IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Eric Alan Sanders, Plaintiff, v. Lowe's Home Centers, LLC, Defendant.	)	Civil Action No.: 0:15-cv-02313-JMC **ORDER AND OPINION**

This matter is before the court on review of the Magistrate Judge's Report and Recommendation ("Report") (ECF No. 187), filed on January 31, 2018, recommending that the court grant Defendant's Motion for Summary Judgment (ECF No. 139) with regard to Plaintiff's federal law claims. Additionally, the Report recommends that the court should deny Plaintiff's Motion in Limine (ECF No. 148) as moot. For the reasons stated below, the court **ACCEPTS** the Report.[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

The court concludes upon its own careful review of the record that the factual and procedural summation in the Report (ECF No. 187) is accurate, and the court adopts this summary as its own. The court will only recite herein facts pertinent to the court's review of the Report (ECF No. 187). On January 31, 2018, Magistrate Judge Paige J. Gossett filed the Report (ECF No. 187), and on February 16, 2018, Plaintiff timely filed an Objection (ECF No. 203). On

[1] The court previously accepted the Report only as to its recommendation that Plaintiff's Motions for Default Judgment (ECF No. 136, 143, 145) be denied. (ECF No. 226.) The court notes that in the initial paragraph of its Order (ECF No. 226 at 1) accepting the Report, the court misidentified Plaintiff's Motions for Default Judgment as Motions for Summary Judgment. Plaintiff did not file a motion for summary judgment.

February 28, 2018, Defendant replied. (ECF No. 214.)

Plaintiff was discharged after Defendant mailed two (2) letters via certified and regular mail to Plaintiff in an attempt to establish whether he was returning to work, neither of which were answered by Plaintiff. (ECF No. 139-7 at 6-7.)[2] On June 12, 2015, because Plaintiff missed five (5) consecutive shifts without contacting his manager, Defendant treated his absenteeism as a voluntary resignation from his position. (*Id.* at 7.)

II. JURISDICTION

The court has jurisdiction over Plaintiff's claims via 28 U.S.C. § 1331, as they arise under laws of the United States. Plaintiff brings his claims pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq., and Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, et seq.[3]

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[2] The first letter, sent on June 1, 2015, stated that Plaintiff needed to contact Human Resources Manager Rayvon Irby by June 5, 2015 in order to establish whether Plaintiff wanted to continue to work for Defendant. Plaintiff asserts that he came to the store on June 4, 2015 and met with Irby (ECF No. 164-5 at 2) and was ejected from the store (ECF No. 203 at 23), but the court has no evidence that Plaintiff came to the store for the purpose of complying with the June 1, 2015 letter. Moreover, whether Plaintiff complied with the letter is not relevant to establishing his constructive discharge claim.

[3] Plaintiff's only federal claims are for "discriminatory constructive discharge" and "retaliatory constructive discharge" as noted by the Report (ECF No. 187 at 1 n.1) and reconfirmed by Plaintiff's objections (ECF No. 203 at 11). Plaintiff has also alleged that Defendant has violated several South Carolina state laws: South Carolina Human Affairs Law § 1-13-80 (2014) (ECF No. 16 at 5 ¶ 24), S.C. Code Ann. § 16-7-150 (1976) for slander and libel (*id.* at 6-7 ¶ 28), S.C. Code Ann. § 16-17-560 (1993) for intimidation on account of exercise of civil rights (*id.* at 7 ¶ 31), S.C. Code Ann. § 16-17-410 (1993) for conspiracy (*id.* at 8 ¶ 37), and S.C. Code Ann. § 15-75-20 (1969) for loss of companionship of his spouse (*id.* at 10 ¶ 44). On September 27, 2016, the court dismissed Plaintiff's claims as to S.C. Code Ann. §§ 16-7-150, 16-17-410, 16-17-560, and 15-75-20. (ECF No. 103 at 8.) The Report recommends that the court decline to exercise supplemental jurisdiction over the remaining state law claim (South Carolina Human Affairs Law § 1-13-80). (ECF No. 187 at 11-12.) Neither party objected to this recommendation, therefore, the court **ACCEPTS** the Report's recommendation as to declining to exercise supplemental jurisdiction over Plaintiff's state law claim. *See* 28 U.S.C. § 1367(c)(3) ("The district courts may decline to

III. LEGAL STANDARD

a. Report and Recommendation

The Magistrate Judge's Report is made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02(B)(2)(c) for the District of South Carolina. The Magistrate Judge makes only a recommendation to this court, which has no presumptive weight. The responsibility to make a final determination remains with this court. *See Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The court is charged with making a *de novo* determination of those portions of the Report to which specific objections are made. Fed. R. Civ. P. 72(b)(2)-(3). As Plaintiff is a *pro se* litigant, the court is required to liberally construe his arguments. *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978); *see also Haines v. Kerner*, 404 U.S. 519, 520 (1972) (*pro se* plaintiff's "inartful pleadings" may be sufficient enough to provide the opportunity to offer supporting evidence.)

b. Summary Judgment

Summary judgment should be granted "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 nonexistence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248–49 (1986). A genuine question of material fact exists where, after reviewing the record as a whole, the court finds that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 248.

In ruling on a motion for summary judgment, a court must view the evidence in the light most favorable to the nonmoving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 124 (4th Cir. 1990) (citing *Pignons S.A. De Mecanique v. Polaroid Corp.*, 657 F.2d 482, 486 (1st Cir.

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exercise supplemental jurisdiction over other claims[:] if the district court has dismissed all claims over which it has original jurisdiction.").

1981)). The nonmoving party may not oppose a motion for summary judgment with mere allegations or denials of the movant's pleading, but instead must "set forth specific facts" demonstrating a genuine issue for trial. Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Anderson*, 477 U.S. at 252. All that is required is that "sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson*, 477 U.S. at 249 (citing *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968)). "Mere unsupported speculation . . . is not enough to defeat a summary judgment motion." *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 62 (4th Cir. 1995). "[T]he burden [to show no genuine issue of material fact] on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325.

"In [ ] a situation [where a party fails to make a showing sufficient to establish an essential element of their case, on which they will bear the burden of proof at trial], there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of their case with respect to which she has the burden of proof." *Id.* at 322–23.

IV. ANALYSIS

Plaintiff specifically objects to the Report on the basis that the Magistrate Judge did not have jurisdiction to file the Report because he had appealed a Text Order by the Magistrate Judge (ECF No. 158). (ECF No. 203 at 12.) The Magistrate Judge's Text Order (ECF No. 158)

terminated as moot Plaintiff's Motion for Protective Order and granted Plaintiff's Motion for an Extension of Time to Respond to Defendant's Motion for Summary Judgment (ECF No. 139). (ECF No. 149.)[4] However, the United States Court of Appeals for the Fourth Circuit denied Plaintiff's appeal for lack of jurisdiction after Plaintiff had already filed his objections to the Report. (ECF No. 223 at 3.) Therefore, the court will not address this objection. Plaintiff also specifically objects to the Magistrate Judge's application of the law in analyzing Plaintiff's discriminatory and retaliatory constructive discharge claim under Title VII and the ADA by focusing on intent rather than intolerability (*id.* at 21-23).[5]

Constructive Discharge

The court finds that the Magistrate Judge erred by citing the incorrect law regarding constructive discharge, therefore, the court will address Plaintiff's constructive discharge claim under the correct law. (*See* ECF No. 187 at 10 n.4.)

Plaintiff alleges that he was discriminated against on the basis of race (ECF No. 16 at 3 ¶ 14), disability (*id.* at 4 ¶ 17), and gender (*id.* at 4 ¶ 20). As a result of this alleged discrimination,

[4] Plaintiff filed a Motion for Protective Order and Motion for Extension of Time in the same document (ECF No. 149).

[5] Plaintiff also specifically objects to the Magistrate Judge's finding that he did not properly respond to Defendant's Motion for Summary Judgment (ECF No. 139) because he filed a letter and several exhibits with the court. (ECF No. 187 at 2.) However, the Magistrate Judge considered Plaintiff's exhibits and submissions as a response to Defendant's Motion for Summary Judgment (ECF No. 139), and analyzed these exhibits and submissions in making her recommendation to the court. Therefore, the court will not address this objection. Additionally, Plaintiff objects to the Magistrate Judge's application of the third prong of the *McDonnell Douglas* framework in the context of at-will employment. (ECF No. 203 at 17.) However, as will be explained below, because the court does not reach the third prong of the *McDonnell Douglas* framework, the court does not need to address this objection.

Plaintiff asserts that he was constructively discharged in violation of Title VII and the ADA.[6] (ECF No. 203 at 11.)

"A claim of constructive discharge [ ] has two basic elements. A plaintiff must prove first that he was discriminated against by his employer to the point where a reasonable person in his position would have felt compelled to resign[,] but [second] he must also show that he actually resigned." *Green v. Brennan*, 136 S. Ct. 1769, 1777 (2016). The standard for constructive discharge requires "objective intolerability", but not "deliberateness, or a subjective intent to force a resignation." *U.S. Equal Employment Opportunity Comm'n v. Consol Energy, Inc.*, 860 F.3d 131, 144 (4th Cir. 2017), *cert. denied sub nom. Consol Energy Inc. v. E.E.O.C.*, 138 S. Ct. 976 (2018) (quoting *Green* 136 S. Ct. at 1779-80)).

In order to establish that Plaintiff was constructively discharged, Plaintiff must first prove that Defendant discriminated against him. To prove a violation of Title VII, Plaintiff can utilize the *McDonnell Douglas* framework.[7] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), *holding modified by Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). To establish discrimination under Title VII, "[t]he complainant . . . must carry the initial burden under the statute of establishing a *prima facie* case of [ ] discrimination." *McDonnell Douglas Corp.*, 411 U.S. at 802. If Plaintiff is able to establish a *prima facie* case of discrimination, then the burden

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[6] Title VII encompasses both race and gender discrimination. *See* 42 U.S.C. § 2000e-2(a).

[7] "A plaintiff may establish a discrimination claim under Title VII through two avenues of proof[, (1) through the mixed-motive framework, utilizing direct or circumstantial evidence, or (2) through the *McDonnell Douglas* pretext framework.]". *Thomas v. Delmarva Power & Light Co.*, 715 F. App'x 301, 302 (4th Cir. 2018) (unpublished opinion) (internal citations omitted). Plaintiff has not presented direct evidence of discrimination or retaliation, and the indirect evidence presented is not "of sufficient probative force to reflect a genuine issue of material fact [as to Defendant's alleged discrimination]" as detailed below. *See Thomas*, 715 F. App'x at 302 (quoting *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 577 (4th Cir. 2015)). Therefore, the court will analyze Plaintiff's claims under the *McDonnell Douglas* framework.

shifts to Defendant to articulate some legitimate, nondiscriminatory reason for the adverse action. *See McDonnell Douglas Corp.*, 411 U.S. at 803; *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 294 (4th Cir. 2010). If Defendant is able to carry this burden, ". . . then Plaintiff has the opportunity to prove by a preponderance of the evidence that the neutral reasons offered by the employer were "not its true reasons, but were a pretext for discrimination." *Merritt*, 601 F.3d at 294 (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

i. Title VII Claims

Plaintiff must establish a *prima facie* case of discrimination by showing that '(1) [he] is a member of a protected class; (2) [he] suffered adverse employment action; (3) [he] was performing [his] job duties at a level that met [his] employer's legitimate expectations at the time of the adverse employment action; and (4) the position remained open or was filled by similarly qualified applicants outside the protected class.'" *Miles v. Dell, Inc.*, 429 F.3d 480, 485 (4th Cir. 2005) (quoting *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 285 (4th Cir. 2004) (*en banc*) *abrogated on other grounds by Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013)).

It is undisputed that Plaintiff is a member of a protected class, being male and African-American. (ECF No. 139-1 at 8.) The parties dispute whether Plaintiff suffered an adverse employment action. "An adverse employment action is a discriminatory act which adversely affects the terms, conditions, or benefits of the plaintiff's employment." *Melendez v. Bd. of Educ. for Montgomery Cty.*, 711 F. App'x 685, 688 (4th Cir. 2017) (unpublished opinion) (quoting *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375 (4th Cir. 2004)). "A constructive discharge—an allegation that the employer made the employee's working conditions so intolerable that [the

employee] was forced to quit her job—may constitute an adverse employment action." *Lacasse v. Didlake, Inc.*, 712 F. App'x 231, 239 (4th Cir. 2018) (unpublished opinion).[8]

"The constructive-discharge doctrine contemplates a situation in which an employer discriminates against an employee to the point such that his 'working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign.'" *Green*, 136 S. Ct. at 1776 (quoting *Pennsylvania State Police v. Suders,* 542 U.S. 129, 141 (2004)). "Whether an employment environment is intolerable is determined from the objective perspective of a reasonable person." *Heiko v. Colombo Sav. Bank, F.S.B.*, 434 F.3d 249, 262 (4th Cir. 2006) (citing *Williams v. Giant Food Inc.*, 370 F.3d 423, 434 (4th Cir. 2004)). "Dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign." *Williams*, 370 F.3d at 434 (quoting *Carter v. Ball*, 33 F.3d 450, 459 (4th Cir. 1994)).

The only alleged adverse employment action presented is Plaintiff's assertion that he was constructively discharged. (ECF No. 16 at 7 ¶ 31; ECF No. 203 at 11.) Plaintiff must not rely on his pleadings, but must present specific evidence of his constructive discharge, meaning that he must present evidence of intolerability.[9] *See Celotex Corp.*, 477 U.S. at 324; *Green* 136 S. Ct. at

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[8] *See also Cronin v. S.C. Dep't of Corr.*, No. CA 3:11-471-MBS-SVH, 2013 WL 5315983, at *8 (D.S.C. Sept. 20, 2013) ("Constructive discharge is recognized as a type of adverse employment action in the context of a disparate treatment claim under Title VII."); *Abrams v. Wachovia Corp.*, No. CA 3:08-4073-JFA-PJG, 2010 WL 2622437, at *4 (D.S.C. June 25, 2010) ("Constructive discharge constitutes an adverse employment action."); *Bowen v. Maryland, Dep't of Pub. Safety & Corr. Servs.*, No. CV RDB-17-1571, 2018 WL 1784463, at *9 (D. Md. Apr. 12, 2018) (court treated constructive discharge as a type of adverse employment action within a Title VII discrimination claim).

[9] Plaintiff asserts that his Complaint is a "verified complaint." "[A] verified complaint is the equivalent of an opposing affidavit for summary judgment purposes, when the allegations contained therein are based on personal knowledge." *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991). "[A] verified complaint that alleges facts that are made on belief or information and belief is insufficient to oppose summary judgment." *Walker v. Tyler Cty. Comm'n*, 11 F. App'x

1777. Plaintiff presents evidence of a complaint he made to Michael Greek, an Area Human Resources Manager for Defendant, regarding an incident involving his coworkers yelling at him and being rude, with one coworker allegedly "pulling up" close to him with a forklift. (ECF No. 164-5 at 22.) He also provides evidence of an e-mail he wrote to Vincent Alexander, an Employee Relations & Compliance Consultant for Defendant, in which he detailed different instances of harassment and retaliation that he allegedly suffered, stating that the store was a "toxic environment." (*Id.* at 58.) Further, Plaintiff also provides a copy of what the court construes as his letter of resignation (*id.* at 41-43) which also details different instances of harassment and Defendant's failure to correct them.

The court finds that Plaintiff has not provided sufficient evidence to establish that he worked under intolerable conditions. Plaintiff asserts that his coworkers yelled at him, they were rude, they made comments about how he was "derelict" in performing his job; and his manager violated company policy by having a conversation about Plaintiff's work performance. (ECF No. 164-5 at 41-43.) These assertions do not establish "objectively intolerable working conditions," therefore, Plaintiff cannot establish that he was constructively discharged. *See Williams*, 370 F.3d at 434 ("[Plaintiff] alleged that her supervisors yelled at her, told her she was a poor manager and gave her poor evaluations, chastised her in front of customers, and once required her to work with an injured back. We agree with the district court that these allegations, even if true, do not establish the objectively intolerable working conditions necessary to prove a constructive discharge."). Because Plaintiff fails to establish that he was constructively discharged, he also fails to establish

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270, 274 (4th Cir. 2001). The court finds that Plaintiff's Complaint is not a verified complaint because the court cannot assess whether each allegation is made on personal knowledge. Therefore, Plaintiff must provide the court with sufficient specific evidence to establish that there is a disputed material question of fact regarding his alleged constructive discharge.

that Defendant discharged him in a discriminatory manner. Therefore, summary judgment should be granted as to this claim.

ii. ADA Claim

To establish a *prima facie* case of discriminatory termination under the ADA, a plaintiff must show: "(1) he 'was a qualified individual with a disability'; (2) he 'was discharged'; (3) he 'was fulfilling h[is] employer's legitimate expectations at the time of discharge'; and (4) 'the circumstances of h[is] discharge raise a reasonable inference of unlawful discrimination.'" *Reynolds v. Am. Nat. Red Cross*, 701 F.3d 143, 150 (4th Cir. 2012) (quoting *Rohan v. Networks Presentations LLC*, 375 F.3d 266, 273 n.9 (4th Cir. 2004)).

Plaintiff provides several documents regarding medical impairments from which he suffers (*see* ECF No. 164), but the crux of Plaintiff's Complaint is that he was "constructively discharged." Therefore, the court will address the second prong of the *prima facie* case for discriminatory termination under the ADA. The constructive discharge analysis is the same under Title VII and the ADA, as both require proof of "discharge" or an "adverse employment action." *See Miles*, 429 F.3d at 485, *Reynolds*, 701 F.3d at 150; *see also Robinson v. BGM Am., Inc.*, 964 F. Supp. 2d 552, 575 (D.S.C. 2013) (accepting Magistrate Judge's finding that the plaintiff's failure to provide sufficient evidence of constructive discharge establishes that the plaintiff cannot survive summary judgment on his wrongful termination claim under the ADA). The court has already determined that Plaintiff has not provided sufficient evidence of a constructive discharge, therefore, Plaintiff also cannot establish that he was discriminatorily discharged under the ADA. As a result, summary judgment must be granted as to this claim.

Retaliation Claim[10]

"Title VII prohibits an employer from both (i) discriminating against an employee on the basis of sex, and (ii) retaliating against an employee for complaining about prior discrimination or retaliation." *Foster v. Univ. of Maryland-E. Shore*, 787 F.3d 243, 249 (4th Cir. 2015) (citing 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a)). Plaintiff can prove retaliation using the *McDonnell Douglas* framework or the "mixed-motive" framework as described above.[11] *See Id.*

To prevail under the *McDonnell Douglas* framework as to retaliation, Plaintiff must first establish a prima facie case by showing: "(i) that [he] engaged in protected activity, (ii) that [Defendant] took adverse action against [him], and (iii) that a causal relationship existed between the protected activity and the adverse employment activity."[12] *Foster*, 787 F.3d at 250 (quoting *Price v. Thompson*, 380 F.3d 209, 212 (4th Cir. 2004)). "A plaintiff [establishes that the defendant took an adverse action against him or her] if 'a reasonable employee would have found the challenged action materially adverse,' meaning that it 'might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" [13] *Pyatt v. Harvest Hope Food Bank*, No.

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[10] Plaintiff's claim of "retaliatory constructive discharge" fits within the second prong of the retaliation framework.

[11] The court analyzes Plaintiff's claims under the *McDonnell Douglas* framework for the same reasons as noted in footnote seven (7).

[12] The court undertakes the same analysis for Plaintiff's retaliation claims under Title VII and the ADA. *See Haulbrook v. Michelin N. Am.*, 252 F.3d 696, 706 (4th Cir. 2001) ("A retaliatory discharge claim under the ADA has three *prima facie* elements: [the plaintiff] must show (1) that he engaged in protected activity; (2) that his employer took an adverse action against him; and (3) that a causal connection existed between the adverse activity and the protected action.").

[13] The standard for an "adverse employment action" under a Title VII retaliation claim is different than the standard for that same adverse employment action under a Title VII disparate treatment (or discrimination) claim. *Pyatt v. Harvest Hope Food Bank,* No. CA 3:10-2002-MBS-PJG, 2012 WL 1098632, at *4 (D.S.C. Feb. 1, 2012), *report and recommendation adopted,* No. CA 3:10-2002-MBS, 2012 WL 1098627 (D.S.C. Mar. 29, 2012).

CA 3:10-2002-MBS, 2012 WL 1098627, at *9 (D.S.C. Mar. 29, 2012) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)).

It is undisputed that Plaintiff engaged in a protective activity by filing two EEOC Complaints (ECF No. 164-2 at 111-14) that are pertinent to this case prior to his alleged constructive discharge. (*See* ECF No. 164-5 at 28); *see also Aronberg v. Walters,* No. 84-2388, 1985 WL 15447, at *1 (4th Cir. July 8, 1985) (filing a complaint with the EEOC is a protected activity). At issue is whether Defendant took an adverse action against Plaintiff. Plaintiff asserts that Defendant's employees physically retaliated against him by ejecting him from the store on June 4, 2015, but the court has no evidence of this fact. Moreover, Plaintiff's absenteeism led to Defendant's determination that Plaintiff voluntarily resigned. (ECF No. 139-7 at 7). Further, the court has determined that Plaintiff has not provided sufficient evidence of constructive discharge.

The court finds that Plaintiff has failed to provide evidence that Defendant took any action to "dissuade Plaintiff from making or supporting a charge of discrimination." *See Pyatt,* 2012 WL 1098627, at *9. Therefore, because Plaintiff fails to provide sufficient evidence, as opposed to allegations, of an adverse employment action, summary judgment must be granted as to this claim.

V. CONCLUSION

For the reasons stated above, the court **ACCEPTS** the Report (ECF No. 187) and **GRANTS** Defendant's Motion for Summary Judgment (ECF No. 139) as to Plaintiff's federal law claims. Additionally, Plaintiff's Motion in Limine (ECF No. 148) is **DENIED AS MOOT.** Furthermore, Plaintiff's Motion to Stay or Alternatively to Extend Time for Filing Objections to Orders 182-188 (ECF No. 190), Plaintiff's Motion to Amend/Correct Amended Complaint (ECF No. 195), Plaintiff's Motion to Reconsider the Orders in ECF Nos. 27, 42, 103, 187, pursuant to

Fed. R. Civ. 54(b) (ECF No. 195), Plaintiff's Amended Motion to Amend/Correct Amended Complaint (ECF No. 201), and Plaintiff's Motion for Discovery (ECF No. 206) are **DENIED WITH PREJUDICE.**

IT IS SO ORDERED.

J. Michelle Childs

United States District Judge

April 20, 2018
Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Eric Alan Sanders, Plaintiff, v. Lowe's Home Centers, LLC, Defendant.	)	C/A No. 0:15-2313-JMC-PJG **REPORT AND RECOMMENDATION**

Plaintiff Eric Alan Sanders, a self-represented litigant, filed this employment action pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, et seq.; and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, et seq., against his former employer Defendant Lowe's Home Centers, LLC.[1] This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.) for a Report and Recommendation on the defendant's motion for summary judgment. (ECF No. 139.) Pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), Sanders was advised of the summary judgment and dismissal procedures and the possible consequences if he failed to respond adequately to the defendant's motion. (ECF No. 141.) In response, Sanders filed numerous motions challenging previous rulings by the court as well as seeking an extension of time to respond to the defendant's motion and seeking a default judgment against the defendant. (See ECF Nos. 143-49.) The court granted Sanders additional time

[1] The court previously interpreted Sanders's Complaint as including additional claims (see ECF No. 27); however, Sanders has unequivocally stated that he is asserting only a "discriminatory/retaliatory constructive discharge" claim under both Title VII and the ADA. (ECF No. 163 at 3.) Therefore, the court's analysis is limited to these federal claims and any other federal claims are deemed abandoned.

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to respond; however, rather than filing a written response in accordance with the Federal Rules of Civil Procedure, which were discussed in the court's Roseboro order, Sanders submitted a letter without any argument and over five hundred pages of exhibits (ECF No. 164). The response does not comply with Rule 56(c). Notwithstanding Sanders's failure to properly respond to the defendant's motion, the court reviewed Sanders's exhibits (most of which appear to relate to Sanders's previous cases against other employers) and, having carefully considered the parties' submissions and the record in this case, the court concludes that the defendant's motion for summary judgment should be granted as to Sanders's federal claims.[2]

BACKGROUND

Sanders, an African-American male, filed this action alleging that he was discharged due to retaliatory and racial animus by the defendant in violation of Title VII. He further alleges that he has been diagnosed with mental and physical illnesses which make him a qualified individual under the ADA, and appears to

[2] Sanders has appealed to United States Court of Appeals for the Fourth Circuit an order terminating as moot Sanders's motion for a protective order and granting his motion for an extension of time. Accordingly, the court must determine whether it has jurisdiction to adjudicate the defendant's motion for summary judgment in light of Sanders's appeal. "[W]hile the filing of a notice of appeal 'confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal [,]' the district court does not lose jurisdiction when the litigant takes an appeal from an unappealable order." United States v. Jones, 367 F. App'x 482, 484 (4th Cir. 2010) (quoting Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982)); accord 16A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3949.1 (4th ed.) ("The weight of authority holds that an appeal from a clearly non-appealable order fails to oust district court authority; older cases holding to the contrary have been rejected.") (footnotes omitted). Here, Sanders appealed a non-final order for which no right to appeal has been triggered. Moreover, Sanders did not obtain a certificate of appealability from this court to pursue an appeal from an interlocutory or collateral order. See, e.g., Poux v. FCI Bennettsville SC, 418 F. App'x 157 (4th Cir. 2011) (dismissing appeal of order staying discovery for lack of jurisdiction because the order was neither a final order nor an appealable interlocutory or collateral order). Accordingly, the court retains jurisdiction over this matter.

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similarly allege that he was discharged as a result of disability discrimination and retaliation. Sanders alleges that he began his employment with the defendant at a location in Aiken, South Carolina in April 2014 and transferred to a location in Rock Hill, South Carolina in October 2014. Sanders alleges that he was "constructively discharged" by the defendant in June 2015.[3] Sanders alleges that Rayvon Irby, the Human Resources Manager, indicated that Sanders was terminated for missing five consecutive shifts from May 26, 2015 through June 2, 2015. Sanders appears to allege that this action was discriminatory because it was taken despite Sanders's notifying Irby and management that he "no longer felt comfortable at work due to the discrimination [he] was experiencing and was awaiting a meeting with upper management to resolve the issues [he] was having with his co-workers." (ECF No. 16 at 6.)

The following additional facts are taken from the undisputed record. It appears that during his approximately fourteen months of employment with the defendant, Sanders submitted over 150 requests for transfers or other positions. Sanders also submitted internal complaints about other employees, which included allegations based on his race, his alleged disabilities, or his religion. The defendant investigated these complaints and found them to be unsupported.

The evidence reveals that the incident leading up to Sanders's separation from employment occurred on May 26, 2015. Mike Calzaretta, who was Sanders's store manager, attested to the following:

> On May 26, 2015, Mr. Sanders came to me to complain about an incident that he considered harassment. What he told me was another associate was driving a forklift in an aisle in the store, asked him to move out of the way, and he considered that request to be harassing to him as he was trying to work in the aisle. I listened to Mr.

[3] Although Sanders lists the year of his discharge as 2012, this appears to be a typographical error.

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> Sanders and after he finished his version of what occurred, I mentioned to him that he needed to work in a more cooperative way with his co-workers. Mr. Sanders took offense with my statement asking him to understand the way that all associates needed to work together in the workplace. He began talking in very loud and confrontational voice after I mentioned his working with others. Due to the tone of his voice, the loudness with which he was speaking such that we could be heard by other associates and customers in the store, I told Mr. Sanders to leave for the day, come back on his next scheduled shift and we would continue our discussion. My intent was to allow Mr. Sanders time to cool off and thus allow us to have a more civil discussion about the events of May 26. My instructions were very clear to him that I expected to see him on his next scheduled work day. At no time did I tell him that I would call him when he was [to] return[] to work.

(Calzaretta Aff. ¶ 11, ECF No. 139-7 at 3-4.) It is undisputed that Sanders did not return to work and Calzaretta attested that "[n]o member of the store management received a call from [Sanders] as to the reason for his not coming to work." (Id. ¶ 12, ECF No. 139-7 at 4.) After confirming the above situation with Calzaretta, Irby attested that he

> sent Mr. Sanders a letter on June 1, 2017 reminding him that he was scheduled to work on 5/27/15-5/29/15 and on 6/1/15. The June 1 letter clearly informed Mr. Sanders that he had failed to report to work as scheduled and that he did not notify the store management that he would not be reporting. He was also specifically informed to contact me so I could evaluate the circumstances of his absences. He was given a deadline to contact me and told the consequences of his failure to make that contact.

(Irby Aff. ¶ 14, ECF No. 139-5 at 3.) Irby further attested that Sanders did not contact him by the June 5th deadline. According to Irby, on June 12, 2015, after waiting an additional seven days without receiving a response from Sanders and with Sanders continuing to fail to report to work, Irby sent Sanders another letter notifying him that "his failure to follow through as requested would be treated as voluntary resignation." (Id. ¶ 16.) The defendant notes that "[t]here is some information that [Sanders] did contact an employee relations specialist"; however, the defendant contends that there is no evidence indicating that Sanders was approved to not return to work and there is no

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evidence that Sanders complied with Irby's instructions. (Def.'s Mem. Supp. Summ. J. at 3 n.2, ECF No. 139-1 at 3.)

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate only if the moving party "shows that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party may support or refute that a material fact is not disputed by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* [dispute] of *material fact*." Ballinger v. N.C. Agric. Extension Serv., 815 F.2d 1001, 1005 (4th Cir. 1987) (internal quotation marks and citation omitted). A fact is "material" if proof of its existence or non-existence would affect the disposition of the case under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (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.

In discrimination cases, a party is entitled to summary judgment if no reasonable jury could rule in the non-moving party's favor. Dennis v. Columbia Colleton Med. Ctr., Inc., 290 F.3d 639, 645 (4th Cir. 2002). The court cannot make credibility determinations or weigh the evidence, but the court should examine uncontradicted and unimpeached evidence offered by the moving party. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000). The court must determine

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whether a party's offered evidence is legally sufficient to support a finding of discrimination and look at the strength of a party's case on its own terms. See id. at 148 (stating that "[c]ertainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational fact-finder could conclude that the action was discriminatory"). Further, while the federal court is charged with liberally construing a complaint filed by a *pro se* litigant to allow the development of a potentially meritorious case, see, e.g., Cruz v. Beto, 405 U.S. 319 (1972), the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, nor can the court assume the existence of a genuine issue of material fact where none exists. Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990).

B. Analysis

1. Burden Shifting Framework in Employment Discrimination Claims

A plaintiff asserting a claim of unlawful employment discrimination may proceed through two avenues of proof. First, he may attempt directly to prove discrimination with direct or circumstantial evidence. Alternatively, when direct proof is lacking, a plaintiff may proceed under the McDonnell Douglas burden-shifting framework for claims of race, gender, or disability discrimination. Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005); see also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 58 (4th Cir. 1995) (holding that the McDonnell Douglas framework applies to claims brought under the ADA). Pursuant to this framework, once the plaintiff establishes a *prima facie* case of discrimination, the burden shifts to the defendant to produce evidence of a legitimate, nondiscriminatory reason for the adverse action. Merritt v. Old Dominion Freight, 601

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F.3d 289, 294 (4th Cir. 2010) (Title VII). The defendant's burden "is one of production, not persuasion." Reeves, 530 U.S. at 142. Once a defendant meets this burden by producing affidavits or testimony demonstrating a legitimate, nondiscriminatory reason, "the McDonnell Douglas framework—with its presumptions and burdens—disappear[s], and the sole remaining issue [is] discrimination *vel non*." Id. (internal quotation marks & citations omitted).

In other words, if the defendant meets its burden to demonstrate a legitimate, nondiscriminatory reason, the plaintiff must demonstrate by a preponderance of the evidence that the proffered reason was "not its true reason[], but [was] a pretext for discrimination." Merritt, 601 F.3d at 294 (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)). Accordingly, the plaintiff's burden of demonstrating pretext "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." Merritt, 601 F.3d at 294 (quoting Burdine, 450 U.S. at 256) (alterations in original). To meet this "merged" burden, the employee may prove by a preponderance of the evidence that the decision maker's affidavit is untrue or that the defendant's proffered explanation is unworthy of credence. Burdine, 450 U.S. at 256.

"[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 (emphasis added). However, "if the record conclusively reveal[s] some other, nondiscriminatory reason for the employer's decision, or if the plaintiff create[s] only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred," summary judgment is appropriate. Id. Accordingly, the court must evaluate "the strength of the

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plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." Id. at 148-49. "Notwithstanding the intricacies of proof schemes, the core of every [discrimination] case remains the same, necessitating resolution of the ultimate question of . . . whether the plaintiff was the victim of intentional discrimination." Merritt, 601 F.3d at 294-95.

2. Sanders's Claims

Because Sanders has not put forth any direct or circumstantial evidence to directly prove his claims of race or disability discrimination, the court will apply the McDonnell Douglas framework to his claims. See Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 284-85 (4th Cir. 2004) (*en banc*), abrogated on other grounds by Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013) (requiring plaintiff's direct proof of discrimination to include "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision") (quoting Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995)).

a. Discriminatory Discharge

As noted above, Sanders has unequivocally stated that he is only asserting a "discriminatory/retaliatory constructive discharge" claim under both Title VII and the ADA. Generally, to show a *prima facie* case of discriminatory discharge, a plaintiff must establish: "(1) []he is a member of a protected class; (2) []he suffered adverse employment action; (3) []he was performing her job duties at a level that met [his] employer's legitimate expectations at the time of the adverse employment action; and (4) the position remained open or was filled by similarly qualified applicants outside the protected class." Miles v. Dell, Inc., 429 F.3d 480, 485 (4th Cir.

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2005) (quoting Hill, 354 F.3d at 285). To establish a *prima facie* case of discriminatory termination based upon a disability, a plaintiff must show: (1) that he was a qualified individual with a disability; (2) that he was discharged; (3) that he was fulfilling his employer's legitimate expectations at the time of discharge; and (4) that the circumstances of his discharge raise a reasonable inference of unlawful discrimination. See 42 U.S.C. § 12112(a); see also Reynolds v. Am. Nat. Red Cross, 701 F.3d 143, 150 (4th Cir. 2012) (citing Rohan v. Networks Presentations LLC, 375 F.3d 266, 273 n.9 (4th Cir. 2004)); Haulbrook v. Michelin N. Am., Inc., 252 F.3d 696 (4th Cir. 2001).

Sanders has failed to forecast evidence establishing a *prima facie* case of gender, race, or disability discrimination. As argued by the defendant, Sanders has identified no evidence that would demonstrate that the circumstances of his separation from employment with the defendant raise a reasonable inference of discrimination based on his race, gender, or disability. Sanders's summary allegations that the defendant discriminated against him is insufficient standing alone. See, e.g., Coleman v. Md. Court of Appeals, 626 F.3d 187, 190-91 (4th Cir. 2010) (finding conclusory, unsupported allegations of a termination based on race without asserting facts establishing the plausibility of the allegations do not rise above speculation and are insufficient to state a claim of discrimination) (citing Ashcroft v. Iqbal, 556 U.S. 662 (2009)); Goldberg v. B. Green & Co., Inc., 836 F.2d 845, 848 (4th Cir. 1988) (recognizing that plaintiff's "own naked opinion, without more, is not enough to establish a prima facie case" of discrimination). Moreover, even if Sanders could establish a *prima facie* case, as summarized above, the defendant has offered a legitimate non-discriminatory reason for Sanders's discharge, and there is absolutely no evidence to suggest the proffered reasons were not its true reasons, but were pretext for discrimination. See Dockins v.

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Benchmark Commc'ns, 176 F.3d 745, 749 (4th Cir. 1999) ("We have long held that a plaintiff's own assertions of discrimination in and of themselves are insufficient to counter substantial evidence of legitimate nondiscriminatory reasons for a discharge.") (internal quotation marks and citation omitted). Accordingly, based on the evidence before the court, no reasonable jury could conclude that the defendant's decision to terminate Sanders was discriminatory, see Reeves, 530 U.S. at 148, and Sanders cannot ultimately prove that he was the victim of intentional discrimination.[4] See Merritt, 601 F.3d at 294-95.

b. Retaliation

To the extent that Sanders alleges that his discharge was retaliatory, the defendant argues that this claim similarly fails because Sanders has failed to forecast any evidence that he would not have been discharged "but-for" a retaliatory motive. The court agrees. In this case, Sanders has failed to demonstrate by a preponderance of the evidence that the proffered reasons for the defendant's actions were not its true reasons, but were a pretext for retaliation. See Merritt, 601 F.3d at 294; see also E.E.O.C. v. Navy Fed. Credit Union, 424 F.3d 397, 407 (4th Cir. 2005) (stating that once the defendant has met its burden of articulating legitimate, non-retaliatory reasons for adverse employment action, "the presumption of retaliation falls, and plaintiff bears the ultimate burden of

[4] Further, there is no evidence to suggest that Sanders was "constructively discharged." See Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 187 (4th Cir. 2004) (stating to demonstrate a constructive discharge, an employee must show that "an employer deliberately makes the working conditions intolerable in an effort to induce the employee to quit," and "dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign") (internal quotation marks and citations omitted); Williams v. Giant Food Inc., 370 F.3d 423, 434 (4th Cir. 2004) (concluding allegations that the plaintiff's "supervisors yelled at her, told her she was a poor manager and gave her poor evaluations, chastised her in front of customers, and once required her to work with an injured back" failed to establish an employee was constructively discharged).

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proving that the defendant's non-retaliatory reason for the adverse employment action was pretextual"). To do this, Sanders must show that retaliation was the real reason for, or the but-for cause of, the challenged adverse action. See Foster v. Univ. of Md.–E. Shore, 787 F.3d 243, 252 (4th Cir. 2015) (stating that Nassar's but-for causation standard "does not demand anything beyond what is already required by the McDonnell Douglas 'real reason' standard" and concluding that "the McDonnell Douglas framework has long demanded proof at the pretext stage that retaliation was a but-for cause of a challenged adverse employment action"). Sanders has failed to direct the court to any evidence from which a reasonable jury could find the but-for cause of the alleged adverse actions was retaliation in violation of Title VII or the ADA. See Reeves, 530 U.S. at 148; Merritt, 601 F.3d at 294-95.

C. Sanders's Motions for Default Judgment

Sanders has filed several motions for default judgment. (ECF Nos. 136, 143, & 145.) Contrary to Sanders's assertion, the defendant's motion for summary judgment was filed in accordance with an extension granted by the court. And, in any event, default is not appropriate under the Rule in this circumstance. See Fed. R. Civ. P. 55. With regard to Sanders's remaining arguments, the court finds that a default judgment is not warranted under the Rule.

RECOMMENDATION

For the foregoing reasons, the court recommends that the defendant's motion for summary judgment be granted with regard to Sanders's federal claims (ECF No. 139), and Sanders's motions for default judgment be denied (ECF Nos. 136, 143, & 145). Additionally, the court should decline

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to exercise supplemental jurisdiction over Sanders's state law claims. In light of this recommendation, Sanders's motions filed at ECF Nos. 135 and 148 should be terminated as moot.

Paige J. Gossett
UNITED STATES MAGISTRATE JUDGE

January 31, 2018
Columbia, South Carolina

The parties' attention is directed to the important notice on the next page.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n 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.'" Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2328

ERIC ALAN SANDERS,

Plaintiff - Appellant,

v.

LOWE'S HOME CENTERS, LLC,

Defendant - Appellee,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, of Charlotte, NC; JOHN HAYWARD; MIKE CALZAREETA; DOUG FORD; RAYVON IRBY,

Defendants.

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. J. Michelle Childs, District Judge. (0:15-cv-02313-JMC)

Submitted: April 4, 2019 Decided: April 8, 2019

Before NIEMEYER and HARRIS, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Eric Alan Sanders, Appellant Pro Se. Celeste T. Jones, William Grayson Lambert, Richard James Morgan, BURR & FORMAN, LLP, Columbia, South Carolina, for

PER CURIAM:

Eric Alan Sanders appeals the district court's order denying his postjudgment motion to amend his complaint. We have reviewed the record and find no reversible error. Accordingly, we affirm substantially for the reasons stated by the district court. *Sanders v. Lowe's Home Ctrs., LLC*, No. 0:15-cv-02313-JMC (D.S.C. Oct. 26, 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

FILED: April 8, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2328
(0:15-cv-02313-JMC)

ERIC ALAN SANDERS

Plaintiff - Appellant

v.

LOWE'S HOME CENTERS, LLC

Defendant - Appellee

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, of Charlotte, NC; JOHN HAYWARD; MIKE CALZAREETA; DOUG FORD; RAYVON IRBY

Defendants

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in

U.S. COURT OF APPEAL FOR THE FOURTH CIRCUIT BILL OF COSTS FORM

(Civil Cases)

Directions: Under FRAP 39(a), the costs of appeal in a civil action are generally taxed against appellant if a judgment is affirmed or the appeal is dismissed. Costs are generally taxed against appellee if a judgment is reversed. If a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed as the court orders. A party who wants costs taxed must, within 14 days after entry of judgment, file an itemized and verified bill of costs, as follows:

- Itemize any fee paid for docketing the appeal. The fee for docketing a case in the court of appeals is $500 (effective 12/1/2013). The $5 fee for filing a notice of appeal is recoverable as a cost in the district court.
- Itemize the costs (not to exceed $.15 per page) for copying the necessary number of formal briefs and appendices. (Effective 10/1/2015, the court requires 1 copy when filed; 3 more copies when tentatively calendared; 0 copies for service unless brief/appendix is sealed.). The court bases the cost award on the page count of the electronic brief/appendix. Costs for briefs filed under an informal briefing order are not recoverable.
- Cite the statutory authority for an award of costs if costs are sought for or against the United States. See 28 U.S.C. § 2412 (limiting costs to civil actions); 28 U.S.C. § 1915(f)(1) (prohibiting award of costs against the United States in cases proceeding without prepayment of fees).

Any objections to the bill of costs must be filed within 14 days of service of the bill of costs. Costs are paid directly to the prevailing party or counsel, not to the clerk's office.

Case Number & Caption: _____

Prevailing Party Requesting Taxation of Costs: _____

Appellate Docketing Fee (prevailing appellants):			**Amount Requested: _____**			**Amount Allowed: _____**	
Document	**No. of Pages**		**No. of Copies**		**Page Cost (≤$.15)**	**Total Cost**	
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TOTAL BILL OF COSTS:						$0.00	$0.00

1. If copying was done commercially, I have attached itemized bills. If copying was done in-house, I certify that my standard billing amount is not less than $.15 per copy or, if less, I have reduced the amount charged to the lesser rate.
2. If costs are sought for or against the United States, I further certify that 28 U.S.C. § 2412 permits an award of costs.
3. I declare under penalty of perjury that these costs are true and correct and were necessarily incurred in this action.

Signature: _____ **Date:** _____

Certificate of Service

I certify that on this date I served this document as follows:

Signature: _____ **Date:** _____

accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

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