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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, and ROBIN FRIENDS, Plaintiff-Intervenor, v. ATLANTA GASTROENTEROLOGY ASSOCIATES, LLC., Defendant.	CIVIL ACTION NO. 1:05-CV-2504-TWT-RGV

MAGISTRATE JUDGE'S NON-FINAL REPORT AND RECOMMENDATION

The Equal Employment Opportunity Commission ("EEOC") filed this civil action against defendant Atlanta Gastroenterology Associates, L.L.C. ("AGA") alleging that defendant engaged in unlawful retaliation, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., ("Title VII"), by terminating Robin Schmidt-Friends ("Friends") for opposing racially discriminatory illegal employment practices. [Doc. 1]. Defendant answered on November 7, 2005.

[Doc. 3]. On November, 23, 2005, Friends filed a Motion to Intervene, [Doc. 5], which was granted by the Court on February 27, 2006. [Doc. 24]. On March 16, 2006, plaintiff-intervenor Friends filed her Intervenor Complaint, [Doc. 26], which defendant answered on April 4, 2006. [Doc. 27]. On August 15, 2006, defendant moved for summary judgment, [Doc. 36], which plaintiffs oppose. [Docs. 50, 58]. For the following reasons, the undersigned Magistrate Judge recommends that the motion for summary judgment be denied.

I. FACTUAL BACKGROUND

In compliance with Local Rule 56.1B(1)-(2), defendant, as movant, filed a Statement of Material Facts To Which There is No Genuine Issue To Be Tried [Doc. 36], to which the EEOC as plaintiff and Friends as plaintiff-intervenor (sometimes jointly referred to as "plaintiffs") filed responses. [Docs. 51, 59]. The Court accepts as undisputed those facts plaintiffs have admitted. See [Doc. 51, admitting ¶¶ 4-6, 8-9, 16, 19, 24, 27, 29, 33, 37-38, 51, 54, 62-63, 67-68, 77; Doc. 59, admitting ¶¶ 4-9, 16, 19, 24, 27, 29, 33, 37-38, 47, 49-51, 53-54, 62-63, 67-68, 74, 76-77]. The Court construes the following pertinent facts of this case at the summary judgment stage in the light most favorable to plaintiffs as the non-moving parties. Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1085 (11th Cir. 2004) (citing Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358 (11th Cir. 1999)).

A. AGA and its growth over the years

AGA is the largest gastroenterology practice in the Southeast engaged in the business of evaluating and treating digestive and liver diseases. [Doc. 36, (Defendant's Statement of Material Facts ("DSMF")) at ¶ 4; Doc. 36, Ex. 1 (Pittner Aff.) at ¶ 2]. AGA was established over twenty years ago and has experienced considerable growth over the most recent years with 22 offices located throughout the Atlanta metropolitan and North Georgia areas, including the St. Joseph's Hospital location. [Id. ¶¶ 4-5; Id.]. AGA employs 40 physicians and approximately 280 employees. [Id. ¶ 5; Id.]. AGA is managed by its practice manager, Dr. Steven Morris, followed by its practice administrator, Jere Pittner ("Pittner"). [Id. ¶ 6; Doc. 53, (Pittner Depo.) at pp. 8-9].

In the summer of 2004, AGA acquired Dr. Richard Friedman's practice, which merged with AGA's office located at St. Joseph's Hospital. [Id. ¶ 27; Doc. 36, Ex. 2 (Robinson Aff.) at ¶ 4; Doc. 55, (Robinson Depo.) at pp. 30-33]. During this time, AGA also acquired a three-physician practice in the North Fulton area, which was merged with AGA's North Fulton satellite office. [Id.].

B. Friends' Employment at AGA

On July 15, 2002, plaintiff-intervenor Friends, a white female, applied for and was hired by AGA as an office manager for AGA's St. Joseph's Hospital location.

[Id. ¶¶ 1, 7; Doc. 43 (Friends Depo.), p. 26, Exs. 2, 8].[1] Suzie Gill ("Gill"), AGA's operations manager at the time, hired Friends for this position. [Id. ¶ 7; Id. at pp. 26-27]. As office manager of AGA's St. Joseph's location, Friends' responsibilities included hiring, firing and disciplining staff, working with the office's physicians and staff to ensure quality patient care, and implementing practice-wide procedures as directed by upper management. [Id. ¶ 8; Robinson Aff., ¶ 3]. At all times relevant to this case, Friends reported directly to AGA's operations manager, who was responsible for the overall functioning of the practice. [Id. ¶ 9; Id. ¶ 2; Doc. 55, p. 7].

On February 3, 2004, Gill conducted a Performance Appraisal for Friends and rated her performance as "excellent" and "very good" in the majority of categories and "satisfactory" in the remaining categories. [Doc. 58, ¶¶ 24, 37-44, Att. 5; Doc. 53, p. 60, Ex. 6]. Gill rated Friends "very good" overall and recommended her for a pay increase. [Id.].

C. Alleged unlawful employment practices at AGA

During Friends' employment with AGA, she allegedly experienced the

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[1] Plaintiffs dispute that Friends actually started her employment with AGA on July 15, 2002, contending that Friends testified that she believed her start date was in "late May, early June" of 2002. [Doc. 51, ¶¶ 1, 7; Doc. 59, ¶¶ 1, 7]. However, the evidence in the record shows that Friends actually applied for a job with AGA on July 15, 2002. See [Doc. 43, Ex. 2].

following events.[2] [See Doc. 43, pp. 30-32, Ex. 3]. On February 26, 2003, Gill and an AGA physician, Dr. Bruce Salzberg, advised Friends that they had concerns over the racial composition of the front intake desk at the St. Joseph's location and wanted white employees at the front desk to create a better image and cater to their predominantly white patients. [Doc. 58, ¶¶ 1-2; Doc. 43, pp. 42-45]. Specifically, Gill stated to Friends, "I want you to start interviewing– the doctors want white people Robin, professional image white people at the front desk. We are too top heavy with Blacks– you need to fix this." [Id. ¶ 3, Att. 1; Doc. 53, pp. 68-69]. Gill also told Friends to be creative and inform the recruiters that AGA wants a "cute white girl" and were willing to pay $2.00 more per hour for white candidates than was currently the applicable rate. [Id. ¶¶ 4-5, Att. 1; Doc. 43, p. 46].

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[2] Because plaintiffs filed statements of material facts in dispute, [Docs. 50, 58], defendant was obligated to respond to plaintiffs' statements under the Local Rules. See N.D. Ga. L.R. 56.1B(3) ("If respondent provides a statement of additional material facts, then . . . the movant shall file a response to each of the respondent's facts.") (emphasis added). However, the Court notes that the EEOC's statement of disputed material facts is not in compliance with the Local Rules. See N.D. Ga. L.R. 56.1B(2)(b) and B(1) ("Each material fact must be numbered separately. . ."). Nonetheless, defendant failed to respond to plaintiffs' statements of material facts. As a result of defendant's failure to respond, the Court will accept the facts contained in plaintiffs' statements of material facts as true to the extent they are supported by the evidence, they do not make credibility determinations, they do not involve legal conclusions, and they are not disputed by defendant's statement of undisputed material facts, [Doc. 36].

Pursuant to AGA's policies for voicing complaints, on March 3, 2003, Friends complained about this directive to AGA's Human Resources Manager, Judy Pollack Barry ("Barry"). [Id. ¶¶ 6-7, Att. 2; Id. at pp. 47, 50]. Barry first laughed and then directed Friends to follow through with the directive stating, "[w]ell, if the doc[tors] want it, just do it. [Gill] gave you the directive, so do it. Just be careful." [Id. ¶¶ 8-9, Att. 1; Id. at p. 50]. She further advised Friends to "keep it low-key." [Id. ¶ 10, Att. 1; Id. at pp. 50-51]. Subsequently, Friends hired three white employees for St. Joseph's front desk. [Id. ¶ 11; Id. at p. 48].[3]

In March 2003, Gill complained about an AGA employee, Linda Nichols ("Nichols") to Friends. [Id. ¶ 12; Id. at pp. 54-55]. Specifically, Gill criticized Nichol's hairstyle stating that Nichols "was too lazy to run a comb through it, it's a black thing" and "[s]o it's a real hairdo for Blacks[]". [Id. ¶¶ 12-13, Att. 3; Id.; Doc. 54, (Barry Depo.) at pp. 13-14]. Based on the alleged comments by Gill, Friends complained to Barry and even recommended that AGA offer Gill some sort of sensitivity training with regard to these comments. [Id. ¶ 14; Id. at pp. 55-56; Id. at p. 14].

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[3] The two black employees previously working the front desk, Crystal West and Rod Johnson, were allegedly given a "fake promotion" and moved to another department within AGA. [Doc. 43, pp. 48-49, 214-15; Doc. 53, p. 67].

Shortly thereafter, in April 2003, Shane Blair ("Blair") was accused of sexual harassment by a white female employee.[4] [Id. ¶ 15; Doc. 43, pp. 58, 62-63]. Gill again commented to Friends and Blair, "Shane is a black man. He can't go around feeling up the white women in this office." [Id.]. On April 9, 2003, Friends again complained to Barry about Gill's remark in reference to Blair. [Id. at ¶ 16, Att. 4]. In response, Barry informed Friends that she would talk to Gill. [Id.]. Subsequently, an investigation revealed that the accuser's allegations could not be substantiated. [Doc. 53, pp. 31-32; Doc. 54, p. 16; Doc. 43, pp. 69, 71]. Therefore, Blair was not fired or demoted as a result of this sexual harassment allegation. [Doc. 43, p. 66]. In fact, Blair was selected for and promoted to a financial counselor position after this allegation. [Id. at pp. 71-73].

In addition to this sexual harassment allegation, Blair was investigated on at least two occasions during his employment with AGA in connection with missing money allegedly within his access and control. [Doc. 36, DSMF ¶ 74; Pittner Aff., ¶ 15, Ex. 2; Doc. 43, pp. 75-79, 88-91, Ex. 58]. In early May of 2003, Gill again made a remark about Blair in reference to one of the allegations that Blair had stolen money from AGA stating, "Shane is behind on child support, and that's probably why the

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[4] Blair became Friends' team leader at St. Joseph's hospital in January 2004. [Doc. 43, pp. 96-99; Doc. 55, p. 16]. In Friends' opinion, the team leader position was considered an assistant manager position. [Doc. 43, p. 103].

money is missing . . . black people don't pay their child support." [Doc. 58, ¶ 17; Doc. 43, p. 78]. Again, Blair was not fired or transferred as a result of these investigations. [Doc. 43, pp. 79-80, 93].

Shortly thereafter, in July 2003, Gill again objected to another AGA employee's hair style stating that a hair band worn by Yasmir Cobb ("Cobb")[5] made her look like "Aunt Jemima." [Doc. 58, ¶ 18; Doc. 43, pp. 80-82]. Gill, with the support of Dr. Salzberg, further directed Friends to fire Cobb. [Id.]. As reasons for firing Cobb, Gill stated that Cobb is black and had "microbraids" in her hair. [Id.]. On July 22, 2003, Friends complained about this directive to Pittner. [Id. ¶ 19; Id. at pp. 83-86]. Pittner advised Friends to follow through with the directive to fire Cobb, at least in part, based on her race, but to "be creative" to avoid legal exposure. [Id. ¶ 20; Id.]. However, Friends did not comply with this directive. [Id. ¶ 21; Id.].

In January and February of 2004, Gill and Dr. Salzberg again directed Friends to terminate Cobb stating Cobb was "black and annoying." [Id. ¶ 22; Id. at pp. 105-108]. They further commented about Cobb's tattoo. [Id.; Id. at pp. 60, 108]. Rather than fire Cobb, Friends advised her to keep her tattoo covered in the office. [Id. ¶ 23; Id. at pp. 108-09].

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[5] Cobb was a medical assistant to Dr. Salzberg in the North Fulton satellite office. [Doc. 43, pp. 36-37].

In May 2004, Barry overturned a decision made by Blair and Friends to terminate a St. Joseph's employee, Jennifer Johnson, for performance deficiencies and violations of company policy. [Doc. 43, pp. 124-30, Ex. 68]. Friends testified that when she met with Barry regarding her decision to overturn Johnson's termination, Barry stated, "Now you know how we feel about Shane, how you handled Shane." [Id.]. In response, Friends sent Pittner a letter regarding this incident. [Id.].

In June 2004, Dr. Salzberg again directed Friends to fire Cobb stating "fire her black face" due to concerns expressed by Dr. Salzberg's nurse that Cobb was "black" and "ghetto." [Doc. 58, ¶¶ 28-29; Doc. 43, pp. 134-35, 138-40; Doc. 53, pp. 35-36, Ex. 2]. Friends again refused to take any action against Cobb, but did move her into another position located away from Dr. Salzberg's nurse. [Id. ¶ 30; Doc. 43, pp. 135, 141].

On August 12, 2004, Barry refused to approve a pay increase for Cobb that Friends and Barry had previously agreed upon when Cobb took over another position with AGA from another employee. [Doc. 43, pp. 173-74]. Barry instructed Cobb to make a formal statement as to why she deserved a pay increase, a request that Friends believed had never been made by AGA to any employee. [Id. at pp. 173-74, 184, 236, Ex. 22]. Shortly thereafter, Cobb made an internal complaint to Friends alleging unfair treatment. [Id. at p. 174].

D. Organizational Restructuring at AGA

AGA determined that the expansion of their St. Joseph's location and North Fulton's satellite office due to the acquisitions of Dr. Friedman's practice and a three-physician practice in the North Fulton area required organizational restructuring. [Doc. 36, DSMF ¶ 28; Doc. 55, pp. 15-16, 32-33]. Previously, the St. Joseph's office and the North Fulton satellite office functioned under the management of a sole manager, who, up until these acquisitions, was Friends. [Id.]. At this time, however, AGA decided to make its North Fulton satellite office the primary office for the acquired three-physician practice and determined it should function independently under a separate manager from the St. Joseph's office. [Id. ¶¶ 29-30, 37; Id. at pp. 15-16, 31-33; Robinson Aff., ¶ 6].[6]

The acquired North Fulton practice came with its own office manager, who remained as office manager when the practice merged with AGA. [Id. ¶ 38; Id. at pp. 15-16; Id.]. The team leader at AGA's North Fulton satellite office was to transfer to the acquired North Fulton practice's office to help integrate the new physicians and staff into AGA's practices and procedures. [Id.]. As a result of this transfer, the team leader position at AGA's North Fulton satellite office became vacant. [Id.].

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[6] AGA asserts that this decision was growth-related, while Friends contends that her duties were being taken away from her. [Doc. 36, DSMF ¶ 31; Robinson Aff., ¶ 16; Doc. 43, pp. 152-54; Doc. 53, pp. 45-46; Doc. 55, pp. 31-33].

Also during this time, in July 2004, AGA, through Pittner, terminated Gill's employment for ineffectiveness as operations manager and replaced her with Suzanne Robinson ("Robinson"), who became Friends' immediate supervisor. [Doc. 58, ¶ 31; Doc. 43, pp. 57, 142; Doc. 36, DSMF ¶¶ 23-24; Doc. 53, pp. 20, 24-26; Pittner Aff., ¶ 7; Doc. 55, pp. 6, 8-10]. Friends first met Robinson on July 13, 2004, when Robinson informed Friends that she had conversations with Pittner regarding both Friends and Blair. [Doc. 58, ¶ 32; Doc. 43, pp. 142-43].

Given the new acquisitions, Robinson deemed it necessary to replace the team leader position at St. Joseph's office with two new supervisory positions: a clinical manager to oversee the nurses and clinical staff, and a supervisor to evaluate and manage the performance of the front line administrative staff. [Id. ¶ 39; Robinson Aff., ¶ 7]. In making this determination, Robinson considered the opinions of the other members of upper management in addition to her own observations. [Id. ¶ 43; Id. ¶ 8]. The supervisor position would differ from the team leader position by focusing more on the day-to-day management of multiple front office roles, staff system and process training, and the gathering and reporting of quality and productivity measures with regard to volumes, data accuracy and patient wait times. [Id. ¶ 40; Id. ¶ 7]. In contrast, the existing team leader position assisted the office manager with the management of day-to-day activities of the staff while also

performing a specific front line role. [Id. ¶ 41; Id.]. Under this new organization, the team leader position would be abolished. [Id. ¶ 42; Id.].

E. Events Leading to Friends' Discharge

1. Alleged Issues with Friends' Job Performance

Although Pittner and Robinson admit that the merging of different offices and the addition of office staff caused problems for all AGA employees, AGA contends that in February or March 2004, it became apparent that Friends was not equipped to handle the growth and changes that the St. Joseph's office was undergoing. [Doc. 36, DSMF ¶¶ 10, 13, 80; Doc. 53, pp. 19-24, 42-45, 62, 79, 83-90; Pittner Aff., ¶ 4; Doc. 55, pp. 20-22, 45; Robinson Aff., ¶¶ 9-10]. Robinson and Pittner believed Friends' demeanor became unprofessional and antagonistic toward upper management, thereby hindering any effective implementation of practice initiatives. [Id. ¶¶ 11-14; Pittner Aff., ¶ 8; Robinson Aff., ¶ 21; Doc. 55, p. 10]. As an example, AGA points to a February 20, 2004, e-mail from Friends to Pittner, with ten other AGA employees copied thereon, containing the words "concerned with procedures" on the subject line. [Doc. 43, pp. 111, 241, Ex. 26]. To avoid the parties' characterizations of this e-mail, the Court quotes it in relevant part as follows:

Dear Jere and Fellow Management Staff

I am concerned and very disheartened with my leadership.

I have been given directives which myself and others have followed, only to be grilled later asking me "Why [d]id [y]ou do that?" Ohh [sic] it gets better Jere, then it's denied by the supervisor who gave it and/or can't remember giving it, even though my staff witnessed (at times be several people) it, giving in writing over and over just to be lost and forgotten and it's making me **very upset**. I am being made out to be a bumbling idiot making all kinds of errors even though "I've been shown" **(incorrectly)**.

Examples? Where do you want me to start? Computer clean up report

3 of us were shown and instructed the same way. This week I get blasted by Lashun, Kera, Suzie asking me what possessed us to this? Your left and right hands in management don't know what the other is doing. This is **completely unfair**. **I call upon your calm manner of reason Jere, I'm not out to make trouble.**

. . .

There is no teamwork, only trying to catch people making errors and pointing out every little infraction all the while denying their own errors. This isn't right. If something is wrong, let's fix it and move on.

If I'm wrong, I will fix willingly and I am okay with this, but someone needs to put these ever changing policies in writing.

I have resorted to documenting every conversation I have with LaShun, Suzie, Dee to protect myself. I know I'm not the only office manager who feels this way.

. . .

Bonus structures are vague and loosely compiled by these same standards. I have asked for a copy of this in writing so I may understand the basis of it and no one has produced anything of sustenance yet! Dangled like a golden carrot then snatched away because we have staffing needs. We are growing, we need unity.

> **Our company will lose good people if this continues. I've seen this before.**
>
> I don't care about a bonus right now. I have two offices I'm trying to run here. This "**mystery budget**" is constantly used against me and other office managers. One I have asked for a copy of for over 1 ½ years. Still waiting on it, just like the new employee manual. It probably doesn't matter it will change a day or so from now anyway. I have never felt so low about my work environment. Jere, help us.

[Doc. 43, Ex. 26] (emphasis in original).

In addition, beginning in March 2004, Gill asserted for the first time that the physicians had problems with Friends' and Blair's job performance; however, the physicians denied expressing any such concerns to Gill. [Doc. 58, ¶¶ 26-27; Doc. 43, pp. 116-19, 233-35].[7] At this same time, Pittner began engaging in discussions with Friends regarding Friends' problems with her supervisor, Gill, and the employment issues Friends believed were personally directed at her and not related to her work. [Doc. 53, pp. 19-20; Doc. 43, pp. 119-20]. Pittner explained that the issues AGA was having with Friends were not directed at her personally, but were related to her job

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[7] Plaintiffs assert that it was during this time in February or March 2004, that Blair filed an internal complaint with Friends, as his supervisor, regarding race discrimination by Gill. [Doc. 58, ¶ 25; Doc. 43, pp. 116-17, 231-233, Exs. 3, 20]. Blair also copied Barry on this internal complaint. [Doc. 43, Ex. 20]. Plaintiffs also assert that on March 9, 2004, Friends met with Pittner to discuss her concerns about Gill's treatment of her. [Doc. 43, pp. 199-20, Ex. 3]. Specifically, Friends testified that she complained of discriminatory treatment and advised Pittner that Gill was harassing her and retaliating against her whenever she questioned an action she felt was illegal. [Id.].

performance. [Id. at p. 20]. Also during this time, Gill began spending more time at the St. Joseph's office dealing with its day-to-day issues rather than being able to focus on the practice as a whole. [Id. at pp. 22-23].

On April 26, 2004, Gill copied Pittner on a memorandum submitted to St. Joseph's physicians regarding her audit of the St. Joseph's office and her recommendations for improvements. [Doc. 36, DSMF ¶ 19; Pittner Aff., ¶ 5, Ex. 1]. In this memorandum, Gill specifically made suggestions regarding St. Joseph's appointment/scheduling area, the schedulers, the front desk, staff breaks, medical records, pre-certification procedures, the operator, the clinical area, and the phone system. [Pittner Aff., Ex. 1]. Pittner believes that Gill's memorandum reflected problems and improvement recommendations Friends should have recognized and made on her own. [Id. ¶¶ 5-6; Doc. 53, pp. 21-24, 43-44].[8]

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[8] Plaintiffs dispute this statement by asserting that, as operations manager, it was Gill's responsibility to "oversee that the practice was functioning as a whole." [Doc. 51, ¶ 20; Robinson Aff., ¶ 2; Doc. 55, p. 7]. Plaintiffs point out that Gill's memorandum specifically discussed Friends and stated as follows:

> Robin has very strong capabilities when it comes to assisting the physicians and intervening on staff issues. She interacts well when asked with referring physicians and venders. She is on top of patient troubleshooting. She is good with administrative duties.

[Pittner Aff., Ex. 1]. Gill also made recommendations for improvements as to Friends' job performance and responsibilities and further stated, "Robin is always very respectful and open to suggestions. . . ." [Id.].

Robinson also believed that Friends was unable to effectively manage the merger of Dr. Friedman's practice with St. Joseph's office. [Doc. 36, DSMF ¶ 32; Robinson Aff., ¶ 17]. For example, Robinson believed that Friends failed to treat Dr. Friedman as an equal partner of the physicians already practicing with St. Joseph's office regarding scheduling and staff assistance and failed to effectively merge Dr. Friedman's patient files into St. Joseph's medical records system. [Id.].[9]

Robinson also directed Friends and other office managers to oversee an initiative to move all clinically safe procedures from the hospital to AGA's privately owned endoscopy suites in an effort to keep AGA's patients' care centered on gastrointestinal health and to maximize AGA's profit. [Doc. 36, DSMF ¶ 33; Robinson Aff., ¶ 18]. Robinson opined that Friends was unable to handle this directive, which made it necessary for upper management to retrain its schedulers and to have Friends be retrained by another manager. [Id. ¶¶ 34-35; Id.; Doc. 55, pp.

[9] According to plaintiffs, Friends did actively attempt to merge the files into St. Joseph's system; however, Robinson did not agree with Friends' method of merging the files. [Doc. 51, ¶ 32; Doc. 55, pp. 20-21, Ex. 36; Doc. 43, Exs. 38, 57]. Specifically, plaintiffs point to two e-mails from Friends evidencing her effort to merge Dr. Friedman's patient files with St. Joseph's system. [Doc. 43, Exs. 38, 57]. In addition, plaintiffs contend that Karen Cheponis ("Cheponis") was specifically responsible for the integration of Dr. Friedman's patient files, not Friends. [Id. at pp. 161-63].

22-23, 45-46].[10]

During this time, Pittner concluded that Friends was unable to manage the St. Joseph's office and considered transferring her to a smaller office where she could utilize the managerial skills she did possess. [Doc. 36, DSMF ¶ 22; Pittner Aff., ¶ 6; Doc. 53, pp. 25-26, 44, 46-47]. Upper management also felt that Blair was not capable of handling a supervisory role as called for by the new restructuring, but determined that he could fulfill the vacant team leader position at the North Fulton office and utilize his financial counseling background in this new, independent office. [Id. ¶ 44; Id. ¶ 8]. Given this plan for restructuring, Robinson decided she would transfer Blair to the team leader position at the North Fulton office and move Rod Johnson, another AGA employee, into the new supervisor role at the St. Joseph's location. [Id. ¶ 45; Id.].[11]

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[10] Plaintiffs contend that Friends was actively handling the scheduling initiative as evidence by two of her e-mails. [Doc. 51, ¶ 34; Doc. 43, Exs. 38, 57]. In addition, plaintiffs assert that the "training session" was really just Friends and the other schedulers actually meeting as a group to determine how to accomplish the scheduling initiative. [Doc. 51, ¶ 35; Doc. 55, p. 24].

[11] Plaintiffs actually contend that Robinson directed Friends to terminate Blair during Robinson and Friends' first meeting in July 2004, after Robinson mentioned Blair's internal complaint of discrimination. [Doc. 50, p. 20; Doc. 43, pp. 143, 145-46]. Plaintiffs assert that it was after Friends opposed Blair's termination that Robinson decided to transfer Blair to another office. [Id.; Id. at pp. 149-50; Doc. 55, pp. 14-18].

2. Proposed Transfer of Friends and Blair

On July 14, 2004, Robinson met with some of St. Joseph's physicians to discuss her plan for restructuring, her concerns that neither Friends nor Blair could handle the St. Joseph's office, and the proposed transfer of Friends and Blair to smaller offices. [Doc. 36, DSMF ¶ 46; Robinson Aff., ¶ 10]. On July 16, 2004, Robinson explained the planned transfer of Blair to Friends. [Id. ¶ 47; Id. ¶ 12; Doc. 53, pp. 55-57; Doc. 43, Ex. 60]. In response, Friends opposed Blair's transfer and stated that Blair was her "right arm." [Id. ¶ 47; Id. ¶ 12; Id. at pp. 55-57; Doc. 43, pp. 149-50]. Later that same day, Robinson explained the proposed transfer to Blair stating that the position at the North Fulton office would allow him to show AGA his competency as an independent leader; and, he should therefore, view the transfer as a promotion. [Id. ¶ 48; Robinson Aff., ¶ 12; Doc. 43, pp. 148-50; Doc. 55, p. 15].[12]

In response, Blair informed Robinson that he did not want to leave, but Robinson informed Blair that the team leader position at St. Joseph's was being eliminated. [Id. ¶ 49; Id.]. Robinson advised Blair that he could either accept the transfer or choose to leave AGA. [Id. ¶ 50; Id.]. After this discussion, Robinson called Friends and requested that she give Blair the weekend to decide whether to

[12] Plaintiffs dispute that AGA ever intended Blair to show his competency as an independent leader as AGA never intended Blair to function as manager at North Fulton since AGA was bringing in another office manager for that location. [Doc. 51, ¶ 48; Doc. 55, p. 15].

accept the transfer or resign from AGA. [Id. ¶ 51; Id. ¶ 13; Doc. 43, Ex. 60].

However, certain physicians at St. Joseph's expressed concern that the timing of the team leader transition was happening too quickly and that the management changes should happen over time. [Id. ¶ 53; Id.; Doc. 55, pp. 16-17]. Indeed, plaintiffs point out that Robinson, in testifying as to the physicians' opinions about her plans for restructuring, stated, "There was some push back, and they weren't comfortable with how the new management was going to happen in North Fulton and that type of thing." [Doc. 55, pp. 16-18; Doc. 53, p. 57]. Thus, Blair was never in fact transferred, but rather, remained in his position as team leader until he was terminated from his employment with AGA. [Doc. 36, DSMF ¶ 54; Robinson Aff., ¶ 13; Doc. 55, pp. 16-17, 19].

3. Friends' July 30, 2004, e-mail to Pittner, Robinson, and Barry

On July 30, 2004, Friends sent an e-mail to Pittner, Robinson and Barry regarding the subject of "Physician's meeting highlight/also Dr's want a meeting with Steve Morris, Jere, Susanne." [Doc. 43, p. 178, Ex. 6; Doc. 53, pp. 50-51; Doc. 54, p. 29; Doc. 55, p. 26]. Again, to avoid the parties' characterizations of this e-mail, the Court quotes it in relevant part as follows:

> At my monthly physician's meeting, held last night 5-6pm, the following issues were discussed:
>
> 1) progress of Friedman's move charts, phones, backlog status

. . .

4) Schedule changes recently made to all docs schedules, forcing everyone to Northern Crescent with exception of extreme medical needs.

A) Doctor's want to know who made this decision.

B) We (Shane and I) were told in no uncertain terms if they want to schedule a patient at St. Jo's or Northside and direct the staff- that is what they will do. They are the physician's.

* **I told them to call you as directed, however,** "they are not having you or anybody else tell them how to care for their patients, we are the MD's!." "[W]here they want the patient is where the patient will go" "they want a sit down meeting here at St. Jo's with Susanne, Jere and Dr. Morris. . .no excuses"

5) Discussion of August 1, 2004 Homa will be over NF offices.

They questioned that, "she knows nothing of the company."
They question why Robin wasn't asked or offered this opportunity, Dr. Kapoor voiced his thought on this already. I told them I was never offered a chance.
They asked who is training the other staff. When will the endosuite be opened?

. . .

This would have ended our meeting however, they continued discussion

7) They wanted a status on Shane's firing. . .Salzberg: What happened to the meeting I requested directly with Susanne?

I told them it's on hold, and in your words, "to be re-visited when it all calms down at some later date"

Their response to this was:

A) Susanne was directly asked for a meeting to be set up, why

didn't this happen?

B) They said he's (Shane) not going anywhere, not now **not ever**, and this kind of harassment (do as we say or you're fired) is to stop.

C) And your punishment of me, for questioning "what's going on?" this warning for "insubordination" as Susanne put it, **is to be lifted; Dr. Salzberg brought it to us. Anybody would have asked.**

D) NO CHANGES are to be implemented here **without the physician's being informed.**

E) Salzberg very upset at Susanne's tone with him and what she said to him on the phone last week, her telling him "this discussion is closed" was out of line. . . and the entire group of physician's agreed.

F) Susanne approved Tammie Timms shift to Cumming as a Team Leader without giving him the courtesy of discussing the issue, this sudden change to our office, or even a chance to make things right with Tammie. The fact Robin had to call and discuss this with him upset him greatly.

All doctors agree this should have been handled by Susanne with all parties involved.

Then they added "and no e-mail from Dr. Morris (?. . .I guess the docs got this) asking us to give her support, is going to convince us with this kind of management style, running over us, and fake promotions/firing innocent people."

They then asked Shane how he was coping and he noted, "I am very depressed, the threat of anyday my job could be taken, I try to stay positive but it's hard, with the CBO- my name keep coming up, singling me out" All docs re-assured him "Neither you or Robin are going anywhere"

(as a side note, I mentioned I noticed this to you earlier this week in our private meeting, however, I gave Shane the number to mental health for Coventry to help with his depression and I documented it.)

> On that note, the meeting ended for you Susanne, Dr. Morris, and Jere for a sit down meeting, a face to face with the physician's and Shane and myself here at St. Jo's. They want to discuss all these issues and get some accountability. They are not letting this drop. They have put the heat on me to get this set up right away.
>
> Please advise.
> Robin
>
> So let me know ASAP please what day next week is good, Tuesdays or Wednesday's are good. Have a good weekend

[Doc. 43, Ex. 6] (emphasis in original).

Pittner believed this e-mail evidenced that Friends' delivery of operational decisions to the St. Joseph's physicians created unnecessary conflict between the physicians and management and hindered the implementation of a scheduling initiative aimed at maximizing AGA's profit. [Doc. 36, DSMF ¶ 56; Pittner Aff., ¶ 9; Doc. 53, pp. 51-53, 65].[13] Pittner contends that this conflict caused her to have to meet with each of St. Joseph's physicians to explain what management was attempting to achieve with the scheduling initiative. [Id. ¶ 57; Id. ¶ 10; Doc. 53, pp. 50-54]. Likewise, Robinson viewed the e-mail as showing that Friends caused physicians to resist the new scheduling initiative rather than relaying the benefits of implementing such an initiative to the patients and the practice. [Id. ¶ 58;

[13] Plaintiffs contend that Friends' purpose was to simply inform Pittner and AGA upper management regarding the physicians' thoughts and the issues that had been discussed at the meeting. [Doc. 43, pp. 178-79, 228-29, Ex. 18].

Robinson Aff., ¶ 19; Doc. 55, pp. 26-28].

On August 5, 2004, Robinson met with Friends to address three major issues and provide feedback to her regarding those issues, to wit: (1) that Friends needed to focus on the big picture and develop action plans for major directives; (2) Friends' inappropriate attitude toward managers outside the office; and (3) her "unprofessional" tone and e-mails. [Id. ¶ 59; Id. ¶ 21; Id. at pp. 41-42, 47-48]. Robinson contends that Friends was unable to handle this criticism and pressed for examples. [Id.]. However, Robinson never issued a written warning to Friends about her alleged performance deficiencies. [Doc. 55, pp. 47-48].[14]

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[14] Indeed, Pittner testified that she did not recall any written reprimands to Friends for her performance deficiencies. [Doc. 53, pp. 83, 86-87]. In addition, plaintiffs contend that Friends continued to welcome feedback from upper management as evidenced by Friends' e-mail to Pittner and Robinson dated August 6, 2004, containing the words "friedman's schedule update" on the subject line. [Doc. 43, Ex. 57]. This e-mail states in pertinent part:

> This is our weekly schedule to keep you updated on our progress.
>
> As I emailed before, Karen Poe is diligently working on the schedule clean up for Aug. (implementing what our last meeting with Karen Cheponis summarized and applying our corrected directive). Thanks to her hard work and with the help of scheduling, Shane and me, we are meeting your goal! [image omitted] And don't forget we also have people working on September at the same time, doubling our efforts!
>
> . . .
>
> So this should be an improvement don't you think, we welcome your positive feedback. Hopefully this clears a lot up, we are working hard

4. Friends' August 6, 2004, e-mail to Pittner, Robinson, and Barry

On August 6, 2004, Blair filed a charge of racial discrimination with the EEOC. [Doc. 58, ¶ 33; Doc. 43, pp. 169-70; Doc. 53, p. 33; Doc. 54, p. 56]. Later that night, at 7:42 p.m., Friends sent to Pittner and Robinson with a copy to Barry an e-mail that contained the words "formal complaint" on the subject line, explained that Blair filed a charge of discrimination with the EEOC, and memorialized her intent to do the same. [Id. ¶ 34; Id. at pp. 169-70, 253-55, Ex. 58; Id. at p. 39, Ex. 3; Doc. 36, DSMF ¶¶ 61-63; Doc. 54, pp. 30-31; Doc. 55, p. 28]. Friends' email states in pertinent part as follows:

> Per our company handbook, it is my duty to bring to your attention as my immediate supervisor's [sic] and Human Resource, a formal complaint has been placed upon AGA and all members of the "Admin Team[.]"
>
> A formal complaint of racial discrimination and harassment has been filed. Shane bases his complaint on the following issues that have not had any resolve and is racially motivated combined with harassment:
>
> . . .
>
> Also, I too am filing this formal complaint:
>
> 1) I Robin Friends file my own claim of harassment and retaliation against the "Admin Team" management staff

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> as a team.
>
> Thanks
> Robin

For my non-compliance of these legal issues:

A)[15] Retaliation by intentionally being left out of management decisions that effect my office/staff.

B) Directives given that are clearly discriminatory and illegal

C) Yearly annual increase held back as retaliation, despite an excellent review.

D) Retaliation by Administration/Human Resource/Operations by not returning my calls or priority e-mails after I defended and/or blocked wrongful firings of Shane and other employees based on racial discrimination.

E) Admin Team giving indecisive directives, that have continued to change, then sending members of the Admin Team to come to my office to make "corrections" as though I am incompetent.

F) Being told by a Physician and my immediate supervisor/s not to put staffing/complaints in writing, because it could be legally used, and being told to "fax her" instead. Being instructed "You're a good manager Robin, just take care of it"

G) Defamation of my character from hearsay by the "Admin Team" and as relayed by Susanne Robinson, "oh I heard all about you Robin" and her telling me "I'm unprofessional"

H) With due diligence and following company guidelines as set forth in AGA's employee manual, I have discussed/reported all matters with immediate supervisors with no relief or resolve.

[Doc. 43, Ex. 58].

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[15] In Friends' e-mail, her enumerated issues used the letter "B" twice. The Court changed the first letter "B" to "A" here.

F. AGA's decision to discharge Friends

AGA contends that at the time it received Friends' August 6, 2004, e-mail, it had already decided to terminate Friends' employment with AGA, and, therefore, did not engage in any discussions with Friends regarding her "formal complaint" e-mail. [Doc. 36, DSMF ¶ 65; Pittner Aff., ¶¶ 10-11; Robinson Aff., ¶¶ 22-23; Doc. 53, pp. 34-35, 40-41, 79-80; Doc. 54, pp. 31-33; Doc. 55, p. 29].[16] On August 13, 2004, Pittner advised Friends in a termination meeting also attended by Barry that Friends was being discharged from her employment with AGA. [Pittner Aff., ¶ 12; Doc. 43, p. 175, Ex. 60]. Pittner says that she informed Friends during the termination meeting that she was being terminated because her job performance no longer met AGA's standards. [Doc. 53, pp. 23-24, 80; Pittner Aff., ¶ 12]. Plaintiffs dispute this contention asserting that Pittner and Barry informed Friends that they fired her because "[she] was given a job to do, and [she] didn't do it." [Doc. 58, ¶ 36; Doc. 43, pp. 175, 183, Ex. 7]. When Friends inquired about what job she did not perform, Friends asserts that Pittner stated, "We talked to you about Shane, and we talked to you about Yasmir. You had a job to do. You didn't do it. So now it's going to cost you your job." [Id.].

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[16] Plaintiffs contend that AGA did not engage in any discussions with Friends regarding her "formal complaint" because AGA determined that Friends' allegations were either already addressed, or that they did not constitute discrimination. [Doc. 53, pp. 34-35].

G. Friends' EEOC Charge

Friends filed a charge of discrimination with the EEOC on August 16, 2004, asserting that she was terminated in retaliation for opposing unlawful employment practices at AGA. [Doc. 36, DSMF ¶ 67; Doc. 43, pp. 185-86, Ex. 9]. Specifically, Friends charged,

> 1. I was employed by the above named employer as a Site Manager. I was hired in 5/02. In June, I was told to terminate a Black employee the Administration Team had been harassing. I refused because I believed that the directive was based on racial and discriminatory issues. From this moment on, I began to experience retaliation and harassment. On August 6, 2004, I informed [t]he Administration Team (All Whites) of the EEOC charge filed by the Black employee they were harassing and if it did not stop, I would be filing a charge also. On August 13, 2004, I was terminated.
>
> 2. I was given no reason for my discharge.
>
> 3. I believe I have been retaliated against for opposing unlawful discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended.

[Doc. 43, Ex. 9].[17]

In the box requesting dates the alleged discriminatory retaliation took place, Friends stated the earliest was June 4, 2004, and the latest was August 13, 2004, the date of her termination. [Doc. 43, Ex. 9]. Friends did not mark the "continuing

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[17] The black employee Friends refers to in this Charge was her team leader, Blair. [Doc. 36, DSMF ¶ 68; Doc. 43, p. 188].

action" box on the Charge. [Id.]. Friends subsequently provided a letter to the EEOC detailing alleged discriminatory practices against other black employees of AGA, including Yasmir Cobb. [Doc. 43, Ex. 11]. The EEOC investigation encompassed all of these allegations. [Doc. 50 at 24 & Ex. 3]. The EEOC determined that AGA terminated Friends in retaliation for opposing unlawful employment practices in violation of Title VII and filed the instant action on September 27, 2005. [Doc. 1]

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The movant bears the initial burden of asserting the basis of his motion, and the burden is a light one. Id. at 323. The movant is not required to negate his opponent's claim. Rather, the movant may discharge this burden merely by

"showing– that is, pointing out to the district court– that there is an absence of evidence to support the non-moving party's case." Id. at 325. When this burden is met, the non-moving party is then required to "go beyond the pleadings and . . . designate specific facts showing that there is a genuine issue for trial." Id. at 324 (quoting Fed.R.Civ.P. 56(e)) (internal quotations omitted).

While the evidence and factual inferences are to be viewed in a light most favorable to the non-moving party, see Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987); Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987), the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party must come forward with specific facts showing there is a genuine issue for trial. An issue is not genuine if it is created by evidence that is "merely colorable" or is "not significantly probative." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986); accord Young v. Gen. Foods Corp., 840 F.2d 825, 828 (11th Cir. 1988). Similarly, substantive law will identify which facts are material. See Anderson, 477 U.S. at 248. Facts that are disputed, but which do not affect the outcome of the case, are not material and thus will not preclude the entry of summary judgment. Id.

Genuine disputes are those in which "the evidence is such that a reasonable

jury could return a verdict for the nonmoving party." Id. For factual issues to be "genuine," they must have a real basis in the record. Matsushita Elec. Indus. Co., 475 U.S. at 586. When the record as a whole could not lead a rational trier of fact to find for the non-movant, there is no "genuine issue for trial." Id. at 587. Thus, to survive a motion for summary judgment, the non-moving party must come forward with specific evidence of every element essential to its case, so as to create a genuine issue for trial. See Celotex, 477 U.S. at 323; Rollins, 833 F.2d at 1528.

III. DISCUSSION

Plaintiffs allege that defendant retaliated against Friends by terminating her employment on August 13, 2004, for opposing unlawful employment practices and for filing a "formal complaint" of harassment and retaliation with management on August 6, 2004. Defendant contends that Friends failed to exhaust her administrative remedies as to certain alleged acts that form the basis of her retaliation claim and that in any event, the plaintiffs cannot set forth a *prima facie* case of retaliation because plaintiffs cannot show that Friends' belief that she was opposing unlawful employment practices was reasonable.

A. Exhaustion of Administrative Remedies

Before filing a civil action under Title VII, a plaintiff, including the EEOC itself, must satisfy certain statutory prerequisites such as timely filing a charge of

discrimination with the EEOC "within one hundred and 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); E.E.O.C. v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1271 (11th Cir. 2002) (exhaustion of administrative remedies applies to the EEOC itself); Pijnenburg v. W. Ga. Health Sys., Inc., 255 F.3d 1304, 1305 (11th Cir.), reh'g denied, 273 F.3d 1117 (11th Cir. 2001). Retaliation claims must be filed with the EEOC within 180 days after the alleged retaliatory act. See Gregory v. Ga. Dep't of Human Res., 355 F.3d 1277, 1279 (11th Cir. 2004). "[I]f a plaintiff fails to file an EEOC charge before the 180-day limitations period, the plaintiff's subsequent lawsuit is barred and must be dismissed for failure to exhaust administrative remedies." Thomas v. Ala. Council on Human Relations, Inc., 248 F. Supp. 2d 1105, 1115 (M.D. Ala. 2003) (citing Brewer v. Alabama, 111 F. Supp. 2d 1197, 1204 (M.D. Ala. 2000)).

In the instant case, Friends filed her Charge of Discrimination with the EEOC on August 16, 2004, alleging that she was terminated in retaliation for opposing unlawful employment practices, with the earliest date of discrimination occurring on June 4, 2004, and the latest discrimination occurring on August 13, 2004, the date of her termination. [Doc. 43, Ex. 9]. Defendant urges the Court to find that certain allegations relied upon by Friends in support of her Title VII retaliatory discharge

claim are time-barred. Specifically, the defendant argues that all allegedly discriminatory or retaliatory acts occurring more than 180 days prior to Friends' August 16, 2004, charge filed with the EEOC (i.e., before February 17, 2004) are time-barred.

Friends timely filed a charge of retaliatory discrimination well within the 180-day limitations period. Friends was terminated on August 13, 2004, and she filed her formal Charge of Discrimination with the EEOC three days later on August 16, 2004. The only claims at issue here concern the alleged retaliatory conduct against Friends that occurred between June 2004 and her termination on August 13, 2004. The underlying acts of alleged discrimination against other AGA employees are not claims being pursued by the plaintiffs. Rather, the alleged discrimination against other AGA employees that Friends opposed is background evidence in support of her timely filed retaliation claim.[18]

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[18] Among the specific acts cited by plaintiffs that occurred prior to February 2004 are: (1) the February 2003 directive to remove certain black employees from the front desk and replace them with attractive while female employees who were to be paid $2.00 more per hour than the previous black employees, (2) a March 2003 racially derogatory remark to a black employee (Nichols) regarding her hairstyle, (3) April 2003 racially derogatory remarks regarding a black employee (Blair) accused of sexual harassment and stealing money, (4) a July 2003 directive to talk to another black employee (Cobb) regarding her hairstyle and to terminate her employment based, in part, on race, (5) a December 2003 investigation of a black employee (Blair) regarding stealing money, and (6) January and February 2004 directives to again fire a black employee (Cobb) based on race.

Both the EEOC and Friends make clear that they are not pursuing any separate claims for relief based on any adverse actions that took place earlier than February 2004. [Doc. 50-1, pp. 22-23, 31-32; Doc. 58-1, pp. 17-19].[19] However, plaintiffs may rely on the incidents of alleged discrimination against AGA employees that Friends opposed as background evidence in support of plaintiffs' retaliation claim. As noted by the Supreme Court, a discriminatory act "which is not made the basis for a timely charge . . . may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue[.]" United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977); see Morgan, 536 U.S. at 113 (finding that pre-limitations acts can be used, where relevant, "as background evidence in support of [the] timely claim," but they cannot themselves form the basis for liability). The Eleventh Circuit endorsed this view in Allen v. Montgomery County, Ala., 788 F.2d 1485, 1488 (11th Cir. 1986), stating that time-barred evidence of discriminatory treatment "may be used . . . to illuminate current practices which, viewed in isolation, may not indicate discriminatory motives." (citation and internal quotation marks omitted). Accordingly, the Court will consider evidence of alleged

[19] Even if the alleged actions cited by plaintiffs were not outside of the statutory period, they could not support independent claims of retaliation because they do not amount to adverse employment actions against Friends. Indeed, Friends does not assert that she suffered any retaliation as a result of opposing these incidents until between June 2004 and her termination on August 13, 2004.

acts of discrimination Friends opposed outside the 180-day limitations period as background and context for the timely filed retaliatory discharge claim. See E.E.O.C. v. Omni Hotels Mgmt. Corp., No. 3:04-cv-1778, 2006 WL 3068874, *2 (N.D. Tex. October 30, 2006) (court considered retaliation for opposition to discrimination against another protected group not named in the original EEOC charge).

Defendant also argue that the allegations of discrimination against AGA employees other than the Blair incident in June 2004 are beyond the scope of Friends' Charge of Discrimination. Friends' EEOC charge referred only to her refusal "to terminate a Black employee the Administration Team had been harassing." [Doc. 43, Ex. 9]. In her deposition, Friends clarified that Blair was the "Black employee" referred to in her charge. Defendant contends that the complaint filed in this Court is limited to the conduct raised in Friends' EEOC charge, and therefore, allegations of discrimination against other AGA employees that Friends opposed are outside the scope of the EEOC charge and not properly before this Court. Defendant seeks to limit the protected activity to Friends' opposition of the proposed lateral transfer of Blair that never occurred. However, defendant's argument draws too narrowly the parameters of the EEOC charge and investigation.

"The starting point for determining the permissible scope of the judicial complaint is the EEOC charge and investigation." Evans v. U.S. Pipe & Foundry

Co., 696 F.2d 925, 929 (11th Cir. 1983). An EEOC charge filed by a plaintiff without the assistance of counsel is to be construed liberally. See Danner v. Phillips Petroleum Co., 447 F.2d 159, 161-62 (5th Cir. 1971).[20] Under this standard, all the alleged discriminatory conduct against Blair that Friends opposed is properly within the scope of the complaint. Friends' EEOC charge alleged that "the Administration Team had been harassing" Blair, and that allegation, liberally construed, encompasses all the alleged discriminatory conduct carried out against Blair, including the racial remarks by Gill. However, Blair was not the only minority employee of AGA who allegedly was the subject of discrimination opposed by Friends.

Friends reported to the EEOC several incidents of alleged discrimination against other black employees of AGA, including Yasmir Cobb, and the EEOC investigated these claims. Thus, the scope of the EEOC investigation was broader than the allegations in Friends' EEOC charge. "[T]he scope of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970) (quoting King v. Ga. Power Co., 295 F. Supp. 943, 947

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[20] Decisions of the Fifth Circuit rendered before October 1, 1981, are binding upon panels of the Eleventh Circuit. Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

(N.D. Ga. 1968)); see also Chanda v. Engelhard/ICC, 234 F.3d 1219, 1225 (11th Cir. 2000) (footnote omitted). "In short, a judicial complaint of employment discrimination may include any allegations of discrimination encompassed by an EEOC investigation, even if the EEOC investigation was arguably broader than the EEOC charge triggering the investigation." Smith v. Sentry Ins., 674 F. Supp. 1459, 1467 (N.D. Ga. 1987); see also Omni Hotels Mgmt. Corp., 2006 WL 3068874, at *2 (EEOC investigation expanded original charge of retaliation). Since it is the actual EEOC investigation and not the original charge that governs the scope of the judicial complaint, the EEOC investigation was sufficiently broad in this case to encompass Friends' opposition to the alleged discriminatory acts against other AGA employees in addition to Blair.

B. Statutory Framework

Under the anti-retaliation clause of Title VII, it is an unlawful employment practice for an employer to, *inter alia*, discriminate against an employee "[(1)] because he has opposed any practice made an unlawful employment practice by this subchapter, or [(2)] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).[21] These two prohibitions on retaliation are generally known

[21] In order for an employee engaging in opposition activity to be protected under the anti-retaliation provision of Title VII, he must be opposing conduct that

as the opposition clause and the participation clause, respectively. E.E.O.C. v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174 (11th Cir. 2000). Given the allegations here, plaintiffs' retaliation claims arise under the opposition clause.[22]

1. Prima Facie Case

Where there is no direct evidence of retaliation,[23] a plaintiff asserting a claim of retaliation in violation of Title VII must use the burden shifting framework

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is made an "unlawful employment practice" by Title VII. Title VII defines an "unlawful employment practice" as, *inter alia*, discrimination against an employee "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).

[22] Friends' August 6, 2004, "formal complaint" e-mail did not clearly express an intent to file a charge with the EEOC, and therefore, does not fall within the participation clause. This distinction is important because the requirements and protections under each clause are different. See Merritt v. Dillard Paper Co., 120 F.3d 1181, 1187 (11th Cir. 1997) (noting that the participation clause is "not so limited" as the opposition clause). Binding case law in this Circuit appears to indicate that an employee's announcement that she intended to file a charge with the EEOC is protected activity under the participation clause in certain circumstances. Jefferies v. Harris County Cmty. Action Ass'n, 615 F.2d 1025, 1035 (5th Cir. 1980); Geer v. Marco Warehousing, Inc., 179 F. Supp. 2d 1332, 1343 (M.D. Ala. 2001). In the instant case, however, Friends did not clearly announce her intention to file an EEOC charge in her August 6, 2004, e-mail. Thus, this Court cannot find that Friends' e-mail fell within the participation clause.

[23] Plaintiffs assert in passing that Pittner's statement at the termination meeting that Friends was being fired because she did not take action against Blair and Cobb is direct evidence of retaliation. [Doc. 50 at 57]. However, the parties have briefed the case under the McDonnell Douglas framework, and the Court will likewise evaluate the evidence under that standard.

articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); and St. Mary's Honor Center. v. Hicks, 509 U.S. 502 (1993). See Harris v. Fulton-Dekalb Hosp. Auth., 255 F. Supp. 2d 1347, 1360-61 (N.D. Ga. 2002). The plaintiff must first establish a *prima facie* case. Berman v. Orkin Exterminating Co., Inc., 160 F.3d 697, 701 (11th Cir. 1998). If the plaintiff establishes the *prima facie* case, an inference of retaliation arises, and the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its action. Id. at 702. This burden is "exceedingly light." Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir. 1997) (citation omitted). If the defendant meets its burden of production, this inference of retaliation is erased, and the burden shifts back to the plaintiff to show that the defendant's articulated reason is merely a pretext for retaliation. Berman, 160 F.3d at 702. Despite this burden-shifting framework, the "ultimate burden of persuading the trier of fact that the defendant intentionally [retaliated] against the plaintiff remains at all times with the plaintiff." See Burdine, 450 U.S. at 253.

In order to establish a *prima facie* case of retaliation, a plaintiff must show "(1) that [s]he engaged in statutorily protected expression; (2) that [s]he suffered an adverse employment action;[24] and (3) that there is some causal relation between the

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[24] This element for a *prima facie* retaliation case generally has been referred to as the adverse employment action element. See, e.g., Holifield, 115 F.3d at 1566.

two events." Meeks v. Computer Assocs. Int'l, 15 F.3d 1013, 1021 (11th Cir. 1994); Burlington N. & Santa Fe Ry. Co. v. White, ___ U.S. ___ , ___ , 126 S.Ct. 2405, 2414 (2006); Brochu v. City of Riviera Beach, 304 F.3d 1144, 1155 (11th Cir. 2002); Sullivan v. Nat'l R.R. Passenger Corp., 170 F.3d 1056, 1059 (11th Cir. 1999). The McDonnell Douglas framework governing Title VII disparate treatment cases also governs the shifting burdens of proof in Title VII retaliation cases. Holifield, 115 F.3d at 1166. Defendant does not specifically address the second or third elements of a *prima facie* case,[25] but rather contends that Friends cannot satisfy the first element.

However, in light of Burlington Northern & Santa Fe Railway Co. v. White, ___U.S. ___, 126 S.Ct. 2405 (2006), it is more appropriate to refer to this element as the "materially adverse action" element. This distinction is not critical here since plaintiff allege retaliatory termination which clearly is a materially adverse employment action.

[25] It is undisputed that Friends suffered a materially adverse employment action (i.e., the second element) when she was terminated on August 13, 2004. It is also undisputed that defendant was aware of Friends' internal complaint of discrimination and retaliation. [Doc. 53, p. 34; Doc. 54, pp. 31-32; Doc. 55, pp. 28-29]. Likewise, the causal connection-which can be established indirectly by showing that the protected activity (Friends' August 6, 2004 email) was closely followed in time by the adverse action (Friends' termination on August 13, 2004), Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004),– is shown in this case by, *inter alia*, evidence that the time between Friends' email and her discharge was a mere seven days. See, e.g., Donnellon v. Fruehauf Corp., 794 F.2d 598, 601 (11th Cir. 1986) (holding one-month period between the protected activity and the adverse action sufficient to establish causation); Cooper v. So. Co., 260 F. Supp. 2d 1278, 1292 (N.D. Ga, 2003) (same); Gaddis v. Russell Corp., 242 F. Supp. 2d 1123, 1147 (M.D. Ala. 2003) (holding two-month period sufficient to create inference of retaliation). See also Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1122 (8th Cir. 2006) (finding material issues of fact existed as to whether retaliatory motive played a part in terminating an employee

a. Protected Activity and Subjective Good Faith Belief

The one remaining factor – whether Friends was engaged in "protected activity" when she opposed AGA's unlawful employment practices – is the focus of defendant's argument that plaintiffs have failed to establish a *prima facie* case of retaliation. Ordinarily, an employee's internal complaint to his employer is examined as protected activity under the opposition clause of Title VII's retaliation provision. See, e.g., Total Sys. Servs., Inc., 221 F.3d at 1174 & n.3; Rollins v. Fla. Dep't of Law Enforcement, 868 F.2d 397, 400 (11th Cir. 1989) ("[T]he protection afforded by the statute is not limited to individuals who have filed formal complaints, but extends as well to those, like [plaintiff], who informally voice complaints to their superiors or who use their employers' internal grievance procedures."). To establish retaliation under the opposition clause, a plaintiff must place the employer on notice that he is complaining of unlawful practices. See Reynolds v. Golden Corral Corp., 106 F. Supp. 2d 1243, 1253-54 (M.D. Ala. 1999). Friends' August 6, 2004, e-mail clearly placed defendant on notice that she was complaining of unlawful conduct because it outlined a number of racially discriminatory acts.

For activity to constitute opposition, a plaintiff must also have a good faith,

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fifteen days after her report of harassment).

reasonable belief that the activity about which he complains is a violation of Title VII. See Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1351 (11th Cir. 1999). To make this determination, courts examine whether (1) the plaintiff subjectively and in good faith believed that his employer engaged in unlawful employment practices; and (2) this "belief was *objectively* reasonable in light of the facts and record presented." Little v. United Techs., Carrier Transicold Div., 103 F.3d 956, 960 (11th Cir. 1997) (emphasis in original). As a result, "it is insufficient for a plaintiff 'to allege his belief in this regard was honest and bona fide; the allegations and record must also indicate that the belief, though perhaps mistaken, was objectively reasonable.'" Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1388 (11th Cir. 1998) (quoting Little, 103 F.3d at 960). "[T]he plaintiff 'need not prove the underlying claim of discrimination which led to her protest,' so long as she had a reasonable good faith belief that the discrimination existed." Meeks, 15 F.3d at 1021 (quoting Tipton v. Canadian Imperial Bank of Commerce, 872 F.2d 1491, 1494 (11th Cir. 1989)).

With respect to her subjective belief that discrimination occurred, Friends' August 6, 2004, e-mail indicates she believed that she was opposing unlawful racial discrimination. Friends' e-mail to management outlined a number of alleged events of racial bias. Friends even indicated that as a result of the allegations, Blair filed an

EEOC charge and she, likewise, was filing a formal complaint, suggesting her belief was in good faith. [Doc. 43, Ex. 58]. Thus, the August 6, 2004, e-mail indicates that Friends subjectively and in good faith believed that unlawful discriminatory employment practices were occurring at AGA. See Taylor v. Renfro Corp., 84 F. Supp. 2d 1248, 1259 (N.D. Ala. 2000) ("The subjective component is clearly met as [plaintiff] believed that her work environment was hostile or abusive, as evidenced by her complaints to management.").

b. Objectively Reasonable Belief.

Since Friends subjectively believed that she was opposing unlawful employment practices, the Court turns to whether her subjective belief was objectively reasonable. "The objective reasonableness of an employee's belief that her employer has engaged in an unlawful employment practice must be measured against existing substantive law." Clover, 176 F.3d at 1351. This does not mean that the plaintiff must "prove the underlying discriminatory conduct that [s]he opposed was actually unlawful in order to establish a prima facie case" of retaliation under the opposition clause. Little, 103 F.3d at 960. See also Taylor v. Runyon, 175 F.3d 861, 869 (11th Cir. 1999). Instead, the conduct opposed "must be close enough to support an objectively reasonable belief that it" constituted unlawful discrimination. Clover, 176 F.3d at 1351.

Here, plaintiffs allege that Friends opposed unlawful racial discrimination at AGA in the form of harassment and proposed adverse actions against black employees. Under existing substantive law, a hostile work environment claim requires proof that "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002) (internal quotations omitted) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). To establish a *prima facie* case of hostile work environment, an employee must show:

> (1) that he belongs to a protected group; (2) that he has been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee, such as [race]; (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) that the employer is responsible for such environment under either a theory of vicarious or of direct liability.[26]

Miller, 277 F.3d at 1275.

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[26] "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998). An employer is liable for co-worker harassment "if it knew or should have known of the harassing conduct but failed to take prompt remedial action." Miller, 277 F.3d at 1278. Assuming plaintiffs can show that it was a close issue whether the harassment was sufficiently severe or pervasive, the Court concludes that plaintiffs could establish employer liability because Friends' supervisors were responsible for the harassment and were aware of Friends' opposition to such conduct.

In this case, Friends testified that she had witnessed Gill, as well as other supervisory employees, make racially derogatory remarks, give racially motivated directives to terminate the employment of black employees, and treat Blair in what she believed to be a racially discriminatory manner, all of which she reported to management to no avail.[27] Plaintiffs have clearly met the first three elements. There can be no dispute that Blair and Cobb, both African-Americans, belong to a protected group. Also, the events Friends described in her e-mail show disparate treatment of Blair based on race. She also had previously complained to

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[27] With regard to whether Friends can show her belief was objectively reasonable, defendant only addresses the enumerated incidents from Friends' August 6, 2004, e-mail she described was the basis of Blair's EEOC charge, to wit: (1) racially derogatory comments by Gill during a sexual harassment investigation against Blair, (2) sexual harassment investigation revealing victim's allegations against Blair could not be substantiated, yet he was never formally cleared of the allegations, (3) accused of theft of monies despite other AGA employees having access to the same, (4) a second accusal of theft of monies based on a patient's claim that he had paid a black guy despite two other black, male employees present in the office, (5) forced to either take a demotion or be terminated, and (6) defamation of Blair's character. [Doc. 36 (Defendant's Memorandum Brief), pp. 30-41; Doc. 43, Ex. 58]. However, plaintiffs identify other harassing conduct to show that Friends had an objectively reasonable belief that AGA was discriminating against its African-American employees: (1) AGA's removal of two African-American employees from the front desk and replacing them with white employees who were also paid $2.00 more per hour than the African-American employees previously in that position, (2) Gill's racial comments to Nichols, Blair and Cobb, (3) AGA's directives to Friends to terminate Cobb and Blair based, in part, on race, (4) disparate treatment of Cobb over her pay increase, and (5) Barry's comment to Friends after overturning Friends and Blair's decision to terminate an employee. [Doc. 50-1, pp. 35-46; Doc. 58-1, pp. 3-10].

management about racial comments by Gill to Nichols, Cobb and Blair. Defendant further cannot dispute that the conduct was unwelcome because Blair and Cobb complained to Friends, who in turn complained to management about the alleged discriminatory conduct. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) (stating the proper inquiry into whether conduct is unwelcome is "whether respondent by her conduct indicated that the alleged [conduct was] unwelcome").

Whether the conduct was sufficiently severe or pervasive is a closer question. Under existing law, establishing that harassing conduct was sufficiently severe or pervasive to alter an employee's terms or conditions of employment includes subjective and objective components. Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998) (citing Harris, 510 U.S. at 21-22); Miller, 277 F.3d at 1276. In evaluating the objective component of the "severe or pervasive" prong, the Court examines whether the actions of the employer altered the employee's working conditions to such an extent that a reasonable person would find the atmosphere hostile and abusive. Harris, 510 U.S. at 22-23. To determine whether the complained of statements and conduct are sufficiently severe or pervasive from an objective standpoint to alter an employee's terms and conditions of employment, courts consider the following four factors: "(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or

a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 584 (11th Cir. 2000).

The Eleventh Circuit has explained that conduct is frequent when there are "'repeated incidents of verbal harassment that continue despite the employee's objections. . . .'" Miller, 377 F.3d at 1276 (quoting Shanoff v. Ill. Dep't of Human Servs., 258 F.3d 696, 704 (7th Cir. 2001)). Conduct is severe when the work environment is "'permeated with discriminatory intimidation, ridicule and insult,' not where there is the 'mere utterance of an . . . epithet.'" Id. at 1276-77 (quoting Harris, 510 U.S. at 21). A court must "look to the totality of the circumstances to determine whether harassment is sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive working environment." Mendoza v. Borden, Inc., 195 F.3d 1238, 1258 (11th Cir. 1999).

As stated above, plaintiffs contend that the following events render Friend's subjective belief objectively reasonable: (1) the directive to remove black employees from the front desk and replace them with white, female employees, in which management acquiesced [Doc. 43, pp. 47, 50-51, Ex. 3]; (2) racial remarks by Gill regarding Nichols, Cobb and Blair, in which again management acquiesced [Id. at pp. 55-56; Doc. 58, Att. 4]; (3) the directive by management to terminate Cobb and

Blair based, in part, on race [Id. at pp. 82-86, 106, 108, 134-35, 138, 141, Ex. 2]; (4) the investigation of Blair for theft of monies and threat to terminate him when a white employee accused of the same received more favorable treatment; and (5) retaliation against Friends for opposing such conduct [Id. at pp. 199-20, 124-30, 169-70, Exs. 3, 58, 68; Doc. 53, p. 34; Doc. 54, pp. 31-32, Doc. 55, pp. 28-29].

The Court concludes that accepting Friend's testimony as true and interpreting it in the light most favorable to her position, the totality of the events Friends relies upon are for purposes of summary judgment sufficiently close to being severe and pervasive to alter the terms or conditions of employment. Given the repeated, overt race-based directives at AGA, it was objectively reasonable for Friends to believe that she was opposing a work environment that was openly hostile to black employees. Cf. Peterson v. Scott County, 406 F.3d 515, 524 n.3 (8th Cir. 2005) (concluding that repeated references to plaintiff as "old lady" and two specific comments about plaintiff's gender were sufficient for plaintiff to reasonably believe that she experienced a hostile work environment); Taylor, 84 F. Supp. 2d at 1259 (finding that plaintiff had an objectively reasonable belief that she suffered sexual harassment where there was evidence of ten specific incidents in a one-year period and her supervisor frequently making inappropriate comments). Because under existing law, it is at least a close issue whether there was a hostile work

environment at AGA, the Court finds that Friends had an objectively reasonable belief that her supervisors acted in a discriminatory manner and that the activity about which she complained violated Title VII.

The Court also finds that Friends' opposition to the repeated directives to terminate Cobb based on her race was objectively reasonable and independently supports a *prima facie* case of retaliation. See Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1454-1455 (11th Cir. 1998) (Because refusing to fill a position based on race is illegal discrimination under Title VII, plaintiff had a good faith, reasonable basis for filing an EEOC charge of discrimination); E.E.O.C. v. HBE Corp., 135 F.3d 543, 554 (8th Cir. 1998) ("Employers may not retaliate against employees who oppose racially discriminatory conduct," and plaintiff who directly opposed the decision to terminate employee based on his reasonable belief that the decision was racially motivated, therefore, made out a claim of protected conduct); Moyo v. Gomez, 32 F.3d 1382, 1385 (9th Cir. 1994) (because opposition can consist of a refusal to carry out an order or policy, prison guard's refusal to enforce policy denying showers only to black inmates was protected conduct); E.E.O.C. v. Carolina Freight Carriers Corp., No. 90-30198-RV, 1992 WL 486584, * 3 (N.D. Fla. 1992) (unpublished) (Title VII makes it unlawful for employers to retaliate against employees who take action opposing racial discrimination). Accordingly, the Court concludes that plaintiffs

have established a *prima facie* case of retaliation under the opposition clause.

2. Defendant's Legitimate, Non-discriminatory Reasons

As previously explained, if a *prima facie* case is established, the employer then has an opportunity to articulate a legitimate, non-retaliatory reason for the challenged employment action. Olmsted v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1998); Meeks, 15 F.3d at 1021. "[T]he defendant's burden of rebuttal is exceedingly light . . . [T]he defendant need not persuade the court that its proffered reasons are legitimate; the defendant's burden is merely one of production, not proof." Perryman v. Johnson Prods. Co., Inc., 698 F.2d 1138, 1142 (11th Cir. 1983) (citation and internal quotation marks omitted). Defendant contends that it legitimately fired Friends on August 13, 2004, because she was incapable of handling the evolving St. Joseph's office, she required continuous training and instruction on patient procedure scheduling, she failed to properly integrate Dr. Friedman's practice into the St. Joseph's office, and she was defensive to any criticism and abrasive and combative toward upper management.[28] [Doc. 36 (Defendant's Memorandum Brief), pp. 43-44]. Poor job performance is a legitimate, non-

[28] Defendant also asserts that it had already decided to terminate Friends prior to her August 6, 2004, "formal complaint" e-mail and had ultimately decided to terminate her employment after Friends sent her July 30, 2004, "Physician's meeting highlight" e-mail to management. [Doc. 36 (Defendant's Memorandum Brief), pp. 44-47].

retaliatory reason on its face for terminating an employee. See Cooper v. S. Co., 390 F.3d 695, 740 (11th Cir. 2004).[29] Thus, defendant has rebutted the *prima facie* case.

3. Pretext

If the employer articulates a legitimate, non-retaliatory reason for the termination, the ultimate burden of proving by a preponderance of the evidence that the reason provided by the employer is a pretext for prohibited, retaliatory conduct remains on the plaintiff. Olmsted, 141 F.3d at 1460. See also Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001); Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1332 (11th Cir. 1998). "In order to directly attack [a defendant's] reasons, [a plaintiff] must demonstrate 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could find [all of those reasons] unworthy of credence.'" Standard, 161 F.3d at 1333 (third alteration in original) (quoting Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997)).

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[29] Indeed, the Eleventh Circuit has made it clear that insubordination, a poor attitude, disruptive conduct, or any combination thereof, are legitimate, nondiscriminatory reasons for terminating employment. See Hawkins v. Ceco Corp., 883 F.2d 977, 985 (11th Cir. 1989) (finding insubordination and failure to work assigned job justifiable reasons to terminate an employee); Carter v. City of Miami, 870 F.2d 578, 584-85 (11th Cir. 1989) (reversing jury verdict for plaintiff where defendant established, and plaintiff was unable to rebut, a legitimate nondiscriminatory reason for discharge based upon plaintiff's insubordination and being a "constant disruptive force" at the workplace).

Defendant's argument that Pittner's motive for firing Friends was her poor job performance must be evaluated against the entire record viewed in the light most favorable to plaintiffs. Under this standard, the record shows that Friends' job performance was considered "very good" and she was recommended for a pay increase in February 2004. [Doc. 58, Att. 5]. Moreover, before Friends' opposition e-mail of August 6, 2004, there was no formal notification to Friends of deficient job performance despite Robinson and Pittner's belief that she was a poor performer. Although an employer is not required to document performance issues, "[i]n discharge cases, failure to warn an employee of poor performance when poor performance is the articulated reason may indicate pretext." Stone v. Galaxy Carpet Mills, Inc., 841 F. Supp. 1181, 1188 (N.D. Ga. 1993) (citing Sweat v. Miller Brewing Co., 708 F.2d 655, 657 (11th Cir. 1983); Evans v. Meadow Steel Prods., Inc., 579 F. Supp. 1391, 1395 (N.D. Ga. 1984) ("The failure to warn and thereby given an opportunity for improvement has been considered evidence of pretext.").

The record, when viewed in the light most favorable to plaintiffs, suggests that AGA only began criticizing Friends' performance after she opposed its alleged discriminatory practices and supported Blair's complaint filed in February or March 2004. A prime example of this is Gill's assertion in March 2004 (only one month after giving Friends a "very good" overall review), for the first time, that the

physicians had problems with Friends' and Blair's job performance; however, the physicians denied expressing any such concerns to Gill. [Doc. 58, ¶¶ 26-27; Doc. 43, pp. 116-19, 233-35]. This assertion by Gill came during the same time that Friends met with Pittner to discuss her concerns about Gill's treatment of her. [Doc. 43, pp. 199-20, Ex. 3]. Specifically, Friends testified that she complained of discriminatory treatment and advised Pittner that Gill was harassing her and retaliating against her whenever she questioned an action she felt was illegal. [Id.].

There are also inconsistencies in the testimony of AGA's decision-makers regarding Friends' performance. For example, Pittner testified that she felt that Friends became overwhelmed with her responsibilities. However, Robinson testified that she did not believe Friends was overwhelmed, and, as a matter of fact, stated that Friends' responsibilities as manager of St. Joseph's office remained the same even after AGA's acquisitions of the two practices and evolving growth. [Doc. 53, p. 25; Doc. 55, p. 35]. In fact, Robinson testified that the merging of different offices caused problems and delays for all AGA employees. [Doc. 55, pp. 44-45]. Howard v. BP Oil Co., 32 F.3d 520, 526 (11th Cir. 1994) ("[T]he identification of inconsistencies in the defendant's testimony is evidence of pretext."). See also Chapman v. AI Transport, 229 F.3d 1012, 1058 (11th Cir. 2000).

There are also genuine factual disputes regarding some of the conduct cited

by defendant as the basis for Friends' termination. With regard to defendant's contention that Friends required continued training and instruction on patient scheduling, it points to one group meeting while plaintiffs assert that this "training session" was really just Friends and the other schedulers meeting as a group to determine how to accomplish the scheduling initiative. [Doc. 51, ¶ 35; Doc. 55, p. 24]. In addition, Friends contends that she was not responsible for patient scheduling as AGA had hired other employees primarily responsible for this initiative. [Doc. 51, p. 44]. Even though she was not primarily responsible for this initiative, the record further shows that Friends did actively manage the initiative. [Doc. 55, p. 23; Doc. 51, p. 44; Doc. 43, Exs. 36, 38, 57; Doc. 50, Ex. 4]. Furthermore, the same is true for defendant's contention that Friends failed to properly integrate Dr. Friedman's practice with the St. Joseph's office. Friends asserts that she was not responsible for this task, but rather it was Cheponis' responsibility, but even so, Friends still participated in trying to get this task accomplished. [Doc. 43, pp. 161-63; Doc. 50, Exs. 5, 6].

Defendant relies on Gill's April 26, 2004, memorandum submitted to St. Joseph's physicians regarding her audit of the St. Joseph's office and her recommendations for improvements as evidence of Friends ineffectiveness as manager. [Pittner Aff., Ex. 1]. Gill stated that the purpose of this memorandum was

"to sit along side the staff and be part of the daily processes to see where office improvements could be made." [Id]. In this memorandum, Gill made suggestions regarding St. Joseph's appointment/scheduling area, the schedulers, the front desk, staff breaks, medical records, pre-certification procedures, the operator, the clinical area, and the phone system. [Id.]. However, Gill specifically discussed Friends and stated:

> Robin has very strong capabilities when it comes to assisting the physicians and intervening on staff issues. She interacts well when asked with referring physicians and venders. She is on top of patient troubleshooting. She is good with administrative duties.

[Pittner Aff., Ex. 1]. While Gill also made recommendations for improvements as to Friends' job performance and responsibilities, she further stated, "Robin is always very respectful and open to suggestions. . . ." [Id.]. On this record as a whole, there is a genuine issue of material fact as to whether Gill's memorandum constitutes evidence of Friends' alleged performance deficiencies.

Finally, although AGA contends that Friends' July 30, 2004, "Physician's meeting highlight" e-mail was "the last straw," which led Pittner and Robinson to conclude that AGA no longer needed Friends as manager of the St. Joseph's location, Friends was not terminated after sending this e-mail. Rather, Friends was not terminated until August 13, 2004, seven days after she made her "formal complaint" to management regarding harassment and retaliation. Moreover, Friends testified

in her deposition that during the termination meeting with Pittner and Barry, Pittner stated, "we talked to you about Shane, and we talked to you about Yasmir. You had a job to do. You didn't do it. So now it's going to cost you your job." [Doc. 43, pp. 175, 184, Ex. 8]. This statement, when viewed in the light most favorable to plaintiffs and placed in the context of repeated race based directives to terminate Cobb, creates a genuine issue as to the real reason for Friends' termination. Under the summary judgment standard, there is a genuine issue of material fact as to whether Friends' opposition is what motivated the defendant's decision to terminate her employment on August 13, 2004, and a reasonable jury could conclude that AGA's claim that it fired Friends for poor job performance is unworthy of credence. See Combs, 106 F.3d at 1529 ("[D]isbelief of the defendant's proffered reasons, together with the prima facie case, is sufficient circumstantial evidence to support a finding of [retaliation]. Therefore, . . . a plaintiff is entitled to survive summary judgment . . . if there is sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of . . .the employer's proffered reasons for its challenged action."); Tidwell v. Carter Prods., 135 F.3d 1422, 1426 (11th Cir. 1998) ("If a plaintiff provides a prima facie case plus evidence discrediting the employer's proffered reasons, the plaintiff is entitled to have the factfinder decide the ultimate issue of discrimination.") (citation omitted).

IV. CONCLUSION

For all the foregoing reasons, the undersigned Magistrate Judge **RECOMMENDS** that defendant's Motion for Summary Judgment [Doc. 36] be **DENIED** as to all claims asserted against it by plaintiffs.

IT IS SO RECOMMENDED, this 29th day of December, 2006.

Russell G. Vineyard

RUSSELL G. VINEYARD
UNITED STATES MAGISTRATE JUDGE