

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-12061

VICTORIA BIRD,

Plaintiff-Appellant,

versus

UNIVERSITY OF FLORIDA BOARD OF TRUSTEES,
THOMAS STRINGER,
LI MING SU,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 1:18-cv-00221-AW-GRJ

Before BRANCH, GRANT, and ED CARNES, Circuit Judges.

ED CARNES, CIRCUIT JUDGE:

The University of Florida hired Dr. Victoria Bird to work part-time as a clinical Assistant Professor of Urology on a one-year

contract. It renewed her contract three times and then decided not to renew it again. Even so, she was permitted to continue working for a fourth and final year, but she was reassigned from clinical work to research so that she could finish the research projects she had already started and look for another job.

In Florida state court, Bird filed a complaint asserting various discrimination and retaliation claims against the University of Florida Board of Trustees (the Board) and some claims against two doctors in the urology department, Thomas Stringer and Li Ming Su. The claims Bird asserted against the Board were for: sex-based hostile work environment harassment, discrimination, and retaliation in violation of Title VII, Title IX, and the Florida Civil Rights Act.¹ The claims that Bird asserted against Drs. Stringer and Su were 42 U.S.C. § 1983 claims that they had subjected her to a hostile work environment and had discriminated against her based on her sex in violation of the Equal Protection Clause of the United States Constitution.²

¹ In her complaint and in her briefs to this Court, Bird variously called her hostile work environment claims “gender motivated harassment,” or “gender based harassment,” or “gender harassment” claims. She clarified to the district court that her “gender motivated harassment claims” are hostile work environment harassment claims. We will refer to them that way.

When opposing summary judgment, Bird also argued that she was subjected to a retaliatory hostile work environment. But she didn’t assert that as a separate claim in her complaint. *See infra* at 24–26.

² In the district court, Bird abandoned the equal protection claim that she had asserted against the Board under the Florida Constitution.

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The defendants removed the case to federal district court. At summary judgment, all the claims were decided against Bird, except for her retaliation claims, which went to trial. On those claims, the jury returned a verdict against her. This is Bird's appeal.

I. DISCUSSION

Bird raises a plethora of issues, most of which involve the grant of summary judgment. We take them up, more or less, in the order they arose in the district court.

A. The Grant of Summary Judgment Before Discovery Closed

Before the close of discovery, and before Bird had taken Stringer's and Su's depositions, the defendants moved for summary judgment. The district court granted it on all of Bird's claims except for her retaliation claims against the Board under Title VII, Title IX, and the Florida Civil Rights Act.

Bird contends that the district court erred in deciding a motion for summary judgment before the close of discovery, before she took Stringer's and Su's depositions, and while she still had motions to compel that were pending. She argues that the court's decision prevented her from establishing a genuine issue of material fact. We review only for abuse of discretion the decision to grant summary judgment before the completion of discovery. *Wallace v. Brownell Pontiac-GMC Co.*, 703 F.2d 525, 527 (11th Cir. 1983).

The defendants removed the case to federal court on October 31, 2018. The court entered its initial scheduling order the next day, requiring that discovery begin immediately and setting a

discovery deadline in March 2019. Over the next thirteen-and-a-half months, the parties jointly asked to extend the discovery deadline three times, and Bird independently asked to extend it another time. In all, the court generously extended the discovery deadline by an entire year, from March 2019 to March 31, 2020.

During that time, Su's and Stringer's depositions were scheduled, cancelled, and rescheduled multiple times. They were initially scheduled for February 2019 but were postponed so the parties could resolve other outstanding discovery issues. They were rescheduled for April 2019 but were cancelled when Bird's daughter had a medical issue. They were again rescheduled for December 2019, but again postponed by Bird, and rescheduled for the end of March 2020.

In January 2020 (a little over two months before the much-extended deadline for completing discovery), the defendants filed a motion for summary judgment. The Board argued in its motion that Bird could not create a genuine issue of material fact on her sex-based harassment, sex discrimination, and retaliation claims. Stringer and Su argued that they were entitled to qualified immunity on Bird's § 1983 equal protection claims against them.

The court held a telephonic discovery hearing in February 2020 and authorized the parties to file motions to compel on any remaining discovery issues. Bird filed three motions to compel. None of those motions mentioned that Stringer's or Su's deposition was necessary for her to oppose summary judgment. Instead, the motions sought to compel the production of patient safety

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reports and performance evaluations for doctors in the urology department, challenged the defendants' privilege log, and challenged the defendants' response to certain document requests.

On March 16, 2020, the court entered a pandemic-related order allowing all parties or witnesses to cancel their scheduled depositions and reschedule them later. The parties cancelled all upcoming depositions, including Su's and Stringer's.

On March 17, 2020, Bird filed her response opposing the defendants' motion for summary judgment. She argued that she had "presented sufficient evidence" for her claims to survive at summary judgment and that Su and Stringer were not entitled to qualified immunity on her § 1983 claims. She also argued that a "retaliatory harassment" claim against the Board, which was not listed as a count in her complaint, should survive summary judgment. The final argument was that ruling on summary judgment would be premature because "[b]efore entering summary judgment the district court must ensure that the non-movant has been given an opportunity to conduct relevant discovery" and discovery was "still ongoing." She cited three decisions, one of which was an unpublished opinion from this Court, and that was the entirety of her argument that summary judgment would be premature.

The sole mention of Stringer's and Su's depositions appeared in a footnote in her statement of the facts. In that footnote, Bird contended that she "will only be able to probe the factual bases" of her employee evaluations from 2015 and 2016 and a

counseling letter from 2016, “when she takes the depositions of Drs. Su and Stringer later this month.” Bird said nothing more about that.

And at the summary judgment hearing on July 20, 2020, Bird’s counsel mentioned in passing that “depositions are still going on here” but did not argue or even mention that those particular depositions had not yet been taken. Counsel didn’t ask the court to postpone ruling on summary judgment until those depositions were taken or even mention the possibility.

On August 14, 2020, the parties filed a motion jointly asking the court to postpone the trial date. The motion mentioned that some depositions that had originally been scheduled for March 2020 had not yet been taken, although it didn’t specifically refer to Stringer’s or Su’s deposition. The motion did mention the pending motion for summary judgment but didn’t ask the court to postpone ruling on it. Instead, it stated that the court’s summary judgment decision “could significantly impact the legal and factual issues that would need to be resolved at a trial.” The court granted the motion for postponement of trial, removing the case from its September trial docket.

On September 1, 2020, the court granted in part and denied in part the defendants’ motion for summary judgment. It granted summary judgment to the defendants on all of Bird’s claims except her retaliation claims against the Board. The court rejected Bird’s “single sentence” argument that summary judgment would be premature because (1) courts do not have to wait until the end of

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discovery to rule on summary judgment, and (2) Bird did not “specif[y] what additional discovery [was] needed for her to establish a genuine issue of material fact.”

Stringer’s deposition was taken in January 2021 (more than four months after the court entered summary judgment on all but Bird’s retaliation claims), and Su’s deposition was taken in May 2021 (more than eight months after summary judgment was entered on September 1, 2020).

A party generally “may file a motion for summary judgment at any time until 30 days after the close of all discovery.” Fed. R. Civ. P. 56(b). District courts don’t have to wait until the close of discovery to rule on a motion for summary judgment. *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1316 (11th Cir. 1990). Summary judgment may be granted if “the party opposing the motion has had an adequate opportunity for discovery.” *Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 859 F.2d 865, 870 (11th Cir. 1988).

Under Federal Rule of Civil Procedure 56(d), nonmovants have a remedy for premature motions for summary judgment. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (“Any potential problem with such premature motions [for summary judgment] can be adequately dealt with under Rule 56([d]) . . .”).³ Rule 56(d)

³ Before 2010, the provisions in the current Rule 56(d) appeared in Rule 56(f). *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1330 n.3 (11th Cir. 2021). Rule 56 was rewritten in 2010, and as part of the revisions, the old Rule 56(f) was moved to subdivision (d) without changing the substance of the rule. *Id.*

provides that if a nonmovant, like Bird, believes she cannot adequately respond to a motion for summary judgment, she should “show[] by affidavit or declaration that, for specified reasons, [she] cannot present facts essential to justify [her] opposition.” Fed. R. Civ. P. 56(d). On that showing, the court can: “(1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.” *Id.* It was Bird’s burden to show she was entitled to relief under Rule 56(d). *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1063 (11th Cir. 2015).

Although Rule 56(d) specifically states that the nonmovant must present an “affidavit or declaration,” we have been less than stringent in enforcing that requirement. *See Snook*, 859 F.2d at 871 (explaining that “a party opposing a motion for summary judgment need not file an affidavit pursuant to Rule 56([d])”). Instead, a nonmovant can invoke Rule 56(d) with proper notice to the court that she is unable to respond to summary judgment without additional discovery. *See Urquilla-Diaz*, 780 F.3d at 1063–64.

The required notice cannot “rest on vague assertions that additional discovery will produce needed, but unspecified facts.” *Fla. Power & Light Co.*, 893 F.2d at 1316 (quotation marks omitted). Instead, the notice “must specifically demonstrate how

Any pre-2010 precedent that discusses Rule 56(f) is now “fully applicable to current Rule 56(d).” *Id.* (alteration and quotation marks omitted). For simplicity, we will refer to the relevant rule as Rule 56(d), even when quoting older decisions that refer to it as Rule 56(f).

postponement of a ruling on the motion will enable [the non-movant], by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." *Id.* (quotation marks omitted); *see also* *Sec. & Exch. Comm'n v. Spence & Green Chem. Co.*, 612 F.2d 896, 900–01 (5th Cir. 1980) (holding that the district court did not abuse its discretion in finding that counsel's "vague and conclusional claims" in his Rule 56(d) motion about conflicts in the testimony was not sufficiently specific to meet his burden).⁴

The district court properly exercised its discretion in declining to wait until the end of discovery to rule on summary judgment because Bird failed to give proper notice as required in Rule 56(d).⁵

⁴ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

⁵ Bird had almost two years from the time discovery began to when the district court ruled on summary judgment, which was enough time to conduct discovery. *See Fla. Power & Light Co.*, 893 F.2d at 1316 (holding that the district court did not abuse its discretion in denying a Rule 56(d) motion in part because "summary judgment was not granted until approximately two years after the complaint was filed"); *Burns*, 999 F.3d at 1334 (considering that the district court extended the discovery deadline three times in holding it did not abuse its discretion in denying the nonmovant's Rule 56(d) motion); *Barfield v. Brierton*, 883 F.2d 923, 932–33 (11th Cir. 1989) (relying in part on the fact that "the plaintiff had ample time and opportunity for discovery, yet failed to diligently pursue his options" in holding that the district court did not abuse its discretion in denying plaintiff's Rule 56(d) motion); *see also Celotex Corp.*, 477 U.S. at 326 (concluding that "no serious claim can be made that [plaintiff]

Burns illustrates the requirements for giving a district court proper notice. *See* 999 F.3d at 1334. In that case, a homeowner sued his town after it denied his application for a building permit because the new home he wanted to build didn't fit in with the surrounding homes. *Id.* at 1322. After the town moved for summary judgment, the homeowner filed a declaration under Rule 56(d) stating that he “wanted discovery on the records of the commission’s hearings to show its lack of discernable standards, to get the legislative history of the relevant ordinances and the commission’s rules and regulations, to hire an expert, and depending on the documents obtained, to take depositions.” *Id.* at 1328 (alteration adopted and quotation marks omitted).

Discovery continued and a magistrate judge conducted a hearing on the summary judgment motion, later issuing a report recommending that the district court grant it. *See id.* at 1328–29. The homeowner filed objections, arguing among other things that the magistrate judge shouldn't have recommended summary judgment before the close of discovery. *Id.* at 1329–30. The district court rejected that argument because the homeowner had responded to the town's motion and participated in oral argument in opposition to summary judgment. *Id.* at 1330. And, while he had listed general categories of discovery that he intended to seek, he didn't specifically identify the facts that would help him oppose summary judgment. *Id.*

was in any sense ‘railroaded’ by a premature motion for summary judgment” when the motion for summary judgment was filed a year after the complaint).

We held that the district court did not abuse its discretion because the homeowner didn't "specifically demonstrate how discovery would show a genuine issue of fact." *Id.* at 1334 (quotation marks omitted). We agreed with the district court that his Rule 56(d) declaration "only listed general categories of discovery without pointing to the specific facts that discovery would reveal and how those facts would create a genuine issue of material fact." *Id.* His declaration did not "explain why he needed legislative history materials, expert testimony, and potential depositions." *Id.* And although he said his request for commission records "would show the lack of discernable standards used by the commission in making its decisions," we held that his request was not specific enough because it "gave no indication how commission records would aid his [claim]." *Id.*

Bird gave the district court even less notice about the need for additional discovery than the *Burns* plaintiff did. Although Bird was not required to specifically invoke Rule 56(d), doing so would have clarified her position. She did not file a motion under Rule 56(d). When she opposed summary judgment, she mentioned almost in passing that a ruling would be premature because the district court had to ensure that she had the "opportunity to conduct relevant discovery," but she did not explain what additional facts she needed or what additional discovery she would take. And her vague assertion in a footnote in the fact section of her brief opposing summary judgment that she could not "probe the factual bases" of her employment evaluations and counseling letter until she took Stringer's and Su's depositions gave the district court no indication

of what “factual bases” she thought the depositions would uncover and how they would create a genuine issue of material fact for summary judgment. *See Burns*, 999 F.3d at 1334.

Bird had several additional opportunities to raise this issue before the district court, in any of her three motions to compel or at the summary judgment motion hearing or in the motion to postpone trial. But she didn’t. At the summary judgment hearing, she argued that the evidence she had submitted in opposition was sufficient to rebut the motion. Through counsel, she told the district court, “[H]ere there is evidence, from which a jury could infer, a sexist animus.” And she asserted, “[T]here is enough evidence in the record here to demonstrate that the evaluations that they relied on . . . were bogus.” And she insisted, “[T]he evidence amply supports a reasonable inference regarding that all of the actions [Stringer] took against her are — are harassment.” The district court was entitled to rely on Bird’s own assurances that she had submitted the evidence she believed she needed to survive summary judgment. *See Nesbitt v. Candler County*, 945 F.3d 1355, 1357 (11th Cir. 2020) (“A party can be held to concessions and admissions its counsel made at oral argument.”).

Bird argues that because she had motions to compel that were pending, their existence established that she properly notified the district court of remaining discovery. But here’s why none of those motions carries the day for her: she did not mention in any of her motions to compel wanting to take either of the doctors’ depositions. And the mere existence of those motions doesn’t

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provide the necessary notice. *See Wallace*, 703 F.2d at 527 (holding that the district court did not abuse its discretion in granting summary judgment when the nonmovant had an outstanding motion to compel and explaining that the court was “under no obligation to treat such motions and responses as satisfying the requirements of” Rule 56(d)). Just because district court was “aware” of a discovery dispute does not mean that it knew Bird “needed the then-outstanding discovery in order to properly oppose [the defendants’] motion for summary judgment,” which is her burden to show under Rule 56(d). *See Urquilla-Diaz*, 780 F.3d at 1064.

Under the circumstances, the district court did not abuse its discretion in granting the motion for summary judgment before the close of discovery.

**B. Summary Judgment on Bird’s Sex-Based
Hostile Work Environment and Tangible
Employment Action Discrimination Claims**

Bird challenges the grant of summary judgment to the Board on her sex-based discrimination claims, which we review *de novo*. *See Bearden v. E.I. du Pont de Nemours & Co.*, 945 F.3d 1333, 1337 (11th Cir. 2019). She relies on evidence that she obtained after the court entered its judgment, but we will not consider that evidence or any arguments that depend on it. We “may examine *only* the evidence which was before the district court when [it] decided the motion for summary judgment.” *Chapman v. AI Transport*, 229 F.3d 1012, 1026 (11th Cir. 2000) (en banc) (quoting *Welch v. Celotex Corp.*, 951 F.2d 1235, 1237 n.3 (11th Cir. 1992)). For the evidence that we

can and do consider, we view it in the light most favorable to Bird as the nonmoving party. *Bearden*, 945 F.3d at 1337.

“Title VII prohibits sex-based discrimination that alters the terms and conditions of employment.” *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1300 (11th Cir. 2007). And we’ve explained that “[t]he forbidden alteration can be brought about in either of two ways.” *Id.* One way is “through creation of a hostile work environment caused by sexual harassment that is sufficiently severe or pervasive to alter the terms and conditions of work.” *Id.* The other way is “through a tangible employment action, such as a pay decrease, demotion or termination.” *Id.* Bird has alleged both types of discriminatory conduct. She claims that she was subjected to harassment severe or pervasive enough to create a hostile work environment. And she claims that she was discriminated against based on her sex as evidenced by tangible actions that were taken against her. She’s wrong about both.

1. *Hostile Work Environment Harassment Theory*

We’ll address her hostile work environment contention first. Bird asserted one sex-based hostile work environment discrimination claim against the Board under the Florida Civil Rights Act (FCRA) and another one under Title VII. We analyze them together because they rise or fall together. The Florida Act “is modeled on Title VII,” and “Florida courts apply Title VII caselaw when they interpret the FCRA.” *Jones v. United Space All., LLC*, 494 F.3d 1306, 1310 (11th Cir. 2007).

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A sex-based hostile work environment claim requires a plaintiff to prove: (1) that she was subject to harassment based on her sex; (2) the harassment was sufficiently severe or pervasive to alter the terms and conditions of her employment and to create a discriminatorily abusive working environment; and (3) the employer is responsible for that work environment. *See Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002). To meet the “severe or pervasive” requirement, she must present evidence that her workplace was “permeated with discriminatory intimidation, ridicule, and insult.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quotation marks omitted). “[C]onduct must be extreme to amount to a change in the terms and conditions of employment” *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

Bird alleges that Stringer’s sexism made the urology department a hostile or abusive workplace for her. She asserts that Su knew about Stringer’s sexist behavior and didn’t do anything about it. And she alleges that the Board is responsible for the hostile work environment that was created by Stringer.

In her brief to this Court, Bird lists the conduct she believes establishes her hostile work environment claim. She points to incidents of alleged mistreatment by Stringer, including his offensive comments about women, his failure to treat her like a professional, and his criticism of her abilities as a doctor. We first identify the conduct that supports Bird’s sex-based hostile work environment claim. Then we analyze whether that evidence is sufficient to show that Stringer’s conduct created a workplace “permeated with

discriminatory intimidation, ridicule, and insult,” that was “sufficiently severe or pervasive to alter the conditions of [Bird’s] employment and create an abusive working environment” *Harris*, 510 U.S. at 21 (quotation marks and citations omitted).

a. *The conduct that supports Bird’s sex-based hostile work environment claim and the conduct that doesn’t*

Discriminatory comments that Stringer allegedly made about other women could create a hostile work environment for Bird, *see Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 807 (11th Cir. 2010) (en banc), but only if Bird actually heard those comments. *See id.* at 811 (“It is enough to *hear* co-workers on a daily basis refer to female colleagues as ‘bitches,’ ‘whores’ and ‘cunts,’ to understand that they view women negatively, and in a humiliating or degrading way.”) (emphasis added). “The totality of a plaintiff’s workplace circumstances does not include other employees’ experiences of which the plaintiff is unaware.” *Adams v. Austal, U.S.A., LLC*, 754 F.3d 1240, 1250 (11th Cir. 2014). The alleged sexist comments that Stringer made about women outside of Bird’s presence, either before or after she was hired, did not subject her to a hostile work environment because those comments were not part of her own work environment. *See id.* at 1255–56.

In the *Adams* case we distinguished between racist conduct a plaintiff experienced firsthand, which supported her hostile work environment claim, and racist conduct that she learned about from her coworkers, which didn’t support the claim. *See id.* In that case, a plaintiff’s “coworker showed her photographs of racist graffiti in

the men’s restroom at least every week, she heard that white supervisors had complained in a human resources meeting about [the employer] hiring black people, she saw a photograph of [a] stick figure with a noose, she heard about [a] noose in the breakroom, and she heard that a supervisor was harassing her black coworkers.” *Id.* at 1255. This Court held that evidence was not enough to support her hostile work environment claim. *Id.* at 1256. We explained that the plaintiff “willingly accepted” information about that conduct, “did not ask that [her coworkers] stop” sharing it, and did not “tell the senders that she felt harassed by” that information. *Id.* Evidence of her coworkers’ experiences didn’t support her claim that *she* was harassed based on her race, and therefore she had failed to establish a genuine issue of material fact “that her workplace was objectively hostile.” *Id.*

Similarly, Bird points to Stringer’s offensive language and sexist conduct that occurred outside of Bird’s presence and that others who worked in the urology department discussed with her. That evidence is not enough to establish that she was harassed based on her sex or that her own work environment was objectively hostile. *See id.*

In addition to the conduct that occurred outside of Bird’s presence, she points to other conduct that was not sex-based. Non-sex-based conduct does not support her sex-based harassment claim, because: “Title VII . . . does not prohibit harassment alone, however severe and pervasive. Instead, Title VII prohibits discrimination, including harassment that discriminates based on a

protected category such as sex.” *Baldwin*, 480 F.3d at 1301–02. To support her claim, Bird must point to evidence of allegedly discriminatory conduct that is motivated by her sex. *See Tonkyro v. Sec’y, Dep’t of Veterans Affs.*, 995 F.3d 828, 838 (11th Cir. 2021) (rejecting the contention that a “chest bump” from another female employee was sex-based touching because the factual context showed that it was “a mere celebratory gesture”); *id.* (concluding that there was no evidence that “angry looks, harsh words, and silent treatment” were “influenced by” plaintiff’s sex); *see also Yelling v. St. Vincent’s Health Sys.*, 82 F.4th 1329, 1336 (11th Cir. 2023) (concluding that the plaintiff failed to establish that co-workers’ comments about being “confederate flag flyers” or “redneck gun owners” were race-based because she provided no context for those statements).

That Stringer made sexist remarks does not lead to the conclusion that every action he had ever taken or would ever take, even those that have no inherent sex-based connotation, was sexist. *See Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1247–48 (11th Cir. 1999) (en banc) (concluding that a supervisor’s comment that he was “getting fired up” during an angry conversation was a non-sex-based reaction that did not support a hostile work environment claim, even though some of his other conduct and comments were overtly sex-based).

Relatedly, there is no evidence in the summary judgment record that anyone else in the department ever treated women differently than they treated men. And there is no evidence that Stringer encouraged anyone else to harass or discriminate against

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Bird because of her sex. “[F]ederal law doesn’t prohibit hostility in the workplace—only hostility caused by impermissible discrimination.” *Harris v. Pub. Health Tr. of Miami-Dade Cnty.*, 82 F.4th 1296, 1304 (11th Cir. 2023). Any alleged offensive or harassing conduct that was not sex-based, taken by Stringer or anyone else in the urology department, does not and cannot support Bird’s hostile work environment claim.

b. *The sex-based conduct Bird has identified
was not severe or pervasive*

Sex-based harassment that is “[e]ither sever[e] or pervasive[] is sufficient to establish a violation of Title VII.” *Reeves*, 594 F.3d at 808. But for harassment to be severe or pervasive, “the employer’s actions must result in both an environment that a reasonable person would find hostile or abusive and an environment that the victim subjectively perceives to be abusive.” *Tonkyro*, 995 F.3d at 837 (alterations and quotation marks omitted). Bird did subjectively perceive her working environment to be abusive.

What is disputed is the objective component: whether a reasonable person would also find the environment to be hostile or abusive. We look at the totality of the circumstances to determine the objective severity of the harassment, “including: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee’s job performance.” *Id.* (quotation marks omitted). And the “intimidation, ridicule, and insult” that creates

a hostile work environment “must also bear the necessary sexual or other gender-related connotations to be actionable sex discrimination.” *Id.* (quotation marks omitted).

Excluding conduct that was not sex-based and conduct that Bird herself didn’t see or hear, that leaves only the following: (1) Stringer told Bird to give surgeries “to the guys,”⁶ (2) Stringer showed Bird a photo of female medical residents cooking with pots and pans in his kitchen,⁷ (3) Stringer patted a female resident on the head and suggested that she was not smart,⁸ (4) Stringer said he wondered about how a prospective female resident would “roll[] in the hay,”⁹ (5) Stringer told Bird her request for an “equal opportunity” to practice urology was “ridiculous,”¹⁰ (6) Stringer offered

⁶ Bird testified that Stringer told her that she should not and would likely never perform “hospital or surgical procedures” and that she should give her “OR [operating room] cases to the guys.”

⁷ Stringer invited some female residents to his home so that his wife could teach them how to cook. He took a picture of the residents with his wife in his kitchen holding pots and pans, and he showed that picture to Bird.

⁸ Bird testified that she once saw Stringer “pet[]” a female resident on the head while introducing her and saying “there’s not much in there,” which Bird interpreted to mean he did not think the resident was smart.

⁹ Bird testified that in a faculty meeting, Stringer was discussing a female residency applicant and commented that he “wonder[ed] how she rolls in the hay.”

¹⁰ A jury could interpret Stringer’s statement: “Equal opportunity. What kind of terminology is that? That is ridiculous,” to mean that he thought it was ridiculous that Bird was implying that she did not have an equal opportunity to practice urology. But because a jury could also interpret that statement to mean that Stringer thought it was ridiculous that she thought she

to let Bird move her practice to the Haile Plantation family practice clinic so she could be close to her children,¹¹ and (7) Stringer yelled at Bird in front of a female undergraduate student in April 2016 and came so close to Bird that his spittle hit her face and she felt threatened.¹²

Considering the totality of the circumstances, Bird failed to show sex-based harassment that was severe or pervasive enough to alter the terms and conditions of her employment and to create a

should be able to practice urology like the men in the department, we include it as sex-based evidence (although barely) for Bird's claim.

¹¹ Bird testified in her deposition that Stringer "said that there was this opportunity in Haile Plantation, I'd be near my kids, and, you know, that's great, although he never offered that to my husband, and we have kids together." Whether Stringer's conduct was sex-based is ambiguous. We include it here because Stringer suggested being close to the children would be desirable for Bird but didn't make the same offer to her husband, who also worked as a doctor in the urology department. Those facts could lead a jury to believe that Stringer made the comment because Bird is a woman and thus should be focused on working somewhere close to her children. Although that is something of a stretch.

¹² In April 2016, a female undergraduate student (not a medical student) was shadowing Bird when Stringer approached the two. Bird testified he yelled angrily and pointed at the student asking: "Who is it, who is she? Is she legal?" Stringer was yelling so close to her face that Bird could smell his breath, spittle hit her face as he talked, and she felt threatened. Bird testified that after this incident, which was investigated by HR, "they made up" a policy that any student participating in clinic activities had to be appropriately credentialed. While certainly rising to the level of offensive and inappropriate, whether this incident is sex-based is ambiguous. The most that can be said to support a conclusion that it was sex-based is the undergraduate student was a female, but that is not a solid basis for the conclusion. We include it anyway.

discriminatorily abusive working environment. *See Miller*, 277 F.3d at 1275. The seven incidents of Stringer’s comments or conduct occurred during the three years Bird was doing clinical work, which is an average of one incident or comment every five months. That is not frequent enough to be pervasive harassment that altered the terms and conditions of her employment. *See id.* at 1275–76.

We have held that frequent harassment did occur when there were 15 separate, serious incidents over four months, an average of just under one a week. *See Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501, 509 (11th Cir. 2000). There’s a lot of difference between one incident every five months in our case and one every week in the *Johnson* case. The difference is that the harassment in *Johnson* was 20 times more frequent than in this case.

And, unlike this case, some of the harassment in *Johnson* was severe. For example, the harasser in that case stood so close to the plaintiff that his body parts touched her from behind, he pulled “his pants tight to reveal the imprint of his private parts,” he gave the plaintiff unwanted shoulder massages, and his conduct was physically threatening. *Id.*

By contrast, some of the conduct Bird alleged was not directed at her, and that makes a difference. *See Tonkyro*, 995 F.3d at 839. We’ve explained that conduct “merely witnessed by” the plaintiff instead of “directed at her” is less severe. *Id.* Infrequent and somewhat ambiguous comments were directed at Bird. *See Faragher*, 524 U.S. at 788 (explaining that “isolated incidents (unless

extremely serious) will not amount to discriminatory changes in the terms and conditions of employment”) (quotation marks omitted).

Bird was not physically threatened in a way that interfered with her job performance. Although Stringer once yelled at her and got so close that his spittle flew in her face, and at that time she felt threatened by him, we’ve held that more extreme conduct was not physically threatening. In *Mendoza*, for example, this Court held that a supervisor’s conduct of “rubbing his hip against [the plaintiff’s] hip while touching her shoulder and smiling,” twice making a sniffing sound while looking at the plaintiff’s groin, and constantly following and staring at the plaintiff when they were together in the workplace was not physically threatening or humiliating. 195 F.3d at 1242, 1247–49. By contrast, in *Hulsey*, the conduct clearly was severe enough to qualify as sexual harassment. The supervisor in that case on various occasions followed the plaintiff into the restroom, repeatedly tried to touch her breasts, placed his hands down her pants, pulled off her pants, and had others help him hold her while he attempted to grope her. *Hulsey v. Pride Rests., LLC*, 367 F.3d 1238, 1240–42 (11th Cir. 2004). We characterized that as behavior a reasonable employee in the plaintiff’s position would perceive to be “physically threatening and humiliating, especially coming as it did from an immediate supervisor.” *Id.* at 1248.

Bird, by contrast, failed to create a genuine issue of material fact that her workplace was “permeated with discriminatory

intimidation, ridicule, and insult . . . sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment.” *Harris*, 510 U.S. at 21 (citation and quotation marks omitted). Or that she had been subjected to comments or behavior severe enough to qualify as sexual harassment. The district court properly granted summary judgment on her sex-based hostile work environment claims against the Board.

*c. The allegedly retaliatory harassment
wasn’t based on Bird’s complaints*

Bird also contends that this same conduct created a retaliatory hostile work environment. In the “statement of facts” section of her complaint, Bird made two vague references to a retaliatory hostile work environment, although she didn’t mention who allegedly committed any retaliatory acts. Doc. 1-2 ¶¶ 61, 111. Although her complaint did not assert a separate claim based on retaliatory hostile work environment, when she opposed summary judgment, she argued that she had been subjected to one. A plaintiff cannot amend her complaint by asserting a new claim in her opposition to summary judgment. *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 859 (11th Cir. 2020).

But the district court considered the “claim” anyway, and it concluded that even if Bird had brought that hostile work environment claim based on retaliatory conduct in a procedurally proper way, that claim would fail on the merits. It observed that Bird relied on the same conduct she had alleged in support of her sex-based hostile work environment claim, and there was no evidence

that any alleged harassment occurred *because of* her protected conduct. Instead, Bird argued that she “was subjected to unrelenting harassment over a four-year period which started immediately when she began working in the clinic and did not end until Defendants had effectively fired her.” The district court unsurprisingly concluded that Bird couldn’t show that her protected conduct caused the alleged harassment. She presented no evidence that the alleged harassment was worse or different after she complained about Dr. Stringer’s behavior than before.

We agree with the district court. To survive summary judgment on a Title VII retaliatory hostile work environment claim, Bird was required to show that she was harassed “*because*” she “opposed” an unlawful employment practice or “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C. § 2000e-3(a) (emphasis added). She had to show that her employer was responsible for a hostile work environment that was created “in retaliation for [her] engagement in protected activity.” *Tonkyro*, 995 F.3d at 835. And she had the burden of showing that her protected conduct was the “but for” cause of the retaliatory harassment. See *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013) (holding that the plaintiff’s Title VII retaliation claims against his employer “must be proved according to traditional principles of but-for causation,” which “requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer”). The district court correctly concluded that Bird didn’t make that showing, so even assuming

that she had properly brought a retaliatory hostile work environment claim without including one in her complaint, the Board was entitled to summary judgment on it.

2. *Tangible Employment Action Theory*

Bird also brought two claims against the Board, one under FCRA and one under Title VII, alleging that she was subjected to sex-based tangible employment action discrimination. The same analysis applies to both of those discrimination claims. *See Jones*, 494 F.3d at 1310; *supra* at 14.

Title VII makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). Bird must show that her sex was a motivating factor in “a tangible employment action, such as a pay decrease, demotion or termination.” *Baldwin*, 480 F.3d at 1300.

In her briefs to this Court, Bird identified the following employment actions that she contends were based on her sex: the decision not to renew her contract, her reassignment from the clinic to research work in her final year as an employee of the urology department, and her employment evaluations (one of which she received along with a counseling letter).

As we will explain, the evaluations and counseling letter did not result in any tangible consequences and thus were not adverse actions. And while the decision not to renew her contract and the

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reassignment from clinical to research work were both adverse actions, there is no evidence Su made those decisions because of Bird's sex.

a. *The evaluations and counseling letter
are not adverse employment actions*

Bird contends that the district court erred in concluding that her 2015 and 2016 employment evaluations and 2016 counseling letter were not adverse actions that supported her retaliation claim.¹³ Counseling letters and negative employment evaluations that do not result in “a serious and material change in the terms, conditions, or privileges of employment” are not adverse employment actions. *See Howard v. Walgreen Co.*, 605 F.3d 1239, 1245 (11th Cir. 2010) (quotation marks and emphasis omitted). Things like reductions in pay or benefits constitute material changes, not things like “counseling memorand[a]” that merely “express[] concern and criticism” of an employee's performance. *Davis v. Town of Lake Park*, 245 F.3d 1232, 1240 (11th Cir. 2001) (quotation marks omitted).

The evidence shows, and Bird does not argue otherwise, that she suffered no immediate material change in the conditions of her employment because of her yearly evaluations or her

¹³ Bird contends that at the summary judgment hearing, the Board's counsel conceded that Su based his decision not to renew Bird's contract on her two evaluations and the counseling letter. But that is not accurate. What the Board's counsel said at the hearing is that the performance and interpersonal issues that Su was having with Bird were outlined both in his affidavit and in her evaluations and counseling letter.

counseling letter. The 2015 evaluation did include some negative feedback and indicated that Bird had room for improvement in certain areas, but it stated that Bird nonetheless “[a]chieved” standards for the year, and it did not express or imply any negative repercussions. And the 2016 counseling letter, delivered to Bird along with her 2016 yearly evaluation, explicitly stated that it did not count as formal discipline and that it could negatively impact Bird’s career only if problems persisted. The evaluations and counseling letter were not adverse employment actions.

b. Bird’s sex was not a motivating factor in the decision not to renew her contract and to reassign her from clinical to research work

Su was the decision-maker who determined that Bird’s contract would not be renewed and that she would be removed from clinical work and reassigned to a research role. Those were adverse employment actions. Although Bird does not allege that Su directly discriminated against her based on her sex, she advances two theories in an attempt to establish that her sex was a motivating factor for Su’s employment decisions.

First, Bird relies on a cat’s paw theory of liability. She argues that Stringer made a biased recommendation to Su, which motivated the adverse employment actions that Su took. Second, she contends that she presented a convincing mosaic of circumstantial evidence showing that her sex was a motivating factor in the decision to take those actions. We address both contentions in turn.

i. The cat’s paw analysis does not apply

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A cat’s paw theory can establish a causal link between a biased recommendation of an employee and an adverse employment action taken by an unbiased decision-maker. *See Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1331–32 (11th Cir. 1999). For Bird’s discrimination claim to survive summary judgment based on a cat’s paw theory, she must show that Stringer used Su “as a mere conduit, or ‘cat’s paw’ to give effect to [Stringer’s] discriminatory animus.” *Id.* at 1332. If that showing is made, her former employer “may be held liable for the [sexist] animus of its non-decisionmaking employee, [Stringer],” if Stringer’s “discriminatory conduct cause[d]” the decision-maker Su “to take an injurious action against [Bird].” *Ziyadat v. Diamondrock Hosp. Co.*, 3 F.4th 1291, 1298 (11th Cir. 2021).

For Bird’s discrimination claim under Title VII, the standard for causation is whether discriminatory animus was a motivating factor in the adverse employment action. *See id.*; *see also Staub v. Proctor Hosp.*, 562 U.S. 411, 418–19, 422 (2011); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009). That standard considers “whether illegal bias played a role” in the adverse employment action. *Yelling*, 82 F.4th at 1338 (quotation marks omitted). So long as discrimination “was a motivating factor for the defendant’s adverse employment action,” Bird can establish causation, “even if some other (lawful) consideration would have led to the same outcome.” *Id.* (quotation marks omitted). Even so, a “motivating factor” is more than just “a factor.” *See Staub*, 562 U.S. at 418–19 (“When a decision to fire is made with no unlawful animus on the part of the firing agent, but partly on the basis of a report prompted

(unbeknownst to that agent) by discrimination, discrimination might perhaps be called a ‘factor’ or a ‘causal factor’ in the decision; *but it seems to us a considerable stretch to call it ‘a motivating factor.’*”) (emphasis added).

The plaintiff must show that the discriminatory animus of a non-deciding supervisor was the proximate cause of the decision-maker’s adverse employment action. *Id.* at 422 (holding “that if a supervisor performs an act motivated by [discriminatory] animus that is *intended* by the supervisor to cause an adverse employment action, *and if that act is a proximate cause* of the ultimate employment action, then the employer is liable”) (footnotes omitted) (first emphasis in original; second emphasis added). Stringer’s negative assessment of Bird was not a proximate cause of Su’s adverse employment actions against Bird if Su determined based on his independent investigation that his actions were entirely justified “apart from” any discriminatory input from Stringer. *See id.* at 421 (“[T]he supervisor’s biased report may remain a causal factor *if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor’s recommendation, entirely justified.*”) (emphasis added). Bird has failed to show a genuine issue of material fact about causation. She has not rebutted the evidence that Su’s independent investigation led him to determine that adverse employment actions were entirely justified apart from Stringer’s earlier negative assessments of Bird.

The parties agree that Su is the decision-maker for the adverse employment actions. Bird does not contend that Su was

biased against her. So her cat’s paw theory requires her to show that Stringer used Su as “a mere conduit . . . to give effect to [Stringer’s] discriminatory animus.” *Stimpson*, 186 F.3d at 1332. To succeed on that theory of liability, she had to show that Su was simply Stringer’s puppet and that Su failed to independently investigate the performance and interpersonal problems that Stringer and others in the department had complained that Bird was having. *See Harris v. Pub. Health Tr. of Miami-Dade Cnty.*, 82 F.4th 1296, 1301 (11th Cir. 2023) (“A cat’s-paw argument requires evidence that the ultimate (and manipulated) decisionmaker—the puppet—followed the biased recommendation of another—the puppeteer—*without independently investigating* the complaint against the employee.”) (emphasis added) (quotation marks omitted); *Stimpson*, 186 F.3d at 1332 (“This theory provides that causation may be established if the plaintiff shows that the decisionmaker followed the biased recommendation *without independently investigating* the complaint against the employee.”) (emphasis added).

Before Su became chair of the urology department in 2016, Stringer conducted Bird’s annual performance evaluation in 2015. The evaluation included some negative assessments, such as noting that Bird’s scheduling and efficiency problems had resulted in patient complaints. Even so, the 2015 evaluation concluded that, overall, Bird met standards.¹⁴ *See supra* at 27–28.

¹⁴ The 2015 evaluation did indicate that Bird had room for improvement in certain areas, but it stated that she nonetheless “[a]chieved” standards

The following year, Su, who had become chair of the urology department, took the lead on Bird's annual evaluation and an accompanying counseling letter, but Stringer was also involved. The 2016 evaluation noted some improvements, such as increased productivity, but Bird's "overall rating" dropped to "below performance standards." The 2016 counseling letter discussed both performance problems and issues with "interpersonal interactions."

In 2017 Su took the adverse actions against Bird that led to this lawsuit. Su swore in his affidavit that he took those actions because Bird's performance and interpersonal problems had continued, and he had not seen any improvement.

Su stated that as chair of the department he made his decisions about Bird based on his own knowledge, gained through personal observation of Bird and reports from multiple people (not just Stringer) who worked inside and outside of the urology department. The fact that Su conferred with others in the department (not just Stringer) is evidence of his independent investigation, and Bird hasn't offered evidence to rebut that. Su's independent investigation also included his personal observations. One of the specific problems Su personally observed was Bird's over-diagnosis of bladder tumors when she did "cystoscopic evaluations," which caused patients to be subjected to unnecessary bladder biopsies in the operating room under anesthesia. That's highly significant. It establishes that Su saw with his own eyes proof of Bird's clinical

for the year, and it did not express or imply that there would be any negative repercussions for anything she had done or failed to do.

shortcomings and the results that had on the treatment of patients. Bird hasn't rebutted that evidence. Su also swore that she failed to correct those problems after she had been counseled to do so, and she hasn't presented evidence to the contrary.

In his affidavit, Su described his *first-hand* experience with the problem of Bird's "over diagnosing bladder tumors during cystoscopic evaluations," which subjected patients to "unnecessary and invasive bladder biopsies." Su *himself* was one of the two doctors to whom Bird routinely referred these patients for surgical biopsies. Su *himself* performed the surgical procedure on these misdiagnosed patients. Stringer, by contrast, was a "general urologist" with a solely "clinic-based" practice like Bird's.

Based on Bird's erroneous findings, Su "took patients to the operating room under general anesthesia for biopsy, only to find either nothing in the bladder or other non-concerning findings or discoloration of the bladder lining." And Su "received similar complaints from *other physicians*" who also performed "operative biopsies on patients referred by Dr. Bird." Su didn't name Stringer as one of those "other physicians," which makes sense given that Stringer and Bird were "general urologists" with "clinic-based" practices, unlike Su and other doctors in department who had a surgical practice.

The evidence of Su's investigation of problems with Bird's performance, including what he saw with his own eyes in the operating room, is enough to rebut the cat's paw allegation as to Bird's performance. He was required to investigate Bird's

performance, but he was not required to investigate the bias of anyone who pointed out Bird's performance problems, whether that was Stringer or someone else. *Harris*, 82 F.4th at 1302 (explaining that "what's required to rebut a cat's-paw allegation is an investigation of the complaint against the employee—not of the bias of the recommender") (quotation marks omitted).

Bird has failed to rebut the evidence that Su based his adverse employment actions on his first-hand observations and his independent investigation of Bird's performance problems. In his affidavit, Su stated that: "The primary reason that I made the decision to non-renew Dr. Bird was my (and institutional leadership's) genuine concerns about the poor quality of clinical care that Dr. Bird was providing to her patients."¹⁵ Su was aware of Stringer's earlier evaluations of Bird and her history of performance problems. Su admitted that before he became chair of the urology department, Stringer's August 27, 2015, yearly evaluation of Bird had made him aware of performance problems she was already having. But he also describes fulfilling his "duty as the newly appointed Chair to make [his] very own independent assessment of Dr. Bird's abilities and interactions" when he took the leadership role in 2016. And his own independent investigation convinced Su there were serious problems with her clinical performance that had detrimentally affected patients by subjecting them to unnecessary biopsy procedures. Based on Su's own knowledge and assessment, he

¹⁵ A secondary reason was her interpersonal relations with others, which is discussed *infra* at 36–37.

determined that Bird “demonstrated no significant improvement” even after meetings and counseling sessions to address the problems she was having.

And Stringer’s earlier evaluations weren’t Su’s only source of information about Bird’s poor performance. Medical residents “independently and anonymously” rated Bird significantly below faculty average in clinical knowledge. At the March 2017 meeting that led to Su’s decision not to renew Bird’s contract, Dean Dewar “weighed in” on “concerns about patient care.”

It was entirely reasonable for Su to be concerned about Bird’s performance problems, including the overdiagnosis of bladder tumors leading to unnecessary biopsies. It would have been irresponsible for him, as chair of the urology department, not to be concerned. Bird swore in her declaration that Su never observed her in a patient’s room and thus could not have independently evaluated her abilities as a doctor. We accept as fact that Su did not base his decision on observing Bird when she was actually with patients. But, even so, Su personally investigated and observed the results of Bird’s performance when he followed up surgically on the heels of her diagnoses and saw for himself that she had misdiagnosed patients and caused them to be taken unnecessarily “to the operating room under general anesthesia for biopsy.” That was his independent assessment, and Stringer had no involvement with it. Su did not need to rely on Stringer or to observe Bird in a patient’s room to determine for himself if she had caused patients to be

unnecessarily taken to the operating room, put under anesthesia, and subjected to an unnecessary and invasive medical procedure.

Another problem with Bird's performance, according to Su, arose from Bird's research work outside of the urology department interfering with her primary duty as a clinician. He believed that her focus on research caused some of her performance problems because she was "overextending herself and not fulfilling her primary role, which was to provide high quality care of her patients in the clinic setting." Su swore that those were his own direct assessments as chair of the urology department, and Bird failed to refute that they were, or that he was just parroting Stringer's concerns and serving as "a mere conduit . . . to give effect to [Stringer's] discriminatory animus." *Stimpson*, 186 F.3d at 1332.

Bird argues that Stringer told Su about the alleged poor quality of clinical care that she was providing and that Stringer's sexist bias thereby drove Su's adverse employment actions. She points to her 2015 and 2016 employee evaluations and the 2016 counseling letter, which Stringer either authored or contributed to. But she has failed to establish that the actions Su took in 2017 were based on those evaluations or that letter, instead of his own independent knowledge of Bird's ongoing and uncorrected performance problems, which Su personally determined had adversely affected patient care.

Su heard about Bird's interpersonal problems from multiple sources. He swore that he "received complaints" not just from Stringer but from "numerous other individuals regarding their

interactions with her, including residents, faculty members, nurses, urology clinic leadership, and other College of Medicine faculty outside the Department.” All of that is evidence of Su’s independent investigation of the interpersonal issues Bird was having. Not only that, but Su himself had trouble communicating with Bird about her problems because she “often cancelled or rescheduled meetings with [him], making communication with her extremely challenging.”

As with the evidence of Su’s independent assessment of her performance problems, Bird hasn’t rebutted the evidence of his independent assessment of her interpersonal issues. It’s not enough for Bird to protest that she really is a good doctor and that Su’s assessment of her performance is wrong. *See Rojas v. Florida*, 285 F.3d 1339, 1342 (11th Cir. 2002) (“In analyzing [Title VII] claims . . . [courts] must be careful not to allow Title VII plaintiffs simply to litigate whether they are, in fact, good employees.”). Nor is it enough for her to argue that she gets along swimmingly with others and that Su’s assessment of her interpersonal problems is wrong. *See id.* She must show that sex-based discrimination caused Su to make the adverse employment decisions. *See Staub*, 562 U.S. at 422.

And to do that using a cat’s paw theory Bird must show that Su’s employment decisions rubber-stamped Stringer’s assessments of her and that he was pulling the strings of his puppet Su to get rid of Bird because she is a woman. *See Stimpson*, 186 F.3d at 1332 (explaining that “causation may be established if the plaintiff shows

that the decisionmaker followed the biased recommendation *without independently investigating the complaint against the employee*” and serving as a mere “rubber stamp” for the discriminatory actor) (emphasis added). To succeed, “[a] cat’s-paw argument requires evidence that the ultimate (and manipulated) decisionmaker—the puppet—followed the biased recommendation of another—the puppeteer—without independently investigating the complaint against the employee.” *Harris*, 82 F.4th at 1301 (quotation marks omitted). Bird hasn’t shown that any biased recommendation or biased complaint from Stringer about her is the proximate cause of the adverse employment actions Su took against her. *See Staub*, 562 U.S. at 422. The evidence of Su’s investigation of complaints against Bird is enough to rebut the cat’s paw allegation; he was not required to investigate the bias of the complainer, whether that was Stringer or someone else. *Harris*, 82 F.4th at 1302. Add to that Su based his decisions on his first-hand observations and his personal knowledge of Bird’s performance and interpersonal problems, and her cat’s paw argument fails.¹⁶

¹⁶ Bird’s other scattered assertions about Su’s decision-making fail to advance her position. She relies on evidence from the trial, which we cannot consider when reviewing summary judgment. *See Chapman*, 229 F.3d at 1026; *supra* at 13. And she argues that we shouldn’t rely on Su’s affidavit because he’s not credible. Simply questioning Su’s credibility, as she does, isn’t enough to create a genuine issue of fact at the summary judgment stage. *See Dershowitz v. Cable News Network, Inc.*, 153 F.4th 1189, 1193 (11th Cir. 2025); *see also Crawford-El v. Britton*, 523 U.S. 574, 600 (1998) (holding that “the plaintiff may not respond simply with general attacks upon the defendant’s credibility, but rather must identify affirmative evidence” to survive summary judgment);

ii. Bird has not established a convincing mosaic of circumstantial evidence

Finally, Bird contends she presented a “convincing mosaic”: enough evidence of discriminatory conduct within the urology department that a jury could believe that Su didn’t renew her contract and reassigned her to research work because of her sex.

A plaintiff can offer direct or circumstantial evidence to establish a sex discrimination claim under Title VII. *Alvarez v. Royal Atl. Devs., Inc.*, 610 F.3d 1253, 1264 (11th Cir. 2010). We’ve said that a claim may survive summary judgment when the plaintiff “presents a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker.” *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011) (footnote and quotation marks omitted). The mosaic can consist of “among other things, (1) suspicious timing, ambiguous statements, and other bits and pieces from which an inference of discriminatory intent might be drawn, (2) systematically better treatment of similarly situated employees, and (3) that the employer’s justification is pretextual.” *Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019) (alteration adopted) (quotation marks omitted).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986) ([T]he plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment.”). If credibility attacks alone were enough to defeat summary judgment, it would seldom be granted.

“The convincing mosaic approach is—in its entirety—the summary judgment standard.” *McCreight v. AuburnBank*, 117 F.4th 1322, 1335 (11th Cir. 2024). The “phrase is a metaphor, not a legal test and not a framework.” *Id.* (quotation marks omitted). It simply “recognize[s] that courts must consider the totality of a plaintiff’s circumstantial evidence on summary judgment.” *Yelling*, 82 F.4th at 1342. And it’s a way of describing the plaintiff’s attempt to present “enough evidence for a reasonable juror to infer intentional discrimination.” *McCreight*, 117 F.4th at 1336.

However it is described, “[s]o long as a plaintiff argues that she has presented enough evidence for a reasonable juror to infer intentional discrimination, she has preserved that issue and put the court on notice of the relevant standard.” *Id.* Regardless of the term used, the substance of the issue is the same.

Bird contends that her sex discrimination claims should survive summary judgment because the Board gave pretextual reasons for the decision not to renew her contract and the decision to reassign her from clinical to research work. “To establish pretext, an employee must cast sufficient doubt on the employer’s proffered nondiscriminatory reasons to permit a reasonable factfinder to conclude that they were not what actually motivated its conduct.” *Phillips v. Legacy Cabinets*, 87 F.4th 1313, 1323–24 (11th Cir. 2023) (alterations adopted and quotation marks omitted). The Board contends that Bird’s contract was not renewed and she was removed from clinical work because she was underperforming as a doctor and did not get along with others in the clinic.

It's not enough for Bird to argue that the factual premises of those reasons were wrong; instead, she has to show that the reasons were a pretext, meaning the Board knew they weren't the real reasons, and that the real reason was intentional discrimination based on her sex. *See Alvarez*, 610 F.3d at 1266. Bird cannot prevail by arguing that her employer's "complaints about the quality of her work were unfounded" and that "she thinks more highly of her performance than her employer does." *Id.* "The inquiry into pretext centers on the employer's beliefs, not the employee's beliefs and, to be blunt about it, not on reality as it exists outside of the decision maker's head." *Id.*

Bird insists that her employer's assessment of her performance was incorrect. She argues that she did not underperform as a doctor, as shown by Stringer's failure to mention concerns about her clinical proficiency in his August 2015 evaluation or in his 2015 email about her credentialing, where he wrote that "within the limited clinical space" where "she is asked to function" there were "no deficiencies or concerns." But even though Bird's August 2015 evaluation is less critical than her 2016 evaluation and counseling letter, it still discussed her clinical deficiencies. It is not inconsistent with the Board's proffered reasons for not renewing her contract and reassigning her to research work.

Bird also points to an affidavit of a radiologic technologist, who stated that she watched Bird perform one of the procedures that Stringer had prohibited Bird from doing and that she "was not concerned about [Bird's] abilit[ies]" to perform it. Evidence that a

technologist believed Bird could effectively perform certain medical procedures does not rebut the reasons given by Dr. Su for his decisions. Bird's arguments merely quarrel with the wisdom of the employer's reasons for its decisions, *see Alvarez*, 610 F.3d at 1266, and fail to create a fact question about pretext.

In sum, instead of showing that the proffered reasons were a pretext for sex discrimination, Bird argues about whether her performance at the clinic was deficient. But the issue isn't whether Bird is a good doctor. *See Rojas*, 285 F.3d at 1342; *see supra* at 37. The issue is whether Bird's sex was a motivating factor in not renewing her contract and reassigning her from clinical work to research work. Bird failed to create a genuine issue of material fact that it was a motivating factor and therefore failed to present enough evidence for a reasonable jury to find that Su decided not to renew her contract and reassigned her to research work because she is female. The district court did not err in granting summary judgment in favor of the Board on Bird's sex-based discrimination claims.

The district court concluded that Bird's § 1983 equal protection claims against Stringer and Su failed for the same reasons that her Title VII claims against the Board failed. We agree. Bird failed to show that she was subjected to a hostile work environment or discrimination based on her sex. Summary judgment was properly granted to Stringer and Su.

C. Denial of Motion to Reconsider Summary Judgment

In denying Bird’s motion for reconsideration of the summary judgment entered against her on the sex-based hostile work environment harassment and discrimination claims, the district court gave three reasons: the motion was filed just before trial was set to begin; it improperly relied on evidence obtained after summary judgment was entered nearly two years before; and it failed on the merits. We agree. The district court properly exercised its discretion in denying the motion to reconsider that part of its judgment.¹⁷

D. The Refusal to Give a Cat’s Paw Jury Instruction

At trial on Bird’s retaliation claims against the Board, the court declined to give a cat’s paw jury instruction that Bird had requested. She asked for the jury to be instructed that, even if Stringer wasn’t the decision-maker, the Board could be held liable for retaliation if the jury found that Stringer’s retaliatory animus

¹⁷ Citing a Fifth Circuit decision from 2018, *McClendon v United States*, 892 F.3d 775 (5th Cir. 2018), Bird contends that we should review *de novo* the denial of her motion to reconsider because the district court considered the additional evidence that Bird had submitted with it. It’s basic that we are bound by our precedent, not that of other circuits. See, e.g., *United States v. Ware*, 69 F.4th 830, 855 (11th Cir. 2023) (“It goes without saying that Third Circuit precedent cannot supersede contrary Eleventh Circuit precedent in appeals to this Court.”); *In re USA*, 624 F.3d 1368, 1372 (11th Cir. 2010) (emphasizing that we are “bound to follow prior panel precedent that is on point”) (quotation marks omitted). And our precedent establishes that we review the denial of her motion to reconsider only for abuse of discretion. See *Corley v. Long-Lewis, Inc.*, 965 F.3d 1222, 1234 (11th Cir. 2020) (“We review the denial of a motion for reconsideration for an abuse of discretion.”).

influenced Su's decisions not to renew her contract and to reassign her from clinical to research work.

Stringer did not testify at trial. Su did testify, but his testimony was limited. He testified that Stringer was interim chair of the urology department when Su took over as chair in March 2016. About Bird, Su's only testimony was that when he took over as chair, he and Stringer conferred about the performance of all faculty members, including Bird. That was the full extent of it.

The court determined that the evidence would not permit a rational juror to find that Stringer's actions influenced the decision-making about Bird. It was correct. The evidence didn't support that theory. And the court did not abuse its discretion by refusing to give an instruction unsupported by the evidence. *See Bhogaita v. Altamonte Heights Condo. Ass'n*, 765 F.3d 1277, 1290 (11th Cir. 2014) (holding that the district court correctly refused to give a requested jury instruction because the evidence didn't support it); *see also Dedmon v. Staley*, 315 F.3d 948, 949–51 (8th Cir. 2003) (holding that because the evidence didn't support a cat's paw theory of liability, the court didn't abuse its discretion by refusing to give a cat's paw jury instruction).

II. CONCLUSION

For all the foregoing reasons, the district court did not abuse its discretion, or err as the standard may be, in deciding the defendants' motion for summary judgment before the close of discovery; granting summary judgment on all but Bird's retaliation claims; denying Bird's motion for reconsideration of summary judgment;

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or declining to give a cat's paw jury instruction on the retaliation claims that went to trial.

AFFIRMED.