IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHELSEA ELIZABETH MANNING,	)	
	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:14-cv-1609 (CKK)
	)	
ASHTON CARTER, *et al.*,	)	**REDACTED – ORIGINAL FILED**
	)	**UNDER SEAL**
Defendants.	)	
_____	)	

DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Manning's opposition brief fails to rebut meaningfully any of the straightforward reasons why her Amended Complaint must be dismissed. She instead relies on speculation about the availability and adequacy of remedies from the military courts; misconstruction of the content and scope of her administrative grievances; and artificial factual disputes regarding the merits of her claims. She offers nothing that can overcome Defendants' three independent bases for dismissal, all of which may be considered on a motion to dismiss: Manning's claims are barred due to the military abstention and exhaustion doctrines; she has not plausibly alleged an Eighth Amendment claim; nor has she plausibly alleged a Fifth Amendment equal protection claim.

For the threshold arguments, Manning speculates that relief may not be promptly available from the military court system. But it must be presumed that military courts provide an adequate forum to "vindicate servicemen's constitutional rights." *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975). Without first trying to bring her claim before the military courts, there is no basis for civilian court review. Similarly, under the Prison Litigation Reform Act (PLRA), she cannot rely on a single grievance—submitted six days after arriving at the United States Disciplinary Barracks (USDB)—as forever exhausting all future claims related to her gender dysphoria. And Manning concedes she has not exhausted all available remedies with respect to her sex-discrimination claim. Neither of her claims, therefore, is properly before this court.

As to the merits of her claims, Manning seeks to avoid dismissal by interposing purported factual disputes. Yet the facts necessary to resolve Defendants' motion are undisputed. Manning is incarcerated at a maximum-security military prison for men. She is receiving extensive treatments for her gender dysphoria. She seeks an exception to the prison's uniform requirement that inmates keep their hair shorter than two inches. The USDB denied this exception based on

their determination that it would present security concerns. All of these facts, which are set forth on the face of the Amended Complaint, are undisputed, and by themselves warrant dismissal.

For her Eighth Amendment claim, Manning cannot plausibly allege that, in light of the significant treatment she is already receiving, denying her longer hair is an objectively serious deprivation. And the required mental state of deliberate indifference is foreclosed by Manning's own allegation that Defendants' decisionmaking is motivated by security concerns. Manning's attempt to litigate the validity of those concerns is unfounded; indeed, nowhere does she allege that they are pretextual or anything other than good-faith judgments by Defendants.

Finally, Manning also has not plausibly alleged an equal protection violation. There are no factual allegations demonstrating that she is similarly situated to her purported comparators. She cannot avoid the deficiencies in her Amended Complaint by asking the Court to assume that Defendants acted discriminatorily with respect to her housing placement, a decision that Manning has never challenged. Dismissal also cannot be avoided by speculation about potential future discovery or factual disputes. Neither issue bears on the antecedent question whether Manning has plausibly alleged a claim for relief based on *facts* rather than mere legal conclusions. Manning has not done so here.

ARGUMENT

I. PLAINTIFF'S CLAIMS ARE NOT PROPERLY BEFORE THIS COURT

A. This Court Must Abstain and Permit Military Courts the First Opportunity to Address Manning's Eighth Amendment Claim

Manning's opposition does not dispute that civilian courts generally must abstain from interfering with military proceedings, or that military remedies must be exhausted prior to civilian court review. *See* Defs.' Br. at 16-17. Instead, she argues that her claim may proceed immediately—without ever being presented to military courts—based on the unsupported

premise that military courts may not issue particular forms of relief, or would not act timely. *See* Pl.'s Br. at 6-8. Manning also argues that abstention is not required once appellate proceedings from a court-martial conviction have begun. *Id.* at 9-10. None of these arguments has merit.

1. Injunctive Relief Likely is Available From the Military Court System

Manning argues that abstention is not required because her requested relief—an order compelling medical treatment—is not available with certainty from the military court system. *Id.* at 8. This argument is incorrect. To begin with, that argument is contrary to what the military courts have said—that they likely *do* have authority, under the All Writs Act, to prospectively remedy Eighth Amendment deprivations. *See, e.g.*, *United States v. Miller*, 46 M.J. 248, 251 (C.A.A.F. 1997) ("[T]he prospective nature of the relief requested in these prisoner claims lends itself quite readily to extraordinary relief under our All Writs Act jurisdiction[.]"); *United States v. Coffey*, 38 M.J. 290, 291 (C.M.A. 1993) (rejecting an Eighth Amendment claim but noting that "under appropriate conditions we might exercise our power to issue an extraordinary writ"); *see also United States v. Dearing*, 64 M.J. 364 (C.A.A.F. 2006) (issuing writ of mandamus in non-Eighth Amendment context); *Kreutzer v. United States*, 60 M.J. 452 (C.A.A.F. 2005) (same); *Courtney v. Williams*, 1 M.J. 267, 268 & n.2 (C.M.A. 1976).[1]

The military courts' express acknowledgment of their All Writs Act jurisdiction is sufficient to compel Manning to present her claim to those courts. The *Parisi* case relied upon by Manning, *see* Pl.'s Br. at 6-7, does not change this conclusion because it involved a situation

[1] Manning questions whether relief is permitted under 10 U.S.C. § 867(c). *See* Pl.'s Br. at 7-8 n.2. Military courts, however, have expressly interpreted that statute as providing jurisdiction to redress Eighth Amendment claims. *See United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001) (distinguishing *Clinton v. Goldsmith*, 526 U.S. 529 (1999)); *United States v. Ouimette*, 52 M.J. 691, 695 (C.G. Ct. Crim. App. 2000). Even if some uncertainty remains, the military appellate courts should have the opportunity to determine the extent of their jurisdiction, in lieu of this Court relying on Manning's unsupported assertion to the contrary. And Manning could of course re-file her claim if the military courts ultimately conclude they lack jurisdiction.

where the desired relief—separation from military service—plainly was not available during the pending court-martial proceeding, and only *potentially* available through a separate proceeding that could be initiated after the court-martial concluded. *Parisi v. Davidson*, 405 U.S. 34, 42-44 (1972). In contrast here, military courts have expressly acknowledged the possibility of providing the relief sought, and no subsequent proceeding would be required. This case is thus far more similar to *Noyd v. Bond*, 395 U.S. 683 (1969), where exhaustion was required because "the Court of Military Appeals had held that it would, in appropriate cases, grant the relief petitioner now demands from us." *Id.* at 695; *see also id.* at 696 ("There seems little reason to blaze a trail on unfamiliar ground when the highest military court stands ready to consider petitioner's arguments."). So too here: the military courts stand ready to hear Manning's Eighth Amendment claim, and potentially grant relief under the All Writs Act. Principles of comity therefore require that military courts be provided with the first opportunity to address Manning's claim. *See New v. Cohen*, 129 F.3d 639, 643-44 (D.C. Cir. 1997) (describing the "narrow reach of the judgment in *Parisi*," and instead emphasizing the comity principles of *Councilman*).

2. Speculative Delay Cannot Justify Avoiding the Military Court System

Manning also argues, based on a declaration from her court-martial appellate counsel, that abstention would unjustifiably delay resolution of her claim until 2019. *See* Decl. of Nancy Hollander (ECF No. 49-1) ¶ 11. Even assuming this extra-record evidence may be considered, the argument lacks merit. First, Manning's appellate brief is currently due in less than two months, *see* Exh. O (attached hereto), rendering it unlikely that this case offers a significantly more immediate forum. And even if military appellate review lasts until 2019, it is not certain that this case, filed in September 2014, would be fully resolved through all appeals any sooner.

Moreover, Manning ignores her ability to seek expedited relief from the military courts. Petitions for extraordinary relief, seeking remedies pursuant to the All Writs Act, are

contemplated by the rules for the Army Court of Criminal Appeals and the Court of Appeals for the Armed Forces, and both courts provide expedited timelines for such petitions.[2] Manning offers no reason to believe that the military courts would not resolve her claim expeditiously. *See Noyd*, 395 U.S. at 696-98 & n.9; *Councilman*, 420 U.S. at 758. This Court must therefore abstain and give military courts at least the *opportunity* to rule on Manning's claim.[3]

3. Abstention is Required Despite Manning's Court-Martial Appeal

Manning also argues that abstention is not required because her court-martial proceedings concluded in 2013. Pl.'s Br. at 9. But her conviction remains pending on appeal, and nothing in *Councilman* or its progeny limits the rationale for abstention only to the trial level. *See New*, 129 F.3d at 642-45. In the analogous context of federal abstention towards state criminal proceedings, *see Councilman*, 420 U.S. at 755-56, abstention is required not just for trial-level proceedings but also appellate proceedings. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975). The asserted distinction between trial and appellate proceedings is therefore illusory.

To the extent Manning argues that abstention is inappropriate because her Eighth Amendment claim is unrelated to "the merits of her underlying criminal conviction," Pl.'s Br. at 9, this argument likewise fails. To start, its premise is incorrect—her claim is directly related

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[2] *See* United States Army Court of Criminal Appeals, Rule 2(b) ("Extraordinary Writs"); *id.* Rule 20(e) (providing expedited briefing timeline following submission of a petition for extraordinary relief and issuance of an order to show cause), *available at* https://www.jagcnet.army.mil/RulesofCourt; *see also* United States Court of Appeals for the Armed Forces, Rules 4(b), 27(a)(3), 27(b), 28(b)-(c), *available at* http://www.armfor.uscourts.gov/newcaaf/library/Rules/Rules2013Sep.pdf.

[3] This result is confirmed by the only case relied upon by Manning in relation to this argument. *See* Pl.'s Br. at 8 (citing *Apple v. Greer*, 554 F.2d 105, 110 (3d Cir. 1977)). That case stated that the plaintiff could "renew his petition in the district court without waiting for a final determination" if "expeditious review by the military" was "not forthcoming." *Apple*, 554 F.2d at 110. Critically, however, the court still required that "the military judicial system" be provided "the initial opportunity to pass on the merits of Apple's claim[.]" *Id.*

to her underlying conviction and sentence, given that success on her claim could reduce her overall length of confinement. *See* Defs.' Br. at 19. Furthermore, even if the claim were truly ancillary, it must still be brought first in the military courts. *See Noyd*, 395 U.S. at 696 (rejecting argument that "there is less justification for deference to military tribunals in ancillary matters").[4]

In short, Manning concedes that she is challenging the application of military regulations, by military personnel, to a military inmate, at a military facility, incident to a military conviction. Military courts, therefore, should have the first opportunity to address her claim.

B. Manning Did Not Exhaust Either Claim Under the PLRA

Manning agrees that the PLRA requires, as a prerequisite to suit, that she have administratively exhausted her claims by filing grievances that include sufficient detail to "give[] officials a fair opportunity to address the problem that will later form the basis of the lawsuit," *Johnson v. Johnson*, 385 F.3d 503, 517 (5th Cir. 2004), including by "clearly stat[ing] the problem" and "giv[ing] a clear, full explanation" of the request. Pl.'s Br. at 11. Under this framework, Manning's August 28, 2013 grievance and subsequent submission to the IG were not sufficient to exhaust either her Eighth Amendment or Fifth Amendment claim.

1. Manning's First Grievance Did Not Exhaust All Future Claims Challenging Her Medical Treatment

Contrary to Manning's contention, her first grievance did not "complain[] of inadequate medical treatment," *id.* at 11, but instead PA/HIPAA

PA/HIPAA

[4] Manning cites two cases for the proposition that "federal courts routinely hear suits brought by military prisoners regardless of the prisoners' use of military courts." Pl.'s Br. at 9-10. But those cases are inapposite. In *Walden v. Bartlett*, 840 F.2d 771 (10th Cir. 1988), there is no indication of any ongoing court-martial proceedings (or appeals) that would have warranted civilian court abstention. And the plaintiff in *Wilkins v. United States*, 279 F.3d 782 (9th Cir. 2002), was neither a military prisoner nor subject to any pending court-martial proceedings.

PA/HIPAA Exh. F (ECF No. 46-9) at 1. This grievance would be sufficient to exhaust a claim that PA/HIPAA PA/HIPAA (Such a claim would be meritless, of course, because Defendants have already provided Manning exactly what she requested—PA/HIPAA PA/HIPAA Manning's first grievance did not, however, exhaust her current, fundamentally different, claim—that the eventual treatment plan, developed and implemented over the next two years, is inadequate. *Cf. Smith-Bey v. CCA/CTF*, 703 F. Supp. 2d 1, 6 (D.D.C. 2010) (a prisoner's "complaints about finding a cockroach in his food on two occasions" were insufficient to exhaust "broader claims regarding the litany of unsanitary [prison kitchen] conditions"). Accordingly, her efforts to analogize this case to ones in which the relevant issue *was* raised in a grievance—in particular her contentions that a cancer patient need not "request the specific medications or forms of chemotherapy necessary," and that a prisoner need not repeatedly submit grievances regarding the same denial or deprivation, *see* Pl.'s Br. at 12-13—are inapposite.

Requiring Manning to exhaust a separate grievance regarding inadequate treatment neither imposes an "impossible burden" nor is it "unfair" or "nonsensical." Pl.'s Br. at 12-13. Manning clearly is able to PA/HIPAA, *see* Exh. F at 6-14, and it is not unduly burdensome that she also be required to exhaust them. Indeed, Manning's approach to exhaustion is contrary to the PLRA's fundamental purpose because, under her theory, her initial grievance exhausted all potential future claims for inadequate treatment. For example, under her logic, she would have already exhausted a claim for PA/HIPAA PA/HIPAA submitted over two years ago, just six days after she arrived at the USDB. This expansive approach to exhaustion hardly "afford[s]

corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516, 525 (2002).

2. Manning Never Raised Her Equal Protection Claim Administratively

Manning concedes that she did not specifically mention sex discrimination at any point in any administrative process. Instead, she argues that her medical grievances provided sufficient notice "of the facts underlying her claim of discriminatory conduct," and exhausted all claims "'intertwined' with . . . her gender identity and transgender status." Pl.'s Br. at 17-18.

Manning is incorrect in arguing that merely raising "the basic facts underlying an equal protection claim" is sufficient for exhaustion. *Id.* at 16. The two cases cited for this proposition are inapposite: one involved a prisoner who *did* actually raise both legal theories administratively, *see Holley v. California Dep't of Corr.*, 2007 WL 586907, at *7 (E.D. Cal. Feb. 23, 2007), and the other involved a grievance system that *limited* the submissions to only factual information, *see Parker v. Mulvaney*, 2008 WL 4425579, at *5 (W.D. Mich. Sept. 26, 2008). The USDB requires that inmates "[g]ive a clear, full explanation" and "clearly state the problem[.]" Defs.' Br. at 20. Manning's Form 510s, PA/HIPAA PA/HIPAA did not "clearly state the problem" with respect to discrimination; officials investigating these grievances had no basis to infer discrimination was at issue. *See* Exhs. F, G. Indeed, the procedural history of this case confirms that nobody had reason to believe sex discrimination was at issue; Manning herself understood her claim as limited to medical care. *See* Defs.' Br. at 23. Clearly she did not raise discrimination, as she must in order to seek a judicial remedy here.

Manning also did not exhaust her sex-discrimination claim simply because her medical requests relate to gender dysphoria. A medical request by itself says nothing about potential discrimination. If a female inmate submits a grievance seeking care for a condition exclusive to females, *e.g.* pregnancy complications, she has exhausted that medical claim, but not necessarily

a claim for gender-based discrimination. That requires something more, such as alleging that a guard refused to provide the requested treatment specifically because the inmate is a woman. *See Johnson v. Johnson*, 385 F.3d at 519 (inmate's complaint about specific comments made by guards gave "prison officials fair notice that there might have been a sexual-orientation-related aspect to Johnson's problem"). Here, Manning's grievances nowhere identified any discrimination (or even comments) related to her sex or gender identity. By entirely failing to raise the issue of discrimination, Manning failed to exhaust that claim. *See Goldsmith v. White*, 357 F. Supp. 2d 1336, 1340 (N.D. Fla. 2005).

Finally, even if Manning's Form 510s sufficiently raised sex discrimination, Manning concedes that she never exhausted this claim through the Army's equal opportunity system. *See* Defs.' Br. at 22 & Exh. N (ECF No. 48-17). Thus, she did not exhaust all "administrative remedies as are available," 42 U.S.C. § 1997e(a), and the claim remains unexhausted.

II. MANNING FAILS TO STATE AN EIGHTH AMENDMENT CLAIM

A. Denying Permission to Grow Longer Hair Is Not An Objectively Serious Deprivation, Particularly When Numerous Other Treatments Are Provided

Manning does not dispute that she is currently receiving extensive treatment for gender dysphoria: weekly psychotherapy, including psychotherapy specific to gender dysphoria; female undergarments; permission to wear cosmetics in her daily life; speech therapy; and cross-sex hormone therapy. In an effort to establish an objectively serious deprivation notwithstanding these treatments, Manning misreads the governing legal framework, the caselaw, and the underlying allegations in her Amended Complaint. Her arguments are meritless.

1. Plaintiff Misconstrues the Eighth Amendment's Legal Framework

Manning's opposition misstates the Eighth Amendment legal framework in two significant ways, both of which permeate her arguments on the objective element.

First, Manning argues that the objective prong of the Eighth Amendment requires only a showing that "the denial of medically necessary treatment will cause . . . serious harm," Pl.'s Br. at 24, a standard purportedly derived from *Estelle v. Gamble*, 429 U.S. 97 (1976). This language does not appear in *Estelle*, however. And in the decades since *Estelle*, the Supreme Court has clarified the showing necessary to satisfy the objective element—that "a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Manning asserts that the "language from *Farmer* does not offer the proper framework for medical care cases," Pl.'s Br. at 24, but the language itself derives from *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), an earlier case considering conditions of confinement. Because there is "no significant distinction between claims alleging inadequate medical care and those alleging inadequate 'conditions of confinement,'" *Wilson v. Seiter*, 501 U.S. 294, 303 (1991), there can be no dispute about the objective prong's meaning: the alleged deprivation must result in the denial of the minimal civilized measure of life's necessities.

Second, Manning argues that the objective component is satisfied simply by "alleg[ing] that she is suffering from an objectively 'serious medical need.'" Pl.'s Br. at 19. But Manning cannot rely solely on the existence of a serious medical condition, such as gender dysphoria. She must make a far more specific demonstration—that "*the deprivation alleged*" is "objectively, sufficiently serious." *Brennan*, 511 U.S. at 834 (emphasis added); *see also Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (asking whether "*the alleged wrongdoing* was objectively 'harmful enough' to establish a constitutional violation" (emphasis added)); *Wilson*, 501 U.S. at 298. Thus, the question is not whether gender dysphoria is sufficiently serious in the abstract; rather, it is whether the alleged wrongdoing (the hair length decision) constitutes an objectively serious deprivation. As the *en banc* First Circuit recognized in similar circumstances:

> The question before our court, therefore, is not . . . whether GID constitutes a serious medical need. Rather, the question is whether the decision not to provide [sex-reassignment surgery]—in light of the continued provision of all ameliorative measures currently afforded [the plaintiff] and in addition to antidepressants and psychotherapy—is sufficiently harmful to [the plaintiff] so as to violate the Eighth Amendment.

Kosilek v. Spencer, 774 F.3d 63, 89 (1st Cir. 2014) (en banc), *cert. denied sub nom. Kosilek v. O'Brien*, 135 S. Ct. 2059 (2015); *see also Smith v. Carpenter*, 316 F.3d 178, 186 (2d Cir. 2003).

With these two points clarified, the inadequacy of Manning's opposition on the Eighth Amendment claim is apparent. She relies on her diagnosis of gender dysphoria in the abstract—nowhere explaining why denying permission to grow longer hair itself constitutes a "denial of the minimal civilized measure of life's necessities," particularly in light of the other significant treatments she is receiving. This defect alone is fatal to Manning's Eighth Amendment claim.

2. Manning's Challenge to the Prohibition on Growing Longer Hair Should Be Rejected as a Matter of Law

In order to avoid dismissal, Manning downplays overwhelming authority that grooming restrictions do not violate the Eighth Amendment, and offers a series of irrelevant responses.

First, Manning asserts that Defendants' arguments would permit a "blanket ban" of medical exceptions to grooming standards. Pl.'s Br. at 21. But in fact, Defendants are not defending any such ban. The Army has previously said that treatment decisions are "based on an individualized assessment of each inmate's medical needs[.]" Exh. I (ECF No. 46-12); *cf. Kosilek*, 774 F.3d at 91. And legally, the Court need only conclude that when an inmate is receiving significant treatments for gender dysphoria (as Manning is), restricting hair length is not an objectively serious deprivation. The argument does not implicate a blanket ban or require the Court to reach that issue.

Manning also misconceives the import of *Farmer v. Moritsugu*, 163 F.3d 610 (D.C. Cir. 1998), and similar cases. *See* Defs.' Br. at 26. Those cases go beyond establishing that hormone

therapy is not always required to treat gender dysphoria. Pl.'s Br. at 20. In *Moritsugu*, the plaintiff had gender identity disorder, had a record of attempted self-castration while incarcerated, and only "intermittent counseling" was provided; yet the D.C. Circuit still found no Eighth Amendment violation on the ground that the plaintiff was "not entitled to any particular treatment of her choosing." *Moritsugu*, 163 F.3d at 611, 615. Under the same principle, Manning's far more extensive treatments *a fortiori* do not establish a violation.[5]

Manning asserts, without support, that the objective component "cannot be resolved as a matter of law." Pl.'s Br. at 20. But the objective prong is indeed a question of law. *See Thomas v. Bryant*, 614 F.3d 1288, 1307 (11th Cir. 2010) ("Whether these deprivations are objectively 'sufficiently serious' to satisfy the objective prong is a question of law[.]"); *Kosilek*, 774 F.3d at 84 (collecting cases).[6] The objective prong is a legal issue because in each case the court must determine whether the alleged harm (or risk of harm) "violates contemporary standards of decency" such that it "is not one that today's society chooses to tolerate." *Helling v. McKinney*, 509 U.S. 25, 36 (1993); *see also Rhodes*, 452 U.S. at 346-47. Manning provides no sound reason why that requirement has been satisfied here.

Manning does not cite a single case, for example, where a court has held that it violates contemporary standards of decency to enforce a particular grooming standard. Presumably that is because an overwhelming number of courts have concluded to the contrary. *See* Defs.' Br.

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[5] Providing an inmate "some measure of treatment" does not immunize prison officials from suit. *De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013). But hypothetical liability where the treatment is equivalent to prescribing a painkiller in the face of a need for surgery, *see id.*, says nothing about the situation here—where Manning is receiving significant treatments and her sole complaint relates to hair length.

[6] Other courts addressing gender dysphoria-related Eighth Amendment claims have rejected those claims at the pleading stage, *see Praylor v. Tex. Dep't of Criminal Justice*, 430 F.3d 1208, 1209 (5th Cir. 2005), and have held as a matter of law that certain treatments are not required. *See Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987).

at 25-26. Although one of Defendants' cited cases involved a grooming standard with a medical exemption, *see* Pl.'s Br. at 22 (citing *DeBlasio v. Johnson*, 128 F. Supp. 2d 315 (E.D. Va. 2000)), the court's analysis did not turn on whether a medical exemption existed; and no other case purported to require medical exemptions for grooming restrictions to be upheld as constitutional. *See* Defs.' Br. at 25-26. While Manning relies on a medical exemption for the Army's *shaving* requirement, *see* Pl.'s Br. at 22-23, that exemption is irrelevant to the hair-length restriction at issue here. *See* Exh. D at 5; Exh. E at 54-55.

Finally, Manning argues that the hair restriction is punishment because she is in prison and "denied treatment that she would otherwise be able to access – either through leaving the military or by being treated as a female service member." Pl.'s Br. at 23. These hypothetical scenarios do not change the undisputed facts: she remains a current servicemember; and thus (like all servicemembers) would be subject to a grooming standard even if not incarcerated. Speculation about which grooming standard would be applicable absent incarceration is irrelevant: it only confirms that such standards apply by virtue of enlistment in the military, not incarceration. Under these circumstances, then, the challenged hair restrictions cannot be considered punishment subject to Eighth Amendment scrutiny. *See* Defs.' Br. at 27. And in any event, Manning does not dispute that grooming standards are enforced among non-incarcerated servicemembers as well, which further undermines any argument that such standards constitute a denial of the minimal civilized measure of life's necessities.

3. Manning's Allegations Are Outdated and Do Not Plausibly Allege an Objectively Serious Deprivation

Even if grooming restrictions are subject to Eighth Amendment scrutiny, Manning has not plausibly alleged extreme psychological harm or a current risk of serious harm. Her response relies on outdated allegations and misconstrues the allegations of the Amended Complaint.

Manning does not dispute that her allegation of psychological harm—following male grooming standards "causes her to feel hurt and sick," Am. Compl. ¶ 107—is not the type of extreme psychological distress necessary under the Eighth Amendment. *See* Defs.' Br. at 27-28. Instead she argues that "she is at a 'high risk for serious medical consequences, including self-castration and suicide'" absent longer hair. Pl.'s Br. at 25 (quoting Am. Compl. ¶ 84). But this allegation is based on an assessment by Dr. Ettner in August 2014—over fourteen months ago, and before Manning received many of her current treatments. Going even further back, Manning relies on past plans for suicide and self-surgery from over five years ago, which she describes as stemming from a "realization that she might not receive treatment for gender dysphoria." Am. Compl. ¶ 44. But she has now received significant treatment.[7] And there are no allegations that Manning currently is suffering from a significant risk of serious harm, specifically caused by the restrictions on her hair length. *See* Defs.' Br. at 28-29; *Baze v. Rees*, 553 U.S. 35, 49-50 (2008) (opinion of Roberts, C.J.) (holding that a risk of future harm must "give rise to 'sufficiently *imminent* dangers'" to violate the Eighth Amendment); *Scott v. Dist. of Columbia*, 139 F.3d 940, 943 (D.C. Cir. 1998). She thus fails to meet the objective prong.

B. Manning Has Not Plausibly Alleged Deliberate Indifference

Manning's opposition brief essentially eliminates the subjective component of Eighth Amendment analysis. By Manning's analysis, this standard is met whenever a prison official is aware that a prisoner is not being provided with certain treatment—regardless of the reason for not providing the treatment, or whether the official actually believes that withholding the

[7] Manning also relies on statements from October 2014 that her condition was "deteriorating." Am. Compl. ¶ 86. But that statement is from over a year ago, when Manning received far fewer treatments (psychotherapy and female undergarments) than she is currently receiving (the addition of cosmetics, speech therapy, and cross-sex hormone therapy). There are no allegations regarding current deterioration, let alone deterioration due to her hair length.

treatment creates an "excessive risk to inmate health or safety." *Brennan*, 511 U.S. at 837. Yet as the Supreme Court has made clear, to establish Eighth Amendment liability the responsible official must actually "draw the inference" that such an excessive risk exists. *Id*.

Here, Manning's allegations do not make it plausible that any of the officials have a culpable state of mind. On the contrary, the USDB has treated Manning's gender dysphoria seriously and extensively, but determined that one particular treatment cannot be provided based on security considerations. These undisputed facts do not establish deliberate indifference.

1. The Extensive Care Provided to Manning Confirms the Absence of Deliberate Indifference, Particularly Where There Is No Allegation of Pretext or Improper Motive

The Government's opening brief set forth the USDB's considered approach to treating Manning's gender dysphoria, phasing in treatment while simultaneously reviewing her medical needs and security concerns within the facility. *See* Defs.' Br. at 31-33. Manning disregards this history, focusing instead on the one treatment that she is not currently receiving and arguing that providing *some* treatment does not necessarily provide constitutionally adequate treatment. Pl.'s Br. at 26-27. But this argument relates only to the objective prong (is the care adequate?), not the subjective prong (do the officials *actually know* that the care is inadequate?).

As to that subjective question, the history of treatment cannot be summarily disregarded. It shows that Defendants have acted in "good faith" with regard to Manning's medical care, not with the "obduracy and wantonness" necessary for an Eighth Amendment violation. *Whitley v. Albers*, 475 U.S. 312, 319 (1986). Even where recommended components of treatment are not provided, so long as this decision is not in bad faith, there is no deliberate indifference. *See Kosilek*, 774 F.3d at 92; *Battista v. Clarke*, 645 F.3d 449, 454 (1st Cir. 2011). Manning concedes she has not alleged that the hair length decision was pretextual or made in bad faith. *Cf. Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1116-17 (N.D. Cal. 2015) (relying on express factual

allegations regarding pretext to conclude that a claim of deliberate indifference was plausible). With the absence of such allegations here, and in light of the substantial treatments Manning has received so far, it is not plausible that Defendants' actions constitute deliberate indifference.[8]

2. Manning's Allegations Do Not Establish Deliberate Indifference By Any Particular Defendant

Manning attempts to skirt the requirement that she plausibly allege deliberate indifference as to each named defendant by focusing on their official-capacity status. Even for an official-capacity claim, however, the plaintiff must still plead and prove the defendant's deliberate indifference. *Guzman v. Sheahan*, 495 F.3d 852, 859-60 (7th Cir. 2007); *see also Goebert v. Lee Cty.*, 510 F.3d 1312, 1331-32 (11th Cir. 2007); *Shorts v. Bartholomew*, 255 F. App'x 46, 58 (6th Cir. 2007). Indeed, there could be no other result, as "deliberate indifference" is required by the Eighth Amendment itself. *See Wilson*, 501 U.S. at 300 ("The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself[.]").[9] By conflating the states of mind of the various Defendants, Manning again attempts to eliminate the subjective component altogether, a theory that must be rejected. Accordingly, each particular Defendant for whom there are insufficient allegations of deliberate indifference should be dismissed.

In opposing dismissal, Manning relies exclusively on each Defendant's relationship to Manning's treatment decisions and knowledge of Manning's gender dysphoria. *See* Pl.'s Br.

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[8] This case is unlike *De'lonta*, 708 F.3d at 526, where the plaintiff alleged that defendants *actually knew* her treatment was inadequate because her condition was worsening. *See id.* at 525 (relying on defendants' "knowledge that De'lonta's therapy sessions with Psychologist Lang actually *provoked* her 'overwhelming' urges to self-castrate"). Here, there is no basis to conclude that Manning's condition has worsened since implementing the current course of treatment, *see* note 7, *supra*, much less that Defendants are aware that it has worsened.

[9] Manning's quoted language from *Battista*, *see* Pl.'s Br. at 27, appears to explain why qualified immunity is not being discussed, rather than set forth a substantive holding about the scope of liability for official-capacity defendants. *See* 645 F.3d at 452. In any event the official-capacity issue was not squarely presented in the case.

at 28. These allegations disregard the legal standard for deliberate indifference—requiring that the individual defendant actually be aware of the inadequate treatment (or risk posed by not providing treatment). *Brennan*, 511 U.S. at 837 ("[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."). Simply alleging responsibility for treatment does not satisfy the subjective awareness requirement. "[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Id.* at 838.

Viewed individually, it is further apparent that each Defendant must be dismissed. Manning does not dispute that Maj. Gen. Quantock must be dismissed. *See* Defs.' Br. at 34 n.8. With respect to the Secretary of Defense, allegations as to Secretary Hagel's purported involvement in July 2014, *see* Am. Compl. ¶¶ 72-74, are insufficient to establish Secretary Carter's present involvement. Even when combined with assertions about the "novelty" and "notoriety" of her case, Pl.'s Br. at 28, these allegations do not plausibly establish that the Secretary, a non-medical official, is *actually aware* of any (alleged) inadequacy in Manning's treatment. *See* Defs.' Br. at 35 n.9. With respect to Lt. Col. Keller, Manning offers no allegations whatsoever about his state of mind in light of Manning's current treatment plan or about his knowledge of the alleged inadequacy thereof. *Cf.* Am. Compl. ¶ 54 (relying on a memo written in October 2013, which has since been overtaken by recent treatments provided to Manning).

Moreover, the only allegations specifically concerning Col. Nelson—the official who signed the treatment decision at issue, the Sept. 2015 Risk Assessment, *see* Exh. L at pg. 1—demonstrate that she has recognized Manning's treatment needs. *See* Exh. I (ECF No. 46-12);

Am. Compl. ¶ 78. There is no factual basis to conclude that Col. Nelson has a culpable state of mind or acted in bad faith; she is not, therefore, deliberately indifferent.

Finally, Manning suggests in a footnote that her claim against the Department of Defense may proceed based on challenging "'the entity's policy or custom[.]'" Pl.'s Br. at 29 n.13 (quoting *Hafer v. Melo*, 502 U.S. 21 (1991)). But the authority on which she relies arose under 42 U.S.C. § 1983, which permits claims against state and local agencies as a statutory matter, and thus says nothing about the availability of an Eighth Amendment cause of action against a federal agency. *See* Defs.' Br. at 35-36. In any event, there are no allegations with respect to any Department of Defense "policy or custom," and none that would constitute deliberate indifference by the Department as a whole. *See Wilson*, 501 U.S. at 300 ("some mental element must be attributed to the inflicting officer" before pain can qualify as punishment). The Eighth Amendment claim against each of the Defendants should therefore be dismissed.

3. The Defendants Appropriately Relied on Security Concerns, Which the Court May Also Consider

Manning's opposition also does not dispute that, at least in some cases, medical treatments may be withheld based on prison security concerns, and that prison officials who legitimately rely on security concerns are not deliberately indifferent. This is precisely the circumstance at issue here. Although Manning attempts to recast the matter as a factual dispute, her own Amended Complaint acknowledges that the hair decision was based on security concerns. There is no need for the Court to engage in the type of factual analysis Manning seeks—*i.e.*, to adjudicate "the validity of the security concerns," Pl.'s Br. at 31—because Manning does not allege that the security concerns were pretext or undertaken in bad faith. The Amended Complaint establishes that Defendants acted in accordance in with their genuine security judgments, which is sufficient to defeat a claim of deliberate indifference even if

Manning herself disagrees with those judgments. That is especially so here, given that the USDB's security and military judgments are concededly entitled to "significant weight," *Kosilek*, 774 F.3d at 83, and the Court must assume that government officials perform their responsibilities in good faith, *see Adair v. England*, 183 F. Supp. 2d 31, 60 (D.D.C. 2002)—the very opposite of the presumption Manning seeks to apply.

Manning asserts that Defendants cannot prevail unless they provide "evidentiary proof that their asserted concerns are valid[.]" Pl.'s Br. at 30. But this analysis flips the pleading burden on its head. The burden at this stage is on Manning to allege sufficient facts to establish a plausible claim. Because the Amended Complaint alleges that the basis for the hair length decision was concern about the facility's security, *see* Am. Compl. ¶¶ 123, 125, and does not contain further allegations that this justification was pretextual or made in bad faith, Manning has not carried this burden. The Amended Complaint itself reveals that Manning's treatment was withheld for a permissible reason. *See Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1116 (D.C. Cir. 2000) ("In some cases, it is possible for a plaintiff to plead too much: that is, to plead himself out of court by alleging facts that render success on the merits impossible.").[10]

[10] The fact that courts in some cases have rejected security concerns as not credible, *see* Pl.'s Br. at 30, has no applicability here. Manning does not contest the extensive case law emphasizing that deference is due both to prison security and military judgments. *See* Defs.' Br. at 36-38. Nor would the Government's argument here mean that dismissal is appropriate whenever a prison proffers a security rationale for denying medical treatment. *See* Pl.'s Br. at 30-31. But where it is factually implausible that a security justification was pretextual or made in bad faith, it would be inappropriate to permit the case to continue in order to test the veracity of the justification. *See* Defs.' Br. at 37-38. Here, the Amended Complaint entirely omits (and thus does not make plausible) any allegations of pretext or bad faith.

The Court may also consider the Sept. 2015 Risk Assessment, which shows the careful consideration prison officials applied to the hair length decision.[11] As Manning agrees, the Risk Assessment's existence is undisputed, *see* Pl.'s Br. at 31 n.14, and thus the Court may rely on the Risk Assessment as accurately reflecting Defendants' decision-making process related to hair.[12] As described in more detail in Defendants' opening brief, the Sept. 2015 Risk Assessment demonstrates that USDB officials conducted a thorough review of the effect that Manning's longer hair would have on prison security. *See* Defs.' Br. at 12-13, 38-39. Manning may disagree with the conclusion, but the careful consideration shown therein, and the absence of any allegation of pretext or bad faith, means that it is not plausible that the Defendants had a sufficiently culpable state of mind as to the hair-length decision. *Battista*, 645 F.3d at 454.

III. MANNING FAILS TO STATE AN EQUAL PROTECTION CLAIM

Even assuming intermediate scrutiny applies as Manning suggests, the Amended Complaint does not state a cognizable equal protection claim. It fails to allege sufficient facts to pass the "threshold inquiry" as to whether Manning is similarly situated to those purportedly receiving favorable treatment. *Women Prisoners of the D.C. Dep't of Corrs. v. Dist. of Columbia,*

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[11] Although Manning denies incorporating the Sept. 2015 Risk Assessment or any of the prior risk assessments by reference, the Amended Complaint quoted directly the USDB's decision regarding hair length, and did so knowing that the decision was based on the risk assessment. *See* Am. Compl. ¶ 100. The Amended Complaint also acknowledges the existence of the "security assessment" regarding hair length and the fact that the decision was made based on "security risks." *See id*. ¶ 124-25. It also discusses the February 2015 Risk Assessment. *See* Am. Compl. ¶ 97. Manning does not dispute the authenticity of these documents. Because they are "referred to in the complaint and are integral" to her claim, they are incorporated by reference. *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004).

[12] Defendants do not contend that the Amended Complaint's quotation from the Risk Assessment automatically establishes the truth of every statement within that document. *See Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1132-1134 (D.C. Cir. 2015). But like any document referenced in a complaint, this document can be considered as part of assessing the sufficiency of the allegations in connection with a motion to dismiss. *Kaempe*, 367 F.3d at 963.

93 F.3d 910, 924 (D.C. Cir. 1996). And it is apparent that the challenged hair decision advances important government interests. Thus, Manning's equal protection claim should be dismissed.

A. Plaintiff Is Not Similarly Situated to Inmates Housed in All-Female Facilities or to the Men Housed in the USDB

Because the Fifth Amendment only requires that similarly situated persons be treated alike, the "dissimilar treatment of dissimilarly situated persons does not violate equal protection." *Id.* Manning's Amended Complaint seeks to draw a comparison between Manning and female military inmates who are permitted to wear longer hair. *See* Am. Compl. ¶¶ 104, 130. But this comparison fails because, unlike inmates housed at the military's female prison, Manning is housed in a military prison for men with grooming restrictions requiring short hair. *See* Defs.' Br. at 39-42. The Amended Complaint's allegation of "similarly situated," therefore, is merely a legal conclusion insufficient to state a claim. Manning's opposition does not attempt to identify any specific factual allegations supporting this legal conclusion. *See* Pl.'s Br. at 33-36. This defect alone conclusively defeats the equal protection claim.

Rather than relying on factual allegations within the Amended Complaint, Manning offers two responses, neither of which has merit. First, Manning asserts that the fact that she lives in a men's prison is irrelevant because this placement itself was discriminatory. This argument is baseless. In the more than two years that Manning has lived at the USDB, she has not contested her placement there; she expressly is not challenging that placement in this lawsuit, *see* Defs.' Br. at 16 n.3, 22 n.5; and she cannot request that the Court merely *assume* that her housing placement was discriminatory. *See Adair*, 183 F. Supp. 2d at 60 ("Well-settled case law instructs courts to presume that government officials will conduct themselves properly."). If Manning wanted the Court to treat the housing decision as discriminatory, she should have properly exhausted and then alleged such a claim. Having failed to do so, she cannot now rely

on an *assumption* of discrimination, solely to avoid the requirement that she adequately allege facts establishing her "similarly situated" status.[13]

Second, Manning presents for the first time a new equal protection theory: that she is similarly situated to *male* prisoners in the USDB and suffers unfavorable treatment relative to them. *See* Pl.'s Br. at 36. This new theory is not based on any allegations in the Amended Complaint, and it should be rejected on that basis alone. *See McManus v. Dist. of Columbia*, 530 F. Supp. 2d 46, 74 n.25 (D.D.C. 2007) ("[I]t is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss."). Even if the Court were to consider this theory, it lacks merit. If Manning were permitted to deviate from the USDB's two-inch restriction on hair length, she would be the only inmate at the USDB relieved of that requirement, and her hair presentation would be unique from the other prisoners with whom she is incarcerated. Unlike the male inmates who must keep short hair (presumably consistent with their gender identities), therefore, allowing Manning to follow the female standards consistent with her gender identity would cause her to stand out. She is thus not similarly situated to the male prisoners either. *Cf. Versace v. Starwood Hotels & Resorts Worldwide, Inc.*, Civ. No. 14-1003, Order (ECF No. 76) at *16 (M.D. Fla. Dec. 7, 2015) (transgender plaintiff failed to identify a similarly situated comparator, because "[i]t is not sufficient to allege that the comparators are all other non-transgender co-workers") (decision attached hereto).[14]

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[13] Manning also asserts that the argument "relies on contested fact claims about the effect on the prison population" of allowing her to wear longer hair. Pl.'s Br. at 35. Yet the Amended Complaint itself establishes that longer hair would cause her to stand out at the USDB but not, in terms of hair length, at the military's female facility, *see* Defs.' Br. at 40, which means she is not similarly situated to those female inmates. Manning does not allege any facts that would make a contrary conclusion possible, and she bears the burden of pleading more than a legal conclusion.

[14] To the extent Manning is claiming that she is discriminated against as a result of her transgender status, *see* Pl.'s Br. at 36, that is a different type of equal protection claim—no longer

B. The Hair Length Decision Is Substantially Related to Important Government Interests, and Manning Does Not Plausibly Allege Otherwise

Defendants' decision on hair length "serves important governmental objectives," namely prison security and military discipline, and is "substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996); Defs.' Br. at 42-45.

Manning's primary response is a procedural one—that heightened scrutiny cannot be satisfied at the pleading stage. *See* Pl.'s Br. at 36-37. But this argument is incorrect, as the D.C. Circuit and other courts have permitted claims to be dismissed even when they implicate heightened scrutiny. *See, e.g.*, *Schrader v. Holder*, 704 F.3d 980, 990-991 (D.C. Cir. 2013) (affirming dismissal for failure to state a claim in as-applied challenge to firearms regulation because the ban was substantially related to an important governmental objective); *Warden v. Nickels*, 697 F. Supp. 2d 1221, 1229-30 (W.D. Wash. 2010) (dismissing challenge to firearms ordinance, because it "is a reasonable and narrow limitation that is substantially and directly related to protecting public safety and welfare at parks"); *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010) (rejecting notion that government must always adduce evidence to justify restriction on speech and noting "[w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to conduct a survey of the public before it may determine that the advertisement had a tendency to mislead").

Defendants are not suggesting they win at the pleading stage "just because they have offered security concerns as a justification." Pl.'s Br. at 36. Rather, Defendants' security

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challenging application of a policy that expressly employs gender-based criteria (here, the Army's grooming restrictions)—which would require Manning to "plead and prove that the defendant acted with discriminatory purpose." *Ekwem v. Fenty*, 666 F. Supp. 2d 71, 78 (D.D.C. 2009). Manning has not plausibly alleged any such discriminatory purpose. She is not "singled out" in any way; she is subject to the same grooming restrictions that apply to everyone else within the USDB. And there are no factual allegations whatsoever regarding an improper motive (*e.g.*, animus towards her transgender status). *Ashcroft v. Iqbal*, 556 U.S. 662, 681-83 (2009).

concerns are expressly acknowledged in the Amended Complaint itself, *see* Am. Compl. ¶¶ 100, 123, 125; the Amended Complaint does not allege any pretext or bad faith with respect to those concerns; and the logic of the security concerns is fully consistent with the underlying factual allegations and common sense. *See* Defs.' Br. at 12-13, 38-39, 41-45. In these circumstances, there is no impediment to the Court granting a motion to dismiss. *Cf. Smith-Haynie v. Dist. of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998) (affirmative defenses may be resolved "under Rule 12(b) when the facts that give rise to the defense are clear from the face of the complaint"). That is particularly true here, where the USDB's security judgments are concededly entitled to significant (but not dispositive) weight.[15] *See Metro Broad., Inc. v. FCC*, 497 U.S. 547, 569 (1990) (upholding FCC policy under intermediate scrutiny, without any factual development, by giving "great weight to the decisions of Congress and the experience of the Commission"), *overruled on other grounds by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

Turning to the government interests at issue, Manning concedes, as she must, that prison security and military discipline are important government interests. *See* Pl.'s Br. at 39. The Amended Complaint's allegations do not call the USDB's judgments on these issues into serious question. With respect to security, Manning relies primarily on her allegation that she was already labeled "high risk for sexual victimization." *Id.* at 37 (citing Am. Compl. ¶ 49). But she disregards the primary basis for the USDB's decision—PA/HIPAA; LES PA/HIPAA; LES *See* Defs.' Br. at 38. Manning provides no reason to doubt the USDB's analysis that PA/HIPAA; LES

[15] Defendants' security judgments also comprise the type of "obvious alternative explanation" for their decisionmaking that makes discrimination "not a plausible conclusion." *Iqbal*, 556 U.S. at 682. While risks will always be "speculative" so long as the feared ill effects have not yet taken place, Pl.'s Br. at 38, the Sept. 2015 Risk Assessment evaluated the nature of the facility itself and specific risks within it, not the generalized or "slippery slope" justifications rejected in the cases proffered by Manning.

PA/HIPAA; LES *Id*. This reasoning accords with common sense and is not contradicted by any factual allegations in the Amended Complaint; dismissal is therefore appropriate. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992) (First Amendment challenge to statute, even though evaluated under strict scrutiny, was properly dismissed based on history, consensus, and "simple common sense").[16]

Second, Manning expresses skepticism about "how her case implicates military discipline at all." Pl.'s Br. at 38. But she does not contest that the USDB is a military institution. *See* Defs.' Br. at 6-8, 45. And at issue is the considered judgment of military professionals that PA/HIPAA; LES PA/HIPAA; LES . *See Goldman v. Weinberger*, 475 U.S. 503, 508 (1986) (accepting, without mentioning any factual evidence, "[t]he considered professional judgment of the Air Force" that "standardized uniforms" are necessary for military discipline). In any event, whatever speculation Manning may wish to offer on the subject, *see* Pl.'s Br. at 38-39, none of it is borne out by factual allegations within the Amended Complaint.

Because Manning has not met the threshold requirement of alleging that she is similarly situated to other prisoners, and because her allegations do not seriously call into question the USDB's security and military judgments, her equal protection claim should also be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff's Amended Complaint.

[16] As noted above (at 13), the exceptions Manning relies on, Pl.'s Br. at 37-38, apply to shaving—not to hair-length restrictions. And even if exceptions were permitted in other circumstances, that does not call into question the USDB's judgment that this exception cannot safely be permitted within the particular military corrections environment of the USDB.

Dated: December 18, 2015

Respectfully submitted,

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Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHELSEA ELIZABETH MANNING, Plaintiff, v. ASHTON CARTER, *et al.*, Defendants.	)	Civil Action No. 1:14-cv-1609 (CKK)

Exhibit O:

Army Court of Criminal Appeals

Motion & Order for Extension (16)

Docket No. ARMY 20130739

IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S, Appellee

MOTION FOR EXTENSION (16)

v.

Docket No. ARMY 20130739

Private First Class
CHELSEA E. MANNING,
United States Army,
Appellant

Tried at Fort Meade, Maryland, on 23 February, 15-16 March, 24-26 April, 6-8, 25 June, 16-19 July, 28-30 August, 2, 12, and 17-18 October, 7-8, and 27 November-2, 5-7, and 10-11 December 2012, 8-9 and 16 January, 26 February-1, 8 March, 10 April, 7-8 and 21 May, 3-5, 10-12, 17-18 and 25-28 June, 1-2, 8-10, 15, 18-19, 25-26, and 28 July-2, 5-9, 12-14, 16, and 19-21 August 2013, before a general court-martial appointed by Commander, United States Army Military District of Washington, Colonel Denise Lind, Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

COME NOW the undersigned appellate defense counsel, pursuant to Rules 23 and 24 of this Court's Rules of Practice and Procedure, and move for extension of time until 15 February 2016 to file a Brief on Behalf of Appellant.

PANEL NO. 3

1. The record of trial has 11,859 pages. This was a contested case.

2. The approved sentence, adjudged on 21 August 2013, includes a dishonorable discharge, confinement for thirty five years, forfeiture of all pay and allowances, and reduction to Private E1.

3. The record of trial was received in the Defense Appellate Division on 25 April 2014, and the current due date is 16 January 2016.

4. The assigned first undersigned appellate defense counsel needs additional time to research issues, prepare pleadings, and discuss matters with appellant.

5. The assigned second undersigned appellate defense counsel has 7 cases pending, including 4 contested cases.

WHEREFORE, appellate defense counsel respectfully request that this Court grant the instant motion.

PANEL NO. 3

MOTION FOR EXTENSION (16)

GRANTED: X FINAL for

DENIED: _____

DATE: NOV - 4 2015

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J. DAVID HAMMOND
CPT, JA
Appellate Defense Counsel
Defense Appellate Division

CERTIFICATE OF SERVICE

UNITED STATES v. Manning

Army No. 20130739

Brief on Behalf of Appellant_____

Motion X

Other _____

I certify that a copy of the foregoing was delivered to the Court and Government Appellate Division on October 30, 2015.

MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

GINA VERSACE,

Plaintiff,

v. **Case No: 6:14-cv-1003-Orl-31KRS**

STARWOOD HOTELS AND RESORTS WORLDWIDE, INC.,

Defendant.

ORDER

This matter comes before the Court without a hearing on the Motion for Summary Judgment (Doc. 55) filed by Defendant Starwood Hotels & Resorts Worldwide, Inc. ("Starwood"), the Response in Opposition (Doc. 62) filed by the Plaintiff Gina Versace ("Versace"), the Reply, and the Sur-Reply filed by Versace.

I. Background

A. Starwood and the Banquet Department

Starwood operates two adjoining hotels called "Walt Disney World Swan" and "Walt Disney World Dolphin" (collectively the "Hotel"). Decl. of Kidane Futwi ¶ 2. Plaintiff Versace was employed by Starwood for fourteen years. Pl. Aff. ¶ 6. Starwood employs different levels of servers, most of which are "on call." Decl. of Kidane Futwi ¶ 4. On call servers sign up for shifts at their own discretion after full-time servers are assigned shifts. *Id*. On call servers do not work exclusively for the Hotel, but full-time servers do. *Id*. Since April 2012, on calls sign up for shifts via an online system, "StaffMate." *Id*. at ¶ 5. They review available shifts and select which they will work. *Id*.

Starwood maintains an Employee Handbook. Decl. of Chad Robertson, ¶ 6, Exh. A, Exh. B. It includes an Anti-Discrimination, Unlawful Harassment & Retaliation Policy, which prohibits discriminatory/retaliatory conduct, a Standards of Conduct Policy, a Use of Facilities Policy, which provides that Hotel facilities are for the use and enjoyment of guests; and an Appearance Policy. *Id*.

B. Plaintiff's Employment By the Hotel

Plaintiff was hired as an on call server in March 1998. Compl. ¶ 25. The Handbook and the Handbook acknowledgment form that Plaintiff received contain express contract disclaimers and provide that a contract exists only if in writing and signed by the General Counsel. Decl. of Chad Robertson ¶ 6, Exh. B.

Plaintiff is a transgender female. In June 2005, Plaintiff approached the Hotel's Human Resources with legal documentation consistent with her identification as a female, including a Social Security Card, Florida drivers' license, and a Court Order for legal proof of her female name and female gender. Pl. Dep. 183:11-23. The Hotel then issued Plaintiff a new ID card with a female picture and her changed name. *Id*. at 73:25-74:15.After notifying the Hotel of her transition, Plaintiff was presented with and signed a form reminding her of Starwood's Anti-Discrimination, Unlawful Sexual Harassment & Retaliation Policy, which expressly prohibited gender identity discrimination. *Id*. at 65:7-10, 67:2-6.

C. Specific Instances of Alleged Discrimination

Although Plaintiff testified that she suffered from discrimination/retaliation from the first day she started work at the Hotel, the relevant time period begins in March 2012.[1]

1. June 4, 2012

[1] See discussion infra at p. 10.

On June 4, 2012, Plaintiff worked a lunch function. *Id*. at 210:17-21. During the function, Plaintiff went to the equipment room to retrieve supplies. *Id*. at 211:8-23. To avoid having an accident, Plaintiff used a restroom near the equipment room on her way to get the supplies. *Id*. at 212:5-213:2. Later that day, Dennis "DJ" Robertson (Ms. Versace's manager) spoke with Plaintiff about exiting her work area. Decl. of Dennis Robertson, ¶ 3. Subsequently, Plaintiff spoke with Yolanda Gonzalez, Assistant Director of Human Resources, about the incident. Pl. Depo. 214:21-215:10. What occurred at this meeting is in dispute. Plaintiff maintains that Ms. Gonzalez called her by the wrong pronoun during the conversation. Pl. Depo. 215:16-17. Plaintiff also maintains Ms. Gonzales stated she was suspending Plaintiff pending termination. *Id*. at 215:23-216:6.

According to Plaintiff, Ms. Gonzalez fabricated a report (later referenced as a final warning) that indicated Plaintiff had defecated on herself and that Plaintiff used that as an excuse for why she left her work area to go to the restroom. *Id*. at 217:7-17. Plaintiff requested a meeting with the Hotel's General Manager, Paul Scott, regarding the incident. *Id*. at 230:3-6. The Human Resources Director, Adrana Zamot, was present at the meeting and referred to Plaintiff using the wrong pronoun. *Id*. at 233:16-20. As a result of this meeting, the warning Plaintiff received was downgraded to a "non-discipline letter." *Id*. at 234:1-10. The final warning Plaintiff received was supposed to be destroyed and removed from Plaintiff's file. Pl. Aff. at ¶ 25.

2. October 23, 2012

On October 23, 2012, Plaintiff worked a buffet function from 7:00 A.M. until 9:00 A.M. Pl. Aff. at ¶ 26. Plaintiff's station was in a section that closed down earlier than other sections and she had no guests to service. Pl. Depo. at 238:22-239:25. According to Plaintiff, servers sometimes get a chance to eat while still working on the clock towards the end of a function. *Id*. at 240:9-15. Plaintiff "went over to where the silverware was, to the closest employee restroom to go

use the restroom, you know, and maybe get cleaned up a little, wash my hands and stuff and use the restroom." *Id*. at 242:21-25. Plaintiff then passed a table where an HR employee was handing out bagels and she took one. *Id*. at 243:2-25. Someone told Plaintiff that everybody was going to stay on the clock and eat because there was no time for a lunch break. *Id*. at 244:1-16. At some point, Plaintiff began talking to her manager, Mr. Robertson. *Id*. at 246:25-247:15. Mr. Robertson responded that he felt bad for what he had to say to her, but they would need to talk tomorrow. *Id*. at 247:16-20. Plaintiff became concerned that she was about to be falsely disciplined, and filed an official report with the ethics hotline. *Id*. at 252:6-24.

Plaintiff received a Constructive Conduct Form on October 24 for leaving her work area on October 23 without notifying a manager. *Id*. at 252:6-9; Decl. of 4, ¶ 4. She refused to sign the form claiming it was not true and that she did nothing wrong. *Id*. 254:9-15. A male employee was also disciplined for leaving his work area without notifying a manager and was found on the clock where bagels were being handed out. Decl. of Dennis Robertson, ¶ 4, Exh. C. He received a final written warning. *Id*. at Exh. C. Plaintiff ultimately received a written warning. *Id*. at Exh. B. Following the warning, Plaintiff went to HR. *Id*. at 255:4-19. Plaintiff explained to Ms. Gonzalez and Mr. Robertson that she wanted to place a private phone call to Corporate. *Id*. at 255:14-17. They told her she could use an unoccupied HR office. 255:17-19. At this time, Ms. Gonzalez interrupted Plaintiff while she was trying to make the phone call and referred to Plaintiff as "sir." *Id*. at 255:20-256:17. Plaintiff objected. *Id*. at 256:17-20. Mr. Robertson heard Plaintiff getting loud and Ms. Gonzalez asking for security. Decl. of Dennis Robertson, ¶ 5. Ms. Gonzalez suspended Plaintiff pending review of her behavior. *Id*. One of the responding members of security, Andy Johnson, called her by the wrong pronoun ("sir'). Pl. Depo. at 257:21-23.

Plaintiff thereafter communicated with Nancy Campbell, who internally investigated Plaintiff's complaint. *Id*. at 259:9-16. In these communications, Plaintiff focused on issues she had with upper management. *Id*. at 266:14-22. Ms. Campbell conducted an investigation and provided Plaintiff with a summary of her conclusions. *Id*. at 275:7-12; Exh. 8, pp. 41-44. Ms. Campbell concluded that the incidents in June and October related to Plaintiff not notifying a manager that she was leaving her work area and were appropriate and consistently applied to other employees, that the employees who had used the wrong pronoun to refer to Plaintiff had apologized and were counseled on the importance of using accurate pronouns, that Plaintiff had been paid for shifts missed during her suspension and was eligible to bid on shifts after it ended, and finally that the denial of her application to become a Level 2 server (promotion) was due to other applicants being more qualified. *Id*.

3. January 3, 2013

On January 3, 2013, Plaintiff showed up to work in the wrong uniform. Pl. Aff. at ¶ 37. This was the first time that this had happened during her employment. *Id*. Starwood's Appearance Policy states that cast members may come to work dressed in their costume or change onsite in a specified location. Doc. 55-1, p. 8. Upon seeing her, Kidane Futwi, the Director of Banquets, told Plaintiff that she could not work and had to go home. Doc. 55-8, p. 8. Plaintiff responded in front of other staff that she did not understand why she had to go home and stated she would check StaffMate to show she did not make a mistake. *Id*. Plaintiff ended up in Human Resources, where she saw Mr. Futwi and Ms. Zamot speaking. *Id*. A dispute arose over whether Plaintiff should be sent home. *Id*. Plaintiff denies yelling or acting aggressively during this interaction. Pl. Aff. at ¶ 39. Plaintiff requested to file a formal written complaint against Mr. Futwi. *Id*. Ms. Zamot was not

helpful but eventually asked another HR representative to "help with his report." Doc. 55-8, p. 8. Plaintiff stated she was not a "him" and Ms. Zamot reacted by stating "Oh, what the hell!" *Id*.

Plaintiff was taken to security and permitted to write the complaint. Pl. Aff. at ¶ 39. One of Defendant's security officers, Eric Clay, called Plaintiff "sir" at this time. *Id*. That day, Plaintiff received a Construct Conduct Form. *Id*. This was an attempt to present Plaintiff a final written warning based on her earlier conduct. Decl. of Kidane Futwi, ¶ 12. Plaintiff protested the Constructive Conduct Form and told them it was false. Pl. Depo. at 342:6-7. Plaintiff denies that she exhibited any inappropriate behavior. Pl. Aff. at ¶44. During this subsequent meeting, HR representative Alisha Ishmael could hear Plaintiff stating that she wanted her previous write-ups stricken although she was outside of Ms. Zamot's office where the meeting was held. Decl. of Alisha Ishmael, ¶ 6. Plaintiff was then told to go home. Decl. of Kidane Futwi, ¶ 12.

Plaintiff subsequently contacted Ms. Campbell, the internal investigator of her former complaints against Starwood management. Doc. 55-8, p. 18. She asserted that what happened on January 3 was discriminatory and that the Constructive Conduct Form she received was false. *Id*. She further asserted that Ms. Campbell was biased. *Id*. On January 7, 2013, Plaintiff signed a charge of discrimination with the Florida Commission on Human Relations against Starwood requesting an investigation based on sex, disability, and retaliation discrimination. Pl. Depo. at 359:1-7. This was the first charge she filed in regards to any incidents of discrimination or retaliation by Starwood. *Id*. at 625:20-626:9.[2] On January 8th, 2013, Ms. Campbell notified Plaintiff through e-mail that Starwood had made the decision to terminate her. *Id*. at 10. However, she notified Plaintiff that the termination would not be effective pending review of Plaintiff's

[2] The Commission determined there was no reason to believe discrimination or retaliation took place and entered a no cause finding. Doc. 55-17.

complaints by Rob Cantrell, the HR Leader of Starwood's Ethics and Compliance Office. *Id*. Mr. Cantrell concluded that Plaintiff's allegations were unsubstantiated (Pl. Depo. at 355:20-356:2) and the decision to terminate Plaintiff's employment went into effect in March 2013. Doc. 55-12.

D. Plaintiff's Complaint

Plaintiff's Complaint alleges four counts. Count One – Hostile Work Environment based on gender and gender identity pursuant to Title VII; Count Two – Sex Discrimination pursuant to Title VII; Count Three – Retaliation pursuant to Title VII; and Count Four – common law breach of contract.

II. Standards

A. Summary Judgment

A party is entitled to summary judgment when the party can show that there is no genuine issue as to any material fact. Fed.R.Civ.P. 56. Which facts are material depends on the substantive law applicable to the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the burden of showing that no genuine issue of material fact exists. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir.1991).

When a party moving for summary judgment points out an absence of evidence on a dispositive issue for which the nonmoving party bears the burden of proof at trial, the nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986) (internal quotations and citation omitted). Thereafter, summary judgment is mandated against the nonmoving party who fails to make a showing sufficient to establish a genuine issue of fact for trial. *Id.* at 322, 324-25. The party opposing a motion for summary judgment must rely on more than conclusory

statements or allegations unsupported by facts. *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985) ("conclusory allegations without specific supporting facts have no probative value").

B. McDonnell Douglas Standard

A Title VII plaintiff may prove her case directly or circumstantially. Here, there is no direct evidence of discrimination, so Ms. Versace must rely on circumstantial evidence. The framework for analyzing circumstantial evidence to establish a prima facie case of discrimination is provided in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Pursuant to *McDonnell Douglas,* a plaintiff must first establish a prima facie case of discrimination. If a plaintiff establishes a prima facie case of discrimination, the burden of production, but not the burden of persuasion, shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment action. *Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 254–55, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). This burden of production means the employer "need not persuade the court that it was *actually* motivated by the proffered reasons" but must produce evidence to raise a genuine factual dispute as to whether it discriminated against the plaintiff. *Kragor v. Takeda Pharm. Am., Inc.*, 702 F.3d 1304, 1308 (11th Cir.2012) (emphasis added) (citation omitted).

A plaintiff then has the opportunity to show that the employer's stated reason is in fact pretext for discrimination. "The plaintiff can show pretext 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.' " *Id.* (quoting *Burdine*, 450 U.S. at 256). Put another way, "a plaintiff can survive a motion for summary judgment ... simply by presenting evidence sufficient to demonstrate a genuine issue of material fact as to the truth or

falsity of the employer's legitimate, nondiscriminatory reasons." *Evans v. McClain of Ga., Inc.*,131 F.3d 957, 964–65 (11th Cir.1997) (citations omitted). Consequently, at this juncture it is not required that a plaintiff prove her employer was motivated by discriminatory intent.

III. Analysis

A. Plaintiff's Affidavit In Support of Her Response to Defendant's Motion For Summary Judgment

Defendant moved to preclude certain portions and exhibits of Plaintiff's Affidavit in support of her Response. Doc. 64. The Court decided to consider the evidentiary objections of the motion along with the merits of Defendant's Motion for Summary Judgment. Doc. 72. The requirements for affidavits and declarations offered in support of or in opposition to a motion for summary judgment are outlined in Rule 56(c)(4), Fed.R.Civ.P. That rule requires that a declaration must be based "on personal knowledge, set out facts that would be admissible in evidence, and show that the. declarant is competent to testify on matters stated." Fed.R.Civ.P. 56(c)(4). Additionally, statements in a declaration may be stricken as a matter of law when it is obvious that they constitute a "sham." *Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir. 1986). This occurs when there is a "flat contradiction" between the declaration and the declarant's prior, sworn testimony. *Id.* On the other hand, "[i]ssues of credibility of witnesses and weight of evidence are questions of fact which require resolution by the trier of fact." *Id.* at 954; *see also Choudhry v. Jenkins*, 559 F.2d 1085, 1090 (7th Cir.1977) ("[E]very discrepancy in an affidavit does not justify a district court's refusal to give credence to such evidence."). A declaration, or portions of it, will be disregarded only "when a party has given clear answers to unambiguous questions ... [and that person attempts] thereafter [to] create such an issue with an affidavit that merely contracts, without explanation, previously given clear

testimony." *Tippens*, 805 F.2d at 954 (quoting *Van T. Junkins & Assocs. v. U.S. Indus.*, 736 F.2d 656, 657 (11th Cir.1984)).

Starwood contends that Ms. Versace's affidavit (1) contains hearsay statements, (2) contains conclusory allegations and opinions without factual support whatsoever, (3) contains blanket statements that are not based on any personal knowledge, and (4) relies on non-authenticated documents and/or documents that never have before been produced. To the extent that Plaintiff's Affidavit relies on documents that were not previously produced, the documents are outside the scope of consideration. Furthermore, to the extent Plaintiff's statements are irrelevant, generalized and in conflict with deposition testimony (self-serving), not based on personal knowledge, or inadmissible hearsay, they will not be considered.

B. Timeliness

Before commencing a Title VII action in federal court, a plaintiff in a deferral state like Florida must file a charge of discrimination within 300 days of the last discriminatory act. 42 U.S.C. § 2000e-5. Accordingly, only those claims arising within 300 days prior to the filing of the [discrimination charge] are actionable." *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1271 (11th Cir. 2002). Plaintiff filed a charge of discrimination on January 7, 2013. Thus, the relevant time period begins in March, 2012.

Despite the limitations period set forth in Title VII, claims that accrued prior to the 300 day period can be deemed timely filed if the claimant can establish the existence of a substantial nexus between the time-barred claims and the timely-asserted acts, in accordance with the "continuing violation" exception. *See Roberts v. Gadsden Memorial Hospital*, 835 F.2d 793 (11th Cir.1988). The continuing violation exception applies when there is evidence of an ongoing discriminatory practice or policy. Although discrete incidents of discrimination that are not the result of a

discriminatory practice or policy will not ordinarily amount to a continuing violation, if the evidence indicates that specific and related instances of discrimination are permitted by an employer to continue unremedied for so long as to amount to a practice or policy, a continuing violation may arise. *See Roberts*, 835 F.2d 793.The Roberts Court cautions, however, that the "continuing violation doctrine does not exist to give a second chance to an employee who allowed a legitimate Title VII claim to lapse." *Id*. at 800.

In order to determine whether otherwise barred claims fall within the continuing violation exception, courts consider whether the claims are related in subject matter and frequency and whether the alleged violations were permanent in the sense that they served to trigger the employee's awareness that her civil rights had been violated. *See id*. at 800–801; *Robinson v. Caulkins Indiantown Citrus Co.*, 701 F. Supp. 208, 211 (S.D. Fla. 1988). If, however, a substantial nexus is proven, thereby establishing a continuing violation, a plaintiff is entitled to have a court consider all relevant acts, including those that would otherwise be time-barred, as long as one or more of the related acts occurred within the statutory time frame. *See Roberts*, 835 F.2d at 799.

Plaintiff alleges several incidents of discrimination that occurred before March 2012, more than 300 days outside of when she filed a charge of discrimination. Plaintiff alleges one incident "prior to 2005," when a "Johnny C" grabbed her arm and fingers and twisted them open to show her fingernails and called people over to see them. Pl. Depo. at 81:16-82:14. Plaintiff alleged "[t]hese things were mentioned to H.R. about Johnny and things and stuff." *Id*. at 83:11-14. Plaintiff also alleges that after she presented legal documents to Starwood management, HR did not provide any training in regards to discrimination and gender identity. *Id*. at 150:24-151:18. Plaintiff alleges she received a Constructive Conduct Form in January 2009 for using a hotel guest

restroom rather than an employee restroom in violation of Starwood's Use of Facilities Policy. *Id*. at 131:8-140:18, Doc. 62-8.

Finally, Plaintiff describes an incident of misgendering in February 2011. Plaintiff was working a lunch function when the Banquet Manager at the time, Robin LaDuke, addressed Plaintiff by the wrong pronoun three times as guests were walking in. Pl. Depo. at 206:21-207:8. Plaintiff objected each time and started crying. *Id*. Plaintiff went to HR after this incident and told Ms. Gonzalez and Manager Nick Michas what happened. *Id*. at 207:17-24. MS. Gonzalez and Mr. Michas apologized to Plaintiff, but included the wrong pronoun ("sir") in their apology. *Id*. at 208:13-20. Plaintiff also referred to constant misgendering "every day since that day" seven years ago (2005 when she presented the Court Order legally changing her name) in her charge of discrimination.

Plaintiff argues that "all of the acts alleged in Plaintiff's complaint are supporting actions that are part of Defendant's hostile work environment, and provide evidence of Defendant's discriminatory animus." Accordingly, Plaintiff asserts that the continuing violation exception should apply to the pre-March 2012 incidents. However, the Court finds that Plaintiff has failed to establish the existence of a substantial nexus between the time-barred claims and the timely-asserted claims, as required under the continuing violation theory. *See, e.g. Roberts,* 835 F.2d at 801; *Robinson,* 701 F.Supp. at 211.

Although the violations seem to be related in terms of subject matter, the evidence does not demonstrate that the other two criteria of the continuing violation exception have been met. *See Roberts,* 835 F.2d 793. First, the incidents, which occurred over the course of an eight year period, are unrelated temporally. Because there were lengthy gaps between incidents (a four year break and then a two year lapse), the frequency element of the continuing violation exception

is not satisfied. *See Roberts,* 835 F.2d at 801 (with regard to a three year gap between incidents, the court stated "[w]here ... two incongruent discriminatory events are separated by a substantial time hiatus, the hiatus further supports the conclusion that the two incidents were discrete and unrelated.")

Moreover, the most important consideration in determining the existence of a substantial nexus is whether the violations were sufficiently permanent to the extent that they should have placed the employee on notice that her civil rights had been violated. *See Roberts,* 835 F.2d at 801; *Robinson,* 701 F.Supp. at 211; *Berry v. Board of Sup'rs of L.S.U.,* 715 F.2d 971 (5th Cir. 1983). Plaintiff alleges that she was sexually harassed by a Johnny C. back in 2005. Yet she did not report his conduct or file a complaint against him. More important is the fact that Plaintiff failed to file charges for more than seven years from the time she first experienced harassment at Starwood. At the very least, she should have filed charges in 2011 when she went to HR to report an incident of misgendering and Ms. Gonzalez and Mr. Michas called her "sir" despite her objections. *See Roberts,* 835 F.2d at 801 (holding that "the focus is on what event, in fairness and logic, should have alerted the average lay person to act to protect his rights, or when he should have perceived that discrimination was occurring.") quoting, *Dumas v. Town of Mount Vernon, Alabama,* 612 F.2d 974, 978. At that point it should have been clear to Ms. Versace that HR was not going to be responsive to her complaints and she needed to seek other recourse. Plaintiff knowingly failed to exercise her rights for at least seven years, and she is consequently barred from using the continuing violation theory to assert pre-March 2012 claims.

Plaintiff also refers to constant misgendering "every day since that day" seven years ago (2005 when she presented the Court Order legally changing her name) in her charge of discrimination. Conclusory and generalized allegations of discrimination are not probative and are

properly stricken by a district court. *Thomas v. Miami Dade Pub. Health Trust*, 369 Fed. App'x 19, 23 (11th Cir. 2010).

C. Hostile Work Environment

Defendant contends summary judgment is warranted on Plaintiff's hostile work environment claim because Plaintiff does not belong to a protected class[3], and, alternatively, she cannot establish the fourth element of her prima facie case.

To establish a hostile work environment claim, Ms. Versace must show that: (1) she belongs to a protected group, (2) she has been subject to unwelcome harassment, (3) the harassment was based on a protected characteristic, (4) the harassment was sufficiently **severe or pervasive** to alter the terms and conditions of employment and create a discriminatory abusive working environment, and (5) the employer is responsible for such environment under either a theory of vicarious or of direct liability. *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002). The requirement that the harassment be "severe or pervasive" contains an objective and subjective element. The behavior must result in an environment "that a reasonable person would find hostile or abusive," and one which the victim "subjectively perceive[s] … to be abusive." *Id.* at 1276. In evaluating the severity of the harassment, courts consider the totality of the circumstances, including the frequency and severity of the conduct, whether the conduct is physically threatening or humiliating or a mere offensive utterance, and whether the conduct unreasonably interferes with the employee's job performance. *Id*. Either severity or pervasiveness suffices to establish the fourth element. *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 808 (11th Cir.2010)

[3] The Court will assume for the purpose of this motion that Plaintiff belongs to a protected class.

Plaintiff has failed to establish the fourth element of a hostile work environment claim - that the alleged harassment was so severe or pervasive as to alter the terms and conditions of employment and create a discriminatorily abusive working environment. Although Plaintiff claims that she was misgendered[4] every day of the relevant time period, she only provides specifics as to the June 2012 incident with Ms. Gonzalez, the October 2012 incident involving Ms. Gonzalez and security officer Andy Johnson, and finally, the January 2013 incident involving Ms. Zamot and Director of Security, Eric Clay. Three or four relatively minor incidents during the relevant time frame does not amount to frequent conduct. While the conduct in question may be considered upsetting, the use of the wrong pronoun is not profane. Furthermore, Plaintiff received apologies from those individuals. Plaintiff also fails to demonstrate how the alleged incidents interfered with her work. There is no indication that any of the allegedly wrongful conduct interfered with Plaintiff's job performance. Though Ms. Versace was issued several disciplinary warnings, Ms. Versace concedes that she did a number of the very things for which she was reprimanded.

In sum, the totality of circumstances does not meet the sufficiently severe or pervasive standard required to support Plaintiff's claim. See *Clark v. South Broward Hosp. Distr.*, 601 Fed. App'x 899-900 (11th Cir. 2015).

D. Disparate Treatment

Plaintiff argues that Starwood discriminated against her based on her gender identity.

1. Prima Facie Case

A plaintiff may establish a prima facie case of gender discrimination through circumstantial evidence by proving that (1) she belongs to a protected class; (2) she was subjected

[4] Plaintiff explains misgendering to mean when others intentionally refer to her using the wrong gender pronoun. Pl. Depo. 157:7-160:11.

to adverse employment action; (3) her employer treated similarly situated employees outside her classification more favorably; and (4) she was qualified to do the job. *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1091 (11th Cir. 2004).

As stated above, the Court will assume for the purpose of this motion that Plaintiff belongs to a protected class and the first prong is satisfied. As to the second prong, Starwood terminated Plaintiff which constitutes adverse employment action.[5] The fourth prong is satisfied because there is no evidence that Plaintiff was unqualified. Therefore, the Court need only analyze the third prong of Plaintiff's prima facie case.

With respect to the third prong, Defendant contends that Plaintiff fails to specifically name someone who was nearly identical to her but was more favorably treated. A relevant comparator is an employee who is similarly situated to the plaintiff "in all relevant respects." *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1091 (11th Cir. 2004) (citation omitted). In determining whether a comparator is similarly situated, we inquire "whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." *Burke–Fowler v. Orange Cnty.*, 447 F.3d 1319, 1323 (11th Cir. 2006) (quotation omitted). And "[w]hen making that determination, we require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions." *Id.* (alteration and quotation omitted). Plaintiff has failed to identify a similarly situated comparator. It is not sufficient to allege that the comparators are all other non-transgender co-workers.

[5] Although Plaintiff claims that she suffered adverse employment action in June and October, 2012, the evidence reflects that she was paid for the shifts she missed due to the suspensions. Also, the evidence does not support her claim that she was entitled to a promotion.

A plaintiff's failure to produce a comparator does not necessarily doom the plaintiff's case; rather, the plaintiff will survive summary judgment if she presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent. *Smith v. Lockheed–Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011). A triable issue of fact exists if the record, viewed in a light most favorable to the plaintiff, presents a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker. (*Id* .) (citations and quotations omitted). The Court finds that there is not sufficient evidence to create a triable issue of Starwood's discriminatory intent. Furthermore, Starwood has offered evidence that similarly situated employees were disciplined for the same conduct as Plaintiff. For example, a male on-call server received a final written warning for leaving his work area without notifying a manager on that same day. Decl. of Dennis Robertson, at ¶ 4. As Plaintiff is unable to establish the third prong of the prima facie case, Starwood is entitled to summary judgement on this claim.

E. Retaliation

To establish a prima facie case of retaliation under Title VII, a plaintiff must show that (1) she engaged in protected expression; (2) she suffered an adverse employment action; (3) there is a causal connection between the expression and the adverse action. *Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501, 507 (11th Cir. 2000).

1. Prima Facie Case

Ms. Versace's termination is obviously an adverse employment action. Taking her informal as well as written complaints through various levels of Starwood's management, culminating in her written discrimination charge with the Florida Commission on Human Relations ("FCHR"), Plaintiff was clearly engaged in protected expression in the months preceding her termination.[6]

[6] The Eleventh Circuit has indicated that Title VII protects not only those "individuals who

Plaintiff's oral complaints about the workplace preceded her discharge and she was fired the day after she filed her written discrimination charge with the FCHR.

To establish a causal connection, a plaintiff must show that the decision-makers were aware of the protected conduct and that the protected activity and the adverse act were at least somewhat related. *Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004) (in the context of an Americans With Disabilities Act case). "Close temporal proximity between the protected activity and the adverse action may be sufficient to show that the two were not wholly unrelated." *Bass v. Bd. of County Comm'rs*, 256 F.3d 1095, 1119 (11th Cir. 2001) (citation omitted).

Plaintiff made an internal ethics complaint in October 2012. Ms. Campbell then internally investigated Plaintiff's complaint. On January 3, 2012, Plaintiff objected to being sent home for wearing the wrong uniform and went to HR to complain that Mr. Futwi was discriminating against her. The next day, she objected to the final written warning she received for insubordination and told Ms. Zamot it was a false report. Plaintiff signed her charge of discrimination on January 7, 2012 and Ms. Campbell notified her on January 8, 2012 that Starwood had made the decision to terminate her. Such close temporal proximity compels a reasonable inference of a causal relation between the protected expression and the adverse action.[7] Plaintiff has established a prima facie case of retaliation.

Under the *McDonnell Douglas* framework, "the successful assertion of a prima facie case then creates a rebuttable presumption that the employer unlawfully discriminated against the

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have filed formal complaints," but also those "who informally voice complaints to their superiors or who use their employers' internal grievance procedures." *See Rollins v. Fla. Dep't of Law Enforcement*, 868 F.2d 397, 400 (11th Cir. 1989).

[7] Based on the record, the Court assumes Defendant was aware of Plaintiff's discrimination charge with the FCHR. In any event, Plaintiff's oral complaints in the months preceding her termination provide the requisite temporal proximity.

plaintiff." *Rioux v. City of Atlanta*, 520 F.3d 1269, 1275 (11th Cir. 2008) (citations omitted) (internal quotation marks omitted). The burden then shifts to the employer to produce evidence that it had a legitimate non-discriminatory reason for the challenged action. Starwood contends that Plaintiff came to work in the wrong uniform and her conduct was insubordinate, disruptive, and unprofessional, in violation of Starwood's Standards of Conduct policy. This reason is sufficient to satisfy Starwood's burden. Consequently, the burden shifts back to Plaintiff to "show that the proffered reason really is a pretext for unlawful discrimination." *Rioux*, 520 F.3d at 1275 (citations omitted) (internal quotation marks omitted). To demonstrate pretext she must show "that the employer's proffered reason [for her discharge] was false and that the true motive for the action was discriminatory." *Thomas v. CVS/Pharmacy,* 336 Fed.Appx. 913, 914 (11th Cir. 2009) (citing *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)). "To survive summary judgment, [Plaintiff] need only show that a genuine issue of material fact in dispute could lead a rational trier of fact to make a finding of pretext." *Id.* (citing *Chapman v. AI Transp.*, 229 F.3d 1012, 1024–25 (11th Cir. 2000)).

Plaintiff alleges that Defendant's proffered reason for her termination is pretext for discrimination. She asserts that she was singled out and Starwood departed from its policies in its treatment of her and denies exhibiting any inappropriate behavior. This court finds that there are genuine issues of disputed fact as to whether Defendants' stated non-discriminatory reason is a pretext for retaliation in violation of Title VII. Given the facts presented above, viewed in the light most favorable to Versace, Defendant's Motion for Summary Judgment regarding Plaintiff's retaliation claim (Count III) is due to be denied.

F. Breach of Contract

Plaintiff does not oppose Defendant's Motion for Summary Judgment in regards to her breach of contract claim in her Response or Sur-Reply. Accordingly, summary judgment is warranted. *See Freese v. Wuesthoff Health Sys., Inc.*, No. 6:06 CV175ORL31JGG, 2006 WL 1382111, at *8 (M.D. Fla. May 19, 2006). Therefore it is:

ORDERED that Defendant's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**. With respect to Counts I, II, and IV, judgment will be entered for the Defendant. The motion is DENIED as to Count III (Title VII Retaliation).

DONE and **ORDERED** in Chambers, Orlando, Florida on December 3, 2015.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party