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

HOLLY A. LAFONTAINE,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 1:10-CV-2465-CC-ECS
ROCKDALE COUNTY,	:	
RICHARD ODEN,	:	
in his individual capacity,	:	
	:	
Defendants.	:	

ORDER, FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

I. Introduction

On August 6, 2010, Plaintiff Holly A. Lafontaine ("Plaintiff") filed this civil action against Defendant Rockdale County and Defendant Richard Oden in his individual capacity ("Defendants"), alleging a variety of federal claims against Defendants arising in connection with Plaintiff's employment in Rockdale County's Public Affairs Department.[1] [Docs. 1, 68]. Plaintiff alleges that Defendants engaged in race discrimination in violation of Title VII, Section 1981, and the Equal Protection Clause when they selected an African-American candidate, Erica Fatima, for the position of Director of Public Affairs instead of selecting Plaintiff. See generally [Pl's

[1] The department is sometimes referred to as "Public Affairs," sometimes as "Public Relations," and sometimes as "Department of Public Affairs and Media Relations," but all titles refer to the same department. [Van Ness Dep. at 17:12-16], [Ex. 28 at 3 to Pl's Dep.].

Compl.] and [Pl's Am. Compl.], [Docs. 1, 68]. In particular, Plaintiff asserts claims for race discrimination under Section 1981 against Defendant Oden individually (Count I); discrimination under the Equal Protection Clause against both Defendants (Count III); and race discrimination under Title VII against Defendant Rockdale County (Count IV). Plaintiff also alleges that Defendants retaliated against her in violation of Title VII and Section 1981 when her position was subsequently eliminated during the County's budget restructuring a few days after her attorney mailed a letter asserting discrimination claims to the County's Board of Commissioners. See generally id. In particular, Plaintiff alleges retaliation under Section 1981 against both Defendants (Count II), and retaliation under Title VII against Defendant Rockdale County (Count IV). Plaintiff seeks special, punitive and compensatory damages, back and front pay, and attorney's fees. [Doc. 1 at 11].

Defendants deny that they discriminated against Plaintiff, arguing that "Plaintiff has identified absolutely no evidence which supports her allegation that she was not selected for the position of Director of Public Affairs due to her race." [Doc. 84 at 2]. Defendants argue that "Oden's decision to recommend the appointment of Ms. Fatima was supported by Ms. Fatima's superior qualifications and Plaintiff's inferior work performance." [Id.].

Defendants also deny that they retaliated against Plaintiff, arguing that "it is undisputed that the Plaintiff's job position and

a number of other positions were defunded due to severe budget issues facing the County," and that "the uncontradicted evidence shows that none of the Commissioners [who voted to defund Plaintiff's position] received [Plaintiff's] attorney's letter until after they voted on the budget reconciliation defunding her position." [Id. at 2-3].

This matter is before the Court on Defendants' motion for summary judgment, [Doc. 83], Plaintiff's motion for leave to file a surreply to Defendants' motion for summary judgment, [Doc. 108], and Defendants' motion for sanctions, [Doc. 86]. All three motions having been fully briefed, the motions are now ripe for the Court's consideration. For the reasons discussed herein, **IT IS RECOMMENDED** that Defendants' motion for summary judgment, [Doc. 83], be **GRANTED**; **IT IS ORDERED** that Plaintiff's motion for leave to file a surreply, [Doc. 108], is **DENIED as moot**; and **IT IS ORDERED** that Defendants' motion for sanctions, [Doc. 86], is **DENIED**.

II.
Factual Background

When evaluating the merits of a motion for summary judgment, the Court must view the evidence and factual inferences in a light most favorable to the non-moving party. Frederick v. Sprint/United Mgmt. Co., 246 F.3d 1305, 1309 (11th Cir. 2001); Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 920 (11th Cir. 1993). Applying the above legal standard, the Court derives the following facts from the parties'

statements of facts and from the record as a whole:[2]

A. Hiring of a Public Affairs Director

1. Background

In August of 1995, Plaintiff, a Caucasian, began working with Defendant Rockdale County ("the County") as an Administrative Secretary to the Board of Commissioners Office. [Defs' SMF ¶ 4]. In or around 1997, Plaintiff became an associate in the County's newly created Public Affairs Department under Director Julie Mills ("Mills"), a Caucasian. [Id. ¶¶ 5-6]. In 2000 or 2001, the associate position was abolished and Plaintiff's title changed to "Deputy Director of Public Affairs." [Id. ¶ 9].

In 2006, Ms. Mills was appointed to the joint position of Director of Public Affairs and Chief of Staff. [Id. ¶ 13]. After Ms. Mills's appointment, African-American Angela Robinson ("Robinson") was hired as a Public Affairs Specialist. [Id. ¶¶ 13, 155].

In January of 2009, Defendant Richard Oden ("Oden"), an African-American, assumed the office of Chairman of the Rockdale County Board of Commissioners ("the Board"). [Defs' SMF ¶ 14]. At that time, the Board was composed of three Commissioners: Chairman Oden; Commissioner Oz Nesbitt ("Nesbitt"), an African-American; and Commissioner JaNice Van Ness ("Van Ness"), a Caucasian. [Defs' SMF ¶ 1], [Van Ness Dep. at 13:13-20].

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[2] Unless otherwise noted, this overview is taken from those facts in parties' statements of material facts ("SMF") that have not been disputed.

After Chairman Oden assumed office, he replaced Ms. Mills as Chief of Staff with R.J. Hadley, an African-American. [Pl's SMF ¶ 8]. Hadley is no longer Chief of Staff, having been replaced by African-American Greg Pridgeon on January 19, 2010. [Van Ness Dep. at 65:11-12], [Pridgeon Dep. at 17:8-10, 50:16-19]. When Mr. Hadley replaced her, Ms. Mills was returned to the position of Director of Public Affairs. [Pl's Resp. to Defs' SMF ¶ 14], [Defs' SMF ¶ 14]. Later in 2009, Ms. Mills resigned from her position as Director of Public Affairs. [Defs' SMF ¶ 16].

2. Plaintiff Becomes Interim Director

In 2009, due to Ms. Mills's resignation, Chairman Oden recommended to the Board that Plaintiff be appointed the Interim Director of the Public Affairs Department. [Defs' SMF ¶ 16]. Mr. Nesbitt and Ms. Van Ness voted to approve his recommendation, and Plaintiff assumed the Interim Director position. [Id. ¶¶ 1, 16].

As Interim Director, Plaintiff "managed the entire PR Department, overseeing and approving all written information disseminated by the County to the public, including press releases, media advisories, brochures, and invitations to County-sponsored events." [Pl's SMF ¶ 20]. She "produced, directed, and approved the broadcasting of public service announcements and public television shows on the County government's cable access television station and all communication posted on the County's website," supervised various branding and marketing projects, and was responsible for promoting tourism within the County. [Id. ¶¶ 21-22].

3. A Permanent Director of Public Affairs Is Sought

When Plaintiff took over as Interim Director, a County ordinance was in place that provided for interim directors to serve for "about 90 days and then, according to [the County's] ordinance, [the County is] supposed to have a permanent director in place." [Van Ness Dep. at 31:8-11]. Though the ordinance was not always strictly followed, [id. at 101:4-5], the Board "made a decision to bring leadership into the role of public relations director as a whole" and "to find an individual that matched what [the Board] was looking for in terms of leadership." [Nesbitt Dep. at 25:19-20, 26:1-3].

The Board "collectively at several times talked about the kind of individual that was going to be the fit. [Oden] had put a lot of emphasis on branding and marketing," and told Mr. Nesbitt and Ms. Van Ness he wanted a Director whose "vision and direction" matched this focus. [Id. at 33:8-17]; accord [Defs' SMF ¶ 67, 70]. Accordingly, the Board as a whole "placed a lot of emphasis on branding and marketing" in order to "put more of a brand name" on the County and give it "a more solid sense of identity." [Nesbitt Dep. at 32:23-33:3].

In late 2009, when the County announced the permanent Director position, Plaintiff submitted her application for the position to Jeff Pogue ("Pogue"), a Caucasian, who was the Human Resources ("HR") Director. [Defs' SMF ¶ 47], [Pl's SMF ¶ 26], [Oden Dep. at 26:9-10], [Pogue Aff. ¶ 2]. At the time of her application, Plaintiff had almost ten years of experience as the Public Relations Deputy Director and four months of experience as the Interim Director. [Pl's SMF ¶ 27].

As for her educational background, Plaintiff received a Bachelor's degree from Clayton State University in 2009 in Integrated Studies with an emphasis in public policy, communications, marketing, and conflict resolution. [Defs' SMF ¶ 77], [Pl's Resp. to Defs' SMF ¶ 77].

In searching for a permanent Director of Public Affairs, the HR Department narrowed the field to approximately ten candidates. [Defs' SMF ¶ 52], [Oden Dep. at 24:9-22]. In March of 2010, a panel of five interviewers, who were not members of the Board, interviewed the ten candidates. [Defs' SMF ¶¶ 49, 52], [Ex. 23 to Pl's Dep]. From those ten interviews, the panel chose four finalists who would meet with Oden. [Defs' SMF ¶ 52].

Plaintiff was one of the four finalists. [Id. ¶¶ 47, 53]. The other finalists were Alysa King, an African-American, Jaquitta Williams, and Erica Fatima ("Fatima"), an African-American. [Id. ¶ 53], [Van Ness Dep. at 56:9-10]. Williams withdrew her name from consideration before public disclosure of the four finalists. [Defs' SMF ¶ 53]. Three out of the five interview panelists gave Plaintiff the highest rating score. [Pl's SMF ¶ 28]. Two out of the five interview panelists ranked Ms. Fatima higher than Plaintiff. [Defs' SMF ¶ 51].

4. Chairman Oden Chooses Ms. Fatima

At some point after the panelist interviews, Chairman Oden interviewed the final candidates, but did not know their ratings from the interview panel. [Id. ¶¶ 53-54]. Two or three days later, Chairman Oden told the HR Department he felt Fatima was the best candidate.

[Id. ¶ 73]. He later made a motion to the Board to appoint Ms. Fatima, [Oden Dep. at 72:16-17], as discussed more fully below.

At the time of Chairman Oden's recommendation, Ms. Fatima had approximately one year of experience in each of the following areas: Deputy Press Secretary for the Georgia Department of Transportation; Community Relations Coordinator for the Rockdale County Public Schools; and Recruiter/Diversity Coordinator for the Rockdale County Public Schools. [Ex. 32 to Pl's Dep. at 3]. She also spent three years as the Lead Production Assistant in the Harpo Studios, which included an internship in the Public Relations Department, and in 1999, she founded Tycoon Industries and Holding Company.[8] [Id. at 4]. In terms of her education, Ms. Fatima received a Bachelor's degree from DePaul University in 1995 in Marketing and Public Relations. [Defs' SMF ¶ 77].

a. Chairman Oden's Branding and Marketing Concerns

Chairman Oden said he chose Ms. Fatima because, "[b]ased on [his] perception, [she] outweighed the other candidates with skills and talents and had a very, very good grasp about branding and marketing, which is where [the County] want[s] to go." [Defs' SMF ¶ 66] (citing [Oden Dep. at 63:5-8]); accord [id. ¶ 73].

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[8] Tycoon Industries and Holding Company has two subsidiaries: Diamond Dreams Company, in which Fatima "created . . . graphic logos [and] . . . collaborative marketing programs," and Baby Bottoms Rent-a-Seat Incorporated, in which Fatima "developed a national advertising campaign with co-branding opportunities for the airline industry" and "designed [the] company logo, mission statement and slogan." [Ex. 32 to Pl's Dep. at 4].

Comparing Ms. Fatima and Plaintiff, Chairman Oden said "[p]resentation is about branding, packaging. You've got to put your best foot forward. [He] didn't see that [in Plaintiff] and [he] wasn't feeling that. [He was] looking at skills and the talent." [Id. ¶ 66].

b. Chairman Oden's Concerns About Plaintiff's Past Work

Chairman Oden also articulated two performance problems by Plaintiff that he states he was aware of before the hiring decision.[9]

i. Web Page

In August of 2009, Clerk of Courts Ruth Wilson ("Wilson") asked Plaintiff to create a website for the Clerk of Courts. [Id. ¶ 18]. Ms. Wilson says that she told Plaintiff she "wanted [the] website [to] be generally similar to the Clayton County Clerk of Courts website," [Wilson Aff. ¶ 9], and "sent [Plaintiff] a link" and said "I need a website like this." [Pl's Dep. at 123:8-124:14]. Plaintiff interpreted this as a request for the site to be "exactly like" the example, [id. at 128:1], denying that Ms. Wilson told her that the link to the Clayton County Clerk of Courts website "was just an example." [Id. at 129:9-14]; accord [id. at 130:9-10] ("[Ms. Wilson] said put this on

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[9] The way Defendants organize some of the facts in their Statement of Material Facts implies that Board members were aware of more than just these two performance problems with Plaintiff. For instance, Statement of Material Fact ¶ 31, which states that a coworker shared concerns with Chairman Oden about Plaintiff's work, immediately follows five paragraphs that discuss a performance problem unrelated to the problem discussed in ¶ 31 (the problem about which the coworker shared her concerns with Chairman Oden). Accordingly, the undersigned's compilation of Plaintiff's performance problems only includes problems for which support exists in the record of knowledge by the Board.

the Web site exactly like this.").

The web page[10] Plaintiff created "contained both text and forms that were copied directly from the Clayton County website and specifically referenced Clayton County and not Rockdale County," [Defs' SMF ¶ 22], and hyperlinks that "went to a Clayton County form or Clayton County website." [Pl's Dep. at 127: 12-15]. "[A]ttorneys and judges in Rockdale County were very upset, and the Chief Judge . . . sent a letter to Chairman Oden informing him that the mistake was extremely embarrassing." [Defs' SMF ¶ 23]. Ms. Wilson met with Chairman Oden about the website issue. [Wilson Aff. ¶ 13].

ii. Magazine Article

In November of 2009, Atlanta Tribune Magazine published an article written by Plaintiff, entitled "Spotlight on Rockdale County." [Defs' SMF ¶ 34], [Doc. 85-6 at 5]. The pictures Plaintiff chose for the article were of the County's courthouse, a covered bridge, a tree line, and a statue of soldiers in a park honoring veterans of 20th century wars. [Doc. 85-6 at 5].

Because the article "was about [the] County going forward and [its] new direction," Chairman Oden felt the pictures "didn't properly portray the county as [t]he brand" image he was looking for. [Oden Dep. at 58:3-5, 22-24]. He testified that he found the picture selection "inappropriate" and a "missed . . . opportunity." [Id. at

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[10] For clarification, Plaintiff created a web page, not a website, [Defs' SMF ¶ 20], which is not relevant to Plaintiff's performance of the task.

58:6-9]. He told Plaintiff he "thought [they] could do better" than what Plaintiff had done because the article did not represent "what [he] wanted to see in the branding." [Id. at 60:7-9]. He testified that his dissatisfaction with Plaintiff's performance on this project was reflected in his performance evaluation of her. [Id. at 60:10].

Chairman Oden's reference to the performance evaluation refers to his January 28, 2010, evaluation of Plaintiff for the 2009 year. [Defs' SMF ¶ 39]. On the evaluation, Plaintiff's overall score was 3.53. [Pl's Resp. to Defs' SMF 40]. The rating scale indicates that "3 = Fully Meets" and "4 = Outstanding."[11] [Ex. 6 to Pl's Dep. at 1]. Plaintiff's scores in individual areas ranged from 2.5 to 4.5, with Plaintiff's two lowest scores being in communication skills and quality of work (with scores of 2.5 and a 2.75, respectively), and her highest score being in loyalty (with a score of 4.5). [Id. at 9].

5. Chairman Oden's First Motion to Appoint Ms. Fatima and Ms. Van Ness's Concerns

On April 5, 2010, Chairman Oden recommended by motion that the Board appoint Ms. Fatima as the Director of Public Affairs. [Defs' SMF ¶ 80]. Ms. Van Ness had concerns about Ms. Fatima's "serv[ing] in such a high-level role for the County" because, according to Ms. Van Ness, when Ms. Fatima's son attended the school where Ms. Van Ness works part-time, Ms. Fatima "sometimes had trouble paying her bills." [Van

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[11] The rating scale ranged from 1 to 5. [Ex. 6 to Pl's Dep. at 1]. The other scores not already discussed are as follows: a score of one is defined as "fails to meet"; two is defined as "mostly meets"; and five is defined as "extraordinary." [Id.].

Ness Dep. at 46:13-19]. Due to her concerns about Ms. Fatima, Ms. Van Ness "requested before [the Board] voted on [Oden's recommendation] that [Van Ness and Nesbitt] have the opportunity to meet with [Fatima] and interview her [them]selves." [Id. at 56:15-17]; accord [Defs' SMF ¶ 81]. Mr. Nesbitt seconded Ms. Van Ness's request "to allow her the opportunity to do her research and do whatever else she needed to do in terms of making a decision." [Nesbitt Dep. at 28:21-24].

Mr. Nesbitt and Ms. Van Ness were given an opportunity to meet with Ms. Fatima, which Ms. Van Ness took advantage of. [Van Ness Dep. at 57:11]. According to Ms. Van Ness, the interview "went well. [Fatima] came across as extremely polished and professional, very well spoken, very put together," and "had a good image of herself." [Id. at 57:11-15]. Although Ms. Van Ness believed Ms. Fatima "definitely seemed more polished and professional" than Plaintiff, she did not believe Ms. Fatima was more qualified than Plaintiff in terms of her experience because of the aforementioned concerns. [Id. at 57:21, 24].

Ms. Van Ness shared her concerns with Mr. Nesbitt and Chairman Oden. [Id. at 46:20-22]. She also "[r]epeatedly" asked Chairman Oden and HR Director Pogue to verify Ms. Fatima's references and was told in response by Mr. Pogue "that th[e] [references] were verified" and that Ms. Fatima "was a good candidate." [Id. at 47:19-24].

Ms. Van Ness then checked on some of Ms. Fatima's references and became concerned because she "called the phone number . . . listed on [her] resume" for the Rockdale County School System, and "it rang to [Fatima's] desk," and when she eventually reached the intended

contact, she was told Ms. Fatima had a "no rehire" designation in her HR folder. [Id. at 48:10-12, 23-24]. Ms. Van Ness made a public statement about the phone call she made, and told Mr. Pogue about the "no hire" designation she had been told about. [Id. at 49:23-50:1]. The mode of communication for this public statement is not specified in the record, but Chairman Oden explained that Ms. Van Ness "usually makes public comments when she has a statement to make," [Oden Dep. at 93:17-18], and that there was "a lot of controversy" regarding Chairman Oden's recommendation to appoint Ms. Fatima to the Director position. [Id. at 89:4].

Ms. Van Ness also told Chairman Oden and Mr. Nesbitt about the no-hire designation she had heard about, telling them that "a public relations department should be an office of truth, and that [she] had great difficulty in putting someone in a position like that that had [a] questionable background." [Id. at 46:20-21, 50:22-51:16]. Chairman Oden responded by telling Ms. Van Ness that Ms. Fatima was "who he want[ed] for the job" because he considered her "the most qualified." [Id. at 51:19-20].

Ms. Van Ness felt that her "concerns weren't validated" because "[a]t no time did [Oden] direct [HR Director Pogue] to provide written references or statements from the references," nor did Oden "direct [Pogue] to go back and recheck [the] references." [Id. at 52:4-8]. Chairman Oden, on the other hand, testified that he personally checked several of Ms. Fatima's references. [Oden Dep. at 86-89].

6. Ms. Fatima's Selection and Its Aftermath

On April 27, 2010, in a called session of the Board, when Chairman Oden made a second motion to appoint Ms. Fatima, Mr. Nesbitt and Chairman Oden voted for the appointment and Ms. Van Ness voted against it. [Defs' SMF ¶ 101], [Pl's SMF ¶ 35], [Van Ness Dep. at 60:25-61:2, 62:12]. The motion passed.

Ms. Fatima began as Director on the same day, [Van Ness Dep. at 63:12-16], and Plaintiff became the Deputy Director of Public Affairs, under Ms. Fatima's supervision. [Oden Dep. at 112:7-10].

After she was not selected for the Director position, Plaintiff contacted attorney Lee Parks because she "felt like the hiring process was extremely flawed and that [she] was not judged fairly." [Pl's Dep. at 61:1, 17-23], [Defs' SMF ¶ 141]. At no time did Plaintiff file a complaint pursuant to the County's complaint procedure for discrimination. [Defs' SMF ¶ 142].

B. Elimination of Plaintiff's Position

1. The County Seeks Solutions to Its Budget Crisis

a. Recognition of Problem and Formation of Budget Group

As early as 2009, County representatives "recognized that there were significant budget concerns" due to "a $4 million dollar budget shortfall, as well as other factors." [Defs' SMF ¶¶ 114, 116]. After discussing how to decrease the budget shortfall, the Board decided that part of the solution was to eliminate positions, [Defs' SMF ¶¶ 117-18], and, in 2009, Chairman Oden made an official announcement to this effect. [Id. ¶ 114].

Chief of Staff Greg Pridgeon ("Pridgeon") was one of the people involved in determining budget cuts. Mr. Pridgeon's "charge from [Oden] . . . was to meet with the operating departments and the finance department and start looking at ways to conserve money." [Pridgeon Dep. at 57:22-25]. Accordingly, Mr. Pridgeon "met with all the departments and . . . told the Board that [Pridgeon and the departments] would give [the Board] different options to take a look at." [Id. at 58:13-15].

HR Director Pogue was another person involved in "finding a solution to the expected budget shortfall." [Pridgeon Aff. ¶ 3]; accord [Pogue Aff. ¶ 8], [Pridgeon Dep. at 60:8-12].

b. Early Stages of the Budget Group - Mr. Nesbitt's List

In addition to Mr. Pridgeon's and Mr. Pogue's involvement, Mr. Nesbitt "took the lead" in making budget cuts. [Nesbitt Dep. at 34:23-35:1]. Specifically, Nesbitt "took a detailed list of all of [the] county departments . . . and the roles and duties . . . and began to identify what [he] felt was nonessential . . . based on "[his] own subjective view." [Id. at 24:5-13]. After Mr. Nesbitt made a list of approximately 30 positions, he gave it to Chairman Oden, Ms. Van Ness, and Mr. Pridgeon during a session and "encouraged them to . . . shav[e] and sav[e]" and "move in the direction [he] was going in terms of making a decision to eliminate those nonessential positions." [Defs' SMF ¶ 119], [Nesbitt Dep. at 35:11-13].

The positions on the list made by Mr. Nesbitt were not discussed during any subsequent work sessions, and there were no plans to

reconvene to discuss Mr. Nesbitt's list in particular. [Nesbitt Dep. at 40:19-21, 41:4-8]. Rather, Mr. Nesbitt "was satisfied that once [he] submitted the list . . . [he] was going to continue to talk publicly about the fact that . . . [the Board] needed to save and shave and eliminate nonessential positions." [Id. at 41:18-22]. Mr. Nesbitt's list did not include names. Instead, positions were listed. [Id. at 43:21-23]. Mr. Nesbitt could not recall what positions were on his list, nor could he recall whether Plaintiff's position was on the list. [Id. at 44:2-3, 67:14-16], [Defs' SMF ¶ 120].

c. Continued Working Sessions - Mr. Nesbitt's May 17, 2010, Memo and Mr. Pridgeon's June 17, 2010, Memo

The Board participated in working sessions throughout the late spring and early summer where "different scenarios" and "different positions that could be eliminated" were discussed. [Oden Dep. at 130:5-10]; accord [Nesbitt Dep. at 33:23-34:1, 55:5]. During those meetings, Plaintiff's position "was not singled out as a point of discussion." [Van Ness Dep. at 69:3]. Though the defunding of Plaintiff's position was not specifically discussed, on May 17, 2010, Mr. Nesbitt recommended to Mr. Pridgeon in writing that the Public Affairs Department staff be reduced by at least one person. [Nesbitt Dep. at 59:1-7].

On June 17, 2010, Mr. Pridgeon sent a memo to the Commissioners, in which he updated them with possible ways to reduce the County's expenditures. [Pridgeon Dep. at 70:11-17]. Mr. Pridgeon's memo did not include any positions in the Public Affairs Department, [Doc. 92-5],

but Mr. Pridgeon testified that "that doesn't mean it wasn't contemplated. [They] contemplated everything" and he told the Board "to consider everything" because "nothing [was] sacred." [Pridgeon Dep. at 70:16-20, 71:17-18]. Mr. Pridgeon testified that, at that time, they "might have [had] seven or eight different directions [they] were going," and that a decision to defund Plaintiff's position "would not have come as an individual position," but rather "would have come in a package of all positions that were being considered." [Id. at 61:25-62:1, 76:20-22].

d. June 21, 2010 - Mr. Pridgeon's Proposal

On June 21, 2010, Mr. Pridgeon presented the Board with a budget reduction proposal. [Pridgeon Dep. at 76]. Plaintiff's department was not on the list, but Mr. Pridgeon explained that the budget reduction proposal from the June 21, 2010, proposal included a "plan with incentives to allow eligible employees to voluntarily retire early." [Id. at 78:23-24, 79:2-3]. When the early retirement plan was "never adopted," the reductions from the early retirement plan "weren't there and so [they] had to find other places . . . to capture some of the savings that were anticipated . . . in that plan." [Id. at 79:9-18].

2. The Commissioners Vote on the Budget

At 9:00 a.m. on June 28, 2010, in a special called meeting, Chairman Oden, Mr. Nesbitt, and Ms. Van Ness "unanimously voted to pass the budget reconciliation." [Defs' SMF ¶ 132]. The budget reconciliation adopted by the Board included a list of positions to defund, identified not by name but by "position codes." [Id. ¶ 133].

The budget reconciliation adopted by the Board "affected the funding or completely defunded about 39 positions, including defunding seven positions which were occupied." [Id. ¶ 130].

Plaintiff's position was on the list of positions to defund that was adopted by the Board. [Id. ¶ 133]. The other six persons whose positions were defunded were Public Affairs Specialist Robinson (African-American); Ivan Duncan, Fleet Shop Attendant (African-American); Bob Hunter, Assistant Director of Code Enforcement (Caucasian); Kathy Johnson (Caucasian); Tyler Van Sant, Building Maintenance Assistant Director (Caucasian); and Cythia Wright, HR Administrative Coordinator (African-American). [Defs' SMF ¶ 155].

Later in the day on June 28, 2010, Ms. Van Ness "realized for the first time that the job listings she voted to defund included the Plaintiff's job position." [Id. ¶ 135]. Ms. Van Ness called County Clerk Jennifer Rutledge ("Rutledge"), who informed her that Ms. Van Ness "could ask the other commissioners to reconsider the vote at a meeting already scheduled for the next day, on June 29." [Id. ¶ 136]. During the June 29, 2010, meeting, Ms. Van Ness "made a motion to reinstate three positions, including Plaintiff's, which were defunded by the budget reconciliation vote on the prior day." [Id. ¶ 137].[12] Mr. Nesbitt and Commissioner Oden "voted to uphold the budget reconciliation as originally voted on the prior day." [Id. ¶ 138]. Plaintiff's position was not reinstated.

[12] The three positions included Plaintiff, Bob Hunter, and Tyler Van Sant. [Van Ness Dep. at 72:8-9].

3. Creation of the Final List

Neither Mr. Nesbitt nor Chairman Oden originated the list of positions for the final list. [Nesbitt Dep. at 68:1-12], [Oden Dep. at 104:15-21]. Rather, Chief of Staff Pridgeon was the one who made the final recommendations for the positions to defund. [Pridgeon Dep. at 83:18-19, 84:2-3]. Mr. Pridgeon made his final recommendations based upon recommendations for positions to defund received from department heads within in each department. [Id. at 85:3-4]. He said "the ultimate decision to make [defunding] recommendation[s] to the Board would have been [his], not any of the departments." [Id. at 102:22-24].

With respect to Plaintiff's position in particular, Mr. Pridgeon testified that he was the one who recommended to the Board to defund Plaintiff's position after he, Ms. Fatima, and the finance director "looked at the bottom line." [Id. at 83:17, 85:6-7]. Mr. Pridgeon testified that no one, including the Commissioners, "put any pressure on [him] or encourage[d] [him] to include [Plaintiff]'s position on the list that [he] submitted to the Commissioners for their vote." [Pridgeon Aff. ¶ 11]; accord [Defs' SMF ¶ 153].

Mr. Pridgeon's final recommendations went into a final list "prepared by [Pogue in HR]" that "reflect[ed] the position number" as directed by Mr. Pridgeon and the "salary savings." [Pridgeon Dep. at 87:21-25]. Mr. Pogue stated that it was "[a]t approximately 8:30 a.m., on June 28, 2010," when Mr. Pridgeon, through Mr. Pogue, added

Plaintiff's position to the list of those to be defunded. [Pogue Decl. ¶ 13].

Mr. Pridgeon could not say when he directed Mr. Pogue to add Plaintiff's position to the list, but he said that a meeting immediately before the vote would not have been unusual because he and Mr. Pogue met "on many occasions, sometimes in the morning," and the County's enabling act allowed the Board to make changes "right up to the very last moment" even if those changes had not been discussed. [Pridgeon Dep. at 74:19-21, 98:10-16].

4. Plaintiff's Attorney Sends Letters to the Commissioners

Four days before the budget vote, on Thursday, June 24, 2010, Plaintiff's attorney mailed a letter via regular mail to each of the three Commissioners, alleging that Plaintiff was subjected to race discrimination when the County hired Ms. Fatima instead of Plaintiff and stating his desire to "resolve this unfortunate situation without litigation." [Defs' SMF ¶ 143]; [Doc. 92-8]. One of the letters appears to have been received on Monday, June 28, 2010, based on Defendants' production of one copy of the letter that bears a "received" stamp dated that day. [Id. ¶ 145], [Pl's SMF ¶ 82].

Chairman Oden's assistant testified that mail is not delivered on the weekends and that mail is delivered to the Commissioner's office by the post office once in the morning after 10:00 a.m., and once in the afternoon after 3:00 p.m. [Defs' SMF ¶ 146].

Mr. Nesbitt's assistant "delivers the mail to [his] upstairs

office and when [he] come[s] in on Mondays and Tuesdays, [he has] a pile of mail on [his] desk." [Nesbitt Dep. at 69:13-16]. Mr. Nesbitt did not know "whether [his assistant] takes it up there every single day or . . . two or three days a week," and she "never opens [his] mail." [Id. at 70:1-3, 10].

All Commissioners denied receiving the letter from Plaintiff's counsel before voting on the first motion. [Oden Dep. at 145:17], [Nesbitt Dep. at 68:20-24], [Van Ness Dep. at 81:3]. Mr. Pridgeon also denied "see[ing] or hav[ing] any knowledge of the letter until after the June 28 meeting," [Pridgeon Aff. ¶ 8], and stated that no one "discussed th[e] letter with [him] prior to the June 28, 2010 vote." [Id. ¶ 7].

5. Plaintiff's Attorney Sends an Open Records Act Request to the County Clerk

On Friday, June 25, 2010, at 10:36 a.m., Plaintiff's attorney e-mailed County Clerk Jennifer Rutledge ("Rutledge") an Open Records Act ("ORA") request. [Pl's SMF ¶ 65]. Plaintiff's attorney also mailed the same request to the Clerk on Friday, June 25, 2010. [Id.]. The subject line of the e-mail read "In the Matter of Holly Lafontaine v. Rockdale County." [Doc. 92-17 at 1].

The request asked for "[a] complete copy of [Plaintiff]'s personnel/employment file" and the following materials "[w]ith regard to the County's hiring of its new Public Affairs & Media Relations Director on or around March, 2010":

A complete copy of all notes, score sheets, ratings sheets

> and related documents created by each interview panelist that participated in the interview process. The County should provide notes, score sheets, and rating sheets created for each and every candidate who interviewed with the panel.

[Doc. 92-17 at 2].

County Clerk Rutledge did not know whether she opened the e-mail on Friday, June 25, 2010, but testified that, at some point after she received the request, she contacted Mr. Pogue in HR "to get a timeline and an estimated amount as to how much this would be." [Rutledge Dep. at 15:4-7, 16:23-24].[13] Mr. Pogue "do[es] not recall receiving a copy of the ORA request . . . prior to the June 28, 2010 vote." [Pogue Decl. ¶ 20].

Ms. Rutledge said she might discuss an ORA request with somebody if she was "unsure if [the information was] subject to disclosure," but that she did not "typically" inform County officials of an ORA request "just . . . as an FYI." [Rutledge Dep. at 12:24-25, 13:21-23].

Though Ms. Rutledge reports directly to Chief of Staff Pridgeon, Mr. Pridgeon denied hearing about the ORA request before the June 28, 2010, meeting, stating that Ms. Rutledge "wouldn't have asked [him] or talked to [him] about it. There wouldn't have been any need to" because Mr. Pridgeon "wasn't over in HR[and . . .] didn't have any of the stuff that would have been asked for." [Pridgeon Dep. at 18:24-19:3, 107:18-21]. Ms. Rutledge also denies sharing the request with any of the Commissioners. [Rutledge Dep. at 19:2-14, 19:22-25:1].

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[13] After opening the e-mail, Ms. Rutledge wrote Plaintiff's counsel. This occurred on July 13, 2010. [Rutledge Dep. at 29:14].

C. Plaintiff's Lawsuit

On August 6, 2010, Plaintiff filed the instant suit against Defendants, alleging race discrimination against Plaintiff in violation of Title VII, Section 1981, and the Equal Protection Clause for Defendants' selection of Fatima, and retaliation under Title VII and Section 1981 for Defendants' defunding of Plaintiff's position after Defendants received the correspondence from Plaintiff's attorney. [Doc. 1].

On August 16, 2011, after the close of discovery, Defendants filed a motion for summary judgment on both of Plaintiff's claims, [Doc. 83], and a motion for sanctions alleging that Plaintiff's retaliation claim is frivolous. [Doc. 86]. Plaintiff also filed a motion to file a surreply, [Doc. 108], in connection with the summary judgment motion. Having been fully briefed, all matters are ripe for the Court's consideration.

III.
Discussion

A. Plaintiff's Motion for Leave to File a Surreply

On October 14, 2011, Plaintiff filed a motion for leave to file a surreply to Defendants' motion for summary judgment. [Doc. 108]. In her motion, Plaintiff argues that a "surreply is necessary to show that [Plaintiff]'s statement that she may have used the 'N' word when singing lyrics to songs is supported by her testimony and to point out factual misstatements that falsely accuse [Plaintiff] as being a racist." [Id. at 2]. Attached to her motion, Plaintiff includes the

signed errata sheet from her February 22, 2011, deposition, [Doc. 108-2], which neither party disputes she sent to the court reporter within 30 days of her deposition. [Doc. 108-1 at 2]. One of Plaintiff's changes on the errata sheet, which references her response to whether it would surprise her if anyone testified that they have heard her use the word "nigger," appears as follows:

> I was under the impression that I was being asked if I would be surprised if anyone testified they heard me use that word, when referring to Oden, Nesbitt or Pridgeon because the previous question referred to those 3 men. However, it appears that I am being asked if it would surprise me if anyone heard me use that word in general or in another setting. I have used that word on occassions (sic) where I may have been singing out loud and the lyrics of a song had that word in it. I may have used the word in front of a black friend - but if so - it was completely in a joking context. I have never used the word when referring to someone particular or in reference to any Rockdale County employee or elected official.

[Doc. 108-2 at 2, 4].

Plaintiff's deposition was attached to Defendants' Statement of Material Facts, [Doc. 85-4], but the errata sheet was not included with the deposition. Defendants argue the errata sheet should not be considered because "Plaintiff never served Defendants with the errata sheet and [they] were unaware of [the] changes" when writing their summary judgment reply brief. [Doc. 109 at 3].

Under the Federal Rules, a deponent is "allowed 30 days after being notified by the officer that the transcript . . . is available in which to review the transcript," and then "[t]he officer must note . . . whether a review was requested and, if so, must attach any

changes the deponent makes . . . ." Fed. R. Civ. P. 30(e)(1)-(2) (emphasis added); accord Fed. R. Civ. P. 28(a)(2) (explaining that an "officer" under Rule 30 includes "an officer authorized to administer oaths . . . and take testimony"). Thus, Rule 30(e) places the burden of notification of changes on the officer and not on the deponent or the party. See Norelus v. Denny's Inc., 628 F.3d 1270, 1304 (11th Cir. 2010) ("[A] deponent who elects to review the deposition's transcript must submit to the court reporter, by way of an errata sheet, changes in the transcript that the deponent wishes to make . . . ."); see also id. at 1309 (explaining that "compliance with the [Rule 30's] procedural mandate" includes the errata sheet's being "properly submitted to the court reporter" and not to the defense counsel).

In this case, Plaintiff followed the appropriate procedure under Rule 30. On April 19, 2011, Melissa Merchant, of Deb Puckett & Associates, the court reporting company responsible for transcribing the February 22, 2011, deposition of Plaintiff, sent Defendants' counsel a copy of Plaintiff's deposition and the errata sheet filled out by Plaintiff. [Doc. 112, Ex. M] ("We have now received the signature page and errata sheet . . . . We have included the signature page and errata sheet in the original transcript and are forwarding to you at this time."). Accordingly, Plaintiff's errata sheet will be considered as part of the record.

As for Plaintiff's motion for leave to file a surreply, the motion is **DENIED as moot**. The Local Rules do not contemplate that a

party will file a surreply. LR 7, NDGa. Nonetheless, when a court examines a party's proposed surreply and finds it to be immaterial to its decision, it is proper for such a court to deny the motion as moot. Shepherd v. Pilgrim's Pride Corp., 1:04-cv-3530-JOF, 2007 WL 781883 at *1 n.1 (N.D. Ga. Mar. 12, 2007). After careful review, the undersigned concludes that whether or not Plaintiff ever used the racial epithet in question is immaterial to the resolution of Defendants' motion for summary judgment and therefore will not be considered in connection with Defendants' motion. Accordingly, Plaintiff's motion for leave to file a surreply, [Doc. 108], is **DENIED as moot.**

B. Defendants' Motion for Summary Judgment

1. Standard of Review

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432 (11th Cir. 1998). A factual dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. United States v. Four Parcels of Real Prop., 941 F.2d 1428, 1437 (11th Cir. 1991) (en banc) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986)). The substantive law applicable to the case determines which facts are material. Anderson, 477 U.S. at 248.

The moving party bears the initial burden of showing the court

"the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact" and "an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Four Parcels, 941 F.2d at 1437-38. If the moving party fails to discharge this initial burden, the motion must be denied. Fitzpatrick v. City of Atlanta, 2 F.3d 112, 1116 (11th Cir. 1993). If the burden is met, however, the non-moving party must then "go beyond the pleadings and . . . designate specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324 (citing Fed. R. Civ. P. 56).

2. Analysis[17]

a. Discriminatory Failure to Promote

Plaintiff brings claims under Section 1981, the Equal Protection Clause, and Title VII for Defendants' alleged race discrimination against Plaintiff in promoting Ms. Fatima to the position of Director rather than Plaintiff. Specifically, Plaintiff's race discrimination claim under Section 1981 is against Defendant Oden (Count I), Plaintiff's Equal Protection Clause claim is against both Defendants (Count III), and Plaintiff's race discrimination claim under Title VII is against Defendant Rockdale County (Count IV). [Docs. 1, 68].

[17] Plaintiff brings both claims against Oden in his individual capacity. However, having found Plaintiff does not have any actionable claims, as discussed below, the Court does not consider whether Oden may be held liable in his individual capacity.

Because these three statutes have the same requirements of proof and use the same analytical framework, the Court will address Plaintiff's Title VII discrimination claim with the intention that the same analysis will apply to the Section 1981 and Equal Protection Clause claims. Bryant v. Jones, 575 F.3d 1281, 1296 n.20 (11th Cir. 2009); Hardin v. Stynchcomb, 691 F.2d 1364, 1369 n.16 (11th Cir. 1982).

Title VII makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). This case involves alleged discriminatory failure to promote. To make out a prima facie case of discriminatory failure to promote under Title VII, Plaintiff must show that (1) she belongs to a protected group; (2) she applied for and was qualified for a promotion; (3) she was rejected despite her qualifications; and (4) someone outside of the protected group was promoted. Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1089 (11th Cir. 2004); Taylor v. Runyon, 175 F.3d 861, 866 (11th Cir. 1999); Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1333 (11th Cir. 1998).[18]

[18] Defendants advance a slightly different version of the prima facie framework. Specifically, Defendants argue that Plaintiff must show that the individual who was promoted was equally or less qualified than Plaintiff. [Doc. 103 at 3 n.1] (citing Brown v. Ala. Dep't of Transp., 597 F.3d 1160, 1174 (11th Cir. 2010)). In Walker v. Mortham, 158 F.3d 1177 (11th Cir. 1998), reh'g en banc denied, 167 F.3d 542 (11th Cir. 1998) (table decision), cert. denied, 528 U.S. 809 (1999), the Eleventh Circuit recognized an intra-circuit split with respect to whether a plaintiff must engage in a comparison of relative qualifications during the prima facie stage of the analysis. When an intra-circuit split occurs, courts should

If Plaintiff establishes a prima facie case, Plaintiff is entitled to a rebuttable presumption of discriminatory intent on the part of Defendants. Standard, 161 F.3d at 1333. To rebut this presumption, Defendants must offer legitimate, nondiscriminatory reasons for Plaintiff's non-promotion. Id. at 1333-34. If Defendants make this showing, Plaintiff must show that the proffered reasons are mere pretext for discrimination. Id. at 1334.

In this case, Plaintiff clearly falls into a protected class; she applied for and was not promoted to the position; and someone outside of her protected group was promoted. The only issue Defendants dispute is whether Plaintiff was qualified for the position. Defendants argue that Plaintiff has failed to make a prima facie case because Plaintiff was neither (1) qualified for the position because of her past performance nor (2) equally or more qualified than Ms. Fatima.

To show she is qualified, a plaintiff need only show she "satisfied an employer's objective qualifications" for the position, Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 769 (11th Cir. 2005), which includes only the minimum qualifications. Carter v. Three Springs Resid. Treatment, 132 F.3d 635, 643 (11th Cir. 1998). As discussed, Plaintiff's qualifications relative to Ms. Fatima are not

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"look to the line of authority containing the earliest case." Walker, 158 F.3d at 1188. The Walker court concluded that the earlier line of Eleventh Circuit authority did not require a Title VII plaintiff to address relative qualifications in order to establish a prima facie case. Id. The Court finds the Walker analysis to be binding and concludes that Plaintiff does not have to engage in a discussion of relative qualifications to establish her prima facie case.

properly considered in analyzing the prima facie case. See supra n.18. Here, the job announcement stated the minimum qualifications as a "Bachelor's degree in communications, journalism or related field"; five years' experience "in public relations, marketing, journalism or related field"; and five years' experience in government. [Pl's Dep., Ex. 28 at 3]. It is undisputed that Plaintiff met these qualifications, [Defs' SMF ¶¶ 4, 9, 10], [Pl's Resp. to Defs' SMF ¶ 10], and Plaintiff was serving in the position as the Interim Director at the time of the Board's promotion decision. Contrary to Defendants' argument, any performance issues Plaintiff may have had while serving in the position are not relevant at this point. Vessels, 408 F.3d at 763 ("[S]ubjective criteria have no place in the plaintiff's initial prima facie case."). Accordingly, Plaintiff can make out a prima facie case for failure to promote her to the position of Director of Public Affairs.

Once Plaintiff makes out a prima facie case, Defendants have the burden to show a legitimate, non-discriminatory reason for Chairman Oden's selection of Ms. Fatima and non-selection of Plaintiff. Standard, 161 F.3d at 1333-34; Taylor, 175 F.3d at 866. In his selection criteria, Chairman Oden "focused strongly on branding and marketing, and he did not feel that Plaintiff was strong in this area." [Doc. 84 at 19]. Chairman Oden also felt that Ms. Fatima presented herself well and offered a vision for the Department. [Doc. 85, Ex. 7 at 6-7]. This explanation is sufficient to meet Defendants' burden of articulating a legitimate, non-discriminatory reason for the

promotion decision, because the burden is "exceedingly light." Chapman v. AI Transport, 180 F.3d 1244, 1249 (11th Cir. 1999) (citation and quotation omitted); Meeks v. Computer Assocs., Int'l, 15 F.3d 1013, 1019 (11th Cir. 1994) (citations and quotations omitted).

Once Defendants have articulated a legitimate, non-discriminatory reason for Chairman Oden's selection of Ms. Fatima instead of Plaintiff, the burden shifts to Plaintiff to show that Defendants' proffered reason is merely a pretext for unlawful discrimination. Standard, 161 F.3d at 1334; Taylor, 175 F.3d at 866.

As an initial matter in the pretext inquiry, Plaintiff takes issue with Defendants' proffered reason, arguing that Defendants, in fact, have offered multiple reasons that are "riddled with inconsistencies and contradictions" when comparing Defendants' interrogatory responses, Chairman Oden's deposition testimony, and Defendants' summary judgment brief. [Doc. 92 at 18, 20]. Though "an employer's failure to articulate clearly and consistently the reason for [the employment action] may serve as evidence of pretext," Hurlbert v. St. Mary's Health Care Sys., Inc., 439 F.3d 1286, 1298 (11th Cir. 2006), the allegedly inconsistent statements "must reveal such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions . . . that a reasonable factfinder could find them unworthy of credence." Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 771 (11th Cir. 2005) (internal citation and quotation omitted); accord Alvarez v. Royal Atlantic Developers, Inc., 610 F.3d 1253, 1265 (11th Cir. 2010) (citing Combs v. Plantation Patterns, 106 F.3d 1519,

1538 (11th Cir. 1997)).

At various stages of this litigation, Defendants have discussed the candidates' respective interview performances and skills. Simply put, Defendants' proffered reason for favoring Ms. Fatima over Plaintiff has been consistent and has always centered on the same theme - that Ms. Fatima would better advance the direction and image Chairman Oden envisioned for the County, whereas Plaintiff did not. Chairman Oden supported his conclusion with specifics. He stated that Ms. Fatima "outweighed the other candidates with skills and talents and had a very, very good grasp about branding and marketing, which is where [the County] want[s] to go." [Oden Dep. at 63:5-8]. And while Ms. Fatima "shared her vision" for the future of the County with Chairman Oden, Plaintiff did not. [Id. at 66:6-14]. The undersigned finds no internal inconsistencies in Defendants' proffered reason, nor does the Court find that there were multiple, inconsistent or incompatible reasons offered by Defendants indicative of pretext.

With regard to the particulars of Defendants' proffered reason, Plaintiff first takes issue with Chairman Oden's comments regarding the respective interview performances of Ms. Fatima and Plaintiff. In particular, Plaintiff focuses on Chairman Oden's comment that Plaintiff's appearance in the interview was "casual business" while Ms. Fatima had a more "professional look." [Doc. 92 at 24]. Plaintiff also points to Chairman Oden's purported reliance on the superiority of Ms. Fatima's application DVD when he did not even look at the DVD. [Id. at 18].

Regarding the candidates' appearances, the subjective opinion that Chairman Oden expressed "constitute[s] a legally sufficient, legitimate, nondiscriminatory reason" because Chairman Oden "articulate[d] a clear and reasonably specific factual basis upon which [he] based its subjective opinion." Chapman v. AI Transport, 229 F.3d 1012, 1033 (11th Cir. 2000). Chairman Oden felt that Plaintiff was not "dressed for success," [Oden Dep. at 62:25], which he felt indicated Plaintiff "was not professionally prepared for th[e] interview from an image standpoint, from a branding standpoint, from a marketing standpoint," [id. at 95:10-13]. He found Fatima "very professional looking" in her "business attire," [id. at 63:20-24], tying into his philosophy that "[p]resentation is about branding, packaging. You've got to put your best foot forward." [Id. at 63:2-3]. Certainly comparative appearance at an interview is a legitimate, non-discriminatory criterion for evaluating candidates for a job dealing with the public.

The fact that Chairman Oden was impressed by Ms. Fatima's DVD even though he failed to watch the DVD does not indicate or prove racial bias. It may show questionable judgment, but this Court is "not in the business of adjudging whether employment decisions are prudent or fair." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1361 (11th Cir. 1999) (citing Jones v. Bessemer Carraway Med. Ctr., 151 F.3d 1321, 1324 n.16 (11th Cir. 1998) (no pretext even where "[t]here may have been a misunderstanding" between plaintiff and the employer)). An employer may make an employment decision "for a good

reason or a bad reason," as long as the employment decision was not motivated by "unlawful discriminatory animus." Damon, 196 F.3d at 1361; accord Jones, 151 F.3d at 1324 n.16 (same).

The undersigned further finds no merit in Plaintiff's argument that pretext is shown by Chairman Oden's alleged failure to provide more specifics as to "what sold him on Fatima." [Doc. 92 at 22]. As discussed, an employer's subjective reason for making a decision does not show pretext where the employer "articulates a clear and reasonably specific factual basis upon which it bases its subjective opinion." Chapman, 229 F.3d at 1033. In this case, Defendants have done so. Chairman Oden pointed to specific commitments he felt that he shared with Ms. Fatima - creating new County programming for the public broadcasting channel, [Oden Dep. at 67:3-6], and making the website more user-friendly by eliminating drop-down pages, [id. at 67:6-10], for example. Chairman Oden used these examples to explain that Ms. Fatima "shared her vision" for the County's direction while Plaintiff did "[n]ot really" provide one, [Oden Dep. at 69:9-14] - a point Plaintiff does not dispute. See Chapman, 229 F.3d at 1036 (no pretext where plaintiff "never refuted th[e] objective bases for the subjective reason proffered for not hiring him" because he concedes he did not ask questions or explain certain things in his interview).

Moreover, Chairman Oden found that Ms. Fatima's vision "blended in with [his] thoughts." [Oden Dep. at 64:9]. In other words, he felt a chemistry with her. "[T]he synergy or chemistry between [two people working in tandem], no matter how intangible or 'subjective' a

determination that may be, is crucial." Hall v. Ala. Ass'n of Sch. Bds., 326 F.3d 1157, 1169 (11th Cir. 2003). At the same time, based on observations of Plaintiff's past performance in the Director role, Chairman Oden stated that he did not find that Plaintiff's vision blended with his. [Oden Dep. at 60:7-10] (discussing Plaintiff's magazine article that "wasn't what [he] wanted to see in the branding").

Even if Chairman Oden may have misjudged Plaintiff's past performance, the Court will not second-guess an employer's "honest assessment" of a person's qualifications, Cooper v. So. Co., 390 F.3d 695, 730 (11th Cir. 2004) (*overruled on other grounds by* Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006)), and Plaintiff "has offered no evidence that [Oden] did not honestly believe" Plaintiff's shortcomings. Cooper, 390 F.3d at 730 (no pretext shown where decisionmaker found plaintiff had shortcomings based on plaintiff's job history). Further weighing against a showing of pretext is the fact that Chairman Oden had counseled Plaintiff about her performance issues before the Director search began. [Oden Dep. at 60:7-10]. Slater v. Energy Servs. Group Intern. Inc., No. 10-14939, 2011 WL 4425306 at *3 (11th Cir. Sept. 23, 2011) (finding no pretext where employer discussed performance issues both orally and via e-mail but not in a formal review).

Finally, the circumstances surrounding the hiring of African-American Roselyn Miller to the County's Finance Director position in

2009 do not show pretext as it relates to Plaintiff. Plaintiff alleges that, in hiring Miller, "Oden and Nesbitt . . . alter[ed] the educational requirements for the position in order to appoint [African-American] Miller over . . . a Caucasian[] who possessed the necessary educational requirements." [Doc. 92 at 24-25]. A plaintiff may attempt to show pretext by pointing to comparator evidence, Rioux v. City of Atlanta, Ga., 520 F.3d 1269, 1276-77 (11th Cir. 2008), but the plaintiff must show that the other employee with whom Plaintiff is being compared is "similarly situated [to the plaintiff] in all relevant respects." Rioux, 520 F.3d at 1280 (citing Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1091 (11th Cir. 2004)). In this case, Ms. Miller is not an adequate comparator because Plaintiff has not shown that she and Miller were similarly situated. The most obvious dissimilarity is that Finance Director and Public Affairs Director are entirely different positions. Further, the evidence of record shows that Plaintiff had performance problems and lacked Chairman Oden's desired qualifications for the position, whereas Ms. Miller "exceeded [Oden's] expectations and performed very well" in the position for which the Commissioners were interviewing. [Oden Aff. ¶ 5]. See Rioux, 520 F.3d at 1281 (other employees were not adequate comparators in part because they did not have past work problems and plaintiff did).

In sum, Plaintiff's having failed to show pretext with respect to Defendants' proffered reason for selecting Ms. Fatima, **IT IS RECOMMENDED** that Defendants' motion for summary judgment, [Doc. 83],

be **GRANTED** as to Plaintiff's discrimination claims.

b. Retaliation

Plaintiff brings claims under Section 1981 and Title VII alleging retaliation against Plaintiff for asserting claims under Title VII and Section 1981 for race discrimination in employment in a letter from her attorney. [Docs. 1, 68]. Specifically, Plaintiff's retaliation claim under Section 1981 is against both Defendants (Count II), and Plaintiff's retaliation claim under Title VII is solely against Defendant Rockdale County (Count IV). [Id.]. Plaintiff argues that "[t]he bizarre circumstances surrounding the placement of [Plaintiff]'s name on the list of defunded positions would permit a jury to infer that either the Commissioners or their agents were aware of the June 24th letter" because "nowhere in their testimony did Oden, Nesbitt or Pridgeon identify a single instance where they discussed eliminating [Plaintiff]'s position prior to June 28th." [Doc. 92 at 29].

Title VII provides that it is "an unlawful employment practice for an employer to discriminate against any of [its] employees" because the employee has opposed unlawful discrimination by her employer or "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" concerning unlawful discrimination by her employer. 42 U.S.C. § 2000e-3(a). To establish her prima facie case for Title VII retaliation, Plaintiff must establish that: (1) she engaged in a statutorily protected

activity; (2) she suffered a materially adverse action; and (3) she established a causal link between the protected activity and the adverse action. See 42 U.S.C. § 2000e-3(a); Bryant v. Jones, 575 F.3d 1281, 1307-08 (11th Cir. 2009). If the plaintiff makes this prima facie showing, the burden shifts to the defendant to rebut the presumption of retaliation by showing legitimate, non-retaliatory reasons for the adverse employment action, followed by the plaintiff's showing that the reasons were pretextual. Bryant, 575 F.3d at 1308 (internal citations omitted).[19]

Defendants do not dispute that Plaintiff has satisfied the first two elements of the prima facie case. Plaintiff engaged in protected conduct when her attorney sent the Commissioners the letter that alleged discrimination, and she also suffered the adverse employment action of having her job position abolished. The dispute is whether Plaintiff came forth with sufficient evidence to create a genuine issue of fact that her termination was causally related to the protected activity.

To establish the requisite causal link required as part of the prima facie case, a plaintiff "need only establish that the protected activity and the adverse action were not wholly unrelated." Brungart v. BellSouth Telecommc'ns, Inc., 231 F.3d 791, 799 (11th Cir. 2000)

[19] As with discriminatory treatment claims, the same analytical framework used in Title VII retaliation claims applies to Section 1981 retaliation claims. Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1277 (11th Cir. 2008). Accordingly, the Court addresses Plaintiff's Title VII retaliation claim with the understanding that the same analysis will apply to the Section 1981 retaliation claim.

(citing Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1354 (11th Cir. 1999)); accord Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1336 (11th Cir. 1999); Goldsmith v. City of Atmore, 996 F.3d 1155, 1163 (11th Cir. 1993). A plaintiff may show that the protected activity and the adverse action were not entirely unrelated by showing "close temporal proximity." Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 590 (11th Cir. 2000), *abrogated on other grounds by* Burlington N. & Santa Fe. R.R. Co. v. White, 548 U.S. 53 (2006) (citing Farley, 197 F.3d at 1337). However, where the plaintiff has not presented sufficient evidence that the decisionmaker had knowledge of the protected activity, close temporal proximity, on its own, will not establish causation. Compare Higdon v. Jackson, 393 F.3d 1211, 1221 (11th Cir. 2004) (plaintiff could not establish causation because, "[a]side from the . . . temporal proximity, . . . [t]here [was] no evidence in the record that [the decisionmaker] even knew" of the protected activity) and Brungart, 231 F.3d at 799 (causation not shown where plaintiff was fired one day before starting medical leave because close temporal proximity was not enough to overcome supervisor's unrebutted testimony denying knowledge) and Clover, 176 F.3d at 1355-56 (no causation where plaintiff was fired one day after protected activity because she "failed to present sufficient evidence to establish that [the decisionmaker] was aware of her protected conduct") with Lippert v. Comm. Bank, Inc., 438 F.3d 1275, 1282 n.7 (11th Cir. 2006) (jury issue regarding employer's knowledge of

plaintiff's FDIC disclosures where FDIC met with supervisor "the same day and immediately after . . . meeting with plaintiff" and discussed "some of the same issues" plaintiff had raised to the FDIC) and Goldsmith, 996 F.2d at 1163 (causation shown where plaintiff presented evidence impeaching decisionmaker's denial that he had discussed plaintiff's protected activity with a third party who knew of plaintiff's protected conduct).

In this case, all three Commissioners testified that they had no knowledge of Plaintiff's protected activity until after the meeting, [Oden Dep. at 145:17], [Nesbitt Dep. at 68:20-24], [Van Ness Dep. at 81:3], and this testimony was supported, in part, by the testimony of Chairman Oden's assistant that the first delivery of mail typically was after 10 a.m. [Defs' SMF ¶ 146]. Mr. Pridgeon, the one who compiled the list of positions to defund, also testified that he had no knowledge of Plaintiff's protected activity. [Pridgeon Aff. ¶¶ 7-8]. Mr. Pogue, who compiled the list at Mr. Pridgeon's direction, stated that he "never heard or saw anything that led [him] to believe that Mr. Pridgeon or anyone else" put Plaintiff's position on the defunding list "in retaliation for a demand letter written by her attorney." [Pogue Aff. ¶ 12]. Plaintiff has not presented any evidence rebutting any of the sworn testimony, including Ms. Rutledge's testimony that she did not share the June 25, 2010, ORA request e-mail[20] with Mr. Pridgeon or any of the Commissioners before the

[20] Defendants argue that the e-mail does not qualify as protected activity. [Doc. 84 at 26 n.4]. The undersigned does not address whether the e-mail qualifies as protected activity, but, for

Monday vote. [Rutledge Dep. at 19:2-14, 19:22-25:1]. See also [Pridgeon Dep. at 18:24-19:3, 107:18-21] (denying knowledge of the ORA e-mail). See Clover, 176 F.3d at 1355-56 (no causation shown in part because plaintiff "did not introduce any evidence that it would have been [the HR department's] standard practice to inform" plaintiff's supervisor of employees' protected activity).

Thus, all Plaintiff has offered are "conclusory assertions" that the decisionmakers, based almost entirely on the close temporal proximity of the events, must have known of her protected activity. But "in the absence of supporting evidence," these unsupported assertions are insufficient to withstand summary judgment. Holifield v. Reno, 115 F.3d 1555, 1564 n.6 (11th Cir. 1997); accord Brungart, 231 F.3d at 799 (no knowledge shown where supervisor's "unrefuted testimony" was that he lacked knowledge); Clover, 176 F.3d at 1355 (no knowledge shown where plaintiff "offered no evidence to impeach [decisionmaker]'s unequivocal denial that he had any knowledge" of the protected activity because fact that other employee with knowledge of protected activity "'could have told' [decisionmaker] is not the same as 'did tell'"). Because Plaintiff cannot show a prima facie case of retaliation, **IT IS RECOMMENDED** that Defendants' motion for summary judgment, [Doc. 83], be **GRANTED** on Plaintiff's retaliation claim.

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the purposes of the analysis, assumes that it does.

C. Defendants' Motion for Sanctions

Defendants bring a motion for sanctions against Plaintiff and her counsel "because [they] have continued to pursue a retaliation claim even after learning that there is absolutely no evidentiary support for this claim." [Doc. 86-1 at 7]. Defendants argue that the testimony from various depositions "establishes without contradiction that all three commissioners did not see nor were they aware of Plaintiff's demand letter prior to voting to eliminate Plaintiff's position on June 28, 2010." [Id. at 8].

Rule 11 sanctions "should only be imposed in limited circumstances where the frivolous nature of the claims-at-issue is unequivocal." Carter v. ALK Holdings, Inc., 605 F.3d 1319, 1323 (11th Cir. 2010). Rule 11, therefore, "is intended to deter claims with no factual or legal basis at all; creative claims, coupled even with ambiguous or inconsequential facts, may merit dismissal, but not punishment." Id. (internal citation omitted). Accordingly, Rule 11 sanctions are appropriate "when (1) a party files a pleading that has no reasonable factual basis; (2) the party files a pleading that is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law; or (3) the party files a pleading in bad faith for an improper purpose." Id. (internal citations omitted).

In this case, Defendants are correct that "a party is responsible for reaffirming all contentions in papers filed before the court and

informing the court of any changes . . . that would render a contention meritless." Attwood v. Singletary, 105 F.3d 610, 612 (11th Cir. 1997). But Plaintiff's retaliation claim is not a claim that has "no reasonable factual basis" or one filed "in bad faith with an improper purpose." Id. (internal citation omitted). Plaintiff argues that Defendants' "inability to explain the bizarre facts leading up to the inclusion of [Plaintiff]'s job on the elimination list" and Defendants' inconsistent and incoherent testimony regarding "when or how it was determined that [Plaintiff]'s position would be eliminated" could lead a jury to find evidence of retaliation. [Doc. 93 at 3].

Although the Court has rejected Plaintiff's retaliation arguments, it was not frivolous for Plaintiff to point to the circumstances, largely related to the timing of the receipt of Plaintiff's attorney's letter, the ORA e-mail, and the fatal vote, especially when "not a single witness could testify to a single instance in which [Plaintiff]'s position had been slated for elimination until thirty minutes before" the voting meeting. [Doc. 92 at 33]. In a similar case, but having more circumstantial evidence, the Court let the case go to the jury where plaintiff told a councilperson of her intention to file an EEOC complaint after not being hired as City Clerk, the councilperson met with the mayor the next day, and the plaintiff was fired by the mayor immediately after this meeting. Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993). Although the undersigned finds that summary judgment should be granted on the retaliation claim, see supra III.B.2.b., this

finding alone does not compel sanctions. See Carter, 605 F.3d at 1323. Accordingly, Defendants' motion for sanctions, [Doc. 86], is **DENIED**.

IV.
Conclusion

For the above-stated reasons, **IT IS RECOMMENDED** that Defendants' motion for summary judgment, [Doc. 83], be **GRANTED**. Further, **IT IS ORDERED** that Plaintiff's motion for leave to file a surreply, [Doc. 108], is **DENIED as moot**, and **IT IS ORDERED** that Defendants' motion for sanctions, [Doc. 86], is **DENIED**.

With no matters pending before the undersigned, the Clerk is **DIRECTED** to terminate the reference to the undersigned magistrate judge.

SO ORDERED, REPORTED AND RECOMMENDED, this 3rd day of February, 2012.

s/ E. Clayton Scofield
E. CLAYTON SCOFIELD III
UNITED STATES MAGISTRATE JUDGE

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

HOLLY A. LAFONTAINE,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 1:10-CV-2465-CC-ECS
ROCKDALE COUNTY,	:	
RICHARD ODEN,	:	
in his individual capacity,	:	
	:	
Defendants.	:	

O R D E R

Attached is the Final Report and Recommendation of the United States Magistrate Judge in this action in accordance with 28 U.S.C. § 636(b)(1) and this Court's Civil Local Rule 72. The Clerk shall serve this Final Report and Recommendation on the parties.

Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b)(2), within fourteen (14) days after being served with a copy, each party may file written objections, if any, to this Final Report and Recommendation. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript, if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the District Court. If no objections are filed, the Final Report and Recommendation may be adopted as the opinion and order of the

District Court and any appellate review of factual findings will be limited to a plain error review. United States v. Slay, 714 F.2d 1093 (11th Cir. 1983), cert. denied, 464 U.S. 1050, 104 S.Ct. 729 (1984).

The Clerk is **DIRECTED** to submit the Final Report and Recommendation with objections, if any, to the District Court after expiration of the above time period.

SO ORDERED, this 3rd day of February, 2012.

s/ E. Clayton Scofield
E. CLAYTON SCOFIELD III
UNITED STATES MAGISTRATE JUDGE