

as a fire lieutenant/medic. She filed this action on January 19, 2017, bringing claims for gender discrimination, hostile work environment, and retaliation arising under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* Plaintiff bases her claims on an alleged general atmosphere of hostility where sex-based harassment was tolerated, as well as numerous specific incidents spanning the course of several years, including (1) promotion denials in 2012, January and June of 2015, and 2017; (2) a transfer to the Training Division in 2009; (3) failure to recommend Plaintiff for an award related to her grant work in 2013; and (4) several denials of training requests in 2015 and 2016. Defendants moved for summary judgment on all claims. Dkt. No. [24].

As discussed above, the Magistrate Judge recommends that the Court grant Defendants' Motion in part and deny it in part. Specifically, the Magistrate Judge recommends that the Court: (1) grant summary judgment to Defendant MFD on all claims because it is a non-suable entity; (2) grant summary judgment to Defendant City of Marietta ("the City") on claims that accrued in 2009, 2012, and 2013 as time-barred; (3) grant summary judgment to the City on Plaintiff's hostile work environment claims based on failure to show severe or pervasive harassment; (4) grant summary judgment to the City on Plaintiff's discrimination claims arising from the June 2015 and January 2017 promotion denials based on, respectively, failure to make a *prima facie* case of discrimination and failure to show pretext; (5) grant summary judgment to the City on Plaintiff's

discrimination claims arising from the denial of training requests in April 2015, August 2015, December 2015, and May 2016 based on failure to exhaust administrative remedies; (6) grant summary judgment to the City on all of Plaintiff's retaliation claims, due to Plaintiff's failure to establish a causal connection between the protected activity of her January 2015 EEOC charge and the subsequent denials of promotions and training requests between April 2015 and January 2017; (7) grant summary judgment to the City on Plaintiff's claims for punitive damages because she cannot recover punitive damages against a governmental entity under Title VII; and (8) deny summary judgment to the City on Plaintiff's discrimination claim arising from the January 2015 promotion denial due to the City's failure to articulate a legitimate, nondiscriminatory reason for the denial. See generally Dkt. No. [37].

II. LEGAL STANDARD

Under 28 U.S.C. § 636(b)(1), the Court reviews the Magistrate's Report and Recommendations for clear error if no objections are filed to the report. 28 U.S.C. § 636(b)(1). If a party files objections, however, the district court must determine *de novo* any part of the Magistrate Judge's disposition that is the subject of a proper objection. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b).

III. DISCUSSION

Plaintiff filed no objections. Defendants solely object to the R&R's finding that summary judgment should be denied as to Plaintiff's discrimination claim

arising from the January 2015 promotion denial. Thus, the Court reviews the Magistrate Judge's analysis on that claim *de novo* and reviews the remainder of the R&R for clear error.

To establish a *prima facie* case for a discrimination claim under Title VII, a plaintiff must show: (1) that she was a member of a protected class; (2) that she sought and was qualified for a promotion; (3) despite her qualifications, she was rejected; and (4) after her rejection, her employer either filled the position with a person outside of her protected class or continued to attempt to fill the position. Voudy v. Sheriff of Broward Cty., Fl., 701 F. App'x 865, 869 (11th Cir. 2017 (citing Walker v. Mortham, 158 F.3d 1177, 1186 (11th Cir. 1998))). Once a *prima facie* case is established, the burden then shifts to the defendant employer to assert a legitimate nondiscriminatory reason for the action at issue. If the employer successfully does so, the burden then shifts back to the plaintiff employee to discredit the proffered nondiscriminatory reasons by showing that they are pretextual. See Standard v. A.B.E.L. Svcs., Inc., 161 F.3d 1318, 1331 (11th Cir. 1998) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973)).²

Defendants object to the Magistrate Judge's finding that the City failed to meet its burden at the second step of the McDonnell Douglas framework to assert a legitimate nondiscriminatory reason for denying Plaintiff a promotion to

² This analytical approach is known as the "McDonnell Douglas framework."

Commander in January 2015. At that step, “[t]he defendant’s burden is met, and the presumption of discrimination is rebutted, when ‘the defendant’s evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff with clear reasons for its decision.’” Steger v. Gen. Elec. Co., 318 F.3d 1066, 1075 (11th Cir. 2003) (quoting Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-55 (1981)) (internal alteration omitted). “The defendant may not satisfy this burden by mere argument but must present evidence of the legitimate reason for its decision.” Id. Defendants “cannot testify in abstract terms as to what might have motivated the decision-maker; [they] must present specific evidence regarding the decision-maker’s actual motivations with regard to the challenged employment decision.” Walker, 158 F.3d at 1181 n.8 (citing IMPACT v. Firestone, 893 F.2d 1189, 1194 (11th Cir. 1990)).

In other words, Defendants cannot meet their rebuttal burden without producing “evidence that asserted reasons for [the adverse employment action] were actually relied on.” Lee v. Russell Cty. Bd. Of Educ., 684 F.2d 769, 775 (11th Cir. 1982); see also IMPACT, 893 F.2d at 1194. Placing this rebuttal burden on the defendant at step two “serves simultaneously to meet the plaintiff’s prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant’s evidence should be evaluated by the extent to which it fulfills these functions.” Burdine,

450 U.S. at 255-56.

Defendants argue that the City presented un rebutted evidence that the person chosen for the January 2015 promotion instead of Plaintiff, Lieutenant Walter McDaniel, was selected due to his 31 years of experience with the MFD and expansive institutional knowledge of its operations. Dkt. No. [39] at 4. In support, Defendants rely on the undisputed fact that Chief Jackie Gibbs selected Lieutenant McDaniel for the promotion after reviewing, among other materials, rankings of the 12 candidates submitted by then-Assistant Chief J.D. Hill and Commander Brinson Williams, who were involved in the interview process. Id.; see also Dkt. No. [24-1] ¶¶ 43-46. Mr. Hill ranked Lieutenant McDaniel first, while Mr. Williams ranked him second.

Mr. Hill and Mr. Williams have both provided affidavits explaining that they ranked Lieutenant McDaniel highly for the legitimate, nondiscriminatory reasons of his 31-year tenure and expansive institutional knowledge. Dkt. Nos. [24-8] ¶ 3; [24-9] ¶ 3. In turn, Chief Gibbs explained in his affidavit:

After interviewing the candidates and reviewing their promotional packets, then-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 (which included eighteen years of experience as a Lieutenant), and his expansive institutional knowledge of the operations of the MFD. Notably, neither Assistant Chief Hill nor Commander Williams ranked [Plaintiff] in their top five. In fact, Commander Williams ranked her second to last out of all twelve candidates. . . . After consulting with Deputy Chief Rackley, then-Assistant Chief Hill, and Commander Williams, I selected Lieutenant McDaniel for the promotion to the

position, effective January 25, 2015. Throughout my tenure as MFD Fire Chief, I encouraged all Lieutenants to apply for the position of Commander, including Butch McDaniel.

Dkt. No. [24-3] ¶ 12.

Moreover, during his deposition, Chief Gibbs gave a general description of the process governing promotion decision-making, explaining that after the candidates have been interviewed:

I take all of [the interviewers'] 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 . . . 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.

Dkt. No. [36], Gibbs Dep. 60:20-61:4.

In reviewing the above-described record evidence in her R&R, the Magistrate Judge explained that the City's argument that Plaintiff was not selected for the January 2015 promotion "because no one involved in the promotional process regarded her as the most qualified candidate" does not suffice to meet the City's burden at step two of the McDonnell Douglas framework, because "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." Dkt. No. [37] at 33. Since Chief Gibbs was the decision-maker with respect to the promotion, the Magistrate Judge found that the record evidence was insufficient to meet the

City's burden because "Chief Gibbs has not testified as to how he weighed and took into account [Mr. Hill's and Mr. Williams's] recommendations" and 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." Id. at 36. Therefore, relying on the legal standards set forth above, the Magistrate Judge concluded that the City failed to "present specific evidence regarding the decision-maker's actual motivations" behind the promotion decision, thus falling short of its burden at step two. Id. at 37 (quoting Walker, 158 F.3d at 1181 n.8, and citing IMPACT, 893 F.2d at 1194 & n.5).

However, as Defendants argue in their Reply to the present Motion as well as in their Objections, Plaintiff's Response openly acknowledges that "McDaniel was selected based on his many years of service and his credentials." See Dkt. Nos. [29-2] at 8; [34] at 10-11; [39] at 4 n.4. Plaintiff further admits in her Response that "McDaniel's qualifications were better than hers because of his years of service, but in the 30 years he had been on the force, he never wanted a promotion. Gibbs asked him to apply. So, it was no surprise when he got the job." Dkt. No. [29-2] at 16. Similarly, in her Complaint, Plaintiff alleges that "[t]he details of the [Commander position] opening were later changed to accommodate the Chief's choice for the position who had been asked to apply *and had more*

time in grade. Her frustration with the unfair promotion practices . . . led her to file the 2014 EEOC matter.” Dkt. No. [1] ¶ 21 (emphasis added).

Thus, it is apparent both from Plaintiff’s Response and from her Complaint that she has never staked her January 2015 promotion denial claim on the absence of legitimate, nondiscriminatory reasons for Lieutenant McDaniel being selected for promotion instead of her. Rather, Plaintiff argued from the outset of this litigation only that the promotion process was “unfair” because Lieutenant McDaniel was seemingly pre-selected for the position. *Id.*; Dkt. No. [29-2] at 16.

Therefore, the Court finds that, even viewing the evidence in the light most favorable to her, Plaintiff conceded that Defendants had a legitimate, nondiscriminatory reason for their January 2015 promotion decision. “[T]he onus is upon the parties to formulate arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned.” Resolution Tr. Corp. v. Dunmar Corp., 43 F.3d 587, 599 (11th Cir. 1995). Here, Plaintiff did not even allege in her Complaint that Defendants could not produce a legitimate, nondiscriminatory reason for the promotion decision—instead, she staked her claim entirely on step three of the McDonnell Douglas framework, arguing that the pre-selection of Lieutenant McDaniel demonstrated pretext. See Dkt. No. [1] ¶ 21. As Defendants note in their Objections, [39] at 11, the Magistrate Judge recognized these limited contours of Plaintiff’s argument as well, explaining in a footnote that “[a]lthough 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' proffered 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." Dkt. No. [37] at 33 n.13. As a result of how Plaintiff framed her claim, Defendants provided an affidavit from Chief Gibbs that focused primarily on Plaintiff's argument that pre-selection of Lieutenant McDaniel was unfair, without an explicit statement that Chief Gibbs actually relied on Lieutenant McDaniel's superior qualifications in making his decision.³ See Dkt. No. [24-3] ¶ 12 ("Throughout my tenure as MFD Fire Chief, I encouraged all Lieutenants to apply for the position of Commander,

³ Notably, Chief Gibbs's affidavit does state that Mr. Hill and Mr. Williams both ranked Lieutenant McDaniel highly "due to his thirty-one years of experience with the MFD . . . and his expansive institutional knowledge of the operations of the MFD" and that he "selected Lieutenant McDaniel for the promotion" after consulting with them and Deputy Chief Rackley. Given that "[t]he sufficiency of the defendant's evidence [at step two] should be evaluated by the extent to which it fulfills [the] functions" of rebutting the plaintiff's *prima facie* case of discrimination and "fram[ing] the factual issue with sufficient clarity so that the plaintiff [has] a full and fair opportunity to demonstrate pretext[,]" this evidence should suffice. Burdine, 450 U.S. at 255-56. Nonetheless, the Court agrees with the Magistrate Judge that much of the governing jurisprudence on this point requires a specific showing that the decision-maker "actually relied" on the reasons proffered, and Defendants failed to connect the dots between Chief Gibbs's testimony that Mr. Hill and Mr. Williams ranked Lieutenant McDaniel highly for legitimate nondiscriminatory reasons and his testimony that he considered their rankings in making his decision. See Lee, 684 F.2d at 775; IMPACT, 893 F.2d at 1194.

including [Lieutenant] McDaniel.”).

Where a party has failed to “fairly raise[an] issue,” the opposing party cannot be “on notice to make arguments and adduce evidence in response.” Resolution Tr. Corp., 43 F.3d at 599. Here, the Magistrate Judge erred by discerning a “potential argument that could be made based upon the materials before it on summary judgment” without considering whether Defendants could fairly be said to have notice that potential argument.⁴ Id. See also Fils v. City of Aventura, 647 F.3d 1272, 1284-85 (11th Cir. 2011) (“To prevail on a particular theory of liability, a party must present that argument to the district court. Our adversarial system requires it; district courts cannot concoct or resurrect arguments neither made nor advanced by the parties.”) (internal citation omitted).

Because Plaintiff stated several times in her briefing that Defendants had a legitimate, nondiscriminatory reason to select Lieutenant McDaniel instead of her for the January 2015 promotion, Defendants were not on notice that any issue but pretext was in contention as to the January 2015 promotion denial.

⁴ Indeed, the Magistrate Judge recognized that Plaintiff’s briefing effectively forced the Court to construct her arguments for her, noting that “instead of structuring her brief to respond specifically to each of Defendants’ arguments in organized sections,” Plaintiff provided an “amorphous” Response, which “basically told the story of what occurred during her employment from her own perspective, never addressing a single point of law throughout.” Dkt. No. [37] at 15 n.8. Thus, the Magistrate Judge “had to review Plaintiff’s brief over and over again” in order “to adduce whether Plaintiff responded to an argument[.]” Id.

Accordingly, the Court finds that Plaintiff conceded that Defendants met their burden at step two and **SUSTAINS** Defendants' objection. See Road Sprinkler Fitters Local Union No. 669 v. Indep. Sprinkler Corp., 10 F.3d 1563, 1568 (11th Cir. 1994) (citing with approval Lazzara v. Howard A. Esser, Inc., 802 F.2d 260, 269 (7th Cir. 1986) for the proposition that "a ground not pressed in the district court in opposition to a motion for summary judgment is to be treated by the district court as abandoned."); see also Stinson v. City of Center, Al., No. 4:08-CV-955-VEH, 2009 WL 10703407, at *1 (N.D. Ala. May 14, 2009) (finding that the defendant "conceded and/or alternatively abandoned any *prima facie* challenge to [the plaintiff's] failure-to-hire claim under Title VII" where its briefing focused only on whether the plaintiff "adduced sufficient evidence of pretext").

Further, the Court finds that Plaintiff has failed to raise a genuine issue of material fact as to whether the reason for denying her the January 2015 promotion was pretextual. As discussed by the Magistrate Judge in connection to Plaintiff's discrimination claim arising from her January 2017 promotion denial, 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." Dkt. No. [37] at 41. These are the same arguments Plaintiff raised to support pretext in connection with her

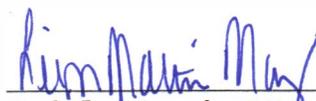
January 2015 promotion denial claim. Id. at 33 n.13. The Court agrees with the Magistrate Judge, however, that “Plaintiff fails to direct the Court to evidence showing that Chief Gibbs’ promotional procedure results in unfairness for women applicants or that women have been disadvantaged by this procedure.” Id. at 41. Consequently, Defendants are entitled to summary judgment on Plaintiff’s discrimination claim arising from the January 2015 promotion denial.

IV. CONCLUSION

The Magistrate Judge recommended that summary judgment be granted to Defendants on all of Plaintiff’s other claims, and neither party raised any objection to those recommendations. The Court has reviewed the remainder of the R&R for clear error and finds none. Thus, in accordance with the foregoing, the Court **ADOPTS IN PART** the Magistrate Judge’s R&R [37] and **GRANTS** Defendants’ Motion for Summary Judgment [24].

The Clerk is **DIRECTED** to close this case.

IT IS SO ORDERED this 25th day of September, 2018.



Leigh Martin May
United States District Judge