



Smith v. Birmingham, City of

2019 | Cited 0 times | N.D. Alabama | September 23, 2019

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION DARSHAE SMITH,

Plaintiff, v. CITY OF BIRMINGHAM,

Defendants.

Case No.: 2:17-cv-00983-JHE

MEMORANDUM OPINION 1 Through her amended complaint, Plaintiff Darshae Smith Smith) brings this employment discrimination action against Defendant the City of Birmingham City or . (Doc. 23). The City has moved for summary judgment on all of claims. (Docs. 32). Smith opposes this motion, (docs. 37), and the City has filed a reply brief in support, (doc. 42). The motion is fully briefed and ripe for review. (Docs. 33, 37 & 42). For the reasons stated more fully below, the motion is GRANTED IN PART and DENIED IN PART.

Standard of Review

the movant shows that there is no genuine dispute as to any material fact and the movant is entitled f summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing

1 In accordance with the provisions of 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73, the parties have voluntarily consented to have a United States Magistrate Judge conduct any and all proceedings, including trial and the entry of final judgment. (Doc. 9).

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N.D. OF ALABAMA party will bear the burden of proof at Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The moving party bears the initial burden of proving the absence of a genuine issue of material fact. Id. he Id. at 324. (citation and internal a reasonable jury could return a verdict for the Anderson v.



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Liberty Lobby,

Inc., 477 U.S. 242, 248 (1986).

The Court must construe the evidence and all reasonable inferences arising from it in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); see also *Anderson*, 477 U.S. at 255 (all justifiable inferences must be drawn in the non-disputed facts. See *Pace v. Capobianco*,

283 F.3d 1275, 1276-78 (11th Cir. 2002) (a court is not required to resolve disputes in the non-conclusions and unsupported factual allegations are legally insufficient to defeat

Ellis v. England, 432 F.3d 1321, 1326 (11th Cir. 2005) (per curiam) (citing *Bald Mtn. Park, Ltd. v. Oliver*, 836 F.2d 1560, 1563 (11th Cir. 1989)). *Walker v. Darby*, 911

F.2d 1573, 1577 (11th Cir. 1990) (citing *Anderson*, 477 U.S. at 252).

Summary Judgment Facts The City is a municipal corporation under Alabama law. (Doc. 20-1 at ¶ 5). Smith, who is female, began working for the City on July 27, 2015, as a temporary laborer Department of Public Works. (Id. at ¶¶ 4-5; Deposition of Darshae Smith, doc. 33- 6 (21:17-22); Deposition of Andrea Travis Stallworth, Doc. 33-4 (Depo.

at 31 (123:1-4)). Smith was not a permanent employee. (Smith Depo. at 6 (21:4-14); Stallworth Depo. at 31 (123:23-124:1)). grass, picking up paper, and generally keeping the City of Birmingham clean. (Smith Depo. at 6- 7 (20:22-22:9); Stallworth Depo. at 31 (124:3-6)).

When Smith started working for the City, her immediate supervisor was Gerald Young 6 (22:16-19)). . Rodriguez also supervised Smith, although he was not her immediate supervisor.

(Smith Depo. at 6 (22:10-19)) former Deputy Director Alfred . (Stallworth Depo. at 32 (127:18-20)). And Menifield was supervised by . (Id. (127:21-23)). Rodriguez was . (Smith Depo. at 6 (22:10-23:11); Stallworth Depo. at 32 (128:18-20)).

Beginning in August 2015, Rodriguez began to sexually harass Smith. (Smith Depo. at 8 (31:22-32:20)). Rodriguez made comments such as: ; 8-10 (32:12-39:12)). At one point, Rodriguez called Smith on her cellphone and asked if they could when he returned from a five-day trip to Atlanta for his do, but I doubt it if I can (Smith Depo. at 10 (38:12-39:12)). Smith

s. (Smith Depo. at 10-11 (40:21-41:7-23)). Fearing termination, Smith did not report any of between July 27, 2015 and January 22, 2016. 2



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(Smith Depo. at 12 (47:12-48:14)).

The City terminated Smith's employment on January 22, 2016, ostensibly for lack of funding; she and approximately two hundred other temporary laborers were laid off. (Smith Depo. at 31; Stallworth Depo. at 31-32 (124:7-125:4)). administrative service manager for the Public Works Department, testified that

Rodriguez had no authority to promote, hire, or fire Smith and could not promise her a job. (Stallworth Depo. at 32 (128:14-18)). 3

However, Smith testified that after she was terminated,

2 sets out a mechanism for reporting sexual harassment. (Smith Depo. at 29-33 (Def. Exh. 9)). Smith testified she had received, read, and understood the policy. (Smith Depo. at 7-8 (26:10-30:11), 15 (57:20-22)). Further, Smith twice signed forms acknowledging she had been informed of the policy. (Smith Depo. at 27-28 (Def. Exh. 7 & 8)).

3

Q: Did Mr. Rodriguez at any point in time have any authority to promote or hire or fire her? A: No. Q:

Rodriguez called her and told her: have had your permanent position before the 22nd

on the list to come back to the City of Birmingham. (Smith Depo. at 11 (42:19-43:12)). Smith testified that she was told supervisors could make recommendations as to hiring or firing. (Id. (43:22-44:8)).

On June 22, 2016 about Smith scheduled a meeting with Peggy Pope Human Resources . (Smith Depo. at 12 (45:20-46:16)). Since Pope was not there, Smith met with two other HR representatives: (Id.; Samuelson Depo. at 3 (11:19-23)). At the meeting, Smith stated she had voice recordings showing Rodriguez had made sexual advances towards her. (Smith Depo. at 13 (49:3-51:7); Samuelson Depo. at 3-4 (12:6-13:10), 24-25). Smith did not show up to a follow-up meeting on June 27, 2016, nor did she call to reschedule or return . (Samuelson Depo. at 4 (13:11-16), 7 (25:15-24)). Smith filed an EEOC 41-5).

On August 8, 2016, the City re-hired Smith as a temporary laborer to begin a new temporary assignment. (Smith Depo. at 13 (52:9-23)). Although supervisor and Smith was not assigned to work with him, Fancher was still the ultimate

. (Id. at 14 (53:1-6); Stallworth Depo. at 8-9 (32:14- 35:1)). under a chain of command that did not include Rodriguez, but shortly afterward she was transferred to the sewer



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A: No.

maintenance department. 4

(Smith Depo. at 15 (59:20-60:4); Stallworth Depo. at 32 (125:15- 126:12)).

On February 28, 2017, wrote Executive Order 50-86 General Safety Rules

3.0 PPE (foot wear), Violations of Departmental Directive 5-6 PPE, City of Birmingham Supplemental Personnel Policies and Procedures 2.2 Core Values and Expected Employee 37-1 at 5). To substantiate this, the write-up indicated:

On or about February 13, 2017, Senior Construction Supervisor, Mike Brown, had his first meeting with the Storm Sewer Crew as their new supervisor. At this meeting he noticed that you, Ms. Darshae Smith, was [sic] not wearing safety shoes. It was mentioned that all employees need to comply with the uniform policy. Mr. Brown was informed that you had not worn safety shoes since your temporary employment started. On 2/13/2017 the District Supervisor, Charles Stewart, told you to get safety shoes. On the morning of 2/21/2017, Mike Brown met with the Storm Crew and you did not have safety shoes. Mr. Brown instructed you again, to get sturdy work shoes, that night. You took off work the next day. On 2/24/2017 Mike Brown saw you at North Lot without safety shoes. He took a picture of you. When you came to work Monday, 2/27/2017, you were wearing safety shoes. (Id.). Prior to the write-up, Smith had explained that she had not acquired safety shoes because a house fire had destroyed her work boots. 5

(Smith Depo. at 15 (60:12-23)). As noted in the report,

4 15 (60:9-11)). 5 The City purportedly disputes this fact because Smith did not testify to a specific date and time she informed the City about the house fire. (Doc. 42 at 5). This is true, but a reasonable inference for summary judgment purposes until the 15 (60:22-23)), and (id. (60:15-17)), is that this occurred prior to her write-up.

Smith had reported to work the day prior to the write-up with the correct shoes. 6

Smith denied that she had been told previously to wear proper safety shoes. (Id.).

-up consisted of two warnings for tardiness. (Doc. 37-1 at 2-4). Stallworth testified two tardiness violations in jeopardy. (Stallworth Depo. at 10 (39:13-17)). On March 1, 2017, the City obtained statements

from six coworkers shoe-related violation, only one of which indicated that work. (Doc. 41-3). Other workers indicated they had not paid attention and one coworker stated . (Id.).



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On March 7, 2017 from Fancher, g for the following day. (Doc. 37-1 at 7). Menifield handled the disciplinary investigation and conducted the determination hearing. (Doc. 37-1 at 7). Fancher, who was on vacation and not present at the disciplinary hearing, ultimately signed off on the decision to terminate Smith on March 8, 2017. 7

(Doc. 37-1 at 8; Smith Depo. at 1 (58:11-15); Stallworth Depo. at 14 (55:12-17)).

The City follows the Rules and Regulations of the Personnel Board of Jefferson County and the City of Birmingham Supplemental Human Resources Policies and Procedures when disciplining its employees. (Stallworth Depo. at 5 (20:2-6), 11 (42:18-43:22)). These policies apply to all employees, regardless of classification status. (Id.). Past rules infractions are taken

6 The City states it disputes this at 5), but the write-up clearly indicates this.

7 The parties dispute to some extent the person who made the decision to terminate Smith. (Doc. 33 at 6; doc. 37 at 11; doc. 42 at 6). The undisputed evidence is that Fancher was not present at the hearing but signed off on the determination.

into account in administering discipline only if (1) they occurred in the previous twelve months and (2) were the same type of offense. (Id. at 28 (109:19-111:16)).

Rodriguez has a lengthy disciplinary history stretching back to 2003, including write-ups for being late to work, being out of uniform (on two occasions), damaging city equipment, failing to report a fight between coworkers, gambling and paying off gambling debts during working hours, taking unauthorized breaks, failing to secure city equipment (ultimately resulting in the theft of the equipment), and insubordination. (Stallworth Depo. at 19-26 (76:6-88:20, 91:7-101:14); doc. 38-2). Despite this, Rodriguez has received several promotions, and has received a maximum punishment of a three-day suspension from Fancher for failing to report the fight. 8

(Stallworth Depo. at 20 (79:16-80:12), 23 (89:3-90-9)).

Analysis amended complaint raises two Title VII claims: a sexual harassment claim, (Doc. 23 at ¶¶ 17-21), and a retaliation claim, (id. at ¶¶ 22-30). The City contends it is entitled to summary judgment on both, of these is discussed separately below.

A. Sexual Harassment . . . discharg[ing] any individual, or otherwise discriminat[ing] against any individual with respect to his

8 Smith describes at length a specific incident that occurred on October 17, 2016, for which Rodriguez received a letter of reprimand and training following a hearing. (Doc. 37 at 13-15). Specifically, around in circles, another was parked on a dead-end street with a crew member in the



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rear seat of the cab, and yet another crew was performing in a manner that was wasteful of time, energy, and (Doc. 41-1). [a]dmitted but immaterial 42 at 6-7).

2000e-2(a).

When a plaintiff bases his disparate treatment claims on circumstantial evidence, the court generally applies the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973). Under the McDonnell Douglas e plaintiff bears the initial burden of establishing a prima facie case of discrimination by showing (1) that she belongs to a protected class, (2) that she was subjected to an adverse employment action, (3) that she was qualified to perform the job in question, and (4) that her employer treated similarly situated employees outside her class more favorably. *Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1220 21 (11th Cir. 2019) (citation omitted). If the plaintiff makes this showing by a preponderance of the evidence, the burden shifts to the defendant employer to show a legitimate, nondiscriminatory reason for its actions. *Id.* at 1221 (citing , 450 U.S. 248, 253 (1981)); *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001). If the defendant does so proffered reason was merely a pretext for unlawful discrimination, an obligat

Lewis, 918 F.3d at 1221 (citing *Burdine*, 450 U.S. at 256).

A plaintiff seeking to make out a prima facie case of sexual harassment must show (1) that he or she belongs to a protected group; (2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that the harassment must have been based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for

holding the employer liable. *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 808 (11th Cir. 2010). To show the fourth element, a plaintiff may rely on one of two theories: either the pervasi *Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1231 (11th

Cir. 2006). Under the first theory, an employer is strictly liable for the harassment suffered by the employee; conversely, an employer may assert an affirmative defense if the plaintiff relies on the second theory.

The City does not dispute that Smith belongs to a protected group, that she was subjected to unwanted sexual harassment, or that the harassment was based on her sex. (Doc. 33 at 12-16). Instead, the parties over which theory Smith may advance. The City argues it took no tangible employment towards her, so Smith must be . (Doc. 33 at 13). As such, it focuses its briefing solely on its defense: that Smith failed to report the sexual harassment and failed to cooperate in the investigation into her allegations. 9



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(Id. at 13-16). Smith ignores the defense, contending because she was fired. (Doc. 37 at 19, 22). Under this interpretation of events, even though it is undisputed that Rodriguez could neither hire nor fire Smith, Fancher simply serv (Id. at 23). 9

This is the Faragher-Ellerth defense, under which the City may avoid liability under a (1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities it provided. Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287, 1303 (11th Cir. 2007) (citations, alterations, and internal quotation marks omitted).

in two sentences was fired because (1) job ended along with that of many other temporary employees. (Doc. 42 at 8-9).

Because the parties take such wildly different positions, neither really confronts the other s arguments. To settle this squabble, the undersigned must determine whether Smith is correct that she suffered a tangible employment action. If she did, the City has not met its own burden to show it is entitled to summary judgment. See Celotex, 477 U.S. at 322. If she did not, Smith has abandoned any , and thus her claim. See Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1 appellants' failure to brief and argue this issue during the proceedings before the district court is

grounds for finding that the issue has been Resolution Trust Corp. v. Dunmar Corp., 43 F.3d 587, 599 (11th Cir. 1995) (dismissing undefended claims on summary judgment); Hudson v. Norfolk S. Ry. Co. to an argument or otherwise address a claim, the Court deems such argument or claim abandoned. .

as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998). the employee. Id. at employment action and tCotton, 434 F.3d at 1231.

Here, Smith undisputedly was laid off by the City on direction. This certainly would qualify as a tangible employment action if Smith could show a causal link between the termination and the harassment. show this causal link what I told you to do, then you would have had your permanent position before . . . the layoff

at 24). entations to her and in the following excerpt:

Q: So do you know if [Rodriguez] actually had any authority to put you on a



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list or make you a permanent employee, or you were just listening to what he was telling you? A: I was listening to what he was telling me. Q: A: I have knowledge of they saying supervisors recommend. (Smith Depo. at 11 (43:22-44:8)). Thus, Smith argues she was only terminated by Fancher because Rodriguez failed to recommend her for retention. (See doc. 37 at 24). This is the so- when a biased actor recommends that an adverse employment action be taken against an employee, [even though] the biased actor is not the ultimate decision- Williamson v. Adventist Health Sys./Sunbelt, Inc., 372 F. App x 936, 938 (11th Cir.2010) (citing Stimpson v. City of Tuscaloosa, 186 F.3d 1328, 1332 (11th Cir. 1999)).

additional purportedly undisputed fact setting out her testimony as to

f testified to the extent this could be construed as an evidentiary objection, it is insufficient to prevent the court from considering the statement as summary judgment evidence. Although [t]he general rule is that inadmissible hearsay cannot be considered on a motion for summary judgment, a court may could be reduced to admissible evidence at trial or reduced to admissible form. Jones v. UPS Ground Freight, 683 F.3d 1283, 1294 (11th Cir. 2012) (quoting Macuba v. Deboer, 193 F.3d 1316, 1322 (11th Cir. 1999)). Consistent with this, the Federal Rules of Civil Procedure require that an evidentiary objection to summary

FED. R. CIV. P. of the statement as hearsay is not an argument that the statement could not be reduced to admissible

he most obvious way that hearsay testimony can be reduced to admissible form is to have the hearsay declarant testify directly to the matter at trial Jones, 683 F.3d at 1294, Smith could call Rodriguez as a witness and solicit his testimony. 10

Nor does the City indicate Accordingly, gned considers it.

Of course, whatever Rodriguez told Smith does not matter if he had no power to affect that . Rodriguez had no authority to affect 42 at 8). By focusing

10 telling her she would have received a permanent position had she done what [Rodriguez] told [her] to do, but the court must make that assumption for summary judgment purposes. The undersigned likewise assumes that Rodriguez would testify honestly at trial.

exclusively on whether Rodriguez had the power to to affect [] pay, make [her] a her, (doc. 33 at 4), 11

the City ignores . If Rodriguez could recommend that Smith be retained through the layoff and withheld his recommendation because Smith declined his advances, Smith suffered the natural consequences of that: layoff along with the other two hundred temporary workers, each of whom presumably also lacked the recommendation of a supervisor. there is a factual dispute as to whether



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he could, and thus as to whether the City took a tangible

. Accordingly, a jury must settle the issue.

Since Smith has adduced sufficient evidence to proceed on the tangible employment action theory, the City may not assert the defense it contends entitles it to summary judgment. And since the City relies exclusively on this inapplicable defense, the C sexual harassment claim.

B. Retaliation T testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under

McDonnell Douglas prima facie case of Title VII or § 1981 retaliation, a plaintiff must show that (1) [s]he engaged in statutorily protected expression, (2) the employer took action that would have been materially adverse to a reasonable employee, and (3) there was

11 what she actually testified to. See *supra*, n.3.

some causal relation between the two events. *Worley v. City of Lilburn*, 408 F. App'x 248, 250 (11th Cir. 2011) (citing *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001)). -for cause of the alleged University of Texas Southwestern Medical Center v. Nassar, 570 U.S. 338, 362 (2013).

filed an EEOC charge. (Doc. 23 at ¶ 23-24). The City concedes the

prima facie case and focuses solely on the third. (Doc. 33 at 17). It offers two primary justifications for why there is no causal connection between activity. First, it argues Fancher, who signed off on the determination to terminate Smith, did not know about her protected activity. (Doc. 33 at 18). Second, it contends the temporal gap between action. (Id. at 18-19). And, assuming Smith could make out a prima facie case, it highlights her failure to wear safety shoes as a legitimate, nondiscriminatory reason for termination. (Id. at 19).

that the employer was actually aware of the protected expression at the time it took adverse employment action. The defendant's

Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1354 (11th Cir. 1999) (citation omitted). The City . (Doc. 33 at 18) Fancher was aware of the EEOC charge when it was filed. (Doc. 37 at 25) (citing Stallworth Depo. at 7 (26:13-27:8)). The of anything yet [sic] alone his personal know 42 at 14). position. First, Stallworth was testifying as Rule 30(b)(6) representative, (Stallworth Depo. at 2 (8:6-8); doc. 33-5 at 1), so she clearly can speak to what was done with the EEOC report internally when it was filed. See *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996)). Second,

Stallworth was specifically list Fancher as a person charge, (see doc. 33-6 at 3-4). The City cannot



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reasonably

when its own discovery responses and corporate representative state the contrary.

more apt. of other evidence tending to show causation, if there is a substantial delay between the protected expression and the adverse Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007) (citation omitted). In Thomas, the court found three months to be too long to show a causal connection, without more. Id. Smith does not argue the temporal connection here, considerably longer than three months, is sufficient. Instead, she says the shoe (Doc. 37 at 25). But the City could easily have retaliated against her earlier take an adverse action against her did not come until March 8,

2017 Department (June 22, 2016), eight months after she filed her EEOC charge (July 8, 2016), and seven months after her rehire date (August 8, 2016) strains credulity.

The cases Smith cites provide no support for her first-opportunity argument. In Jones v. Suburban Propane, Inc., which Smith cites for the basic proposition that if there was a significant time gap between the protected expression and the adverse action, the plaintiff must offer additional evidence to demonstrate a causal connection, such as . . . the adverse action was the first opportunity for the employer to retaliate not alleged any such evidence. 577 F. App'x 951, 955 (11th Cir. 2014). In Porter v. California Dep't of Corr., 419 F.3d 885, 895 (9th Cir. 2005), the court found a two-year delay was not fatal to the plaintiff case when the manager who took the retaliatory acts was not in a position to retaliate until he received responsibility for making personnel decisions. Here, though, Smith had the same ultimate decisionmaker she alleges was responsible for her retaliatory firing: Fancher. And in Ford v. Gen. Motors Corp., 305 F.3d 545, 554 (6th Cir. 2002), the court found a five-month gap between the protected action and the retaliatory conduct could nevertheless support an inference of causation diate supervisor changed, she does not argue Brown had any retaliatory animus towards her (or was even aware of her EEOC charge).

is her effort to show she was treated differently than Rodriguez, who has an extensive history of misconduct, arguing causal connection can be shown if a plaintiff-employee presents evidence that, after the employer learned of the EEOC charge, the employer treated the employee differently from similarly-situated nonprotesting employees. (Doc. 37 at 27-28) (citing Williams v. Hager Hinge Co., 916 F. Supp. 1163, 1177 (M.D. Ala. 1995)). Although the City does not attempt to address Rodriguez as a comparator, (see doc. 42 at 13-15), Smith bears the burden of persuasion as to her prima facie case. Thus, the undersigned considers whether she has met that burden with her comparator argument.

prima facie stage, a plaintiff must show she and any ered comparators were similarly situated in all material respects. Lewis, 918 F.3d at 1218. The court supplied several criteria that generally apply to a similarly situated comparator: he or she will have engaged in the same basic conduct (or misconduct) as the plaintiff disciplinary



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Id. at 1227-28. Notwithstanding Lewis announced an arguably new standard, 12

Smith did not attempt to show Rodriguez was similarly situated under any of the previous Eleventh Circuit standards; instead, she simply assumes he was. Although Rodriguez does appear to have a checkered disciplinary history, he is not an appropriate comparator for two interrelated reasons. First, Smith and Rodriguez have very different employment roles; Smith was a temporary line employee, while Rodriguez was a permanent manager. Second, n in his

supervisory duties, which Smith did not share. 13

Smith even emphasizes this point, noting that . Since Smith was not a say anything about how the City

12 The Lewis 13 In fact, management failures regarding the October 2016 incident Smith recounts in her response were detailed in a letter from Menifield to Rodriguez. (Doc. 41-1 at 1- 5). Menifield judgment, initiative, leadership and supervisory skills . . . assist and inspire their crews to perform quality and productive work at all times, and help them to understand that subpar performance or inappropriate behavior will merit fair, but consistent disciplinary actions Id. at 2).

treated her. To the extent Smith implies were worse infractions than hers, that is not for the court to decide in assessing whether he is an appropriate comparator. Although there are a few respects in which Rodriguez and Smith are similarly situated (e.g., they were both ultimately supervised by Menifield and Fancher and were both subject to the same City policies evidence falls far short of demonstrating they were similarly situated in most material respects, let alone all.

Since Smith cannot show a prima facie case of retaliation, her arguments that her termination was pretextual, (doc. 37 at 28), is beside the point. But even accepting she had presented a prima facie case, one-paragraph rehash of her argument that Rodriguez is an appropriate comparator. (Id.). Accordingly, the City is due

C. Punitive Damages Finally, the City argues it is immune from punitive damages as a matter of law. (Doc. 33 at 19-20). In support, it cites Ala. Code § 6-11- p]unitive damages may not be awarded against the State of Alabama or any county or municipality thereof; or any agency thereof at 20). Additionally, it notes that the Supreme Court history and policy do not support exposing a municipality to punitive damages for the bad-faith

City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981). Smith does not respond to this argument. Consequently, she has abandoned any claim for punitive damage claim to the extent it seeks punitive damages. See Resolution Trust Corp., 43 F.3d at 599.

Conclusion dgment, (doc. 32), is GRANTED IN PART and DENIED IN PART. Specifically, it is



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GRANTED retaliation claim. It is also GRANTED as The motion is

DENIED in all other respects. I am, Count I of her complaint, will go forward. The parties are encouraged to discuss alternative dispute resolution, including the potential for mediation. The parties are ORDERED to file a joint status report by October 7, 2019, regarding the status of such discussion and whether they believe mediation would be beneficial to the resolution of the remaining claim.

DONE this 23rd day of September, 2019.

JUDGE

JOHN H. ENGLAND, III UNITED STATES MAGISTRATE

