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United States Court of Appeal
Tenth Circuit

October 18, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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TONI R. PALMER,

Plaintiff - Appellant,

v.

KAISER FOUNDATION HOSPITALS TECHNOLOGY RISK OFFICE,

Defendant - Appellee.

APPENDIX A

No. 18-1028
(D.C. No. 1:16-CV-02376-WJM-KMT)
(D. Colo.)

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ORDER AND JUDGMENT*

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Before EID, KELLY, and O'BRIEN, Circuit Judges.

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Toni R. Palmer appeals from the district court's grant of summary judgment to her former employer, Kaiser Foundation Hospitals, in her employment lawsuit. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

Palmer began working as a Senior Case Manager in the Technology Risk Office of Kaiser Foundation Hospitals (Kaiser) on March 31, 2015. She was the only

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

African-American employee in her department. Starting in May, she was assigned as a support person for Senior Director Natalie Henderson, who had participated in the hiring process and approved of hiring Palmer. But Henderson was dissatisfied with Palmer's performance, and Palmer had difficulty with Henderson's management style. Palmer accused Henderson of bullying her, intimidating her, and being critical of her. She experienced physical and mental ailments due to her work situation, and she unsuccessfully sought transfers to other departments. By the end of 2015, Palmer had complained about Henderson numerous times.

On January 11, 2016, Henderson presented Palmer with a thirty-day Performance Improvement Plan (PIP). In February Henderson extended the PIP for another thirty days. Palmer failed to successfully complete the PIP.

The PIP ended on March 11, 2016. The next day, Henderson decided to terminate Palmer's employment. She planned to tell Palmer at a meeting scheduled for March 24. But after receiving an allegedly hostile communication from another team member on March 22, Palmer called in sick on March 23, 24, and 25. She then submitted doctor's notes to support her request for medical leave through the first part of April. Henderson e-mailed Palmer about the unsuccessful conclusion of the PIP and rescheduled their meeting for Palmer's return.

On April 6, Palmer's therapist submitted a certification in support of a request for leave under the Family and Medical Leave Act of 1993 (FMLA). The request was for two to three hours, one day per week, to attend therapy.



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Palmer returned to work on April 11, and Kaiser terminated her employment effective that day. On April 12, the same day Palmer's physician signed a certification she would need FMLA leave one to two days a month, Kaiser approved her FMLA request. It retroactively applied FMLA leave to adjust Palmer's paid-time-off payout amount.

Palmer sued Kaiser, alleging race discrimination, retaliation, and hostile work environment under Title VII of the Civil Rights Act of 1964; interference and retaliation under the FMLA; and intentional infliction of emotional distress under the Federal Tort Claims Act (FTCA). Palmer later moved to amend her complaint to add nine new defendants and additional factual support for her claims. The district court denied leave to amend because Palmer's proposed new claims were subject to dismissal and thus would be futile. The district court then granted Kaiser's motion for summary judgment on all claims. Palmer now appeals.

## DISCUSSION

Because Palmer appears pro se, we construe her filings liberally. *See Requena v. Roberts*, 893 F.3d 1195, 1205 (10th Cir. 2018). But "this court has repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (brackets and internal quotation marks omitted). The court affords a solicitous reading to pro se briefing, but it "cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Id.* (brackets and internal quotation marks omitted). For reasons discussed below, ignoring the

shortcomings of Palmer's briefing would stretch solicitude beyond elastic limits. We cannot impartially decide an appeal if we assume the role of an advocate.

Palmer first complains the district court denied leave to amend her complaint. Generally we review a denial of amendment for abuse of discretion, but because the district court's decision was based on a determination of futility, our review is de novo. *Jones v. Norton*, 809 F.3d 564, 579 (10th Cir. 2015).

Palmer sought to bring her Title VII, FMLA, and FTCA claims against nine additional defendants—six individuals and three Kaiser-related entities. The district court concluded Palmer had failed to adequately object to the magistrate judge's recommendation regarding some of the claims. It further concluded the remaining claims failed to state a cognizable claim. For example, the Title VII claims were futile because none of the new defendants were Palmer's employer, and the FTCA claims were futile because none of the new defendants were subject to the FTCA.

Under this court's firm waiver rule, a failure to object to a magistrate judge's findings and recommendations "waives appellate review of both factual and legal questions." *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010) (internal quotation marks omitted). Palmer does not challenge the determination she inadequately objected to parts of the recommendation and does not assert any exception to the firm waiver rule should apply. Thus, we do not review the denial of amendment as to claims to which Palmer did not object. *See Requena*, 893 F.3d at 1205 (stating this court addresses only those claims challenged on appeal and does not "conjure facts [a pro se plaintiff] might conceivably raise in support of his

claims"). And having reviewed the remaining proposed claims, we see no error in the district court's conclusion they were legally futile. Particularly, as the district court stated, the new entities were not Palmer's employer, and in this circuit a plaintiff cannot proceed with Title VII claims against an individual, *see Haynes v. Williams*, 88 F.3d 898, 901 (10th Cir. 1996).

Palmer next complains about the district court's denial of her motion for a settlement conference. A decision to order parties into settlement proceedings is a matter within the district court's discretion. *United States v. U.S. Dist. Court for N. Mariana Islands*, 694 F.3d 1051, 1059 (9th Cir. 2012). But the district court understood Kaiser was not interested in settling, and under those circumstances, it was not an abuse of discretion for it to decline to order a settlement conference. That is true even assuming Kaiser had settled in cases brought against it by other plaintiffs, as Palmer alleges.

Palmer's remaining arguments attack the grant of summary judgment to Kaiser. She states she "is gravely concerned with authenticity of most all Exhibits attached to" the motion for summary judgment," Opening Br. at 13, and "is requesting further review of all Exhibits provided by Defendant and rebuttals provided," *id.* at 14. However, we examine only the one exhibit she specifically identifies (which also appears to be the only exhibit she objected to in the district court)—a job description including a bachelor's degree requirement, which she alleges was not a requirement when she was hired. *See Requena*, 893 F.3d at 1205. Whether Palmer possessed a bachelor's degree had no bearing on her performance or

Henderson's perception thereof, however, so the identified differences in the job descriptions do not create a genuine issue of material fact relevant to the issues before the court.

Palmer also states there exist disputed facts. But she does not specifically identify any material, disputed facts that would undermine the grant of summary judgment to Kaiser. While she alleges Kaiser submitted her deposition as an exhibit before the conclusion of discovery and without her line-item changes, she does not identify how any such changes affected the deposition excerpts Kaiser submitted or otherwise cast doubt on the district court's judgment. And while she states her access to Kaiser's discovery documents was delayed because of an inoperable link, she does not explain how any delay hindered her ability to respond to the motion for summary judgment. *See* Fed. R. Civ. P. 56(d) (requiring nonmovant to "show[] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition").

Palmer further complains Kaiser breached numerous internal policies and procedures. "The mere fact that an employer failed to follow its own internal procedures does not necessarily suggest that the substantive reasons given by the employer for its employment decision were pretextual." *Berry v. T–Mobile USA, Inc.*, 490 F.3d 1211, 1222 (10th Cir. 2007) (ellipsis and internal quotation marks omitted). In addition, in these sections of her brief, Palmer simply identifies evidence she submitted, without making any effort to challenge the district court's rationales regarding such evidence.

Having reviewed the briefs and the record on appeal, for substantially the reasons thoroughly discussed by the district court we conclude the evidence does not create a genuine issue of material fact to be submitted to a jury. As the district court cogently stated with regard to the Title VII claims:

> Plaintiff's description of the manner of Ms. Henderson's communications depicts an unnecessarily unpleasant work environment and perhaps even abusive management. If the issue were merely whether Plaintiff was poorly treated, then Plaintiff would, at a minimum, have raised a triable question of fact on that issue. But absent evidence that *because of her race* Plaintiff was treated differently than her co-workers, or was subjected to a hostile work environment, evidence of general mistreatment of an employee does not present an actionable claim under Title VII.

R., Vol. 5 at 160 (record citations omitted). Likewise, the record does not support Palmer's claims Kaiser acted in violation of the FMLA.[1]

Palmer's request to admit Document 75 into the appellate record is denied as unnecessary, because it already is part of the record on appeal transmitted by the district court. The district court's judgment is affirmed.

Entered for the Court

Terrence L. O'Brien
Circuit Judge

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[1] During the litigation, Palmer acknowledged Kaiser was not a proper defendant under the FTCA. The magistrate judge's recommendation found Palmer had abandoned any claim regarding infliction of emotional distress by failing to argue it in her summary-judgment briefing, and also the evidence was insufficient to establish a common-law tort claim. The district court adopted the recommendation. Because Palmer does not challenge these determinations on appeal, we do not address them. *See Requena*, 893 F.3d at 1205.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**
**Judge William J. Martínez**

Civil Action No. 16-cv-2376-WJM-KMT

TONI R. PALMER,

Plaintiff,

v.

KAISER FOUNDATION HOSPITALS TECHNOLOGY RISK OFFICE,

Defendant.

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**ORDER ADOPTING NOVEMBER 17, 2017 RECOMMENDATION OF MAGISTRATE JUDGE AND GRANTING SUMMARY JUDGMENT**

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This matter is before the Court on the November 17, 2017 Recommendation of United States Magistrate Judge Kathleen M. Tafoya ("Recommendation," ECF No. 73) that the Motion for Summary Judgment filed by Defendant, Kaiser Foundation Hospitals Technology Risk Office (Defendant, or "Kaiser") (ECF No. 40) should be granted. The Recommendation is incorporated herein by reference. *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b). Plaintiff filed an objection to the Recommendation. ("Objection," ECF No. 75), to which Defendant Responded (ECF No. 77). For the reasons set forth below, Plaintiff's Objection is overruled, the Recommendation is adopted, and Defendant's Motion for Summary Judgment is granted.

## I. STANDARD OF REVIEW

### A. Rule 72(b) Standard

When a magistrate judge issues a recommendation on a dispositive matter, Federal Rule of Civil Procedure 72(b)(3) requires that the district judge "determine *de*

*novo* any part of the magistrate judge's [recommendation] that has been properly objected to." An objection to a recommendation is properly made if it is both timely and specific. *United States v. One Parcel of Real Property Known as 2121 East 30th St.*, 73 F.3d 1057, 1059 (10th Cir. 1996). An objection is sufficiently specific if it "enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute." *Id.* In conducting its review, "[t]he district court judge may accept, reject, or modify the recommendation; receive further evidence; or return the matter to the magistrate judge with instructions." *Id.* Here, Plaintiff filed a timely objection to Judge Tafoya's Recommendation. (ECF No. 77.) Therefore, this Court reviews the issues before it *de novo*.[1]

**B. Summary Judgment Standard**

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Henderson v. Inter-Chem Coal Co., Inc.*, 41 F.3d 567, 569 (10th Cir. 1994). Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require submission to a jury or conversely, is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248–49 (1986); *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132 (10th Cir. 2000). A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the

[1] Defendant argues that Plaintiff's Objection is not sufficiently specific to permit review. (ECF No. 77 at 7.) While there is some truth to this criticism of Plaintiff's Objection, the Court declines to simply reject Plaintiff's Objection on that basis, given her status as a *pro se* litigant. Rather, the Court addresses the points raised by Plaintiff's Objection in its analysis below.

evidence is so contradictory that if the matter went to trial, a reasonable jury could return a verdict for either party. *Anderson*, 477 U.S. at 248. In ruling on summary judgment, the Court must resolve factual ambiguities against the moving party, thus favoring the right to a trial. *Houston v. Nat'l Gen. Ins. Co.*, 817 F.2d 83, 85 (10th Cir. 1987).

In addition, Plaintiff is proceeding *pro se*; thus, the Court must liberally construe her pleadings. *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972); *Trackwell v. United States Gov't*, 472 F.3d 1242, 1243 (10th Cir. 2007). The Court, however, cannot act as advocate for Plaintiff, who must still comply with the fundamental requirements of the Federal Rules of Civil Procedure. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991); *see also Ledbetter v. City of Topeka, Kan.*, 318 F.3d 1183, 1188 (10th Cir. 2003).

## II. FACTUAL & PROCEDURAL BACKGROUND

### A. Factual Background

Neither party specifically objects to the recitation of facts in the Recommendation and the Court therefore adopts and incorporates the "Facts" section of the Recommendation as if set forth herein, while re-stating key facts below. (ECF No. 73 at 1–7.) To the extent Plaintiff's Objection raises additional facts, or characterizes them differently than the Recommendation, those issues are addressed in the Court's analysis of Plaintiff's Objection. *Infra*, Part III.[2]

[2] Plaintiff's Objection includes a section titled "Disputed Facts." (ECF No. 75 at 1–2.) However, this section contains no citations to evidence, as are required to assert that disputed facts make summary judgment improper. Fed. R. Civ. P. 56(c)(1). Moreover, this Section includes statements which the record as a whole shows to be uncontested, such as that Plaintiff

Plaintiff was employed by Kaiser as a senior case manager in the Technology Risk Office beginning March 31, 2015. (ECF No. 1-1 at 2; ECF No. 73 at 1–2.) She was the only African-American employee in her department. (ECF No. 40-3 at 53–54; ECF No. 73 at 1.) By May 2015, she reported to Natalie Henderson. (ECF No. 40-1 ¶¶ 7–9.) According to Ms. Henderson, Plaintiff's initial supervisor had by then already reported that Plaintiff's job performance was weak. (*Id.* ¶ 8.)

On or around May 26, 2015, Plaintiff expressed concerns regarding a lack of clarity of her job responsibilities. (ECF No. 1-1 at 2; ECF No. 75 at 1–2.) On or around May 29, 2015, Ms. Henderson provided Plaintiff with a list of deficiencies with her job performance. (ECF No. 40-1 ¶ 10; ECF No. 40-3 at 16–17.)[3] Plaintiff then made a complaint to Kaiser's Human Resources Department, which Plaintiff describes as "[b]ased on discrimination and [Ms. Henderson's] aggressive behavior." (ECF No. 40-3 at 11–12). Around the same date, Plaintiff filed a Charge of Discrimination with the EEOC, alleging race-based discrimination and retaliation, claiming, among other things, that she had been denied the training provided to her co-workers, had been denied the option to "work off site," and "had [her] job tasks taken away." (ECF No. 40-4.) The EEOC issued a notice of right to sue on or around July 27, 2015, but Plaintiff did not

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"was the only African-American in her department" (ECF No. 75 at 1), which Plaintiff herself testified was the case in her deposition (ECF No. 40-3 at 53–54). The Court therefore does not treat this portion of Plaintiff's Objection as stating facts that are necessarily in dispute. Instead, the Court relies on the record materials cited by both parties to determine which facts are genuinely disputed. *See* Fed. R. Civ. P. 56(c)(1); WJM Revised Practice Standards III.E.4. (denial of claimed facts must be accompanied by a factual explanation and specific reference to materials in the record).

[3] All citations to docketed materials are to the page number found in the CM/ECF header, which sometimes differs from a document's internal pagination.



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initiate a lawsuit in 2015.[4]

In September 2015, Ms. Henderson prepared Plaintiff's mid-year performance review, rating her as "2, Needs Improvement." (ECF No. 40-1 at 4, ¶ 11.)[5] Beginning no later than approximately September 2015, Plaintiff and Ms. Henderson began to have weekly one-on-one meetings. (*See* ECF No. 40-1 ¶ 12.) Plaintiff's claims in this lawsuit are based in large part on Ms. Henderson's conduct and demeanor towards Plaintiff during these meetings, which Plaintiff has variously described as "aggressive," "bullying," "very critical," "abrasive," and "very insulting." (ECF No. 40-3 at 20, 53, 55.)[6]

According to Plaintiff, in October 2015, she informed a Vice President of her division that she could not be successful on Ms. Henderson's team, and she submitted a written complaint of racial discrimination to the same Vice President in November 2015. (*See* ECF No. 42 at 4–5 ¶¶ 4–5.)[7] On December 8, 2015, Plaintiff e-mailed this Vice

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[4] The documents in the present record do not establish the date when Plaintiff's 2015 EEOC charge was filed, nor when she received a right to sue letter, but the parties agree on these dates. (*See* ECF No. 40 at 4, ¶¶ 11–12; ECF No. 42 at 2.)

[5] Neither party explains the performance review rating scale or cites to written documentation of this performance review. However, the record includes a September 25, 2015 e-mail from Plaintiff referencing her "draft Performance Review," and acknowledging a "current rating of 'needs improvement.'" (ECF No. 75-3.) The Court therefore finds it undisputed that Plaintiff received such a review as of September 2015.

[6] The parties appear to dispute how frequently these meetings actually occurred, or were canceled, and also whether their primary purpose was "to discuss specific tasks and projects [Plaintiff] needed to focus on and to identify areas of performance where [Plaintiff] could improve," as Ms. Henderson describes, or simply to discuss the status of work tasks, as Ms. Palmer indicates. (ECF No. 40-1 ¶ 12; ECF No. 75 at 3.) These disputes do not alter the outcome of the Court's analysis of Plaintiff's legal claims, and are therefore are not "material facts" for purposes of summary judgment. *See Anderson*, 477 U.S. at 248.

[7] Plaintiff made these allegations in her summary judgment opposition, without citing any materials in the record. In her present Objection, Plaintiff attaches an e-mail she sent to the Vice President on November 16, 2016, which complains of Ms. Henderson's "constant destructive criticism," "repetitive negativity," and "belittl[ing]" Plaintiff. (ECF No. 75-5.)

President and another Kaiser executive (copying Ms. Henderson), to report Ms. Henderson's "abrasive, aggressive and threatening" communications with Plaintiff, that "the animosity [Ms. Henderson] demonstrates . . . . is not warranted," and that Plaintiff was "often fearful and intimidated to come to work due to the anxiety" caused by Ms. Henderson's "corporate bullying." (ECF No. 48-30; ECF No. 75-6--75-10.) Plaintiff also submitted a complaint to Kaiser HR on December 14, 2015. (ECF No. 73 at 4.)

In addition to raising these complaints regarding Ms. Henderson's conduct, Plaintiff applied internally to other positions not under Ms. Henderson's supervision. Plaintiff testified that she applied for case manager and administrative assistant positions, but she did not remember exactly when, who was making the hiring decisions, or who filled any of the positions she applied for. (ECF No. 40-3 at 48–49.) On September 29, 2015, Plaintiff e-mailed a Kaiser portfolio manager, Jennifer Thunblom, regarding potential new openings resulting from a reorganization. (ECF No. 48-3.) However, according to Plaintiff, "a couple days later, Ms. Thunblom told her all of the desired positions were either filled or candidates were already in mind." (ECF No. 42 at 4, ¶ 2.) An intermediate case manager position opened in October 2015, but Plaintiff only applied for the position two months later, after the applicants had already been interviewed. (ECF No. 40-8; ECF No. 40-3 at 49.)

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However, this e-mail does not appear to have been submitted by Plaintiff in opposition to Defendant's Motion, instead first being submitted with Plaintiff's Objection to the Recommendation. (*See* ECF No. 77 at 8.) While issues not raised before the Magistrate Judge are generally treated as waived, see *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996), the Court has discretion to consider issues not raised below. *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721 (10th Cir. 1993). Here, even if the Court considers this e-mail, it does not mention racial discrimination, or allege facts showing that Ms. Henderson directed abusive behavior at Plaintiff because of her race, or treated Plaintiff differently than other employees.

In December 2015, Ms. Henderson reviewed Plaintiff's job performance for 2015 and on January 11, 2016, Kaiser placed Plaintiff on a Performance Improvement Plan ("PIP"), formally notifying her that her "performance is at an unacceptable level and you must show immediate and sustained improvement." (ECF No. 40-6 at 1.) The PIP stated that its purposes were (1) to "formally notify [Plaintiff of the severity of the situation requiring [her] immediate action," (2) to "provide an outline of the necessary responses and behaviors," and (3) to "provide specific actions you must take." (*Id.* at 2.) The PIP stated that failure to complete the assigned tasks within the prescribed time or to sustain performance improvement "may result in further disciplinary action, up to and including termination." (*Id.* at 4.)

The PIP was initially to run through mid-February 2016, but was extended through March 11, 2016. (ECF No. 40-1 ¶ 18; ECF No. 75 at 2.) During that period, Ms. Henderson reported Plaintiff's performance in a weekly tracking chart, concluding at the end of the period that Plaintiff did not meet expectations in three of four identified performance areas, and marginally met expectations in the in fourth. (ECF No. 40-9 at 22–25.) The day the PIP period concluded, March 11, 2016, Ms. Henderson scheduled a meeting with Plaintiff for March 24, 2016 to discuss the results. (*See* ECF No. 40-11.) Ms. Henderson indicates that she made the decision to terminate Plaintiff the next day, March 12, 2016, in consultation with her own supervisor and a Human Resources consultant, and decided then she would inform Plaintiff of the termination decision at their scheduled March 24 meeting. (ECF No. 40-1 ¶ 22.)

However, Plaintiff did not come to work on March 23–25, 2016, sending e-mails to Ms. Henderson requesting sick days. (ECF No. 40-10 at 2–4.) On March 25, 2016,

Ms. Henderson granted Plaintiff's requests for sick leave and sent Plaintiff the final tracking chart for her PIP, noting "[a]s you can see, you did not successfully accomplish the Plan objectives," and indicating she would re-schedule their meeting "as soon as we can," or for no later than April 8, 2016. (ECF No. 40-11 at 2.) Plaintiff thereafter sought FMLA leave,[8] evidently making such a request no later than April 6, 2016, when a medical provider submitted paperwork to Kaiser in support of that request. (ECF No. 40-13.)

Plaintiff evidently returned to work on April 11, 2016. (ECF No. 40-12 at 2.) She was terminated by Ms. Henderson effective that same date. (ECF No. 40-12 at 2; ECF No. 40-14.) In processing her termination, Kaiser approved Plaintiff's request for FMLA leave and applied it retroactively to her last week of employment. (*See* ECF No. 40-12.) Plaintiff filed a second Charge of Discrimination with the EEOC on or around June 17, 2016, and received a right to sue letter on July 13, 2016. (ECF No. 48-12.)

**B. The Recommendation**

The Recommendation initially noted that any claims arising from Plaintiff's 2015 EEOC charge are time-barred and that only claims of discrimination presented in her 2016 Charge may be pursued in this lawsuit. (ECF No. 73 at 8–9.) Plaintiff raises no viable objection to the Recommendation's analysis of these procedural issues, and the Court sees no error.

The Recommendation then set out the *McDonnell Douglas* burden-shifting framework under which Plaintiff's discrimination and retaliation claims must be

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[8] *See generally* 29 U.S.C. § 2601 *et seq.*, the Family and Medical Leave Act of 1993 ("FMLA").

analyzed, given the absence of direct evidence of discrimination. The Recommendation concluded that none of the claims arguably pled by Plaintiff can survive summary judgment.

1. Title VII Race Based Discrimination Claims

a. *Failure to Hire*

As to Plaintiff's claim of failure to hire her into other positions for which she applied, the Recommendation correctly noted that to establish a *prima facie* case, a plaintiff must show, among other elements, that she applied and was qualified for a job, and that after she was not hired, "the job remained open and defendant continued to seek applicants from persons with the plaintiff's qualifications." (ECF No. 73 at 10 (citing *Fischer v. Forestwood Co.*, Inc. 525 F.3d 972, 982–83 (10th Cir. 2008).) Given the facts summarized above (and further detailed in the Recommendation), Judge Tafoya concluded that even viewing the evidence in the light most favorable to Plaintiff, she cannot show that she actually applied for positions about which she only inquired. Further, the Recommendation held that "presuming, without deciding, that . . . [Plaintiff] applied for project manager and administrative assistant positions," she cannot establish a *prima facie* failure-to-hire case, because no evidence shows that the positions remained open and that Kaiser continued seeking other applicants with Plaintiff's qualifications after she was rejected. (ECF No. 73 at 11.)

b. *Termination*

As to Plaintiff's claim that her termination was the result of racial discrimination, the Recommendation concluded that even presuming Plaintiff has made out a *prima*

*facie* case, Defendant has proffered sufficient evidence of a legitimate reason for her termination—namely, Plaintiff's failure to meet job performance expectations—to return the burden to Plaintiff to show that this stated reason was pretextual. (ECF No. 73 at 14.) The Recommendation then found Plaintiff lacks evidence to show that Defendant's stated reason for termination was a pretext for discrimination. (*Id.* at 15.)

The Recommendation relied on the case law which establishes that the "inquiry is not whether Defendant's reason for discharging Plaintiff was 'wise, fair or correct,' but whether Defendant 'honestly believed those reasons and acted in good faith upon those beliefs.'" (*Id.* at 15 (quoting *Rivera v. City & Cnty. of Denver*, 365 F.3d 912, 925 (10th Cir. 2004)). Reviewing the evidence raised by Plaintiff, the Recommendation found that Plaintiff had not presented evidence supporting her own assertion that she was treated differently from other employees, given that Plaintiff does not know whether other case managers in her department were similarly reprimanded by Ms. Henderson, nor whether other employees were performing at similar levels, to warrant similar performance or disciplinary measures. (*Id.* at 16–17; *see also* ECF No. 40-3 at 36, 54.)

As to Plaintiff's disputes regarding her job performance, the Recommendation observed that "[p]retext is not established by . . . some favorable comments . . . [or] some good evaluations," and that while Plaintiff disagrees with the assessment, she concedes that Ms. Henderson considered her job performance inadequate. (*Id.* at 18 (quoting *Perry v. St. Joseph Reg'l Med. Ctr.*, 110 F. App'x 63, 68 (10th Cir. 2004), and *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 528 (3d Cir.1992).)

2. Title VII Retaliation Claims

As to retaliation, the Recommendation concluded that "Plaintiff has not met her burden as to the third element of her *prima facie* retaliation claim," that is, that Plaintiff lacks evidence of a causal connection between her protected activity (*i.e.*, raising complaints of discrimination), and the adverse employment action (*i.e.*, her termination). (ECF No. 73 at 21.) The Recommendation observed that the lapse of time between Plaintiff's complaints and her termination could not establish "temporal proximity" sufficient to permit an inference of causation. (*Id.*) Further, the Recommendation concluded that even assuming Plaintiff has made out a *prima facie* case of retaliation, she could not show that Kaiser's stated reasons for her termination were pretextual, based on the same review of the evidence that was fatal to Plaintiff's claim of discriminatory termination. (*Id.* at 21–22.)

3. Title VII Hostile Work Environment Claims

As to Plaintiff's Title VII claim of a hostile work environment, the Recommendation observed that to prevail on this claim a plaintiff "'must show that the [workplace] harassment was racial or stemmed from racial animus,'" and that such claims are not actionable "'[i]f the nature of the plaintiff's work environment, however, unpleasant, is not due to [her] race.'" (ECF No. 73 at 22, 23 (quoting *Bolden v. PRC Inc.*, 43 F.3d 545, 551 (10th Cir. 1994) *and Abiakam v. Qwest Corp.*, 2012 WL 1577438, at *11 (D. Colo. Apr. 12, 2012), *adopted*, 2012 WL 1576310 (D. Colo. May 4, 2012)). The Recommendation concluded that "[w]hile Plaintiff's description [of Ms. Henderson's hostile or bullying communications] certainly depicts an unpleasant work environment, she has not produced any evidence supporting an inference that the

unfavorable environment was due to her race." (ECF No. 73 at 23.)

4. FMLA Claim(s)

As to Plaintiff's claim that Kaiser either interfered with her rights under FMLA or retaliated for her FMLA leave request, the Recommendation noted that "[i]n light of the fact Plaintiff's FMLA request was . . . approved, Plaintiff's interference claim primarily depends upon a finding that her termination was related to her FMLA request." (*Id.* at 25.) Because "it is undisputed in the record that Defendant had already made the decision to terminate Plaintiff . . . prior to her request for FMLA leave," the Recommendation concluded that Plaintiff could not prevail on a claim of interference with her FMLA rights. (*Id.*) The Recommendation also suggested this chronology makes it impossible for Plaintiff to show she was terminated in retaliation for an FMLA request made *after* the termination decision had already been made, but the Recommendation nevertheless held that for the same reasons previously analyzed as to Title VII, Plaintiff cannot prove that Kaiser's stated reasons for her termination were a pretext for a retaliatory discharge. (*Id.* at 27–28.)

5. Age Discrimination Claims

The Recommendation concluded that Plaintiff's June 2016 EEOC Charge had not asserted an age discrimination claim, that Plaintiff therefore did not exhaust her administrative remedies for any such claim in the present lawsuit, and that in any event, Plaintiff effectively abandoned any claim of age discrimination by not addressing it in her summary judgment submissions. (ECF No. 73 at 28.)

6. Intentional Infliction of Emotional Distress

To the extent Plaintiff asserts a tort claim for intentional infliction of emotional

distress (independently, or pursuant to the Federal Tort Claim Act), the Recommendation noted that as a private employer, Kaiser cannot be sued pursuant to the FTCA, and that she lacks evidence that could meet the high standard of showing Kaiser "'engaged in extreme and outrageous conduct . . . recklessly with the intent of causing the plaintiff severe emotional distress.'" (ECF No. 73 at 29 (quoting *Han Ye Lee v. Colo. times, Inc.*, 222 P.3d 957, 966-67 (Colo. App. 2009)).)

## III. ANALYSIS

### A. The Recommendation is Adopted in its Entirety

Having reviewed the Recommendation and the parties' submissions fully and *de novo*, the Court finds no error in the Recommendation's analysis, and adopts the Recommendation in its entirety.

In particular, the Court agrees that Plaintiff has not presented evidence which can discharge her burden of showing that Kaiser's proferred reasons for her termination were pretextual. While it is plain that Plaintiff herself disagrees with Kaiser's evaluation of her job performance, and her evidence could show that on some past occasions she was praised for certain aspects of her job performance, that is not sufficient to prove Kaiser's reasons for termination were merely a pretext for discrimination or retaliation. As emphasized in the Recommendation, the relevant legal inquiry is not simply whether the employer's actions were mistaken or reflected a poor business decision:

> Evidence that the employer should not have made the termination decision—for example, that the employer was mistaken or used poor business judgment—is not sufficient to show that the employer's explanation is unworthy of credibility. In determining whether the proffered reason for a decision was pretextual, we examine the facts as they

> appear to the person making the decision, and do not look to the plaintiff's subjective evaluation of the situation. Instead of asking whether the employer's reasons were wise, fair or correct, the relevant inquiry is whether the employer honestly believed those reasons and acted in good faith upon those beliefs.

*DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 970–71 (10th Cir. 2017) (internal quotation marks and citations omitted). Plaintiff's evidence at most could show that Kaiser's evaluation of her job performance was incorrect, unwise, or even unfair. But she does not have evidence to raise any genuine dispute that Kaiser disbelieved its own assessment of Plaintiff's job performance or used it merely as a pretext for discrimination.

As to Plaintiff's claims regarding Ms. Henderson's hostile, bullying, or improper conduct, the Court also agrees with the Recommendation that Plaintiff's description of the manner of Ms. Henderson's communications depicts an unnecessarily unpleasant work environment and perhaps even abusive management. (*See* ECF No. 73 at 23.) If the issue were merely whether Plaintiff was poorly treated, then Plaintiff would, at a minimum, have raised a triable question of fact on that issue. But absent evidence that *because of her race* Plaintiff was treated differently than her co-workers, or was subjected to a hostile work environment, evidence of general mistreatment of an employee does not present an actionable claim under Title VII. *See Dick v. Phone Directories Co.*, 397 F.3d 1256, 1263 (10th Cir. 2005) ("Title VII is not 'a general civility code for the American workplace.'" (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)); *Bolden*, 43 F.3d at 551 ("General harassment if not racial or sexual is not actionable."); *Stahl v. Sun Microsystems, Inc.*, 19 F.3d 533, 538 (10th Cir.

1994) ("If the nature of an employee's environment, however unpleasant, is not due to her [race] she has not been the victim of [race] discrimination as a result of that environment.").

**B. Plaintiff's Additional Objections**

Having reviewed the Recommendation and concluded it should be affirmed in its entirely, the Court addresses in turn several issues raised by Plaintiff's Objection.

1. Rule 7.1(a) Conferral

Plaintiff argues the Court should deny Summary Judgment because Defendant "did not fulfill the requirements and purposes of Local Rule 7.1A," which, in general, requires counsel to "confer or make reasonable good faith efforts to confer" before filing a motion. D.C.COLO.LCivR 7.1(a). However, the Rule does not apply to motions seeking summary judgment under Federal Rule of Civil Procedure 56. D.C.COLO.LCivR 7.1(b)(3). Any failure to confer therefore does not provide a reason to deny Defendant's Motion for Summary Judgment.

2. Deposition Errata Sheet

Plaintiff objects that "[d]iscovery had not concluded" when Defendant filed its Motion for Summary Judgment, attaching excerpts of Plaintiff's deposition transcript, and that these materials were docketed before Plaintiff returned an errata sheet claiming 25 errors in the transcript. (ECF No. 75 at 2; ECF No. 40-3; ECF No. 67-4.) However, Plaintiff does not explain how any of the 25 corrections claimed on the errata sheet demonstrate an error in the Recommendation or provide reason to deny summary judgment. From the Court's review, the deposition excerpts cited in

Defendant's Motion do not include any of the page and line citations where Plaintiff claims the reporter made an error. (*Compare* ECF No. 40-3 *with* ECF No. 67-4.) This objection therefore does not provide a reason to reject the Recommendation.[9]

3. Settlement Issues

Plaintiff also objects that she was surprised by Judge Tafoya's Recommendation, claiming Judge Tafoya had advised Kaiser that it should settle this case at the Final Pretrial Conference. Having reviewed the audio recording of that conference, the Court cannot agree that Judge Tafoya's comments encouraging both parties to engage in settlement communications amounted to either an opinion that Kaiser should settle the case, or any comment on the merits of Plaintiff's claims. In any event, finding no error with the Recommendation, this provide no reason to deny summary judgment.

Plaintiff also objects that "[o]pposing [c]ounsel kept trying to coerce Plaintiff into agreeing settlement negotiations had taken place when in fact none had." (ECF No. 75 at 3.) The Court is aware that the parties have disagreed as to whether or not their prior communications reflected true settlement communications. (*See* ECF No. 69 at 18–19.) However, this dispute does not alter the merits of Plaintiff's claims, nor whether she has brought forth sufficient evidence to defeat summary judgment.

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[9] Since Plaintiff's errata sheet corrections do not impact the Court's analysis, there is no occasion to evaluate whether they reflect the permissible correction of stenographic errors or offer impermissible substantive changes to deposition testimony. *See BancFirst v. Ford Motor Co.*, 422 F. App'x 663, 666 (10th Cir. 2011) ("adopt[ing] a restrictive view of the changes that can be made pursuant to Rule 30(e) and tak[ing] a dim view of substantive alteration of deposition testimony") (citing *Garcia v. Pueblo Country Club*, 299 F.3d 1233, 1242 n.5 (10th Cir. 2002)).

4. Information Given to Plaintiff About Her Job Performance

Plaintiff raises several factual contentions which the Court views as raising an objection that Plaintiff was not always timely provided with relevant information about her job performance evaluations, that the reasons Kaiser found her performance deficient were misguided, or that Kaiser deviated in various ways from the proper performance review procedures. For example, Plaintiff alleges she "never received a mid-year or end-of-year review," that when she asked for a meeting with Ms. Henderson to explain why her job performance was rated "2—Needs Improvement" as of September 2015, no such meeting was scheduled, and that as to what appears to be an unsigned draft of a 2015 annual performance review, "Plaintiff had never seen this document prior to discovery" in this lawsuit. (*See* ECF No. 75 at 3, 4.)[10]

On many of these points, Plaintiff's Objection does not cite any evidence, making it insufficient to defeat summary judgment. *See* Fed. R. Civ. P. 56(c)(1) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record . . . .").

Moreover, even crediting Plaintiff's factual contentions (or treating her *pro se* filings themselves as "materials in the record"), there is no genuine dispute that Kaiser, particularly Ms. Henderson, viewed Plaintiff's job performance as deficient for a sustained period of time, and that Plaintiff knew as much, beginning no later than May 2015 and continuing through the time of her termination. Since it is clear that Plaintiff

[10] Plaintiff also claims that as of June 2015 "[t]here were no comments concerning [her] performance or explaining how the rating of 2 needs improvement was derived" (ECF No. 75 at 3), and that she was asked for the names of colleagues to participate in her performance review in an untimely fashion (*id.* at 4.).

was frequently advised that Kaiser viewed her job performance as unacceptable, any claimed gaps in additional communications reflecting the same evaluation do not alter the Court's analysis. To the extent Plaintiff advances these points as evidence of claimed procedural irregularities in Kaiser's performance evaluation, for the reasons explained above and in the Recommendation, this evidence does present a genuine dispute that Kaiser's reason(s) for termination were a pretext for discrimination or retaliation, and could at most show that Kaiser's decision was ultimately unwise, a bad business judgment, or unfair in a general way not connected to Plaintiff's race.

5. Lack of Responsiveness to Plaintiff's Complaints

Plaintiff also points to materials tending to show that she lodged multiple complaints with Kaiser regarding Ms. Henderson, and arguably showing that Kaiser was unresponsive to these complaints. (*See* ECF No. 75 at 4; ECF No. 75-5; ECF No. 48-30.) As addressed above, however, even treating Plaintiff's allegations regarding Ms. Henderson's conduct as true, this evidence of an alleged lack of responsiveness does not show that any actions taken by Ms. Henderson or others at Kaiser were due to Plaintiff's race. Although Plaintiff has claimed other employees were treated better than she was, she cites no evidence that could prove this claim, and admits that for the most part she does not know how other employees were treated, including whether they were similarly reprimanded by Ms. Henderson. (ECF No. 40-3 at 54.)

6. Dispute Regarding Plaintiff's Job Performance

Plaintiff raises points arguably supporting the view that her job performance was better than Kaiser claims. Plaintiff alleges that Ms. Henderson "was concealing Plaintiff's work accomplishments" (ECF No. 75 at 5), and she cites evidence which she argues

shows the true nature of her work performance. Even if the Court were to accept materials first submitted with Plaintiff's Objection to arguably support these contentions, or to navigate voluminous materials on its own, these arguments again show, at most, that Kaiser was mistaken in its evaluation of Plaintiff's job performance. This does not, by itself, suffice to raise a triable issue of fact that Kaiser discriminated against Plaintiff because of race, or that its reasons for termination were pretextual. *See supra*, Part. III.A.

6. Additional FMLA Narrative

Plaintiff's Objection provides additional narrative regarding the chronology of her FMLA leave request, and the reasons for it. (ECF No. 75 at 8–9.) As addressed by the Recommendation, the dispositive facts regarding Plaintiff's FMLA claims are that the undisputed record shows that Kaiser's decision to terminate Plaintiff was made *before* Plaintiff requested FMLA leave, and that her request was granted, albeit retroactively. The additional details regarding the chronology of when Plaintiff inquired about FMLA leave and the nature of her request do not alter the analysis of her FMLA claims.

7. Claim that Plaintiff's PIP or Performance Review Were Retaliatory

Plaintiff also objects that "[t]he PIP was administered in retaliation" for her internal complaints regarding Ms. Henderson. Initially, the Court is disinclined to consider evidence submitted by Plaintiff for the first time with her Objection. This is particularly true here, given the multiple opportunities Plaintiff was given to submit briefing and evidentiary materials in opposition to Defendant's Motion, and the fact that she did submit voluminous materials at that time. (*See* ECF No. 75 at 6; ECF No. 75-1; ECF No. 76; ECF Nos. 42 & 48.) In particular, to the extent, if any, that Plaintiff's Objection seeks

to raise a claim that she has direct evidence of retaliatory intent, rather than indirect evidence subject to analysis under *McDonnell Douglas*, the Court views any such argument as having been waived. *Marshall*, 75 F.3d at 1426 ("Issues raised for the first time in objections to the magistrate's recommendation are deemed waived.")

As addressed by the Recommendation and above, even assuming that Plaintiff's evidence could show a causal connection between her complaints and her termination, it cannot defeat Kaiser's showing that it had a valid, non pre-textual reason for Plaintiff's termination. Even if the PIP itself could be shown to have been retaliatory, Plaintiff's ultimate discharge was based on non-pretextual performance concerns.

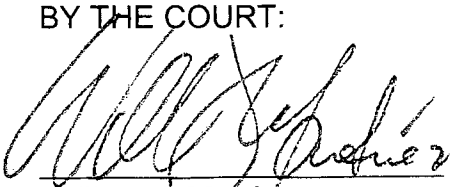
## IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. Plaintiff's Objection (ECF No. 75) to the Magistrate Judge's Recommendation (ECF No. 73) is OVERRULED;
2. The Magistrate Judge's Recommendation (ECF No. 73) is ADOPTED in its entirety;
3. Defendant's Motion for Summary Judgment (ECF No. 40) is GRANTED;
4. The trial currently set to commence on January 22, 2018, and the Final Trial Preparation Conference set for January 5, 2018 are hereby VACATED;
6. The Clerk shall ENTER FINAL JUDGMENT in favor of Defendant, Kaiser Foundation Hospitals Technology Risk Office, against all of Plaintiff's claims; and,
5. Defendant shall have its costs upon compliance with D.C.COLO.LCivR 54.1.

Dated this 22nd day of December, 2017.

BY THE COURT:



William J. Martínez
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16–cv–02376–WJM–KMT

TONI R. PALMER,

Plaintiff,

v.

KAISER FOUNDATION HOSPITALS TECHNOLOGY RISK OFFICE,

Defendant.

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**RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

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**Magistrate Judge Kathleen M. Tafoya**

This case comes before the court on Defendant "Kaiser Foundation Hospitals' Motion for Summary Judgment and Brief in Support." (Doc. No. 40 ["Mot."], filed June 2, 2017). Plaintiff filed a Response (Doc. No. 42 ["Resp."], filed June 16, 2017), to which Defendant replied. (Doc. No. 44 ["Reply"], filed June 30, 2017.) On July 15, 2015, Plaintiff filed a Surreply (Doc. No. 48 ["Surreply"]), to which Defendant filed a Response. (Doc. No. 65, filed September 20, 2017.)

**1. Facts**[1]

Plaintiff began working for Defendant as a Senior Case Manager on March 31, 2015 and was the only African-American in her department. (Doc. No. 40-1 at 2; Doc. No. 40-3 at 89-

[1] The following facts are undisputed unless noted otherwise. Additionally, although Fed. R. Civ. P. 56(c)(1)(A) requires a party to cite to the record in order establish a fact is undisputed, the court has included some factual allegations from Plaintiff's Complaint and briefing for which she did not cite to the record. However, Defendant did not dispute the unsupported factual allegations and their inclusion was necessary for the sake of clarity.

90.)[2] Beth Pumo, Director of the Technology Risk Office, was Plaintiff's initial supervisor. (Doc. No. 40-3 at 44-45.) Ms. Pumo regularly reported to Natalie Henderson, Deputy Risk Information Officer, that Plaintiff struggled to demonstrate the behaviors and skills considered necessary for her position. (Doc. No. 40-1 at 1, 3.) In May 2015, Ms. Henderson became Plaintiff's immediate supervisor. (*Id.*) Ms. Henderson observed the same problems with Plaintiff's job performance as Ms. Pumo. (*Id.*)

On May 26, 2015, Plaintiff raised concerns to Edward Fuller, Executive Director, regarding a lack of clarity over her specific job performances. (Doc. No. 1-1 at 2.) Between May 26, 2015 and May 29, 2015, Ms. Henderson presented Plaintiff with a list of deficiencies related to Plaintiff's job performance. (Doc. No. 40-3 at 81-82.) Plaintiff does not recall the specific deficiencies listed, nor does she remember whether they were accurate. (*Id.*) She contends she was not given an opportunity to respond to the same. (*Id.*) According to Ms. Henderson, the list identified Plaintiff's recurring failure to (1) timely schedule a set of recurring meetings; (2) timely schedule a kick-off meeting with the appropriate assessment teams; and (3) complete the correct forms and work with her team to ensure projects were escalated correctly. (Doc. No. 40-1 at 3-4.) Ms. Henderson had a meeting with Plaintiff at that time, in which she explained Plaintiff was "struggling to meet the expectations of the position and identified several specific assignments that had not been completed by her as well as tasks she repeatedly failed to perform." (*Id.* at 3.)

On May 29, 2015, following receipt of the list of deficiencies, Plaintiff complained about Ms. Henderson's treatment of her to Defendant's Human Resources Department ("HR"). (Doc.

[2] When citing deposition testimony, the court uses the page references in the original deposition transcript.

No. 1-1 at 2; Doc. No. 40-3 at 53-55, 58-59.) On that same date, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). (Doc. No. 1-1 at 2; Doc. No. 40-4.) In each, Plaintiff alleged Ms. Henderson took projects away from her and failed to provide her the same training as other case managers. (Doc. No. 40-3 at 53-55; Doc. No. 40-4 at 2.) The EEOC issued a Right to Sue Letter on July 27, 2015. (Doc. No. 40-4.) Plaintiff does not recall being treated differently at work after she filed her Charge of Discrimination. (Doc. No. 40-3 at 77.)

Ms. Henderson held weekly one-on-one meetings with Plaintiff in order to discuss Plaintiff's difficulties in performing her job. (Doc. No. 40-1 at 3.) Plaintiff alleges Ms. Henderson belittled her during these meetings, stating that Plaintiff was unprofessional, could not perform the case manager role, failed to take initiative, and was not as good as Kimberly Stover, another senior case manager. (Doc. No. 40-3 at 89-90, 102-03, 193-94.) Plaintiff also contends Ms. Henderson acted like a bully and became increasingly aggressive and hostile over time during these meetings, including leaning over the table and yelling, and leaving Plaintiff physically shaking. (*Id.* at 102-03, 194-95.)

In September 2015, Ms. Henderson rated Plaintiff as a "2, Needs Improvement" in her mid-year review. (Doc. No. 40-1 at 4.) When she met with Plaintiff regarding the review, Ms. Henderson went over the specific goals, behaviors, and measurements that needed improvement in order to meet a rating of "3, Successful Performance." (*Id.*)

On October 1, 2015 and November 10, 2015, Plaintiff informed Jason Zellmer, Vice-President of Plaintiff's division, that she could not be successful on Ms. Henderson's team. (Doc. No. 1-1 at 3; Resp. at 4-5.) On November 16, 2015, Plaintiff submitted a written

complaint of racial discrimination to Mr. Zellmer. (*Id.*) On December 8, 2015 and December 9, 2015, Plaintiff submitted a complaint to Mr. Zellmer, Mr. Fuller, and Ms. Henderson, stating that the latter had been aggressive, abrasive, and threatening toward her. (Doc. No. 1-1 at 4; Resp. at 5-6.) Plaintiff submitted a complaint to HR on December 14, 2015 regarding Ms. Henderson's intimidation, harassment, and bullying. (Doc. No. 1-1 at 4-5; Resp. at 5-6.)

Plaintiff recalls applying for positions of junior project manager and/or project manager, senior case manager, and administrative assistant during her employment with Defendant. (Doc. No. 40-3 at 180.) On September 29, 2015, Jennifer Thunblom, Portfolio Manager, sent Plaintiff an email, attaching an organization chart indicating new positions created by a recent reorganization. (Doc. No. 48-3 at 2.) Ms. Thunblom stated that she thought a position under Rob Hernandez or Linda Jones may be the best fit for Plaintiff. (*Id.* at 3) Plaintiff met with Ms. Thunblom a couple of days later and Ms. Thunblom informed Plaintiff the positions she had in mind had already been filled. (Resp. at 4.)

An intermediate case manager position was posted on October 23, 2015. (Doc. No. 40-8 at 2.) Jim Dublikar was the hiring director for the position and reviewed resumes and conducted interviews during October and November 2015. (*Id.*) Plaintiff applied for the position on December 30, 2015, after Mr. Dublikar had already filled it. (*Id.*) In January 2016, Plaintiff sent an email to Mr. Dublikar inquiring about the position and he responded the following day, explaining the position had already been filled. (Doc. No. 40-3 at 181; Doc. No. 40-8 at 2-3.)

In December 2015, Ms. Henderson reviewed Plaintiff's performance for the year and concluded she had not improved. (Doc. No. 40-1 at 4.) In January 2016, Ms. Henderson and Mr. Fuller, Ms. Henderson's supervisor, presented Plaintiff with a Performance Improvement

Plan ("PIP"). (*Id.*; Doc. No. 40-6.) The PIP identified four specific areas in which Plaintiff needed to improve and noted specific tasks Plaintiff had to complete for a successful job performance. (Doc. No. 40-6.) The PIP was accompanied by a spreadsheet setting forth 55 job assignments Plaintiff had not completed. (Doc. No. 40-7.) The PIP was supposed to be in place through mid-February in order to allow Plaintiff to improve her performance. (Doc. No. 40-1 at 4-5; Doc. No. 40-6 at 4.) During the PIP, Plaintiff and Ms. Henderson continued to meet weekly and Ms. Henderson maintained a "Performance Improvement Action Plan Tracking" spreadsheet monitoring Plaintiff's progress. (Doc. No. 40-1 at 5; Doc. No. 40-9.) In February, Ms. Henderson extended the PIP 30 additional days in order to allow Plaintiff more time to improve her job performance. (Doc. No. 40-1 at 5; Doc. No. 40-9.)

On March 11, 2016, Plaintiff's PIP ended. (Doc. No. 40-1 at 5; Doc. No. 40-9 at 22-25.) During the final review of Plaintiff's performance during the PIP, Ms. Henderson noted on the tracking chart that Plaintiff had failed to meet specific expectations. (Doc. No. 40-9 at 22-25.) On March 11, 2016, Ms. Henderson informed Plaintiff that they would meet on March 24, 2016 to discuss the fact that she had failed to meet the expectations of the PIP. (Doc. No. 40-1 at 5; Doc. No. 40-11 at 2.) Ms. Henderson consulted Mr. Fuller on March 12, 2016 and Kim West, HR Consultant, regarding Plaintiff's performance and made the decision to terminate Plaintiff's employment and to communicate the same to her during the March 24, 2016 meeting. (*Id.* at 6.)

On March 23, 24, & 25, 2016, Plaintiff sent emails to Ms. Henderson stating that she was not feeling well and intended to take a sick day. (Doc. No. 40-10 at 2-4.) On March 25, 2016, Ms. Henderson sent an email to Plaintiff explaining Defendant was granting Plaintiff sick time for the previous three days. (Doc. No. 40-11 at 2.) Ms. Henderson also stated:

> As you know, on 3/11/16, I scheduled a meeting for us to meet on 3/24/16 to review the final outcome of your Performance Improvement Plan. We were unable to hold that meeting and so I rescheduled our meeting for today (3/25/16), but you were also unable to attend today as well. As such, the final tracking chart for your review and information is attached per the email sent to you yesterday. As you can see, you did not successfully accomplish the Plan objectives. I will reschedule our meeting to review this in detail as soon as we can (not later than 4/8/16).

(*Id.*)

Sometime between March 24, 2016 and April 11, 2016, Plaintiff inquired about how to take medical leave and attempted to confirm whether Ms. Henderson had submitted the appropriate paperwork, Form 1480, for such a request. (Doc. No. 40-3 at 167-68; Doc. No. 40-12; Doc. No. 42 at 11-12.) Plaintiff's therapist submitted paperwork for Plaintiff related to the Family and Medical Leave Act ("FMLA") on April 6, 2016, stating that Plaintiff needed intermittent leave for intensive outpatient treatment, including therapy sessions one time per week for three hour sessions plus transportation. (Doc. No. 40-13.)

Defendant approved Plaintiff's request for FMLA leave at or about the same time she was terminated. (Doc. No. 40-12.) Defendant retroactively applied the FMLA leave to Plaintiff's last week of employment and paid out Plaintiff's extra paid time off in her last paycheck. (*Id.*)

Plaintiff is not aware of any other case managers who were not completing 50% of their assignments per week and/or less than 20% of their high priority assignments per week. (Doc. No. 40-3 at 163-64.) Although Plaintiff disagrees with Ms. Henderson's assessment, she acknowledges Ms. Henderson considered her job performance inadequate overall. (*Id.* at 150.)

Plaintiff filed a second Charge of Discrimination with the EEOC on June 23, 2016. (Doc. No. 48-12.) Plaintiff checked boxes indicating she had been subject to race and age

discrimination, as well as retaliation. (*Id.*) The EEOC issued Plaintiff's Right to Sue letter on July 13, 2016. (Doc. No. 48-12.) Plaintiff filed the present action on September 20, 2016 asserting causes of action under Title VII based on race discrimination, hostile work environment, and retaliation, under the FMLA based on interference and retaliation, as well as asserting an intentional infliction of emotional distress claim under the Federal Tort Claims Act (the "FTCA"). (*See generally* Doc. No. 1 ["Comp."]).

**2. Standard of Review**

Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." *Concrete Works, Inc. v. City & Cnty. of Denver*, 36 F.3d 1513, 1518 (10th Cir. 1994) (citing *Celotex*, 477 U.S. at 325). The nonmoving party may not rest solely on the allegations in the pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324; *see also* Fed. R. Civ. P. 56(c). A disputed fact is "material" if "under the substantive law it is essential to the proper disposition of the claim." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute is "genuine" if the evidence is such that it might lead a reasonable jury to return a verdict for the nonmoving party. *Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1160 (10th Cir. 2011) (citing *Anderson*, 477 U.S. at 248).

When ruling on a motion for summary judgment, a court may consider only admissible evidence. *See Johnson v. Weld County, Colo.*, 594 F.3d 1202, 1209–10 (10th Cir. 2010). The factual record and reasonable inferences therefrom are viewed in the light most favorable to the party opposing summary judgment. *Concrete Works*, 36 F.3d at 1517. Moreover, because Plaintiff is proceeding *pro se*, the court, "review[s] [her] pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys." *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007); *see also Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (holding allegations of a *pro se* complaint "to less stringent standards than formal pleadings drafted by lawyers"). At the summary judgment stage of litigation, a plaintiff's version of the facts must find support in the record. *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1312 (10th Cir. 2009). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Thomson*, 584 F.3d at 1312.

**3. Analysis**

**a. Title VII**

As an initial matter, the court notes that to the extent Plaintiff's Title VII claims are based on actions addressed in Plaintiff's Charge of Discrimination filed with the EEOC in May 2015, such claims are barred. The EEOC issued Plaintiff's right to sue letter on July 27, 2015. (Doc. No. 1-1 at 2; Doc. No. 40-4.) 42 U.S.C. § 2000e–5(f)(1) provides that a lawsuit must be commenced within 90 days from the EEOC giving such notice. Plaintiff did not file her lawsuit until September 20, 2016, well beyond the 90 day deadline.

"Compliance with the filing requirements of Title VII is not a jurisdictional prerequisite, rather it is a condition precedent to suit that functions like a statute of limitations and is subject to waiver, estoppel, and equitable tolling." *Million v. Frank*, 47 F.3d 385, 389 (10th Cir. 1995). Though "[c]ourts have narrowly construed equitable exceptions to the time limitations set out in Title VII," *see Biester v. Midwest Health Servs., Inc.*, 77 F.3d 1264, 1267 (10th Cir. 1996), Plaintiff has not offered an argument invoking any of those exceptions. Instead, Plaintiff vaguely implies her failure to comply with the time requirements should be excused based on the "continuing violation" doctrine. (Resp. at 19.) "This reflects a misunderstanding of the limited application of the 'continuing violation' doctrine. When properly invoked, that doctrine excuses an employee from the requirement that a Charge be filed within 180 days of the discriminatory act as required by 42 U.S.C. § 2000e–5(e)(1)." *Felix v. City and Cnty. of Denver*, 729 F. Supp. 2d 1243, 1251 (D. Colo. 2010) (citing *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115–17 (2002) (explaining limited application of doctrine in harassment-type situations)). "[I]nvocation of the 'continuing violation' doctrine does not excuse an employee's failure to commence suit within 90 days of receiving notice of the right to sue from the EEOC." *Id.*

Plaintiff also states that the EEOC has "held that the time limit for filing a formal EEO complaint can be extended if the employee produces sufficient evidence to establish that he was unable to meet the time limit because of mental or physical incapacitation." (Resp. at 19.) It is not clear Plaintiff is referencing her failure to file a lawsuit within 90 days of her right to sue letter. Nevertheless, because Plaintiff failed to offer any evidence, even a description, related to an incapacity to timely file a lawsuit related to the allegations asserted in the May 2015 Charge of Discrimination, the court finds this is insufficient to toll the 90 day limitation.

**(i) Race Based Discrimination**

Plaintiff alleges Defendant discriminated against her based on her race by failing to hire her for any other positions and by terminating her employment. Title VII claims, including racial discrimination, are analyzed using the burden-shifting framework enumerated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); *Crowe v. ADT Sec. Servs. Inc.*, 649 F.3d 1189, 1195 (10th Cir. 2011). A plaintiff bears the initial burden to establish a *prima facie* case of discrimination. *Crowe*, 649 F.3d at 1195. Once a *prima facie* case is established, the burden shifts to the defendant to provide a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* If the defendant is able to do so, the burden returns to the plaintiff to demonstrate the defendant's proffered reason is pretextual. *Id.*

**A. Failure to Hire**

Plaintiff alleges she applied for nine to twelve different jobs with Defendant during her employment but was not granted an interview for any position. (Resp. at 3; Surreply at 5.) Under the *McDonnell Douglas* rubric, Plaintiff bears the burden of first establishing a *prima facie* case of discriminatory failure to hire by showing that: (1) she belongs to a protected class; (2) she applied and was qualified for a job for which the employer was seeking applicants; (3) she was rejected for that job; and (4) following her rejection, the job remained open and defendant continued to seek applicants from persons with the plaintiff's qualifications. *Fischer v. Forestwood Co., Inc.*, 525 F.3d 972, 982-83 (10th Cir. 2008); *Vazirabadi v. Boasberg*, No. 17–cv–01194–WJM–MEH, 2017 WL 4516913, at *10 (D. Colo. Oct. 10, 2017).

Though she states that she applied for nine to twelve different positions, Plaintiff only recalls applying for positions of junior project manager and/or project manager, senior case

manager, and administrative assistant. (Doc. No. 40-3 at 180.) Further, she cannot recall when she applied for them, does not know who made the hiring decisions for most of them, nor is she aware of who ultimately filled any of the positions for which she applied. (*Id.* at 180-81.)

The record does contain evidence Plaintiff applied for and/or inquired about certain specific positions, however, neither of the examples meets the elements of a *prima facie* failure to hire claim. As set out above, Plaintiff submitted her application for an intermediate case manager position on December 30, 2015, after the position had already been filled. (Doc. No. 40-3 at 181; Doc. No. 40-8 at 1; Resp. at 15.) Similarly, Ms.Thunblom mentioned positions that she thought might be a good fit but when Plaintiff met with her about the positions, the positions had been filled or the relevant supervisors already had candidates in mind. (Doc. No. 48-3 at 2, 3; Resp. at 4.) Thus, based on Plaintiff's own version of events, she never actually applied for any of the jobs referenced by Ms. Thunblom and therefore, she is unable to satisfy the second element of her failure to hire claim. *See, cf., Manning v. Blue Cross and Blue Shield of Kansas City*, 522 F. App'x 438, 441-42 (10th Cir. 2013) (affirming summary judgment in favor of employer on failure to hire claim wherein "the plaintiffs knew they had not successfully applied for any of the positions and, thus, could not establish the second element of a *prima facie* case.").

Moreover, presuming, without deciding, that Plaintiff's vague allegations that she applied for project manager and administrative assistant positions are sufficient to satisfy the second and third *prima facie* elements, Plaintiff has not presented any evidence to support the final element, *i.e.*, that the "position[s] remained open and [Defendant] continued to seek applicants from persons of [Plaintiff's] qualifications." *Fischer,* 525 F.3d at 983. Plaintiff testified that she did not know who made the hiring decisions, nor who ultimately filled each position. She has not

presented any evidence related to whether or for how long Defendant continued to seek applicants after Plaintiff was rejected. The court recognizes Plaintiff's *pro se* status and as such, liberally construes each of her filings. *See Haines,* 404 U.S. at 520-21. However, Plaintiff must present evidence to support her claims. *See Buwana v. Regents of the Univ. of Colo.*, No. 98-1325, 1999 WL 436267, at *2 (10th Cir. June 29, 1999) (affirming district court's grant of summary judgment to employer where *pro se* plaintiff failed to present evidence to support Title VII claims).

**B. Termination**

Plaintiff also alleges her termination was the result of racial discrimination. In order to establish a *prima facie* case for race discrimination, Plaintiff must introduce evidence showing that: (1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *James v. James*, 129 F. Supp. 3d 1212, 1225 (D. Colo. 2015) (citing *E.E.O.C. v. PVNF, L.L.C.*, 487 F.3d 790, 800 (10th Cir. 2007); *Jones v. Denver Post Corp.*, 203 F.3d 748, 752-53 (10th Cir. 2000)). Defendant does not dispute the first two elements, but argues Plaintiff cannot establish the third element because "Plaintiff attributes no discriminatory remarks to her supervisor, nor can she produce evidence of any preferential treatment toward similarly situated employees." (Mot. at 12.)

Regarding the third element, "[t]he real question, it must be remembered, is whether a plaintiff has shown actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under the Act." *Hysten v. Burlington N. and Santa Fe Ry. Co.*,

296 F.3d 1177, 1181 (10th Cir. 2002) (internal quotations omitted). "'Plaintiffs can establish evidence of the third prong [of the *prima facie* test] in various ways, such as actions or remarks made by decisionmakers, preferential treatment given to employees outside the protected class, or more generally, upon the timing or sequence of events leading to plaintiff's termination.'" *Tuffa v. Flight Servs. & Sys., Inc.*, 78 F. Supp. 3d 1351, 1360 (D. Colo. 2015) (quoting *Barlow v. C.R. England, Inc.*, 703 F.3d 497, 505 (10th Cir. 2012)). "Only a 'small amount of proof [is] necessary to create an inference of discrimination.'" *Id.* (quoting *Orr*, 417 F.3d at 1149 (10th Cir. 2005)).

Plaintiff has not offered any evidence related to racially discriminatory remarks by Ms. Henderson. The only remarks Plaintiff attributes to Ms. Henderson are those in which Ms. Henderson stated that Plaintiff was unprofessional, lacked initiative, and could not perform her job. (Doc. No. 40-3 at 89-90, 102-03, 193-94.) Such remarks, while arguably harsh, are not racially discriminatory. Plaintiff also asserts conclusory statements that other case managers were not held to the same standards because she was the only one being penalized for shortcomings other case managers were also exhibiting. (Doc. No. 40-3 at 162.) However, Plaintiff is not aware of any other case managers who were not completing 50% of their assignments per week and/or less than 20% of their high priority assignments per week. (*Id.* at 163-64.) Moreover, the record indicates Plaintiff experienced difficulty performing the expectations of her Senior Case Manager position from the beginning, including during the time she was supervised by Beth Pumo, prior to Ms. Henderson. (Doc. No. 40-1 at 3.)

This evidence undermines Plaintiff's ability to establish an inference of discrimination. However, presuming, without deciding, Plaintiff has presented enough evidence to support a

*prima facie* case of racial discrimination, Defendant must present a legitimate, non-discriminatory reason for Plaintiff's termination. *Crowe*, 649 F.3d at 1195.

Defendant contends it terminated Plaintiff's employment based on her inability to adequately perform her job duties as Senior Case Manager. Again, the record indicates Plaintiff had difficulty performing her job duties throughout her employment. Ms. Pumo, Plaintiff's initial supervisor, reported to Ms. Henderson that Plaintiff's performance "was particularly weak" and that "she struggled to demonstrate the behaviors and skills considered critical for a case manager, especially at the Senior level." (Doc. No. 40-1 at 3.) Ms. Henderson observed the same difficulties when she became Plaintiff's supervisor. (*Id.*) Ms. Henderson met with Plaintiff in May 2015 and reviewed specific areas in which Plaintiff was repeatedly failing to meet expectations. (*Id.* at 3-4.) In September 2015, Ms. Henderson rated Plaintiff as a "2, Needs Improvement" in her mid-year review. (*Id.* at 4.)

The record indicates Plaintiff's performance did not significantly improve, including when she was placed on a PIP, which was accompanied by a spreadsheet setting forth 55 job assignments Plaintiff had not completed. (*Id.*; Doc. No. 40-6; Doc. No 40-7.) In spite of the PIP and weekly meetings with Ms. Henderson to track Plaintiff's progress, Plaintiff continued to fail to meet the expectations of her position. (Doc. No. 40-9.) Based on Plaintiff's performance, Defendant terminated her employment. (Doc. No. 40-1 at 5-6.)

The court finds Defendant has presented sufficient evidence to support its legitimate, nondiscriminatory reason for terminating Plaintiff's employment. Thus, the burden returns to Plaintiff to demonstrate Defendant's proffered reason is pretextual. *Crowe*, 649 F.3d at 1195. "An employee may demonstrate pretext by showing the employer's proffered reason was so

inconsistent, implausible, incoherent, or contradictory that it is unworthy of belief." *Stover v. Martinez*, 382 F.3d 1064, 1071 (10th Cir. 2004). "Pretext may also be shown by providing direct evidence that the proffered rationale is false, or that the plaintiff was treated differently from similarly-situated employees." *Crowe,* 649 F.3d at 1196 (internal quotations omitted). This court's inquiry is not whether Defendant's reason for discharging Plaintiff was "wise, fair or correct," but whether Defendant "honestly believed those reasons and acted in good faith upon those beliefs." *Rivera v. City & Cnty. of Denver*, 365 F.3d 912, 925 (10th Cir. 2004) (citation and quotations omitted). "Accordingly, '[i]t is the perception of the decision maker [that] is relevant, not plaintiff's perception of [herself].'" *Barcikowski v. Sun Microsystems, Inc.*, 420 F. Supp. 2d 1163, 1175 (D. Colo. 2006) (quoting *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988)).

Construing Plaintiff's filings liberally, the court finds she has attempted to establish pretext based on procedural irregularities, comments from Ms. Henderson, similarly situated employees being treated differently, and compliments on her job performance by other employees. As to procedural irregularities, Plaintiff states that she did not agree to the PIP and there was not a signature line on the PIP for her to sign. (Surreply at 2.) In support, Plaintiff submitted Defendant's policies related to performance evaluations. (Doc. No. 48-13.) The policies indicate managers are required to give employees performance evaluations at least once per year. (*Id.* at 1.) The policy also requires those evaluations be signed by the employee and if the employee refuses to do so, the manager should document this and include it as part of the employee's performance evaluation record. (*Id.* at 2.) There is also a procedure for the employee to dispute the evaluation. (*Id.*) However, the only thing the policy states about PIPs

is, "If the employee's overall performance is less than successful, the manager should set clear expectations about how to improve performance and behaviors, which may include developing a performance improvement plan." (*Id.*) The policy does not contain a requirement that the employee agree to the PIP or that the employee sign the same. (*Id.* at 1-2.)

Moreover, presuming an employee signature line was required for the PIP, such an omission does not provide an inference of pretext in this case. "The mere fact that an employer failed to follow its own internal procedures does not necessarily suggest that the substantive reasons given by the employer for its employment decision were pretextual." *Berry v. T–Mobile USA, Inc.*, 490 F.3d 1211, 1222 (10th Cir. 2007) (internal ellipsis and quotations omitted). Courts will not infer pretext based on every technical violation of an employer's policy. "[F]or an inference of pretext to arise on the basis of a procedural irregularity, there must be some evidence that the irregularity directly and uniquely disadvantaged a minority employee." *Conroy v. Vilsack*, 707 F.3d 1163, 1176 (10th Cir. 2013) (internal ellipsis and quotations omitted). Although she disagrees with its necessity, Plaintiff does not dispute that she was presented with and was aware of the PIP. (Resp. at 8.) Thus, the record does not support a finding that failure to provide a signature line, presuming the same was required, disadvantaged Plaintiff in any relevant manner.

Plaintiff also relies on comments purportedly made by Ms. Henderson to establish pretext. (Resp. at 4-8.) As previously noted, Plaintiff claims Ms. Henderson belittled her, stating that Plaintiff was unprofessional, could not do her job, and was not as good Kimberly Stover. (Doc. No. 40-3 at 89-90, 193-94.) Plaintiff testified that she was the only African American in the department and she did not see Ms. Henderson treating anyone else in the same

manner. (*Id.* at 194-95.) However, she also testified that she does not know whether Ms. Henderson reprimanded other case managers. (*Id.*) Additionally, Plaintiff believes the latter comment is evidence of racial bias because Kimberly Stover is Caucasian. (*Id.* at 89-90.)

Along this same vein, Plaintiff contends she was treated differently than other similarly situated employees because all Senior Case Managers struggled with weekly status reports, yet she was scrutinized more harshly than the others. (*Id.* at 89, 161.) The record indicates, however, that Plaintiff's struggles in performing her job duties were not limited to weekly status reports. (Doc. No. 40-1 at 3, 4, 5; Doc. No. 40-6 at 3-4; Doc. No. 40-7; Doc. No. 40-9.) Moreover, as noted, Plaintiff is not aware of any evidence indicating other case managers were only completing 50% of their assignments per week and/or less than 20% of their high priority assignments per week. (*Id.* at 163-64.) Similarly, Plaintiff does not have any evidence indicating that other case managers were not meeting the drive for results expectations to which Plaintiff was held, nor any personal knowledge that other case managers were not engaging with the team to the same degree Plaintiff was expected to engage. (*Id.* at 164.)

Thus, Plaintiff has not presented any evidence, beyond her own unsubstantiated allegations, that she was treated differently than other similarly situated employees. "[M]ere conjecture that [an] employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment." *Santana v. City & Cnty. of Denver*, 488 F.3d 860, 864–65 (10th Cir. 2007) (internal quotations omitted); *see also Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1225 (10th Cir. 2007) (mere conjecture insufficient to defeat summary judgment).

Plaintiff also relies on purported compliments and/or praise she received from others to undermine Defendant's position that she was terminated due to poor job performance. Specifically, on November 3, 2015, Jim Walker, Project Manager Lead, commented "Excellent work!!!" in reply to an email from Plaintiff explaining that she had put together, with Ms. Henderson, a high profile deliverables tracker" and attached it to the email to Mr. Walker. (Surreply at 3; Doc. No. 48-18.) On January 25, 2016, Mr. Fuller stated in an email, "Thanks for your efforts and continue to make good progress" in reply to an email from Plaintiff to which she had attached her weekly status report. (Doc. No. 48-19.) In March 2016, Robert Klusman, Director of Digital Planning, told Ms. Henderson in an email that Plaintiff had been a great resource supporting them while Ms. Henderson was out. (Doc. No. 48-21 at 2.)

However, receiving three positive comments regarding specific work, tasks, and/or actions does not establish Ms. Henderson's evaluations of Plaintiff's overall performance was pretextual. "'[P]retext is not established by virtue of the fact that an employee has received some favorable comments in some categories or has, in the past, received some good evaluations.'" *Perry v. St. Joseph Reg'l Med. Ctr.*, No. 03-6120, 2004 WL 1903507, at *5 (10th Cir. Aug. 26, 2004) (quoting *Ezold v. Wolf, Block, Schorr & Solis–Cohen*, 983 F.2d 509, 528 (3d Cir. 1992)). Similarly, during the time period Plaintiff was working under her PIP, Ms. Henderson herself noted some improvements. (Doc. No. 40-9 at 4, 6, 8, 12, 15, 16, 19, 20, 24.) Ms. Henderson's findings in this regard do not establish her conclusion that Plaintiff's overall work performance warranted termination was pretextual. Additionally, although Plaintiff disagrees with the assessment, Plaintiff appears to concede Ms. Henderson considered her job performance inadequate. (Doc. No. 40-3 at 150.)

The court finds Plaintiff has failed to establish a genuine issue of material fact concerning pretext. Accordingly, Defendant's request for summary judgment against Plaintiff's Title VII claim based on racial discrimination should be granted.

**(ii) Retaliation**

"Title VII makes it unlawful to retaliate against an employee because she has 'opposed' any practice made unlawful by Title VII . . . ." *Annett v. Univ. of Kan.*, 371 F.3d 1233, 1237 (10th Cir. 2004). Title VII retaliation claims apply the same burden-shifting framework as discrimination claims. *Id.* As a result, Plaintiff must first establish a *prima facie* case of retaliation, which requires that: (1) plaintiff engaged in a protected opposition to discrimination; (2) plaintiff suffered an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse employment action. *Id.*; *O'Neal v. Ferguson Const. Co.*, 237 F.3d 1248, 1252 (10th Cir. 2001).

There is no dispute Plaintiff suffered an adverse employment action in that she was terminated and that her termination followed several months of her submitting complaints about Ms. Henderson's treatment of her. Thus, Plaintiff must establish a causal connection between her complaints and her termination. Plaintiff's testimony indicates a lack of awareness regarding any causal connection. For example, she testified that she does not know why she thinks her termination was in retaliation for something she had done. (Doc. No. 40-3 at 161.) While Plaintiff also testified that her termination was in retaliation for "speaking up about my concerns, the inconsistencies," she does not recall what specific concerns she raised that resulted in retaliation. (*Id.* at 151.) Nevertheless, in an attempt to construe Plaintiff's filings liberally, the court considers Plaintiff's various allegations and evidence in the context of her retaliation claim.

Plaintiff's allegations include the statement that on May 26, 2015, she raised concerns to Mr. Fuller regarding a lack of clarity over her specific job responsibilities. (Doc. No. 1-1 at 2.) Three days later, on May 29, 2015, Ms. Henderson held a one-on-one meeting with Plaintiff in which she "explained that [Plaintiff] was struggling to meet the expectations of the position and identified several specific assignments that had not been completed by her as well as tasks she repeatedly failed to perform." (Doc. No. 40-1 at 3.) Ms. Henderson continued to have weekly one-on-one meetings with Plaintiff to review her job performance. (*Id.* at 4.) Plaintiff contends these meetings, in which she claims Ms. Henderson treated her unprofessionally and belittled her, were in retaliation for her complaints regarding Ms. Henderson. (Resp. at 4.) It appears Plaintiff intends to assert the retaliatory nature of these weekly meetings is evidence that her termination was also retaliatory.

The court notes the concerns Plaintiff voiced on May 26, 2015, which she contends prompted the initial one-on-one meetings, were not related to Ms. Henderson's treatment of her or any alleged violation of Title VII, but were instead about a lack of clarity over her specific job responsibilities. (Doc. No. 1-1 at 2.) Thus, any action allegedly taken in response were not the result of protected action on Plaintiff's part. Further, Plaintiff's first complaints regarding Ms. Henderson occurred on May 29, 2015 when Plaintiff complained to HR and filed a Charge of Discrimination with the EEOC. Yet, she admits she does not remember being treated differently after filing her first EEOC complaint. (Doc. No. 40-3 at 77.)

Moreover, "[i]t is well-established in the Tenth Circuit that a lapse of three months or greater is insufficient to establish the requisite causal connection between the protected activity and the adverse employment action." *Harp v. Dep't of Human Servs., Colo. Mental Health Inst.*

*at Pueblo*, 932 F. Supp. 2d 1217, 1230-31 (D. Colo. 2013) (citing *Meiners v. Univ. of Kan.*, 359 F.3d 1222, 1231 (10th Cir. 2004) (time lapse of up to three months was too long to establish temporal proximity); *White v. Schafer*, 738 F.Supp.2d 1121, 1136 n.9 (D. Colo. 2010) (time period between two and three months "strains the outer boundaries of the temporal proximity test.")). Although Plaintiff submitted complaints about Ms. Henderson's treatment of her at least six times during her employment, this occurred over the course of eight months and Plaintiff was not terminated until ten months after submitting her first complaint. Also, when Ms. Henderson placed Plaintiff on a PIP in January 2015, it was supposed to only last through February 2016. (Doc. No. 40-1 at 4-5; Doc. No. 40-6 at 4.) However, Ms. Henderson extended the PIP 30 additional days in order to allow Plaintiff more time to improve her job performance. (Doc. No. 40-1 at 5.)

This evidence undermines Plaintiff's ability to establish any causal connection between her termination and her complaints about Ms. Henderson. Thus, the court concludes Plaintiff has not met her burden as to the third element of her *prima facie* retaliation claim.

Presuming, without deciding, Plaintiff made a *prima facie* case for retaliation, Defendant has presented legitimate and nondiscriminatory justifications for her termination, as previously established. The burden thus shifts back to Plaintiff to present evidence that Defendant's "proffered reason for the employment decision was pretextual – *i.e.* unworthy of belief . . . ." *Kendrick*, 220 F.3d at 1230 (internal quotations omitted). It is not enough to disbelieve Defendant's explanation. The court may not second-guess an employer's business judgment. *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1119 (10th Cir. 2007). To defeat summary

judgment, Plaintiff must present evidence sufficient to allow a rational fact-finder to infer Defendant was actually motivated by a retaliatory intent.

This court has already reviewed Plaintiff's evidence of pretext and found it insufficient. Defendant is therefore entitled to summary judgment on Plaintiff's Title VII retaliation claim.

**(iii) Hostile Environment**

Plaintiff also asserts a Title VII claim based on the theory of hostile environment. Title VII authorizes a plaintiff to bring a claim for hostile work environment based on unlawful race discrimination. *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1221 (10th Cir. 2015). "'We have recognized that Title VII does not establish a general civility code for the workplace' and that a plaintiff may not predicate a hostile work environment claim on 'the run-of-the-mill boorish, juvenile, or annoying behavior that is not uncommon in American workplaces.'" *Id.* (quoting *Hernandez v. Valley View Hosp. Ass'n*, 684 F.3d 950, 957 (10th Cir. 2012) (additional quotations omitted). To survive summary judgment on a hostile work environment claim, a plaintiff must meet two criteria.

> First, the plaintiff must show that "'under the totality of the circumstances, the harassment was pervasive or severe enough to alter the terms, conditions, or privilege of employment.'" *Trujillo v. Univ[.] of Colo[.] Health Sciences C[tr.]*, 157 F.3d 1211, 1214 (10th Cir. 1998) (quoting *Bolden v. PRC Inc.*, 43 F.3d 545, 550 (10th Cir. 1994) citing *Meritor Sav[.] Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986)). The court must look at all circumstances including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* Second, the plaintiff must show that "'the harassment was racial or stemmed from racial animus.'" *Id.* (quoting *Bolden* [], 43 F.3d [at] 550 [] citing *Meritor Sav[.]*, 477 U.S. at 66 []).

*Abiakam v. Qwest Corp.*, No. 10–cv–03086–CMA–BNB, 2012 WL 1577438, at *10 (D. Colo. April 12, 2012).

Plaintiff fails to specify in her Complaint or her summary judgment briefing the conduct that constituted a hostile work environment. In her deposition, Plaintiff complained of comments Ms. Henderson made to Plaintiff during their one-on-one meetings, as well as Ms. Henderson acting like a bully and being aggressive. (Doc. No. 40-3 at 102.) Plaintiff testified that Ms. Henderson insisted Plaintiff could not perform the case manager role, was unprofessional, and failed to take initiative. (*Id.* at 102-03, 194.) She also explained that Ms. Henderson became increasingly aggressive and hostile in making such comments. (*Id.* at 102-03, 194-95.) She concedes, however, that she is not aware of whether Ms. Henderson similarly reprimanded other case managers. (*Id.* at 194-95.) While Plaintiff's description certainly depicts an unpleasant work environment, she has not produced any evidence supporting an inference that the unfavorable environment was due to her race. "If the nature of the plaintiff's work environment, however unpleasant, is not due to [her] race, color, or national origin, then [she] has not been the victim of discrimination as a result of that environment." *Abiakam*, 2012 WL 1577438, at *11 (citing *Stahl v. Sun Microsystems, Inc.*, 19 F.3d 533, 538 (10th Cir. 1994)).

**b. FMLA**

The FMLA requires employers to provide their employees with up to twelve weeks of unpaid leave in the event the employee has a serious medical condition. 29 U.S.C. § 2612(a)(1)(D). Courts construing the FMLA have recognized two theories of recovery—the interference theory and the retaliation theory. *See Smith v. Diffee Ford–Lincoln–Mercury, Inc.*, 298 F.3d 955, 960-61 (10th Cir. 2002); *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1261-62 (10th Cir. 1998). The interference theory arises under § 2615(a)(1), and provides that an employee may bring a claim against her employer for interference with or refusal to provide her

with a benefit to which she was entitled under the FMLA, such as reinstatement to her former position or an equivalent position upon her return from FMLA leave. *Diffee Ford-Lincoln-Mercury*, 298 F.3d at 960-61. The retaliation theory arises under § 2615(a)(2), which provides that an employee can bring a claim that her employer retaliated against her because she took, or attempted to take, FMLA leave. *Id.* In the instant case, Plaintiff asserts claims against Defendant under both section 2615(a)(1) and section 2615(a)(2). (Comp. at 7.)

**(i) Interference claim**

"'To establish an interference claim, [plaintiff] must show: (1) that [s]he was entitled to FMLA leave, (2) that some adverse action by the employer interfered with h[er] right to take FMLA leave, and (3) that the employer's action was related to the exercise or attempted exercise of h[er] FMLA rights.'" *Smith-Megote v. Craig Hosp.*, 229 F. Supp. 3d 1224, 1227 (D. Colo. 2017) (quoting *Campbell v. Gambro Healthcare, Inc.*, 478 F.3d 1282, 1287 (10th Cir. 2007)).

It is not clear from the record when Plaintiff first requested FMLA leave. However, the record establishes Plaintiff took sick days on March 23, 24, & 25, 2016 and that sometime between March 24, 2016 and April 11, 2016, Plaintiff inquired about how to take medical leave and attempted to confirm whether Ms. Henderson had submitted the appropriate paperwork, Form 1480, for such a request. (Doc. No. 40-2 at 167-68; Doc. No. 40-10 at 2-4; Doc. No. 40-12; Doc. No. 42 at 11-12.) Similarly, the record is unclear as to precisely when Defendant approved Plaintiff's request for FMLA, but it appears it occurred at or near the same time she was terminated. (Doc. No. 40-12.) Defendant retroactively applied the FMLA leave to Plaintiff's last week of employment and paid out Plaintiff's extra paid time off in her last paycheck. (*Id.*)

Plaintiff bases her interference claim on the fact that her FMLA request was not approved until after her termination and was retroactively applied. (Doc. No. 40-3 at 199.) Plaintiff also bases this claim on Ms. Henderson allegedly not submitting the required Form 1480. (*Id.* at 199-201.) However, Plaintiff's therapist did not submit the FMLA paperwork until April 6, 2016, *see* Doc. No. 40-13, and Plaintiff concedes she is unaware whether Ms. Henderson submitted the Form 1480 before or after that date. (Doc. No. 40-3 at 200-01.)

In light of the fact Plaintiff's FMLA request was ultimately approved, Plaintiff's interference claim primarily depends upon a finding that her termination was related to her FMLA request. However, it is undisputed in the record that Defendant had already made the decision to terminate Plaintiff based on her job performance prior to her request for FMLA leave. (Doc. No. 40-1 at 5-6; Doc. No. 40-12.) A reason for dismissal that is unrelated to a request for an FMLA leave will not support recovery under an interference theory. *Diffee Ford–Lincoln–Mercury*, 298 F.3d at 961 (holding that an indirect causal link between dismissal and an FMLA leave is an inadequate basis for recovery); *McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099, 1108 (10th Cir. 2002) (finding no FMLA interference if the employee would have been terminated in the absence of the FMLA request or leave); *Gunnell*, 152 F.3d at 1262 (noting that to withstand summary judgment on an interference theory, an employee's termination must have been related to her request for an FMLA leave).

Further, Plaintiff offers no evidence, beyond her own speculation, that Ms. Henderson delayed submitting the required FMLA documentation. Moreover, Plaintiff's request for FMLA leave does not shelter her from Ms. Henderson's conclusion that she did not meet expectations under her PIP. *See Diffee Ford–Lincoln–Mercury*, 298 F.3d at 960 (noting that an employee

who requests FMLA leave has no greater rights than an employee who does not request such a leave). The court concludes no reasonable juror could deduce from the above evidence that Plaintiff's termination was related to her request for FMLA leave.

**(ii) Retaliation claim**

Similar to Title VII retaliation claims, a *prima facie* case of FMLA retaliation requires proof (1) that plaintiff engaged in a protected activity; (2) that her employer took actions that a reasonable employee would have found materially adverse; and (3) that there was a causal connection between the protected activity and the adverse action, that is, that there was bad faith or retaliatory motive on the part of the employer. *Campbell,* 478 F.3d at 1287. Also similar to Title VII, FMLA retaliation claims are analyzed under the burden-shifting analysis developed in *McDonnell Douglas. Pina-Belmarez v. Bd. of Cnty. Comm'rs of Weld Cnty. Colo.*, No. 11–cv–03179–REB–MJW, 2012 WL 2974701, at *5 (D. Colo. July 19, 2012).

In the instant case, Plaintiff clearly meets the first two elements as she engaged in protected activity when she requested FMLA leave and termination of her employment is a materially adverse action. *See Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 (10th Cir. 2006) (stating that the plaintiff clearly engaged in protected activity by taking FMLA leave). Thus, to establish her *prima facie* case of retaliation, Plaintiff must show a causal connection between her protected activity of requesting FMLA leave and Defendant's decision to terminate her employment.

Similar to her FMLA interference claim, however, Plaintiff has not created a question of fact that a causal connection exists between her FMLA leave request and her termination. In many situations, the exceedingly close temporal proximity between Plaintiff's FMLA request

and her termination could be sufficient to justify an inference of retaliatory motive. *Metzler*, 464 F.3d at 1171 (noting when "the termination is very closely connected in time to the protected activity," temporal proximity may, by itself, be sufficient to "justify an inference of retaliatory motive.") *Compare Metzler*, 464 F.3d at 1172 (holding that a four-week period between employee's FMLA request and her termination may, by itself, establish causation) and *Ramirez v. Okla. Dep't of Mental Health*, 41 F.3d 584, 596 (10th Cir. 1994), *overruled on other grounds by Ellis v. Univ. of Kan. Med. Ctr.*, 163 F.3d 1186 (10th Cir. 1998) (holding that a one and one-half month period between the protected activity and the adverse action may, by itself, establish causation) with *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (determining that a period of three months between the protected activity and the adverse action, standing alone, is not sufficient to establish causation). However, Defendant has established, and Plaintiff has not presented any evidence disputing, that it made the decision to terminate Plaintiff's employment on March 11, 2016, prior to her FMLA leave request. (Doc. No. 40-1 at 5-6; Doc. No. 40-9 at 2-25; Doc. No. 40-10; Doc. No. 40-11.) Although as previously noted, both parties have failed to specify when Plaintiff first requested FMLA leave, she did not begin missing work due to illness until March 23, 2016 and it is clear from the record that she did not request FMLA leave until some time after that date. (Doc. No. 40-10; Doc. No. 40-11; Doc. No. 40-12.)

Presuming without deciding that the record's ambiguity as to the timing of Plaintiff's request coupled with the close temporal proximity of her termination created a question of fact as to the causation element, the burden under *McDonnell Douglas* shifts to Defendant to demonstrate a legitimate, nonretaliatory reason for its decision to terminate Plaintiff. *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1135 (10th Cir. 2003). As previously established,

Defendant has articulated a legitimate nondiscriminatory reason for terminating Plaintiff's employment and Plaintiff has not offered a basis for pretext that has not already been addressed above. Accordingly, the court finds Defendant is entitled to summary judgment against this claim.

**c. Age Discrimination Claim**

In her Complaint, Plaintiff states that Defendant discriminated against her based on her age, *see* Comp. at 2, however, she failed to offer any facts in her Complaint to support this claim. Defendant has requested summary judgment based on Plaintiff's failure to exhaust her administrative remedies and failure to provide any factual basis for said claim. (Mot. at 20-21.) In the June 2016 Charge of Discrimination filed with the EEOC, Plaintiff indicates only racial and disability discrimination, as well as retaliation. (Doc. No. 1-1 at 12.) As such, she failed to exhaust her administrative remedies with regard to a claim of age discrimination. *See Chytka v. Wright Tree Serv., Inc.*, 925 F. Supp. 2d 1147, 1160 (D. Colo. Feb. 15, 2013) ("The failure to file an administrative [ADEA] claim [with the EEOC] before bringing suit is jurisdictionally fatal and requires dismissal pursuant to Fed. R. Civ. P. 12(b)(1)."). Additionally, Plaintiff failed to address this claim and/or Defendant's request for summary judgment against the same in either her Response or her Surreply. Accordingly, she has effectively abandoned any claim of age discrimination. *Lewis v. Recreational Sports & Imports, Inc.*, No. 15–cv–1690–WJM–CBS, 2016 WL 8542533, at *8-9 (D. Colo. Oct. 27, 2016).

**d. FTCA**

Plaintiff also asserted a claim for intentional infliction of emotional distress under the FTCA. (Comp. at 6.) In her deposition, Plaintiff acknowledged that after filing her complaint,

she learned the FTCA does not apply because Kaiser is not a federal entity and she was not a federal employee. (Doc. No. 40-3 at 186.) *See also Woodruff v. Covington*, 389 F.3d 1117, 1126 (10th Cir. 2004) ("The [FTCA] is a limited waiver of sovereign immunity that only applies to federal employees.").

To the extent Plaintiff intended to assert a state law claim of intentional infliction of emotional distress, Defendant argues it is entitled to summary judgment because Plaintiff has not alleged any conduct on the part of Defendant that is so extreme or outrageous as to support the same. (Mot. at 21.) Similar to her age discrimination claim, Plaintiff failed to address this claim in either her Response or her Surreply. Accordingly, she has effectively abandoned this claim. *Lewis,* 2016 WL 8542533, at *8-9. Additionally, the court agrees Plaintiff has not alleged conduct so severe as to support this claim. *See Han Ye Lee v. Colo. Times, Inc.*, 222 P.3d 957, 966-67 (Colo. App. 2009) (holding that to state a claim for intentional infliction of emotional distress, a plaintiff must alleged sufficient facts to show "the defendant engaged in extreme and outrageous conduct . . . recklessly or with the intent of causing the plaintiff severe emotional distress . . . ."); *Green v. Qwest Servs. Corp.*, 155 P.3d 383, 385 (Colo. App. 2006) ("The tort of outrageous conduct was designed to create liability for a very narrow type of conduct."); *Pearson v. Kancilia*, 70 P.3d 594, 597 (Colo. App. 2003) ("[T]he level of outrageousness required to create liability [for intentional infliction of emotional distress] is extremely high. . . . Only conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community, will suffice.").

**WHEREFORE**, for the foregoing reasons, the court respectfully

**RECOMMENDS** that Defendant "Kaiser Foundation Hospitals' Motion for Summary Judgment and Brief in Support" (Doc. No. 40) be **GRANTED** in its entirety.

**ADVISEMENT TO THE PARTIES**

Within fourteen days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. One Parcel of Real Prop. Known As 2121 East 30th Street, Tulsa, Okla.*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579–80 (10th Cir. 1999) (stating that a district court's decision to review a magistrate judge's recommendation *de novo* despite the lack of an objection does not preclude application of the "firm waiver rule"); *One Parcel of Real Prop.*, 73 F.3d at 1059–60 (stating that a party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Ref. Sys., Inc.*, 52

F.3d 901, 904 (10th Cir. 1995) (holding that cross-claimant had waived its right to appeal those portions of the ruling by failing to object to certain portions of the magistrate judge's order); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (holding that plaintiffs waived their right to appeal the magistrate judge's ruling by their failure to file objections). *But see Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (stating that firm waiver rule does not apply when the interests of justice require review).

Dated this 17th day of November, 2017.

BY THE COURT:

Kathleen M. Tafoya
United States Magistrate Judge