APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-50247

United States Court of Appeals
Fifth Circuit
FILED
March 26, 2019
Lyle W. Cayce
Clerk

QUIANNA S. CANADA, Individually,

Plaintiff - Appellant

v.

TEXAS MUTUAL INSURANCE COMPANY; STACY PARASTAR GONZALEZ, in her official capacity; MARSHA THIBODAUX, in her official capacity; KRISTEN KIRKPATRICK; EDWARD "ED" COATES; DEMETRIC "DE" LEVIAH; RYAN JOHNSON; LYNETTE CALDWELL,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-148

Before CLEMENT, GRAVES, and OLDHAM, Circuit Judges.

PER CURIAM:*

For over two years, pro se plaintiff Quianna S. Canada has fought Texas Mutual Insurance Company's (TMIC) refusal to hire her. During the litigation, she amended her complaint seven times, repeatedly engaged in duplicative—and sometimes frivolous—motions practice, impugned the integrity and sought

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

the disqualification of the district court judge, tried to disqualify defense counsel, filed a frivolous interlocutory appeal, and at one point attempted to voluntarily dismiss her claim because she believes "the legal proceedings in the United States is racist, supports racism, [and] staffs racist[s]." This decision will bring her odyssey to an end.

Although Canada claims that TMIC's decision was motivated by racial animus and although she asserts an ever-evolving series of claims—against anyone with even a tangential connection to the circumstances at issue—the district court was correct that none of the claims should reach a jury. For the reasons explained below, we affirm the district court's grant of summary judgment.

I.

A.

Canada is a black woman. For 28 days between June 28, 2016, and August 8, 2016, she was temporarily assigned to TMIC by Evins Personnel Consultants to fill a vacant policy-support-clerk position. During her temporary assignment, Canada was required to report to work every day from 8:00 a.m. to 5:00 p.m., using a badge to enter the building. The system recorded that on 13 of the 28 days, Canada swiped the badge after 8:00 a.m.

While temporarily employed, Canada applied for three permanent positions at TMIC. The application centrally at issue here was for the position of permanent policy support clerk—essentially, the same job she was provisionally staffing. Canada applied for the support clerk position on June 29, her second day of work, after speaking with Marsha Thibodaux, the policy support supervisor and Canada's immediate supervisor.

On July 21, Thibodaux told Canada that TMIC had hired Ryan Johnson, a white man, for the support clerk position. It is unclear from the record

whether Thibodaux specifically mentioned Johnson's race to Canada when she told her the position had been filled. Regardless, that same day, without informing anyone at TMIC, Canada filed a complaint with the City of Austin's Equal Employment and Fair Housing Office.

On August 8, Canada met Johnson when he reported for his first day of work. During her lunch break, Canada requested to speak to a human resources employee concerning her applications. Edward Coates, a human resources staff member, met with Canada and listened to her concerns that she had been improperly passed over for the jobs. When Canada requested to speak with the individuals who reviewed her job applications, Coates refused.

Some time before 3:44 p.m. on that same day, Thibodaux contacted Kristen Kirkpatrick, a human resources senior administrative assistant, to request that Canada's temporary assignment to TMIC be ended because the position had been filled. Kirkpatrick then spoke by phone with an Evins representative, and at 3:44 p.m., Kirkpatrick emailed Evins confirming her request to end Canada's temporary assignment at the close of business.

Shortly before 4:00 p.m., Canada received an email from the Equal Employment and Fair Housing Office asking Canada to contact them to discuss her July 21 complaint. At 3:59 p.m., Canada left the building to call a staff member at the Equal Employment and Fair Housing Office. She spoke with the representative for approximately 25 minutes before reentering the building at 4:24 p.m. After reentering, Canada told Thibodaux for the first time that Canada believed she was being discriminated against in the hiring process and that she had filed a complaint with the Equal Employment and Fair Housing Office. Canada then finished her shift. On August 25, Canada received an email from TMIC rejecting her for the document clerk position.

B.

On August 26, Canada filed a charge with the Equal Employment Opportunity Commission (EEOC), receiving her right to sue letter in December.[1] In January 2017, Canada filed a pro se petition and amended petition against TMIC and various TMIC employees in state court alleging racial discrimination in hiring practices and asserting claims under both federal civil rights statutes and state labor laws. TMIC removed the case to federal court, and it was assigned to District Judge Sam Sparks. Canada then filed a motion to remand to state court, followed by an amended motion to remand, both of which the district court denied. Canada also filed what she styled as third, fourth, fifth, sixth, and seventh amended complaints, each reasserting discrimination claims under federal and state law. She also moved to disqualify defense counsel.

In June 2017, Canada filed another motion to remand to state court and sought leave to file an eighth amended complaint to delete her federal claims. According to Canada, deleting her federal claims would leave only state-law claims over which the district court should decline to exercise supplemental jurisdiction. The district court denied the motion to remand and to file the eighth amended complaint on grounds that Canada was attempting to circumvent the court's jurisdiction and had already amended her complaint numerous times. In the same ruling, the court denied the motion to disqualify defense counsel and placed limits on Canada's discovery efforts considering the "volume" of interrogatories and requests for admission the defendants had already answered. The court did allow Canada to select 24 interrogatories to

[1] The record does not indicate—and the parties do not mention—what happened with Canada's complaint to Austin's Equal Employment and Fair Housing Office.

be answered from previously served discovery and to seek court action if the answers were wanting.

Four days later, Canada moved to disqualify Judge Sparks. She argued that he had a relationship with defense counsel's law firm, and had demonstrated bias against her by making condescending comments about her pro se status during a status conference and by ruling against her on numerous matters. The motion was referred to Senior District Judge David A. Ezra.

While the disqualification motion was pending, Canada filed a motion seeking reconsideration of the prior order denying remand and leave to amend her complaint. On July 31, 2017, Judge Ezra denied Canada's motion to disqualify Judge Sparks. On that same date, Judge Sparks denied Canada's motion to reconsider. Undeterred, Canada filed another motion to remand and for leave to amend and a motion for reconsideration of the prior denial, which the district court denied.

Canada immediately filed a petition for a writ of mandamus in this court challenging the district court's denial of her motion to file an eighth amended complaint, denial of her motion to remand, denial of her motions to disqualify Judge Sparks and opposing counsel, and, finally, the limits placed on her discovery. We denied the motion.

Because we refused to stay the district court proceedings while considering Canada's writ petition, those proceedings continued apace during the pendency of the appeal. Judge Sparks soon dismissed the remaining individual defendants for failure to state a claim. Three weeks later, Judge Sparks referred the case to a magistrate judge, who subsequently recommended that summary judgment be granted to TMIC, the sole remaining defendant. Canada objected to the magistrate's report and recommendation,

but the district court adopted it in full and issued judgment in favor of TMIC. This appeal shortly followed.

II.

Canada first challenges the district court's grant of summary judgment to TMIC on her Title VII claims—specifically, her disparate-impact claim, her disparate-treatment claim, and her retaliation claim. We review a district court's decision to grant summary judgment de novo. *Manuel v. Turner Indus. Grp., L.L.C.*, 905 F.3d 859, 863 (5th Cir. 2018).

A.

"Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')." *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009). One of TMIC's chief defenses to Canada's Title VII claims is that Canada cannot show she was qualified for the positions she sought because Canada could not have passed a criminal background check. Although her briefing is confusing in places, the court understands Canada to be arguing that TMIC's use of background checks to exclude job candidates with certain criminal histories violates Title VII by disproportionately impacting black applicants.

Of Canada's disparate-impact claim, the district court said only that she had failed to provide any authority indicating that an employer may not use a background check to screen candidates. But Canada's argument is not that employers may *never* use background checks to screen candidates; it is instead that an employer's use of a background check policy that *disproportionately affects* black applicants violates Title VII. The fundamental problem with Canada's argument, however, is that she has offered no evidence that the TMIC policy disproportionately affects black applicants.

"To establish a prima facie case of discrimination under a disparate-impact theory, a plaintiff must show: (1) an identifiable, facially neutral personnel policy or practice; (2) a disparate effect on members of a protected class; and (3) a causal connection between the two." *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 275 (5th Cir. 2008). Satisfying the second element typically requires establishing that the practice or policy had a statistically significant adverse impact on the protected class. *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 860 (5th Cir. 2002). "[T]he comparison must be made between the employer's work force and the pool of applicants." *Crawford v. U.S. Dep't of Homeland Sec.*, 245 F. App'x 369, 379 (5th Cir. 2007). The only evidence Canada relies on to establish a disparate impact is her belief that any kind of background check disproportionately affects black individuals. She infers that TMIC's policy must be having an adverse impact on black applicants due to her claim (without support) that less than 9% of TMIC employees are black.

Even if the court were to accept at face value Canada's premise that background checks, generally, have a disproportionate impact on the black population, generally, her claim would still fail. Reliance on a policy's disparate impact on the general population, rather than on the applicant pool, is misplaced. *Crawford*, 245 F. App'x at 379. Among other things, to establish a disparate impact, Canada needed to show that the specific type of background-check policy TMIC uses to screen candidates disproportionately impacts black applicants who are otherwise qualified. She needed to establish a racial disparity between the employer's work force and the pool of applicants, and then tie that disparity to the use of background checks. *See id.* at 379–80. Canada has done neither. Her disparate-impact claim fails.

B.

To establish a prima facie case of discrimination, the plaintiff must either present direct evidence of discrimination or, in the absence of direct evidence, rely on circumstantial evidence using the *McDonnell Douglas* burden-shifting analysis. Under *McDonnell Douglas*, the plaintiff carries the burden to prove that (1) she belongs to a protected class; (2) she applied for and was qualified for the position; (3) she was rejected despite being qualified; and (4) others similarly qualified but outside the protected class were treated more favorably. *McDonnell Douglas*, 411 U.S. at 802; *see also Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 332 (5th Cir. 2019). Next, the burden shifts to the employer to "articulate a legitimate nondiscriminatory reason for the adverse employment action." *Cannon v. Jacobs Field Servs. N. Am., Inc.*, 813 F.3d 586, 590 (5th Cir. 2016). Finally, the burden shifts back "to the plaintiff to produce evidence from which a jury could conclude that the employer's articulated reason is pretextual." *Id.*

The district court held that Canada could not prevail on her disparate treatment claim because she cannot show that she was qualified for a position at TMIC. The court ruled that both her chronic tardiness and her criminal history precluded Canada from obtaining the positions. Because we agree that Canada's lack of punctuality negated her eligibility for the positions, we do not address whether TMIC's after-acquired evidence that Canada could not pass a background check insulates its decision not to hire her.

1.

Canada first argues that the district court erred by analyzing her claim only under the *McDonnell Douglas* framework because she also introduced "direct evidence" of discrimination. "Direct evidence is evidence that, if believed, proves the fact of discriminatory animus without inference or

presumption." *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002). In her deposition and in a sworn declaration filed in response to TMIC's summary judgment motion, Canada identified several statements by TMIC employees that she believes qualify as direct evidence. But neither the statements she relies on nor the direct-evidence theory itself are mentioned in any of Canada's complaints, including her lengthy seventh amended complaint. In fact, the complaint specifically frames her disparate-treatment claim under the *McDonnell Douglas* framework. Similarly, in her response to the EEOC's request for information regarding the substance of her claim, Canada did not mention either the alleged statements or the direct-evidence theory; instead she explained her belief that she can satisfy the *McDonnell Douglas* standard.

We agree with TMIC that Canada has waived her right to argue under the direct-evidence framework. She did not identify any direct evidence or mention a direct-evidence theory in either her EEOC charge or her complaint. She did not mention direct evidence in her opposition to the defendant's summary-judgment motion. Her objections to the magistrate's report and recommendations mention direct evidence only in passing. Although we liberally construe briefs of pro se litigants, arguments not raised before the district court are waived. *See Martco Ltd. P'ship v. Wellons, Inc.*, 588 F.3d 864, 877 (5th Cir. 2009) ("[A]rguments not raised before the district court are waived and cannot be raised."). The direct-evidence argument is waived.

2.

Turning now to the *McDonnell Douglas* framework, we also agree with the district court that Canada was unqualified for the positions she sought. TMIC introduced evidence that Canada was repeatedly tardy during her temporary assignment, in contravention of a written employment policy.

Although Canada now attempts to backtrack from her complaint's acknowledgement that she was late for work on multiple occasions, she has not created a genuine fact dispute regarding her general tardiness for work during her short employment at TMIC. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (explaining that a genuine dispute of material fact means that "evidence is such that a reasonable jury could return a verdict for the nonmoving party"). Canada's speculation about the accuracy of the badge system does not create a genuine factual issue. *See Likens v. Hartford Life & Acc. Ins. Co.*, 688 F.3d 197, 202 (5th Cir. 2012) ("[A] non-movant . . . cannot defeat summary judgment with speculation, improbable inferences, or unsubstantiated assertions." (citations omitted)). Because she cannot show that she was otherwise qualified for the positions she applied for, Canada could not make the required prima facie showing under *McDonnell Douglas*. Summary judgment on her disparate-treatment claim was therefore appropriate.

C.

Canada's retaliation claim likewise fails. "Making a prima facie case for a retaliation claim requires the plaintiff to demonstrate that: (1) she engaged in protected activity; (2) an adverse employment action occurred; and (3) a causal link exists between the protected activity and the adverse employment action." *Gorman v. Verizon Wireless Tex., L.L.C.*, 753 F.3d 165, 170 (5th Cir. 2014) (quotations omitted). If the plaintiff establishes her prima facie case, the *McDonnell Douglas* burden-shifting framework applies. *Id.*

Canada claims that adverse employment action was taken in response to her complaint to the Equal Employment and Fair Housing Office on July 21 and her complaint to Coates on August 8. To satisfy the causation element of her claim, she needed to prove that her complaints were the but-for cause of

her termination. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013). The crucial problem with her argument is that Kristen Kirkpatrick, the human resources senior administrative assistant who ended Canada's assignment to TMIC, was not aware of Canada's discrimination complaints until *after* the decision not to retain her had been made. Accordingly, the complaints could not have played a role in the decision. *See Chaney v. New Orleans Pub. Facility Mgmt., Inc.*, 179 F.3d 164, 168 (5th Cir. 1999) ("If an employer is unaware of an employee's protected conduct at the time of the adverse employment action, the employer plainly could not have retaliated against the employee based on that conduct.").[2]

Canada also relies on a "cat's paw" theory of causation to prove her retaliation claim. "Plaintiffs use a cat's paw theory of liability when they cannot show that the decisionmaker—the person who took the adverse employment action—harbored any retaliatory animus." *Zamora v. City Of Houston*, 798 F.3d 326, 331 (5th Cir. 2015). Canada's theory is that even if Kirkpatrick did not intentionally discriminate against her, Kirkpatrick was simply a "cat's paw" of Thibodaux and Coates. She suggests that Kirkpatrick would not have terminated her but for the malicious, untrue information that Thibodaux and Coates provided to Kirkpatrick.

To invoke the cat's paw analysis, Canada must establish "(1) that a co-worker exhibited discriminatory animus, and (2) that the same co-worker possessed leverage, or exerted influence, over the titular decisionmaker." *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 653 (5th Cir. 2004) (quotations omitted). But Thibodaux did not learn of Canada's discrimination complaints until after Kirkpatrick made her decision. And although Canada's meeting

[2] Canada fails to brief her rejection for the document clerk position, so any retaliation arguments with respect to that position are waived.

with Coates occurred several hours before Kirkpatrick's decision, Canada offers no evidence that Kirkpatrick and Coates communicated at all during the intervening period or that Coates had influence over Kirkpatrick. *See Stewart v. Int'l Ass'n of Machinists & Aerospace Workers*, 643 F. App'x 454, 457 (5th Cir. 2016) (per curiam) (affirming summary judgment on a retaliation claim where the employee failed to show the discriminating employer "had influence over" the decisionmakers). As such, the district court correctly granted summary judgment on her retaliation claim.

III.

Canada also challenges the district court's dismissal of Thibodaux, arguing that she has stated a viable claim against Thibodaux for tortious interference with a prospective business relationship. But the threshold for establishing a tortious interference action is exceedingly difficult. *See Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 713 (Tex. 2001). And where, as here, the claim is that an individual tortiously interfered with the prospective business relations of its own employer, the threshold is even more difficult. *Powell Indus., Inc. v. Allen*, 985 S.W.2d 455, 456–57 (Tex. 1998) (per curiam). In fact, unless the employer admits that the employee was acting against its interest, the burden is insurmountable. *Id.* at 457. Because TMIC has not conceded that Thibodaux was acting against its interest, Canada's claim fails.[3]

IV.

Finally, Canada contends that the district court reversibly erred by denying her Rule 56(d) motion for leave to conduct additional discovery, as well as by refusing to allow Canada to amend her complaint for an eighth time.

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[3] To the extent Canada intends to appeal her claim against Thibodaux under 42 U.S.C. § 1981, that claim fails for the same reasons Canada's Title VII claims fail. *See Wright v. Chevron Phillips Chem. Co., L.P.*, 734 F. App'x 931, 933 n.2 (5th Cir. 2018) (per curiam) ("The analysis under both Title VII and § 1981 is identical.").

We review a district court's denial of a Rule 56(d) motion for abuse of discretion. *Am. Family Life Assur. Co. of Columbus v. Biles*, 714 F.3d 887, 894 (5th Cir. 2013). Although such motions are "broadly favored" and should be "liberally granted," Canada was not entitled to additional discovery as a matter of right. She was instead required to "set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion." *Id.* (quotations omitted). Canada was able to identify no *plausible* basis for believing that additional facts might change the outcome of the motion. She also failed to identify how any additional discovery could be resolved in a timely manner. Accordingly, given the volume of discovery that had already occurred, the district court did not abuse its discretion in denying her motion.

Regarding the district court's refusal to permit an eighth amended complaint, the district court concluded that Canada only sought leave to amend to eliminate her federal claims and circumvent federal jurisdiction. We have recognized once already in this litigation that the district court's decision was correct, *see In re: Quianna Canada*, No. 17 -50677, at 2–3 (5th Cir. Dec. 29, 2017), and we now do so for a second time.

* * *

Discrimination in employment is an invidious practice. We encourage those who believe themselves harmed by such discrimination to vindicate their rights. Given the nature of her claim, Canada may be entitled to legitimate skepticism toward the defendants. But that skepticism does not justify her extraordinary claims of bias against defense counsel, the district judge specifically, and the federal judicial system in general. The court's

disagreement with Canada does not automatically impute prejudice. In our legal system, Canada is entitled only to a fair shake. She has received one.

AFFIRMED.

APPENDIX B

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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NEW ORLEANS, LA 70130

March 26, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 18-50247 Quianna Canada v. Texas Mutual Insurance Company, et al
USDC No. 1:17-CV-148

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R.us 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that each party bear its own costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk

By:_____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Ms. Quianna S. Canada
Mr. Paul W. Schlaud
Mr. Steven Seybold

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

QUIANNA S. CANADA
Plaintiff,

-vs- **Case No. A-17-CV-148-SS**

TEXAS MUTUAL INSURANCE COMPANY,
Defendant.

ORDER

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Plaintiff's Motion to Withdraw Lawsuit Voluntarily [#117], Defendant Texas Mutual Insurance Company (TMIC)'s Response [#118] thereto, and Plaintiff's Motion to Supplement [#119] in support; Plaintiff's Motion to Continue with Lawsuit [#122]; TMIC's Motion for Summary Judgment [#126], Plaintiff's Response [#129] in opposition, and TMIC's Reply [#138] in support; Plaintiff's Motion to Strike [#139]; Plaintiff's Opposed Motion for Sanctions [#147]; the United States Magistrate Judge's Report and Recommendation [#148]; and Plaintiff's Objections and Motion for Continuance [#154].[1] Having reviewed the documents, the governing law, and the file as a whole, the Court enters the following.

All matters in this case were referred to United States Magistrate Judge Mark Lane for report and recommendation pursuant to 28 U.S.C. § 636(b) and Rule 1(d) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the

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[1] Earlier, when several individual defendants were parties, Defendants filed a motion for sanctions asking the Court to dismiss this lawsuit. *See* Defs.' Mot. Sanctions [#99]. The Court took Defendants' motion for sanctions under advisement indicating it would "review the parties' conduct and make a final determination whether to order sanctions" at the end of the case. Order of Oct. 3, 2017 [#116].

Assignment of Duties to United States Magistrate Judges. Plaintiff is entitled to *de novo* review of the portions of Magistrate Judge Lane's report to which she filed specific objections. 28 U.S.C. § 636(b)(1). All other review is for plain error. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc). A party's failure to timely file written objection to the proposed findings, conclusions, and recommendation in a Report and Recommendation bars that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

In this case, Plaintiff filed objections to the Magistrate Judge's Report and Recommendation, In light of Plaintiff's objections, the Court reviews the entire case *de novo.*

Background

I. Factual Context

This case predominately concerns allegations of racial discrimination and retaliation. Plaintiff, a black woman, is a former temporary employee who was assigned to perform work at TMIC by Evins Personnel Consultants (Evins). Among other services, Evins assists organizations with temporary staffing. Plaintiff was assigned to work for TMIC as a policy support clerk for twenty-eight days, June 28, 2016 to August 8, 2016. Mot. Summ. J. [#126-2] Ex. A (Canada Dep.) at 119:4–23. The policy support clerk position required Plaintiff to report to work at 8:00 a.m. and finish at 5:00 p.m. *Id.* To enter TMIC's building, Plaintiff needed to swipe her electronic badge. *Id.* at 143:17–20. During the temporary assignment, Marsha Thibodaux, the policy support supervisor, supervised Plaintiff. *See* Seventh Am. Compl. [#42] ¶¶ 18–21, 33, 45. Kirsten Kirpatrick, a senior

administrative assistant in Human Resources (HR), was responsible for communicating with Evins regarding temporary staffing assignments. Resp. Mot. Summ. J. [#129] ¶9.

While providing temporary services to TMIC, Plaintiff applied for three permanent positions at TMIC but was not hired. Resp. Mot. Summ. J. [#129] ¶ 6. On July 21, 2016, Plaintiff learned one of the positions for which she applied had been filled. Seventh Am. Compl. [#42] ¶¶ 31–33. That same day, Plaintiff filed a complaint against TMIC with the City of Austin's Equal Employment and Fair Housing Office. *Id.* ¶ 35.

One of the permanent positions for which Plaintiff applied was the policy support clerk position, the position she had been temporarily filling. Resp. Mot. Summ. J. [#129] ¶ 6 n.4. The policy support clerk position was filled by Ryan Johnson, a white male. *Id.* ¶ 7. Plaintiff met Mr. Johnson when he reported for work on August 8, 2016. *Id.* ¶ 7.

During her lunch break on August 8th, Plaintiff asked to speak to a Human Resources (HR) employee. *Id.* ¶ 50. Edward Coates, a HR staff member, invited Plaintiff into the HR conference room and listened to Plaintiff's concerns. *Id.* Plaintiff informed Mr. Coates she had been rejected from three positions at TMIC and asked to speak to the individual who reviewed her three applications. *Id.* Mr. Coates expressed anger and irritation with Plaintiff and refused to set up a meeting between Plaintiff and the person who had reviewed Plaintiff's applications. *Id.* ¶ 51.

That same day, sometime before 3:44 p.m., Ms. Thibodaux contacted Ms. Kirpatrick and requested Plaintiff's assignment to TMIC through Evins be ended because the policy support clerk position had been filled. Mot. Summ. J. [#126-5] Ex. D (Kirpatrick Decl.) ¶ 7. Ms. Kirpatrick then called a point of contact at Evins to end Plaintiff's assignment. *Id.* ¶ 8. At 3:44 p.m., Ms. Kirpatrick

sent an email to Evins confirming TMIC filled the policy support clerk position and requesting Plaintiff's assignment with TMIC be ended at the close of business on August 8th.

Id. ¶ 8.

Shortly before 4:00 p.m., Plaintiff received an email from a person at the Equal Employment and Fair Housing Office asking Plaintiff to contact him to discuss her July 21st complaint. Seventh Am. Compl. [#42] ¶ 54. At 3:59 p.m., Plaintiff stepped out of TMIC's building to call the Equal Employment and Fair Housing Office staff member. *Id.* ¶ 55. Plaintiff returned inside the TMIC building at 4:24 p.m. Mot. Summ. J. [#126-3] Ex. B (Badge Reports) at 27; Kirpatrick Decl. ¶ 12. After she returned from the call, Plaintiff alleges she told Ms. Thibodaux she was concerned she was being discriminated against in the hiring process and she had made a complaint to the Equal Employment and Fair Housing Office. Seventh Am. Compl. [#42] ¶ 55.

II. Procedural History

Proceeding *pro se*, Plaintiff filed this suit on January 24, 2017, in Texas state court, and TMIC subsequently removed the case to this Court. Removal Notice [#1].While Plaintiff initially sued TMIC and a series of individual defendants—including Ms. Kirpartrick, Ms. Thibodaux, and Mr. Johnson—the Court previously dismissed Plaintiff's claims against the individual defendants for failure to state a claim. Order of Oct. 4, 2017 [#116]. The Court expressly noted TMIC was the only remaining defendant. *Id.*

In her seventh amended complaint, Plaintiff alleges TMIC is liable for race discrimination, in the form of failure to hire, and retaliation under Title VII of the Civil Rights Act of 1964 and the Texas Commission on Human Rights Act (TCHRA). Seventh Am. Compl. [#42] at 18–28. Plaintiff also brings claims against TMIC for negligent hiring and training as well as tortious interference with

a business relationship. *Id.* at 28–34. Plaintiff further contends she brings some of her claims under 42 U.S.C. § 1981 for civil conspiracy. *Id.* at 35.

When Plaintiff requested leave to amend her complaint for an eighth time, this Court denied Plaintiff's request, finding Plaintiff had already amended her complaint seven times during the four-month span of the lawsuit and Plaintiff merely sought to eliminate her federal claims and circumvent the Court's jurisdiction. Order of June 12, 2017 [#69].

In October 2017, Plaintiff filed a motion to withdraw this lawsuit and approximately a week later filed a motion to continue with this lawsuit against TMIC. Mot. Withdraw [#117]; Mot. Continue [#122]. This Court then referred the case to Magistrate Judge Lane. Order of Oct. 18, 2017 #125].

TMIC subsequently moved for summary judgment arguing it is entitled to judgment as a matter of law because Plaintiff fails to establish a genuine issue of material fact on any of her claims. *See* Mot. Summ. J. [#126]. Specifically, TMIC argues (1) Plaintiff cannot establish a *prima facie* failure-to-hire claim because she cannot show she was qualified for the positions to which she applied; (2) Plaintiff's retaliation claims fail because Plaintiff provides no evidence a causal link existed between a protected activity and an adverse employment action; and (3) Plaintiff's common law claims fail because TCHRA is the exclusive remedy for workplace discrimination under Texas law. *Id.*

Following Plaintiff's response to the motion for summary judgment, Magistrate Judge Lane set a hearing to review all the pending motions. Order of Nov. 6, 2017 [#134]. Plaintiff then moved for permission to appear at the hearing via telephone or video conference as she was interning out of the United States and unable to appear in person. Mot. Appear Telephonically [#135]. In response,

Magistrate Judge Lane ordered Plaintiff to provide documentation of her out-of-country internship and cancelled the hearing. Order of Nov. 7, 2017 [#136]. Plaintiff provided the Court with a copy of an email showing Plaintiff had scheduled a one-way flight from Austin, Texas to Toronto, Canada on September 6, 2017. Travel Itinerary Notice [#139-1] Ex. 1 (Confirmation Email). Plaintiff did not provide the Court with any documentation showing she was participating in an out-of-country internship. *See id.*

Plaintiff then filed a motion titled "Unopposed Motion for Reconsideration to Appear Telephonically or Via Video Conference." *See* Mot. Recons. [#140]. After this motion was docketed, Defendant's counsel emailed Magistrate Judge Lane's chambers stating Plaintiff had not contacted Defendant's counsel before filing the motion for reconsideration. Order of Dec. 6, 2017 [#142] at 1. Copied on the email, Plaintiff responded, "I never stated in my motion that I contacted the defendant to discuss the agreement or opposition to the motion." *Id.* Magistrate Judge Lane denied Plaintiff's motion for reconsideration, finding Plaintiff failed to meaningfully confer with Defendant's counsel and misrepresented her motion for reconsideration as unopposed. *Id.* at 2.[2]

Magistrate Judge Lane subsequently determined a hearing on the pending motions was unnecessary and found TMIC's motion for summary judgment meritorious. R. & R. [#148] at 2. In particular, Magistrate Judge Lane concluded Plaintiff was unable to establish a *prima facie* case TMIC engaged in racial discrimination by failing to hire her. *Id.* at 7–10. Magistrate Judge Lane also concluded Plaintiff's retaliation claims fail because Plaintiff did not provide any evidence her termination was causally connected to any protected activity. *Id.* at 10–11. Furthermore, Magistrate

[2] Under Local Rule CV-7(i), "[t]he court may refuse to hear or may deny a nondispositive motion unless the movant advises the court within the body of the motion that counsel for the parties have first conferred in a good-faith attempt to resolve the matter by agreement and, further, certifies the specific reason that no agreement could be made."

Judge Lane found that Plaintiff's common law negligent training claim was preempted by her TCHRA claim and that Plaintiff had agreed to dismiss her tortious interference claim. *Id.* at 12–13. In light of these conclusions, Magistrate Judge Lane recommended granting TMIC's motion for summary judgment and dismissing the remaining motions as moot.

Analysis

Plaintiff objects to Magistrate Judge Lane's report and recommendation on both procedural and substantive grounds. The Court briefly rejects Plaintiff's procedural objections before conducting a *de novo* review of TMIC's motion for summary judgment and then reviewing Plaintiff's other requests for relief.

I. Procedural Objections

Plaintiff asserts Magistrate Judge Lane procedurally erred in (1) concluding Plaintiff did not comply with his order to provide documentation of her out-of-country internship and (2) finding Plaintiff violated the Local Rules in failing to confer with Defendant. Obj. [#154] at 1–3.[3] However, review of the record in this case demonstrates Magistrate Judge Lane did not err in concluding Plaintiff failed to comply with his order and the Local Rules. First, Plaintiff failed to provide Magistrate Judge Lane with any documentation showing the nature, location, or duration of Plaintiff's internship. In response to Magistrate Judge Lane's order, Plaintiff only provided a copy of an email showing Plaintiff had booked a one-way flight from Austin, Texas to Toronto, Canada.

[3] Plaintiff also claims Magistrate Judge Lane procedurally erred in applying the incorrect standard in reviewing TMIC's motion for summary judgment. Objs. [#154] at 3–4. However, because reviewing whether Magistrate Judge Lane applied the correct standard requires the Court to review the evidence Magistrate Judge Lane relied on and his conclusions, the Court addresses this objection by conducting a *de novo* review of TMIC's motion for summary judgment below.

See Confirmation Email. Such a document was insufficient to prove Plaintiff was out of the country for an internship and unable to return to Austin, Texas for a hearing.

Second, Magistrate Judge Lane relied on Plaintiff's own statement in concluding Plaintiff did not comply with the Local Rules. Plaintiff represented to Magistrate Judge Lane's chambers she had not contacted TMIC's counsel to inquire whether TMIC opposed her motion to reconsideration. *See* Order of Dec. 6, 2017 [#142] at 1. Thus, Plaintiff violated Local Rule CV-7(I) by failing to confer with TMIC's counsel before filing her motion for reconsideration.

Moreover, even if Magistrate Judge Lane erred in concluding Plaintiff did not comply with his order or the Local Rules, any such error is non-prejudicial. At most, in light of his conclusions, Magistrate Judge Lane refused to hold a hearing on the pending motions. As "[t]he allowance of an oral hearing is within the sole discretion of the court," Magistrate Judge Lane validly exercised that discretion in declining to hold a hearing on the pending motions in this case. *See* Local Rule CV-7(h).

II. TMIC's Motion for Summary Judgment

A. Legal Standard

Summary judgment shall be rendered when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986); *Washburn v. Harvey*, 504 F.3d 505, 508 (5th Cir. 2007). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When ruling on a motion for summary judgment, the court is required to view all inferences

drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Washburn*, 504 F.3d at 508. Further, a court "may not make credibility determinations or weigh the evidence" in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 254–55.

Once the moving party makes an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *Id.* The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.*

"Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Disputed fact issues that are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion. *Id.* If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322–23.

A. Application

Plaintiff contends Magistrate Judge Lane (1) applied the incorrect standard in evaluating TMIC's motion for summary judgment; (2) incorrectly concluded Plaintiff was not a qualified applicant for the TMIC positions; (3) should not have considered Plaintiff's criminal history; (4) erroneously concluded Plaintiff failed to show causation for her retaliation claims; and (5) failed to address Plaintiff's claims for tortious inference and civil conspiracy against Ms. Kirkpatrick and Ms. Thibodaux as well as her claims for unjust enrichment against Mr. Johnson.

In light of these objections, the Court conducts a *de novo* review of TMIC's summary judgment motion by evaluating each of Plaintiff's claims. In particular, the Court examines whether a material fact issue precludes summary judgment on Plaintiff's claims for failure-to-hire, retaliation, tortious interference, unjust enrichment, and civil conspiracy. As Plaintiff "concedes she cannot bring an actionable tort of negligent hiring and tortious inference against TMIC," the Court does not evaluate Plaintiff's claims against TMIC for negligence or tortious interference and grants summary judgement for TMIC on these claims. *See* Objs. [#154] at 31.[4]

Because TCHRA was modeled after federal civil rights law and is intended to coordinate state law with federal law in employment discrimination cases, the Court analyzes Plaintiff's claims under Title VII and TCHRA together. *See Shackelford v. Deloitte & Touche, L.L.P.*, 190 F.3d 398, 404 n.2 (5th Cir. 1999) ("[T]he law governing claims under the TCHRA and Title VII is identical."); *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 308 (Tex. 2010) (noting "analogous federal statutes and the case interpreting them guide our reading of the TCHRA") (citation omitted).

[4] Alternatively, the Court finds Plaintiff's negligence and tortious inference claims against TMIC are preempted by Plaintiff claims under TCHRA. *See Waffle House, Inc. v. Williams,* 313 S.W.3d 796, 801 (Tex. 2010) (finding TCHRA preempts common law claims concerning the same conduct).

1. Failure to Hire

Title VII and TCHRA prohibit an employer from "fail[ing] or refus[ing] to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2012); TEX. LABOR CODE § 21.051. Where a plaintiff offers only circumstantial evidence of discrimination, the three-step *McDonnell Douglas* framework applies. *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 219 (5th Cir. 2001); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803–04 (1973). To survive summary judgment in an employment discrimination case, a plaintiff must first establish a prima facie case of discrimination. *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 881 (5th Cir. 2003). If the plaintiff does so, the employer must produce a legitimate, non-discriminatory reason for the challenged employment decision. *Haire v. Bd. of Supervisors of La. State Univ. Agric. & Mech. Coll.*, 719 F.3d 356, 362–63 (5th Cir. 2013) (citing *Manning*, 332 F.3d at 881). If the employer produces such an explanation, the plaintiff must then demonstrate the employer's reason is pretextual, by showing either that it is "unworthy of credence" or that it was inspired by a discriminatory motive. *Id.*

To establish a *prima facie* failure-to-hire case, Plaintiff must show (1) she is a member of a protected class; (2) she sought and was qualified for an open position; (3) she was rejected from the position; and (4) after such rejection, the position remained opened and the employer continued to seek applicants with Plaintiff's qualifications. *See McMullin v. Miss. Dep't of Pub. Safety*, 782 F.3d 251, 258 (5th Cir. 2015) (citing *Williams-Boldware v. Denton Cty.*, 741 F.3d 635, 643 (5th Cir. 2014)); *Joshi v. Fla. State Univ.*, 646 F.2d 981, 986 (5th Cir. 1981).

Plaintiff cannot establish a *prima facie* failure-to-hire case because she cannot show she was qualified for a position at TMIC. First, TMIC offers evidence showing Plaintiff was repeatedly tardy

during her temporary assignment. Although Plaintiff admits she was expected to report to work at 8:00 a.m. and finish at 5:00 p.m., TMIC's badge reports show Plaintiff swiped into TMIC's building after 8:00 a.m. on at least thirteen of the twenty-eight days Plaintiff worked at TMIC. Mot. Summ. J. [#126-3] Ex. B (Badge Reports). TMIC also offers evidence confirming it requires all of its employees to be punctual. *See id.* [#126-6] Ex. E (Employee Handbook) at 27–28 ("Attendance and punctuality are important factors in [an employee's] ability to perform [her] job . . . .").

Plaintiff argues the Badge Reports are fraudulent and merely evidence of TMIC's pretextual reason for refusing to hire her. Objs. [#154] at 20–27. But Plaintiff provides no evidence the Badge Reports were altered or falsified. *See id.* Additionally, Plaintiff does not argue she was punctual while working at TMIC. *See id.* In fact, Plaintiff's record of tardiness in reporting for her temporary assignment is supported by Plaintiff's own complaint wherein she repeatedly provides excuses for her late arrivals. *See* Seventh Am. Compl. [#42] ¶¶ 11–14, 16, 18, 29, 30 (providing reasons for why Plaintiff was late to work including getting lost, construction on the road, and her boyfriend's malaise).

Second, Plaintiff cannot show she was qualified for the TMIC positions because she cannot show she would have passed TMIC's background check. TMIC provides evidence every candidate who receives a conditional offer of employment must complete a background check before a final offer is extended. Mot. Summ. J. [#126-7] Ex. F (Hiring Process Guidelines). TMIC further provides evidence Plaintiff has been convicted of theft, forgery, criminal mischief, burglary, unauthorized use or possession of a driver's license, and credit card abuse. Def.'s Mot. Sanctions [#99-4] Ex. D (Pl.'s Travis County Criminal Rs.). As a result, the Court finds Plaintiff was objectively unqualified for a position at TMIC. *See Johnson v. Maestri Murrell Prop. Mgmt.*, No. 3:09-0638, 2014 WL

3512859, at *3 (M.D. La. July 10, 2014) (citing *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1108 (5th Cir. 1995) (finding defendant can prove that it would not have hired the individual using after-acquired evidence).

In arguing she was qualified, Plaintiff objects to TMIC's use of her criminal history. Plaintiff first argues TMIC's use of a background check is a facially neutral employment practice disparately impacting blacks. Objs. [#154] at 9–12. Plaintiff also argues evidence of Plaintiff's criminal convictions is prejudicial. Yet, Plaintiff cites no authority indicating an employer may not use a background check to screen candidates. Indeed, other courts have approved an employer's requirement that candidates pass a background check and found candidates unqualified where they failed to do so. *See Robair v. CHI St. Luke's Sugarland*, No. CV H-16-776, 2017 WL 2805190, at *11 (S.D. Tex. June 12, 2017), *report and recommendation adopted*, No. CV H-16-776, 2017 WL 2805000 (S.D. Tex. June 28, 2017), *appeal dismissed sub nom. Robair v. Chi St. Luke's Health Baylor Coll. of Med. Med. Ctr.*, No. 17-20422, 2017 WL 6759107 (5th Cir. Oct. 24, 2017); *Brown v. AT & T Servs. Inc.*, 236 F. Supp. 3d 1000, 1007 (S.D. Tex. 2017) (finding candidate's failure to complete a drug screen and background check was a legitimate, nondiscriminatory reason for recision of employment offer).

In sum, Plaintiff's failure-to-hire claims brought under Title VII and TCHRA fail because Plaintiff cannot show she was qualified for the TMIC positions. TMIC is therefore entitled to summary judgment on Plaintiff's failure-to-hire claims.

2. Retaliation

To establish a prima facie case for retaliation under Title VII and TCHRA, a plaintiff must demonstrate (1) she engaged in protected activity; (2) an adverse employment action occurred; and

(3) a causal link exists between the protected activity and the adverse employment action. *Gorman v. Verizon Wireless Tex., L.L.C.*, 753 F.3d 165, 170 (5th Cir. 2014). If the plaintiff establishes her *prima facie* case, the *McDonnell Douglas* burden-shifting framework applies. *Id.*

Plaintiff fails to establish a *prima facie* case for retaliation. Assuming Plaintiff engaged in a protected activity and the termination of Plaintiff's temporary position with TMIC was an adverse employment action, the Court finds Plaintiff does not provide evidence her termination was causally connected to her protected activity.

Plaintiff alleges she engaged in protected activity by complaining to Mr. Coates she was being discriminated against in TMIC's interview process and by filing a complaint with the Equal Employment and Fair Housing Office. Seventh Am. Compl. [#42] at 25–28. Thus, to establish causation for a *prima facie* claim of retaliation, Plaintiff must show her complaints were the but-for cause of her termination. *See Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013). This requires proof the unlawful retaliation would not have occurred absent the protected activity. *See id.*

But Plaintiff fails to provide any evidence showing her termination was causally connected to her complaints. The evidence in the record shows TMIC filled the policy support clerk position with Mr. Johnson. Resp. Mot. Summ. J. [#129] ¶ 7. When Mr. Johnson started working on August 8th, TMIC ended Plaintiff's temporary position. Kirpatrick Decl. ¶¶ 7–8. And only after Mr. Johnson began working at TMIC did Plaintiff notify TMIC staff of her complaints. *See* Resp. Mot. Summ. J. [#129] ¶¶ 50–51, 55.

Additionally, Plaintiff does not provide evidence Mr. Coates played any role in her termination or Mr. Coates communicated Plaintiff's complaint to Ms. Kirpatrick or another decision maker before the decision to end Plaintiff's temporary employment was made. By contrast, Ms.

Kirpatrick testified under oath she had no knowledge of Plaintiff's discrimination complaints. Reply Mot. Summ. J. [#137-3] Ex. C (Kirpatrick Dep.) at 42:13–16. At most, Plaintiff only offers a conclusory allegation Ms. Thibodaux conspired with Ms. Kirpatrick and Mr. Coates to get rid of her without any supporting evidence. Resp. Mot. Summ. J. [#129] ¶ 12. Such conclusory allegations are not sufficient to defeat a motion for summary judgment. *See Turner*, 476 F.3d at 343.

Moreover, Plaintiff asserts she told Ms. Thibodaux she filed a complaint with the Equal Employment and Fair Housing Office after Ms. Kirpatrick had already informed Evins that Plaintiff's temporary assignment was over. Ms. Kirpatrick confirmed Plaintiff's termination via email at 3:44 p.m. while Plaintiff alleges she told Ms. Thibodaux of her complaint after 4:24 p.m., following reentry into the building after the phone call with the Equal Employment and Fair Housing Office. Kirpatrick Decl. ¶¶ 7–8; Seventh Am. Compl. [#42]; Resp. Mot. Summ. J. [#129] ¶ 14. The timing of the events indicates Ms. Kirpatrick ended Plaintiff's assignment before she had any knowledge of Plaintiff's complaints. *See* Kirpatrick Decl. ¶¶ 7–8.

Because Plaintiff cannot establish her alleged protected activity caused her termination, the Court finds Plaintiff's federal and state claims for retaliation fail as a matter of law.

3. Tortious Inference, Civil Conspiracy, and Unjust Enrichment

Plaintiff claims her tortious inference and civil conspiracy claims against Ms. Kirpatrick and Ms. Thibodaux as well as her unjust enrichment claim against Mr. Johnson survive and Magistrate Judge Lane erred in failing to address these claims in his Report and Recommendation. However, the Court previously dismissed Plaintiff's claims against the individual defendants for failure to state a claim. Order of Oct. 4, 2017 [#116]. Therefore, Plaintiff's tortious inference, civil conspiracy, and unjust enrichment claims against individual defendants are no longer live.

C. Plaintiff's Other Requests for Relief

As part of her objections to Magistrate Judge Lane's Report and Recommendation, Plaintiff argues she should have been granted leave to amend her seventh amended complaint and the Court should allow additional discovery as authorized by Federal Rule of Civil Procedure 56(d)[5] before reviewing TMIC's motion for summary judgment. To the extent these objections constitute requests for relief, the Court rejects both requests.

This Court liberally granted Plaintiff leave to amend her by allowing Plaintiff to repeatedly amended her complaint until Plaintiff filed her seventh amended complaint,. However, the Court denied Plaintiff leave to file an eighth amended complaint because the Court found Plaintiff merely sought leave to file an eighth amended complaint to eliminate her federal claims and circumvent this Court's jurisdiction. Order of June 12, 2017 [#69]. Presently, Plaintiff offers no reason why she seeks to amend her complaint except to correct unspecified "defects in her complaint." Objs. [#154] at 32. Furthermore, Plaintiff fails to identify how the outcome of this case would be different if Plaintiff were allowed to further amend her complaint. Thus, to the extent Plaintiff requests last-minute leave to amend her complaint, the Court denies such request.

The Court also denies Plaintiff's request the Court grant additional discovery and defer considering TMIC's motion for summary judgment. Plaintiff relies on vague assertions TMIC withheld "its HR policy on retaliation and discrimination and why Mr. Johnson is no longer an employee at TMIC." *See* Objs. [#154] at 32–33. To merit additional discovery under Rule 56(d), a party must "set forth a plausible basis for believing that specified facts, susceptible of collection

[5] Plaintiff cites Federal Rule of Civil Procedure Rule 56(f), but the Court assumes Plaintiff is relying a prior version of the Federal Rules of Civil Procedure as the relief Plaintiff requests is now authorized under Rule 56(d).

within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion." *Am. Family Life Assur. Co. of Columbus v. Biles*, 714 F.3d 887, 894 (5th Cir. 2013) (citation omitted). Plaintiff does not meet this burden. She identifies no specific facts that probably exist and would influence the outcome of the instant summary judgment motion. *See* Objs. [#154] at 32–33. She also fails to indicate how any additional discovery could be conducted within a reasonable time frame. *See id.* The Court therefore declines to delay ruling on TMIC's motion for summary judgment to allow additional discovery.

Conclusion

Having found no error in Magistrate Judge Lane's findings and conclusions, the Court overrules and denies Plaintiff's objections and accepts Magistrate Judge Lane's Report and Recommendation. The Court therefore grants TMIC's motion for summary judgment and dismisses all other pending motions as moot.

Accordingly,

IT IS THEREFORE ORDERED that Plaintiff's Objections to the Report and Recommendation of the United States Magistrate Judge and Motion for Continuance [#154] are OVERRULED and DENIED;

IT IS FURTHER ORDERED that the Report and Recommendation of United States Magistrate Judge Mark Lane [#148] is ACCEPTED;

IT IS FURTHER ORDERED that Defendant Texas Mutual Insurance Company's Motion for Summary Judgment [#126] is GRANTED; and

IT IS FINALLY ORDERED that Defendants' Motion for Sanctions [#99], Plaintiff's Motion to Withdraw Lawsuit Voluntarily [#117], Plaintiff's Motion to Supplement [#119],

Plaintiff's Motion to Continue with Lawsuit [#122], Plaintiff's Motion to Strike [#139], and Plaintiff's Opposed Motion for Sanctions [#147] are DISMISSED as moot.

SIGNED this the 26th day of March 2018.

SAM SPARKS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

QUIANNA S. CANADA
Plaintiff,

-vs-

Case No. A-17-CV-148-SS

TEXAS MUTUAL INSURANCE COMPANY,
Defendant.

JUDGMENT

BE IT REMEMBERED on this day the Court entered its order granting Defendant Texas Mutual Insurance Company's motion for summary judgment, and thereafter enters the following:

IT IS ORDERED, ADJUDGED, and DECREED that the Plaintiff Quianna Canada TAKE NOTHING in this cause against the Defendant Texas Mutual Insurance Company, and that all costs of suit are taxed against the plaintiff, for which let execution issue.

SIGNED this the 26th day of March 2018.

Sam Sparks

SAM SPARKS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

QUIANNA S. CANADA, Plaintiff,	§	
v.	§	
TEXAS MUTUAL INSURANCE COMPANY,	§	CAUSE NO. 1:17-CV-148-SS-ML
Defendant.	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE SAM SPARKS
UNITED STATES DISTRICT JUDGE:

Before the court are Defendants' Motion for Sanctions (Dkt. #99)[1], Plaintiff's Motion to Withdraw Lawsuit Voluntarily (Dkt. #117), Plaintiff's Motion to Supplement (Dkt. #119), Plaintiff's Motion to Continue with Lawsuit (Dkt. #122), Defendant's Motion for Summary Judgment (Dkt. #126), Plaintiff's Motion to Strike (Dkt. #139), Plaintiff's Opposed Motion for Sanctions, and all related pleadings.[2] Plaintiff has also filed what is styled as Plaintiff's Notice of Voluntary Dismissal (Dkt. #143) in the latest of her many attempts to strike her federal claims from her Seventh Amended Complaint.

The District Court entered its Referral Order in this case on October 18, 2017. Consequently, the undersigned set Defendant's Motion for Summary Judgment and other then-pending motions for hearing on December 6, 2017. Plaintiff filed a motion to appear telephonically or via video conference at that hearing, representing that she was "on internship

[1] When the Motion for Sanctions was filed on August 23, 2017, TMIC and several individual defendants were parties to this suit. In the intervening months, all claims against the individual defendants were dismissed. *See* Dkt. #116. TMIC is the sole remaining defendant.

[2] The foregoing motions and related briefings were referred by United States District Judge Sam Sparks to the undersigned for a Report and Recommendation as to the merits pursuant to 28 U.S.C. § 636(b)(1)(B), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

out of the United States" and "unable to appear in person." Dkt. #135. Relying on Plaintiff's representation, the undersigned cancelled the December 6, 2017 hearing and ordered Plaintiff to file documents that corroborated her out-of-country internship, to be reviewed in support of her request to appear telephonically and to assist the undersigned in choosing a hearing date that suited the parties. Plaintiff failed to comply with the undersigned's order and filed instead a Motion for Reconsideration. Dkt. #140. Because she represented the motion as unopposed despite her failure to confer with Defendants before filing the motion, the undersigned denied that motion for Plaintiff's failure to follow the Local Rules and because the undersigned found the motion to be frivolous. Dkt. #142.

Upon further review of the parties' written pleadings, the undersigned determined that a hearing on the summary judgment motion and other pending motions is unnecessary. Accordingly, having reviewed the pleadings, the motions, the briefing, the evidence, and the relevant law, as well as the entire case file, the undersigned issues the following Report and Recommendation to the District Court.

I. BACKGROUND

On May 18, 2017, Canada filed her Seventh Amended Complaint,[3] alleging a claim for discrimination in TMIC's failure to hire her and a retaliation claim under Title VII of the Civil Rights Act of 1964, the Texas Commission on Human Rights Act ("TCHRA," also known as Chapter 21 of the Texas Labor Code), and the Texas Civil Practice and Remedies Code. Her Complaint also purports to bring claims based on 42 U.S.C §1981. She further alleges claims of negligent hiring and training, civil conspiracy, and tortious interference with a business relationship. These claims arise out of Canada's temporary employment relationship with

[3] For ease of readability, the undersigned simply cites to the Seventh Amended Complaint, Dkt. # 42, using the abbreviation "Compl."

Defendant Texas Mutual Insurance Company ("TMIC") and her failed applications for three permanent employment positions with TMIC. [4]

Canada is a former employee of Evins Personnel Consultants ("Evins"). Dkt. #99-3, Canada Dep. 119:4-6.[5] Evins assigned Canada to temporarily fill the role of a Policy Support Clerk at TMIC from June 28, 2016 to August 8, 2016, a total of 28 business days. *Id.* at 119:13-21. Of those 28 days, Canada arrived late to work on at least thirteen days, despite her acknowledgment that the required hours for the position were 8:00 a.m. to 5:00 p.m. *See* Dkt. #126-3, Def. Ex. B; Canada Dep. 119:8-12.

During her time at TMIC as a temporary employee, Canada applied for three permanent positions, including the permanent Policy Support Clerk position that she was temporarily serving. Dkt. #126, ¶ 6; Dkt. #129, ¶ 6; Canada Dep. 162:9-11. TMIC did not interview her for these positions. *See, e.g.,* Dkt. #129-2, ¶ 49, Pl. Ex. C. In response to an inquiry from Canada about the status of her application for the Policy Support Clerk vacancy, Canada alleges that TMIC informed her on July 21, 2016 that TMIC had hired someone else for the vacancy. Compl., ¶¶ 31-33.

The vacancy was filed by applicant Ryan Johnson. He was interviewed for the position, *see* Dkt. #132-5, Pl. Ex. M, and started with TMIC on August 8, 2016. Canada Dep. 197:25-198:12. Canada met Johnson that morning when he was introduced to her as the new Policy Support Clerk. Compl., ¶ 45. Because the Policy Support Clerk vacancy had been filled, the

[4] In her Summary Judgment briefing and Notice of Voluntary Dismissal, Canada seeks to dismiss her federal claims, as she has done numerous times throughout this suit, in an apparent attempt to divest this court of jurisdiction. The undersigned notes that the analysis of Canada's Title VII claims would be indistinguishable from analysis of her TCHRA claims and that the District Court has repeatedly declined to dismiss these claims. Accordingly, the undersigned analyzes these claims on their merits.

[5] Both Canada and TMIC offer various excerpts of Canada's Deposition in their summary judgment briefing. To avoid confusion, the undersigned simply cites to "Canada Dep." regardless of whether plaintiff or defendant cited to the excerpt. For context, the entirety of Canada's Deposition of June 12, 2017 is available under seal at Dkt. #99-3.

Policy Support Supervisor (Thibodaux) asked the Human Resources Senior Administrative Assistant (Kirkpatrick) to end Canada's temporary assignment. Def. Ex. D, ¶¶ 7-8. In response to that direction, at 3:44 p.m. on August 8, 2016 Kirkpatrick informed Evins by telephone and a follow-up email that TMIC had filled the vacant position and no longer needed a temporary employee. *Id.* At no time before Canada's temporary assignment was ended was Kirkpatrick aware of any discrimination complaint against TMIC or its employees by Canada. *See* Dkt. #137-3, Def. Ex. C; Pl. Ex. F at 42.

Canada alleges that she received a call from a City of Austin employee later that afternoon around 4:00 p.m. to discuss a discrimination complaint she had filed against TMIC with the City on July 21, 2016, the same day she alleges she was informed the vacancy had been filled. Compl., ¶¶ 54-55. She left her desk and went outside to take his call. She was away from her desk for approximately 25 minutes, from 3:59 p.m. to 4:24 p.m. Def. Ex. D, ¶ 12. Kirkpatrick noticed that Canada was outside the building by viewing the security camera monitor. After confirming that Canada's shift had not ended, she called Evins to ask them not to inform Canada that her temporary assigned had ended until after the end of her shift. *Id.* at ¶ 9. When Canada returned to her desk after the City of Austin phone call, she informed her supervisor Thibodaux of the discrimination she was alleging in her City of Austin complaint. Compl., ¶ 55. Canada was informed by Evins that her assignment with TMIC was "over." Compl., ¶ 58.

On August 26, 2016, Canada filed an EEOC charge. She subsequently filed her Original Petition in Travis County District Court on January 24, 2017. Dkt. #1-1. TMIC timely removed pursuant to 28 U.S.C. 1441(a) and (c) on the basis of the federal questions presented in this case. Dkt. #1, ¶ 4. The current complaint before the court is Canada's Seventh Amended Complaint, Dkt. #42.

II. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. Background

Canada's Seventh Amended Complaint, Dkt. #42, brings claims against TMIC alleging discrimination in its failure to hire her and retaliation under Title VII of the Civil Rights Act of 1964, the Texas Commission on Human Rights Act ("TCHRA," also known as Chapter 21 of the Texas Labor Code), and the Texas Civil Practice and Remedies Code. She further alleges claims of negligent hiring and training and tortious interference with a business relationship. Her complaint also purports to bring some of these claims under 42 U.S.C §1981.[6]

Summary judgment is appropriate when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986); *Washburn v. Harvey*, 504 F.3d 505, 508 (5th Cir. 2007). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A fact is material if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir. 2009) (quotations and footnote omitted). When reviewing a summary judgment motion, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (alteration in original) (quoting *Anderson*, 477 U.S. at 255). Further, a court may not make credibility determinations or weigh the evidence in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

[6] Canada's Seventh Amended Complaint also alleges a claim for civil conspiracy against some of the individual defendants but not TMIC. This claim has already been dismissed by the District Court. *See* Dkt. #116.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). Furthermore, the nonmovant is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.*

"When the moving party has met its Rule 56[ ] burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings." *Duffie v. United States*, 600 F.3d 362, 371 (5th Cir. 2010). The nonmovant must identify specific evidence in the record and articulate how that evidence supports that party's claim. *Id.* (internal quotation marks omitted). "This burden will not be satisfied by 'some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence.'" *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc)). "In deciding a summary judgment motion, the court draws all reasonable inferences in the light most favorable to the nonmoving party." *Duffie*, 600 F.3d at 371.

B. Analysis

Canada alleges failure-to-hire and retaliation claims under Title VII of the Civil Rights Act of 1964 and Texas Labor Code § 21. Throughout this suit, despite still including these claims in her *Seventh* Amended Complaint, she has sought to dismiss her federal claims. The District Court has declined to do so. Accordingly, the undersigned evaluates both Canada's state and federal claims at issue in TMIC's Motion for Summary Judgment. As to the failure to hire and retaliation claims, the substantive analysis is parallel under the federal and state causes of action. *See, e.g., Reed v. Neopost USA, Inc.*, 701 F.3d 434, 439 (5th Cir. 2012)(observing that the statutes are "effectively identical"); *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W. 3d 629, 633-634 (Tex. 2012)(The "analogous federal statutes and the cases interpreting them guide [the court's] reading of the TCHRA.").

1. Failure to Hire

Liability based on alleged disparate treatment depends on whether the protected trait "actually motivated the employer's decision." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141(2000) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). That is, the plaintiff's race must have "actually played a role in the employer's decisionmaking process and had a determinative influence on the outcome." *Id.*

A plaintiff may prove the requisite intentional discrimination using either direct or indirect evidence. *See Lawrence v. Univ. of Tex. Med. Branch*, 163 F.3d 309, 312 (5th Cir. 1999). Direct evidence of discrimination is evidence that proves the defendant acted with discriminatory intent, without the need for inference or presumption. *Brown v. East Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993). If direct evidence is unavailable, as is typically the case, the plaintiff may create an inference of discrimination by using the burden-shifting

framework enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 222 (5th Cir. 2000).

In order to create an inference of discrimination, the plaintiff must first establish a prima facie case of discrimination. *Reeves*, 530 U.S. at 142; *Shackleford v. Deloitte & Touche, LLP,* 190 F.3d 398, 404 (5th Cir. 1999). Such a prima facie case is established by evidence that: (i) the plaintiff is a member of a protected class; (ii) she was qualified for the position that she held; (iii) she was fired or suffered other adverse employment action; and (iv) she suffered from disparate treatment because of membership in the protected class. *See Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 512-13 (5th Cir. 2001).

The prima facie case, once established, raises a presumption of discrimination which the defendant must rebut by articulating legitimate, nondiscriminatory reasons for its actions. *McDonnell Douglas*, 411 U.S. at 802; *Shackleford*, 190 F.3d at 404. This burden on the employer is only one of production, not persuasion, involving no credibility assessments. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981). If the employer carries this burden of production, the presumption of discrimination created by the plaintiff's prima facie case "drops out of the picture" and the burden shifts back to the plaintiff to establish intentional discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511-12 (1993). The plaintiff must then offer sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another motivating factor is the plaintiff's protected characteristic (mixed-motive alternative). *Rachid v. Jack in the Box, Inc.*, 376 F3d 305 311-12 (5th Cir. 2004). Thus, to survive summary judgment, the plaintiff must raise a fact issue as to whether the employer's proffered reason was either mere

pretext for discrimination or only one motivating factor. *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 317 (5th Cir. 2004); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 425 (5th Cir. 2000).

Canada is unable to set forth a prima facie case that TMIC engaged in racial discrimination against her in their failure to hire her. The parties agree that Canada is an African American and that she was not hired for any of the positions to which she applied, but they disagree as to whether Canada was qualified for these positions. TMIC argues that because Canada had a demonstrated record of tardiness in her temporary position and she concedes that timely arrival was a job requirement for her prospective positions, she was not a qualified applicant for TMIC positions. The undersigned agrees. Canada's self-serving, inconsistent deposition testimony about the reliability of TMIC's time records fails to give rise to a genuine issue of material fact. Accordingly, the undersigned recommends dismissing this claim.

The undersigned notes that a full review of the record in this case also reveals that Canada has multiple felony convictions for crimes of moral turpitude, *see, e.g.,* Dkt. #99-4; Dkt. #99-5. Although TMIC does not cite to any specific piece of this evidence in its summary judgment briefing, TMIC argues that summary judgment in favor of TMIC on the failure-to-hire claim is also appropriate on the basis of these convictions, because the record is clear that Canada would have been terminated or not hired based on this after-acquired evidence. Dkt. #126, ¶¶ 25-26. TMIC has set forth evidence of TMIC policy and practice of revocation of conditional offers where the applicant cannot pass a background check. *See, e.g.,* Dkt. #126-6, Def. Ex. E; Dkt. #126-7, Def. Ex. F; and Dkt. #126-8, Def. Ex. G. Canada's failure-to-hire claim could also be dismissed on this basis. *See Shattuck v. Kinetic Concepts*, 49 F.3d 1106, 1108 (5th

Cir. 1995)(explaining that after-acquired evidence can provide a basis for immunity from liability on a *failure-to-hire* claim).

2. Retaliation

To establish a claim of retaliation under Title VII, a plaintiff must demonstrate with either direct or circumstantial evidence that: (1) she engaged in activity protected by Title VII; (2) her employer took an adverse employment action against her; and (3) a causal connection exists between the protected activity and the adverse employment action. *Fabela v. Socorro Indep. Sch. Dist.*, 329 F.3d 409, 414 (5th Cir. 2003), *overruled on other grounds by Smith v. Xerox Corp.*, 602 F.3d 320, 330 (5th Cir. 2010). If the employee can demonstrate this prima facie case of retaliation, the burden then shifts to the employer to state a legitimate non-retaliatory reason for the employment action, under the familiar *McDonnell Douglas* framework. Once the employer states such reasons, the burden falls to the employee to show that the explanation is a pretext for unlawful retaliation or that the explanation, while true, is only one of the reasons for its conduct and another motivating factor is the plaintiff's protected characteristic. *Burrell v. Dr. Pepper/Seven Up Bottling Grp., Inc.*, 482 F.3d 408, 411-12. (5th Cir. 2007).

Canada appears to allege that the protected activity in which she engaged was her "complaint to human resources and her supervisor," i.e., a lunch-break discussion with Ed Coates (Human Resources) and a late-afternoon discussion with Thibodaux after returning to her desk after her City of Austin phone call. She alleges, without further documentation, that Thibodaux, Coates, and Kirkpatrick, "in a collaborative effort," terminated her "based on discriminatory animus" and that her termination was causally connected to these two conversations.

Canada fails to establish a prima facie case for retaliation because she has not set forth any evidence that her termination was causally connected to these two discussions. Without citation to any piece of supporting evidence, her conclusory statement that "[o]n August 8, 2016, sometime before 3:44 p.m." Coates and Kirkpatrick "conspired to end" her position on "the same day she complained about feeling discriminated in the application/interview process" is insufficient to support a finding of causation.

The timing of the pieces of evidence set forth underscores that there is no causal connection. Thibodaux instructed Kirkpatrick to end Canada's temporary position and Kirkpatrick had multiple communications with Evins about ending the position *before* Canada spoke to Thibodaux about her complaint. As to her conversation with Coates, while Canada alleges with particular detail the brusqueness with which Coates treated her during that conversation and specifically quotes the alleged dialogue between the two, she fails to allege any facts that support a conclusion that Coates himself took further steps to play a role in her termination. Nor does she cite any evidence that he spoke to either Thibodaux or Kirkpatrick in the interim such that Kirkpatrick's email of 3:44 p.m. to Evins was influenced by their lunchtime conversation, however heated and offensive it may have been.

Canada has not pointed to any genuine issue of material fact about these events that supports the conclusion that either of these conversations was causally related to her termination. Accordingly, the undersigned recommends dismissing with prejudice Canada's federal and state claims for retaliation.

3. Negligent Training

Canada describes in her Seventh Amended Complaint a claim for negligent training under 42 U.S.C. § 1981 and Tex. Civ. Prac. & Rem. Code § 41.003.[7] Compl. at 32. TMIC argues neither statute supports such a cause of action, and that any claim Canada might otherwise bring under the common law is preempted by her TCHRA claims. Dkt. # 126, ¶¶ 34-35. In Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, Canada fails to respond to TMIC's arguments or point to any specific evidence that responds to these arguments. Dkt. #129. Her only statements about this claim in her response are that she maintains this claim under state law, *id.* at n.9, and that Kirkpatrick's deposition testimony about protected activity supports a claim for negligent hiring against a defendant no longer present in this case, *id.* at ¶ 69. Thus, she has disclaimed any negligent training claim under federal law.

Further, where the conduct forming the basis of a statutory TCHRA claim against an employer is also the basis of the common law negligence claims against the same employer, the common law claims are preempted. *See Patton v. Adesa Tex., Inc.,* 985 F. Supp. 2d 818, 821-22 (N.D. Tex. 2013)(declining to extend the Texas Supreme Court's preemption holding in *Waffle House, Inc. v. Williams*, 313 S.W. 3d. 796 (Tex. 2010), to common law claims against co-workers with the same basis as a plaintiff's TCHRA claims against an employer). As TMIC argues, the facts underlying this common law claim are predicated on the same conduct that underpins her statutory claims. Accordingly, this claim against TMIC is preempted and should be dismissed with prejudice.

[7] Tex. Civ. Prac. & Rem. Code § 41.003 describes when exemplary damages may be awarded but does not create a cause of action.

4. Tortious Interference with Contract

In Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, Canada "stipulates she cannot bring a tortious interference claim against [TMIC]." Dkt. #129, ¶ 68. Accordingly, this claim should be dismissed with prejudice.

III. OTHER PENDING MOTIONS

Plaintiff also has the following motions pending before the court: Plaintiff's Motion to Withdraw Lawsuit Voluntarily (Dkt. #117), Plaintiff's Motion to Supplement (Dkt. #119), Plaintiff's Motion to Continue with Lawsuit (Dkt. #122), Plaintiff's Motion to Strike (Dkt. #139), and Plaintiff's Opposed Motion for Sanctions (Dkt. #147).

In Dkt. #117, Canada states in part that she "voluntarily withdraws this lawsuit as the legal proceedings in the United States is racist, supports racism, staffs racist" and represents that she no longer lives in the United States and will not return during the Trump Administration, in contrast to her representation to the court in Dkt. #135 and Dkt. #137 that she intends to return from an out-of-country internship in March 2018. In Dkt. #119, she demands that Ogletree Deakins, counsel for TMIC, provide her with video from her own deposition, and threatens that she will not dismiss her lawsuit if TMIC fails to comply with her ultimatum. Indeed, in Dkt #122, she states that TMIC failed to respond to her demands and she "continues with her lawsuit." In Dkt. #139, among requests for relief that are no longer pending, she moves the court to "grant her motion to strike her own motion to withdraw her lawsuit." In light of the recommendation to grant summary judgment on behalf of TMIC, the undersigned recommends dismissing each of these motions as moot.

In Dkt. #147, Canada "submits that the very temple of justice has been defiled in this case" and moves for sanctions against TMIC for its "disrupting the litigation" and "hampering

the enforcement of a court order." The specific sanction she requests is "for this court to lift the order prohibiting the Marshal's office from issuing services of process and subpoenas on the defendants as the defendants have abused the court's process and taken advantage of Plaintiff's indigence." In light of the recommendation to grant summary judgment on behalf of TMIC, the undersigned recommends dismissing this motion as moot.

Also pending before the court is Defendants' Motion for Sanctions (Dkt. #99), which requests that the court dismiss with prejudice all Canada's claims against TMIC but contains no other pending requests for relief. This Motion was granted in part by the District Court's Order at Dkt. #116, and taken under consideration by the District Court until the conclusion of this case. In light of the recommendation to grant summary judgment on the merits on behalf of TMIC, the undersigned recommends dismissing this motion as moot.

IV. RECOMMENDATIONS

For the foregoing reasons, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment (Dkt. #126) be **GRANTED** and that all Canada's remaining claims be **DISMISSED WITH PREJUDICE**.

Consequently, the undersigned **RECOMMENDS** Defendants' Motion for Sanctions (Dkt. #99), which requests that the court dismiss with prejudice all Canada's claims against TMIC but no further relief, be **DISMISSED AS MOOT**.

Further, the undersigned **RECOMMENDS** Plaintiff's Motion to Withdraw Lawsuit Voluntarily (Dkt. #117), Plaintiff's Motion to Supplement (Dkt. #119), Plaintiff's Motion to Continue with Lawsuit (Dkt. #122), Plaintiff's Motion to Strike (Dkt. #139), and Plaintiff's Opposed Motion for Sanctions (Dkt. #147) all be **DISMISSED AS MOOT**.

V. OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battles v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150–53 (1985); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

SIGNED January 30, 2018.

MARK LANE
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50247

QUIANNA S. CANADA, Individually,

Plaintiff - Appellant

v.

TEXAS MUTUAL INSURANCE COMPANY; STACY PARASTAR GONZALEZ, in her official capacity; MARSHA THIBODAUX, in her official capacity; KRISTEN KIRKPATRICK; EDWARD "ED" COATES; DEMETRIC "DE" LEVIAH; RYAN JOHNSON; LYNETTE CALDWELL,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 03/26/2019 _____, 5 Cir., _____, _____ F.3d _____)

Before CLEMENT, GRAVES, and OLDHAM, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Edith B. Clement

EDITH BROWN CLEMENT
UNITED STATES CIRCUIT JUDGE

APPENDIX E

APPENDIX E

STATUTES

1. 42 U.S.C. § 1981 provides in relevant part:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens...

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes...the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

2. 42 U.S.C. § 2000e–2 provides in relevant part:

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual...because of such individual's race...or

(2) to limit...or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

otherwise adversely affect his status as an employee, because of such individual's race * * *

3. 42 U.S.C. § 2000e–3 provides in relevant part:

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

U.S. CONSTITUTION

4. Seventh Amendment

Right to jury trial

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *

5. Fourteenth Amendment

Privileges and Immunities, Due Process, Equal Protection

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty...without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTERNATIONAL, FOREIGN LEGISLATION & LAW

Right to work

6. Article 23 of The Universal Declaration on Human Rights (UDHR) provides in relevant part:

(1) Everyone has the right to work, to free choice of employment...

7. Article 6 of the Declaration on Social Progress and Development Proclaimed by General Assembly resolution 2542 (XXIV) of 11 December 1969

Social development requires the assurance to everyone of the right to work and the free choice of employment.

Social progress and development require the participation of all members of society in productive and socially useful labour and the establishment, in conformity with human rights and fundamental freedoms and with the principles of justice and the social function of property, of forms of ownership of land and of the means of production which preclude any kind of exploitation of man, ensure equal rights to property for all and create conditions leading to genuine equality among people.

Foreign law protecting workers right to earn a living

8. Article 27 of the Constitution of Japan provides in relevant part:

'...all people shall have the right to work and obligation to work'.

9. Article 1 of the European Social Charter states in relevant part:

(1) To accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment.

(2) To protect effectively the right of the worker to earn his living in an occupation freely entered upon.