IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

WENDY FOSTER,	§	
Plaintiff,	§	
	§	
v.	§	**MO:18-CV-00204-DC**
	§	
FERRELLGAS, INC.,	§	
Defendant.	§	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING AS MOOT PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

BEFORE THE COURT are the Motion for Summary Judgment filed by Defendant Ferrellgas, Inc. (Defendant) and Motion for Partial Summary Judgment filed by Plaintiff Wendy Foster (Plaintiff). (Docs. 25-1, 26). Both motions were filed on February 14, 2020. *Id.* The parties filed timely[1] responses on March 6, 2020. (Docs. 31, 32). Defendant filed a reply in support of its Motion for Summary Judgment on March 13, 2020. (Doc. 33). After due consideration of the parties' filings, the record, and the applicable law, the Court **GRANTS** Defendant's Motion for Summary Judgment (Doc. 25) and **DENIES AS MOOT** Plaintiff's Motion for Partial Summary Judgment (Doc. 26).

I. BACKGROUND

This case stems from the employer-employee relationship between Plaintiff and Defendant. (*See* Doc. 1). Plaintiff began working for a company by the name Bridger as a Crude Logistics Scheduler (also known as a dispatcher) on or about December 17, 2014.[2] Defendant acquired Bridger on June 24, 2015, and operated Bridger as one of its divisions. After the

1. Plaintiff and Defendant requested an extension of time on February 21, 2020, and February 24, 2020, respectively. (*See* Docs. 27, 28). The Court granted the parties an extension, ordering them to file their responses on or before March 6, 2020. (*See* Text Only Entries, Feb. 24, 2020).
2. The background is, in large part, composed of the parties' statements of facts. (*See* Docs. 25-14; 32).

acquisition, Plaintiff was employed by Defendant in the Bridger division as a dispatcher. According to Defendant, Plaintiff confirmed she could perform essential job functions and did not identify or request accommodations.

Plaintiff alleges that when she was originally hired, Tom Glenn (Glenn), one of her supervisors at the time, promised her she would receive a $15,000.00 raise after thirty days, which would increase her pay from $50,000.00 to $65,000.00 annually. When Plaintiff did not receive a raise within thirty days, Plaintiff complained to Glenn and then to his replacement, Lyle Lawrence (Lawrence). Plaintiff also contends that when she complained to Lawrence regarding her raise, Lawrence responded by stating Plaintiff would not get a raise because she is black. In addition, Plaintiff complained to Larry Garren (Garren), the Area Operations Manager, and Zach Hepperle (Hepperle), the Regional Operations Manager for the Permian Basin and Garren's supervisor. Defendant alleges Garren could not give Plaintiff a raise because, at the time, Defendant had a pay freeze in place due to a financial downturn in the oil and gas industry. Finally, Defendant states Plaintiff did not file a complaint regarding this issue with Human Resources (HR), nor did she put her complaint in writing.

Plaintiff's immediate supervisor was Bart Larson (Larson), the Dispatcher Manager. During her employment with Defendant, Defendant hired Larson's uncle, Eldon Wanzer (Wanzer), as a dispatcher. Plaintiff alleges Wanzer made racially motivated jokes, such as telling Plaintiff "she is too black to blush." Moreover, Wanzer allegedly sexually harassed Plaintiff. According to Plaintiff, Wanzer wore loose gym shorts to work, sat on Plaintiff's left side, took out his penis, and asked Plaintiff to touch it. Plaintiff refused Wanzer. On a separate occasion, Wanzer allegedly followed Plaintiff into a bathroom and locked the door. After Plaintiff asked Wanzer what he was doing, Wanzer stated, "Just let me touch it." Plaintiff pushed past Wanzer

to leave the restroom. Wanzer then asked Plaintiff, "Who are you going to tell, [Larson]?" In addition, Plaintiff claims Wanzer warned her, "You really are good at your job[.] Do you wan[t to] lose it?" Plaintiff contends that on a different day, Wanzer insisted Plaintiff go with him to Chick-fil-a to pick up breakfast for the office. After going through the drive-thru lane, Wanzer allegedly pulled into an alley and pulled his penis out. Wanzer then put his hand on Plaintiff's neck and pushed her toward his penis saying, "Suck it for me real quick, and we can go." Plaintiff pulled back, got out of the truck, and stated she would walk back to the office. Wanzer became angry and told her she could not walk back. Plaintiff got back inside the truck. On that same morning, Wanzer saw Plaintiff leave a restroom at the office, pulled her into an empty room with the lights off and told Plaintiff, "You know what I want, and you just need to make me happy. No one knows where we are, and they can't hear." Plaintiff asked Wanzer to stop and left the room.

According to Plaintiff, she asked Larson whether Wanzer could fire her. Larson answered in the negative and told Plaintiff that he was her supervisor and that Wanzer was just a Lead. Defendant states Wanzer was relocated to a different location prior to Plaintiff being laid off. Moreover, Defendant contends Plaintiff did not report Wanzer's conduct to Defendant's HR department, nor to Garren.

On January 5, 2016, Plaintiff was provided with an Employee Counseling Report, stating Plaintiff was late to work and indicating a history of tardiness. Plaintiff alleges she was late to work because she was taking migraine medication and did not hear her alarm go off. According to Plaintiff, Larson told her that if she took her migraine medicine, she would be fired. Plaintiff obtained a note from her doctor dated January 29, 2016, asking that Plaintiff be allowed to

consume pain medication for headaches as directed. Plaintiff presented the note to Defendant shortly before she was terminated.

Plaintiff lastly alleges that a week before she was terminated she complained to Garren that she was being paid less because she is black. Plaintiff requested that her pay be corrected. On February 15, 2016, Plaintiff was asked to meet Garren in the conference room where she was advised of her termination by Garren and Susan Boon (Boon). Plaintiff alleges she was not given a reason for her termination and that Garren stated he did not know why Plaintiff was being fired. Additionally, Plaintiff was presented with a document offering pay for two weeks if she signed a release of all claims. Plaintiff declined to sign the document.

Defendant claims that in 2016, due to its acquisition of Bridger and a downturn in the price of oil, Defendant was forced to conduct major layoffs across the country. As part of a reduction in force (RIF) at Bridger, Defendant decided to eliminate five dispatcher positions. Sometime in January or February 2016, Hepperle advised Larson and Garren of the RIF. Subsequently, Hepperle, Larson, and Garren identified an "A team" of dispatchers who would not be terminated in the RIF. Defendant alleges Plaintiff was not included in the "A team" because she took lunches that surpassed an hour, used her cell phone during work hours, and exceeded her authority by deviating from established protocols. Plaintiff was not replaced after her termination.

On September 30, 2016, Plaintiff filed a Charge (Original Charge) with the Texas Workforce Commission (TWC) and the Equal Employment Opportunity Commission (EEOC). Plaintiff checked the boxes for discrimination based on race, color, sex, national origin, retaliation, and disability. *See* Def.'s Ex. E. In the Original Charge, Plaintiff states her belief that she was not paid equally because she is black and Wanzer's racially motivated jokes targeting

Plaintiff. *Id.* Plaintiff also included her history of migraines and Larson's statement that he would fire Plaintiff if she continued to take her medication. *Id.* Plaintiff did not include any facts related to any sexual harassment she might have suffered while working for Defendant. *Id.*

On January 19, 2017, Plaintiff filed an Amended Charge with the TWC and the EEOC. *See* Def.'s Ex. F. In the Amended Charge, Plaintiff adds, "I was subjected to quid pro quo sexual harassment and a hostile work environment by my Supervisor Eldon Wanzer." *Id.*

Plaintiff filed the instant lawsuit on November 20, 2018. (*See* Doc. 1). She raises six causes of action against Defendant: (1) race discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et. seq.*, (Title VII); (2) race retaliation in violation of Title VII; (3) violation of 42 U.S.C. § 1981; (4) quid pro quo sex discrimination in violation of Title VII; (5) hostile work environment in violation of Title VII; and (6) disability discrimination in violation of the Americans with Disabilities Act of 1990, as amended (ADAAA). *Id.*

Defendant moves for summary judgment on all claims. (*See* Doc. 25-14). First, Defendant alleges summary judgment is warranted as to Counts IV and V, premised on Wanzer's alleged unwelcomed sexual advances, because Plaintiff did not exhaust her administrative remedies as to those claims. *Id.* Next, Defendant argues Counts I, II, III, IV, and VI should be dismissed because Plaintiff cannot establish one or more of the elements necessary to establish a *prima facie* case of race discrimination, race retaliation, quid pro quo sexual harassment, and disability discrimination. *Id.* Alternatively, Defendant alleges Plaintiff lacks evidence that Defendant's decision for terminating her, the RIF, was pretextual. *Id.* Finally, Defendant contends the hostile work environment claim also fails because Plaintiff cannot

establish Wanzer's actions affected a term of Plaintiff's employment or that she reported Wanzer's actions. *Id.*

Plaintiff responds that she exhausted her administrative remedies because the Amended Charge relates back to the Original Charge. (*See* Doc. 32). As to the remaining claims, Plaintiff argues there are genuine issues of material fact for trial. *Id.* Finally, Plaintiff alleges a reasonable juror could find that Defendant's given reasons for terminating Plaintiff and refusing to give her a raise were pretext based on evidence establishing the RIF was false and disparate treatment. *Id.*

Finally, Plaintiff moves for summary judgment on Defendant's failure to mitigate damages affirmative defense. (*See* Doc. 26). Plaintiff claims Defendant cannot point to a single "substantially equivalent" job for which Plaintiff did not apply. *Id.* Defendant counters that Plaintiff's Motion for Partial Summary Judgment should be denied because Plaintiff cannot sustain her *prima facie* burden of identifying evidence in the record that shows the absence of employment opportunities available to her. (*See* Doc. 31-1). Secondly, Defendant alleges the evidence produced by Plaintiff raises an issue of fact as to whether equivalent employment was available to Plaintiff in 2016. *Id.*

II. LEGAL STANDARD

Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court must examine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52. In making this determination, the Court must consider the record as a whole by reviewing all

pleadings, depositions, affidavits, and admissions on file, and drawing all justifiable inferences in favor of the party opposing the motion. *See Caboni v. Gen. Motors Corp.*, 278 F.3d 448, 451 (5th Cir. 2002). The Court may not weigh the evidence or evaluate the credibility of witnesses. *Id.*

The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party demonstrates an absence of evidence supporting the nonmoving party's case, then the burden shifts to the nonmoving party to come forward with specific facts showing that a genuine issue for trial exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving party cannot rest on the mere allegations of the pleadings to sustain this burden. *See* Fed. R. Civ. P. 56(e); *see also Anderson*, 477 U.S. at 248. "After the nonmovant has been given an opportunity to raise a genuine factual issue, if no reasonable juror could find for the nonmovant, summary judgment will be granted." *Caboni*, 278 F.3d at 451. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. The admissibility of summary judgment evidence is subject to the same rules of admissibility applicable to a trial. *See Resolution Tr. Corp. v. Starkey*, 41 F.3d 1018, 1024 (5th Cir. 1995) (citing *Munoz v. Int'l All. of Theatrical Stage Emps. & Moving Picture Mach. Operators of the U.S. & Can.*, 563 F.2d 205, 297 n.1 (5th Cir. 1977)). Federal courts sitting in diversity apply state substantive law and federal procedural law. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 437 (2010) (citing *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996)).

III. DISCUSSION

As detailed previously in this Order, Plaintiff raises six causes of action against Defendant. (*See* Doc. 1). Defendant moves to dismiss all counts raised against it. (*See*

Doc. 25-14). Further, Plaintiff moves for summary judgment on Defendant's mitigation of damages affirmative defense. (*See* Doc. 26). Because Plaintiff's Motion for Partial Summary Judgment on the mitigation of damages issue is dependent on Plaintiff establishing a *prima facie* case, the Court will address Defendant's Motion for Summary Judgment first.

A. Counts IV & V Are Time-Barred

Defendant argues summary judgment is warranted as to Counts IV and V, quid pro quo sexual harassment and hostile work environment, because Plaintiff's Original Charge filed with the TWC and EEOC on September 30, 2016, did not include facts related to sexual harassment. (*See* Doc. 25-14 at 19–20). Rather, Plaintiff added allegations regarding these two claims on January 19, 2017, when she filed an Amended Charge more than 300 days after she was terminated. *Id.* at 20. Defendant alleges Plaintiff's Amended Charge is only timely if it relates back to the date of the Original Charge. *Id.* It is Defendant's position that quid pro quo sexual harassment and hostile work environment are new legal theories based on new facts relating to Wanzer's conduct and thus, the relation back doctrine does not apply in this case. *Id.* at 21. On this basis, Defendant contends, summary judgment is appropriate as to both Counts IV and V. *Id.*

Plaintiff counters the Amended Charge relates back to the Original Charge because Plaintiff checked the same boxes in both charges, including sex discrimination. (*See* Doc. 32 at 11). Plaintiff states sexual harassment is a form of discrimination based on sex. *Id.* Further, Plaintiff notes the EEOC served the Amended Charge on Defendant and that Defendant filed a position statement in response to the Amended Charge. *Id.* at 11–12. Thus, Defendant had notice of the sexual harassment allegations raised by Plaintiff. *Id.*

Defendant replies the Fifth Circuit rejected the proposition "that checking a box has any legal import" in determining whether the relation back doctrine applies. (*See* Doc. 33 at 2–3). Finally, Defendant counters that responding to an EEOC charge does not make it timely, nor does it remedy a complainant's failure to timely raise her claims. *Id.* at 6.

A plaintiff alleging discrimination must exhaust his or her administrative remedies before filing suit under Title VII. *See Castro v. Tex. Dep't of Criminal Justice*, 541 F. App'x 374, 379 (5th Cir. 2013) (citations omitted). This means plaintiffs are required to file a charge with the EEOC in which they sufficiently provide notice of their claims against the defendant *within 300 days* under Title VII, *Newton v. Securitas Sec. Servs., USA, Inc.*, 250 F. App'x 18, 20 (5th Cir. 2007), or *180 days* under the Texas Labor Code, *Green v. Costco Wholesale Corp.*, No. 3:15-CV-1868-N, 2017 WL 10110295, at *3 (N.D. Tex. May 30, 2017), after learning of the conduct alleged. Moreover, a "Title VII suit may 'extend as far as, but not further than, the scope of the EEOC investigation which could reasonably grow out of the administrative charge.'" *Simmons-Myers v. Caesars Entm't Corp.*, 515 F. App'x 269, 273 (5th Cir. 2013) (citations omitted). The Fifth Circuit does not condone lawsuits exceeding the scope of the investigation because doing so would frustrate the administrative process intended to promote conciliation. *See Castro*, 541 F. App'x at 379 (quoting *McClain v. Lufkin Indus.*, 519 F.3d 264, 273 (5th Cir. 2008)).

"EEOC regulations allow a claimant to amend a charge of discrimination to 'cure technical defects or omissions' or to 'clarify and amplify' the initial allegations." *Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 878 (quoting 29 C.F.R. § 1601.12(b)). In instances where the amendment "involves acts that 'relate[] to or grow[] out of the subject matter of the original charge,' the amendments will 'relate back to the date the charge was first received.'" *Id.* (quoting 29 C.F.R. §§ 1601.12(b), 1626.8(c)). However, if the amendment raises new legal

theories, it does not "relate back" to an original charge. *Id.* (citations omitted). Whether an amended charge relates back to the original charge does not turn on whether the complainant adds facts but rather, on "whether the employee *already included* sufficient facts in [her] original complaint to put the employer on notice that the employee might have additional allegations of discrimination." *Id.* at 879 (emphasis in original).

There is no genuine dispute of material fact relating to the exhaustion issue. Plaintiff filed her Original Charge within the 300-day deadline. *See* Def.'s Ex. E. The Original Charge checked the boxes for race, color, sex, retaliation, and disability discrimination, but did not include facts related to Plaintiff's sexual harassment claims. *Id.* Plaintiff stated:

> I believe that I have been discriminated against on the basis of my sex (female), race/color (black), national origin (African-American), and/or disability . . . when I was paid less than other non-black and/or non-female employees and my employment was terminated. I believe I was retaliated against for complaining about discrimination.

Id. The Amended Charge, on the other hand, was filed more than 300 days after Plaintiff was terminated—the last alleged discriminatory action taken by Defendant. *See* Def.'s Ex. F. The Amended Charge also checks the boxes for race, color, sex, retaliation, and disability discrimination. *Id.* However, it adds the allegation that Plaintiff "was subjected to quid pro quo sexual harassment and a hostile work environment by [Wanzer]." *Id.* Plaintiff also added the following:

> I believe that I have been subjected to a hostile work environment, quid pro quo harassment, and/or discriminated against on the basis of my sex (female), race/color (black), national origin (African-American), and/or disability . . . when I was paid less than other non-black and/or non-female employees and my employment was terminated. I believe I was retaliated against for complaining about discrimination.

Id.

Moreover, Plaintiff does not dispute that her sexual harassment claims were not included in the Original Charge. (*See* Doc. 32 at 11). Rather, she argues her sexual harassment claims are "timely because they were included in the Amended Charge" and the Amended Charge relates back to the Original Charge. *Id.* Consequently, the question before the Court is whether Plaintiff's sexual harassment claims are time-barred. This question hinges on whether the Amended Charge relates back to the date of the filing of the Original Charge.

Construed liberally, Plaintiff's Original Charge alleges sex, race, and disability discrimination and retaliation based on race. *See* Def.'s Ex. E. However, the facts included in the Original Charge make no reference to sexual harassment. *Id.* The Court finds that Plaintiff's amendment added a "new and independent charge, sexual harassment." *See Hornsby v. Conoco, Inc.*, 777 F.2d 243, 247 (5th Cir. 1985) (differentiating between a sex discrimination claim and a sexual harassment claim premised on new facts). Further, there is no question that the sexual harassment claims are supported by new and independent facts related solely to Wanzer's conduct while employed by Defendant such that the Original Charge could not have placed Defendant on notice that Plaintiff might have additional allegations of sexual harassment. (*See* Doc. 32 at 9–10). Moreover, whereas Plaintiff's sex-based discrimination allegation is premised on the contention that she was paid less because she is female, her quid pro quo sexual harassment and hostile work environment claims are based on Wanzer's unwelcomed sexual advances. (*See* Doc. 1). The Fifth Circuit held this type of amendment is "far more substantive than merely cures to technical defects." *Hornsby*, 777 F.2d at 247. Thus, the Amended Charge does not properly relate back to the Original Charge.

Plaintiff argues that because Defendant was on notice of the sexual harassment allegation, the exhaustion requirement was met. (*See* Doc. 32 at 11–12). However, this would

only be the case if the facts supporting both the amendment and the original charge are essentially the same. *See Manning*, 332 F.3d at 879 (explaining the narrow exception to the general rule that new legal theories raised in an amendment do not relate back to the original charge). As explained above, that was not the case here.

The time period for filing an EEOC charge is a period of limitations. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982) (citation omitted) (discussing the purpose of the timely-filing requirement). In addition to providing notice of claims against defendants so as to promote conciliation, the timely filing requirement is meant to prevent "the pressing of 'stale' claims." *Id.* (citation omitted). Thus, to the extent Plaintiff alleges that Defendant's actual notice of Plaintiff's sexual harassment allegations against it cures her failure to timely file her charge including said claims with the EEOC or TWC, the Court finds the argument is without merit.

The Court finds Plaintiff's Amended Charge was an addition to the Original Charge rather than an allowed amendment and as such, it is barred by the statute of limitations. Consequently, the Court dismisses Plaintiff's sexual harassment claims against Defendant, which include Counts IV and V.

B. *Prima Facie* Case

Defendant next argues Plaintiff cannot establish the *prima facie* elements of her claims for quid pro quo sexual harassment (Count IV), race discrimination (Counts I and III), retaliation based on race (Count II), and disability discrimination (Count VI). (*See* Doc. 25-14 at 22). Because the Court found Plaintiff's quid pro quo sexual harassment cause of action is time-barred, the Court need not decide whether Plaintiff established a *prima facie* case for quid pro quo sexual harassment.

1. *Counts I & III: Race Discrimination & Violation of 42 U.S.C. § 1981*[3]

Plaintiff alleges Defendant violated Title VII and 42 U.S.C. § 1981 when it paid her less than other non-black dispatchers and when it terminated Plaintiff because she is black. (*See* Doc. 1 at 6–7). Defendant argues Plaintiff's claim based on disparate pay fails because there is no evidence of any similarly situated, better-paid employee. (*See* Doc. 25-14 at 23). Further, Defendant claims Plaintiff's race discrimination claim premised on her termination fails because Plaintiff cannot adduce evidence that she was replaced by, or treated differently than, a non-protected comparator. *Id.* at 24.

a. *Race Discrimination: Disparate Pay*

"Under the *McDonnell Douglas* framework, to succeed on [her] disparate compensation claim, [Plaintiff] must first present a *prima facie* case of discrimination." *Minnis v. Bd. of Supervisors of La. State Univ. and Agric. and Mech. Coll.*, 620 F. App'x 215, 218 (5th Cir. 2015). Thus, Plaintiff must show that: "(1) '[s]he was a member of a protected class,' and (2) '[s]he was paid less than a non-member for work requiring substantially the same responsibility.'" *Id.* (quoting *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 522 (5th Cir. 2008)).

Plaintiffs claiming disparate treatment in pay are required to show their "circumstances are 'nearly identical' to those of a better-paid employee who is not a member of the protected class." *Taylor*, 554 F.3d at 523 (citing *Little v. Republic Ref. Co.*, 914 F.3d 93, 97 (5th Cir. 1991)). However, plaintiffs may not rely on the type of pattern-or-practice evidence, such as statistical evidence, in making this showing. *Id.* (citing *Thompson v. Leland Police Dep't*, 633 F.2d 1111, 1114 (5th Cir. 1980)) (explaining "evidence that is acceptable in class action suits

3. The parties agree that the analysis is the same for race discrimination under Title VII (Count I) and race discrimination under § 1981 (Count III). (*See* Docs. 25-14 at 22; 32 at 13).

alleging similar conduct" is not acceptable for a plaintiff who pursues an individual claim). Rather, the evidence must show the plaintiff's "pay was lower than *specific* employees who are not members of the protected class." *Id.* (emphasis in original). Courts consider factors such as job responsibility, experience, and qualifications when deciding whether a comparator is similarly situated. *See Lavigne v. Cajun Deep Founds., LLC*, 654 F. App'x 640, 646 (5th Cir. 2016).

Defendant concedes that Plaintiff, a black female, is a member of a protected class. (*See* Doc. 25-14 at 22 n.7). However, it argues Plaintiff fails to identify a comparator that is similarly situated. *Id.* Defendant contends Plaintiff's sole evidence as to this point is a conversation she overheard where a white female said she was making $15,000.00 per year more than Plaintiff. *Id.* at 23. Further, Defendant emphasizes that Plaintiff testified she could not recall any other dispatchers, their responsibilities, their education, how long they worked for Defendant, or who they reported to. *Id.*

Plaintiff responds there is evidence in the record that "white comparators were paid more." (*See* Doc. 32 at 13). Specifically, Plaintiff points to Defendant's answers to Plaintiff's first set of interrogatories where Defendant lists the name, age, race, gender, and salary of seven dispatchers "whose terms of employment overlapped with Plaintiff's." *Id.* at 13. The chart lists five white female dispatchers as making an average of $64,000.00 per year. *See* Def.'s Answer to Plf.'s Interrogatories, at 4. One of the white females made $70,000.00 per year, two made $60,000.00 per year, and one made $65,000.00 per year. *Id.* In addition, Plaintiff argues a 35-year-old white female was paid $65,000.00 per year for the same position and at the same location Plaintiff worked. (*See* Doc. 32 at 13). Next, Plaintiff emphasizes the salary of two white males who also worked as dispatchers when Plaintiff worked for Defendant. *Id.* One had an

annual salary of $70,000.00 and the other $85,000.00. *See* Def.'s Answer to Plf.'s Interrogatories, at 4. Finally, Plaintiff points to the average salary for dispatchers in Midland/Odessa, $67,857.00, and compares that figure to Plaintiff's annual salary of $50,000.00. (*See* Doc. 32 at 14).

Defendant replies the evidence supplied by Plaintiff is not sufficient because it does not include "who the comparators reported to, their responsibilities, when they were hired, and their 'job duties, disciplinary histories, or levels of experience.'" (*See* Doc. 33 at 6–7).

Plaintiff's evidence, a chart depicting statistical data related to dispatchers employed by Defendant whose "terms of employment overlapped with Plaintiff's,"[4] is not sufficient to establish a *prima facie* case of discrimination based on disparate compensation because it does not provide specific evidence related to each of the white employees' education, skills, responsibilities, hire date, initial salary, experience, or performance. *See Hannon v. Kiwi Servs.*, No. 3:10-CV-1382-K-BH, 2011 WL 7052795, at *6 (N.D. Tex. Dec. 30, 2011), *report and recommendation adopted as modified*, No. 3:10-CV-1382-K, 2012 WL 234650 (N.D. Tex. Jan. 24, 2012) (finding the plaintiff failed to provide any evidence that the named white employees were in circumstances nearly identical to him and thus granted summary judgment in the defendant's favor). As noted previously, statistical data is not sufficient to establish the comparators' work required substantially the same responsibility as Plaintiff's work. *See Taylor*, 554 F.3d at 523. The same is true of the statistical data related to dispatchers generally employed in Midland/Odessa. *Id.*

4. Plaintiff emphasizes the alleged comparators' terms of employment overlapped with Plaintiff's terms of employment based on Defendant's response to interrogatories. (Doc. 32 at 13–14). However, Plaintiff does not specify the terms of employment, nor does having the same terms of employment indicate that the purported comparators' experience, qualifications, skills, effort, or performance was nearly identical to Plaintiff's.

Similarly, Plaintiff's contention that the white employees worked under substantially similar circumstances because they held the same position, worked at the same location and were employed during the same time that Plaintiff worked for Defendant is not sufficient to meet her evidentiary burden. Plaintiff would have the Court hold that merely because all dispatchers hold the same title, their work involved equal skill, effort, and responsibility. However, the Court cannot do so. *See Howard v. Edgewood Indep. Sch. Dist.*, No. 5-16-CV-00962-FB-RBF, 2019 WL 570776, at *10 (W.D. Tex. Feb. 11, 2019) (finding plaintiff's allegation that all head coaching varsity positions involve "equal skill, effort, and responsibility" was not sufficient). Without more information regarding job responsibilities, experience, or qualifications of the white dispatchers, the Court is unable to compare them to Plaintiff. *See Kidd v. City of Hous.*, No. 4:17-CV-01695, 2019 WL 6913317, at *5 (S.D. Tex. Feb. 7, 2019) ("Without knowing the identity, salary, job responsibilities, experience, or qualifications of these five males, however, the [c]ourt cannot compare them to [the plaintiff]." (footnote omitted)); *see also Abila v. Amec Foster Wheeler USA Corp.*, 216 F. Supp. 3d 778, 784 (S.D. Tex. 2016) (granting summary judgment in defendant's favor because plaintiff, despite identifying four persons outside his protected class who were paid more than he, failed to present evidence that "his circumstances were nearly identical to those of any one of the better-paid non-Hispanic" employees).

In sum, the Court finds Plaintiff fails to show that she was paid less than someone outside her protected class for work requiring substantially the same responsibility. Consequently, she fails to establish a *prima facie* case of race discrimination on the basis of disparate pay.

b. *Race Discrimination: Termination*

In RIF cases, "the Fifth Circuit has modified the *McDonnell Douglas* test in the context of termination cases." *Eugene v. Rumsfeld*, 168 F. Supp. 2d 655, 668 (S.D. Tex. 2001) (citations

omitted). This is so because plaintiffs are incapable of proving "actual replacement by someone outside the protected group." *Id.* (citation omitted). Rather, to establish a *prima facie* case of discrimination, Plaintiff must show: "(1) she is a member of a protected class; (2) she was adversely affected by the employer's decision; (3) she was qualified to assume another position; and (4) others who were not members of the protected class remained in similar positions." *Id.* (citing *Bauer v. Albemarle Corp.*, 169 F.3d 962, 966 (5th Cir. 1999); *Meinecke v. H & R Block of Hous.*, 66 F.3d 77, 83 (5th Cir. 1995); *Vaughn v. Edel*, 918 F.2d 517, 521 (5th Cir. 1990)). Alternatively, as to the fourth element, Plaintiff may provide "evidence, either circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Id.* at 668–69 (citing *Woodhouse v. Magnolia Hosp.*, 92 F.3d 248, 252 (5th Cir. 1996); *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41 (5th Cir. 1996); *Amburgey v. Corhart Refractories Corp., Inc.*, 936 F.2d 805, 812 (5th Cir. 1991)).

Defendant's Motion for Summary Judgment only challenges the fourth prong. (*See* Doc. 25-14 at 25). Namely, Defendant claims Plaintiff cannot show she was replaced or that she was treated less favorably than others under nearly identical circumstances. *Id.*

Plaintiff responds that in RIF cases, the fourth prong does not require her to prove that she was replaced, nor that she was treated less favorably than other similarly situated employees outside the protected group. (*See* Doc. 32 at 15). Plaintiff argues the focus is on the employees who were retained. *Id.* Plaintiff states there is evidence that as many as seven non-black dispatchers were retained when Plaintiff was terminated. *Id.* at 16.

Defendant replies that Plaintiff's inability to establish that the employees who were retained remained in similar positions is fatal to her race discrimination claim based on her

termination and points to *Noble v. Lear Siegler Services, Inc.*, 554 F. App'x 275, 276 (5th Cir. 2014) (per curiam), for support. (*See* Doc. 33 at 7).

In *Noble*, the Fifth Circuit affirmed the district court's dismissal of the plaintiff's race discrimination claim. 554 F. App'x at 275. Noble, an African American male, alleged he was wrongfully terminated because of his race and retaliated against when he filed an EEOC charge for discrimination. *Id.* The defendant in *Noble* also alleged the plaintiff's termination was due to a RIF, not discrimination. *Id.* The Fifth Circuit found Noble failed to establish "that he was treated less favorably than a similarly situated employee outside of his protected class or that he was terminated because he is African American." *Id.* The Fifth Circuit made this finding despite Noble's assertion that "five Caucasian men in his unit kept their jobs" because Noble did not show that the five white men, his comparators, "were under 'nearly identical circumstance.'" *Id.* (quoting *Okoye v. The Univ. of Tex. Hous. Health Sci. Ctr.*, 245 F.3d 507, 514 (5th Cir. 2001)). The Fifth Circuit held:

> Noble presents no evidence regarding the comparators' job descriptions, qualifications, experience, work and disciplinary history, or other information that would indicate that they were similarly situated. As Noble submits no other evidence demonstrating that he was terminated on account of his race, he has not raised a genuine issue of material fact as to each element of his prima facie case.

Id.

As noted previously, in RIF cases, the fourth element requires Plaintiff to show "others who were not members of the protected class remained in similar positions" or Plaintiff may provide circumstantial or direct evidence, "from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Eugene*, 168 F. Supp. 2d at 668 (citations omitted). Plaintiff does not address the "similar positions" aspect of the requirement when she alleges that she met her burden of establishing the fourth prong. Like

Noble, Plaintiff points to evidence that Defendant retained as many as seven non-black dispatchers when Plaintiff was terminated. (*See* Doc. 32 at 16). And, like Noble, Plaintiff fails to submit "evidence regarding the comparators' job descriptions, qualifications, experience, work and disciplinary history, or other information that would indicate that they were similarly situated." *See Noble*, 554 F. App'x at 276.

In addition, the Court notes Plaintiff does not provide circumstantial or direct evidence from which a juror might reasonably conclude Defendant intended to discriminate when it terminated Plaintiff, nor does Plaintiff argue this alternative theory. (*See* Doc. 32).

For the reasons stated above, the Court finds Plaintiff fails to establish a *prima facie* case of race discrimination based on her termination.

* * *

Because Plaintiff cannot establish race discrimination for wrongful termination or disparate treatment, the Court grants summary judgment in Defendant's favor as to Counts I and III.

2. *Count II: Retaliation*

In Count II, Plaintiff alleges Defendant retaliated against Plaintiff by terminating her employment when she complained to Defendant that "she was paid $15,000.00 per year less than a white employee." (*See* Doc. 1 at 7). Defendant moves for summary judgment, arguing Plaintiff's retaliation claim fails because she cannot establish that she engaged in protected activity or that a causal link existed between the protected activity and the adverse employment action. (*See* Doc. 25-14 at 26–27). As to the first argument, Defendant contends Plaintiff first complained to Glenn about her salary in January 2015 and continued to repetitively complain to her subsequent supervisors. *Id.* at 27. However, Defendant argues, Plaintiff did not complain that

her pay was related to her race. *Id.* Rather, Plaintiff merely complained about not getting the raise Glenn promised her when she was hired. *Id.* It is Defendant's position that this is not protected activity because the conduct she was complaining of, not getting a promised raise, was not unlawful conduct. *Id.* As to the second argument, Defendant alleges Plaintiff lacks evidence that anyone was upset by Plaintiff inquiring about a raise. *Id.* Moreover, Defendant claims Plaintiff first complained about not getting a raise in January 2015 but was not terminated until February 2016. *Id.* Thus, there is a lack of temporal proximity that undermines Plaintiff's claim. *Id.*

Plaintiff responds that after becoming aware that a white female was being paid $15,000.00 more per year than Plaintiff, she complained about the discrepancy to every supervisor in the office. (*See* Doc. 32 at 16). Further, Plaintiff claims Lawrence told her she was denied a raise because she is black. *Id.* Finally, the last time Plaintiff complained about not getting a raise was a week before her termination. *Id.* Thus, Plaintiff claims there is temporal proximity between Plaintiff's protected activity and her termination. *Id.*

Defendant replies that despite complaining about her pay a week before she was terminated, Plaintiff does not allege her complaint raised any issues regarding her race. (*See* Doc. 33 at 7). Finally, Defendant argues temporal proximity alone is not sufficient to defeat summary judgment. *Id.*

"To establish a *prima facie* case of retaliation, [Plaintiff] must show three elements: '(1) that she engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse employment action.'" *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 655 (5th Cir. 2004) (quoting

Long v. Eastfield Coll., 88 F.3d 300, 304 (5th Cir. 1996)). Defendant questions Plaintiff's ability to establish the first and third elements.

a. *Whether Plaintiff Engaged in Protected Activity*

Plaintiff presents the following evidence to prove she engaged in protected activity: (1) Plaintiff's testimony that she complained to every supervisor that she believed she was discriminated against because she is black and (2) the Original Charge and Amended Charge, which state that Plaintiff asked Larson and Garren "for a personal meeting and asked again about [her] raise," that Plaintiff informed Larson that a younger white female was making more than Plaintiff, and that Plaintiff communicated to each of her supervisors that she "was being treated differently because [she is] black." (*See* Doc. 32 at 16). Contrary to Defendant's contention, Plaintiff offered evidence that she engaged in protected activity when she complained about being treated differently because she is black and the inconsistency between her pay and a white co-worker's pay. *See Brandon v. Sage Corp.*, 61 F. Supp. 3d 632, 649 (W.D. Tex. 2014), *aff'd*, 808 F.3d 266 (5th Cir. 2015) ("[I]nformal opposition to a discriminatory practice can constitute protected activity."). Consequently, the Court opines Plaintiff produced evidence showing that a genuine issue for trial exists as to the first element.

b. *Whether Plaintiff Can Establish A Causal Link*

Because Defendant does not question whether Plaintiff suffered an adverse employment action, the only remaining question raised by the parties is whether there is a causal link between the protected activity detailed immediately above and Plaintiff's termination, the adverse employment action. *See Evans v. City of Hous.*, 246 F.3d 344, 352 (5th Cir. 2001) (citing *Long*, 88 F.3d at 304). As to this issue, Plaintiff points to her deposition where she testified that

Lawrence, one of her supervisors, told her that she was denied a raise because she is black. (*See* Doc. 32 at 16). Further, Plaintiff relies on temporal proximity to establish a causal link. *Id.* at 17.

"In order to establish the causal link between the protected conduct and the illegal employment action as required by the *prima facie* case, the evidence must show the employer's decision to terminate was based in part on knowledge of the employee's protected activity." *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998) (emphasis added). The Court's focus is on the final decisionmaker. *See Gee v. Principi*, 289 F.3d 342, 346 (5th Cir. 2002) (citing *Long*, 88 F.3d at 306–07) ("[I]n determining whether an adverse employment action was taken as a result of retaliation, our focus is on the final decisionmaker."). Moreover, a lapse of time is one of the factors used in deciding whether a causal connection exists between the protected activity and the subsequent firing. *See Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 44 (5th Cir. 1992). However, "temporal proximity must be 'very close.'" *See Strong v. Univ. Healthcare Sys., L.L.C.*, 482 F.3d 802, 808 (5th Cir. 2007) (quoting *Clark Cty. School Dist. v. Breeden*, 532 U.S. 268, 273 (2001)). Moreover, "temporal proximity alone, when very close, can in some instances establish a *prima facie case* of retaliation." *Id.* (emphasis in original) (citing *Breeden*, 532 U.S. at 273).

Because Plaintiff relies solely on temporal proximity to establish a causal link, the Court must determine whether this case is similar to cases where mere temporal proximity was sufficient evidence of causality. Those cases, as stated above, involve temporal proximity that is very close.

Plaintiff states she complained about her pay a week before she was terminated, citing the Original Charge and Amended Charge for support. (*See* Doc. 32 at 17). However, the Original Charge merely states that on February 8, 2016, Plaintiff asked Larson and Garren "for a personal

meeting and asked again about [her] raise." *See* Def.'s Ex. E, F. She was terminated on February 15, 2016. *Id.* There is no indication Plaintiff complained about being paid less than non-black dispatchers during this meeting. *Id.* Complaining about one's salary, alone, is not a protected activity. *See Allen v. Envirogreen Landscape Prof'ls, Inc.*, 721 F. App'x 322, 329 (5th Cir. 2017), *as revised* (Dec. 7, 2017) ("Although Title VII prohibits racial discrimination with respect to compensation, compensation issues are not protected by Title VII when they do not allege discrimination based on race, color, religion, sex, or national origin."). Thus, Plaintiff cannot rely on the meeting that took place on February 8, 2016, to establish temporal proximity between Plaintiff's protected activity and her termination.[5]

Plaintiff alleges she complained about being discriminated against within the office on multiple occasions and about her belief that she was denied a raise because she is black.[6] *See* Foster Dep. 106:11–112:11. However, Plaintiff does not address when the complaints were made. Accordingly, the Court cannot determine whether temporal proximity is close enough that the Court may accept mere temporal proximity as sufficient evidence of a causal link. *See Porter v. Houma Terrebonne Hous. Auth. Bd. of Comm'rs*, 810 F.3d 940, 948 (5th Cir. 2015) (explaining that temporal proximity between the protected activity and alleged retaliation must be "very close in time to establish causation by timing alone" (quotation marks omitted)).

5. The Court notes that Plaintiff does not point to any other document in the record where Plaintiff details what was discussed at the meeting that took place on February 8, 2016. (*See* Doc. 32). Moreover, "it is not incumbent upon the court to scour the record for evidentiary support." *See Holmes v. N. Tex. Health Care Laundry Coop. Ass'n*, 304 F. Supp. 3d 525, 550 (N.D. Tex. 2018).

6. Notably, Plaintiff testified that she believed she was being discriminated within the office because she is black and that she "let them know." *See* Foster Dep. 106:11–112:11. Further, Plaintiff testified that Lawrence told her, "Wendy, the reason you are not getting your raise is because you're Black." *Id.* After her conversation with Lawrence, Plaintiff complained to "every supervisor that passed through the office." *Id.*

The Court finds Plaintiff's testimony[7] and the charges filed with the EEOC are not sufficient to satisfy the causal link element of her *prima facie* case. Thus, summary judgment in Defendant's favor is warranted as to Plaintiff's retaliation claim (Count II).

3. *Count VI: ADAAA Discrimination*

Plaintiff's final cause of action against Defendant arises under the ADAAA. (*See* Doc. 1 at 9). Plaintiff alleges she has a disability because she suffers from migraine headaches. *Id.* Moreover, Plaintiff contends Defendant fired her because of her disability or because it regarded Plaintiff as having a disability in violation of the ADAAA. *Id.*

Defendant argues Plaintiff's ADAAA claim fails because Plaintiff does not have evidence that her migraines are a disability as defined by the ADAAA and because Plaintiff cannot show she was qualified for the job, particularly because Plaintiff was tardy and or absent from work on several occasions. (*See* Doc. 25-14 at 30–31). Finally, Defendant contends Plaintiff cannot establish that she was included in the RIF because of her disability or that other similarly situated employees were treated more favorably. *Id.* at 31.

Plaintiff answers that a juror must decide whether Plaintiff's migraines are a disability under the ADAAA. (*See* Doc. 33 at 22). Further, Plaintiff counters she presented Defendant a note dated January 29, 2016, where her doctor requests that she be allowed to take pain medication for headaches after Plaintiff was told that she would be fired if she continued to take her medicine. *Id.* at 24. The note was given to Defendant less than a month before Plaintiff was fired. *Id.* Thus, the close temporal proximity creates a causal connection between the request to take her medication and Plaintiff's termination. *Id.*

7. Plaintiff testified that Lawrence told her she was denied a raise because she is black. Foster Dep. 107:4–107:06. However, Lawrence was not a decisionmaker. Further, the statement is hearsay and insufficient for summary judgment purposes. *See Snapt Inc. v. Ellipse Commc'ns Inc.*, 430 F. App'x 346, 352 (5th Cir. 2011) (holding the statements of a third party in a summary judgment affidavit, which were offered to prove the truth of the matter asserted, constitute inadmissible hearsay).

Under the ADAAA, employers cannot "discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees . . . ." 42 U.S.C. § 12112(a). To prevail on her ADAAA claim, Plaintiff must establish that "(1) [s]he is disabled within the meaning of the ADA, (2) [s]he is qualified and able to perform the essential functions of [her] job, and (3) [her] employer fired [her] because of [her] disability." *Kemp v. Holder*, 610 F.3d 231, 235 (5th Cir. 2010) (citing *Talk v. Delta Airlines, Inc.*, 165 F.3d 1021, 1024 (5th Cir. 1999)). Finally, Plaintiff must also prove that "she was replaced or treated less favorably than non-disabled employees." *Claiborne v. Recovery Sch. Dist.*, 690 F. App'x 249, 256 (5th Cir. 2017) (quoting *EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 615 (5th Cir. 2009)) (listing the elements of a disability discrimination claim in a RIF context).

a. *Whether Plaintiff is Disabled Under the ADAAA*

A disability is defined as "a physical or mental impairment that substantially limits one or more major life activities of such individual," "a record of such impairment," or "being regarded as having such an impairment." 42 U.S.C. § 12102(1). Major life activities include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." *Id.* § 12102(2)(A). "Merely having an impairment does not make one disabled." *Aquart v. Ascension Health Info. Servs.*, No. A-09-CA-804-AWA, 2011 WL 233587, at *7 (W.D. Tex. Jan. 24, 2011) (citation omitted). Rather, a plaintiff must show that "the impairment limits a major life activity." *Id.* (citation omitted).

Plaintiff argues this Court should find that "migraines, when active, substantially limit the major life activity of brain function." (*See* Doc. 32 at 23). Further, Plaintiff explains that district

courts in the Fifth Circuit found that whether a plaintiff with migraines is disabled under the ADAAA is a material fact question. *Id.* Thus, the Court should deny summary judgment. *Id.* Plaintiff first cites *Burns v. Nielson*, No. EP-17-CV-00264-DCG, 2020 WL 429429 (W.D. Tex. Jan. 28, 2020), to support her assertion. *Id.*

In *Nielson*, the district court noted that the record before it included a letter from Burns' physician where the doctor stated Burns had "degenerative disc disease of the lumbar spine and chronic migraine headaches," which evinced Burns' impairments that formed the basis of his disabilities under the ADAAA. 2020 WL 429429, at *10. Further, Burns adduced evidence to show how his migraines and back pain limited multiple life activities, which was undisputed. *Id.* On that basis, the district court adopted the magistrate's finding that Burns raised a genuine dispute of material fact as to whether he was actually disabled. *Id.*

Plaintiff next points to *Hebert v. Ascension Parish School Board*, 396 F. Supp. 3d 686 (M.D. La. 2019), for support. (Doc. 32 at 23). In *Hebert*, the district court relied on Hebert's testimony that she had "severe, painful rashes that make it difficult to work and to move around freely." 396 F. Supp. 3d at 698–99 (quotation marks omitted). Further, Hebert stated "her 'symptoms include fatigue, difficulty concentrating, difficulty sleeping, difficulty breathing, upset stomach, lack of focus, and irritability, all of which interfere with [her] ability to perform [her] job duties as a teacher.'" *Id.* at 699. Hebert also included medical records explaining her treatment for several of her illnesses and conditions. *Id.* Presented with this evidence, the district court found a material issue of fact existed for trial regarding whether the plaintiff was disabled. *Id.*

Other courts have ruled similarly, finding the evidence presented by plaintiffs was sufficient to raise a genuine issue for trial regarding whether the plaintiffs were substantially

limited in a major life activity. For example, in *Vanderberg v. Rexam Beverage Can Co.*, the district court denied summary judgment after concluding Vanderberg's testimony[8] was sufficient to demonstrate the existence of a disability. No. 3-15-CV-00214-NBB-JMV, 2017 WL 507610, at *5 (N.D. Miss. Feb. 7, 2017). In *Aquart*, the district court held "the frequency of Aquart's absences and the testimony concerning the debilitating nature of her condition create[d] fact issues that preclude summary judgment on [the basis that Aquart's migraines were not so severe as to substantially limit a major life activity]."[9] 2011 WL 233587, at *7–8.

However, there are also courts that hold the evidence produced is not sufficient to raise a genuine issue of fact for trial as to whether a migraine constitutes a disability, such as *Ellzey v. Gusman*, CIV. A. No. 08-4081, 2011 WL 2580549 (E.D. La. June 29, 2011), *aff'd*, 470 F. App'x 360 (5th Cir. 2012), and *Badri v. Huron Hospital*, 691 F. Supp. 2d 744 (N.D. Ohio 2010).

In *Ellzey*, the district court held that "[w]hile migraine headaches certainly inhibit one's functional ability, they do so when one has an episode of a migraine." 2011 WL 2580549, at *9. The *Ellzey* court held Ellzey's evidence was insufficient to establish a disability under the ADAAA, including a letter where she stated she suffered one to two attacks each month and that she missed up to seven days of work in one month and a letter from a physician attesting to her disability. *Id.* Likewise, in *Badri*, the district court concluded that although "migraine headaches and neck pain and spasms can cause severe discomfort," Badri's testimony "merely establishe[d]

8. The plaintiff "testified that when he does have a severe migraine, it leaves him totally incapacitated and unable to work." *Vanderberg*, 2017 WL 507610, at *5. "There was also testimony that when he had a migraine at work, he had to take a nap in the breakroom and could not do anything until it went away." *Id.* Moreover, "[the plaintiff's] primary physician confirmed via the medical certification form that his severe migraines prevented him from being able to perform his essential job functions." *Id.*

9. The testimony established that the plaintiff was unable to work an eight-hour day every day, that "her headaches would affect her ability to see, focus, walk, and think." *Aquart*, 2011 WL 233587, at *8. Her physician also testified that the plaintiff mentioned that "her headaches occasionally prevented her from performing her job duties," that plaintiff "rarely had auras, which would affect sensory and motor functions," and that "[t]he pain could affect her ability to think and concentrate." *Id.* Further, there was evidence that the plaintiff "took isolated days off from work and occasionally worked from home, but she did not require limitations on her duties or work schedule" and that although the plaintiff's "headaches dissipated in a day or two" most times, "she either missed work, worked from home, or left for a doctor's visit close to forty times during her eleven months of employment." *Id.*

that these conditions are impairments, not that they substantially limit any major life activities." 691 F. Supp. 2d at 759. On that basis, the court held Badri failed to put forth evidence "to show that any major life activities [had] been substantially limited by his various impairments and, therefore, [he could not] make out a *prima facie* case of disability discrimination." *Id.*

The caselaw on the issue is instructive. The courts that find an issue exists for trial regarding whether a plaintiff has a disability under the ADAAA were presented with evidence that supported one or more of the plaintiff's major life activities was substantially limited. *See, e.g.*, *Burns*, 2020 WL 429429, at *10; *Hebert*, 396 F. Supp. 3d at 698–99; *Vanderberg*, 2017 WL 507610, at *5; *Aquart*, 2011 WL 233587, at *7–8. On the other hand, the cases where the district courts granted summary judgment in the defendant's favor as to whether a migraine constitutes a disability are devoid of evidence establishing that a major life activity is substantially limited. *See, e.g.*, *Ellzey*, 2011 WL 2580549, at *9; *Badri*, 691 F. Supp. 2d at 759; *see also Allen v. SouthCrest Hosp.*, 455 F. App'x 827, 835 (10th Cir. 2011) (finding the plaintiff failed to establish a *prima facie* case of disability discrimination because she did not demonstrate "that she was substantially limited in performing a class of jobs or broad range of jobs in various classes as compared to most people with comparable training, skills, and abilities"); *Palmer v. Fed. Express Corp.*, 235 F. Supp. 3d 702, 722 (W.D. Pa. 2016) (concluding that the plaintiff "failed to adduce sufficient evidence from which a reasonable jury could find that she is an individual with a 'disability'" despite pointing to a history of migraines and testifying that her overall enjoyment of life had diminished and that her ability to engage in physical activities was reduced); *Ramage v. Rescot Sys. Grp., Inc.*, 834 F. Supp. 2d 309, 322 (E.D. Pa. 2011) (granting the defendant's motion for summary judgment with respect to Ramage's disability

discrimination claim because Ramage failed to establish that "her brain tumor and migraine headaches substantially limited her ability to sleep, think, or see").

The Court finds that this case is akin to those finding the evidence insufficient to establish a *prima facie* case of disability discrimination. In particular, the Court finds Plaintiff fails to establish an impairment that substantially limits a major life activity. (*See generally* Doc. 32 at 23). Rather, Plaintiff, at most, argues that she had migraines that affected her brain function when active. *Id.* However, Plaintiff does not cite to the record to support her allegations. In order to find that an issue for trial exists, Plaintiff was required to offer evidence of her disability, how it affected her brain's ability to function, how often, and the debilitating nature of her condition. *See, e.g.*, *Burns*, 2020 WL 429429, at *10; *Hebert*, 396 F. Supp. 3d at 698–99.

Plaintiff also urges the Court to find that migraines, when active, substantially limit the major life activity of brain function. *Id.* The Court declines to make a general conclusion regarding migraines. Such a finding must be based on an individualized inquiry into a plaintiff's impairment. *See Galvan v. City of Bryan, Tex.*, 367 F. Supp. 2d 1081, 1086 (S.D. Tex. 2004), *aff'd sub nom.*, 121 F. App'x 567 (5th Cir. 2005) ("The court must conduct a 'rigorous and carefully individualized inquiry' into [a plaintiff's] claim that he is disabled, 'to fulfill [its] "statutory obligation to determine the existence of disabilities on a case-by-case basis."'" (quoting *Waldrip v. Gen. Elec. Co.*, 325 F.3d 652, 654 (5th Cir. 2003))); *see also McInnis v. Alamo Cmty. Coll. Dist.*, 207 F.3d 276, 280 (5th Cir. 2000) ("[T]he analysis of whether a plaintiff's claimed impairment interferes with a major life activity in such a substantial way as to constitute a disability requires an individualized inquiry.").

The Court finds Plaintiff simply has not come forward with evidence to show that the major life activity of brain function has been substantially limited by her migraines and thus, Plaintiff cannot make out a *prima facie* case of disability discrimination on this basis.

b. *Whether Plaintiff Was Regarded as Disabled*

Even though Plaintiff is unable to establish she has an impairment that substantially limits her in a major life activity, her disability discrimination claim may still proceed if Defendant regarded her as disabled and discriminated against her on that basis. *See* 42 U.S.C. § 12102(1). Assuming for the sake of argument that Plaintiff is able to establish that she was regarded as disabled, that she was qualified for the dispatcher position, and that she was terminated, Plaintiff did not offer evidence that "she was replaced or treated less favorably than non-disabled employees." *See Claiborne*, 690 F. App'x at 256 (citing *Chevron Phillips Chem. Co*, 570 F.3d at 615) (enumerating the four elements of a disability discrimination claim). Rather, Plaintiff merely argues she was disabled, or perceived as disabled, and that Defendant terminated her based on her disability, or because Defendant perceived Plaintiff as disabled. (*See* Doc. 22–25). As a result, the Court finds Plaintiff also fails to establish the final element of her *prima facie* disability discrimination claim.

In sum, because Plaintiff fails to establish the fourth element of her *prima facie* case—that she was replaced by a non-disabled person or treated less favorably than non-disabled employees—the Court holds Plaintiff fails to state a *prima facie* case that her termination was the result of ADAAA discrimination. *See Claiborne*, 690 F. App'x at 257.

* * *

The Court rules that Plaintiff fails to establish a *prima facie* case of retaliation and discrimination. Further, Plaintiff's sexual harassment claims are time-barred. Accordingly, the

Court grants Defendant's Motion for Summary Judgment. Nonetheless, the Court will entertain Plaintiff's allegations regarding the second and third steps of the *McDonnell Douglass* framework.

C. Legitimate Nondiscriminatory Reason for Plaintiff's Termination[10]

Once a plaintiff establishes a *prima facie* case of discrimination or retaliation, the burden shifts to the defendant to "articulate a legitimate non[]discriminatory reason for the adverse employment action." *See Chevron Phillips Chem. Co.*, 570 F.3d at 615. Plaintiff claims she suffered from two adverse employment actions, termination and disparate pay.

1. *Termination*

Defendant asserts that Plaintiff was terminated because of an overall RIF. (*See* Doc. 25-14 at 32) (citing Def.'s Ex. J, M). Defendant explains that after it acquired Bridger in 2015, the oil and gas industry, and Defendant in particular, experienced a significant downturn. *Id.* Consequently, Defendant was forced to lay off personnel across the country. *Id.* Defendant implemented a RIF of dispatchers at its Bridger division in February 2016 as part of its nationwide layoffs. *Id.* At Bridger, Defendant appointed Hepperle, Larson, and Garren to decide which dispatchers to terminate. *Id.* According to Defendant, Plaintiff was included in the RIF because "she was often late for work without notice," "missed work on several occasions," her absence "disrupted the dispatch group," Plaintiff "took long lunches offsite," "was often on her cell phone during work[] hours," "exceeded her authority when coordinating with drivers," and was generally "one of the worst-performing dispatchers." *Id.* (citing Garren Decl. Ex. M, at 1–2). The Court finds Defendant provided a legitimate nondiscriminatory reason for Plaintiff's termination. *See Villarreal v. Tex. A&M Sys.*, 561 F. App'x 355, 359 (5th Cir. 2014) (citing

10. Because the Court found Plaintiff's sexual harassment claims are time-barred, it will only discuss steps two and three of the *McDonnell Douglass* framework in the context of Plaintiff's ADAAA and race-based claims.

E.E.O.C. v. Tex. Instruments Inc., 100 F.3d 1173, 1181 (5th Cir. 1996)) ("We have stated that a RIF is a legitimate nondiscriminatory reason to relieve an individual of their employment.").

2. *Disparate Pay*

Defendant contends the reason Plaintiff was paid less than other dispatchers is that she was hired as a ticketing specialist by Glenn and that by the time Plaintiff complained to Garren about her pay there was a pay freeze preventing a raise. (*See* Doc. 33 at 13). Moreover, Mary Lentz (Lentz), Defendant's Director of Employee Relations, testified that the dispatchers' salary was based on "experience and their skill sets." *See* Lentz Dep. 170:2–170:12. The Court finds Defendant asserted legitimate nondiscriminatory reasons for Plaintiff's salary. *See Browning v. S.W. Research Inst.*, 288 F. App'x 170, 175 (5th Cir. 2008) (finding the defendant's proffered reason for wage discrepancy—that the salary reflected prior work experience and seniority—sufficient evidence of a legitimate nondiscriminatory reason for disparate wage payments); *see also Wojciechowski v. Nat'l Oilwell Varco, L.P.*, 763 F. Supp. 2d 832, 859 (S.D. Tex. 2011) (finding the defendant met "its initial burden to provide a 'legitimate nondiscriminatory' justification for the decision not to give [the] [p]laintiff a raise" when he listed a pay freeze among the reasons).

D. Pretext

If the defendant satisfies its burden, the plaintiff must "rebut the employer's purported explanation, to show that the reason given is merely pretextual." *Moss v. BMC Software, Inc.*, 610 F.3d 917, 922 (5th Cir. 2010) (citing *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 378–79 (5th Cir. 2010)). "Plaintiffs must create a genuine issue of material fact under one of the alternative methods of proof[:]" mixed motive or pretext. *Johnson v. BAE Sys. Land & Armaments, L.P.*, No. 3:12-CV-1790-D, 2014 WL 1714487, at *9 (N.D. Tex. Apr. 30, 2014).

Here, Plaintiff does not clearly contend Defendant had mixed motives. Rather, Plaintiff merely argues that Defendant's justification was pretextual. (*See* Doc. 32 at 28) (stating that a jury could find *pretext* for the pay difference and termination based on a lack of documentation, inconsistencies, and changes in Defendant's records (emphasis added)). Thus, the Court will consider Plaintiff's arguments under the pretext alternative. *See Siddiqui v. AutoZone W., Inc.*, 731 F. Supp. 2d 639, 651 (N.D. Tex. 2010) (citing *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)) (clarifying that after the defendant establishes a legitimate nondiscriminatory reason for the termination, the plaintiff "may proceed under one of two alternatives: the pretext alternative or the mixed-motives alternative"). "To establish pretext, plaintiffs must show that [the defendant's] 'proffered explanation is false or unworthy of credence.'" *Johnson*, 2014 WL 1714487, at *9 (quoting *Vaugh v. Woodforest Bank*, 665 F.3d 632, 637 (5th Cir. 2011)). Plaintiff's claims are premised on her termination and disparate pay. (*See* Doc. 1).

1. *Termination*

Plaintiff contends the RIF due to the oil market downturn is a pretext for discrimination based on her disability and race. (*See* Doc. 32 at 25). Plaintiff points to the fact that, at the time she was fired, the documents related to her termination did not reflect that her termination was due to a RIF. *Id.* Plaintiff turns the Court's attention to the termination letter and argues it does not give a reason for her termination, much less state that there was a RIF. *Id.* (citing Plf.'s Ex. F). If signed by Plaintiff, the termination letter provided that Plaintiff would release and discharge Defendant from all claims Plaintiff may have had against it and required confidentiality in exchange for two weeks' pay. *Id.*; *see also* Plf.'s Ex. F. Plaintiff also testified that she was not given a reason for her termination. *See* Foster Dep. 143:7–143:16. Moreover,

Plaintiff points to the Employee Status Form, which reflects the reason for the separation was involuntary and includes termination code I-45. *See* Plf.'s Ex. G. Termination code I-45, according to Defendant, is the code for unsatisfactory job performance, whereas the code for a RIF is I-39. *See* Lentz Dep. 131:25–132:4. Further, Defendant did not provide supporting documentation for Plaintiff's termination. *See* Plf.'s Ex. H. Plaintiff alleges Defendant changed the code from I-45 to I-39 after Defendant received Plaintiff's EEOC charge. *See* Lentz Dep. 132:5–133:4. Finally, Plaintiff contends Defendant does not have evidence of her alleged poor job performance and that her only absences were related to her migraines. (*See* Doc. 32 at 25). Plaintiff suggests the discrepancies listed above regarding the RIF create a genuine dispute of fact as to whether a RIF actually took place.

Defendant counters that Bridger was not familiar with the processes utilized by Defendant due to its recent acquisition; hence, the discrepancy in coding. (*See* Doc. 33 at 12) (citing Lentz Dep. 130:18–131:10). According to Defendant, the person who entered the termination code meant to insert I-39 rather than I-45. *Id.* Defendant alleges Plaintiff's contentions do not evidence that the person who entered the code was involved in the decision to terminate Plaintiff or in a conspiracy to cover any alleged discrimination. *Id.* Further, Defendant points to Garren's declaration where he states five individuals were laid off as part of the RIF. *Id.* (citing Garren Decl. Ex. M, at 1–2).

Plaintiff cites *Walther v. Lone Star Gas Co.*, 952 F.2d 119 (5th Cir. 1992), to support her position. (Doc. 32 at 27). In *Walther*, an age discrimination case, the Fifth Circuit found a juror could reasonably infer that the defendant's justification for including the plaintiff in a RIF—poor job performance—"was 'an after-the fact inspiration triggered by the necessity of fending off litigation.'" 952 F.2d at 124 (quoting *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13, 21 (7th

Cir. 1987)). In that case, the defendant did not provide specific evidence showing its dissatisfaction with the plaintiff's performance. *Id.* Rather, the decisionmaker could only report that the plaintiff's performance was unsatisfactory. *Id.* In doing so, the Fifth Circuit also found support in the fact that the decisionmaker neither examined personnel files, nor consulted the plaintiff's immediate supervisor before including the plaintiff in the list for termination. *Id.*

In contrast, Garren declared that in early 2016, Hepperle, the Regional Operations Manager for the Permian Basin, notified Garren and Larson that there would be a RIF and that five dispatchers would need to be terminated in the RIF. *See* Garren Decl. Ex. M, at 1–2. Thereafter, Hepperle asked Larson and Garren to create an "A team" that would remain at the Bridger location. *Id.* at 2. Hepperle, Larson, and Garren held a meeting in which they discussed job performance to identify five dispatchers who would not be included in the "A team." *Id.* At that meeting, they identified three males and two females that would be terminated in the RIF. *Id.* Although not recorded in Plaintiff's personnel file, Garren declared Plaintiff often took long lunches offsite, prompting Defendant to institute a policy requiring all dispatchers to take lunch breaks on-site. *Id.* Garren also asserted Plaintiff was often on her cell phone during working hours, resulting in a no-cell phone while working policy at the Bridger location. *Id.* Garren declared Plaintiff would circumvent the policy by taking bathroom breaks. *Id.* Plaintiff also deviated from Defendant's protocols by failing to obtain approval from a manager before coordinating drivers outside established parameters.[11] *Id.* The Court finds that, unlike *Walther*, Defendant in this case did not merely report that Plaintiff's performance was weak. Rather, Defendant set up a team including the Dispatcher Manager, the Area Operations Manager, and the Regional Operations Manager for the Permian Basin to determine who would remain and

11. The Court notes that Plaintiff only disputes Defendant's allegation that she was often absent from work by stating that her absences were due to her medical condition. However, she did not dispute Garren's other statements regarding her performance at work. (*See generally* Doc. 32).

who would be discharged pursuant to the RIF. *Id.* Further, in *Walther*, the plaintiff's supervisor praised his work. 952 F.2d at 124. The same is not true in this case. Consequently, the Court finds *Walther* is not similar to the instant case.

As to Plaintiff's suggestion that there is a genuine dispute of fact as to whether the RIF actually took place when Plaintiff was terminated, the Court finds the facts do not provide grounds for a juror to find that there was in fact no RIF at the time. Namely, the Court notes that Lentz declared that four other dispatchers were also terminated in the RIF. *See* Lentz Decl. Ex. I, at 2. Lentz listed three males and one female between ages twenty-five and forty-eight. *Id.* Two men and the female are white, and one male is Hispanic. *Id.* Plaintiff was the only black employee terminated. *Id.* Lentz also asserted no one was hired to replace Plaintiff. *Id.* On these facts alone, no reasonable juror could conclude the RIF did not exist and instead was mere pretext for discrimination based on Plaintiff's disability or race. *See, e.g.*, *Johnson*, 2014 WL 1714487, at *8 (considering evidence that three white and one Hispanic employee were also terminated relevant to the race discrimination claim).

The Court finds Plaintiff fails to present evidence that she was treated differently in the RIF or that Defendant's contention that it terminated Plaintiff due to a RIF is unworthy of credence. *See Elder*, 2017 WL 4083605, at *5 (explaining that pretext can be shown by evidence of disparate treatment or by showing that the proffered reason is false). Thus, even if Plaintiff had established a *prima facie* case of race or disability discrimination based on her termination or race-based retaliation, Defendant proffered a legitimate nondiscriminatory reason for Plaintiff's termination that Plaintiff fails to rebut.

2. *Disparate Pay*

Plaintiff alleges the excuse provided to explain the discrepancy in Plaintiff's pay versus that of other dispatchers could be found by a juror to be false because the evidence suggests Plaintiff was hired as a dispatcher, not a ticket specialist. (*See* Doc. 32 at 27). Plaintiff cites her Offer Letter, Employment Application, and New Hire Status Form to support the proposition that she was hired as a dispatcher. *See* Plf.'s Ex. A, B, C. According to Plaintiff, the fact that she held the same job title as other employees who were paid less is evidence that Defendant discriminated against her based on her race. (*See* Doc. 32 at 27).

The Court finds Plaintiff's evidence insufficient to establish pretext. In particular, the Court notes the evidence presented by Defendant, and Plaintiff, shows dispatchers working for Defendant at the Bridger location were paid at different rates. *See* Def.'s Answer to Plf.'s Interrogatories, at 4. The lowest paid dispatchers' annual salary was $60,000.00 whereas the highest annual salary was $85,000.00. *Id.* This supports Lentz's testimony that the dispatchers' salary was dependent on their skills and experience. Lentz Dep. 170:2–170:12. Finally, Plaintiff does not dispute that Defendant had a pay freeze in place when Plaintiff inquired about a pay raise. Neither does Plaintiff indicate that other employees were given a raise when the pay freeze was in place.

In sum, the fact that Plaintiff was hired as a dispatcher, "the same position as the white employees," does not indicate Defendant's race-neutral reasons for denying Plaintiff a raise were mere pretext. Consequently, even if Plaintiff had established a *prima facie* race discrimination claim based on disparate pay, she does not adduce sufficient evidence to rebut Defendant's legitimate nondiscriminatory motive for the pay discrepancy.

* * *

The Court finds that even if Plaintiff had established a *prima facie* case of retaliation or discrimination, she fails to rebut Defendant's legitimate nondiscriminatory reasons for her termination and the wage discrepancy. Thus, the Court grants Defendant's Motion for Summary Judgment on this basis as well.

E. Plaintiff's Motion for Partial Summary Judgment

In her Motion for Partial Summary Judgment, Plaintiff asks the Court for summary judgment on Defendant's failure to mitigate damages affirmative defense. (*See* Doc. 26). However, because the Court grants Defendant's Motion for Summary Judgment and dismisses all of Plaintiff's claims against Defendant, Plaintiff's Motion for Partial Summary Judgment on the mitigation issue is moot.

IV. CONCLUSION

Based on the foregoing, the Court **GRANTS** Defendant's Motion for Summary Judgment. (Doc. 25). Accordingly, the Court **DISMISSES WITH PREJUDICE** Plaintiff's race (Counts I and III), sex (Counts IV and V), and disability (Count VI) discrimination claims against Defendant. The Court also **DISMISSES WITH PREJUDICE** Plaintiff's retaliation claim (Count II) against Defendant.

The Court further **DENIES AS MOOT** Plaintiff's Motion for Partial Summary Judgment. (Doc. 26).

It is so **ORDERED**.

SIGNED this 2nd day of May, 2020.

DAVID COUNTS
UNITED STATES DISTRICT JUDGE