UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2097

BRENDA MASSAQUOI,

Plaintiff - Appellant,

v.

AMERICAN CREDIT ACCEPTANCE,

Defendant - Appellee,

and

ANGELA PREUTER; SHARON PONDER,

Defendants.

Appeal from the United States District Court for the District of South Carolina, at Spartanburg. Bruce H. Hendricks, District Judge. (7:16-cv-02220-BHH)

Submitted: February 28, 2019 Decided: March 26, 2019

Before WILKINSON, KING, and RICHARDSON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Brenda Massaquoi, Appellant Pro Se. Jeffrey Andrew Lehrer, FORD & HARRISON LLP, Spartanburg, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Brenda Massaquoi appeals the district court's order accepting the recommendation of the magistrate judge and granting American Credit Acceptance's motion for summary judgment in her employment discrimination action. We have reviewed the record and find no reversible error in the district court's rejection of Massaquoi's discriminatory discharge claim.* Accordingly, we affirm for the reasons stated by the district court. *Massaquoi v. Am. Credit Acceptance*, No. 7:16-cv-02220-BHH (D.S.C. Aug. 31, 2018). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

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* Because Massaquoi does not challenge in her informal brief the district court's decision not to consider the harassment and hostile work environment allegations she raised in response to the motion for summary judgment, she has forfeited appellate review of these issues. *See* 4th Cir. R. 34(b); *Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014). With regard to her retaliation claim, Massaquoi has waived appellate review by failing to object to the portion of the magistrate judge's report concluding that she failed to articulate a causal connection between engaging in protected activity and her termination. *See United States v. Midgette*, 478 F.3d 616, 622 (4th Cir. 2007). Finally, to the extent Massaquoi raises new claims for the first time on appeal, we decline to address them. *See Pornomo v. United States*, 814 F.3d 681, 686 (4th Cir. 2016).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Brenda Massaquoi, Plaintiff, v. American Credit Acceptance, Defendant.[1]	)	Case No. 7:16-cv-02220-DCC-JDA **REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE**

This matter is before the Court on Defendant's motion for summary judgment. [Doc. 52.] Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and Local Civil Rule 73.02(B)(2)(g), D.S.C., all pretrial matters in employment discrimination cases are referred to a United States Magistrate Judge for consideration.

Plaintiff, proceeding pro se, filed this action on June 24, 2016, alleging discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"). [Doc. 1.] Defendant filed a motion for summary judgment on June 2, 2017. [Doc. 52.] On June 5, 2017, the Court issued an Order in accordance with *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), advising Plaintiff of the summary judgment/dismissal procedure and of the possible consequences if she failed to adequately respond to the motion. [Doc. 53.] Plaintiff filed a response in opposition [Doc. 56], Defendant filed a reply [Doc. 57], and Plaintiff filed a sur-reply [Doc. 58]. The motion is now ripe for review.

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[1]This caption represents the current parties to the litigation. On October 12, 2016, The Honorable Bruce Howe Hendricks dismissed Defendants Angela Preuter and Sharon Ponder without prejudice and without issuance and service of process. [Doc. 28; *see* Doc. 20.]

BACKGROUND

Plaintiff, who describes herself as a black African from Liberia, West Africa, began working for Defendant in June 2013. [Docs. 1 at 5; 52-2 at 4:21–24.] Plaintiff first worked as a collector and later became a loss mitigation specialist around October 2014. [Doc. 52-2 at 6:23–7:3.] Plaintiff alleges that when she woke up on August 24, 2015, she did not feel well, so she called Defendant and said she would be back to work on August 26, 2015, two days later. [Docs. 1 at 5; 52-2 at 44:16–21, 45:3–5, 45:16–46:15.] Plaintiff alleges that when she called out, she had accrued around forty hours of paid time off ("PTO"). [Doc. 1 at 5.] On August 25, 2015, Plaintiff read a letter from Sharon Ponder ("Ponder"), Defendant's Human Resources Business Partner, dated August 24, 2015, indicating that Defendant had terminated her employment because Defendant did not believe Plaintiff intended to return to work. [Docs. 52-2 at 47:10–48:13, 94; 52-6 at 2–3 ¶¶ 2–5, 7; 52-8 at 2 ¶ 5.] The letter instructed Plaintiff to contact Ponder by 5:00 p.m. on August 26, 2015, if there were extenuating circumstances that should be considered. [Doc. 52-2 at 94.] Plaintiff contends that her termination was discriminatory because other employees without sufficient PTO time called in sick and were either accommodated or given an occurrence or write-up. [Doc. 1 at 5.] Liberally construed, Plaintiff alleges that Defendant violated Title VII by discriminating and retaliating against her because of her race—black African—and national origin—Liberia, West Africa. [Doc. 1 at 3–5.]

APPLICABLE LAW

Liberal Construction of Pro Se Complaint

Plaintiff brought this action pro se, which requires the Court to liberally construe her pleadings. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Loe v. Armistead*, 582 F.2d 1291, 1295 (4th Cir. 1978); *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). Pro se pleadings are held to a less stringent standard than those drafted by attorneys. *Haines*, 404 U.S. at 520. The mandated liberal construction means only that if the Court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so. *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999). A court may not construct the plaintiff's legal arguments for her. *Small v. Endicott*, 998 F.2d 411, 417–18 (7th Cir. 1993). Nor should a court "conjure up questions never squarely presented." *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985).

Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure states, as to a party who has moved for summary judgment:

> The court shall grant summary judgment 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). A fact is "material" if proof of its existence or non-existence would affect disposition of the case under applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. When determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Fed. R. Civ. P. 56(c)(1). Accordingly, when Rule 56(c) has shifted the burden of proof to the non-movant, she must produce existence of a factual dispute on every element essential to her action that she bears the burden of adducing at a trial on the merits.

DISCUSSION

Title VII Discrimination Claim

Title VII makes it unlawful for an employer to discriminate against an employee with respect to compensation, terms, conditions or privileges of employment on the basis of race or national origin. 42 U.S.C. § 2000e-2(a). Absent direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor motivated an employer's adverse employment action, a plaintiff may proceed under the *McDonnell Douglas* "pretext" framework to establish a claim of employment discrimination. *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005) (quoting *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 (4th Cir. 2003)). Under this framework, an employee must first prove a prima facie case of discrimination.[2] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If the plaintiff succeeds, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action. *Id.* By providing such an explanation, the employer rebuts the presumption of discrimination created by the prima facie case, and "[t]he presumption, having fulfilled its role of forcing the [employer] to come forward with some response,

[2]To establish a prima facie case of discrimination under Title VII, a plaintiff must demonstrate "(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) different treatment from similarly situated employees outside the protected class." *Coleman v. Md. Ct. of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010).

simply drops out of the picture." *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 510–11 (1993) (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981)). If the employer articulates a legitimate, nondiscriminatory reason, the burden shifts back to the employee to show that the articulated reason was actually a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 802, 804.

Plaintiff alleges that Defendant unlawfully discriminated against her due to her race and national origin when she was terminated.[3] [Doc. 1 at 4–5.] Defendant argues Plaintiff cannot establish a prima facie case of discrimination, but even if she could, Plaintiff's claim would fail because Defendant has produced a legitimate, nondiscriminatory reason for terminating Plaintiff's employment and Plaintiff has failed to prove that the proffered reason is a mere pretext. [*Id.* at 9–15.] Here, even assuming without deciding Plaintiff can establish a prima facie case of race or national origin discrimination,[4] the Court finds that

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[3]In response to Defendant's motion for summary judgment, Plaintiff argues, for the first time, that Defendant subjected her to harassment and a hostile working environment. [*See* Docs. 56 at 2–3; 58 at 2–4.] Even liberally construing Plaintiff's Complaint, however, the Court finds that Plaintiff failed to plead that she was subjected to a hostile working environment in violation of Title VII. Plaintiff did check the box for unequal terms and conditions of employment on her Complaint; however, her factual allegations only address her termination. New matters cannot be raised in a response in opposition to a motion for summary judgment. *Temple v. Oconee Cnty.*, No. 6:13-144-JFA-KFM, 2014 WL 4417702, at *13 (D.S.C. Sept. 8, 2014) (citing *White v. Roche Biomedical Labs.*, 807 F.Supp. 1212, 1216 (D.S.C. 1992)); *see Weller v. Dep't of Soc. Servs. for City of Baltimore*, 901 F.2d 387, 390–91 (4th Cir. 1990) (noting that the "'special judicial solicitude' with which a district court should view such pro se complaints does not transform the court into an advocate'"). Thus, to the extent Plaintiff argues additional causes of action in her response and sur-reply to Defendant's motion for summary judgment, the Court will not address these matters as they were not pled in Plaintiff's Complaint.

[4]The Court notes that Plaintiff has failed to address whether she was fulfilling Defendant's legitimate expectations when she was terminated. [*See* Doc. 52-3 ¶ 6 (averring that Plaintiff was a month behind on her work when terminated).] The Fourth Circuit Court of Appeals has observed,

Defendant has articulated a legitimate, nondiscriminatory reason for terminating Plaintiff and Plaintiff has failed to establish a genuine issue of material fact remains as to whether the articulated reason is pretext for unlawful discrimination. Defendant argues that Plaintiff was terminated for cause because Defendant believed Plaintiff would not be returning to

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> Notwithstanding the intricacies of proof schemes, the core of every Title VII case remains the same, necessitating resolution of "the ultimate question of discrimination *vel non*." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983). As the Supreme Court has explained, "[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000). Thus, "[c]ourts must . . . resist the temptation to become so entwined in the intricacies of the [*McDonnell Douglas*] proof scheme that they forget that the scheme exists solely to facilitate determination of 'the ultimate question of discrimination *vel non*.'" *Proud v. Stone*, 945 F.2d 796, 798 (4th Cir. 1991) (citation omitted).

Merritt v. Old Dominion Freight Line, Inc., 601 F.3d 289, 294–95 (4th Cir. 2010); *see Lerner v. Shinseki*, No. ELH-10-1109, 2011 WL 2414967, at *14 (D. Md. June 10, 2011) (noting that "[t]he relevance of the *McDonnell Douglas* scheme outside of the trial context is limited"). Further, the Supreme Court has stated,

> Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff."

Aikens, 460 U.S. at 715 (quoting *Burdine*, 450 U.S. at 253); *see Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008) ("The *Aikens* principle applies, moreover, to summary judgment as well as trial proceedings"). In light of this guidance from the Supreme Court and the Fourth Circuit Court of Appeals, the Court agrees with the District of Maryland that where the employer has met its burden of articulating a legitimate, nondiscriminatory reason for its adverse action against the plaintiff, the Court may assume, without deciding, that the plaintiff has established a prima facie case of discrimination. *See Lerner*, 2011 WL 2414967, at *14.

work. [Doc. 52-1 at 12.] In support of its argument that Plaintiff was terminated for a legitimate nondiscriminatory reason, Defendant has provided an abundance of evidence, including several affidavits and Plaintiff's deposition transcript.

Plaintiff testified that she told several co-workers she was moving to Charlotte. [Doc. 52-2 at 51:13–21, 68:8–14 ("Everybody knew I was moving to Charlotte"); *see* Docs. 52-3 ¶¶ 2–3; 52-4 at 2 ¶ 2; 52-5 ¶ 2; 52-6 at 2–3 ¶¶ 2, 4; 52-7 ¶ 1; 52-8 at 1 ¶ 2.] Ruby Green, Plaintiff's former co-worker, avers that Plaintiff made comments that she would use up her PTO time to move to Charlotte. [Doc. 52-5 ¶ 2.] After learning that Plaintiff was moving and observing that Plaintiff's desk appeared to be cleaned out, Angela Preuter ("Preuter"), Plaintiff's supervisor, communicated the information to Ponder. [Docs. 52-4 at 2 ¶¶ 2–3, 4–6; 52-6 at 2 ¶¶ 3, 4–5, 7.] Ponder attests that she consulted with Dana Gottman ("Gottman"), Defendant's Director of Human Resources. [Doc. 52-6 at 3 ¶ 4–5, 7; *see* Doc. 52-8 at 1–2 ¶¶ 2–5.] Ponder and Gottman decided to send the following letter to Plaintiff via electronic mail and Federal Express overnight delivery:

> Based on information we have received that you have relocated to North Carolina and do not intend to return to work at ACA and the fact that you removed all personal items from your work area as of August 21, 2015[,] indicating that you do not intend to return to work at ACA your employment is being terminated effective 8/24/2015.
>
> If there are extenuating circumstances we should consider, please contact [Ponder] by 8/26/2015 at 5:00 p.m. to discuss.

[Docs. 52-2 at 94; 52-6 at 3 ¶ 5, 7–8.] Plaintiff never responded to Ponder. [Doc. 52-6 at 3 ¶ 6.] After beginning her move to Charlotte, Plaintiff emailed Gottman on August 31, 2015, alleging that her termination violated her civil rights. [Docs. 52-2 at 96–97; 52-8 at 2 ¶ 7.] Gottman responded to Plaintiff's email the same day, requesting that Plaintiff

contact Gottman. [Docs. 52-2 at 98; 52-8 at 2 ¶ 7, 3.] After Plaintiff never responded to Gottman's first email, Gottman sent Plaintiff a follow-up email, asking to speak with Plaintiff and asking if Plaintiff was interested in returning to work. [Docs. 52-2 at 99; 52-8 at 2 ¶ 8, 4.] Plaintiff admitted that she never responded to Defendant even though she received the letter and emails. [Doc. 52-2 at 47:21, 54:19–21, 62:3–5, 63:15–23, 64:4–5, 65:2–10; *see* Docs. 52-6 at 3 ¶ 6 (averring that Plaintiff "never contacted [Ponder] in response to the e-mail and letter"); 52-8 at 2 ¶¶ 6–8 (attesting that Plaintiff did not respond to Ponder's letter or either of Gottman's emails).] Thus, the record evidence establishes that Defendant offered Plaintiff not one but three chances to contact Defendant about her position if she believed that Defendant was incorrect and wished to return to work. Accordingly, the Court concludes Defendant has met its burden under *McDonnell Douglas* of articulating a legitimate, nondiscriminatory reason for terminating Plaintiff. Therefore, the Court will consider whether Plaintiff has met her burden of demonstrating that Defendant's proffered reason is merely a pretext for discrimination, which would indicate whether Plaintiff could meet her ultimate burden of persuasion and demonstrate discrimination. *See Merritt*, 601 F.3d at 294 ("The final pretext inquiry 'merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination,' which at all times remains with the plaintiff." (alteration in *Merritt*) (quoting *Burdine*, 450 U.S. at 256)).

Generally, to prove an employer's articulated reason is a pretext for discrimination, a plaintiff "must prove '*both* that the reason was false, *and* that discrimination was the real reason' for the challenged conduct." *Jiminez v. Mary Wash. Coll.*, 57 F.3d 369, 378 (4th Cir. 1995) (emphasis in original) (quoting *St. Mary's Honor Ctr.*, 509 U.S. at 515). However, "a plaintiff's prima facie case, combined with sufficient evidence to find that the

employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148. Ultimately, to survive summary judgment, a plaintiff must demonstrate "a genuine dispute of material fact on the question of pretext sufficient to make [the employer's] proffered justification a triable issue." *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 217 (4th Cir. 2016).

Here, Plaintiff has failed to satisfy her burden of demonstrating a genuine dispute of material fact on the question of pretext. Indeed, Plaintiff admitted in her deposition that she cannot prove any discrimination and that she did not believe Ponder or Gottman made the decision to terminate her based on her race. [Doc. 52-2 at 13:10–21 (testifying that Preuter laughed at [Plaintiff's] accent and that Preuter did not say she disliked Plaintiff because of her race, noting that "[Preuter] didn't say that to me"), 26:21–23 (testifying as to Ponder, "[e]ven though I believe she terminated me wrongly, that doesn't me[an] she's a racist[,] I don't know that"), 26:25–27:3 ("Do you think it's possible that [Gottman] terminated you because she truly believed what other people were saying? That could be. It could be it"), 27:16–25 (testifying that Ponder was not out to get Plaintiff, and that "I'm not going to lie on her, no"), 66:15–24 (admitting that Defendant may have brought Plaintiff back if she had responded to Gottman's emails), 63:17–23 (admitting that Plaintiff would have returned to work for Defendant had she opened Gottman's email).] Further, Plaintiff has failed to present evidence supporting her conclusory argument that Defendant "applied its attendance policy to those whites and one black American accordingly then disregarded the same policy when dealing with the Plaintiff." [Doc. 58 at 2.] To the extent Plaintiff proffers Shannon Kirkpatrick ("Kirkpatrick") as supportive of her argument, the record reveals the exact opposite. Plaintiff testified that Kirkpatrick was allowed to take time off

even when she had already used all of her PTO. [Doc. 52–2 at 59:7–13.] Plaintiff testified that Kirkpatrick "just knew, per company policy, she was terminated," but that Ponder approved Kirkpatrick returning to work.[5] [Doc. 52-2 at 59:7–20.] However, Plaintiff's situation is different from Kirkpatrick's because Plaintiff never responded to Ponder or Gottman about returning to work, despite being offered multiple opportunities to do so. [Docs. 51-1 at 12; 52-2 at 54:19–55:3, 61:25–62:5, 62:19–63:1, 63:16–23, 94, 98–99; 52-6 at 7; 52-8 at 3–4.]

In evaluating pretext, it is the perception of the decision maker that is relevant. See *Merritt*, 601 F.3d at 300 ("It is regrettable that any distasteful comments will arise in the workplace, but that cannot mean that the actual decision maker is impugned thereby. It is the decision maker's intent that remains crucial, and in the absence of a clear nexus with the employment decision in question, the materiality of stray or isolated remarks is substantially reduced"). Plaintiff argues that Preuter made inappropriate comments about her accent and did not like Plaintiff. [Doc. 52-2 at 11:23–24, 12:12–14.] However, Preuter was not involved in the decision to terminate Plaintiff. [Docs. 52-4 at 3 ¶ 5 (attestation by Preuter, "I was not involved in any decision to terminate [Plaintiff's] employment"); 52-6 at 3 ¶ 5 (noting that Ponder and Gottman, after reviewing information from Preuter and Plaintiff's co-workers, decided to email Plaintiff regarding her termination); 52-8 at 2 ¶ 5 (attesting that Ponder and Gottman "decided to send [Plaintiff] an email" advising her that based on the information available, Defendant was terminating her employment).]

[5]The Court notes that Plaintiff has failed to provide Kirkpatrick's race or national origin, only mentioning that "the difference[] between Plaintiff and others on Preuter's team[:] [t]hey were white and black Americans; [P]laintiff is black from Liberia, West Africa[,] and speaks with a deep black African accent." [Doc. 56 at 3.]

Plaintiff has not challenged the affidavits or her deposition testimony; as such, she has failed to prove that Defendant's proffered reason for her termination is a pretext for unlawful termination. Thus, the undersigned recommends granting Defendant's motion for summary judgment with respect to Plaintiff's Title VII discrimination claims.

Title VII Retaliation Claim

Under Title VII, an employer is forbidden from taking action that discriminates against an employee because that employee has either "opposed any practice made an unlawful employment practice by this subchapter" or has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[6] 42 U.S.C. § 2000e–3(a). The purpose of this antiretaliation provision is to prevent "an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

A plaintiff may establish a violation of Title VII's antiretaliation provision either through direct and indirect evidence of retaliatory animus or through the burden-shifting framework of *McDonnell Douglas*.[7] *Foster v. Univ. of Md.-Eastern Shore*, 787 F.3d 243, 249 (4th Cir. 2015). To establish a prima facie case of retaliation, a plaintiff must demonstrate "(1) she engaged in a protected activity, (2) the employer acted adversely against her, and (3) there was a causal connection between the protected activity and the

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[6]Through the two clauses of the antiretaliation provision, Title VII protects activities that "fall into two distinct categories: participation or opposition." *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998). Here, Plaintiff alleges she engaged in opposition activity.

[7]For a discussion of the *McDonnell Douglas* framework, *see supra* pp. 5–6.

asserted adverse action." *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 337 (4th Cir. 2011) (citing *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 218 (4th Cir. 2007)).

In her Complaint, Plaintiff checked the box for retaliation. [Doc. 1 at 4.] Defendant notes, and the Court agrees, that Plaintiff has failed to allege any facts supporting a retaliation claim in her Complaint. [*See* Doc. 52-1 at 15–16.] Out of an abundance of caution, however, the Court will address the merits of Plaintiff's retaliation claim, as gleaned from her filings and deposition testimony.

As an initial matter, Defendant argues that Plaintiff has failed to establish a prima facie case of retaliation. The Court agrees. Liberally construing Plaintiff's allegations, and viewing the evidence in the light most favorable to Plaintiff, the Court finds that Plaintiff's alleged protected activity was reporting work issues to Ponder. [*See* Doc. 52-2 at 17:21–21:7, 21:10–22:23 (noting three times Plaintiff discussed work conditions with Ponder: (1) Plaintiff's request for a heating pad, which Ponder approved; (2) Plaintiff complained to Ponder that Greg Evans, another employee, yelled at Plaintiff on the floor; and (3) Ponder asking Plaintiff if she had observed a confrontation on the floor between two other employees).] Plaintiff's response in opposition to Defendant's motion argues that Plaintiff also went to Ponder in 2015 to complain about Preuter's harassment, which resulted in Preuter "stepping up her harassment." [Docs. 56 at 2–3; 58 at 2–4.] These arguments include no facts or corroborating information. The Court finds them particularly unpersuasive in light of Plaintiff's contrary sworn deposition testimony.[8] [*See* Doc. 52-2 at

[8]Plaintiff also argues that counsel for Defendant admitted that Plaintiff complained to Ponder about Preuter. [Doc. 58 at 2.] Plaintiff provides no support for this allegation, nor does the record support her argument.

17:21–22:23 (testifying "that was the only two times I had interaction with [Ponder]").] Additionally, the Court finds Plaintiff has failed to establish a casual connection between her complaints to Ponder and her termination.[9] Plaintiff has provided no information about her interactions with Ponder, beyond testifying that they occurred in 2015, to support a finding that Plaintiff was terminated because she participated in protected activity. Consequently, Plaintiff has failed to meet her burden of establishing a prima facie case of retaliation.[10] Thus, the undersigned recommends granting Defendant's motion for summary judgment as to Plaintiff's Title VII retaliation claim.

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[9]Plaintiff has not challenged Gottman's affidavit, which avers that Gottman was not aware of any discrimination complaints from Plaintiff when she terminated Plaintiff. [Doc. 52-8 at 2 ¶ 9.] Importantly, Plaintiff neither argued nor alleged that Ponder fired her because she complained about Preuter, testifying in her deposition that Ponder was "not out to get [her]." [Doc. 52-2 at 27:16–25.] At best, Plaintiff argues in her response in opposition that Defendant allowed Preuter to act with "immunity," but identifies Preuter as the individual wanting her to quit or be terminated. [*See* Doc. 56 at 2 ("Preuter did not hide her hatred for Plaintiff . . . [in] an effort to persuade Plaintiff" to quit).]; *see also Merritt*, 601 F.3d at 300 ("It is the decision maker's intent that remains crucial, and in the absence of a clear nexus with the employment decision in question, the materiality of stray or isolated remarks is substantially reduced").

[10]As previously stated, even assuming Plaintiff could prove a prima facie case, Defendant has articulated a legitimate, non-discriminatory reason for terminating Plaintiff. *See supra* pp. 7–9 (discussing Defendant's decision to terminate Plaintiff). Further, with respect to Plaintiff's discrimination claim, the Court has found Plaintiff failed to establish pretext and that same analysis applies to her retaliation claim. *See supra* pp. 9–12. Plaintiff's conclusory assertions are insufficient to withstand summary judgment. Thus, Plaintiff's retaliation claim would fail even if Plaintiff had established a prima facie case of retaliation under Title VII.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Brenda Massaquoi, Plaintiff, vs. American Credit Acceptance, Defendant.	)	C/A No. 7:16-cv-02220-BHH OPINION AND ORDER

This matter is before the Court on Defendant's Motion for Summary Judgment.[1] (ECF No. 52.) In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2), (D.S.C.), this matter was referred to United States Magistrate Judge Jacquelyn D. Austin for pre-trial proceedings. On February 9, 2018, the Magistrate Judge issued a Report and Recommendation ("Report") recommending that the Motion for Summary Judgment be granted. (ECF No. 67.) The Magistrate Judge advised the parties of the procedures and requirements for filing objections to the Report. Plaintiff Brenda Massaquoi ("Plaintiff") filed objections on March 8, 2018. (ECF No. 75.) Defendant filed a reply, and Plaintiff subsequently filed additional objections.[2] (ECF Nos. 79 & 81.)

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *See Mathews v. Weber*, 423 U.S. 261 (1976). The

[1]Angela Preuter and Sharon Ponder were previously dismissed from this action without prejudice and without issuance of service of process. (ECF No. 28.)

[2]Plaintiff addresses Docket Entry Numbers 75 and 81 to the Fourth Circuit Court of Appeals; however, because the Report is only a recommendation to this Court, it is not immediately appealable to the Fourth Circuit. Accordingly, the Court has construed these filings as objections to the Report.

Court is charged with making a *de novo* determination of any portion of the Report to which a specific objection is made. The Court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter with instructions. *See* U.S.C. § 636(b). The Court will review the Report only for clear error in the absence of an objection. *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (stating that "in the absence of a timely filed objection, a district court need not conduct a *de novo* review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation" (citation omitted)).

Plaintiff, proceeding *pro se*, brings this action alleging discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"). (ECF No. 1.) The Magistrate Judge provides a thorough recitation of the facts of this case and the applicable law in the Report, including a discussion of the summary judgment standard and the requisite liberal construction of a *pro se* complaint, which the Court incorporates by reference. The Magistrate Judge recommends granting summary judgment with respect to both claims. (ECF No. 67 at 16.)

As an initial matter, it does not appear that Plaintiff challenges Magistrate Judge Austin's recommendation regarding her retaliation claim. Plaintiff's objections do not point the Court to any specific errors in the Magistrate Judge's reasoning or analysis. Upon review of the record, the applicable law, and the Report, the Court finds no error and agrees with the recommendation that Defendant is entitled to summary judgment with respect to this claim.

Turning to Plaintiff's discrimination claim, the Magistrate Judge assumed without deciding that Plaintiff could establish a *prima facie* case of discrimination on the basis of race and national origin. (ECF No. 67 at 7.) She also found that Defendant provided a legitimate, nondiscriminatory reason for Plaintiff's termination and determined that Plaintiff had not demonstrated that the proffered reason was mere pretext. (*Id.* at 8-13.) Plaintiff makes several objections to the Magistrate Judge's findings that she failed to demonstrate the pretextual nature of the reason proffered for her termination, and failed to show that discrimination was the real reason for her termination.

First, Plaintiff argues that it was Defendant's responsibility to confirm that she had moved to Charlotte before terminating her employment. (ECF Nos. 75 at 4 & 7; 81 at 1.) Plaintiff has provided no support for her assertion that it was Defendant's responsibility to ascertain her whereabouts before terminating her employment. Regardless, Plaintiff was provided an opportunity to confirm this information herself when Defendant sent her a letter via email and overnight delivery informing her that she was being terminated and asking her to call Sharon Ponder, Defendant's Human Resources Business Partner, in the event that there were extenuating circumstances that should be considered. (ECF No. 52-2 at 94.) Plaintiff does not dispute that she did not contact Defendant at that time to correct the assumption that she had moved and would not be returning to work. After she emailed one of Defendant's employees that her termination violated her civil rights, Defendant's employee emailed her twice requesting that she contact Defendant to address these concerns and perhaps return to work. Plaintiff failed to respond to these emails or contact Defendant's employee. In summary, the specific fact that Plaintiff had not yet actually

vacated her residence in South Carolina and taken up residence in Charlotte, North Carolina, is immaterial to the question of whether Defendant's proffered reason for Plaintiff's termination was a pretext for discrimination. Accordingly, this objection is overruled.

Second, Plaintiff contends that the Magistrate Judge erred in failing to review voice messages Plaintiff alleges she left with Defendant informing Defendant that she was calling in sick and would be back at work. (ECF No. 75 at 4, 8.) Plaintiff asserts that she had sufficient paid time off to cover her absence; accordingly, because she called in, she was entitled to take leave. (*See id.*) It appears to the Court that this voice message has not been provided by Plaintiff for the Court's review. The Magistrate Judge has no duty to conduct discovery on behalf of any party. Accordingly, Plaintiff's conclusory allegation, without more, is insufficient to preclude the entry of summary judgment. *See Ross v. Commc'ns Satellite Corp.*, 759 F.2d 355, 365 (4th Cir.1985) ("Unsupported allegations as to motive do not confer talismanic immunity from Rule 56."), *abrogated on other grounds by Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Third, Plaintiff objects to the Magistrate Judge's consideration of Defendant's argument that its employees believed Plaintiff had moved to Charlotte because there were no personal items on her desk; Plaintiff contends that she never had any personal items on her desk. (ECF Nos. 75 at 4, 9; 81 at 1.) Liberally construing this objection, Plaintiff may be arguing that this putative lack of personal items is evidence that Defendant's proffered legitimate, nondiscriminatory reason for terminating her was mere pretext. However, Plaintiff fails to assert or provide any evidence that the decision maker knew Plaintiff did

not have any personal items on her desk. Even assuming that Plaintiff did not keep personal items at work, at most she argues that Defendant's employees were mistaken in their belief that she cleaned out her desk. This is insufficient to demonstrate that discrimination was the real reason for her termination and the objection is overruled. *See Jiminez v. Mary Wash. Coll.*, 57 F.3d 369, 378 (4th Cir. 1995) (holding that, generally, to prove an employer's articulated reason is a pretext for discrimination, a plaintiff "must prove '*both* that the reason was false, *and* that discrimination was the real reason' for the challenged conduct" (emphasis in original) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993))).

Next, Plaintiff objects to the Magistrate Judge's reliance on the statement by one of Defendant's employees that, after her termination, the employee who took over Plaintiff's work reported that Plaintiff was behind in her paperwork. (ECF No. 75 at 4, 10.) It does not appear that the Magistrate Judge considered this statement when rendering her recommendations, mentioning it only obliquely in a footnote, and only to say that she was, essentially, granting Plaintiff the benefit of the doubt by assuming without deciding that Plaintiff established a *prima facie* case of discrimination. (*See* ECF No. 67 at 7-8 n.4) Further, even assuming that Plaintiff was not behind in her paperwork and that Defendant's employee's statement was false, Plaintiff has not alleged that this assertion was known to Defendant at the time of her termination or played any role in the decision to terminate her employment. Thus, the objection is overruled.[3]

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[3]In the last page of her objections, Plaintiff states that the Magistrate Judge failed to properly consider the facts of the case and the evidence submitted in opposition to the motion. While this is not a specific objection, after a thorough review of the record, the

In her supplemental objections to the Report, Plaintiff appears to argue that three other employees were treated differently than Plaintiff.[4] (ECF No. 81 at 2.) She contends that,

> ACA CEO, a white man lives in Charlotte, North Carolina with immunity[;] Shannon Kirkpatrick, a black American woman called off with occurrences, without PTO time and did several "no calls no shows," then was called back to work with ACA with immunity[;] Pam, a white American woman, was given reasonable pay raises even though she was months behind on her work while consistently working unlimited overtime.

Id. First, Plaintiff has failed to establish that she is similarly situated to Defendant's Chief Executive Officer. *See Edwards v. Newport News Shipbuilding*, 166 F.3d 1208 (4th Cir. 1998) (unpublished table decision) (citing *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992), for the proposition that to be similarly situated, employees must have the same supervisors and must have engaged in the same conduct without differentiating or mitigating circumstances). Next, Plaintiff's allegation that Pam was behind in her work but continued to receive raises is irrelevant to the present action because, as explained above, Plaintiff has not alleged that any adverse action was taken against her because Defendant or its employees believed she was behind in her work. Finally, the Magistrate Judge specifically addressed Plaintiff's argument that Shannon Kirkpatrick ("Kirkpatrick") is similarly situated to Plaintiff. The Magistrate Judge found Kirkpatrick's alleged

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applicable law, and the Report, the Court finds that the Magistrate Judge properly considered the evidence and the law in issuing the Report.

[4] Evidence that an employer treated similarly situated individuals differently can be evidence of pretext. *See, e.g.*, *Laing v. Fed. Express Corp.*, 703 F.3d 713, 721 (4th Cir. 2013) (stating that such comparator evidence "would be 'especially relevant' to a showing of pretext").

situation–namely, where Kirkpatrick failed to inform Defendant that she was taking time off, was terminated, and then permitted to return to work–was sufficiently different from Plaintiff's situation. Specifically, the Magistrate Judge noted that Plaintiff failed to respond to Defendant's three attempts to communicate with her about possibly returning to work. (ECF No. 67 at 12 (citing ECF Nos. 51-1 at 12; 52-2 at 54-55, 61–63, 94, 98-99; 52-6 at 7; 52-8 at 3-4)). Upon review of the record and the applicable law, the Court agrees with the Magistrate Judge's determination that Plaintiff has not established that she and Kirkpatrick are similarly situated. Accordingly, the supplemental objections are overruled.

CONCLUSION

For the reasons set forth above, the Court adopts and incorporates herein the Report and Recommendation (ECF No. 67) of the Magistrate Judge. Therefore, Defendant's Motion for Summary Judgment (ECF No. 52) is **GRANTED**.

IT IS SO ORDERED.

/s/Bruce H. Hendricks
United States District Judge

August 31, 2018
Charleston, South Carolina

NOTICE OF RIGHT TO APPEAL

The parties are hereby notified of the right to appeal this order pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

Additional material from this filing is available in the Clerk's Office.