (Pl.'s Dep. 273). Plaintiff further testified that on such occasions, Bishop would push her or slap her on her shoulder or her back. (Pl.'s Dep. 273; Pl.'s Decl. ¶ 8). Thus, there is no indication in the record that Bishop's behavior was physically threatening or dangerous. The remainder of the incidents as described by Plaintiff, while unpleasant, offensive, inappropriate, or insensitive, were not enough to amount to a hostile work environment. Moreover, for the most part, there is no indication here that the alleged incidents of harassment unreasonably interfered with Plaintiff's work performance. Under these circumstances, Plaintiff does not demonstrate that she was subjected to severe or pervasive harassment. Manley v. DeKalb Cty., 587 F. App'x 507, 514 (11th Cir. 2014) (holding that no severe or pervasive harassment occurred where male colleagues spoke openly about not wanting to work for female captains and commented that women should not be firefighters); Smith v. Naples Cmty. Hosp., 433 F. App'x 797, 799 (11th Cir. 2011) (explaining that plaintiff did not show she suffered from severe or pervasive harassment where plaintiff cited annoyances, petty slights, and communication issues, complained she was given "make-work assignments," described three instances where supervisor acted excessively aggressive, angry, and physically threatening, and referred to once incident where supervisor "went ballistic"). Therefore, summary judgment should be **GRANTED** as to Plaintiff's gender-based hostile work environment claim.

V. Gender Discrimination Claim Concerning Failure to Promote

Plaintiff contends that Defendants discriminated against her on the basis of her gender when she was not selected for Commander positions filled in January 2015, June 2015, and January 2017.

A. January 2015 Position

Defendants argue Plaintiff cannot establish her prima facie case because she cannot show that she was equally or more qualified than the selected candidate given that Butch McDaniel, the selectee, had more experience and institutional knowledge than any other candidate. Defendants contend that Plaintiff's promotion claim fails because she cannot show that the City's legitimate, nondiscriminatory reason for not selecting her, that she was not the most qualified candidate, was pretextual.

Title VII of the Civil Rights Act of 1964 prohibits an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). In order for Plaintiff to prevail on her discrimination claims, she must show that Defendants intentionally discriminated against her on the basis of her gender using direct evidence, statistical evidence that shows a pattern or practice of discrimination, or circumstantial evidence based on the four-pronged test outlined in McDonnell Douglas v. Green, 411 U.S. 792 (1973). See Walker v. NationsBank of Fla., 53 F.3d 1548, 1555-56 (11th Cir. 1995); see also Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001) (citing EEOC

v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir. 2000)). Under the McDonnell Douglas/Burdine framework, the plaintiff first has the burden of establishing a prima facie case of gender discrimination. See McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. 248, 253 (1981).

Defendants incorrectly argue that in order to establish a prima facie case, Plaintiff must show that equally or less qualified candidates outside of her protected class were promoted. In Walker v. Mortham, 158 F.3d 1177 (11th Cir. 1998), the Eleventh Circuit addressed conflicting panel opinions concerning whether plaintiffs must demonstrate that equally or less qualified candidates were promoted over them as part of their prima facie case. See Voudy v. Sheriff of Broward Cty., 701 F. App'x 865, 869 (11th Cir. 2017) (citing Walker, 158 F.3d at 1186). The Court in Walker after analyzing the Eleventh Circuit's prior precedent rule and performing "an independent assessment of which standard best comported with Supreme Court precedent," determined that a plaintiff need only show that the position was filled by someone outside of her protected class to establish a prima facie case. Voudy, 701 F. App'x at 869 (citing Walker, 158 F.3d at 1193. Accordingly, to establish a prima facie case for discriminatory failure to promote, Plaintiff need only show that: (1) she was a member of a protected class; (2) she applied for and was qualified for a position for which defendant was accepting applications or trying to fill; (3) despite her qualifications, she was not hired; and (4) after her rejection, the position remained open despite the plaintiff's proven qualifications or the position was filled by a person outside of her protected class.

Austin v. Progressive RSC, Inc., 265 F. App'x 836, 844 (11th Cir. 2008); Williams v. Waste Mgmt., Inc., 411 F. App'x 226, 228 (11th Cir. 2011); Schoenfeld v. Babbitt, 168 F.3d 1257, 1267 (11th Cir. 1999); Walker, 158 F.3d at 1192. Here, Plaintiff can establish a prima facie case. Plaintiff was a member of a protected class and she applied for the promotion position. (Gibbs Dep. 55; Pl.'s Dep. 120-21; DSUF ¶ 43). Plaintiff presented a promotional package expressing her interest in the position. (DSUF ¶ 43). It also may be inferred that Plaintiff was qualified for the position. It is undisputed that all individuals holding the rank of lieutenant for a minimum of one year were eligible to apply for the position, and Plaintiff had been a lieutenant since 2007. (DSUF ¶¶ 3-4, 39). Chief Gibbs testified that the candidates for Commander are interviewed and considered for the position if everything is sufficient in the candidate's promotional package, but members of the management team may narrow the list of individuals to be interviewed if they need to. (Gibbs Dep. 53-54). According to a memorandum Plaintiff received from Chief Gibbs, each candidate's background, resume, management statement and questionnaire were to be reviewed to determine if the candidate should be interviewed. (Pl.'s Dep., Def.'s Ex. 13, 16). Plaintiff was interviewed for the Commander positions available in 2015, 2016, and 2017. (Pl.'s Dep. 122-23, 134, 180-81; Whitmire Decl. ¶ 3; Decl. of Brinson Williams, hereinafter "Williams Decl.," ¶ 3; Decl. of Christi Cronin, hereinafter "Cronin Decl.," ¶ 6). Under these circumstances, a reasonable factfinder could infer that because Plaintiff was interviewed and considered each time a Commander position became available, she was qualified for the position.

Finally, the position was filled by McDaniel, who was outside of Plaintiff's protected class. Accordingly, enough evidence is presented in the record tending to show that Plaintiff can establish her prima facie case.[12]

Because Plaintiff raises a genuine issue of material fact as whether she applied for and was qualified for the Commander position and because it is undisputed that the Commander position was filled by a person outside of her protected class, Plaintiff need not marshal evidence that she was equally or less qualified than the selectee. To require her to do so would be error. Voudy, 701 F.3d at 869; Walker, 158 F.3d 1190-93 (explaining that per Supreme Court precedent, the evidence of relative qualifications between the plaintiff and the selectee is evaluated at the pretext stage and that the prima facie case is not meant to be so onerous).

Because Plaintiff can establish her prima facie case, the burden shifts to the City

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[12] Although not necessary to the analysis, Plaintiff has alleged facts suggesting that Chief Gibbs may harbor discriminatory animus towards female firefighters. Plaintiff testified that Chief Gibbs sometimes referred to female firefighters as "lesbians." (Pl.'s Dep. 96 (when Plaintiff told Chief Gibbs that she bought a bumper sticker stating that her "other vehicle is a fire truck" at a gay and lesbian bookstore while at a woman's firefighter conference, Chief Gibbs laughed and said, "Imagine that. A female firefighter lesbian."), 96 (referred to Plaintiff as "having some diesel in [her]" and asked, "Don't you have to be a lesbian to drive a Subaru?"), 291-92). Based on these statements, it may be inferred that Chief Gibbs' reference to females who perform firefighter roles, a traditionally masculine role, as lesbians can reflect animus or hostility towards women who fill such roles and an expectation that women not perform such roles. Discrimination against an individual for failing to act and appear according to gender stereotypes is sex-based discrimination. See, e.g., Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1253-54 (11th Cir. 2017) (holding that discrimination against a female on the basis of failure to conform to feminine dress would be sex discrimination).

to articulate a legitimate, nondiscriminatory reason for the failure to promote her. McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. at 254; Chapman v. AI Transp., 229 F.3d 1012, 1024 (11th Cir. 2000) (en banc). This burden is one of production, not persuasion, and is "exceedingly light." Turnes v. AmSouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994); Perryman v. Johnson Prod. Co., 698 F.2d 1138, 1141 (11th Cir. 1983). If the City meets its burden, the burden shifts to Plaintiff to show that the City's proffered nondiscriminatory reason was merely a pretext for discriminatory intent. Burdine, 450 U.S. at 253; Chapman, 229 F.3d at 1024.

The City argues Plaintiff was not selected for the Commander position filled in 2015 because no one involved in the promotional process regarded her as the most qualified candidate.[13] The problem with the City's argument, however, is that the City fails to point to evidence that the decisionmaker, Chief Gibbs, actually based his decision on the notion that others in the promotional process did not regard Plaintiff as the most qualified. The evidence the City provides is that although Deputy Chief Danny Rackley, Assistant Chief J.D. Hill, and Commander Brinson Williams conducted interviews for all twelve candidates, Chief Gibbs had the authority to make the final decision as to which candidate would be promoted. (DSUF ¶ 42, 44). Assistant Chief

[13] Although Plaintiff's Brief is disjointed, she appears to contend that although McDaniel's qualifications were better than hers because of his thirty years of service, Defendants' profferred reason is nevertheless pretextual because McDaniel never wanted a promotion but was nevertheless encouraged by Chief Gibbs to apply, and the process was generally unfair because the City had no involvement which exposed the process to bias. (Pl.'s Br. 14, 16, 20; Pl.'s Decl. ¶ 38).

Hill and Commander Williams ranked their top five candidates, and they both ranked Lieutenant McDaniel as either their first or second choice, due to his thirty-one years of experience. (DSUF ¶ 45; Williams Decl. ¶ 3; Hill Decl. ¶ 3). After consulting with Rackley, Hill, and Williams, Chief Gibbs selected McDaniel for the position. (DSUF ¶ 46). The City, however, does not point to evidence explaining Chief Gibbs' specific reason for not selecting Plaintiff for the promotion. Chief Gibbs only generally describes his decisionmaking process as follows:

> A. Okay. After all of that is done and I get back the panelist points, I take - - and when I have an opening because it's a firm opening to be filled, I take all of their notes, their rank orders, I look at the top candidates, typically we have some idea who the top candidates - - they come to the top. I mean, you can tell through that process who is really performing well in that process. I look at their package as far as their performance evaluations, their resume, their comments of my evaluators and then put it with my own thoughts and make the final decision as to who is going to get promoted.
> Q. So it's ultimately your decision?
> A. Yes ma'am.

(Gibbs Dep. 61-62). Indeed, Chief Gibbs testified that he does not remember the selection decision. He testified:

> Q. So do you remember back to the selection process for 2014?
> A. In general terms, but no, not really.
> Q. Do you remember who won?
> A. Not off the top of my head. I would have to do my math.
> Q. Who got promoted?
> A. I would have to figure that out. That was three years ago.
> Q. Wasn't that the process where you promoted McDaniel?
> A. Probably was, but . . .
> Q. Okay. Do you recall what Meg Richardson's position was in terms of her performance in this process?
> A. No.

(Gibbs Dep. 61-62). Thus, while Gibbs could testify as to generally some of the factors that go into his promotion decisions, Gibbs did not explain why he made the decision to promote McDaniel instead of Plaintiff.

The City may not satisfy its burden of presenting a nondiscriminatory reason for the selection of McDaniel instead of Plaintiff by describing the categories of information considered when making the promotion decision, by presenting hypothetical reasons for the decision, or by merely pointing to evidence that shows dissimilarities in the applicants' qualifications. Voudy, 701 F.3d at 870; IMPACT v. Firestone, 893 F.2d 1189, 1194 (11th Cir. 1990) (holding that personnel director's statement that it was the general practice of the department to select the best qualified person for the position, coupled with pointing to evidence in the record showing differences in the applicants' qualifications, did not satisfy defendant's burden of articulating a legitimate, nondiscriminatory reason for the challenged employment actions). If there is no evidence that the asserted reason for the discharge was actually relied on at the time the decision was made, the reason is not sufficient to meet the City's rebuttal burden. IMPACT, 893 F.3d at 1194 (citing Lee v. Russell Cty. Bd. of Educ..684 F.2d 769, 775 (11th Cir. 1982)).

Here, the City presents some evidence that two of the four of the individuals who interviewed the candidates, Assistant Chief Hill and Commander Williams, ranked

McDaniel either first or second among the candidates.[14] It is undisputed, however, that Chief Gibbs was the decisionmaker with respect to the promotion, not the two interviewers who ranked McDaniel higher than other candidates. Chief Hill and Commander Williams can testify as to their recommendations to Chief Gibbs, but Chief Gibbs has not testified as to how he weighed and took into account their recommendations. Chief Gibbs testified that when he makes the decision as to whom to promote to Commander, he takes into consideration the opinions of the other interviewers on the panel, along with several other factors, including the candidates' performance evaluations, their resumes, and his "own thoughts." (Gibbs Dep. 61). Chief Gibbs, however, does not explain how he applied this formula to make to decision to select McDaniel over Plaintiff. Indeed, as shown by the deposition testimony cited above, Chief Gibbs testified that he does not remember the details about the selection decision.[15] (Gibbs Dep. 61-62). The City has not pointed to any evidence by any witness as to how Chief Gibbs took into account the opinions of the other interviewers when making the decision to select McDaniel over Plaintiff or how he took into account any of the other factors he identified as being part of his usual decisionmaking process.

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[14] Deputy Chief Rackley and Chief Gibbs did not prepare rankings. (Gibbs Dep. 56, 81).

[15] The Court finds it odd that Chief Gibbs remembers so little about the promotion decision that was the subject of Plaintiff's EEOC Charge and a key part of her allegations in this case. (Gibbs Dep. 61-62). Chief Gibbs' deposition testimony occurred less than three years after his decision to promote McDaniel to the Commander position.

Under these circumstances, the City has not satisfied its burden of production as to a legitimate, nondiscriminatory reason for not selecting Plaintiff. The Eleventh Circuit has explained that "[i]t is not enough for the employer to say that general categories provide a backdrop for its decision-making process, but not tell us which categories were relied on in this particular case." Voudy, 701 F. App'x at 870. Additionally, "[a]bstract terms as to what might have motivated the decisionmaker are insufficient to meet the defendant's burden of articulation." Voudy, 701 F. App'x at 870; Walker,158 F.3d at 1181 n.8. Furthermore, employers cannot meet their burden of articulating a legitimate, nondiscriminatory reason through circumstantial evidence. IMPACT, 893 F.2d at 1194-95 n.5. The employer "must present specific evidence regarding the decision-maker's actual motivations with regard to each challenged employment decision." Walker,158 F.3d at 1181 n.8; IMPACT, 893 F.2d at 1194 & n.5 (concluding that it was error to assume that the defendants satisfied their burden to articulate a legitimate, nondiscriminatory reason for the challenged employment actions where the defendants did not offer any proof by any person who made the employment decision or by any other person stating that the decision was made on the basis of the reason offered by defendants as their legitimate, nondiscriminatory reason and that relying on the general practice of the department to select the best qualified did not satisfy burden). Because the City cannot do so here, the City has not met its burden of articulating a legitimate, nondiscriminatory reason. Because Plaintiff set forth sufficient evidence to establish a prima facie case of gender discrimination in the January 2015 promotion

decision, she enjoys a presumption of unlawful discrimination. Bogle v. Orange Cty. Bd. of Cty. Comm'rs, 162 F.3d 653, 657-58 n.4 (11th Cir. 1998). Without meeting the burden of articulating a legitimate, nondiscriminatory reason for the promotion decision to rebut the presumption, the City is not entitled to summary judgment on this issue. Bogle, 162 F.3d at 657-58 n.4. Accordingly, summary judgment is due to be **DENIED** as to Plaintiff's claim that the City[16] discriminated against her on the basis of her gender when the City did not promote her to the Commander position in January 2015.

B. June 2015 Position

Defendants contend that Plaintiff cannot establish her prima facie case of gender discrimination with respect to the July 2015 decision to promote Christi Chronin because Chronin is female. Plaintiff does not respond to Defendants' argument and has thus, abandoned her gender discrimination claim as to the Commander position filled by Chronin. Jones, 564 F. App'x at 434 (explaining that when a party fails to respond to any portion or claim in a motion indicates such portion, claim, or defense is unopposed); Clark, 544 F. App'x at 854-55. Additionally, because Chronin was a member of Plaintiff's protected class, Plaintiff cannot establish that the City's failure to select her for the Commander position was due to discrimination on the basis of gender. Shoots v. City of Mobile, No. 11-00673-KD-M, 2013 WL 3281875, at *5 (S.D. Ala. June 28, 2013); Hall v. Piedmont Ear Nose & Throat & Related Allergy, P.C., No.

[16] This Court has already determined that summary judgment should be granted as to all of Plaintiff's claims against Defendant MFD on the grounds that MFD is not an entity capable of being sued.

1:09-CV-1569-RLV-RGV, 2010 WL 11596912, at *5 (N.D. Ga. Mar. 5, 2010). Accordingly, summary judgment should be **GRANTED** as the City's failure to promote Plaintiff to the Commander position filled in June 2015.

C. January 2017 Position

Defendants contend that summary judgment should be granted as to Plaintiff's gender discrimination claim relating to Defendants' failure to promote her to the Commander position in January 2017 because she cannot show that the City's legitimate, nondiscriminatory reason for not selecting her was pretextual. Here, Chief Gibbs states that Jeff Guest was selected for the 2017 Commander position because he was a "great employee" who was "very well respected by his peers and his subordinates" and that he had done a "lot of training" and that his "education [was] great." (Gibbs Dep. 67). Because the City has offered a nondiscriminatory reason for the challenged employment action, the inference of discrimination drops out of the case entirely and Plaintiff is given an opportunity to show that the proffered nondiscriminatory reason was merely a pretext for discriminatory intent. Burdine, 450 U.S. at 253; Kilgore v. Trussville Dev., 646 F. App'x 765, 772 (11th Cir. 2016); Chapman, 229 F.3d at 1024. A plaintiff raises a genuine issue of material fact concerning pretext if the plaintiff casts sufficient doubt on the defendant's proffered non-discriminatory reasons to permit a reasonable factfinder to conclude that the proffered reasons were not actually what motivated its conduct. Brooks v. Cty. Common of Jefferson Cty., 446 F.3d 1160, 1162-63 (11th Cir. 2004). This may be accomplished either by directly persuading the court

that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Id. In doing so, the court evaluates whether the plaintiff has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." Combs v. Plantation Patterns, Inc., 106 F.3d 1519, 1538 (11th Cir. 1997).

In this case, Plaintiff does not present evidence tending to show that the reasons offered by Gibbs were pretextual. While Plaintiff indicates in her declaration that Guest was "not so qualified," she does not present specific facts tending to show that Guest was not qualified or compare her qualifications with his beyond her conclusory assertion. (Pl.'s Decl. ¶ 38). Plaintiff also appears to contend that the process was unfair or discriminatory because Assistant Chief Whitmire, who was a member of the committee assessing the candidates for promotion, criticized her judgment in connection with her inability to follow his orders during a firefighting incident because she did not have the proper equipment with her crew to do so. (Pl.'s Decl. ¶ 38). Although Plaintiff takes issue with Whitmire's criticism of her judgment during the selection process, she does not provide enough context for the incident that drew Whitmire's criticism to suggest that the criticism was unwarranted or connected to her gender. (See Pl.'s Decl. ¶¶ 36-38). Additionally, Plaintiff does not point to any evidence that Chief Gibbs, who made the selection decision, based his decision in any way on Whitmire's criticism of

her judgment.

Finally, Plaintiff contends that the promotion process itself is unfair because Chief Gibbs chooses the interview committee, selects the interview questions, encourages specific people to apply for the promotion, and selects the individuals to fill the positions and the City does not sit in on the interviews. Be that as it may, Plaintiff fails to direct the Court to evidence showing that Chief Gibbs' promotional procedure results in unfairness for women applicants or that women have been disadvantaged by this procedure. Plaintiff also does not show that this particular procedure disadvantaged her with respect to the selection of Guest instead of her. Because Plaintiff has failed to raise a genuine issue of disputed fact as to whether the City's reason for selecting Guest for the Commander position in January 2017 was pretextual, summary judgment should be **GRANTED** as to Plaintiff's gender discrimination claim arising out of the promotion decision in January 2017.

VI. Plaintiff's Retaliation Claims

Plaintiff contends that the City retaliated against her for filing internal complaints of harassment and because of her EEOC activity when the City refused to promote her or grant her requests for training. Defendants contend that summary judgment should be granted as to Plaintiff's retaliation claims because she cannot demonstrate the existence of a causal connection between her protected activity and Defendants' decisions to deny her requests for training or to select others for promotion to the Commander positions between 2015 and 2017. In the absence of direct evidence of

retaliation, as in the instant case, claims of retaliation follow the McDonnell Douglas burden-shifting framework. Jackson v. Geo Group, Inc., 312 F. App'x 229, 233 (11th Cir. 2009); Goldsmith v. City of Atmore, 996 F.2d 1155, 1162-63 (11th Cir. 1993). To make out a prima facie case of retaliation under Title VII, the plaintiff must show that (1) she engaged in protected activity; (2) she suffered an adverse employment action by the employer simultaneously with or subsequent to her protected activity; and (3) a causal connection exists between the protected activity and the adverse employment action. Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008); Apodaca v. Sec'y of Dep't of Homeland Sec., 161 F. App'x 897, 900 (11th Cir. 2006). The causation element requires a showing of "but-for" causation. Jefferson v. Sewon Am., Inc., 891 F.3d 911, 924 (11th Cir. 2018); Frazier-White v. Gee, 818 F.3d 1249, 1258 (11th Cir. 2016). Stated another way, the plaintiff must prove that had she not complained, the adverse action would not have been taken against her. Jefferson, 891 F.3d at 924.

In this case, Plaintiff fails to establish a causal connection between any of the challenged employer actions and her protected activity. To establish the requisite causal connection, Plaintiff must, at a minimum, show that the decisionmaker was aware of her protected conduct, and that the protected activity and the adverse action were not wholly unrelated. McCann v. Tillman, 526 F.3d 1370, 1376 (11th Cir. 2008), cert. den'd McCann v. Cochran, 555 U.S. 944 (2008). The decisionmaker's awareness of the employee's protected activity may be established by circumstantial evidence. Goldsmith, 996 F.2d at 1163. Plaintiff, however, must show the decisionmaker's

awareness with more than curious timing coupled with speculative theories. Raney v. Vinson Guard Serv., Inc., 120 F.3d 1192, 1197 (11th Cir. 1997) (holding that "[i]n the modern era of summary judgment, the plaintiff is effectively required to put forth her entire case at summary judgment to persuade the court that a reasonable fact finder could rule in the plaintiff's favor" and therefore, the plaintiff must set forth "significant probative evidence regarding the identity, authority and knowledge" of the decisionmaker.). While close temporal proximity between the protected activity and the adverse employment action may help establish a causal connection, the Supreme Court has stated that "mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action . . . must be 'very close.'" Clark Cty. Sch. Dist. v. Breedon, 532 U.S. 268, 273 (2001) (citing Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (10th Cir. 1997) (three month period insufficient)); Porter v. Am. Cast Iron Pipe Co., 427 F. App'x 734, 737-38 (11th Cir. 2011); Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004). "If there is a substantial delay between the protected expression and the adverse action in the absence of other evidence tending to show causation, the complaint of retaliation fails as a matter of law." Higdon, 393 F.3d at 1220.

Plaintiff cannot meet her burden of establishing the requisite causal connection. Although Plaintiff claims that the Defendant's failure to select her for promotion in January 2015 was retaliatory, she does not show any relationship between her protected activity and the January 2015 promotion selection. Prior to the January 2015 promotion

decision, Plaintiff arguably engaged in protected activity in March 2009 when she complained of the alleged harassment of female workers in the fire department. Plaintiff, however, cannot demonstrate a causal connection between her internal complaint and the January 2015 promotion decision because the promotion decision occurred more than six years later. Furthermore, the letter Plaintiff sent to the EEOC in December 2014 does not aid Plaintiff in establishing the causal connection because Plaintiff does not present any evidence that Gibbs was aware that she sent the letter.

Likewise, prior to the June 2015 and January 2017 promotion decisions, Plaintiff's most recent protected activity was when she filed her January 2015 EEOC charge. Thus, at the shortest end of the spectrum, there was no less than four months between the protected activity and the promotional decisions. The four months and more between the protected expression and the denied promotions are insufficiently close to establish the requisite causal connection. See, e.g., Clemons v. Delta Airlines, Inc., 625 F. App'x 941, 945 (11th Cir. 2015); Brown v. Ala. Dep't of Transp., 597 F.3d 1160, 1182 (11th Cir. 2010) (three-month interval between protected activity and adverse employment action too long to establish causal connection). Despite Plaintiff's suggestion that a reasonable factfinder could infer that foul play was afoot because she was far more qualified than selectees Christi Cronin and Jeff Guest, Plaintiff fails to direct the Court to any evidence specifically comparing their alleged disparate qualifications. (Pl.'s Br. 17).

Plaintiff also fails to establish the causal connection between her denied requests

for training and her protected activity. First, Plaintiff does not show that the decisionmakers who denied her training were even aware that she engaged in protected activity. Moreover, the majority of Plaintiff's requests for training were denied more than six months after Plaintiff's most recent EEOC activity in January 2015. (DSUF ¶¶ 71, 75, 80-81). Finally, Plaintiff offers nothing to dispel Defendants' decisionmakers reasons for denying her requests for training – manpower and budgetary concerns. (DSUF ¶¶ 67, 72, 76, 78, 81; Whitmire Decl. ¶ 5). Plaintiff does not direct the Court to any other facts tending to establish causation. Under these circumstances, summary judgment should be **GRANTED** as to Plaintiff's retaliation claims concerning the promotions she did not receive and the denial of her requests for training.

VII. Plaintiff's Punitive Damages Claim

Defendants contend that Plaintiff's claims for punitive damages must be dismissed because she cannot recover punitive damages against a governmental entity under Title VII. Plaintiff has not responded to Defendants' arguments. Therefore, Plaintiff's claims for punitive damages have been abandoned and should be dismissed. Hudson v. Norfolk S. Ry. Co., 209 F. Supp. 2d 1301, 1324 (N.D. Ga. 2001); Bute v. Schuller Int'l Inc., 998 F. Supp. 1473, 1477 (N.D. Ga. 1998) (finding plaintiff abandoned a claim for retaliation under the ADA by failing to respond to defendant's argument on summary judgment that plaintiff failed to exhaust administrative remedies). Furthermore, punitive damages are barred against municipalities under Title VII. See 42 U.S.C. § 1981a(b)(1) (barring punitive damages against "a government, government

agency or political subdivision" for Title VII claims); Dickey v. Crawford Cty. Sch. Dist., No. 5:10-CV-356 (CAR), 2011 WL 482716, at *3 (M.D. Ga. Feb. 7, 2011) (dismissing plaintiff's claims for punitive damages while allowing plaintiff's Title VII claims to proceed); Bradley v. DeKalb Cty., Ga., No. 1:10-CV-0218-TWT-GGB, 2010 WL 4639240, at *5 (N.D. Ga. May 17, 2010) ("Governmental entities are expressly exempt from punitive damages under Title VII . . . ."). Accordingly, summary judgment should be **GRANTED** as to Plaintiff's claims for punitive damages under Title VII.

CONCLUSION

Based on the foregoing reasons, Defendants' Motion for Summary Judgment should be **GRANTED IN PART AND DENIED IN PART**. (Doc. 24). As this is a final Report and Recommendation and there are no other matters pending before this Court, the Clerk is directed to terminate the reference to the undersigned.

IT IS SO ORDERED AND REPORTED AND RECOMMENDED this 9 day of August, 2018.

/s/ Linda T. Walker
LINDA T. WALKER
UNITED STATES MAGISTRATE JUDGE