United States Court of Appeals
For the Eighth Circuit

No. 20-1769

Lisa Truong

Plaintiff - Appellant

v.

UTC Aerospace Systems

Defendant - Appellee

Appeal from United States District Court
for the District of Minnesota

Submitted: December 14, 2020
Filed: December 17, 2020
[Unpublished]

Before GRUENDER, ERICKSON, and GRASZ Circuit Judges.

PER CURIAM.

Lisa Truong appeals the district court's[1] adverse grant of summary judgment. After careful review of the record and the parties' arguments on appeal, we find no

[1]The Honorable Patrick J. Schiltz, United States District Judge for the District of Minnesota, adopting the report and recommendations of the Honorable Becky R. Thorson, United States Magistrate Judge for the District of Minnesota.

basis for reversal. See Banks v. John Deere & Co., 829 F.3d 661, 665 (8th Cir. 2016) (standard of review). Accordingly, we affirm. See 8th Cir. R. 47B.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1769

Lisa Truong

Plaintiff - Appellant

v.

UTC Aerospace Systems

Defendant - Appellee

Appeal from U.S. District Court for the District of Minnesota
(0:18-cv-00941-PJS)

JUDGMENT

Before GRUENDER, ERICKSON, and GRASZ, 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.

December 17, 2020

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

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1769

Lisa Truong

Appellant

v.

UTC Aerospace Systems

Appellee

Appeal from U.S. District Court for the District of Minnesota
(0:18-cv-00941-PJS)

ORDER

The petition for rehearing by the panel 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

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

LISA TRUONG, Case No. 18-CV-0941 (PJS/BRT)

Plaintiff,

v. ORDER

UTC AEROSPACE SYSTEMS,

Defendant.

Lisa Truong, pro se.

Julia H. Pozo, Allyson L. Johnson, and Kyle A. Petersen, SEYFARTH SHAW LLP, for defendant.

Plaintiff Lisa Truong brings this action against her current employer, Collins Aerospace ("Collins"),[1] alleging discrimination and harassment on the basis of her race and national origin.[2] This matter is before the Court on Truong's objection to the January 27, 2020 Report and Recommendation ("R&R") of Magistrate Judge Becky R. Thorson. ECF No. 55. Judge Thorson recommends granting Collins's motion for summary judgment and denying Truong's cross-motion for summary judgment. The

[1]When Truong joined the company in September 2014, defendant Rosemount Aerospace, Inc. was operating under the brand name "UTC Aerospace Systems." Defendant is now operating under the brand name "Collins Aerospace." *See* ECF No. 39-1 at 2.

[2]Although not pleaded in her complaint, Truong's subsequent filings suggest that she also means to assert a retaliation claim and a claim under Minnesota's Whistleblower Act, Minn. Stat. § 181.932. *See* ECF No. 8 at 1; ECF No. 43 at 2.

Court has conducted a de novo review. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Based on that review, the Court overrules Truong's objection and adopts Judge Thorson's careful and thorough R&R.

Truong does not specifically object to any of Judge Thorson's factual findings or legal conclusions. Instead, Truong recites a litany of grievances against her employer—grievances that, as Judge Thorson explains, do not rise to the level of actionable claims under Title VII. Among other things, Truong's objection reiterates that: (1) she was placed on a performance improvement plan in 2016 and some of the feedback that she received in connection with the plan was embarrassing and upsetting;[3] (2) she has had numerous meetings with Collins's human resources ("HR") department; (3) she received a written warning in 2018 related to her alleged misuse of sick time; and (4) she was suspended with pay for more than a month. ECF No. 56 at 1-3. Judge Thorson carefully analyzed each of these grievances (and many others) in recommending dismissal of Truong's discrimination and harassment claims, and the Court adopts Judge Thorson's analysis in its entirety.

As Judge Thorson explains, Truong's discrimination claim fails for several reasons, including the fact that she has not suffered an adverse employment action. *See Grant v. City of Blytheville*, 841 F.3d 767, 773 (8th Cir. 2016) (to establish prima facie case

[3]Collins discontinued the plan on March 13, 2017, based on Truong's improved performance. ECF No. 39-3 at 3; ECF No. 39-1 at 60.

of discrimination plaintiff must show, *inter alia*, that he suffered an adverse employment action). Truong has been employed as a product inspector at Collins since 2014, and remains so employed today. *See* ECF No. 39-1 at 25-26, 74. Throughout her tenure with the company, Truong's job title has not changed, her work schedule has not fluctuated, and her pay has increased every year. ECF No. 39-1 at 27, 29; ECF No. 44-6 at 46-64. *See Jones v. City of St. Louis*, 825 F.3d 476, 480 (8th Cir. 2016) ("'An adverse employment action is defined as a tangible change in working conditions that produces a material employment disadvantage, including but not limited to, termination, cuts in pay or benefits, and changes that affect an employee's future career prospects, as well as circumstances amounting to a constructive discharge.'" (quoting *Jackman v. Fifth Judicial Dist. Dep't of Corr. Servs.*, 728 F.3d 800, 804-05 (8th Cir. 2013)); *see also Powell v. Yellow Book USA, Inc.*, 445 F.3d 1074, 1079 (8th Cir. 2006) ("We have held that formal criticisms or reprimands that do not lead to a change in compensation, responsibilities, or other benefits do not constitute an adverse employment action under Title VII." (citing *Spears v. Mo. Dep't of Corr. & Human Res.*, 210 F.3d 850, 854 (8th Cir. 2000) (en banc))); *Givens v. Cingular Wireless*, 396 F.3d 998, 998 (8th Cir. 2005) ("[P]lacing Givens on a 'performance improvement plan,' without more, did not constitute an adverse employment action." (citation omitted)); *Singletary v. Mo. Dep't of Corr.*, 423 F.3d 886, 891-92 (8th Cir. 2005) (plaintiff did not suffer an adverse employment action by being placed on paid

administrative leave). On the record before it, the Court cannot find that Truong has suffered an adverse employment action, and as a result, her discrimination claim necessarily fails. (The Court also agrees with Judge Thorson that Truong has failed to establish that any of the actions about which Truong complains were motivated by animosity to her race or nationality.)

Judge Thorson recommends dismissing Truong's harassment claim for failure to exhaust her administrative remedies, and Truong has not objected to this recommendation. *See* ECF No. 55 at 13. Even if Truong's harassment claim had been exhausted, the Court would dismiss it on the merits. Harassment is not actionable under Title VII unless the harassment is "'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Paskert v. Kemna-ASA Auto Plaza, Inc.*, ___ F.3d ___, No. 18-3623, 2020 WL 727740, at *2 (8th Cir. Feb. 13, 2020) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). Even if Truong had established that any of the alleged harassment of which she complains was motivated by Truong's race or national origin—and she has not—none of that alleged harassment comes close to clearing the "high bar" of severity necessary to establish a Title VII violation. *See id.* ("[O]ur Eighth Circuit precedent sets a high bar for conduct to be sufficiently severe or pervasive in order to trigger a Title VII violation. . . . [S]ome conduct well beyond the bounds of respectful and appropriate behavior is

nonetheless insufficient to violate Title VII." (citing *McMiller v. Metro*, 738 F.3d 185, 188 (8th Cir. 2013)).

Finally, in her objection to the R&R, Truong asserts that between 2016 and 2018, her manager repeatedly brought her to the HR department after she refused to certify that certain products that she had inspected met customer specifications. ECF No. 56 at 3. Conscious of its duty to liberally construe pro se filings, the Court interprets Truong's assertions as an attempt to revive her whistleblower claim under Minn. Stat. § 181.932. As Judge Thorson explains, however, Truong's whistleblower claim is not properly before the Court because it was not included in Truong's initial complaint, and because Truong never formally amended her complaint to add the claim.[4] ECF No. 55 at 15-16. Even if it had been included in her complaint, Truong's whistleblower claim would fail on the merits. To establish a violation of Minn. Stat. § 181.932, Truong must show, among other things, "that [she] engaged in statutorily protected conduct—in other words, that [she] reported a violation (or suspected violation) of the law." *Colenburg v. STARCON Int'l, Inc.*, 656 F. Supp. 2d 947, 956 (D. Minn. 2009), *aff'd* 619 F.3d 986 (8th Cir. 2010). Truong has not alleged that she reported any actual or suspected violation of federal or state law; instead, she says that Collins "failed

[4]Truong did, however, write a letter to the Court attempting to add this claim, as well as a claim for retaliation. *See* ECF No. 8.

ethically." ECF No. 56 at 3. Truong has therefore not raised a viable whistleblower claim.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, the Court OVERRULES Truong's objection [ECF No. 56] and ADOPTS the January 27, 2020 R&R [ECF No. 55]. IT IS HEREBY ORDERED THAT:

1. Defendant's motion for summary judgment [ECF No. 36] is GRANTED.
   a. Plaintiff's claims under the Minnesota Human Rights Act are DISMISSED WITH PREJUDICE AND ON THE MERITS.
   b. Plaintiff's Title VII discrimination claims—except for claims related to Truong's 2018 suspension and Collins's failure to promote Truong in 2019—are DISMISSED WITH PREJUDICE AND ON THE MERITS.
   c. Plaintiff's remaining claims are DISMISSED WITHOUT PREJUDICE.
2. Plaintiff's cross-motion for summary judgment [ECF No. 42] is DENIED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 11, 2020

s/Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Lisa Truong,

Plaintiff,

v.

UTC Aerospace Systems,

Defendant.

Civ. No. 18-941 (PJS/BRT)

REPORT AND RECOMMENDATION

Lisa Truong, 6232 Vincent Avenue South, Richfield, MN 55423, *pro se* Plaintiff.

Allyson L. Johnson, Esq., Julia H. Pozo, Esq., and Kyle A. Petersen, Esq., Seyfarth Shaw, LLP, counsel for Defendant.

This matter comes before the Court on Defendant's Motion for Summary Judgment. (Doc. No. 36, Def.'s Mot. for Summ. J.). Plaintiff, Lisa Truong, who is proceeding *pro se*, has filed a Cross-Motion for Summary Judgment.[1] (Doc. No. 42, Pl.'s Mot. for Summ. J.) After a hearing on the motions, and for the reasons that follow, this Court recommends that Defendant's motion be granted, and Plaintiff's motion be denied.

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[1] Defendant argues in a supplemental memorandum that because Truong failed to respond to its Motion for Summary Judgment, this Court should conclude that it "is uncontroverted and should [therefore] be granted." (Doc. No. 51, Def.'s Second Mem. 2 (citing cases).) This Court, however, construes Truong's submission at Doc. No. 42 as a response to Collins's Motion for Summary Judgment as well as a Cross-Motion for the same.

I. Introduction

On April 5, 2018, Plaintiff Lisa Truong ("Truong") filed a Complaint against her employer, Collins Aerospace ("Collins")[2] alleging violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* ("Title VII") and the Minnesota Human Rights Act, Minn. Stat. § 363A *et seq.* ("MHRA"). (*See* Doc. No. 1, Compl.; Doc. No. 8, Pl.'s Suppl.) Specifically, Truong alleges that Collins discriminated against and harassed her on the basis of both her race and national origin. (Compl. 3–4, 6–7.) Truong alleges that the discrimination and harassment began in November 2015 and is ongoing.[3] (Pl.'s Suppl. 1) She has also made a claim under the Minnesota Whistleblowers' Act, Minn. Stat. § 181.932. (*Id.*) Truong seeks in excess of $250,000 in damages. (Compl. 8.) Collins denies all of Truong's allegations. (*See* Doc. No. 4, Answer.)

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[2] In September 2014—when Truong joined the company—Collins still operated under the brand name "UTC Aerospace Systems," but it has since changed its brand name to Collins. (*See* Def.'s Mot. for Summ. J. 1, 2–3.)

[3] Truong's Complaint lists the date as August 2015, but in her "Supplement" she corrected the date to November 2015. (Pl.'s Suppl. 1.) The first incident she complains of, however, occurred in August 2015 (Compl. 6), and Truong's subsequent submissions do not resolve the conflict between these dates.

II. Facts

A. Plaintiff's Work History at Collins

Truong joined Collins as an Inspector I[4] in September 2014. (Doc. No. 39-1, Truong Dep. 24:7–9; Doc. No. 39-1, Offer Letter.) Rick Knutson hired her for the position, and Truong states that she believes that Knutson was aware that she was Vietnamese at the time of hiring. (Truong Dep. 47:23–48:10.) During her time with Collins, Truong has had three supervisors: David Navandy ("Navandy"), Rick Knutson ("Knutson"), and her current supervisor, Marty Smith ("Smith"). (*Id.* at 48:11–51:6.)

Pursuant to Truong's Complaint, the first incident occurred in August 2015 when Inspection Team Group Leader Deb Sund ("Sund") yelled at Truong. (Compl. 6) Truong had noticed something on Sund's product line that did not "me[e]t the customer blueprint," and she brought it to Sund's attention. (Truong Dep. 111:5–20.) In response, Truong alleges that Sund yelled at her, and subsequently bullied her and watched her work. (*Id.* at 113:2–8, 114:10–12.)

In November 2015, Truong reported to Collins's human resources department that she felt "picked on" by her superiors concerning her work performance. (Doc. No. 39-1, Kurtz Decl. ¶ 2.) Kimberly Kurtz ("Kurtz")—then a Human Resources Generalist—investigated the matter. (*Id.* ¶¶ 1–2.) Kurtz reports that she "found no evidence" substantiating Truong's claims; instead, Kurtz's investigation led her to conclude that

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[4] An Inspector I is responsible for ensuring that products are dispatched to customers pursuant to the customers' specifications. (Doc. No. 39-1, Truong Dep. 81:16–20; Doc. No. 39-1, Decl. of Courtney Schnaus ¶ 8.)

Truong "had difficulty taking constructive criticism and accepting and following directions." (*Id.* ¶ 3.) Truong disagreed with Kurtz's findings at the time. (*Id.*)

Truong was given a "Plan of Action – Reset of job expectations – Move to PL52, Space" ("Plan of Action") by Knutson and Kurtz on January 14, 2016. (*See* Truong Dep. 97:6–12, 151:4–15; Doc. No. 39-2, 1/14/16 Plan of Action 22–25.) That document informed Truong that she had "not demonstrated proficiency with some of the fundamental skills required for [her] position and as a result [she was] being transitioned to a different product line." (*Id.* at 22.) The Plan of Action discussed "areas for improvement" and the expectations for Truong's new role. (*Id.* at 22–23.) A handwritten note on the Plan of Action states that Knutson planned to meet with Truong "every couple of weeks" to monitor her training for and performance in the new position. (*Id.* at 23.)

Truong, however, did not feel that her issues had been resolved, and she e-mailed Human Resources Manager Heather Paur ("Paur") on February 11, 2016, asking to discuss company policy with her. (Doc. No. 39-3, 3/21/16 E-mail Chain 34–35.) It appears from Truong's deposition that she sought Paur out to discuss Kurtz and Knutson's treatment of her and the Plan of Action she had been given. (*See* Truong Dep. 92:4-95:8.) Truong stated that when she subsequently met with Paur, Truong never raised the issue of discrimination due to her race or national origin; Truong further stated that she was having a personality conflict with Kurtz and Knutson. (*Id.* at 93:19-94:9.) Paur told Truong that she believed Kurtz and Knutson were following policy and were authorized to issue Truong the Plan of Action. (*Id.* at 94:10–18.) Paur restated this in a

subsequent e-mail, writing that she "approve[d] of the way that [Kurtz and Knutson] are moving forward . . . . They have completed all of the follow-up actions I asked them to do," and instructing Truong to address any further concerns she might have to Kurtz and Knutson "directly." (3/21/16 E-mail Chain 34.) In that e-mail, Paur also informed Truong that if she felt she was "not getting answers," she could contact the ombudsman confidentially. (*Id.*)

On March 17, 2016, Truong received performance feedback related to her Plan of Action from Group Lead Sylvia Pieper ("Pieper"). (Doc. No. 39-3, Pieper Feedback 44.) Among other concerns, Pieper remarked that Truong "still needs to be told to help her fellow inspectors when she's slow in our department. She doesn't seek them out, likes to say [sic] and talk to the girls in her language." (*Id.*) On April 14, 2016, Truong e-mailed Kurtz and Knutson memorializing a meeting held the day before. (Doc. No. 39-3, 4/14/2016 E-mail Chain 36.) That e-mail states that Truong refused to sign an updated Plan of Action because of alleged discrimination by Pieper. Specifically, Truong cites as examples of discrimination Pieper's statements that Truong (1) was not qualified to inspect Pieper's product, (2) could not read a blueprint, and (3) spoke to other workers in Vietnamese. (*Id.*)

Kurtz and Knutson investigated Truong's complaints, "but found no evidence of unfair treatment." (Kurtz Decl. ¶ 5.) Instead, they determined that Truong "received legitimate feedback regarding her work performance that had nothing to do with her race or national origin." (*Id.*) Concerning Pieper's comment about Truong speaking Vietnamese to other employees, Kurtz represents that this was related to the fact that

Truong "was observed talking a lot at work and, by doing so, she could distract other employees that needed to complete their work." (*Id.*) Kurtz did, however, meet with Pieper about Truong's concerns, discussing company "EEO, discrimination, harassment, and retaliation policies." (*Id.* at ¶ 6.) Kurtz and Truong also met to discuss the matter. (*Id.*; Doc. No. 39-3, 4/25/16 E-mail Chain 37.)

On October 28, 2016, Truong was given a new Plan of Action, and transferred to another product line. (Doc. No. 39-2, 10/28/2016 Plan of Action 27–29; Truong Dep. 160:10–18.) Truong began reporting to Chan Yang, and meeting with Kurtz and Knutson bi-weekly to monitor her performance. (Truong Dep. 153:24–154:4, 154:15–22.) Truong's pay and title remained the same and she reports viewing the transfer as a positive change. (Truong Dep. 177:18–178:4.) On March 1, 2017—in light of improved performance on Truong's part—Knutson took Truong off of her Plan of Action. (Truong Dep. 163:2–9.)

On June 13, 2017, however, Truong filed a new complaint with Collins's Human Resources Department, alleging a lack of professionalism in the Human Resources Department and among other individuals. (Doc. No. 39-2, 6/13/17 Letter 1; Truong Dep. 151:2–15.) Truong alleged that the individuals in question had been dishonest, unfair, and disrespectful to her. (6/13/17 Letter 1.) Truong subsequently met with the then-Director of Human Resources, Sarah Siddiqui, to discuss her complaint. (Truong Dep. 178:5–21; Doc. No. 48-2, Schanus Decl. ¶ 10.) Truong's next encounter with Human Resources came in September 2017 when she and Knutson disagreed as to whether a product label met customer specifications. (Truong Dep. 37:14–21, 79:6–12, 85:20–86:1; Doc No. 39-

4, 9/27/17 E-mail 2.) Knutson arranged a meeting with Truong and Senior Human Resources Generalist Courtney Schanus to discuss the issue, but no disciplinary action was taken. (Truong Dep. 80:13–18; Schanus Decl. ¶ 1; Doc. No. 39-4, 9/22/17 E-mail 1.)

Approximately ten months later, on July 3, 2018, Truong received a written warning for missing over forty hours of work unexcused. (Truong Dep. 53:6–19; Doc. No. 39-4, 7/3/18 Warning 6.) The events leading up to this involved Truong's request to take June 28, 2018, off of work. (Truong Dep. 53:20–54:20.) That request was denied by Knutson, and Truong subsequently called in sick on the day she had requested off. (Truong Dep. 53:20–56:17.) The written warning issued to Truong stated that she had demonstrated a pattern of calling in sick on days previously requested as vacation time but denied by her supervisor. (7/3/18 Warning 6.) Based on the record in this matter, this was the only written warning Truong ever received.

After receiving the written warning, Truong sent an e-mail to her supervisor and individuals in Human Resources stating that she was unwell, could not focus on her work, and was not responsible for any future problems at work because Knutson was labeling her sick days as unexcused absences. (Truong Dep. 62:18–63:11; Doc. No. 39–4, 7/11/18 E-mail 9.) In response, Schanus placed Truong on paid leave for over a month, from July 12, 2018 until August 20, 2018. (Schanus Decl. ¶ 11; Truong. Dep. 64:20–65:8, 185:10–12.)

Truong and Knutson had another disagreement in November 2018, once again concerning customer specifications. (Truong Dep. 75:5-15, 76:24–77:6, 77:16–18; Doc. No. 39-4, 11/15/18 E-mail 12–13.) Truong faced no disciplinary action as a result of this.

(Truong Dep. 79:24–80:9.) Then, in January 2019, Truong refused to sign her performance review because she believed Knutson lied therein when he said that she left her workstation, spoke with other employees, and was not productive. (Truong Dep. 130:11–22.)

Undeterred by her ongoing disputes with management, Truong applied for a "group leader" position in 2019. (Truong Dep. 31:24–32:17.) Collins instead hired a another candidate—also of Asian descent—for the position. (Truong Dep. 32:21–33:12.) Truong received a 1.6% raise in 2016, a 1.55% raise in 2017, a 2.1% raise in 2018, and a 1.9% raise in 2019. (Truong Dep. 133:15–21.)

B. Procedural History

Truong filed a Charge of Discrimination with the Minnesota Department of Human Rights ("MDHR") on July 18, 2016, alleging discrimination based on race and national origin. (Truong Dep. 179:24–180:7; Doc. No. 8-1, Charge of Discrimination 22–23.) The MDHR completed its investigation on July 31, 2017, and issued a determination of no probable cause. (Schanus Decl. ¶ 13; Doc. No. 48-2, MDHR Determination 16.) Truong appealed, and the MDHR affirmed. (MDHR Determination 18.) On January 2, 2018, the Equal Employment Opportunity Commission ("EEOC") adopted the findings of the MDHR in Truong's case and issued a dismissal and notice of rights. (Doc. No. 8-1, EEOC Determination 2.)

On April 5, 2018, Truong filed suit against Collins alleging race and national origin discrimination and harassment under Title VII. (*See* Compl.) Truong's Complaint

also invokes the Minnesota Human Rights Act. (*Id.* at 6.) Plaintiff describes the following events to support her claims:

- The August 2015 incident where Sund allegedly yelled at Truong, threatened her, and told Truong not to touch Sund's product line (Compl. 6; Truong Dep. 111:5–20);
- Sund favored Truong's coworker, Mary Chung, with respect to overtime (Compl. 6; Truong Dep. 158:16–24);
- Sund yelled at and watched Truong at work (Truong Dep. 112:22-113:18.);
- In November 2015, an unidentified employee (Truong refers to this person as "the defendant") accused Truong of being stubborn (Compl. 6.);
- Starting in November 2015, Knutson periodically disagreed with Truong over product specifications (Truong Dep. 36:22–37:21, 40:23–41:9.);
- In January 2016, Knutson and Kurtz placed Truong on a Plan of Action, and Kurtz failed to consider Truong's views (Truong Dep. 35:20–36:7, 95:9–18; Compl. 6);
- Paur "pick[ed] sides" and did not take time to look at the policy issues Truong raised (Truong Dep. 91:18–92:17);
- Pieper's March 2016 remark about Truong's use of Vietnamese at work (Truong Dep. 165:23–25; Compl. 6);
- In September 2017 and November 2018, Knutson had disagreements with Truong and discussed the issue with Human Resources (Truong Dep. 36:20–37:11, 80:13–18, 89:5–8);
- Knutson's July 2018 decision to allow Truong four hours of vacation instead of a week, and the subsequent issuance of a written warning for missing over forty hours of time away from work without an excuse (Truong Dep. 52:7–24);
- Truong's placement on a paid leave of absence in July 2018 (Truong Dep. 68:11–18, 72:5–9);
- Truong's allegedly low salary increases in 2017 and 2018 (Compl. 6);

- Truong's 2018 performance review, which she alleges contained false and negative comments (Truong Dep. 130:7–131:5, 138:13–15); and
- Collins's decision not to hire Truong for a group lead position she applied for in 2019. (Truong Dep. 31:24–32:17, 119:14–17.)

Additionally, Truong seeks to pursue a harassment claim related to her September 2017 and November 2018 product disagreements with Knutson, and his decision to take up those disagreements with Collins's Human Resources Department. (Compl. 4; Truong Dep. 138:21–139:9.) Truong further alleges that Schanus harassed her when she "r[a]n behind" Truong's back and told Truong to calm down when she was upset. (Truong Dep. 139:10–18.)

Finally, it appears Truong may be alleging retaliation and whistleblower protection related to the following events: Knutson's decision to give Truong an allegedly unfair review in 2018, the fact that Knutson "pick[ed] on" Truong, and Collins's decision not to hire her for a group leader position. (Truong Dep. 31:15–21, 32:8–17, 119:24–120:20, 130:23–131:5, 137:2–4.) Plaintiff believes that she is a "whistleblower" because her superiors forced her to ship product even though she told them it did not meet customer specifications. (Truong Dep. 140:5–11.)

III. Analysis

Defendant Collins argues that summary judgment is appropriate in this matter because (1) most of Truong's claims are procedurally barred; and (2) those claims that are not procedurally deficient fail as a matter of law. (*See generally*, Def.'s Mem. 16–27.) In her motion and its supporting memorandum, Truong makes no legal arguments, but instead restates allegations from her Complaint and cites facts she believes support those

allegations. (*See* Doc. Nos. 42, 43.) For the reasons that follow, this Court recommends that Collins's Motion for Summary Judgment be granted, and Truong's Motion for Summary Judgment be denied.

A. Standard of Review

Summary judgment is appropriate if the evidence in the record, when viewed in the light most favorable to the nonmoving party, shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Thomas v. Heartland Emp't Servs., LLC*, 797 F.3d 527, 529 (8th Cir. 2015). The moving party bears the initial burden of informing the court of the basis for its motion and identifying "those portions of the record which it believes demonstrate the absence of a genuine issue of material fact." *Jackson v. United Parcel Serv., Inc.*, 643 F.3d 1081, 1085 (8th Cir. 2011). If the moving party does so, the nonmoving party "may not . . . rest on mere allegations or denials," but must point to evidence "of specific facts which create a genuine issue of material fact." *Krenik v. Cty. of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995). The mere existence of a factual dispute will not defeat a motion for summary judgment unless that dispute is "genuine," meaning that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In deciding a summary-judgment motion, a court need not accept a nonmoving party's unsupported allegations, *see Reed v. City of St. Charles, Mo.*, 561 F.3d 788, 790–91 (8th Cir. 2009), conclusory statements, *see Heisler v. Metro. Council*, 339 F.3d 622, 628 (8th Cir. 2003), or other statements that are "blatantly contradicted by the record,"

such that "no reasonable jury could believe" them. *Edwards v. Byrd*, 750 F.3d 728, 733 (8th Cir. 2014); *see also Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").

B. Truong's MHRA Claims are Barred by the Statute of Limitations

The MHRA allows that a private party may bring a civil action "within 45 days after receipt of notice that the commissioner has reaffirmed a determination of no probable cause if the charging party requested a reconsideration of the no probable cause determination, or has decided not to reopen a dismissed case that the charging party has asked to be reopened." Minn. Stat. § 363A.33, subd. 1(2).

Here, the MDHR notified Plaintiff on September 29, 2017, that it was affirming its decision of no probable cause and informed her that she had forty-five days within which to file a civil action. (Doc. No. 48-2, MDHR Appeal Decision 15.) While Rule 3 of the Federal Rules of Civil Procedure states that an action is commenced upon the filing of a complaint, Minnesota's procedural rules state that an action is commenced upon service of process. *See* Minn. R. Civ. P. 3.01; *Metro. Fed. Bank of Iowa, F.S.B. v. W.R. Grace & Co.*, 999 F.2d 1257, 1261 (8th Cir. 1993). This Court need not determine which procedural rules apply, because Truong did not file her Complaint in this matter until April 5, 2018, and a summons was issued that same day. (*See* Compl.) Thus, at least 188 days had elapsed since the MDHR issued its affirmation of its decision, well in excess of the forty-five days allowed under the law. Truong failed to bring her claims under the

MHRA until after the forty-five-day limitations period had expired. As a result, this Court concludes that such claims are time-barred and should be dismissed.

C. Truong Did Not Administratively Exhaust Her Harassment Claim

It is well established that Title VII requires claimants to first exhaust their administrative remedies before filing a lawsuit in court. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). To exhaust one's administrative remedies, one must (1) timely file a charge of discrimination with the EEOC and (2) receive notice of one's right to sue. 42 U.S.C. § 2000e-5(f)(1). A plaintiff must exhaust her administrative remedies with regard to every incident of discrimination or retaliatory adverse employment decision she wishes to litigate. *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 851 (8th Cir. 2012) (citing *Morgan*, 536 U.S. at 114).

Here, Truong never presented her harassment claim to either the MDHR or the EEOC. (*See* MDHR Appeal Decision; Doc. No. 8, EEOC Dismissal 2.) From her deposition, it appears that Truong's harassment claim is related to her September 2017 and November 2018 disagreements with Knutson and his subsequent decision to involve human resources in the matter. (Truong Dep. 138:21–139:9.) Truong further believes that Schanus harassed her when she "r[a]n behind" Truong's back and told her to calm down when she was upset. (*Id.* at 139:10–18.) However, those allegations were not put before the EEOC (or the MDHR). This Court therefore concludes that Truong's harassment claim should be dismissed for failure to exhaust administrative remedies. *See Zellmer v. Koch*, No. CIV. 4-95-461, 1997 WL 405484, at *7 (D. Minn. Mar. 5, 1997) (holding that plaintiff's claims of hostile work environment and sexual harassment were insufficiently

like or related to her claims of sex discrimination and retaliation to be deemed within the scope of her lawsuit) (citing *Tart v. Hill Behan Lumber Co.*, 31 F.3d 668 (8th Cir. 1994)).

D. Truong Has Not Administratively Exhausted Title VII Claims that Post-Date Her MDHR/EEOC Charge

Truong filed her charge with the MDHR on July 18, 2016, the MDHR issued its no probable cause determination on July 31, 2017, and the EEOC adopted the MDHR's no probable cause determination on January 2, 2018. (*See* MDHR Appeal Decision; EEOC Dismissal.) The record in this matter does not indicate precisely when the charge was filed with the EEOC, though it would have had to have been following Truong's direct appeal at MDHR, which was decided on September 29, 2017.

Certain of Truong's discrimination allegations, however, reference acts that post-date those decisions. These include:

- Knutson's decision in July 2018 to allow Truong only four hours of vacation, and the written warning issued to Truong for missing over forty hours of time away from work without an excuse (Truong Dep. 52:7–24);
- Schanus's July 2018 decision to place Truong on a paid leave of absence (Truong Dep. 68:11–18, 72:5–9);
- Collins's decision not to hire Truong for a group leader position 2019 (Truong Dep. 31:24–32:17, 119:14–17).

Because these allegations concern events that post-date the MDHR and EEOC's decisions—and because each one constitutes a discrete employment action that is unrelated to the allegations contained in Truong's charge—it follows that they could not have been considered by those agencies when they made their determination of no probable cause in this matter. *Richter*, 686 F.3d at 851 (citing *Morgan*, 536 U.S. at 114);

Tademe v. Saint Cloud State Univ., 328 F.3d 982, 987 (8th Cir. 2003) (stating that "'[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire' are 'not actionable if time barred, even when they are related to acts alleged in timely filed charges.'") (quoting *Morgan*, 536 U.S. at 114.). If Truong wishes to litigate these actions, she must first exhaust her administrative remedies by filing a new charge with the EEOC that includes them before she is permitted to bring them here as claims under Title VII. This Court appreciates that Truong is not an attorney and is proceeding *pro se*, but the rules apply equally to *pro se* and represented litigants alike. *Ackra Direct Mktg. v. Fingerhut Corp.*, 86 F.3d 852, 856 (8th Cir. 1996) (stating that court rules and orders apply equally to *pro se* litigants). Accordingly, this Court concludes that Truong's claims relating to events that post-date the MDHR and EEOC's decisions in this matter should be dismissed for failure to exhaust administrative remedies.

E. Retaliation and Whistleblower Claims Have Not Been Properly Pleaded

Truong's statements throughout this litigation have at times implied that she wishes to pursue retaliation and whistleblowing claims against her employer. (*See* Doc. No. 8, Pl.'s Supp. 1; Truong Dep. 28:22–29:3.) This Court's Pretrial Scheduling Order required that Truong amend her Complaint by April 1, 2019. (Doc. No. 19, Pretrial Sched. Ord. 3.) Truong did not do so, and she has made no such request to date. Accordingly, this Court concludes that any retaliation or whistleblower claims Truong may have wished to pursue are not a part of this case and are therefore not before the Court. *See, e.g.*, *Seenyur v. Coolidge*, No. CV 14-4250 (WMW/BRT), 2016 WL

7971295, at *13 (D. Minn. July 21, 2016), *report and recommendation adopted*, No. 14-CV-4250 (WMW/BRT), 2016 WL 4467887 (D. Minn. Aug. 22, 2016) (discussing requirements for a motion to amend where party has failed to meet a scheduling order's deadline, and declining to consider claim at summary judgment that was not pleaded in Plaintiff's complaint).

F. Plaintiff's Title VII Race-Discrimination Claim Fails

In light of the analysis above, only a race discrimination claim based on the following allegations remains for the Court's consideration. Those allegations include that (1) Sund favored Mary Chung over Truong when awarding overtime (Truong Dep. 158:16–24; Compl. 6); (2) Sund yelled at and watched Truong at work (Truong Dep. 112:22–114:12); (3) an unidentified employee accused Truong of being stubborn (Compl. 6); (4) Knutson began a habit of periodically disagreeing with Truong in November 2015 that continued through November 2018 (Truong Dep. 36:20–37:11, 40:23–41:9, 80:13–18, 89:5–8; Compl. 6); (5) Truong was placed on a Plan of Action without having her views taken into account (Truong Dep. 35:20–36:7; 95:9–18; Compl. 6); (6) Paur took sides and did not consider policy issues raised by Truong in February 2016 (Truong Dep. 91:18–92:17); low salary increases in 2017 and 2018 (Compl. 6); (7) Knutson's remarks in Truong's January 2019 performance feedback[5] (Truong Dep. 130:7–131:5, 138:13–15;

[5] This incident certainly post-dates Truong's EEOC charge, but this Court concludes that it is sufficiently related to the conduct described in her charge to survive Defendant Collins's statute of limitations challenge. *See Parisi v. Boeing Co.*, 400 F.3d 583, 585 (8th Cir. 2005) (stating that plaintiffs may bring suit for additional allegations that are "like or reasonably related" to the employment-discrimination claim presented to the EEOC) (quotation omitted).

Doc. No. 39-4, Performance Feedback 15–20; and (8) Pieper's negative remark concerning Truong's use of her native language at work on March 17, 2016 (Truong Dep. 165:23–25; Compl. 6).

A plaintiff alleging discrimination on the base of race and national origin may survive a motion for summary judgment through direct evidence "indicating unlawful discrimination, that is, evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." *Fields v. Shelter Mut. Ins. Co.*, 520 F.3d 859, 863 (8th Cir. 2008). Where direct evidence is unavailable, a plaintiff "must [first] establish a prima facie case of discrimination." *Jackson v. United Parcel Serv., Inc.*, 643 F.3d 1081, 1086 (8th Cir. 2011). To do so, she must show that (1) she is a member of a protected class; (2) she met her employer's legitimate expectations; (3) she suffered an adverse employment action; and (4) similarly situated employees who are not members of the protected group were treated differently. *Gilmore v. AT&T*, 319 F.3d 1042, 1046 (8th Cir. 2003) (citing *Clark v. Runyon*, 218 F.3d 915, 918 (8th Cir. 2000)).

When a plaintiff establishes a prima facie case, the defendant "may rebut [it] by articulating a non-discriminatory rationale for its action. *Jackson*, 643 F.3d at 1086. If the defendant does so, the burden shifts back to the plaintiff to "prove that the defendant's proffered rationale was merely pretext for discrimination." *Id.* The plaintiff may prove pretext by "adducing enough admissible evidence to raise genuine doubt as to the legitimacy of [the defendant's] motive." *Anderson v. Durham D & M, L.L.C.*, 606 F.3d

513, 521 (8th Cir. 2010) (internal quotation marks and citation omitted). Here, there is no direct evidence of discrimination, thus this Court will analyze Truong's remaining claim under this burden-shifting framework.

As to the first prong, it is undisputed that Truong belongs to a protected class based on her race (Asian) and national origin (Vietnamese). But even if this Court assumes that she met her employer's legitimate expectations—an assumption Collins disputes—Truong still cannot show that most of the incidents she complains of resulted in an adverse employment action.

For example, Truong alleges that Sund yelled at and watched her at work, leading Truong to feel that she was being bullied. Truong also relates a specific incident from August 2015 in which Sund allegedly yelled at Truong and told her not to touch Sund's product line.[6] (Truong Dep. 111:5–20; Compl. 6.) But this alleged conduct, while unpleasant and unprofessional, does not rise to the level of an adverse employment action. An adverse employment action is defined as "a material employment disadvantage, such as a change in salary, benefits, or responsibilities." *Tademe v. Saint Cloud State Univ.*, 328 F.3d 982, 992 (8th Cir. 2003) (citing *Bradley v. Widnall*, 232 F.3d 626, 632 (8th Cir. 2000)). "Mere inconvenience without any decrease in title, salary, or benefits is insufficient to show an adverse employment action." *Cruzan v. Special Sch. Dist. # 1*, 294 F.3d 981, 984 (8th Cir. 2002). Truong has produced no evidence that Sund's alleged behavior materially affected her employment.

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[6] Collins argues that any claim related to the August 2015 conduct by Sund is untimely. (*See* Def.'s Mem. 17.) This Court does not address that question, instead resolving the matter on Truong's failure to show a prima facie case of discrimination.

The same logic applies to Truong's complaints that an unidentified person accused her of stubbornness, Knutson disagreed with her repeatedly, Knutson criticized her job performance in her January 2019 performance feedback, Paur took sides and refused to consider issues Truong raised, and that Kurtz failed to consider Truong's views regarding her January 2016 Plan of Action. In none of these cases has Truong even attempted to show that the events in question led to her material disadvantage. To the contrary, the record shows that Truong remains employed at Collins, has retained her position as Inspector, and been granted annual pay raises every year she has been with the company. (Truong Dep. 32:3–14, 45:1–9; 202:1–9.) Consequently, Truong cannot show that she suffered an adverse employment action. *Gilmore*, 319 F.3d at 1046 (citation omitted). Thus, this Court concludes that summary judgment in favor of Collins is appropriate as to these claims.[7]

Truong also complains of the salary increases she received in 2016 (1.6%), 2017 (1.55%), and 2018 (2.1%). (Compl. 6.; Doc. No. XX, Pl.'s Exs. 50–60.) She alleges that the average increase at Collins during those years was 3% and that her performance was "very strong." Truong, however, has asserted no further facts to support such a claim.

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[7] Even if this Court construed these allegations together as a hostile work environment claim instead of claims for discrimination based on race, that claim would still fail. To establish a prima facie case under the hostile work environment framework, Truong would still need to demonstrate, *inter alia*, that "a causal nexus exists between the harassment and the protected group status" and that "the harassment affected a term, condition, or privilege of employment." *Sallis v. University of Minn.*, 408 F.3d 470, 476 (8th Cir. 2005). Here, Truong has not demonstrated that any of these actions were motivated by her race or national origin, nor has she shown how they affected the material circumstances of her employment.

Even assuming that a modest annual increase in one's salary amounts to an adverse employment action, Truong has not demonstrated that other similarly situated employees who are not part of her protected class received higher annual raises.[8] Truong's subjective dissatisfaction with her annual salary increases is insufficient to make a prima facie showing of discrimination. Thus, this Court concludes that summary judgment in favor of Collins is appropriate as to this claim.

Finally, Truong alleges that Sund discriminated against her by showing favoritism to her coworker—Mary Chung—with regard to overtime. Assuming this *was* an adverse employment action, Truong cannot show that similarly situated employees who are *not* members of her protected class were treated differently. *Gilmore*, 319 F.3d at 1046 (citation omitted). To the contrary, Truong concedes that Mary Chung is—like herself—Asian and Vietnamese. (Truong Dep. 158:16–159:11; Compl. 6.) Truong does not cite any other examples of similarly situated comparators who were treated differently than she was. Because Mary Chung is both Asian and Vietnamese, Plaintiff has failed to establish that similarly situated comparators that are *not* members of her protected class were treated differently. Thus, this Court concludes that summary judgment in favor of Defendant is appropriate as to this claim.

For similar reasons, Truong's claim relating to Knutson and Kurtz's decision to put her on a Plan of Action fails. (*See* Compl. 6; Truong Dep. 35:20–36:7, 39:19–40:13;

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[8] While the record is lacking in any direct evidence on this point, the MDHR, in its decision on appeal, observed that its "investigator showed that [Truong] was paid more than any employee in her classification who was hired during the 12 months after she was hired, and she received consistent annual pay increases."

95:9–18.) This episode *also* involved Truong's transfer to a new product line, but such a transfer does not qualify as an adverse employment action when it does not affect the employee's title, pay, hours, or any other material conditions of employment. *See Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (stating that "[c]hanges in duties or working conditions that cause no materially significant disadvantage . . . are insufficient to establish the adverse conduct required to make a prima facie case," and holding a secretary's reassignment to a new position with no reduction in title, salary, or benefits, did not constitute an adverse employment action); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 457 (7th Cir. 1994) (holding that a change in title and a "bruised ego" did not constitute an adverse employment action where pay, benefits, and responsibility remained the same). Moreover, this Court observes that Truong herself appears to concede that she was not placed on the Plan of Action due to her protected characteristics and regarded the transfer as a "positive change." (*See* Truong Dep. 109:25–110:23; 177:18–178:4.) Thus, this Court concludes that summary judgment in favor of Collins is appropriate as to this claim.

Truong's final—and perhaps most colorable—claim relates to Pieper's performance review remark that Plaintiff "still needs to be told to help her fellow inspectors when she's slow in our department. She doesn't seek them out, likes to say [sic] and talk to the girls in her language." (Compl. 6; Truong Dep. 165:23–25.) While Kurtz represents that this was related to the fact that Truong "was observed talking a lot at work and, by doing so, she could distract other employees that needed to complete their work," she did meet with Pieper about Truong's concerns, and in that meeting the

two discussed company "EEO, discrimination, harassment, and retaliation policies." (*Id.* ¶ 6.) However, the fact remains that in order to meet her burden of making a prima facie showing of discrimination, Truong must demonstrate that Pieper's remark resulted in an adverse employment action, and she has not done so. *Gilmore*, 319 F.3d at 1046 (citation omitted). From a review of the record, it appears that not only did Pieper's comment not result in an adverse employment action, but Pieper herself never criticized Truong again. Moreover, Pieper was required to meet with Human Resources to discuss Collins's policies concerning discrimination, harassment, and retaliation. Accordingly, this Court concludes that summary judgment in favor of Defendant is appropriate as to this final claim.

IV. Recommendation

Based on the files, records, and proceedings herein, **IT IS HEREBY RECOMMENDED** that:

1. Defendant's Motion for Summary Judgment **(Doc. No. 36)** be **GRANTED**;
2. Plaintiff's Motion for Summary Judgment **(Doc. No. 42)** be **DENIED**;
3. Plaintiff's Complaint **(Doc. No. 1)** be **DISMISSED**; and
4. Judgment be entered accordingly.

Date: January 27, 2020.

s/ Becky R. Thorson
BECKY R. THORSON
United States Magistrate Judge

NOTICE

Filing Objections: This Report and Recommendation is not an order or judgment of the District Court and is therefore not appealable directly to the Eighth Circuit Court of Appeals. Under Local Rule 72.2(b)(1), a party may file and serve specific written objections to this Report within **fourteen days**. A party may respond to those objections within **fourteen days** after service thereof. LR 72.2(b)(2). All objections and responses must comply with the word or line limits set forth in LR 72.2(c).

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