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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

AMANDA COOK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Civil Action No. 5:13-cv-1057-CLS**
	)	
THE ORTHOPAEDIC CENTER, P.C.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, Amanda Cook, commenced this action against her former employer, The Orthopaedic Center, P.C. ("TOC"), on June 3, 2013. Her complaint alleges claims for interference and retaliation pursuant to the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* (the "FMLA" or the "Act").[1] The case currently is before the court on defendant's motion for summary judgment.[2] Upon consideration of the motion, briefs, and evidentiary submissions, the court concludes that the motion is due to be granted.

I. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact

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[1] Doc. no. 1 (Complaint).

[2] *See* doc. no. 15.

and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In other words, summary judgment is proper "after adequate time for discovery and upon motion, 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). "In making this determination, the court must review all evidence and make all reasonable inferences in favor of the party opposing summary judgment." *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000) (*en banc*) (quoting *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995)). Inferences in favor of the non-moving party are not unqualified, however. "[A]n inference is not reasonable if it is only a guess or a possibility, for such an inference is not based on the evidence, but is pure conjecture and speculation." *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1324 (11th Cir. 1983) (alteration supplied). Moreover,

> [t]he mere existence of some factual dispute will not defeat summary judgment unless that factual dispute is *material* to an issue affecting the outcome of the case. The relevant rules of substantive law dictate the materiality of a disputed fact. A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor.

Chapman, 229 F.3d at 1023 (quoting *Haves*, 52 F.3d at 921) (emphasis and alteration supplied). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)

(asking "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law").

II. "SHAM AFFIDAVIT" ANALYSIS

Plaintiff objects to paragraphs 3-15 of the affidavit of Amy Daniel, which was submitted by defendant in support of its motion for summary judgment, "because [those paragraphs] conflict with [Daniel's] prior sworn deposition testimony."[3]

The Eleventh Circuit has held that "a party cannot give 'clear answers to unambiguous questions' in a deposition and thereafter raise an issue of material fact in a contradictory affidavit that fails to explain the contradiction." *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1530 (11th Cir. 1987) (quoting *Van T. Junkins and Associates, Inc. v. U.S. Industries, Inc.*, 736 F.2d 656, 657 (11th Cir. 1984)). The Eleventh Circuit has cautioned, however, that this so-called "sham affidavit" rule should be applied "'sparingly because of the harsh effect it may have on a party's case.'" *Nichols v. Volunteers of America, North Alabama, Inc.,* 470 F. App'x 757, 761 (11th Cir. 2012) (quoting *Latimer v. Roaring Toyz, Inc.,* 601 F.3d 1224, 1237 (11th Cir. 2010)).

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[3] Doc. no. 18 (plaintiff's response brief), at 15 n.7 (alterations supplied). Plaintiff did not file a motion to strike Ms. Daniel's affidavit, or any portion thereof, instead burying her objection in a footnote in her summary judgment response brief. Even so, the court will discuss plaintiff's objection as though she has requested that those paragraphs of the affidavit be stricken.

> [T]he court must be careful to distinguish "between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence." *Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir.1986).
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> > [E]very discrepancy contained in an affidavit does not justify a district court's refusal to give credence to such evidence. In light of the jury's role in resolving questions of credibility, a district court should not reject the content of an affidavit even if it is at odds with statements made in an early deposition.
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> *Id.* at 954 (quoting *Kennett–Murray Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir.1980)) (alteration in original) (citation omitted).

Faulk v. Volunteers of America, 444 F. App'x 316, 318 (11th Cir. 2011) (first alteration supplied, second alteration in original).

Paragraphs 3-15 of Ms. Daniel's affidavit discuss defendant's reasons for filling various positions after the end of plaintiff's active employment with defendant.[4] Plaintiff asserts that those paragraphs "change[] [Ms. Daniel's] deposition testimony without allowing Plaintiff's counsel the benefit of cross-examination and should not be considered by this Court."[5] Plaintiff does not elaborate that argument any further, and she does not identify any specific ways in which the affidavit allegedly "changed" Ms. Daniel's deposition testimony.

In response, Ms. Daniel explains her reasons for submitting her affidavit as

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[4] *See* Section III, *infra*, for a more complete discussion of plaintiff's employment history with defendant.

[5] Doc. no. 18 (plaintiff's response brief), at 15 n.7 (alterations supplied).

follows:

> I do have fairly high turnover in my departments and therefore several openings became available between June 2012 and the end of the year. In my deposition, I did my best to recall specifics about the turnover during the relevant time period, but I have now had time to sit down and put the timeline together; I therefore submit this affidavit to clarify and supplement my deposition testimony.[6]

From the court's own comparison of the deposition transcript and the affidavit, the court concludes that Ms. Daniel's own description of her testimony is more accurate. The affidavit did not *contradict* Ms. Daniel's previous deposition testimony; it elaborated it. Moreover, Ms. Daniel adequately explained why she needed to rely upon her affidavit testimony to provide additional detail. Accordingly, *all* of Ms. Daniel's affidavit —including paragraphs 3-15 — can be considered in ruling on defendant's motion for summary judgment.

III. SUMMARY OF FACTS

Defendant, The Orthopaedic Center, P.C. ("TOC" or "defendant") is a comprehensive care center for orthopaedics, spine surgery, and sports medicine based in Huntsville, Alabama.[7] Plaintiff, Amanda Cook, began working for TOC through a temporary employment agency on February 22, 2010, and she became a full-time, direct employee of TOC approximately four to six weeks later, working eight hours

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[6] Defendant's evidentiary submission, Exhibit 11 (Affidavit of Amy Daniel) ¶ 3.

[7] Defendant's evidentiary submission, Exhibit 10 (Affidavit of Matthew DeOrio) ¶ 2.

a day, five days a week.[8] At the commencement of her employment, plaintiff received a copy of the TOC employment handbook, and Tammy Jackson, TOC's Chief Operating Officer, "walked through" the handbook with her.[9]

Plaintiff's first position with TOC was that of "cast technician," which required her to perform such tasks as placing, repairing, and removing patients' casts and splints, along with "basic medical assistant duties" like wound care, directing patients to examination rooms, obtaining medical history, and ordering x-rays.[10] For approximately the first two years of her employment, plaintiff was assigned to the medical teams assisting two pediatric physicians, Drs. Buckley and Lawley.[11]

Plaintiff decided to return to college for the fall semester of 2011. She desired to retain her employment with TOC while taking classes, however, so she requested that TOC accommodate her class schedule by allowing her to leave early on days when she had classes.[12] TOC accommodated that request, but on the condition that plaintiff would need to find other employees to cover her clinical shifts while she attended class. That arrangement worked during plaintiff's first semester of classes,

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[8] Defendant's evidentiary submission, Exhibit 9 (Affidavit of Tammy Jackson) ¶ 2; defendant's evidentiary submission, Exhibit 1 (Deposition of Amanda Cook), at 14.

[9] Cook Deposition, at 14.

[10] *Id.*; *see also* Jackson Affidavit ¶ 2.

[11] Jackson Affidavit ¶ 2.

[12] Cook Deposition, at 17-19; Jackson Affidavit ¶ 3.

but by the end of 2011, plaintiff and defendant came to a mutual agreement that accommodating plaintiff's class schedule "was not going to work for [TOC's] schedules" in plaintiff's current position.[13]

At approximately the same time, another TOC physician, Dr. Matthew DeOrio, developed a need for a Medical Secretary, and plaintiff decided to apply for that position, because its demands would be more compatible with her school schedule.[14] Jackson warned plaintiff that Dr. DeOrio had a reputation of being very demanding and having high expectations for his staff's performance, but plaintiff felt prepared to accept the challenges of that work environment.[15] Dr. DeOrio interviewed plaintiff for the position and hired her, effective January 9, 2012.[16]

The TOC employee handbook states the following with regard to employees who transfer to different positions within the TOC organization:

> Employees moving into a new position will have a three (3) month probationary period in the new position. If at the end of the probationary period the employee's performance is not satisfactory, the employee will be eligible to move back to his/her old position if that position is vacant. If the position is not vacant, the employee is eligible to apply for any position for which s/he is qualified. Employees who cannot be placed will be put on a preferential hiring list according to the

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[13] Cook Deposition, at 17; plaintiff's evidentiary submission, Exhibit 1 (Declaration of Amanda Cook) ¶¶ 3-4 (alteration supplied).

[14] Cook Deposition, at 24-27.

[15] *Id.* at 27; Jackson Affidavit ¶ 4.

[16] Cook Deposition, at 27; DeOrio Affidavit ¶ 3.

Job Posting policy.[17]

Jackson testified that she warned plaintiff that she would fall under this three-month probationary period once she started a new position with Dr. DeOrio, but plaintiff testified that she "was not aware that [she] would be under another 90 day probation period."[18]

During the first three months of plaintiff's assignment with Dr. DeOrio, Dr. DeOrio became dissatisfied with plaintiff's job performance.[19] Dr. DeOrio was aware that plaintiff's three-month probationary period would be over in early April of 2012, and it became "clear to [him] before the expiration of [plaintiff's] probationary period that [she] was not suited to be a long term member of [his] staff."[20] He sent an e-mail to Tammy Jackson on April 16, 2012, detailing some of plaintiff's performance problems and further stating:

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[17] Jackson Affidavit, Exhibit A, at TOC 000020. TOC's Job Posting policy provides: "TOC supports promotion and reassignments from within the organization whenever possible. To encourage qualified employees to advance within TOC, vacant positions and newly created job openings will be posted. Job posting provides TOC employees with the opportunity to indicate interest in a position and to have their qualifications reviewed." *Id.* This paragraph is the only portion of the Job Posting policy that is included in the record. It is unclear whether the policy includes any additional language.

[18] Cook Affidavit ¶ 6 (alteration supplied).

[19] The reasons for Dr. DeOrio's dissatisfaction were many; defendant's description of them spans more than eleven pages of defendant's summary judgment brief. *See* doc. no. 16 (defendant's brief), at 3-14. Plaintiff disputes some, but not all, of Dr. DeOrio's complaints. *See* doc. no. 18 (plaintiff's response brief), at 1-5. There is no need to discuss all of the alleged performance problems, or plaintiff's disputes, because, as will be discussed more fully in Section III(B), *infra*, plaintiff is not directly challenging Dr. DeOrio's decision not to retain her in his office.

[20] DeOrio Affidavit ¶ 15 (alterations supplied).

> I am not sure that Amanda has the personal skills that I'm looking for in a medical assistant to represent my practice and provide the best possible foot and ankle care.
>
> I do not see her as a long term assistant with me and a responsibility as a part time cast tech may be more appropriate.
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> I need a good medical assistant whom I can trust. This has been a 3 month evaluation and I do not think she should be my full time medical assistant. Thanks.[21]

Dr. Deorio testified, however, that he actually made the decision to terminate plaintiff's employment as his assistant two weeks earlier, on approximately April 2, 2012. The delay in sending the e-mail to Jackson was a result of his busy practice, and trying to find an appropriate time to communicate his decision.[22]

Plaintiff suffered from degenerative disc disease the entire time she was employed by TOC, and she had her first back surgery in September of 2010.[23] At some unspecified point during plaintiff's initial probationary period with Dr. DeOrio, she learned that she needed to have a second surgery.[24] Plaintiff does not recall exactly when she informed Dr. DeOrio, Tammy Jackson, or anyone else at TOC of her need for additional surgery, but she confirmed during her deposition that it was

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[21] *Id.* ¶ 15 and Exhibit F.

[22] DeOrio Deposition, at 32-33.

[23] Cook Deposition, at 20.

[24] *Id.* at 199-202, 213.

not before April 11, 2012.[25] When plaintiff did speak to Dr. DeOrio about it, she only told him that she would soon need surgery; she did not say if or when the surgery was scheduled, ask for medical leave, or even mention the FMLA.[26]

The record does not reflect any details of a conversation between plaintiff and Tammy Jackson about plaintiff's upcoming surgery until April 25, 2012, the date on which Jackson met with plaintiff to inform her of Dr. DeOrio's decision not to retain her on his team.[27] Plaintiff did not object to that. In fact, she agreed that it probably would not be good for Dr. DeOrio's practice if she remained on his team, but she intended to "stay on until someone else was hired and *hopefully* fall into another position at TOC."[28] Plaintiff also inquired about what her general employment status with TOC would be going forward, because she had surgery coming up and needed her employer-provided health insurance.[29] Jackson asked plaintiff how much time off she would need for the surgery, and plaintiff estimated that she would need two weeks, because that was approximately how long she had taken off work for her first

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[25] *Id.* at 213.

[26] DeOrio Deposition, at 69-72.

[27] Cook Deposition, at 163; Jackson Affidavit ¶ 9. Jackson waited until April 25 to discuss Dr. DeOrio's decision with plaintiff because she was out of town when Dr. DeOrio sent the e-mail on April 16. Jackson Affidavit ¶ 9.

[28] Cook Deposition, at 163-64 (emphasis supplied).

[29] Jackson Affidavit ¶ 10.

surgery.[30]

Tammy Jackson attested that the April 25, 2012 conference with plaintiff was the first time she had heard of plaintiff's need for surgery or medical leave,[31] but plaintiff attested that "*defendant*" knew of her upcoming surgery since April 11, 2012, although she did not specifically identify the TOC employees who allegedly possessed such knowledge, or how they acquired it.[32] Jackson attested that plaintiff did not mention the FMLA during their April 25th meeting,[33] but plaintiff testified during her deposition that she asked Jackson for FMLA papers as soon as her surgery was scheduled, which was *before* the April 25th meeting.[34]

On April 25, 2012 , soon after her meeting with Tammy Jackson, plaintiff sent a text message to a friend who had inquired about the status of her job, stating: "I'm here until my replacement is hired and trained then idk [I don't know] what will happen. Kinda funny how he wants me to stay and train my replacement when and if he finds one."[35] She added that "Tammy said she didn't want me to leave [TOC] though."[36] Plaintiff's friend responded: "If she's going to find u [*sic*] another job ok.

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[30] Jackson Affidavit ¶ 10; Cook Deposition, at 203.

[31] Jackson Affidavit ¶ 10.

[32] Cook Affidavit ¶ 21 (emphasis supplied).

[33] Jackson Affidavit ¶ 10.

[34] Cook Deposition, at 198.

[35] Cook Deposition, Exhibit 13, at TOC 000005 (alteration supplied).

[36] *Id.* at TOC 000006 (alteration supplied).

If not I'd throw the deuce,"[37] which presumably was a suggestion that plaintiff go ahead and resign. Plaintiff responded: "Hard to do anything when I'm scheduled for surgery in 2 weeks though. I can put my extra large bitch panties on for a while and hang out until after the surgery and go to interviews while I'm out those two weeks."[38] Plaintiff testified that her message meant she was just going to go in and do her job to the best of her ability for the remainder of her assignment to Dr. DeOrio.[39]

That same day, at 11:49 a.m., Tammy Jackson sent Dr. DeOrio a text message, stating: "Spoke to Amanda and LeeAnn this morning. I will be posting LPN and Med Sec positions today. They both took it very well. Amanda will stay onboard for at least 8 weeks to allow time for hiring and training new staff."[40]

Plaintiff remained employed with TOC, with her full pay and benefits, until her surgery and throughout her recovery period. The surgery originally was scheduled for May 11, 2012, which was a Friday, but due to an exacerbation of plaintiff's condition occurring the previous Thursday evening, May 3, the surgery was moved up to Tuesday, May 8, 2012. Plaintiff also was unable to report to work on Friday,

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[37] *Id.*

[38] *Id.*

[39] Cook Deposition, at 179.

[40] Plaintiff's evidentiary submission, Exhibit 2, at TOC 000010.

May 4 and Monday, May 7, because of her exacerbated injury.[41] At 10:48 a.m. on May 7, 2012, Dr. DeOrio sent Tammy Jackson a text message, stating, "Amanda is not in clinic today, we are going to run way behind without any help . . . . . if there is anybody who can help that would [b]e great."[42]

Plaintiff ended up needing more than two weeks off work after her surgery because her recovery was slower than expected. She sent Jackson an e-mail on May 25, 2012, asking to use some of her paid leave for that pay period and the next so that she could retain her insurance coverage.[43] Ultimately, plaintiff needed even more leave than that. In fact, plaintiff's recovery took so long that she never returned to work in Dr. DeOrio's office in order to train her replacement.[44] Jackson found a replacement for plaintiff's position in Dr. DeOrio's office on June 4, 2012, and that individual started work on June 11, 2012.[45] Because plaintiff was not able to return to Dr. DeOrio's office to train her replacement, Jackson processed the paperwork for plaintiff's separation from employment at TOC on June 5, 2012. Even so, Jackson listed plaintiff's formal last day of employment as July 6, 2012, so that plaintiff could

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[41] Cook Deposition, at 182-87.

[42] Plaintiff's evidentiary submission, Exhibit 2, at TOC 000010 (alteration supplied, ellipses in original).

[43] Jackson Affidavit ¶ 12 and Exhibit H.

[44] Jackson Affidavit ¶ 12.

[45] *Id.* ¶ 13.

exhaust all of her paid leave before her employment officially terminated, and so she could retain her health insurance coverage through the end of July 2012.[46]

Plaintiff undisputedly received all the leave she requested related to her 2012 surgery.[47] A total of 350.75 hours of leave was coded as "FMLA" in defendant's recordkeeping system.[48] Additionally, plaintiff was allowed to exhaust all of the paid leave she had accrued up to that point.[49]

Jackson testified in her affidavit that she attempted to assist plaintiff in other ways after her assignment with Dr. DeOrio was terminated, including:

> I told [plaintiff] during our meeting on April 25, 2012 that I hoped she would apply for other openings at TOC, and I told her I would mention her availability to Amy Daniel, who supervises TOC's Communications and Front Desk Departments. In doing this, I was very clear with Ms. Cook that she was still being terminated, but that this would be an opportunity for her to find a new role at TOC. In no way did I indicate that she was guaranteed or assured of a spot in a different Department at TOC. I made clear to her that the onus was on her to apply and that it would be up to any other decisionmaker to whom she applied to determine whether she would be hired. It was clear that failing a new hire, she would not continue as a TOC employee. In order to hold up my end of this arrangement, I mentioned to Amy Daniel to keep Ms. Cook in mind in the event any openings arose; I did not tell her that there was any binding obligation to hire her, however. I also did not

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[46] *Id.*

[47] Cook Deposition, at 203-06.

[48] Jackson Affidavit ¶ 11.

[49] *Id.* ¶ 13.

mention any use of FMLA leave to Ms. Daniel.[50]

Amy Daniel first talked to plaintiff about an unspecified open position in her department sometime during May of 2012. Plaintiff informed Daniel that she was still recovering from surgery, and she was therefore unable to accept any position at that time. Daniel did not know any of the details about plaintiff's medical condition or the reasons for her surgery, and she did not know whether plaintiff was on FMLA leave, or even whether plaintiff had requested *any* kind of leave related to her surgery. In fact, Daniel never became aware of the specific fact that plaintiff had taken FMLA leave until this lawsuit was filed.[51]

Daniel next discussed an open position with plaintiff on May 30, 2012. There was a vacancy for a Communications Specialist, and Daniel had tentatively selected an applicant for that position. However, she "was under the impression that Tammy Jackson, [her] own supervisor, wanted [her] to give some consideration to [plaintiff], so [she] called [plaintiff] to ask her about her availability."[52] Plaintiff informed Daniel that her surgeon had just extended her leave for another four weeks, so she would not be available for any jobs with a start date during the month of June 2012.

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[50] *Id.* ¶ 14 (alteration supplied). *See also* Daniel Affidavit ¶ 3 ("Ms. Jackson informed me that Amanda was no longer serving Dr. DeOrio. Nevertheless, she asked me to give Amanda some consideration with regard to any openings in the Departments I supervise. Without asking for any details, I told her I would do that.").

[51] Daniel Affidavit ¶¶ 4, 15.

[52] *Id.* ¶ 5 (alterations supplied).

Plaintiff suggested that she might be able to work half days, but Daniel stated that the "Communications Specialist position is not one for which half-day work is appropriate . . . ."[53] Before she made a final decision not to place plaintiff in the position part-time, however, Daniel sent an e-mail to Jackson, asking for clarity on "what the obligation is to [plaintiff]."[54] Jackson responded that same day, saying that:

> The obligation we have to Amanda is to give her an opportunity to apply for any other openings within TOC that she is qualified for. She knew when she transferred to Dr. DeOrio's position it was a risk because she had to successfully complete a new 90 day probationary period. She understands it was not a good fit and she has been open to work as long as needed until we hire/train a new person. She will have to go through the same screening process you would give any other TOC employee applying for your position.
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> I have not been given anything in writing taking her off work for an additional 4 weeks. What I have from Dr. Scholl is "half days only, light duty, seated/computer work only" starting 5/23/12 — open ended. Amanda called and left a voice mail that she felt she couldn't do the half day work because the drive/doctor appointment really made her uncomfortable. I supported her decision to not return to work so quickly, she needs time to heal so I told her that would be okay.
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> You need to hire the best candidate for the position. Amanda is smart and can catch on easy. She seems to like structure better and has good communication skills as long as it is not on a personal basis (her affect can be confrontational if you don't know her). One thing to remember is she will require to be off two half days a week to go to school. If you feel Amanda comes with too many limitations then she may not be the best candidate. If you feel you can work with the

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[53] *Id.*

[54] Daniel Affidavit, at Exhibit A (May 30, 2012 e-mail from Amy Daniel to Tammy Jackson at 12:36 p.m.) (alteration supplied).

> limitations and meet the department's needs, because she is a known quantity, then you may want to give her a chance. I will support your decision either way.[55]

Daniel was "concerned" about the information she had received from Jackson. She attested:

> The positions I routinely have available are either in the Communications Department or at the Front Desk Reception/Registration area. Both of these positions entail extensive customer relations work, and require staff members who are eager, outgoing, and friendly. In fact, the job descriptions for both of these positions require a "pleasant" and "friendly demeanor" and a "positive, 'teamwork' attitude." . . . I was concerned about hiring someone who was just terminated from Dr. DeOrio's team to work in my Department, because the termination itself obviously indicated lack of effort or inability to perform. I wanted a candidate who could perform well and be relied upon. Likewise, the last thing I need in a customer relations employee either in the Communications Department or at the Front Desk is a person whose "affect can be confrontational if you don't know her." These team members deal almost exclusively with patients and are the principal people TOC patients interact with when making appointments, checking in, and arranging for their care. Finally, my Communications and Front Desk positions are full-time, 8-5 positions, five days per week. I do not hire employees who are not available full-time. Given that Amanda's school schedule required half-days, I did not think she was a good fit.[56]

Despite those concerns, Daniel contacted plaintiff about the position a second time, both because she had already spoken to plaintiff about it once, and because Ms.

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[55] Daniel Affidavit, at Exhibit A (May 30, 2012 e-mail from Tammy Jackson to Amy Daniel at 1:05 p.m.).

[56] Daniel Affidavit ¶ 7 (redactions supplied).

Jackson "had asked me to give [plaintiff] consideration."[57] Plaintiff confirmed that she could not start work immediately because she still was taking narcotic medication, so Daniel filled the position with the applicant she already had tentatively selected.[58]

The next position that came open in Daniel's department was for a Communications Specialist on June 12, 2012. As soon as the position opened, Daniel knew that she would hire an applicant named Lydia Jones for the position, because Ms. Jones "did not have any schedule limitations and appeared to be a good candidate with a positive attitude."[59] Ms. Jones was awarded the position on June 12, and she reported to work on June 26, after giving her previous employer two weeks' notice. On June 14, two days after Ms. Jones had been selected, Daniel received an e-mail from plaintiff asking whether she had any open positions. Daniel did not have any open positions on that date because she had just hired Ms. Jones. Even so, Daniel attested that she "would not have selected [plaintiff] for [the June 12] opening anyway given the information [she] had received about [plaintiff's] prior termination, her confrontational affect, and her school schedule."[60]

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[57] *Id.* ¶ 8 (alteration supplied).

[58] *Id.*

[59] *Id.* ¶ 9.

[60] *Id.* (alterations supplied).

The next opening was for a Communications Specialist that was expected to come open on June 25, 2012, as a result of an upcoming termination. In anticipation of that opening, Daniel reviewed a resume on file for an applicant named Nicole Patrick, interviewed Ms. Patrick, determined her to be a good candidate who was immediately available and had no schedule limitations, and offered her the position. When Daniel hired Ms. Patrick, she "had not received any specific request from [plaintiff] to be considered for this position nor had [she] received [plaintiff's] resume."[61] Even if plaintiff had applied for the position, Daniel would not have selected her over Ms. Patrick, "given what [she] had been told about [plaintiff's] affect, her previous employment termination with Dr. DeOrio, and her school schedule."[62]

The next opening arose on July 2, 2012, for a Communications Specialist position. Before that position opened, however, Daniel already knew she would select an individual named Karen Ridenour, and she in fact filled the vacation position with Ms. Ridenour. At the time the selection was made, Daniel "had not received any specific request from [plaintiff] to be considered for this position nor had [she] received [plaintiff's] resume."[63] Even if plaintiff had applied for the position, Daniel

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[61] *Id.* ¶ 10 (alterations supplied).

[62] Daniel Affidavit ¶ 10 (alterations supplied).

[63] *Id.* ¶ 11 (alterations supplied).

would not have selected her over Ms. Ridenour, "given what [she] had been told about [plaintiff's] affect, her previous employment termination with Dr. DeOrio, and her school schedule."[64]

The next opening was to replace a Front Desk Receptionist who intended to resign, effective July 20, 2012. Daniel selected an individual named Shannon Hillis for that position on July 11, 2012, and Ms. Hillis began work on July 16, 2012. After that decision was made, but also on July 11, 2012, Daniel received an e-mail from plaintiff, asking whether any positions were available. That was the first time Daniel had heard from plaintiff since June 14, 2012. Because Daniel had already selected Ms. Hillis for the Receptionist position, she responded to plaintiff's e-mail by telling her that there were no positions available at that time. Daniel attested that, even if plaintiff had requested to be considered for the position sooner, she "would not have hired her over Ms. Hillis given the attitude issues, previous performance issues, and school schedule issues that [she] had been informed about by Ms. Jackson on May 30, 2012."[65]

The next opening was to replace a Communications Specialist who intended to resign, effective July 30, 2012. The position arose on July 16, 2012. Daniel

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[64] *Id.* (alterations supplied).

[65] *Id.* ¶ 12 (alteration supplied).

selected an individual named Brittany Green for that position on July 25, 2012, and Ms. Green began work on August 3, 2012. Even though Daniel had received an e-mail from plaintiff on July 11, inquiring about open positions, Daniel did not consider plaintiff a viable candidate for the following reasons:

> A person who had just been terminated for failure to meet a probationary period and who is reported to have a "confrontational affect" is not, in my judgment, a good candidate for a position in one of my Departments. This is especially true because of the significant customer relations aspects of the jobs that I fill. Additionally, as already stated, I do not hire part-time workers or permit employees to work half-days for school. Tammy Jackson had already told me that [plaintiff] came with a school schedule requiring half-days twice a week. My positions do not permit that sort of schedule.[66]

Daniel did not receive any additional correspondence from plaintiff — either by phone or e-mail — after July 11, 2012.[67] In any event, plaintiff testified during her deposition that, because of her recovery from surgery, she would not have been available to work in a full-time, 8:00-5:00 position until August 1, 2012.[68]

Daniel did have vacancies arise after August 1. The first was for a Communications Specialist on October 18, 2012, and the second was for a Front Desk Receptionist on November 1, 2012. Daniel attested that she "did not even consider

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[66] *Id.* ¶ 13 (alteration supplied).

[67] *Id.* ¶ 15.

[68] Cook Deposition, at 205, 209.

[plaintiff] for these positions because she had not contacted me since July."[69] Moreover, even if plaintiff had contacted Daniel about either of those positions, Daniel attested that she would not have hired plaintiff for the same reasons that she had not hired her for any of the other open positions: *i.e.,* her past termination, her attitude, and her school schedule.[70]

III. DISCUSSION

Plaintiff's claims arise under the Family and Medical Leave Act of 1993, which is codified at 29 U.S.C. § 2601 *et seq.* ("FMLA" or "the Act"). The FMLA grants an eligible employee the right to take up to twelve workweeks of unpaid leave annually for any one (or more than one) of several reasons specified in the Act, including "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). The FMLA creates a private right of action against employers who "interfere with, restrain, or deny the exercise of or the attempt to exercise" rights provided by the Act. 29 U.S.C. §§ 2615(a)(1), 2617(a); *see also, e.g.*, *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 724-25 (2003). The Eleventh Circuit has recognized that

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[69] Daniel Affidavit ¶ 14 (alteration supplied).

[70] *Id.*

> § 2615(a) creates two types of claims: "*interference claims*, in which an employee asserts that his employer denied or otherwise interfered with his substantive rights under the Act, and *retaliation claims*, in which an employee asserts that his employer discriminated against him because he engaged in activity protected by the Act."

Hurlbert v. St. Mary's Health Care, 439 F.3d 1286, 1293 (11th Cir. 2006) (quoting *Strickland v. Water Works & Sewer Board of the City of Birmingham*, 239 F.3d 1199, 1206 (11th Cir. 2001)) (emphasis supplied, internal citations omitted). In this case, plaintiff alleges both types of claims.

A. Interference

To establish an interference claim, "an employee must demonstrate that [s]he was denied a benefit to which [s]he was entitled under the FMLA." *Martin v. Brevard County Public Schools*, 543 F.3d 1261, 1267 (11th Cir. 2008) (alterations supplied). *See also* 29 U.S.C. § 2615(a)(1); *Strickland*, 239 F.3d at 1206-07. Here, plaintiff does not argue that she actually was denied the right to take leave under the FMLA,[71] nor could she, because the record shows that she was granted all the leave she requested — and perhaps even more than she requested — and her leave was coded in defendant's recordkeeping system as FMLA leave. Instead, plaintiff's interference theory is based upon the contention that defendant "failed to reinstate

[71] *See* doc. no. 18 (plaintiff's response brief), at 9-16.

[her] to the same or equivalent position she held prior to taking leave."[72]

> The Act states that an eligible employee who takes FMLA leave
>
> shall be entitled, on return from such leave —
>
> (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
>
> (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

29 U.S.C. § 2614(a)(1). Even so, no restored employee is entitled to "any right, benefit, or position of employment *other than* any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave." 29 U.S.C. § 2614(a)(3)(B) (emphasis supplied). The federal FMLA regulations clarify that statutory provision by stating:

> An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

29 C.F.R. § 825.216(a).

Following these statutory and regulatory provisions, the Eleventh Circuit has held that, "when an 'eligible employee' who was on FMLA leave alleges her

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[72] *Id.* at 10 (alteration supplied).

employer denied her FMLA right to reinstatement, the employer has an opportunity to demonstrate it would have discharged the employee even had she not been on FMLA leave." *O'Connor v. PCA Family Health Plan, Inc*., 200 F.3d 1349, 1354 (11th Cir. 2000). "In other words, if an employer can show that it refused to reinstate the employee for a reason wholly unrelated to the FMLA leave, the employer is not liable." *Strickland*, 239 F.3d at 1208.

Here, defendant has asserted that plaintiff "would not otherwise have been employed" following her FMLA leave because:

> a decision was made to terminate plaintiff's employment on or about April 2, 2012; that decision was put in writing on April 16, 2012; and it was communicated to plaintiff on April 25, 2012. From the date that plaintiff was first informed of her termination, her job was posted and a search began to find her replacement. . . . The evidence shows the decision was final and nonnegotiable.[73]

Plaintiff offers several arguments to refute defendant's assertion, none of which are convincing. First, plaintiff asserts that the text messages exchanged between Tammy Jackson and Dr. DeOrio on April 25 and May 7, 2012 "show that as a result of Ms. Cook taking leave for her surgery, the time line for replacing her in that office was shortened, thereby interfering with her ability to return to work before the anticipated end of the assignment."[74] Even construed in the light most favorably to

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[73] Doc. no. 23 (defendant's reply brief), at 15.

[74] Doc. no 18 (plaintiff's response brief), at 11-12.

plaintiff, the evidence simply does not support that assertion. Dr. DeOrio's May 7 text message — stating, "Amanda is not in clinic today, we are going to run way behind without any help . . . . . if there is anybody who can help that would [b]e great"[75] — cannot reasonably be construed to mean that the end date of plaintiff's employment, either with Dr. DeOrio's office or the entire TOC organization, was being hastened due to her May 7 absence from clinic. Instead, the message can only *reasonably* be construed as a request by Dr. DeOrio for extra help in clinic due to plaintiff's absence *that day.*

Second, plaintiff asserts that defendant's "refusal to place Ms. Cook in an equivalent position in another office *following the completion of her leave* show[s] that the Defendant's failure to return Ms. Cook to work was related to her FMLA leave."[76] This argument is a non-starter: plaintiff is asserting that she was not reinstated after her leave because of the fact that she had been on leave. That would be so in any case where the plaintiff alleges FMLA interference based on failure to reinstate, and it does nothing to refute defendant's argument that the decision to terminate plaintiff's employment had already been made before she went on leave. Moreover, the evidence plaintiff cites to support her argument actually *weakens* it.

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[75] Plaintiff's evidentiary submission, Exhibit 2, at TOC 000010 (alteration supplied, ellipses in original).

[76] Doc. no. 18 (plaintiff's response brief), at 12 (alteration and emphasis supplied).

Plaintiff points to evidence that she did not receive several job openings *while she was still on leave*, but that evidence says nothing about whether she was entitled to reinstatement *following the completion of her leave*, which is what she argues in her brief. To the extent plaintiff is suggesting that defendant was required to hold for her all positions that came open during her leave, so that she could decide whether to accept those positions after she returned from leave, that stretches an employer's obligation under the FMLA too far.

Finally, plaintiff asserts that defendant has "improperly equate[d] the termination of an assignment with the termination of employment."[77] According to plaintiff, even though the decision to terminate her *assignment* to Dr. DeOrio's office was made in April of 2012, *before* she went on leave, the actual decision to terminate her *employment* was not made until June 5, 2012, when Jackson processed her termination paperwork. There simply is no evidence to support any distinction between the termination of plaintiff's assignment to Dr. DeOrio and the termination of her overall employment with TOC. Plaintiff acknowledged in her deposition that, after the decision was made for her to leave Dr. DeOrio's office, her agreement with Tammy Jackson was that she would "*hopefully* fall into another position at TOC."[78]

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[77] *Id.* at 15 (alteration supplied).

[78] Cook Deposition, at 163.

There is no indication anywhere in the record that plaintiff was promised, or was in any way entitled to, continued employment with TOC after her assignment with Dr. DeOrio ended. Instead, the record indicates that the continuation of plaintiff's paychecks through the end of July was a favor designed to allow plaintiff to retain her health insurance benefits after her separation from Dr. DeOrio's office. Plaintiff's attempts to now twist that favor into the foundation for an FMLA interference claim are not persuasive.

In summary, the court concludes that defendant has met its burden of demonstrating that plaintiff would not otherwise have been employed at TOC following her return from FMLA leave. Accordingly, even though plaintiff was not reinstated to her previous position, or a similar one, following her leave, defendant will not be held liable under the FMLA.

B. Retaliation

In order to establish a claim for FMLA retaliation, "an employee must show that his employer intentionally discriminated against him for exercising an FMLA right." *Martin*, 543 F.3d at 1267; *see also* 29 U.S.C. § 2615(a)(2); 29 C.F.R. § 825.220(c). Unlike an interference claim, an employee "bringing a retaliation claim faces the increased burden of showing that his employer's actions were motivated by an impermissible retaliatory or discriminatory animus." *Strickland*, 239 F.3d at 1207

(internal quotation marks omitted).

Where, as here, the plaintiff seeks to prove intentional retaliation with circumstantial evidence, the court must analyze the case under the *McDonnell Douglas* burden-shifting framework. *See, e.g.*, *Strickland*, 239 F.3d at 1207. Under that framework, the plaintiff bears the initial burden of presenting sufficient evidence to allow a reasonable factfinder to determine that he has satisfied the elements of a *prima facie* case. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). A *prima facie* case of retaliation under the FMLA requires a showing that: (1) the employee engaged in statutorily protected conduct; (2) the employee suffered an adverse employment action; and (3) there is a causal connection between the two. *See, e.g.*, *Smith v. BellSouth Telecommunications, Inc.*, 273 F.3d 1303, 1314 (11th Cir. 2001). If the plaintiff satisfies these *prima facie* requirements, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for the employment decision. If the defendant does so, then the burden shifts back to the plaintiff to demonstrate that the defendant's proffered legitimate, non-retaliatory reasons are actually a mere pretext for retaliation. *McDonnell Douglas Corp.*, 411 U.S. at 802.

Here, defendant is entitled to summary judgment because plaintiff cannot demonstrate that the legitimate, non-retaliatory reasons defendant offered for all of the challenged employment decisions were actually a mere pretext for retaliation. It

is important to note that plaintiff "is not challenging [as retaliatory] the decision to remove her from Dr. DeOrio's office, but rather the decision to terminate her employment with the Defendant organization."[79] More specifically, "[t]he acts [plaintiff] is challenging in this action are the decisions made from May 7, 2012 forward."[80] Thus, plaintiff is arguing only that defendant's decisions not to select her for any of the vacancies that came available after May 7, 2012 — the date on which plaintiff actually commenced medical leave for her surgery — were retaliatory.

Defendant articulated legitimate, non-retaliatory decisions for choosing not to hire plaintiff for each of the open positions. First, defendant stated that the only openings were for the positions of Receptionist and Communications Specialist, both of which required a full-time, 8:00-5:00, five-day-a-week work schedule. According to defendant, plaintiff was not selected for those positions because her school schedule prevented her from working eight hours a day, five days a week. Second, defendant stated that plaintiff was not available to begin any kind of full-time employment until August 1, 2012, because she still was recovering from surgery. Third, defendant sated that "Amy Daniel had been warned, by Jackson, that plaintiff was 'confrontational if you don't know her," and that plaintiff "had failed to pass

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[79] Doc. no. 18 (plaintiff's response brief), at 23 (alteration supplied).

[80] *Id.* (alterations supplied).

probation with Dr. DeOrio," and she was concerned about those facts because the open positions "centered around customer service functions."[81]

Accordingly, the burden shifted to plaintiff to "come forward with evidence . . . sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision," but merely a pretext for intentional retaliation. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir. 1997) (citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *McDonnell Douglas*, 411 U.S. at 804)); *see also Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1088 (11th Cir. 2004) ("If the proffered reason is one that might motivate a reasonable employer, a plaintiff cannot recast the reason but must meet it head on and rebut it. Quarreling with that reason is not sufficient.") (internal citation omitted). The plaintiff shoulders this burden by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F.3d at1528 (citation omitted); *see also Silvera v. Orange County School Board*, 244 F.3d 1253, 1258 (11th Cir. 2001).

Plaintiff has not satisfied that burden. With regard to defendant's assertion that

[81] Doc. no. 16 (defendant's brief), at 16.

it did not hire plaintiff for any of the open positions because her class schedule prevented her from working 8:00 a.m. to 5:00 p.m., five days a week, plaintiff states that Amy Daniel, the decisionmaker, did not ask her whether she would be willing and/or able to modify her class schedule in order to accommodate the demands of the position. While there is, indeed, no record of Daniel having any such discussion with plaintiff, her failure to do so does not undercut defendant's proffered legitimate reason. Daniel had already been informed by Tammy Jackson, her own supervisor, that plaintiff's school schedule would limit the number of hours she could work, and it was reasonable for Daniel to rely on that information. Moreover, it was reasonable for Tammy Jackson to believe that plaintiff's work schedule would be limited, considering that plaintiff left her position as a cast technician with Drs. Buckley and Lawley at the end of 2011 because her work schedule would not allow her to take classes. There is no reason to question defendant's proffered legitimate, non-retaliatory reason on these grounds.

With regard to defendant's assertion that it did not hire plaintiff for any of the positions that came open prior to August 1, 2102, because she was still recovering from surgery and could not work full-time, plaintiff states:

> The Defendant made decisions in June 2012 to decline to place Ms. Cook in job vacancy [*sic*], and tell her on June 14, 2012 (in response to an email from Ms. Cook saying she expected to be returned to work in

> approximately a week) that no jobs were open despite there being vacancies. The Defendant then terminated her employment in a document dated in June 2012. These decisions were made prior to August 1 at a time the Defendant had received communications from Ms. Cook that her return to work was imminently soon. Ms. Cook's release date did not play a factor in the Defendant's decisions because it did not know at the time those decisions were made that she would be unable to return to full-time work in August. To the extent the Defendant now claims it was motivated by a fact it could not have known until after Ms. Cook's termination, such an argument suggests pretext.[82]

Plaintiff unnecessarily focuses on the August 1 "release date." August 1 may have been the date on which plaintiff ultimately was released to return to work, but it is undisputed that, at the time *each* of the challenged employment decisions was made, plaintiff was physically unable to return to work in a full-time, eight-hour-a-day, five-day-a-week capacity.

Finally, plaintiff has offered *no* argument to refute defendant's assertion that Amy Daniel did not select plaintiff for *any* open position (either before or after August 1) because plaintiff failed to complete her probationary period with Dr. DeOrio, and because Tammy Jackson had informed Daniel that plaintiff's personality could be "confrontational."[83] There is no reason to question that legitimate, non-retaliatory reason for defendant's decision not to select, or even consider, plaintiff for

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[82] Doc. no. 18 (plaintiff's response brief), at 25.

[83] Plaintiff apparently placed all her strategic eggs in the basket of attempting to exclude Amy Daniel's affidavit testimony as a "sham." Since that argument was unsuccessful, plaintiff has no remaining challenge to defendant's final proffered legitimate, non-retaliatory reason.

any of the positions that came open after she went on medical leave.

Because plaintiff has failed to discredit *any* — and certainly has not discredited *each* — of defendant's proffered legitimate, non-retaliatory reasons for choosing not to place plaintiff in any open positions after she went on medical leave, defendant is entitled to summary judgment on plaintiff's claim for retaliation under the FMLA. *See Chapman*, 229 F.3d at 1024-25 ("If the plaintiff does not proffer sufficient evidence to create a genuine issue of material fact regarding whether *each* of the defendant employer's articulated reasons is pretextual, the employer is entitled to summary judgment on the plaintiff's claim.") (citing *Combs*, 106 F.3d at 1529) (emphasis supplied).

C. After-Acquired Evidence

Defendant also argues that it is entitled to summary judgment on plaintiff's claims for back pay, front pay, reinstatement, and other injunctive relief because those claims are precluded by after-acquired evidence.[84] There is no need to consider that argument, however, because it already has been determined that defendant is entitled to summary judgment on the merits of plaintiff's claims.

IV. CONCLUSION AND ORDER

For the reasons stated herein, defendant's motion for summary judgment is

[84] *See* doc. no. 16 (defendant's brief), at 42-45.

GRANTED, and it is ORDERED that all claims embraced herein are DISMISSED with prejudice. Costs are taxed to plaintiff. The Clerk is directed to close this file.

DONE this 14th day of November, 2014.

United States District Judge