APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KATHERINE JACOBS, Plaintiff(s), vs. JOHNSON STORAGE & MOVING CO. HOLDINGS, LLC, Defendant(s).	)	Case No. 4:18-cv-00024-SRC

MEMORANDUM AND ORDER

This matter comes before the Court on the [61] Motion for Summary Judgment of Defendant Johnson Storage & Moving Co. Holdings, LLC and [79] Johnson Storage's Consent Motion to Continue Trial. For the reasons set forth below, the Court grants the Motion for Summary Judgment, and denies the Motion to Continue Trial as moot.

I. FACTS AND BACKGROUND

This case arises from the events leading up to Plaintiff Katherine Jacobs's termination from Johnson Storage, where she worked from March 2017 to August 2017. Jacobs claims that Johnson Storage terminated her because she would not under-report her working hours to avoid accruing overtime, and in retaliation for complaining about Johnson Storage's overtime-pay practices. Johnson Storage maintains that while Jacobs recorded far more overtime hours than authorized, the company nonetheless paid her for all overtime she recorded and terminated Jacobs for poor performance. The summary judgment record establishes the following uncontroverted facts.

A.

A. Johnson Storage

Johnson Storage is a moving and storage company that handles residential, military, domestic, and international moving. Johnson Storage's International Through Government Bill of Lading ("ITGBL") department handles international military moves. Throughout her time working for Johnson Storage, Jacobs's job title was "ITGBL coordinator/analyst." In that role, Jacobs coordinated moves for military members. Johnson Storage hired Jacobs as part of the team to set up the ITGBL department.

Tina Heaney is the Director of Military Services at Johnson Storage. The ITGBL department that Heaney oversaw consisted of three employees: Jacobs, Heaney, and Diana Miller. Jacobs and Miller had the same job title and reported to Heaney.

B. Jacobs's Hiring

Jacobs previously worked in the military ITGBL department of another company. At Johnson Storage, Jacobs worked remotely from home. Johnson Storage offered Jacobs the position of ITGBL coordinator/analyst earning a base rate of $29 per hour. Jacobs accepted the offer on February 28, 2017 and began employment two weeks later.

C. Jacobs's Knowledge of Johnson Storage's Policies

On her first day on the job, Jacobs received a copy of the Johnson Storage Employee Handbook. Jacobs understood that the Employee Handbook set forth the policies that applied to her employment and that she was an at-will employee. She also understood that Johnson Storage classified her as a "non-exempt employee" and that Johnson Storage's policy was to pay her one and one-half times her regular rate for hours worked over 40 in a week. The "Overtime" Policy in the handbook expressly provides: "Non-exempt employees may work overtime only with prior

approval of their supervisor/manager. Employees working overtime without supervisor approval may face disciplinary action." Johnson Storage's "Time Reporting" Policy provides:

> Non-exempt employees must record time worked on a daily basis. Non-exempt employees must:
>
> i. clock in, using the company designated time keeping system, at the start of their shift and when they return to work from lunch.
>
> ii. clock out, using the company designated time keeping system, when they go to lunch and at the end of their shift.
>
> ...
>
> At the conclusion of each pay period (15th and the last day of the month), employees must check their timecards for accuracy. When employees forget to clock in/out for their shift or before/after their meal period, they must notify their supervisor/manager immediately. Their supervisor will then make the correction in the time keeping system. Supervisors must make corrections and approve the time sheets of their non-exempt employees within three business days after the close of pay period (the 15th and the last day of the month).

Doc. 75 at ¶ 39.

D. Payment for Recorded Hours

Jacobs recorded her own time by punching in and out through a time-tracking program on her computer. If Jacobs missed a punch, she would call or email Heaney and tell her what time should be entered for the missed punch. Jacobs received check stubs during her employment with Johnson Storage that advised her of her earnings, including the hours and the rate of pay. Jacobs admits that Johnson Storage paid her for all hours she recorded, and that whenever Jacobs recorded more than 40 hours in a week, she received overtime pay for those hours.

E. Johnson Storage's Overtime Policy for Peak Season

Under Johnson Storage's policy, no one is authorized to work overtime outside of peak season, which begins May 15th, about two months after Jacobs began, and ends September 30th.

During peak season, Johnson Storage authorized Jacobs and Miller to each work up to 10 hours of overtime per pay period.

Jacobs testified that Heaney told her overtime needed to be minimal and that Jacobs would be told when she could log overtime. Jacobs further testified that Heaney told her she needed "to stop logging in overtime hours." Other than her first week and a vacation week, Jacobs recorded overtime every week of her employment. During the 22 weeks Jacobs worked for Johnson Storage, she recorded 171.71 total hours of overtime, an average of 7.805 hours of overtime per week. Jacobs recorded more than ten overtime hours in ten of the workweeks, despite only being authorized to work ten hours of overtime per pay period during peak season. During the last three full workweeks before her termination, Jacobs recorded an average of 19.39 hours of overtime per workweek. In contrast, Jacobs's peer, Miller, worked some overtime but never exceeded the amount of overtime authorized.

F. Heaney's Communications to Jacobs about Overtime

Heaney had multiple conversations with Jacobs about the amount of overtime she recorded. The first occurred after Jacobs received her first or second paycheck. According to Jacobs, the check reflected a small amount of overtime, and Heaney said to her, "we will tell you when you can log in overtime hours." Jacobs testified that, at some point, Heaney told her not to log in overtime hours and to watch the overtime. When asked if anyone at Johnson Storage told her to work time and not report it, Jacobs testified she would ask Heaney for help and would communicate that she could not get the required work done in eight hours and "the only response was, you need to continue – or you need to stopping logging in the hours." Jacobs subjectively understood these conversations to mean she should work hours and not record them. To Heaney's knowledge, Johnson Storage paid Jacobs for all of the hours she worked.

On July 6, 2017, Heaney and Jacobs spoke about the hours Jacobs was working. According to Jacobs, during this call Heaney instructed Jacobs "not to log in [her] overtime hours." Jacobs testified that she understood this directive to mean she should keep doing the work, but not record the time. Jacobs followed up on her July 6, 2017 phone call with Heaney with an email sent the next day. In the email, Jacobs expressed her belief that she could not complete her job duties without incurring overtime: "If I cut the hours then I will surely start to see service failures because I won't be able to respond to the emails in time." Jacobs continued: "I guess I'm a little confused about cutting my hours but not having anyone to send the overflow work to. If I stop the hours, then I'm going to have a mess on my hands." Finally, Jacobs stated: "I am seriously not complaining about the volume because I understand it is the season but I don't know how to cut the hours and get all of this done. The only other thing I could do is clock out and continue to do the work but we have already had conversations about that." Doc. 75 at ¶ 143.

G. Heaney's July 11, 2017 Email to Human Resources

On July 11, 2017, Heaney sent an email to Johnson Storage's Human Resources Director, Marina Manandhar, regarding Jacobs. In the email, Heaney outlined issues she observed in her interaction with Jacobs, including that Jacobs did not respect her role as supervisor, was defiant and did not follow direction, did not appear teachable, and rarely answered her phone calls. Heaney stated: "At this point in time, there is not a failure in job performance in the sense that there have not been service failures." Heaney noted that Jacobs's workload was identical to Miller's and that Miller was able to accomplish the job with minimal overtime. Heaney also noted that less than a week after she communicated to Jacobs that she was not allowed to have more than ten overtime hours per pay period, Jacobs had already exceeded the limit. Heaney

stated: "On July 5th I brought to her attention that her overtime was way out of line and she is not allowed to have more than 10 hours per pay period. I directed her to evaluate her hours and work load every Thursday and send me a list of things she will not be able to complete within the time restriction and I will complete those tasks." Heaney expressed to Manandhar that she intended to write up Jacobs for exceeding the overtime limit but also noted that the situation was "unsustainable" and that she "had already started thinking about how to begin the process of hiring a replacement." Doc. 75-7.

H. Diana Miller's Complaints about Jacobs

Jacobs's co-worker and peer, Diana Miller, communicated to Heaney that she was frustrated that she was the go-to person for agents when Jacobs would fail to respond. Heaney told Miller that if she wanted her to intervene, she needed specifics; Miller then forwarded to Heaney multiple emails from agents/vendors demonstrating Jacobs's failure to respond.

I. M. Dyer's Complaint about Jacobs

In early August 2017, a manager for a key business partner of Johnson Storage sent an unsolicited email to Heaney concerning Jacobs. The business partner, M. Dyer & Sons, was Johnson Storage's agent in Hawaii. As agent, M. Dyer handled packing, loading, delivery, and storage for Johnson Storage as well as working with the ports in Hawaii. Because of the military installation there, Hawaii played a pivotal role in Johnson Storage's business. Jacobs acknowledges M. Dyer's importance to Johnson Storage.

In her email, the M. Dyer manager told Heaney that Jacobs had acted in a "curt, unprofessional manner." She described Jacobs's "yelling" at her, "barking" at her team, and "ranting and raving." She told Heaney: "We will continue to partner with [Jacobs] in a very professional manner and ask that she afford us the same."

J. Jacobs's Termination

On August 17, 2017, Heaney and Manandhar called Jacobs and informed her that Johnson Storage was terminating her employment. Without Heaney or Manandhar's knowledge, Jacobs recorded the telephone call, during which Heaney told Jacobs:

> So the first item that -- that I want to bring to your attention is that we had a conversation in early July about overtime and we talked about ten hours of overtime per pay period and that you were to evaluate your workload and your hours on Thursday and communicate with me what you weren't able to complete so that we could evaluate how to -- how to accomplish your job in the amount of hours that were allowed. And since then, the three pay periods since then, the first one directly after that you've had 17.13 overtime hours. The following pay period you had 20.4 overtime hours. And this last pay period you had 37.77 hours of overtime.

Doc. 75 at ¶ 109. Heaney continued:

> And then the next thing on my list is last week we had three complaints from M. Dyer about your interactions with their staff. The words that they used -- I'm quoting exact words -- that you were -- that you yelled at them, that you were ranting and raving, that you were belligerent and unprofessional. And so I need to point out that we're in a customer service business and that our partners, our agents, our members, are all our customers. And in this case, it seems as though you failed with -- with regard to M. Dyer. And then we've received several e-mails, Diana and I, requesting paperwork or information from more than one place stating that -- that they've had second and third requests to you and not been responded to. And so with all of -- with all of this, I've decided to terminate your employment as of today.

Id. The same day, Heaney documented the reasons for Jacobs's termination in a letter.

K. Jacobs's Calculation of Unpaid Overtime

Jacobs claims that she consistently worked more hours than she recorded. Jacobs does not know whether there is any week during her employment with Johnson Storage in which her recorded hours accurately reflect all the hours she worked; could not explain how she decided how many hours she was going to record in a week; and does not have any records showing whether the time she reported actually reflects all the hours she worked.

Jacobs, with her attorney, came up with an estimate of the hours she worked but did not record. Jacobs did not review any contemporaneous notes to come up with her estimate. Instead, Jacobs based her estimate on her recollection and "just knowing how much time [she] was putting in on an average." The only documents Jacobs reviewed in determining her estimate were her paychecks from Johnson Storage. Plaintiff claims that she worked a total of 129 unrecorded overtime hours.

L. Jacobs's Alleged Protected Activity

In addition to her conversations with Heaney, Jacobs spoke to three individuals at Johnson Storage about overtime before her termination: Don Hindman, John Hiles, and Clark Zabokrtsky. Jacobs had only one overtime-related conversation with each of these three individuals; Jacobs has no firsthand knowledge whether these conversations had anything to do with her termination.

Jacobs spoke with Heaney about overtime on at least four occasions between May and July 2017. Jacobs testified that Heaney told her not to log in overtime hours, and that Jacobs responded, "I'm working more than an eight hour day, how is that legal?"

Jacobs called Hindman in May or June 2017. Jacobs testified that her main reason for calling Hindman was to tell him that she needed more than eight hours a day to do her job and that Heaney had told her to reduce her overtime. Jacobs claims that she told Hindman about being "asked to under-report my hours" and "being asked to not log in the hours I was working."

Jacobs called Hiles the week after she spoke to Hindman and recounted the conversation: "We were talking about work and then I told him that I had a conversation with [Heaney] about overtime and not logging in overtime. That was pretty much when he said, Yeah, Don Hindman called me saying you had call[ed] him bitching about overtime."

Jacobs spoke with Zabokrtsky, the general manager of Johnson Storage's Kansas City branch, in July 2017. During this conversation, Jacobs told Zabokrtsky that she was working more than eight hours a day and was asked not to log in her hours.

M. Jacobs's Post-Termination Communications with Hindman

After her termination, Jacobs emailed Hindman, stating:

> [Heaney] said she was firing me because of the overtime hours. In the aforementioned email attachments, I asked for help to reduce the hours (without success). I also offered several suggestions that would help reduce the workload (without success or even a follow up phone call or email). At one point I asked Tina if she was asking me to work the hours and not report them and she said, "I can't technically ask you to do that." If you are limiting my overtime and not offering any help, then I am being set up for failure. And, my being fired can only be explained as retaliation for failing to perform an act which is to show 10 hours of overtime each pay period when I am being given me far more work than can be accomplished within that time. From my research this could be a violation of the wage and hours laws.

Doc. 75 at ¶¶ 177-78.

A few days after receiving Jacobs's email, Hindman called Jacobs. During the call, Hindman related his varying viewpoints that her termination was "not performance related" or "for cause[;]" that he thought she was a "very qualified person[;]" that Heaney "felt, rightly or wrongly, she felt like you weren't taking her direction and she felt like you were insubordinate[;]" and that he "truthfully [did not] know why [Heaney] felt that way" but also stated that "with my workload, I just don't have time to, like, dig into every personnel issue because we have too many." Finally, Hindman told Heaney that Johnson Storage would not contest a claim for unemployment and offered to give Jacobs a positive reference.

II. STANDARD

Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Cordry v. Vanderbilt Mortg. & Fin.,*

Inc., 445 F.3d 1106, 1109 (8th Cir. 2006) (quoting *Bockelman v. MCI Worldcom, Inc.*, 403 F.3d 528, 531 (8th Cir. 2005)). The proponent of a motion for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). The proponent need not, however, negate the opponent's claims or defenses. *Id.* at 324–25. In response to the proponent's showing, the opponent must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). A "genuine" dispute of material fact is more than "some metaphysical doubt as to the material facts." *Id.* at 586. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "If the evidence is merely colorable...or is not significantly probative...summary judgment may be granted." *Id.* at 249–50 (citations omitted).

III. DISCUSSION

Jacobs asserts four claims against Johnson Storage: Count I, for retaliation in violation of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*; Count II, a Missouri state-law claim for wrongful discharge in violation of public policy; and, Counts III and IV, for failure to pay overtime in violation of, respectively, FLSA and the Missouri Minimum Wage Law (MMWL), Mo. Rev. Stat. § 290.500, *et seq.*

A. FLSA Retaliation (Count I)

FLSA makes it unlawful to discharge an employee "because such employee has filed any complaint or instituted or caused to be instituted any proceeding ..., or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3). In *Kasten v. Saint–Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011), the Supreme Court found that the statutory term "filed any complaint" included oral complaints as well as written complaints, meaning that oral complaints to employers can serve as the basis of a FLSA retaliation claim. *Id.* at 4. Under the standard set out in *Kasten*, an oral complaint "must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and call for their protection" to find the employee engaged in the statutorily-protected activity of filing a complaint. *Id.* at 14.

The Court analyzes a claim of FLSA retaliation under the burden-shifting framework established in *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973). *Grey v. City of Oak Grove, Mo.*, 396 F.3d 1031, 1034 (8th Cir. 2005). Under the *McDonnell Douglas* burden-shifting framework, a plaintiff has the initial burden of establishing a prima facie case of retaliation. *Pye v. Nu Aire, Inc.*, 641 F.3d 1011, 1021 (8th Cir. 2011). To establish a prima facie case of retaliation, the plaintiff must show that "(1) she participated in a statutorily protected activity, (2) the [employer] took adverse employment action against her, and (3) there was a causal connection between [plaintiff]'s statutorily protected activity and the adverse employment action." *Montgomery v. Havner*, 700 F.3d 1146, 1149 (8th Cir. 2012). "If an employee establishes a prima facie case of retaliation, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for its action." *Fercello v. Cty. of Ramsey*, 612 F.3d 1069,

1078 (8th Cir. 2010). If the employer does so, "the burden then shifts back to the employee to put forth evidence of pretext, the ultimate question being whether a prohibited reason, rather than the proffered reason, actually motivated the employer's action." *Id.* In addition, a plaintiff alleging retaliation must demonstrate that the adverse employment action would not have occurred "but for" the retaliatory motive. *Spencer v. Barton Cty. Ambulance Dist.*, No. 16-05083-CV-SW-RK, 2017 WL 7036658, at *4 (W.D. Mo. Sept. 13, 2017) (citing *University of Texas Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 359 (2013)).

Johnson Storage moves for summary judgment on Jacobs's FLSA retaliation claim on two independent grounds. First, Johnson Storage argues that Jacobs cannot establish even a prima facie case of retaliation because she did not engage in any protected activity. Second, Johnson Storage argues that, even if Jacobs could establish a prima facie case, Johnson Storage has put forth legitimate, non-retaliatory reasons for her termination and Jacobs cannot show that those reasons are pretextual.

Jacobs asserts that she engaged in protected activity when she complained to Heaney, Hiles, and Hindman "regarding her overtime hours and [Johnson Storage's] overtime policies." Doc. 74 at 13. Johnson Storage argues that Jacobs's oral complaints fall short of *Kasten's* "clear and detailed" requirement. Doc. 62 at 6-7. The Court need not decide whether Jacobs's oral complaints constituted protected activity because—even assuming Jacobs could make a prima facie case—she cannot show that Johnson Storage's legitimate reasons for her termination were pretextual. *See Riser v. Target Corp.*, 458 F.3d 817, 820-21 (8th Cir. 2006) (where employer has proffered legitimate, non-discriminatory reasons for adverse employment action, court may skip analysis of prima facie case and move directly to question of discrimination *vel non*).

Johnson Storage undisputedly offered legitimate, non-retaliatory reasons for Jacobs's termination. During the telephone call in which Heaney told Jacobs of her termination, Heaney articulated three reasons for the discharge: (1) Jacobs's working unauthorized overtime, (2) complaints from M. Dyer about Jacobs's unprofessional conduct, and (3) Jacobs's unresponsiveness to emails from agents/vendors. Doc. 75-13. Heaney listed the same three reasons in the termination letter to Jacobs. Doc. 75-12. Jacobs does not dispute that Johnson Storage could legally terminate her employment for any of these three reasons. *See* Doc. 74 at 17 (acknowledging that "poor performance" is a legitimate reason for termination); s*ee also Ritchie v. St. Louis Jewish Light*, 630 F.3d 713, 716-17 (8th Cir. 2011) (recording overtime hours where such hours are unauthorized is insubordination, and not protected by FLSA). Thus, because Johnson Storage has put forth legitimate reasons for her termination, Jacobs bears the burden to show those reasons were pretextual. *Grey*, 396 F.3d at 1035.

Jacobs argues that she has presented sufficient evidence to create a genuine issue of material fact that Johnson's Storage's articulated reasons for her termination were pretext for retaliation. Doc. 74 at 15-16. First, Jacobs argues that Johnson Storage has offered shifting and inconsistent reasons for her termination. "Pretext may be shown with evidence that the employer's reason for the termination has changed substantially over time." *Loeb v. Best Buy Co.*, 537 F.3d 867, 873 (8th Cir. 2008). Further, "[i]f the proffered reason is shown by conflicting evidence to be untrue, then the nonmoving party is entitled to all favorable inferences that the false reason given masks the real reason of intentional discrimination." *Id.* (quoting *Bassett v. City of Minneapolis*, 211 F.3d 1097, 1107 (8th Cir. 2000)).

As evidence that the articulated reasons for her termination are false and have shifted over time, Jacobs points to her post-termination phone call with Hindman, Johnson Storage's

General Counsel. During that call, Hindman told Jacobs he considered her a "very qualified person" and that her termination was "not performance related" or "for cause." Doc. 75-14. Jacobs argues that Hindman's comments demonstrate inconsistency in Johnson Storage's rationale for her termination. However, in the same call, Hindman stated that Heaney felt Jacobs "[was not] taking direction" and was "insubordinate." *Id.* Hindman acknowledged that he "did not know why [Heaney] felt that way" because he did not have time to personally investigate every personnel issue. *Id.* Further, Hindman's comments that Jacobs's termination was "not performance related" or "for cause" came in the context of his representation that Johnson Storage would not oppose Jacobs's claim for unemployment.

Jacobs also relies on a Notice of Decision from the Colorado Department of Labor and Unemployment, finding "based on information received" that Jacobs was laid off from Johnson Storage "due to a lack of work," and therefore eligible for unemployment benefits. Doc. 75-15. The document does not disclose anything about where the tribunal obtained its information, so it cannot evidence inconsistency in *Johnson Storage's* rationale for Jacobs's termination. Furthermore, this finding is wholly consistent with Hindman's representation that Johnson Storage would not oppose Jacobs's claim for unemployment. Doc. 75-14. Accordingly, Hindman's comments do not evidence that Johnson Storage's articulated reasons for Jacobs's termination were false or shifted over time.

Jacobs next argues that Johnson Storage's proffered reasons for her termination are pretextual because there is no evidence of poor performance. This argument lacks merit. When Heaney sent her email to Manandhar on July 11, 2017, she noted that Jacobs was insubordinate, frequently unresponsive, and that she repeatedly recorded unauthorized overtime. Thus, about

five weeks before terminating Jacobs, Heaney described two of the three performance issues that Heaney would cite as the reasons for Jacobs's termination.

Further, Jacobs does not dispute that shortly before her termination, Johnson Storage's key business partner M. Dyer complained to Heaney about Jacobs's "curt, unprofessional manner". Doc. 75 at ¶ 98. Nor does Jacobs dispute that both her peer, Diana Miller, and agents/vendors of Johnson Storage made other unsolicited complaints about Jacobs to Heaney before her termination. Doc. 75 at ¶¶ 84-89. To the extent Jacobs argues that there is no evidence of *actual* poor performance because these complaints were inaccurate or unsubstantiated, she misunderstands the evidentiary burden. *See Grey*, 396 F.3d at 1035 ("The question is whether appellees' articulated reasons for discharge were a pretext for retaliation, not whether appellant actually did what he was accused of doing or whether discharge was warranted."); *see also Logan v. Liberty Healthcare Corp.*, 416 F.3d 877, 883 (8th Cir. 2005) ("We do not 'sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination or unlawful retaliation.'") (quoting *Henderson v. Ford Motor Co.*, 403 F.3d 1026, 1034 (8th Cir. 2005)). In sum, the record contains substantial evidence documenting the very performance issues for which Johnson Storage terminated Jacobs.

Jacobs attempts to discount the complaints Johnson Storage received about her performance after July 11, 2017 by arguing that Heaney had already made the decision to terminate her by then. Doc. 74 at 18-20. Jacobs argues that the subsequent complaints evidence a Heaney-engineered campaign to document her deficiencies to justify Heaney's already-made decision. *Id.* Jacobs's argument fails for at least two reasons. First, the evidence does not support Jacobs's contention that Heaney had already made the decision to terminate her by July

11, 2017. In her email to Manandhar on that date, Heaney stated "I have already *started thinking* about how to begin the process of hiring a replacement, however I want to make sure I handle it in a way that is legal and doesn't hurt the company." Doc. 75-7 (emphasis added). Heaney's statement that she had "started thinking" about hiring Jacobs's replacement does not show Heaney had already made the decision. Second, no evidence suggests Heaney solicited any of the complaints Johnson Storage received from its agent and vendors, and Jacobs admits that these complaints came unsolicited. Doc. 75 at ¶ 89, 99. Thus, the evidence shows that Heaney was already dissatisfied with Jacobs's performance on July 11, 2017, and that she received multiple unsolicited complaints about Jacobs after that date.

Finally, Jacobs argues that the temporal proximity between her complaints and her termination is evidence of pretext. Doc. 74 at 20. Contrary to Jacobs's assertion, "[g]enerally, more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation." *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999). By her own admission, "Jacobs first complain[ed] to Ms. Heaney in approximately April 2017." Doc. 74 at 21. Johnson Storage terminated Jacobs's employment in August 2017—some four months after her first complaint. The Court finds this timing insufficient to show pretext. *See Kipp v. Missouri Highway & Transp. Comm'n.*, 280 F.3d 893, 897 (8th Cir. 2002) (interval of two months "so dilutes any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding in [plaintiff]'s favor on the matter of causal link"); *see also Arraleh v. Cty. of Ramsey*, 461 F.3d 967, 978 (8th Cir. 2006) (in absence of other evidence of pretext, three-week interval insufficient to create genuine factual issue).

Further, even if the four-month interval between Jacobs's complaints and her termination could evidence pretext, intervening events "'erode any causal connection' suggested by temporal proximity." *Cheshewalla v. Rand & Son Const. Co.*, 415 F.3d 847, 852 (8th Cir. 2005) (quoting *Kiel*, 169 F.3d at 1136). Here, Heaney undisputedly received multiple unsolicited complaints about Jacobs between April 2017 and her termination in August 2017. And Jacobs does not dispute that, after her complaints, she continued to record more overtime than authorized. These intervening events also defeat Jacobs's claim of causal connection.

In sum, the Court finds no evidence from which a reasonable jury could determine that Johnson Storage's stated reasons for Jacobs's termination were pretextual. Accordingly, the Court grants summary judgment for Johnson Storage on Jacobs's FLSA retaliation claim (Count I).

B. Wrongful Discharge in Violation of Missouri Public Policy (Count II)

Missouri follows the general rule "that an at-will employee may be terminated for any reason or no reason[.]" *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 92 (Mo. banc 2010). Because Jacobs's claim arose before the effective date of Missouri's Whistleblower Protection Act, Missouri common law governs Jacobs's claim. *Meehan v. PNC Fin. Servs. Grp., Inc.*, No. 4:17-CV-2876 PLC, 2018 WL 2117655, at *5 (E.D. Mo. May 8, 2018). Missouri common law included a public-policy exception, which prohibited termination of an at-will employee for either: (1) "refusing to violate the law or any well-established and clear mandate of public policy as expressed in the constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body"; or (2) "reporting wrongdoing or violations of law to superiors or public authorities, also known as 'whistleblowing.'" *Newsome v. Kansas*

City, Mo. Sch. Dist., 520 S.W.3d 769, 777 (Mo. Banc 2017) (quoting *Fleshner*, 304 S.W.3d at 92).

Jacobs claims that Johnson Storage wrongfully terminated her both for refusal to violate the law and for whistleblowing. The Court first considers Jacobs's common-law whistleblowing claim.

C. Discharge for Whistleblowing

To prevail on this claim, Jacobs must demonstrate that: "(1) she reported serious misconduct that constituted a violation of the law and of well-established and clearly-mandated public policy; (2) her employer discharged her; and (3) her report causally contributed to the discharge." *Yerra v. Mercy Clinic Springfield Communities*, 536 S.W.3d 348, 351 (Mo. App. S.D. 2017). Jacobs's complaints to Heaney do not constitute whistleblowing under the Missouri common law public policy exception, because, as this Court previously found, "a report of wrongdoing to the wrongdoer is insufficient to invoke the whistleblowing public policy exception." Doc. 13 at 5-6 (quoting *Drummond v. Land Learning Found.*, 358 S.W.3d 167, 171 (Mo. App. 2011)).

Johnson Storage argues that Jacobs cannot show that her complaints to Hindman, Hiles, or Zabokrtsky causally contributed to her termination. Doc. 62 at 16. Jacobs admits that she had one only one conversation each with Hindman, Hiles, and Zabokrtsky about overtime before her termination. Jacobs called Hindman in May or June 2017 to tell him that she needed more than eight hours a day to do her job and that Heaney had told her to reduce her overtime. Jacobs testified that she told Hindman she was being "asked to under-report my hours" and "being asked to not log in the hours I was working." Jacobs testified that she called Hiles the week after she spoke to Hindman and told him about "not logging in overtime." Jacobs spoke with

Zabokrtsky in July 2017 and told him that she was working more than eight hours a day and had been asked not to log in her hours.

Regarding Jacobs's calls to Hiles and Zabokrtsky, the Court finds no evidence from which a reasonable jury could infer that these complaints were a contributing factor in Jacobs's termination. Jacobs does not dispute that Heaney was the decisionmaker who ultimately decided to terminate her employment. *See* Doc. 74 at 20, 21. No evidence suggests that Heaney was even aware of Jacobs's complaints to Hiles or Zabokrtsky, much less that these complaints influenced her decision to terminate Jacobs.

Conversely, some evidence could indicate that Hindman influenced Heaney's decision to terminate Jacobs. A few days before Heaney terminated Jacobs, Heaney discussed Jacobs's performance with Hindman, telling Hindman she intended to give Jacobs a disciplinary write-up. Hindman replied: "I don't know why you're messing around with this. Just terminate her." Doc. 75 at ¶ 103. Thus, Jacobs complained to Hindman in May or June that Heaney was asking her to under-report hours, then Hindman told Heaney on August 13 to "just terminate" Jacobs, which Heaney did four days later.

However, no evidence indicates that Hindman told Heaney about Jacobs's complaint to him—on August 13 or at any other time. Nor does any evidence support a reasonable inference that Jacobs's complaint in May or June influenced Hindman's advice to Heaney in August to "just terminate" Jacobs. Jacobs herself admitted that she has no personal knowledge that her complaint to Hindman had anything to do with her termination. Doc. 75 at ¶ 184. Thus, the only "evidence" of a causal relationship between Jacobs's complaint to Hindman and her termination is that the one preceded the other by two or three months. Unlike the "but for" causation standard of a FLSA retaliation claim, Jacobs need only show that her complaint to

Hindman was a "contributing factor" in her termination. *Fleshner*, 304 S.W.3d at 95. Even under this more lenient standard, Jacobs has presented insufficient evidence to withstand summary judgment. The Court finds here that the temporal proximity between the complaint and adverse action—in the absence of any other evidence of a causal relationship—does not create a genuine issue of material fact on the issue of causation. Accordingly, the Court grants Johnson Storage's motion for summary judgment on Jacobs's Missouri common law whistleblowing claim.

2. Discharge for Refusal to Perform an Illegal Act

Jacobs separately argues that Johnson Storage wrongfully discharged her in violation of Missouri public policy for refusing to violate the law. To come within this "narrow category of protected employees," Jacobs must show, first, that Johnson Storage directed her to engage in conduct that "violated a statute, constitutional provision, or regulation adopted pursuant to statute." *Bartis v. John Bommarito Oldsmobile-Cadillac, Inc.*, 626 F. Supp. 2d 994, 1000 (E.D. Mo. 2009). Second, Jacobs must show that she "was discharged for [her] refusal to perform the unlawful act." *Id.*

Jacobs alleges that Heaney directed her to violate the law by instructing her to under-report her working hours. Johnson Storage argues for summary judgment because "the undisputed facts establish that Ms. Heaney did not direct Plaintiff to underreport her hours." Doc. 62 at 13. The Court agrees. At most, the evidence shows Jacobs had *a subjective belief* that Heaney wanted her to work more hours than she reported. The record contains no objective evidence that Heaney ever actually gave Jacobs such an instruction. During her deposition, Jacobs testified repeatedly that Heaney instructed her not to log in overtime hours. Doc. 75-1 at

87:9-15; 90:10-15; 219:17-220:17. However, when asked directly whether Heaney ever instructed her to work off the clock, Jacobs testified:

> Q Did [Heaney] ever give you an explicit instruction to work off the clock?
>
> A She told me not to log in the hours.
>
> Q Did she also say to work the hours and not log them in or did she just say not to log in the hours?
>
> A There was no instruction to not do the work. The instruction was always not to log in the hours.
>
> Q How many times did she give you the instruction not to log in the hours?
>
> A When we would talk – pretty much the majority of the time when I would have a conversation with her, it was – you know, I would ask for help. It was the same routine. I'm being told I need to reduce your hours. You need to stop logging in hours. I – I'm on a salary and I know they want me to help but that's not going to happen. And just a number of responses.
>
> Q So did she ever tell you to continue working and not log the hours?
>
> A Isn't – I believe that's what I just said. She told me not to log in the hours, I asked for help, and she would say back that there's no help coming.

Doc 75-1 at 219:17-220:17.

Jacobs's subjective belief that Heaney was instructing her to work off the clock does not create a genuine issue of fact. In *Bazzi v. Tyco Healthcare Grp., LP*, 652 F.3d 943, 948 (8th Cir. 2011), the Eighth Circuit upheld summary judgment for an employer on a Missouri common-law claim of wrongful discharge for refusal to violate the law. The appeals court agreed with the district court's finding that the employee had failed to create a genuine issue of fact where he "failed to offer even a scintilla of admissible evidence" showing that the employer's conduct at issue was a "clear violation" of the law. *Id.* (citing *Margiotta v. Christian Hosp. Ne. Nw.*, 315 S.W.3d 342, 348 (Mo. 2010); *see also Zasaretti-Becton v. Habitat Co. of Missouri, LLC*, No. 4:12 CV 587 DDN, 2012 WL 2396868, at *8 (E.D. Mo. June 25, 2012) ("a reasonable belief of legal wrongdoing is not itself sufficient to succeed on an unlawful termination claim brought

under Missouri's public policy exception to the at-will employment doctrine"). Thus, Jacobs must show more than that Heaney instructed her to not "log in" overtime hours and that she subjectively *understood* this as a directive to under-report her hours. Jacobs must show that Heaney actually instructed her to under-report her hours, in "clear violation" of FLSA and the MMWL. *Bazzi*, 652 F.3d at 948. The summary judgment record shows the opposite.

In her deposition testimony, Jacobs repeatedly stopped short of stating that Heaney instructed her to work off the clock. Doc 75-1 at 219:17-220:17. During the telephone call when Heaney informed Jacobs of her termination (which Jacobs surreptitiously recorded), Heaney told Jacobs:

> [W]e talked about ten hours of overtime per pay period and that you were to evaluate your workload and your hours on Thursday and communicate with me what you weren't able to complete so that we could evaluate how to – *how to accomplish your job in the amount of hours that were allowed.*

Doc. 75 at ¶ 109 (emphasis added). And in Jacobs's post-termination email to Hindman, she stated: "While I was not happy working 10-11 hour days, I was not going to let the customer's [sic] down by working 8-9 hour days which would result in service failures. ... I worked 10-11 hour days out of necessity." Doc. 75-2. Jacobs's email to Hindman continued: "At one point I asked [Heaney] if she was asking me to work the hours and not report them and she said 'I can't technically ask you to do that.'" *Id.* In sum, Jacobs has identified no evidence showing that Heaney instructed her to under-report her hours.

Nor does it matter that Jacobs believed her job duties could not be completed in 40 hours. In *Ritchie*, the plaintiff specifically alleged that her work duties required more than 40 hours in a week and therefore required overtime. 630 F.3d at 716. Nevertheless, the Eighth Circuit affirmed dismissal because the employer had not authorized overtime. *Id.* At 716-17. Thus, "her recording of her overtime could be nothing more than mere insubordination, she having been

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instructed to the contrary." *Id.* Further, the plaintiff's allegation that her employer instructed her to "stop recording overtime" did not, standing alone, allege misconduct, since the employer "could merely have been instructing [plaintiff] to complete the work required by the job within a 40-hour workweek and to stop working overtime altogether." *Id.* At 717 n.2. Similarly, Jacobs's testimony that Heaney directed her to "stop logging overtime" does not, standing alone, show that Heaney instructed Jacobs to under-report hours.

Jacobs has failed to raise a genuine issue of material fact as to whether Johnson Storage instructed her to violate the law by under-reporting her hours. Accordingly, the Court grants Johnson Storage's motion for summary judgment on Jacobs's claim of wrongful discharge for refusal to violate the law in violation of Missouri public policy (Count II).

C. Failure to Pay Overtime in Violation of FLSA (Count III) and MMWL (Count IV)

Under section 7 of FLSA, an employer may not subject non-exempt employees to a work week in excess of forty hours without paying overtime of at least one and one-half times the regular hourly wage. 29 U.S.C. § 207. An employer who violates this restriction "shall be liable to the employee or employees affected in the amount of their ... unpaid overtime compensation ... and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). Under the MMWL, "[n]o employer shall employ any of his employees for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." Mo. Rev. Stat. § 290.505. The MMWL explicitly provides that this provision "shall be interpreted in accordance with the Fair Labor Standards Act, 29 U.S.C. Section 201, et seq." *Id.* Accordingly, the Court may jointly consider Jacobs's claims for unpaid overtime under FLSA and the MMWL. *Anderson v. Creve Coeur Urgent Care LLC*, No. 4:16CV2136 HEA,

2019 WL 4643954, at *3 n.1 (E.D. Mo. September 24, 2019); *Tolentino v. Starwood Hotels & Resorts Worldwide, Inc.*, 437 S.W.3d 754, 757 n.3 (Mo. banc 2014).

To prevail on a claim for unpaid overtime, a plaintiff must show: (1) that she worked overtime hours that were uncompensated, and (2) that the employer "knew or should have known" that the plaintiff worked unpaid overtime. *Hertz v. Woodbury Cty., Iowa*, 566 F.3d 775, 781 (8th Cir. 2009). If an employer fails to keep accurate records of wages and hours, employees are not denied recovery under FLSA simply because they cannot prove the precise extent of their uncompensated work. *Holaway v. Stratasys, Inc.*, 771 F.3d 1057, 1059 (8th Cir. 2014). Instead, a "relaxed standard of proof" applies. *Id.* Under this evidentiary standard, "once the employee has shown work performed for which the employee was not compensated, and 'sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference,' the burden then shifts to the employer to produce evidence to dispute the reasonableness of the inference." *Id.* (quoting *Carmody v. Kansas City Bd. of Police Comm'rs*, 713 F.3d 401, 406 (8th Cir. 2013)). Here, the Court assumes without deciding that the relaxed standard of proof applies.

Johnson Storage argues that it is entitled to summary judgment on Jacobs's unpaid overtime claims on two independent grounds. First, Jacobs cannot show Johnson Storage knew or should have known that she worked unpaid overtime hours. Second, even under the relaxed standard of proof, Jacobs cannot meet her burden to show the amount of unpaid overtime as a matter of just and reasonable inference. *Holaway*, 771 F.3d at 1059.

The Court finds that Jacobs cannot show the amount of unpaid overtime as a matter of just and reasonable inference.[1] Jacobs claims that she worked a total of 129 hours of unpaid

[1] Jacobs's Opposition brief wholly fails to respond to Johnson Storage's argument that she cannot meet her burden to show the amount of unpaid overtime as a matter of just and reasonable inference. Failure to oppose a basis for

overtime. Jacobs does not dispute that this number is an "estimate" based solely on her own recollection and on "just knowing how much time she was putting in on an average." Doc. 75 at ¶¶ 121-22; Doc. 75-1 at 114:34-115:20. In arriving at her estimate, Jacobs did not consult any contemporaneous notes or other documents showing the amount of time she worked but did not report to Johnson Storage. The only documents Jacobs relied on were her paycheck stubs from Johnson Storage.

In *Holaway*, the Eighth Circuit affirmed summary judgment for the employer on a FLSA unpaid overtime claim finding that the plaintiff failed to establish the amount of uncompensated work as a matter of just and reasonable inference. 771 F.3d at 1060. The Court noted that the plaintiff had put forth "contradictory and bare assertions of his overtime hours worked" supported only by "vague testimony [that] failed to reference specific days and hours worked." *Id.* at 1059-1060.

The Court finds *Holaway* controls here. As in *Holaway*, Jacobs only offers her own testimony to support her claim of 129 unpaid overtime hours. During her deposition, Jacobs was twice asked to explain the basis of her estimate:

> Q Did you – when you came up with the number that ultimately you and your prior counsel decided you worked and weren't paid for, did you look at any documents in coming up with that number?
>
> A. No, other than just knowing how much time I was putting in on average.
>
> ...
>
> Q Okay. So is it fair to say that the number you came up with was just your estimate based on your recollection?
>
> A Mm-mm.
>
> Q Is that a yes?

---

summary judgment may constitute waiver of that argument. *Satcher v. Univ. of Arkansas at Pine Bluff Bd. of Trustees*, 558 F.3d 731, 735 (8th Cir. 2009).

A Yeah, my recollection was included in there as well.

Q Okay. Was anything included other than your recollection?

A No.

Doc. 75-1 at 114:24-115:20.

Q Where did you come up with these numbers?

A So I initially worked them out based on looking at the paycheck and doing – I did it two weeks, and then I believe it was [Jacobs's prior counsel], he went over it and we worked on it together.

Q Did you reference any documents other than your paycheck stubs to come up with this answer?

A No, I had no other documents.

Q You didn't have any sort of notes or anything like that?

A No.

Doc. 75-1 at 207:14-25. Jacobs's testimony is vague and does not reference specific days worked. *Holaway*, 771 F.3d at 1060. And Jacobs's reliance on her paycheck stubs to determine her estimate hurts rather than helps her claim. Jacobs's paychecks reflected numbers of hours that she herself claims she reported inaccurately. Doc. 75 at ¶¶ 45, 121-22.

Further, as in *Holaway*, Jacobs has offered "contradictory and bare assertions" of her overtime hours worked. 771 F.3d at 1059. Jacobs based her claim of 129 unpaid overtime hours on her recollection of hours she allegedly worked but did not record during the period from March to August 2017. Doc. 75-1 at 114:24-115:20; 208:1-209:25. However, in her Opposition brief, Jacobs now asserts that she "accurately recorded her hours worked" from April to August 17, 2017. Doc. 74 at 6. Further, Jacobs concedes that she does not know if there is any week she worked for Johnson Storage where she accurately recorded all the hours she worked. Doc. 75 at ¶ 149. These representations are irreconcilably contradictory. *See Holloway v. United States*, 960 F.2d 1348, 1358 (8th Cir. 1992) (self-contradicting statement is insufficient to create a

genuine issue of material fact). Jacobs offers no revised calculation or other evidence from which a jury could determine Jacobs's allegedly unpaid overtime hours.

The Court also finds *Zhou v. Int'l Bus. Machines Corp.*, No. 15-CV-1027-LRR, 2017 WL 1217195 (N.D. Iowa Mar. 31, 2017), *aff'd*, 709 F. App'x 413 (8th Cir. 2018), instructive here. In *Zhou*, the district court granted summary judgment for the employer because the plaintiff failed to offer evidence from which a jury could calculate a measure of unpaid hours worked as a matter of just and reasonable inference. The plaintiff, who worked remotely and recorded his own hours, admitted that he did not keep notes contemporaneously as he worked and that he had no other objective evidence demonstrating the amount of overtime that he worked. *Id.* at *21. The court found the record unclear as to how often the plaintiff worked overtime without claiming it, and how often he merely claimed less overtime than he worked. *Id.* The plaintiff testified that he "normally" worked twice the amount of overtime that he recorded, but the court found this calculation insufficient.

> [T]he only method that Zhou puts forth to demonstrate the extent of uncompensated time worked is based on mere approximation and Zhou admits that it was not consistently applied. Without any evidence that Zhou employed this method with any more regularity than "[n]ormally," the court cannot conclude that a jury could find, as a matter of just and reasonable inference, an amount of hours that Zhou worked but for which he was not compensated. Zhou's contentions are unsupported by anything but his own self-serving statements, which in turn are unsupported by any evidence in the record.

Id. As in *Zhou*, Jacobs has failed to offer any objective evidence to support her own self-serving estimate and approximation. Accordingly, following *Holaway* and *Zhou*, the Court finds that Jacobs has not met her burden to produce "sufficient evidence to show the amount and extent of [uncompensated] work as a matter of just and reasonable inference." *Holaway*, 771 F.3d at

1059. The Court therefore grants summary judgment for Johnson Storage on Jacobs's claims of unpaid overtime under FLSA (Count III) and the MMWL (Count IV).[2]

Accordingly,

IT IS HEREBY ORDERED that [61] Johnson Storage's Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED that [79] Johnson Storage's Consent Motion to Continue Trial is DENIED as moot.

So Ordered this 3rd day of March, 2020.

SL R. CR

STEPHEN R. CLARK
UNITED STATES DISTRICT JUDGE

[2] Because the Court finds that Johnson Storage is entitled to summary judgment on Jacobs's unpaid overtime claims because Jacobs cannot show the amount of unpaid overtime as a matter of just and reasonable inference, the Court need not reach Johnson Storage's alternative argument for summary judgment on these claims, i.e., that Johnson Storage neither knew nor should have known that Jacobs was working unpaid overtime.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KATHERINE JACOBS,	)	
	)	
Plaintiff(s),	)	
	)	
vs.	)	Case No. 4:18-cv-00024-SRC
	)	
JOHNSON STORAGE & MOVING CO. HOLDING, LLC,	)	
	)	
	)	
Defendant(s).		

Memorandum and Order

The Court considers Plaintiff Katherine Jacobs's Motion for Relief of Judgment. Doc. 95. Jacobs initially brought this action against Defendant Johnson Storage & Moving Co. Holding, LLC, for retaliatory termination under the Fair Labor Standards Act (FLSA), wrongful discharge under Missouri public policy, and unpaid overtime under the FLSA and Missouri Minimum Wage Law. Doc. 1; Doc. 20. On March 3, 2020, the Court entered summary judgment in favor of Johnson Storage on all counts. Doc. 81. On November 12, 2020, the Eighth Circuit affirmed. Doc. 92; Doc. 93. And on December 18, 2020, the Eighth Circuit denied Jacobs's petition for rehearing by panel. Doc. 100-A. Jacobs now seeks relief from the Court's summary judgment order under Federal Rule of Civil procedure 60(b).[1] Doc. 95. The Court finds that Jacobs's motion lacks merit and therefore denies her Motion for Relief of Judgment [95]. The Court also denies Jacobs's Motion for a Subpoena [98] and Motion for Relief from Defendant's Bill of Costs [103].

I. Standard

[1] Jacobs combined her Motion for Relief of Judgment with a Motion for Indicative Relief, pursuant to Federal Rule of Civil Procedure 62.1. Doc. 95.

B.

Federal Rule of Civil Procedure 60(b) gives the district court power to relieve a party from a judgment for certain limited reasons. Fed. R. Civ. P. 60(b). These reasons include: (1) mistake, inadvertence, surprise, or excusable neglect, (2) newly-discovered evidence, or (3) fraud, misrepresentation, or misconduct by an opposing party. Fed. R. Civ. P. 60(b)(1)-(3). Rule 60(b) "provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances." *Atkinson v. Prudential Property Co.*, 43 F.3d 367, 371 (8th Cir. 1994) (internal citations and quotations omitted). Courts view Rule 60(b) motions with disfavor. *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 515 (8th Cir.), *cert. denied*, 469 U.S. 1072 (1984). Further, the decision to grant relief under Rule 60(b) rests "within the sound discretion of the district court." *Mitchell v. Shalala*, 48 F.3d 1039, 1041 (8th Cir. 1995). A district court may, without first obtaining leave of the appellate court, act on a Rule 60(b) motion after the appellate court disposes of an appeal. *Standard Oil Co. of Calif. v. United States*, 429 U.S. 17, 19 (1976).

II. Discussion

A. Motion for Relief from Judgment

Jacobs asks for relief from judgment based on excusable neglect, newly-discovered evidence, perjury, and fraud. Doc. 95. Under Rule 60(b)(1), Jacobs seeks relief for excusable neglect due to her former counsel's alleged lack of competence. Doc. 95 at p. 14. Under Rule 60(b)(2), she seeks relief due to the discovery of new evidence on a previously-unopened laptop in her possession. Doc. 95 at p. 9. Finally, under Rule 60(b)(3), Jacobs seeks relief for fraud and misconduct by Johnson Storage based on allegedly falsified discovery documents. Doc. 95 at p. 11. In response, Johnson Storage states that Jacobs does not present any evidence to establish "exceptional circumstances" under any of the grounds for relief in Rule 60(b).

1. Excusable neglect

Rule 60(b)(1) applies in "situations in which the failure to comply with a filing deadline is attributable to negligence" and "must be accompanied by a showing of good faith and some reasonable basis for not complying with the rules." *Noah v. Bond Cold Storage*, 408 F.3d 1043, 1045 (8th Cir. 2005) (internal citations omitted). Excusable neglect does not include ignorance or carelessness of an attorney, nor does it include mistakes of law or failure to follow the clear dictates of a court rule. *Id.* (citing *Hunt v. City of Minneapolis*, 203 F.3d 524, 528 n.3 (8th Cir. 2000)). In considering excusable neglect, courts must consider several factors, including "(1) the danger of prejudice to the non-moving party, (2) the length of delay and its potential impact on judicial proceedings, (3) whether the movant acted in good faith, and (4) the reason for the delay, including whether it was in the reasonable control of the movant." *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, 496 F.3d 863, 866-67 (8th Cir. 2007) (citing *Pioneer Inv. Serv. Co. v. Brunswick Ass'n Ltd. Partnership*, 507 U.S. 380, 395 (1993)).

Jacobs does not allege that she or her former counsel accomplished an act or omission, such as missing a deadline, which the Court could excuse under Rule 60(b)(1). Rather, Jacobs alleges a lack of competence by her counsel, providing four examples. Doc. 95 at p. 16-17. Jacobs claims that her counsel 1) should have deposed an additional witness, 2) did not properly prepare her for deposition, 3) did not properly prepare for mediation, and 4) abandoned her after the Court issued its summary judgment order. *Id.* None of these instances involve excusable neglect that the Court can remedy through Rule 60(b)(1). *See Sutherland v. ITT Continental Baking Co.*, 710 F.2d 473, 476-77 (8th Cir.1983) ("Rule 60(b) has never been a vehicle for relief because of an attorney's incompetence or carelessness."). The Court finds that Jacobs does not

establish excusable neglect, therefore, she is not entitled to relief from judgment under Rule 60(b)(1).

2. Newly-discovered evidence

A Rule 60(b)(2) motion based on the discovery of new evidence must show "(1) that the evidence was discovered after the court's order, (2) that the movant exercised diligence to obtain the evidence before entry of the order, (3) that the evidence is not merely cumulative or impeaching, (4) that the evidence is material, and (5) that the evidence would probably have produced a different result." *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1036 (8th Cir. 2007) (citing *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 n.3 (8th Cir. 2006).

Jacobs alleges that during discovery, Johnson Storage withheld multiple emails that show that Johnson Storage knew she was working uncompensated overtime hours. Doc. 95 at p. 9-11. Jacobs claims that she discovered these missing emails after the Court's summary judgment order, but she does not attempt to explain how or when she obtained these emails. *Id.* Her reply in support of her motion elaborates that she found the emails on her company laptop, which she and her attorneys possessed during the pendency of this case. Doc. 102 at p. 9-11. Jacobs claims that she opened her company laptop and discovered the emails for the first time after the Court issued its summary judgment order in favor of Johnson Storage. *Id.* The Court finds that these emails do not constitute "newly discovered evidence" for purposes of Rule 60(b)(2).

Jacobs does not establish that "the evidence was discovered after the Court's order" or that she "exercised diligence to obtain the evidence before entry of the order." *See Greyhound Lines, Inc.*, 485 F.3d at 1036. Jacobs admits that she and her attorneys possessed the laptop during the pendency of this case. Doc. 102 at p. 9-11. Jacobs had access to these emails before

the Court's summary judgment order, but her attorneys decided against using the evidence from her laptop. *See id.* Even if Jacobs and her attorneys had not previously opened the laptop or reviewed the emails, Jacobs still cannot show that she "exercised diligence" to find the emails. Jacobs possessed her own work laptop; she knew that she had access to these emails. *See id.* Her attorney simply advised her against opening the laptop because "ownership was in question and Johnson Storage would be responsible for submitting all documents and emails during discovery." *Id.* at p. 9. Jacobs did not make the laptop available to Johnson Storage during discovery, nor did she produce any documents from it. *Id.* Her failure to provide the laptop and its contents to Johnson Storage affected Johnson Storage's ability to produce responsive documents in discovery. *Id.* Jacobs's physical possession of this evidence indicates that Jacobs did not exercise due diligence to discover the evidence before summary judgment.

Jacobs also cannot show that she exercised diligence in obtaining this evidence from Johnson Storage during discovery. On January 29, 2019, Johnson Storage served its answers and objections to Jacobs's First Set of Interrogatories and First Set of Requests for Production of Documents. Doc. 100-B, Martin Decl. at ¶ 5. In February 2019, Johnson Storage and Jacobs's former counsel conferred regarding Johnson Storage's document production and the appropriate search terms for document production from Jacobs's email accounts. Martin Decl. at ¶ 6. The parties did not come to an agreement on search terms before their mediation, or at any time after mediation, when Jacobs secured new representation. Martin Decl. at ¶ 7, 9. Johnson Storage did not receive notice from Jacobs that she considered its discovery responses to be deficient, nor did Jacobs file a motion to compel regarding Johnson Storage's discovery responses. Martin Decl. at ¶ 9-10. The Court finds that Jacobs did not exercise diligence to obtain the emails she alleges were withheld by Johnson Storage.

Finally, even assuming the emails are material, Jacobs fails to establish that the emails she discovered on the laptop are not merely cumulative of documents Johnson Storage previously produced and that the evidence probably would have produced a different result. *See Greyhound Lines, Inc.*, 485 F.3d at 1036. At summary judgment, the Court considered documentary evidence that Johnson Storage knew about Jacobs's uncompensated overtime work. Doc. 81. Jacobs asserts that her new evidence proves the same thing, but this makes her new evidence merely cumulative. Doc. 95. Further, Jacobs's evidence does not disturb the Court's findings on summary judgment that: 1) "Johnson Storage undisputedly offered legitimate, non-retaliatory reasons for Jacobs's termination," 2) there was "no evidence from which a reasonable jury could determine Johnson Storage's stated reasons for Jacobs's termination were pretextual," 3) "temporal proximity between the complaint and adverse action does not create a genuine issue of material fact on the issue of causation," 4) "Jacobs has failed to raise a genuine issue of material fact as to whether Johnson Storage instructed her to violate the law by under-reporting her hours," and 5) "Jacobs cannot show the amount of unpaid overtime as a matter of just and reasonable inference." Doc. 81. The Court did not make any findings on whether Johnson Storage "knew or should have known" that Jacobs worked unpaid overtime, as Jacobs had already failed to present "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* Jacobs's new evidence is cumulative, and the Court did not consider at summary judgment whether Johnson Storage knew about Jacobs's unpaid overtime, so the new evidence would not have produced a different result. *See Greyhound Lines, Inc.*, 485 F.3d at 1036. The Court finds that Jacobs's evidence does not constitute "newly discovered evidence" that might warrant relief from judgment under Rule 60(b)(1).

3. Fraud or misconduct

Rule 60(b)(3) provides for relief from judgment in the case of "fraud . . . misrepresentation or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). To prevail on a Rule 60(b)(3) motion, "the movant must show, with clear and convincing evidence, that the opposing party engaged in a fraud or misrepresentation that prevented the movant from fully and fairly presenting its case." *Atkinson*, 43 F.3d at 372-73 (citing *Paige v. Sandbulte*, 917 F.2d 1108, 1109 (8th Cir. 1990)). Jacobs alleges that Johnson Storage attempted to deceive the Court by altering several documents it produced in discovery. She claims that "two documents have been proven to be fraudulent and the third is suspiciously fraudulent." Doc. 95 at p. 11-14. Jacobs also alleges that Tina Healey committed perjury in her deposition when Healey stated that Johnson Storage was not withholding any documents. Doc. 95 at p. 9-11. The Court finds that Jacobs has not submitted "clear and convincing" evidence of fraud or misconduct, however. Jacobs does not prove that Johnson Storage's documents are fraudulent or that Healey committed perjury in her deposition.

Jacobs presents three examples of alleged document fraud by Johnson Storage. First, Jacobs presents two different versions of the same email which Johnson Storage produced in discovery. Jacobs claims that after comparing the two emails "side by side," the differences between the two emails show that Johnson Storage deliberately manufactured evidence. But the differences between the two emails are not a result of tampering: the second email is just a forwarded version of the first email. Martin Decl. at ¶ 13. In Tina Heaney's deposition on November 26, 2019, Jacobs's counsel asked Heaney about these two emails. Doc. 100-C, Heaney Dep. 217:7-13. Heaney testified that the second version of the email was "a forward of another shipment where Diana [Miller] is being asked to provide information and/or documents that previously Katy had not." Heaney Dep. 217:14-22. Jacobs's counsel asked Heaney whether

Diana Miller "created" the document, to which Heaney replied, "I understand where you're going with this. I get what you're trying to do here. It didn't happen that way." Heaney Dep. 227:8-15. The Court finds that Jacobs presents no clear and convincing evidence of fraud with regard to these emails.

Second, Jacobs presents Johnson Storage's ADP time-card report. Jacobs recorded her time by punching in and out through the ADP time-tracking program on her computer. Jacobs claims that "the ADP report has been proven to be fraudulent as Jacobs was told to under-report her hours." Doc. 102 at p. 4. This is not evidence of fraud, as Jacobs has already admitted that she did not enter her unreported hours on the timekeeping system. Doc. 81. Jacobs also speculates that a mistake on the ADP report where the document indicates that May 11 and May 12, 2017 were both "Thursday" means that Johnson Storage manually altered the ADP report. Doc. 95. She also points out that the ADP report Johnson Storage produced did not have the ADP logo on it. *Id.* But Jacobs presents no evidence linking the incorrect date entry and the lack of an ADP logo to her allegations that Johnson Storage tampered with the document. The Court finds no clear and convincing evidence of fraud with regard to the ADP report.

Third, Jacobs claims that Johnson Storage "entered into evidence a deceptive Organizational Chart . . . to cause confusion" and "significantly altered their organization chart to conceal evidence." Doc. 95 p. 15-16. Jacobs points to Tina Heaney's admission in her deposition that the organizational chart was not completely accurate. *Id.* But even though Johnson Storage's organizational chart contained factual inaccuracies, the Court will not assume that Johnson Storage altered the chart to conceal evidence from the Court or to cause confusion. Johnson Storage's inaccurate organizational chart is not evidence of fraud. Additionally, this evidence could not have affected the outcome of Jacobs's case. Johnson Storage did not cite the

organizational chart in its Motion for Summary Judgment, and the Court did not rely upon it. Doc. 61; Doc. 62; Ex. B, Martin Decl. at ¶ 14. The Court finds that the inaccuracies in the organizational chart are not clear and convincing evidence of fraud, nor did they prevent Jacobs from fully and fairly presenting her case at summary judgment.

Jacobs argues next that Healey committed perjury during her deposition because Healey testified that Johnson Storage did not withhold any documents during discovery. Doc. 95 at p. 9-11; Healey Dep. 130:7-133:20. Jacobs claims that the emails she found on her work laptop show that Johnson Storage withheld documents because Johnson Storage did not produce them. *Id.* Jacobs attached several unattested emails in support of her motion. *Id.* In response, Johnson Storage states in a sworn declaration that it complied with all of its discovery obligations. Martin Decl. at ¶ 5, 9-12. Jacobs has not provided clear and convincing evidence of perjury.

Jacobs implies that Johnson Storage committed misconduct during discovery by not producing the emails that Jacobs found on her work laptop. Doc. 95 at p. 9-11. While discovery misconduct can be a basis for relief under Rule 60(b)(3), the Court finds that Jacobs does not present clear and convincing evidence of any misconduct. *See Atkinson*, 43 F.3d at 373 (8th Cir. 1994) (noncompliance with discovery requests "may under some circumstances be grounds for vacating [a] judgment" under Rule 60(b)(3)). First, Jacobs does not attempt to demonstrate that Johnson Storage's answers and objections to document production were improper or that she pursued the available discovery remedies before the entry of summary judgment. *See, e.g., Dukes v. City of Minneapolis*, 339 Fed.Appx. 665, 668 (8th Cir. 2009) (Rule 60(b)(3) relief unavailable for alleged failure to produce records in advance of summary judgment because plaintiff "was obligated to pursue the release of those records prior to the grant of summary judgment"); *Miller v. Baker Implement Co.*, 439 F.3d 407, 410, 414 (8th Cir. 2006) (holding no

basis for Rule 60(b)(3) relief when party "failed to avail himself of available discovery remedies before the district court issued its order"); *Floorgraphics Inc. v. News Am. Mktg. In–Store Servs.*, Inc., 434 Fed.Appx. 109, 112 (3d Cir. 2011) (holding that when a receiving party objects to a discovery request and the requesting party "failed to move to compel," the court may conclude that the requesting party "abandoned its request" and the claimed failure to produce responsive documents does not constitute clear and convincing evidence of discovery misconduct under Rule 60(b)(3)).

Second, Jacobs does not establish that Johnson Storage's alleged withholding of documents prevented her from fully and fairly litigating her case. Jacobs had possession of her work laptop with these emails on it for the entirety of the case, so she had a "fair opportunity to discover" the emails herself and use them to bolster her claims. *Atkinson*, 43 F.3d at 373 (finding that a defendant's failure to disclose did not prevent the plaintiff from fully and fairly litigating his claim because "[t]his is not a case in which defendants withheld information that they alone possessed. A copy of the letter was in [plaintiff's] possession the entire time . . ."). And as explained above, Johnson Storage's production of these emails would have made no difference in the result of the case. *See id.*

Jacobs fails to present clear and convincing evidence that Johnson Storage engaged in fraud or misconduct. Jacobs is not entitled to relief under Rule 60(b)(3). As Jacobs cannot show "exceptional circumstances" justifying relief under Rule 60(b), the Court denies Jacobs's Motion for Relief of Judgment [95].

B. Motion for Subpoena

Jacobs filed a Motion for Subpoena [98], which Court construes as a request to reopen discovery to gather evidence in support of her Motion for Relief of Judgment [95]. District

courts may, in their discretion, allow a party to pursue post-judgment discovery when the moving party can make a "prima facie demonstration of success on the merits" or, alternatively, a "colorable claim." *See, e.g., Pearson v. First NH Mortg. Corp.*, 200 F.3d 30, 35 (1st Cir. 1999); *Midwest Franchise Corp. v. Metromedia Restaurant Group, Inc.*, 177 F.R.D. 438, 440 (N.D. Iowa 1997). Unlike discovery under Federal Rule of Civil Procedure 26(b), "a request for discovery for the purpose of attacking a final judgment involves considerations not present in pursuing discovery in a pending action prior to a judgment. Primary among these considerations is the public interest of the judiciary in protecting the finality of judgments." *H.K. Porter Co. v. Goodyear Tire &Rubber Co.*, 536 F.2d 1115, 1118 (6th Cir. 1976). When the movant alleges fraud under Rule 60(b)(3), courts should not reopen discovery without actual evidence of fraud: "our strong interest in the finality of judgments leads courts to intervene in a search for evidence of fraud only if there has been some showing that a fraud actually has occurred." *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 7-8 (1st Cir. 1999).

Jacobs seeks a subpoena of documents from C T Corporation System, the custodian of Johnson Storage's ADP record-keeping system. Doc. 98. Jacobs claims in her Motion for a Subpoena that Johnson Storage altered its ADP report before producing the document in discovery. *Id.* Jacobs points to the incorrect date entry and the lack of an ADP logo on Johnson Storage's ADP report. *Id.* This evidence is not sufficient to show that Johnson Storage committed fraud by altering its ADP report. The report's entry of two consecutive days as "Thursday" does not indicate that Johnson Storage manually changed the hours on the report, and the missing ADP logo is meaningless without additional evidence on whether ADP reports always contain the logo. Jacobs presents no evidence "showing that a fraud has actually occurred," that would enable the Court to reopen discovery and disturb an otherwise final

judgment. *See Duhaime*, 183 F.3d at 7-8. In sum, Jacobs does not present evidence creating a colorable or prima facie claim for relief under Rule 60(b)(3). The Court denies her Motion for Subpoena [98].

C. Motion for Relief from Bill of Costs

Jacobs also filed a Motion for Relief from Johnson Storage's Bill of Costs, presumably under Rule 60(b). Doc. 103. In her motion, she raises the same allegations as those in her Motion for Relief of Judgment [95] and seeks relief from all of Johnson Storage's costs. Doc. 103. For the reasons set forth above, the Court will not grant relief under Rule 60(b). But Jacobs also seeks relief from Johnson Storage's costs because (1) the Court cannot grant costs to Johnson Storage after she filed her notice of appeal under Federal Rule of Civil Procedure 58(e), (2) Johnson Storage's Bill of Costs contains errors and non-allowable costs, and (3) her former attorney did not act in her best interest after the Court issued its summary judgment order. Doc. 103. The Court finds these arguments to be meritless and denies Jacobs's motion [103].

The Court granted Johnson Storage's motion for Bill of Costs on April 4, 2020. Doc. 90. Jacobs now seeks relief from these costs under Rule 60(b). Doc. 103. Courts view Rule 60(b) motions with disfavor and grant them only in "exceptional circumstances." *See Rosebud Sioux Tribe*, 733 F.2d at 515; *Atkinson*, 43 F.3d at 371. And Federal Rule of Civil Procedure 54(d)(1) provides that "costs...shall be allowed as a matter of course to the prevailing party unless the court otherwise directs." Recoverable costs include (1) fees of the clerk, (2) fees for transcripts, (3) fees for printing and witnesses, (4) fees for copies of papers necessarily obtained for use in the case, (5) docket fees, and (6) compensation of court-appointed experts and interpreters. 28 U.S.C. § 1920. Rule 54(d) creates a presumption favoring the award of costs to the prevailing party. *Computrol, Inc. v. Newtrend*, 203 F.3d 1064, 1072 (8th Cir. 2000).

First, Jacobs argues that Rule 58(e) prevents a district court from awarding costs once a party has filed a notice of appeal. Doc. 103 at p. 2, ¶ 1. She claims that the Court should not have awarded costs to Johnson Storage on April 6, 2020, because she had already filed her notice of appeal on March, 16, 2020. This argument is unpersuasive. Rule 58(e) allows a court to *extend the time for parties to appeal a judgment*, pending the outcome of a motion for attorney's fees:

> Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the *court may act before a notice of appeal* has been filed and become effective *to order that the motion have the same effect under Federal Rule of Appellate Procedure 4 (a)(4) as a timely motion under Rule 59.*

Fed. R. Civ. P. 58(e) (emphasis added). Under Federal Rule of Appellate Procedure 4(a)(4), certain motions may extend the deadline to file a notice of appeal. Jacobs's filing her notice of appeal had no bearing on the Court's ability to award costs under Rule 54(d)(1). *See Blakley v. Schlumberger Technology Corp.*, 648 F.3d 921, 930 (8th Cir. 2011) (district court may award costs after a party has filed a notice of appeal). The Court did not seek to extend Jacobs's time for appeal under Rule 58(e), therefore Rule 58(e) does not apply in this situation.

Second, Jacobs argues that Defendant's Bill of Costs contains errors and non-allowable costs, including unnecessary fees for service of subpoena, fees for deposition transcripts, and fees for obtaining tax records. Doc. 103 at p. 2, ¶ 2. Jacobs raised largely the same arguments in her Memorandum in Response to Johnson Storage's Bill of Costs. Doc. 85. The Court already addressed these arguments in its Memorandum and Order granting costs to Johnson Storage. Doc. 90. The Court found in its Memorandum and Order that fees for service of subpoena, deposition transcripts, and obtaining tax records were necessary for litigation of the case and that Johnson Storage reasonably incurred these costs. Doc. 90. Jacobs does not present

any additional evidence to show "exceptional circumstances," so the Court will not grant her relief from these costs.

Third, Jacobs argues that she should obtain relief due to excusable neglect by her former attorney, Bridget Halquist, because Halquist did not act in her best interest after the Court issued its summary judgment order. Doc. 103 at p. 4, ¶ 3. Jacobs requests relief from Johnson Storage's Bill of Costs because Halquist delayed filing her notice of appeal by 10 days, neglected to show Jacobs the memorandum in response to Johnson Storage's Bill of Costs [85] before filing it, and defied Jacobs's instructions by stipulating to Jacobs's responsibility for Johnson Storage's costs. As discussed above, excusable neglect under Rule 60(b)(1) deals with situations where an attorney accidentally misses a filing deadline or fails to comply with a court rule, not professional incompetence or carelessness. *Sutherland*, 710 F.2d at 476-77; *Noah*, 408 F.3d at 1045. Jacobs does not allege any conduct by Halquist that the Court can excuse under Rule 60(b)(1), nor does Halquist's conduct create "exceptional circumstances" justifying relief from these costs.

The Court also observes that Jacobs's filing of her notice of appeal did not implicate Johnson Storage's ability to recover costs under Rule 54(d)(1). Had Halquist filed the notice of appeal immediately after the Court's summary judgment order, Johnson Storage could still have recovered its costs, so Halquist's alleged delay did not harm Jacobs. *See* Fed. R. Civ. P. 54(d)(1). Jacobs also admits that on March 13, 2020, when Halquist offered to file a response to Johnson Storage's Motion for Bill of Costs, Jacobs replied: "I do not care what you do just as long as your response does not indicate that I am in any way responsible for these charges." Doc. 103 at p. 5, ¶ 3. Halquist filed Jacobs's response memorandum that same day. Doc. 85. The evidence does not support Jacobs's claim that Halquist acted against her interests by not

showing Jacobs the memorandum before filing it. And Halquist did not stipulate to Jacobs's responsibility for Johnson Storage's costs in the memorandum. Doc. 85. The memorandum asks the Court to deny Johnson Storage's Bill of Costs and claims that Johnson Storage did not present sufficient evidence that the costs were necessarily incurred. Doc. 85. The Court awarded costs to Johnson Storage because it disagreed with Jacobs's assessment. Doc. 90. Thus, the court record and Jacobs's own admissions belie her claim that Halquist did not act in her best interest after the Court's summary judgment order.

III. Conclusion

Jacobs fails to present evidence of "exceptional circumstances" that would justify granting her relief under Rule 60(b). Accordingly, the Court denies Jacobs's Motion for Relief of Judgment [95]. The Court also denies Jacobs's Motion for a Subpoena [98] and Motion for Relief from Defendant's Bill of Costs [103]. The Court denies Jacobs's Motion for Indicative Ruling [95] as moot; Jacobs's case is no longer on appeal, so the Court has jurisdiction to consider Jacobs's motion for relief of judgment. *See* Fed. R. Civ. P. 62.1.

Jacobs filed a Motion for Order to Enter Evidence with the Eighth Circuit on July 7, 2020, but the Circuit Clerk transferred the motion to the District Court. The Court construes Jacobs's motion [99] as an additional motion for relief from judgment under Rule 60(b). Because the motion raises the very same issues as her Motion for Relief from Judgment [95], the Court denies the motion [99] for the same reasons.

Jacobs attempted to file a Motion to Vacate Order Denying Rehearing with the Eighth Circuit on January 4, 2021, but the Circuit Clerk dismissed the motion as successive under Eighth Circuit Local Rule 40A(c). Jacobs filed the same motion with the District Court, which docketed it as a pending motion before the Court. Doc. 96. As the Eighth Circuit has already

disposed of the motion, the Court directs the Clerk of Court to terminate the motion [96] on the docket.

Finally, the Court observes that Jacobs has filed four motions with the Court in the short time since her unsuccessful appeal and petition for rehearing. Doc. 95, 96, 98, 103. The Court acknowledges Jacobs's pro se status but cautions Jacobs against filing any additional post-judgment motions in an attempt to advance previously-filed motions or claims for relief. Should Jacobs continue litigating this closed matter, the Court may interpret her actions as an attempt to abuse the judicial process and waste judicial resources.

So Ordered this 3rd day of March, 2021.

SLR. CR

STEPHEN R. CLARK
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1545

Katherine Jacobs

Plaintiff - Appellant

v.

Johnson Storage & Moving Co. Holdings, LLC

Defendant - Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:18-cv-00024-SRC)

JUDGMENT

Before ERICKSON, WOLLMAN, and STRAS, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

November 12, 2020

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

C.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1545

Katherine Jacobs

Appellant

v.

Johnson Storage & Moving Co. Holdings, LLC

Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:18-cv-00024-SRC)

ORDER

The petition for rehearing by the panel is denied.

December 18, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

D.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1545

Katherine Jacobs

Appellant

v.

Johnson Storage & Moving Co. Holdings, LLC

Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:18-cv-00024-SRC)

ORDER

Katherine Jacobs's motion for relief of judgment and request to supplement her appeal has been construed as a motion to reopen the appeal and to supplement the appeal. The court has considered the requests and the motion to reopen and to supplement the appeal is denied.

March 19, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

E.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 20-1545

KATHERINE JACOBS,

Plaintiff/Appellant/Pro Se,

v.

JOHNSON STORAGE & MOVING CO. HOLDINGS, LLC

Defendant/Appellee.

DEFENDANT JOHNSON STORAGE & MOVING CO. HOLDINGS LLC'S CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Eighth Circuit Local Rule 26.1A, Defendant Johnson Storage & Moving Co. Holdings, LLC files its Corporate Disclosure Statement as follows:

1. Johnson Storage & Moving Co. Holdings, LLC, is a limited liability corporation and has no parent corporation.

2. No publicly held corporation owns more than 10% of Johnson Storage & Moving Co. Holdings, LLC.

F.

Respectfully submitted,

/s/Patricia J. Martin

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on the 8th day of May, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF system. I also e-mailed the foregoing document to: Katherine Jacobs, Plaintiff/Appellant/Pro Se at jacobsfamily40@gmail.com.

/s/ Patricia J. Martin

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1545

Katherine Jacobs

Appellant

v.

Johnson Storage & Moving Co. Holdings, LLC

Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:18-cv-00024-SRC)

ORDER

Appellant's motion to stay/recall the mandate is denied.

January 20, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

G.

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