NOT RECOMMENDED FOR PUBLICATION

No. 20-2176

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SASHA TRIESTE MCGARITY, Plaintiff-Appellant, v. BIRMINGHAM PUBLIC SCHOOLS, dba West Maple Elementary – Bloomfield Hills, Defendant-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER

Before: SUTTON, Chief Judge; SILER and ROGERS, Circuit Judges.

Sasha McGarity, a pro se Michigan resident, appeals from the district court's grant of summary judgment in her employment-discrimination action filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

I

A

In August 2018, Birmingham Public Schools (BPS) hired McGarity to serve as a special education paraprofessional at West Maple Elementary School. McGarity was to be classified as a probationary employee for the first ninety days of her employment, from August 28 to January 22,

2019. During this probationary period, BPS had the "unconditional right to terminate" McGarity's employment without going through the grievance process included in the Paraprofessional Collective Bargaining Agreement. The Birmingham Association of Paraprofessionals is the union for the school district's paraprofessionals.

McGarity's job as a special education paraprofessional involved assisting students with special educational needs and their teachers so that the students received an education in the least restrictive environment and in accordance with their respective individualized education plans (IEP). Where possible, the special education students sometimes took classes in general education (GE) classrooms with other students. In those situations, paraprofessionals like McGarity worked with the students they were assigned to on a one-on-one basis. Special education students could also take classes in the learning resource center (LRC), a classroom specifically dedicated to serving them and staffed with its own teachers. Although paraprofessionals work with both GE and LRC teachers, the LRC teachers coordinate the work of the paraprofessionals by setting their schedules, assigning them their students, and providing special instructions based on each student's IEP requirements and current needs. Communication with teachers and students is an important part of a paraprofessional's job.

For the 2018-19 school year, the LRC teachers at West Maple were Claire Theys and Grace Weiss. McGarity was one of four paraprofessionals under their supervision. Except for McGarity, the other paraprofessionals had worked at West Maple for at least ten years. One of these veteran paraprofessionals was Julie Shimshock. Jason Pesamoska was West Maple's interim principal that school year. Theys, Weiss, Pesamoska, and the three other paraprofessionals, including Shimshock, are white, while McGarity is African American.

Although McGarity's tenure at West Maple began with initial promise, problems soon emerged between McGarity and her West Maple colleagues. According to the complaint, McGarity started to take issue in November with how Weiss and Theys interacted with certain students. The LRC teachers, in turn, allegedly started scrutinizing McGarity more closely than the three other paraprofessionals. In December, McGarity was scheduled to have a meeting with

Weiss and Theys. McGarity informed Weiss that she would be late to that meeting, prompting Weiss and Theys to inform Pesamoska. The next day, Pesamoska met with McGarity and asked her to reschedule the meeting with the LRC teachers. McGarity met with Weiss and Theys the next week. That meeting proved contentious, with Weiss allegedly telling McGarity "that she should put in her 2 weeks[']] notice and leave." The day after this contentious meeting, Pesamoska informed McGarity that she was under investigation and that she had two options, either transfer to another school or "stay and work things out with the teachers." McGarity eventually informed Pesamoska of her desire to stay at West Maple, but she also asked for a union representative at an upcoming meeting with Pesamoska. By then, McGarity also learned about a physical altercation involving Shimshock and a student that suggested to McGarity that "she was being treated differently from the Caucasian paraprofessionals."

On January 10, 2019, McGarity attended a meeting with Pesamoska; Grat Dalton, a union representative; Dean Niforos, a BPS human-resources official; and Laura Mahler, the school district's Interim Executive Director of Special Education. Pesamoska gave a negative assessment of McGarity's job performance, which McGarity disputed. Dalton informed McGarity that she would be dismissed, but he also said that Pesamoska would offer two weeks' pay and not oppose unemployment assistance if McGarity resigned. McGarity rejected the offer, and she was dismissed from her position on January 11. Niforos informed McGarity by email the next day that she was being dismissed for lack of communication with the LRC teachers and failure to meet job performance standards.

The record provides other details about what happened between McGarity and her colleagues at West Maple between August and January, some of which McGarity disputes. By October, according to the depositions and statements of others, McGarity had preferred to take her breaks and lunches by herself, either in a vacant classroom or in her car, which limited opportunities for her colleagues, including the LRC and GE teachers, to talk to her and keep everyone updated. McGarity also stopped visiting the LRC as a rift opened up between her and

the LRC teachers. Weiss and Theys asserted that McGarity was not communicating with the teachers who taught the students assigned to McGarity.

In November, Weiss and Theys raised concerns about McGarity's job performance to Pesamoska, primarily with respect to the loss of regular communication and McGarity's tendency to direct a particular student having trouble in GE classrooms to the LRC instead of trying to help that student adjust to the least restrictive environment. At Pesamoska's urging, Weiss and Theys met with McGarity to provide more specific guidance, and McGarity was assigned a different student in place of the student with whom Weiss and Theys took issue.

In his December meeting with McGarity, Pesamoska emphasized the importance of maintaining communication with the LRC teachers and other colleagues. Pesamoska began a separate investigation of McGarity's job performance, independent of Weiss's and Theys's involvement, by interviewing the other paraprofessionals, several GE teachers, and the school secretary. Notes from these interviews confirmed existing concerns about McGarity's job performance and her communicativeness with her colleagues.

In January, although McGarity wrote that she wanted to try working things out with the LRC teachers, she deliberately decided not to speak with them because she "was still very angry" with them. Indeed, McGarity e-mailed Robyn O'Keefe, the president of the Birmingham Association of Paraprofessionals, expressing her intention to file a grievance and requesting a meeting "in order to get this resolved as soon as possible." McGarity sent that e-mail shortly before the meeting where McGarity was informed of her dismissal. At some point after McGarity's dismissal, Amy Tomaselli, a white woman, took over as the new paraprofessional at West Maple.

B

A magistrate judge construed McGarity's complaint as raising claims of race discrimination, retaliation, and a hostile work environment under Title VII, and a claim under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 206. McGarity served the complaint and summons

on May 21, 2019. BPS filed an answer with the court on June 12, one day later than the permitted 21-day period. *See* Fed. R. Civ. P. 12(a)(1)(A)(i). McGarity filed multiple requests for a clerk's entry of default, which were denied. McGarity then moved for default judgment, which was denied by the district court, upon the recommendation of the magistrate judge and over McGarity's objection, on the basis that McGarity did not demonstrate how she was prejudiced by the one-day delay. The case proceeded to discovery.

In May 2020, before the close of a rather contentious discovery period, McGarity filed a motion for summary judgment. BPS filed its own motion for summary judgment in August. McGarity filed a response in opposition, and BPS filed a reply. In parallel with these motions, both parties filed motions for sanctions due to disputes over how discovery was conducted.

A magistrate judge filed a report recommending that BPS's summary-judgment motion be granted on all claims and that McGarity's be denied. The magistrate judge denied the motions for sanctions. McGarity then filed a motion for leave to amend her complaint, wanting to replace her putative claim under the FLSA with one under the National Labor Relations Act (NLRA) and adding the Birmingham Association of Paraprofessionals as an additional defendant to the proposed claim. McGarity also filed an objection to the report and recommendation.

The district court overruled the objection, adopted the report and recommendation, granted BPS's summary-judgment motion, denied McGarity's summary-judgment motion, and denied as futile and untimely McGarity's motion for leave to amend her complaint. Concluding that "plaintiff's objections are not sufficiently specific or substantive to constitute proper objections," the court declined to review them, but it did independently review the parties' summary-judgment motions. The district court found "that plaintiff's case is so lacking in factual or legal support as to be frivolous and sanctionable," but the court did not take further action since BPS did not object to the magistrate judge's order denying sanctions. McGarity filed a timely notice of appeal.

II

A

McGarity raises six issues on appeal. First, she challenges the district court's denials of default judgment in her favor. McGarity also appeals the district court's denial of the motion for leave to amend her complaint. The four remaining issues relate to the grant of summary judgment in favor of BPS. Each is addressed in the order addressed by the district court.

McGarity's brief contains exhibits intended to bolster her arguments on appeal, but the record on appeal, with very few exceptions, can only include "the original papers and exhibits filed in the district court." Fed. R. App. P. 10(a)(1); *see United States v. Murdock*, 398 F.3d 491, 500 (6th Cir. 2005). These exhibits cannot be taken into account at this late stage and have no bearing on this discussion.

B

We review the denial of default judgment for an abuse of discretion. *Shepard Claims Serv., Inc. v. William Darrah & Assoc.*, 796 F.2d 190, 193 (6th Cir. 1986). Default judgment is appropriate if "a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend" in the proceedings of the underlying action. Fed. R. Civ. P. 55(a). The movant must first obtain a clerk's entry of default against the defaulting party before the court or clerk may enter default judgment. Fed. R. Civ. P. 55(a)-(b). Because McGarity filed her first request for an entry of default on July 1, well after BPS filed its answer with the court on June 12, the clerk was under no obligation to enter a default against BPS. *See* Fed. R. Civ. P. 55(a). McGarity consequently had no basis to pursue a default judgment. *See Heard v. Caruso*, 351 F. App'x 1, 15-16 (6th Cir. 2009). The district court therefore did not abuse its discretion in denying the motion.

C

1

We review the district court's grant of summary judgment de novo. *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 903 (6th Cir. 2004). Summary judgment is appropriate if the movant can demonstrate that no genuine dispute of material fact exists and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The movant bears the initial burden of establishing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The district court must view the evidence in the light most favorable to the nonmoving party, who must present sufficient evidence such that a rational jury might find in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 256-57 (1986); *see also Rorrer v. City of Stow*, 743 F.3d 1025, 1038 (6th Cir. 2014).

McGarity argues that the district court erred in ruling on the summary-judgment motions by (1) excluding from its Title VII analysis certain employees that McGarity had identified in order to demonstrate disparate treatment; (2) failing to recognize that "declaration statements and deposition responses [favorable to BPS] are not genuine but merely deception" that erroneously justified the grant of summary judgment; (3) disposing of the retaliation claim for McGarity's failure to depose Mahler; and (4) assessing McGarity's claim that she faced a hostile work environment based on the frequency of hostile events or occurrences. McGarity's objection to the report and recommendation included numerous disagreements with the report's factual determinations, but it also included four arguments objecting to the report's legal analysis. The first two issues relate to the discrimination claim, while the third and fourth issues relate respectively to the retaliation and hostile-work-environment claims. Because McGarity makes no arguments with respect to her FLSA claim, we deem that claim forfeited. *See Geboy v. Brigano*, 489 F.3d 752, 767 (6th Cir. 2007).

In a case alleging employment discrimination based on circumstantial evidence, that is, where there is no direct evidence of discrimination, the *McDonnell Douglas* burden-shifting framework applies. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, the plaintiff must first establish a prima facie case of discrimination before the burden shifts to the employer to rebut that prima facie case; if the employer can identify legitimate and nondiscriminatory reasons for its actions, then the plaintiff must demonstrate that the reasons offered by the employer were a pretext for discrimination. *Id.* at 802; *Wheat v. Fifth Third Bank*, 785 F.3d 230, 237 (6th Cir. 2015).

Here, the parties do not dispute that McGarity established a prima facie case of discrimination because McGarity (1) is African American and therefore a member of a protected class; (2) was qualified for the job, having been appointed to her position as paraprofessional; (3) suffered an adverse employment decision, specifically dismissal from employment; and (4) was replaced by a person outside the protected class or treated differently from similarly situated non-protected employees, namely that Tomaselli took over McGarity's place as West Maple's fourth paraprofessional and her white colleagues were not dismissed. *See White v. Baxter Healthcare Corp.*, 533 F.3d 381, 391 (6th Cir. 2008). But BPS stated a legitimate and nondiscriminatory reason for dismissing McGarity, specifically that McGarity was inadequately communicating with the LRC teachers and did not meet her job performance standards. *See Cicero v. Borg-Warner Auto., Inc.*, 280 F.3d 579, 588 (6th Cir. 2002) (recognizing failure to satisfy performance expectations as a legitimate and nondiscriminatory reason for dismissal); *Martin v. Toledo Cardiology Consultants, Inc.*, 548 F.3d 405, 413 (6th Cir. 2008) (recognizing a personality conflict as a legitimate and nondiscriminatory reason for dismissal). McGarity thus had the burden to demonstrate that a genuine dispute of material fact exists over pretext.

McGarity argues that, in analyzing whether her evidence of disparate treatment demonstrated pretext, the district court improperly excluded from its analysis certain employees she had presented, specifically Theys, Shimshock, and Tomaselli. Because the Supreme Court has

rejected "'the premise that a plaintiff must always introduce additional, independent evidence of discrimination' beyond that presented in his or her prima facie case in order to prove pretext," the evidence establishing McGarity's prima facie case of disparate treatment can also establish pretext if it shows that BPS's stated reason for dismissing her (1) has no basis in fact, (2) did not actually motivate the dismissal, or (3) was insufficient to warrant dismissal. *Garrett v. Sw. Med. Clinic*, 631 F. App'x 351, 356 (6th Cir. 2015) (quoting *Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133, 149 (2000)); *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 858 (6th Cir. 2018). "Disparate treatment occurs when an employer treats some employees less favorably than others because of race, religion, sex, or the like." *Huguley v. Gen. Motors Corp.*, 52 F.3d 1364, 1370 (6th Cir. 1995). McGarity proposed Theys because, according to McGarity, Theys was the daughter of Mahler, Pesamoska wanted to impress Mahler in order to become principal on a permanent basis, and Mahler improperly participated in the decision to dismiss McGarity. McGarity has a problem, though, because Mahler had recommended her for the position at West Maple, so even if the evidence could fully substantiate these allegations, McGarity does not offer an explanation as to why Mahler would support her hiring, then on the basis of race support her dismissal. *See Garrett*, 631 F. App'x at 357. McGarity proposed Shimshock because Shimshock did not lose her position as paraprofessional after an incident involving a physically agitated student during the 2017-18 school year, but Shimshock, who had been hired in 2007, was permanently established as paraprofessional when the incident occurred, in contrast to McGarity's probationary status, and the issues surrounding a one-time physical confrontation contrast too sharply with an eventual deterioration of relations to consider Shimshock in this disparate-treatment argument. McGarity proposed Tomaselli because she eventually took over McGarity's position as Maple West's fourth paraprofessional, but the only information McGarity offers about Tomaselli is that she is white. The district court committed no error in not taking into account Theys, Shimshock, and Tomaselli as comparators offered in support of McGarity's pretext argument.

McGarity next argues that, in evaluating her pretext argument, the district court inappropriately took into account "facts that were not genuine and contained a host of unexplained

inconsistencies." Inconsistencies are inevitable when the record takes into account numerous documents and witness statements, but McGarity does not identify any blatant contradictions, only factual determinations made by the district court that she disagrees with.

3

A Title VII claim of retaliation arises if an employer takes adverse action against the plaintiff for either opposing an unlawful employment practice or participating in an investigation, proceeding, or hearing related to an unlawful employment practice. *See* 42 U.S.C. § 2000e-3(a). The *McDonnell Douglas* framework also governs retaliation claims. *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1066 (6th Cir. 2015). To establish a prima facie case, the plaintiff must demonstrate that (1) she engaged in an activity protected by Title VII, (2) the employer knew of the plaintiff's protected activity, (3) the employer subsequently took adverse action against her, and (4) a causal connection links the protected activity and the adverse action. *Taylor v. Geithner*, 703 F.3d 328, 336 (6th Cir. 2013).

In order to establish the causal connection, the plaintiff must demonstrate that her engagement in a "protected activity was a but-for cause of the alleged adverse action by the employer." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013); *New Breed Logistics*, 783 F.3d at 1066. Assigning but-for causation to the retaliation depends on whether the employer would have taken the same adverse action in the absence of the protected conduct. *See Gross v. FBL Fin. Servs.*, 557 U.S. 167, 176 (2009). An intervening event that provides the employer a "'legitimate reason' to take an adverse employment action" between the protected activity and the adverse action breaks the connection necessary for but-for causation. *Kuhn v. Washtenaw County*, 709 F.3d 612, 628 (6th Cir. 2013) (citation and quotation marks omitted).

McGarity argues that the district court improperly declined to identify a genuine dispute of material fact because she did not depose Mahler. Deposing Mahler was a contentious issue during discovery that led to motions for sanctions by both parties, but McGarity ultimately decided not to depose her despite being given that option. The district court identified two possible theories for

the retaliation claim, one involving retaliation by Pesamoska in response to McGarity's request for union representation at their eventual January meeting—by uninviting Weiss and Theys from the meeting and inviting instead Niforos and Mahler "with the sole intent of terminating McGarity's employment"—and the other involving retaliation by Mahler by "participating in a complaint process involving her daughter [Theys] . . . that could result in an EEOC charge." In light of McGarity's later motion for leave to amend her complaint and how the proffered amended complaint modified the retaliation claim, McGarity's own theory of her claim asserts the former, that she suffered retaliation for invoking her putative right under the NLRA to have union representation. In either case, McGarity's failure to depose Mahler truncated the necessary "inquiry into the motives of an employer" to develop the issue of causation. *See Dixon v. Gonzales*, 481 F.3d 324, 335 (6th Cir. 2007) (quoting *Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 895 (9th Cir. 2005)).

In any event, the district court denied the retaliation claim primarily by identifying an intervening event that broke the causal connection. Specifically, Pesamoska had told McGarity that she must maintain communication with the LRC teachers in order to continue as a paraprofessional. After McGarity had requested the presence of a union representative in her upcoming meeting with Pesamoska and other school officials, Pesamoska learned that McGarity had not talked at all with the LRC teachers in the weeks after he had stressed with her the importance of maintaining communication; that lack of communication persuaded Pesamoska to move toward dismissing McGarity from her position. Because McGarity does not raise any arguments toward identifying a genuine dispute of material fact over this intervening event, the district court's conclusion must be affirmed.

4

A Title VII hostile-work-environment claim can arise if the plaintiff cannot work in an environment free from discriminatory intimidation, ridicule, and insult. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). In order to establish a prima facie case, the plaintiff must

demonstrate that (1) she was a member of a protected class, (2) she was subjected to unwelcome harassment, (3) the harassment was based on her protected status, (4) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment, and (5) the employer knew or should have known about the harassment and failed to act. *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 813 (6th Cir. 2013). The allegations of harassment must be "sufficiently severe or pervasive" to persuade a court, after looking at "all the circumstances," that the incidents of harassment, when taken together, "make out such a case" of a hostile work environment. *Id.* at 814 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 562 (6th Cir. 1999)); *see also Russell v. Univ. of Toledo*, 537 F.3d 596, 608 (6th Cir. 2008) (noting that the harassment must be based on the plaintiff's protected status).

The district court construed the allegations surrounding the December meeting between Theys, Weiss, and McGarity, which involved Weiss allegedly telling McGarity to resign from her position, to be a claim that McGarity endured a hostile work environment. McGarity seems to take issue with assessing the claim based on the frequency of discriminatory or adverse occurrences, but that approach was advocated only by BPS and not considered by the district court in adopting the magistrate judge's report and recommendation. In any case, McGarity now concedes that Weiss's words "are not unlawful under [T]itle VII," but she argues that they are unlawful under "the common tort law." Unfortunately for McGarity, she did not assert such a state-law claim below, and we will not consider it in the first instance on appeal. *See Frazier v. Jenkins*, 770 F.3d 485, 497 (6th Cir. 2014).

D

We review the denial of a motion for leave to amend the complaint for an abuse of discretion, unless the denial is based on the legal conclusion that the proposed amendment would be futile, in which case we review the denial de novo. *United States v. Gibson*, 424 F. App'x 461, 464-65 (6th Cir. 2011); *Evans v. Pearson Enters., Inc.*, 434 F.3d 839, 853 (6th Cir. 2006). Leave

to amend the complaint should be freely given when justice so requires. Fed. R. Civ. P. 15(a)(2). Nevertheless, discretion to deny leave is appropriate due to "undue delay, bad faith[,] or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment," and other appropriate reasons. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

McGarity filed her complaint on May 6, 2019. More than a year and a half had elapsed when she filed her motion for leave to amend her complaint on November 16, 2020. Through that period, McGarity and BPS engaged in a contentious discovery process, filed cross-motions for summary judgment, and received the magistrate judge's report and recommendation that would adjudicate all of the claims in the original complaint. McGarity would need very compelling reasons to justify her motion.

The amended complaint proposed a claim under the NLRA against BPS, adding Birmingham Association of Paraprofessionals as a co-defendant for that claim. Careful parsing of the original complaint and the amended complaint, as well as McGarity's filings at the summary-judgment stage, makes clear that the putative NLRA claim against BPS is merely the Title VII retaliation claim for which the district court granted summary judgment. The amendments clarify McGarity's assertion that she suffered retaliation for seeking union representation, a putative right she identifies under the NLRA. Thus, the amended complaint, to the extent that it modifies the Title VII retaliation claim against BPS, would introduce a futile amendment.

As to the claim against the Birmingham Association of Paraprofessionals, the amended complaint only adds that the union representative Dalton "did not perform his due diligence in representing McGarity." The union would not have "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957), *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Moreover, the union and BPS would also suffer undue prejudice by the protracted delay. If McGarity wanted to pursue a claim against the Birmingham Association of Paraprofessionals, she had ample time to add the union as a co-

defendant; she chose not to until it was too late. To the extent the district court exercised its discretion with respect to the motion, the court did not abuse its discretion.

III

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SASHA McGARITY,

Plaintiff,

Civil Action No. 19-11316
Honorable Bernard A. Friedman
Magistrate Judge David R. Grand

v.

BIRMINGHAM PUBLIC SCHOOLS,

Defendant.
_____/

REPORT AND RECOMMENDATION TO DENY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (ECF No. 37) AND GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (ECF No. 55)

This is an employment discrimination action brought by plaintiff Sasha McGarity ("McGarity") against her former employer Birmingham Public Schools ("BPS"). McGarity was a paraprofessional at BPS, and was terminated during her initial 90-day probationary period. In her complaint, McGarity asserts claims of race discrimination and retaliation in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*, and a claim under the Fair Labor Standards Act ("FLSA"), 29 U.S.C.A. § 206. (*Id.* at PageID.15.)[1]

On May 18, 2020, McGarity filed a motion for summary judgment. (ECF No. 37.) With the Court's permission, BPS responded after the close of discovery, a few months later. (ECF. Nos. 38, 65.) On August 3, 2020, BPS filed a motion for summary judgment. (ECF No. 55.) McGarity responded, BPS replied, and McGarity filed a supplemental brief. (ECF Nos. 60, 63, 64.)

[1] This case was referred to the undersigned for all pretrial matters under 28 U.S.C. § 636(b). (ECF No. 29.)

For the reasons set forth below, it is **RECOMMENDED** that McGarity's motion for summary judgment (**ECF Nos. 37**) be **DENIED** and BPS's motion for summary judgment **GRANTED (ECF No. 55)**.

I. REPORT

A. Facts

On August 28, 2018, BPS hired McGarity as a special education paraprofessional at West Maple Elementary. (ECF No. 1, at PageID.12.) BPS classified her as a "probationary employee" for 90 days following her hire—from August 28, 2018 through January 22, 2019. (ECF 37-2, PageID.179.) As a probationary employee, BPS had the "unconditional right to terminate" McGarity at-will without triggering the grievance procedure in the Paraprofessional Collective Bargaining Agreement. (ECF No. 55-6, PageID.556.) According to McGarity, her job was to "[a]ssist the teacher [and] assist the special needs student." (ECF No. 55-4, PageID.529.)

McGarity also acknowledges that special education students are to be educated in the least restrictive environment (LRE). (ECF No. 60-2, *Id.* at PageID.849.) Attached to her response to BPS's motion for summary judgment is a description of LRE.

> [E]very attempt will be made to first serve disabled students in the context of a regular education classroom. Other more restrictive environments such as resource rooms, self-contained classrooms, or settings outside of a District school will be considered only after consideration has been given by the IEPC [Individualized Education Plan Committee] as to the feasibility of placement in the regular classroom.

(*Id.*)

McGarity spent most of her work day rotating between the general education classrooms, where she worked one-on-one with her assigned students. (*Id.* at PageID.836.) The special education students at West Maple at the time had a wide range of disabilities including learning disabilities, cognitive impairments, emotional impairments, behavioral issues, and Down's

Syndrome. (ECF No. 55-4, PageID.530-533.) The special education teachers in the Learning Resource Classroom ("LRC") would assign McGarity her schedule and students. (ECF No. 55-4, PageID.529.) Communication between McGarity and the LRC teachers was a necessary part of McGarity's position. (*Id.* at PageID.545.) The LRC teachers at West Maple during the 2018/2019 school year were Claire Theys and Grace Weiss. (*Id.* at PageID.529.)

McGarity took her breaks and lunches in a vacant classroom by herself, or alone in her car. (ECF No. 55-4, PageID.536; ECF No. 60, PageID.801.) McGarity admits that "conflict arose between [she] and the LRC teachers" (ECF No. 60, PageID.801), and she then stopped visiting the LRC room altogether (ECF No. 55-8, PageID.561; No. 55-18, PageID.591). Both Weiss and Theys averred in their declarations that McGarity did not communicate with the teachers in the manner that was expected or necessary to best serve the students. (*Id.*) The following averments from Weiss' declaration exemplify their similar concerns:

> 7. The paras—except Sasha—would keep contact with us throughout the school day as well. We would informally meet in the hallways, we would see them during breaks, or at lunch. During these interactions, we were always communicating about the students. These conversations are very important for serving our students.
>
> * * *
>
> 11. I began noticing issues with Sasha in October 2018.
>
> 12. Before that, Sasha did come to the LRC room before class began but would occasionally throughout the day. She was quiet and would rarely interact with anyone from our team. Sometime in October, she stopped coming to the LRC room altogether. I had no idea where she was for a while. I came to find out she would spend her time in the morning, during breaks, and at lunch, in a vacant classroom by herself. No one knew what was going on with her, and she would not share information with us about the students she was working with.
>
> 13. As October progressed, Sasha would not talk to me when I did see her. I asked simple things, like if a specific student completed assignments. Initially, Sasha gave short, terse responses, with no information.

> 14. By November 2018, Sasha would not respond to me at all when I would be in the same classroom as her. At this point, Sasha was still not coming to the LRC room. When I would run into her in the hall, I would try talking with her. She would not respond to anything I said, so I had no idea if she understood what I was trying to communicate about the students.

(ECF No. 55-18, PageID.591.)

McGarity's own testimony might not confirm Weiss' most concerning averments, but it does corroborate that McGarity made the conscious decision to be independent rather than communicating with the LRC teachers :

> Q. Did there become a time when you preferred contacting one [Weiss or Theys] over the other?
> A. There came a time when I didn't want to contact either. I wanted to be able to stand on my own. . . . I wanted to be able to do it on my own.

(ECF No. 55-4, PageID.534.)

Further, although McGarity explained that, from her perspective, she did not believe she had a "communication issue" with Weiss and/or Theys, she agreed that they might have had such an issue with her because "[e]verything is open to interpretation . . . So, a lack of communication could be myself just being, trying to be independent and servicing the students on my own without guidance." (*Id.*, PageID.539.) When asked, "How often would you communicate back with the teachers about the progress of the students?," McGarity simply answered, "I do not recall." (*Id.*, PageID.535.) And, when questioned about her relationship with Weiss, McGarity responded, "My goal is to do my job and go home. My goal is not to make friends at work." (*Id.*, PageID.536.)

Regardless of McGarity's belief about the appropriateness of her communication style, it is undisputed that in November, in the middle of her probationary period, Weiss and Theys began raising their concerns about McGarity's communication with the Principal of West Maple, Jason Pesamoska. (ECF No. 55-8, PageID.562; ECF No. 55-18, PageID.592.) These concerns centered around her lack of in-person communication, and her tendency to use the LRC classroom

immediately when a student showed difficulties in the general education classroom, instead of attempting to work with the student in the LRE first. (*Id.*) At Principal Pesamoska 's instruction, the LRC teachers tried meeting with McGarity to address these issues. (ECF Nos. 55-8, 55-18.) During these meetings, the LRC teachers reviewed expectations and offered guidance. (*Id*). In late November 2018, the LRC teachers changed McGarity's schedule and assigned her a different student. (*Id.*)

In early December 2018, the LRC teachers scheduled another meeting with McGarity to once again address their growing concerns and to give her another new schedule. (ECF Nos. 55-8, 55-18.) McGarity did not attend the scheduled meeting. (ECF No. 55-4, PageID.539.) The LRC teachers then reported their concerns again to Principal Pesamoska. (ECF Nos. 55-8, 55-18.)

On December 13, 2018, Principal Pesamoska met with McGarity regarding the LRC teachers' complaints. (ECF No. 55-13, PageID.577.) Pesamoska directed McGarity to communicate with the LRC teachers daily regarding her students. (*Id.*) Five days after this meeting, Pesamoska e-mailed McGarity to see if she "had an opportunity to touch base with Grace [Weiss] and Claire [Theys] ... to make sure that those lines of communication have been opened." (ECF No. 55-14, PageID.580.) McGarity responded that they "were supposed to meet but it didn't happen." (*Id.*) Principal Pesamoska instructed McGarity "to touch base with them before the end of the day tomorrow," meaning Wednesday, December 19, 2018. (*Id.*)

McGarity finally met with the LRC teachers. (ECF Nos. 55-8, 55-18.) During the meeting, the teachers raised concerns with communication and sending student K.E. to the LRC too frequently, instead of working with him in the class. (ECF No. 55-4, PageID.540.) At that time, Pesamoska decided to investigate these complaints on his own. (ECF No. 55-11.) He interviewed two other special education paraprofessionals, four general education teachers, and the school

secretary. (*Id.*) All seven witnesses confirmed the LRC teachers' observations about McGarity's communication issues and difficulties with certain students. (*Id.*) For example, notes of Pesamoska's interviews report the interviewees as saying things like, "[McGarity] has not spoken more than two words to me," "stand-offish not willing to build relationships with adults," "refusal to engage with the team at all . . . didn't know if she understood [Weiss] and [Theys] were supervisors and if she did didn't act like it," "always off to self, not welcoming," and "not receptive to suggestions from classroom teacher and would shut teacher down and talk back to her." (*Id.*)

On December 21, 2018, Principal Pesamoska met with McGarity again regarding these issues and explained she needed to communicate with the LRC teachers. (ECF Nos. 55-4, PageID.541; No. 55-15, PageID.582; No. 62, PageID.910-11.) Principal Pesamoska gave McGarity a choice between either transferring to a new building, or meeting with union representation to work things out with the LRC teachers. (*Id.*) On January 1, 2019, McGarity sent Principal Pesamoska a text message stating that she wanted to work things out with the LRC teachers. (ECF 37-2, PageID.181.)

Upon returning to school on January 2, 2019, however, McGarity consciously decided not to communicate at all with the LRC teachers:

> Q. And what happened when you returned to school?
> A. We were supposed to gather a meeting to, you know, discuss my issues with Grace and Claire. And did I talk to them? No. I did my job and I went home. . . . I did my job and went home. Did I talk to them? No. I did not want to talk to them. I was still very angry.

(ECF No. 55-4, PageID.541-42.)

On January 4, 2019, at 9:03 a.m., McGarity e-mailed Robyn O'Keefe, the President of the Birmingham Association of Paraprofessionals, stating:

> I do not feel comfortable meeting with the group alone. I have just decided to file a grievance to express some unfair treatment. I will submit the

> complaint by 8pm tonight. I would like to meet on Monday or Tuesday morning in order to get this resolved as soon as possible. If the process takes time that's fine with me. I will just need to let the principle [sic] know. I appreciate your assistance on this matter.

(ECF No. 37-2, PageID.182.)

On January 8, 2019, Principal Pesamoska e-mailed McGarity and scheduled a meeting for January 10, 2019. (ECF No. 55-16, PageID.584.) He stated: "Dean Niforos, Human Resources, along with Laura Mahler, Special Education will be in attendance. I have also included Robyn O'Keefe on this e-mail, so she is aware and also knows if you wish to have union representation." (*Id.*) During the January 10th meeting, Pesamoska terminated McGarity's employment due to BPS's "concerns with [her] lack of communication with the LRC teachers . . ." (ECF No. 61, PageID.888; No. 37-2, PageID.183; No. 62, PageID.910-11.)

On May 6, 2019, McGarity filed suit against BPS alleging race discrimination and retaliation under Title VII and the FLSA. (ECF No. 1.) On May 18, 2020, well before discovery closed, McGarity filed a motion for summary judgment. (ECF No. 37.) The Court allowed BPS to respond to that motion after the close of discovery, and the motion has been fully briefed. (ECF Nos. 39, 44, 60, 65.) BPS filed its own motion for summary judgment on August 3, 2020. (ECF No. 55.) McGarity responded, BPS replied, and McGarity filed a supplemental brief that BPS has moved to strike. (ECF Nos. 55, 60, 63, 64, 66.)[2]

[2] Also before the Court are the parties' competing motions for sanctions (ECF Nos. 53, 69), which the Court will mainly address in a separate Order. Most all of the issues raised by these motions concern the parties' alleged improper litigation behavior and do not directly bear on the merits of this case. The only issue of any substance is McGarity's contention that BPS failed to allow her to take the deposition of Laura Mahler, who (1) held an administrator position in BPS's Special Education Department and attended the meeting at which McGarity was terminated, (2) is allegedly Theys's mother, and (3) allegedly was one of the decision-makers in McGarity's termination. (ECF Nos. 53, 44.) Attached to its own sanctions motion, BPS provided copies of recent e-mails that its counsel sent to McGarity offering her an opportunity to depose Mahler. (ECF No. 69-10.) At oral argument on the pending motions, the undersigned explained to

B. The Applicable Legal Standards

Pursuant to Rule 56, the Court will grant summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Pittman v. Cuyahoga County Dep't of Children & Family Servs.*, 640 F.3d 716, 723 (6th Cir. 2011). A fact is material if it might affect the outcome of the case under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a genuine issue of material fact exists, the Court assumes the truth of the non-moving party's evidence and construes all reasonable inferences from that evidence in the light most favorable to the non-moving party. *See Ciminillo v. Streicher*, 434 F.3d 461, 464 (6th Cir. 2006).

The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and must identify particular portions of the record that demonstrate the absence of a genuine dispute as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Alexander v. CareSource*, 576 F.3d 551, 558 (6th Cir. 2009). "Once the moving party satisfies its burden, 'the burden shifts to the nonmoving party to set forth specific facts showing a triable issue.'" *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 453 (6th Cir. 2001) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In response to a summary judgment motion, the opposing party may not rest on its pleadings, nor "'rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact' but must make an

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McGarity that the present record did not seem to favor her position as to some of the central issues before the Court – including whether BPS's proffered reason for her termination was pretext – and that her allegations about Mahler's involvement, which related to that issue, were unsupported by evidence. Accordingly, the undersigned offered McGarity the opportunity to take Mahler's deposition and supplement the briefing. McGarity expressly declined the Court's invitation and indicated that she wished to have the pending summary judgment motions decided on the current evidentiary record.

affirmative showing with proper evidence in order to defeat the motion." *Alexander*, 576 F.3d at 558 (quoting *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989)). Indeed, "'[t]he failure to present any evidence to counter a well-supported motion for summary judgment alone is grounds for granting the motion.'" *Id.* (quoting *Everson v. Leis*, 556 F.3d 484, 496 (6th Cir. 2009)). "Conclusory statements unadorned with supporting facts are insufficient to establish a factual dispute that will defeat summary judgment." *Id.* at 560 (citing *Lewis v. Philip Morris, Inc.*, 355 F.3d 515, 533 (6th Cir. 2004)).

A moving party with the burden of proof (typically the plaintiff) faces a "substantially higher hurdle." *Arnett v. Myers*, 281 F.3d 552, 561 (6th Cir. 2002). As set forth above, the moving party without the burden of proof needs only show that the opponent cannot sustain his burden at trial. "But where the moving party has the burden – the plaintiff on a claim for relief or the defendant on an affirmative defense – his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." *Calderone v. U.S.*, 799 F.2d 254, 259 (6th Cir. 1986) (internal citations omitted). Accordingly, summary judgment in favor of the plaintiff "is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Harris v. Kowalski*, 2006 WL 1313863, at *3 (W.D. Mich. May 12, 2006) (quoting *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999)).

C. Analysis

1. BPS is Entitled to Summary Judgment on McGarity's Race Discrimination Claim

a. McGarity Establishes a Prima Facie Case

McGarity claims her termination is a result of race discrimination. McGarity does not have direct evidence of race discrimination, so she must use the familiar burden-shifting framework set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). Under this framework,

McGarity must establish a prima facie case of discrimination by showing that: (1) she "was a member of a protected class;" (2) she "suffered an adverse employment action;" (3) she "was qualified for the position;" and (4) she "was replaced by someone outside the protected class or was treated differently than similarly-situated, non-protected employees." *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 707 (6th Cir. 2006). If McGarity can establish these elements, then the burden shifts to BPS to articulate a legitimate, nondiscriminatory reason for her termination. *Id.* If BPS does so, then, to survive summary judgment, McGarity must identify evidence from which a reasonable jury could conclude that the proffered reason is actually a pretext for race discrimination. *Id.*

In her motion for summary judgment, McGarity simply states that she has proven her *prima facie* case. (ECF No. 37, PageID.159.) At least in its own summary judgment motion, BPS does not seem to dispute this, as its first substantive argument is that "[McGarity's] Termination was Based on Legitimate Non-Discriminatory Reasons." (ECF No. 55, PageID.496.) At any rate, the Court notes that McGarity, as an African-American is member of a protected class, and that she was terminated, which means she suffered an adverse action. Her qualifications for the paraprofessional job do not seem to be in dispute, and in his deposition, Principal Pesamoska confirmed McGarity's contention that BPS replaced her with a Caucasian female. (ECF Nos. 60, PageID.818; No. 61, PageID.894; No. 60-2, PageID.868.) Therefore, the Court finds that McGarity has established a *prima facie* case.

b. BPS Articulates a Non-Discriminatory Reason for Terminating McGarity's Employment

Having established a *prima facie* case, the burden shifts to BPS to "articulate some legitimate, nondiscriminatory reason" for McGarity's termination. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978). Failure to meet performance expectations is a legitimate, non-

discriminatory reason for termination. *Cicero v. Borg-Warner Auto*, 280 F.3d 579, 588 (6th Cir. 2002). Even a personality conflict is a legitimate nondiscriminatory reason for termination. *Martin v. Toledo Cardiology*, 548 F.3d 405, 413 (6th Cir. 2008). Here, BPS asserts that it terminated McGarity due to the ongoing inadequate communication with LRC teachers and her failure to meet job performance standards, as described above. (ECF No. 55, PageID.496-97.) This sufficiently articulates a legitimate non-discriminatory reason for terminating McGarity. Consequently, the burden shifted to McGarity to prove that BPS's reason is pretext for unlawful discrimination. *Manzer v. Diamond Shamr. Chem.*, 29 F.3d 1078, 1084 (6th Cir. 1994).

c. *McGarity Fails to Raise a Material Question of Fact that BPS's Proffered Reason for Her Termination is Pretext*

McGarity may establish pretext by showing "either (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate [her] discharge, or (3) that they were insufficient to motivate discharge." *Id.* The Sixth Circuit has held that an employer's business judgment should not be questioned as a means of establishing pretext because the issue is not whether the decision was wrong or mistaken but whether the decision was discriminatory. *Hartsel v. Keys*, 87 F.3d 795, 801 (6th Cir. 1996), cert. denied, 519 U.S. 1055 (1997). Courts should instead defer to sound business judgment to avoid "the illegitimate role of acting as a 'super personnel department,' overseeing and second guessing employers' business decisions." *Bender v. Hecht's Dep't Stores,* 455 F.3d 612, 628 (6th Cir. 2006). BPS argues that McGarity cannot prove pretext under any of the three types of showings listed above. (ECF No. 55, PageID.497-504.) The Court agrees.

First, as shown above, BPS's reasons proffered for termination are based in fact. McGarity admits that communication was a necessary part of her job. (ECF No. 55-4, PageID.545.) McGarity cannot dispute that the LRC teachers had issues with the manner and frequency in which

she communicated with them, and that those concerns were conveyed to Pesamoska, leading to his investigation. (ECF Nos. 55-8; 55-18.) Nor does McGarity dispute that after Pesamoska specifically instructed her to meet with the teachers so the issue could be addressed, she still had not done so five days later, claiming simply that she knew she was supposed to meet with them "but it didn't happen." (ECF No. 55-14, PageID.580.) McGarity also admits that she ceased communicating with the LRC teachers after they voiced their concerns to Pesamoska. (ECF No. 55-4, PageID.541-42) ("And did I talk to them? No. I did my job and I went home. . . . I did my job and went home. Did I talk to them? No. I did not want to talk to them. I was still very angry."). Finally, it is undisputed that Pesamoska met with at least seven of McGarity's colleagues to investigate the complaints about her lack of communication, and that they all provided similar negative comments about her communication skills. (ECF No. 55-11; *see supra* at 5-6.) In short, BPS's concerns about McGarity's communications skills are based on facts borne out by evidence in the record.

McGarity's attempts to raise a material question of fact as to the proffered reasons for her termination fail. First, she attached various text messages to her motion for summary judgment, which she claims shows she did communicate with her colleagues. (*See e.g.*, ECF No. 37-2.) But McGarity cannot unilaterally decide what form of communication is appropriate. Indeed, the LRC teachers do not dispute that McGarity texted, but state that it is part of the job to meet in person daily to discuss students and accommodations, and no reasonable juror would conclude otherwise in the school setting in which McGarity worked. (ECF Nos. 55-8, 55-18.) Second, while McGarity acknowledges that she spent her breaks by herself in the vacant classroom or her car, instead of the LRC room, she asserts there is nothing wrong with this and provides an exhibit showing that breaks for paraprofessionals are supposed to be "duty free." (ECF No. 55-4, PageID.536; ECF

No. 64-1, PageID.949.) Even so, this conduct is entirely consistent with BPS's concerns about McGarity's overall ineffective communication with her co-workers, and does not raise a material question of fact that the stated reason for her termination was pretext for race discrimination. Moreover, even ignoring McGarity's "break time" conduct, BPS presented ample evidence of communication issues that would warrant termination. *See e.g., supra* at 11-12.

McGarity also relies on a few thank you cards from students and parents, and Pesamoska's written recommendation of McGarity for an aide position at the school's Kids Club. (*See e.g.*, ECF No. 37-2, PageID.174-75; No. 60-2, PageID.838, 847.) But this evidence also fails to raise a material question of fact on the issue of pretext. The fact that some students and their families appreciated McGarity reflects positively on her, but BPS never said it terminated her because she had no positive relationships with students or parents. And, although Pesamoska did recommend McGarity for a Kids Club aide position, noting that she "works well with students," this was early in McGarity's probationary period, and "well before" Weiss and Theys had advised Pesamoska about their concerns with McGarity's lack of communication and Pesamoska's ensuing investigation. (ECF No. 60-2, PageID.838; No. 62, PageID.903.) Moreover, the Sixth Circuit has found that the mere fact that the plaintiff had received positive feedback prior to her discharge does not establish a discriminatory motive:

> The central theme of [the plaintiff's] argument is that, because he continued to receive good performance evaluations and merit pay increases even after the incidents which [the defendant employer] cited as illustrative of his inaccuracy and combative attitude, those explanations must be incredible. This argument is misdirected. The issue is not whether [the plaintiff] was truly "obnoxious" enough, or "unreliable" enough, to justify firing him. Nor are we concerned with why [the defendant employer] retained [the plaintiff] as long as it did. Those are precisely the type of "just cause" arguments which must not creep into an employment discrimination lawsuit. [The defendant employer] asserts that these are the reasons [the plaintiff] was fired and, in the absence of [evidence raising a material question of fact as to pretext], its explanations must be accepted.

See Manzer, 29 F.3d at 1084-85.

McGarity's attempts to explain her viewpoint of the communication issue discussed above are immaterial under "the honest belief rule." *See Miles v. South Central Human Resource Agency, Inc.*, 946 F.3d 883, 897 n. 5 (6th Cir. 2020). Under this rule, as long as BPS had an "honest belief" in the nondiscriminatory reason for terminating McGarity, then McGarity cannot establish that the reason was pretextual even if it were later determined to be incorrect. *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001)(citations omitted). An employer has "an honest belief" in its reason for discharging an employee where the employer reasonably relied on the particularized facts that were before it at the time the decision was made. *Todd v. RBS Citizens, N.A.*, 483 Fed. App'x 76, 83 (6th Cir.2012). The decisional process need not be optimal but only "reasonably informed and considered." *See Michael v. Caterpillar Fin. Serv. Corp.*, 495 F.3d 584, 589-99 (6th Cir. 2007); *see Wright v. Murray Guard, Inc.*, 455 F.3d 702, 708 (6th Cir. 2006). McGarity has failed to raise a material question of fact that Principal Pesamoska reasonably believed the reasons for terminating McGarity were true due to his own observations and investigation. The evidence is undisputed that Principal Pesamoska addressed the LRC teachers' complaints with McGarity, and that she did not deny the allegations against her, but instead "just stayed quiet." (ECF No. 55-4, PageID.542; ECF No. 55-13.) Then, Pesamoska interviewed numerous other West Maple employees who had first-hand knowledge about McGarity's work performance, and they all voiced similar serious concerns about her communication skills. (ECF No. 55-11.) Finally, McGarity admits that after the meeting and her return from break, she did not speak with Weiss or Theys at all. *See supra* at 6. Based on all of those facts, Pesamoska made a reasonably informed and considered decision to terminate McGarity for non-discriminatory reasons. Again, this shows that McGarity failed to raise a material question of fact on the issue of

pretext.

Finally, McGarity cannot prove that the proffered reasons did not actually motivate her discharge. *Manzer*, 29 F.3d at 1084. To prove pretext under this prong, McGarity must adduce evidence of discriminatory motive. *Id.* McGarity must prove that the "sheer weight of circumstantial evidence of discrimination makes it 'more likely than not' that the employer's explanation is a pretext, or coverup." *Id.* McGarity first attempts to prove that her performance problems did not actually motivate her discharge by attaching text messages and phone bills showing she contacted the LRC teachers. (ECF No. 60, PageID.815.) She claims that under *Westmoreland v. TWC Administration*, 924 F.3d 718, 726-27 (4th Cir. 2019), that this is sufficient to survive summary judgment. (ECF No. 60, PageID.815.) The Court disagrees.

In *Westmoreland*, an age discrimination case, the Court held that an employee successfully rebutted the employer's reasonable, non-discriminatory reason for discharge with evidence of a replacement outside of her protected class and a remark that the plaintiff could now take care of her grandbabies. *Westmoreland* – a Fourth Circuit case – is not binding on this Court. Moreover, McGarity's case is distinguishable from *Westmoreland*, where the evidence of pretext and motivation was a remark that referred to the plaintiff's age. Here, McGarity points only to Weiss' purported statement, suggesting that McGarity "put in her two weeks' notice and leave." (ECF No. 60, PageID.823.) Unlike the statement in *Westmoreland*, nothing about Weiss' alleged statement suggests it was motivated by race. And, as discussed above, whether McGarity occasionally communicated with her colleagues via text message is immaterial to the reason she was terminated – her failure to communicate in-person regularly about the students' needs while at work.

McGarity's attempt to prove that her performance problems did not actually motivate her

discharge by alleging that nepotism was the real reason for her discharge also fails. She alleges that the Director of Special Education, Laura Mahler, is Theys's mother, and that Mahler violated BPS's conflict of interest policy when she attended McGarity's termination meeting. (ECF No. 60, PageID.820; 55-4, PageID.544; 60-2, PageID.869.) However, McGarity has not presented any evidence that Mahler had any input into the termination decision.[3] (ECF No. 55-4, PageID.542-43; ECF No. 61, PageID.888.) And, even if McGarity is correct that Mahler's attendance at the meeting violated BPS policy, that does nothing to save her claim. As the Sixth Circuit explained in *Williams v. Columbus Metropolitan Housing Authority*, 90 Fed. Appx. 870, 876 (6th Cir. 2004), "an employer's failure to follow its own regulations and procedures, alone, is not sufficient to support a finding of pretext." Moreover, Mahler recommended McGarity for the position (ECF No. 55-5), so it makes little sense to suggest that she would now discriminate against McGarity based on her race. *See Garrett v. SW Med. Clin.*, 631 Fed.Appx. 351, 357 (6th Cir. 2015)(under the "same actor inference," when the same person who hired plaintiff also fired plaintiff, there is a presumption that an employee's race did not motivate the termination)). In short, McGarity fails raise a material question of fact that Mahler's attendance at the termination meeting was in any way a motivating factor in the decision to terminate her, or that the proffered reasons for her termination were pretext.

Finally, McGarity failed to raise a material question of fact that BPS's proffered reasons for termination were insufficient to warrant her termination. This type of argument is ordinarily proven with evidence that similarly situated employees were treated more favorably for the same conduct that resulted in the adverse action against the plaintiff. *Manzer*, 29 F.3d at 1084. It is

[3] As explained above, *supra* at 7-8, McGarity expressly declined the opportunity to depose Mahler about these matters.

McGarity's burden to establish that similarly situated employees were treated differently than she was. *Macy v. Hopkins County Sch. Bd. of Educ.*, 484 F.3d 357 (6th Cir. 2006). "To satisfy the similarly-situated requirement, a plaintiff must demonstrate that the comparable employee is similar 'in all of the relevant aspects.'" *Martin v. Toledo Cardiology Consultants, Inc.*, 548 F.3d 405, 412 (6th Cir. 2008). To be "similarly situated," employees generally must "'have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.'" *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998). A plaintiff fails to meet her burden if she offers no "evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct to which the employer contends motivated its discharge of the plaintiff." *Manzer*, 29 F.3d at 1084.

McGarity seems to argue that Julie Shimshock is a similarly situated employee. (ECF No. 60, PageID.819.) However, the facts simply do not bear this out. Shimshock started working as a paraprofessional at West Maple Elementary School in 2007. (ECF No. 63-3, PageID.929.) Thus, BPS employed her well beyond her probationary period, making her not similarly situated to McGarity who was terminated during her probationary period. (*Id.*) The issues involving the employees are also not similar. McGarity claims that Shimshock received favorable treatment due to her race when she had an incident involving a student. (ECF No. 60, PageID.819.) But the incident in question involved an agitated student who became physical, throwing items and grabbing Shimshock around her legs. (ECF No. 63-3, PageID.934.) Shimshock radioed for assistance, but did not physically engage with the student. (*Id.*) BPS put Shimshock on paid leave while it investigated this incident. (*Id.*) BPS determined that Shimshock responded appropriately.

(*Id.*) In contrast, after complaints were made regarding McGarity's communication issues, Principal Pesamoska conducted a thorough investigation which corroborated the complaints and their seriousness. (ECF Nos. 55-11, 55-15.) McGarity has not identified any other employee who had performance issues similar to McGarity's, and who was treated more favorably. As such, she cannot prove pretext under the third prong.

For all of these reasons, BPS is entitled to summary judgment on McGarity's Title VII race discrimination claim.

2. BPS is Entitled to Summary Judgment on McGarity's Retaliation Claim

"Title VII prohibits an employer from retaliating against an employee who has either: (1) 'opposed any practice made an unlawful employment practice by this subchapter,' or (2) 'made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.'" *E.E.O.C. v. New Breed Logistics*, 783 F.3d 1057, 1066 (6th Cir. 2015) (quoting 42 U.S.C. § 2000e–3(a)). "These two provisions, respectively, constitute the 'opposition' and the 'participation' clauses." *Id.* To establish a *prima facie* case of retaliation under either clause of Title VII's anti-retaliation provision, a plaintiff must demonstrate that: (1) she engaged in activity protected by Title VII; (2) the defendant knew of the protected activity; (3) thereafter, the defendant took adverse action against her; and (4) a causal connection existed between the protected activity and the materially adverse action. *Id.* (citing *Taylor v. Geithner*, 703 F.3d 328, 336 (6th Cir.2013)). The same *McDonnell Douglas* burden-shifting framework discussed above then applies; if the plaintiff establishes a *prima facie* case of retaliation, the defendant must proffer some legitimate, nonretaliatory reasons for its actions, and if it does so, the plaintiff must show that those reasons were pretext for retaliation. *Id.* Importantly, the plaintiff must "establish but-for causation to establish the retaliation claim. This standard 'requires proof that the unlawful

retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.'" *Id.* (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013)).

McGarity seems to assert two theories of unlawful retaliation. First, she argues that BPS improperly retaliated against her for requesting a union representative at the January 10, 2019 meeting. (ECF No. 37, PageID.161.) Second, McGarity seems to assert that she was retaliated against for various complaints and comments she made because of the alleged relationship between Mahler and Theys:

> The Plaintiff theorizes (1) Mahler terminated McGarity in retaliation for participating in a complaint process involving her daughter, (2) Mahler fired McGarity in retaliation for participating in process that could result in an EEOC charge because of her own admittance and awareness of Pesamoska's biased investigations into the plaintiff's performance and (3) Mahler terminated McGarity in retaliation because she advised Pesamoska in matters and wanted to protect her daughter and herself from repercussions should the matter escalate.

(ECF No. 60, PageID.822.)

McGarity's arguments fail for a few reasons. First, as noted above, McGarity declined to depose Mahler, and McGarity's "theory" about her involvement is not evidence sufficient to create a material question of fact. Second, even assuming McGarity can satisfy the first three elements of a retaliation claim, BPS is entitled to summary judgment because she fails to raise a material question of fact as to the issue of causation. *See Morris v. Oldham Co. Fiscal Court*, 201 F.3d 784, 792 (6th Cir. 2000). "The element of causation which necessarily involves an inquiry into the motives of an employer, is highly context-specific." *Dixon v. Gonzales*, 481 F.3d 324, 335 (6th Cir. 2007)(citations omitted). And, as noted above, in the Title VII retaliation context, to prove a causal connection, the plaintiff must establish heightened "but for" causation. *New Breed Logistics*, 783 F.3d at 1066. The Supreme Court has described this "but for" standard as a "more demanding" standard of proof than the "motivating factor" standard. *Nassar*, 570 U.S. at 362.

When determining the "but for" issue, the relevant question is whether the defendant would have taken the same adverse action even in the absence of the alleged protected conduct. *See Gross v FBL Fin Servs*, 557 US 167, 176, (2009). Temporal proximity alone is not enough to prove causation. *See Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986). This is especially true where, as here, the fact of temporal proximity is not particularly compelling because "the plaintiff's retaliation claim [is] otherwise weak and there [is] substantial evidence supporting the defendant's version of the events." *Nguyen v. City of Cleveland*, 229 F.3d 559, 567 (6th Cir. 2000). Moreover, the Sixth Circuit has "held that an intervening cause between protected activity and an adverse employment action dispels any inference of causation." *Kenney v. Aspen Technologies, Inc.*, __F.3d__, 2020 WL 3638388, *4 (6th Cir. July 6, 2020). An intervening event is a "legitimate reason to take an adverse employment action" and "dispels an inference of retaliation based on temporal proximity". *Kuhn v. Washtenaw County*, 709 F.3d 612, 628 (6th Cir. 2013).

McGarity fails to raise a material question of fact as to causation. In December 2018, before McGarity accepted Pesamoska's offer to have a union representative at the early January meeting, it is undisputed that Pesamoska had multiple meetings with McGarity regarding her ongoing communication issues. (ECF Nos. 55-5; 55-14; 62, PageID.910-11.) During these meetings, Pesamoska told McGarity that she must communicate with the LRC teachers to continue as a paraprofessional at the school. (*Id.*) After returning to school on January 2nd, McGarity admits that she did not comply with Pesamoska's directive to communicate with the LRC teachers. (ECF No. 55-4, PageID.541-42.) When Pesamoska learned that McGarity ignored his order and was not communicating with the LRC teachers, he recommended her termination based on that conduct. (ECF No. 61, PageID.888; ECF No. 62, PageID.910-11.) Thus, McGarity's refusal to

communicate with the LRC teachers after January 1st is an intervening event that is a legitimate reason for her termination, and McGarity cannot prove that but for her earlier "request" for a union representative she would have remained employed. In short, McGarity cannot use her request as a shield from the consequences of her ongoing refusal to follow her principal's orders to communicate with her supervisors. *See Nassar*, 133 S.Ct. at 2532.

For all of these reasons, BPS is entitled to summary judgment on McGarity's Title VII retaliation claim.

3. BPS is Entitled to Summary Judgment on McGarity's Hostile Work Environment Claim

In her complaint, McGarity vaguely alleges that Grace Weiss created a hostile work environment by recommending to McGarity that she put in her "two weeks" during their conversation on December 19, 2018. (ECF 1, PageID.13.) BPS argues that this one isolated comment does not, as a matter of law, create a hostile work environment. (ECF No. 55, PageID.506-507.) The Court agrees.

The "standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a general civility code." *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 562 (6th Cir. 1999). Such claims require proof of severe or pervasive, objectively offensive harassment based on race. *Russell v. University of Toledo*, 537 F.3d 596, 608 (6th Cir. 2008). The isolated non-race-based comment alleged by McGarity clearly does not meet that high threshold. *See Id.* (non-race-based comments that reflect on the plaintiff's work habits rather than racial animosity do not create a hostile work environment). In her response to BPS's summary judgment motion on this issue, McGarity also makes vague accusations that her schedule "changed" twice. (ECF No. 60, PageID.823.) However, McGarity fails to explain this accusation in any further detail, let alone why any such change would rise to the level of creating a hostile work environment under

the stringent standard described above. *Wade v. Automation Pers. Servs., Inc.*, 612 F. App'x 291, 299 (6th Cir. 2015) (Holding that mere shifting of work schedule "does not come close to being objectively hostile under our standard.").

Accordingly, BPS is entitled to summary judgment on McGarity's hostile work environment claim.

4. BPS is Entitled to Summary Judgment on McGarity's FLSA Claim

McGarity claims that she was terminated in violation of the FLSA. The FLSA sets federal standards for minimum wage and overtime compensation for covered employees. *See* 29 U.S.C. §§ 206(a), 207(a). As such, an employer violates the FLSA if it violates the statute's minimum wage or overtime compensation provisions. To prevail on a FLSA overtime or minimum wage claim "a plaintiff must prove, by preponderance of the evidence, that [she] 'performed work for which [she] was not properly compensated.'" *Moran v. Al Basit LLC*, 788 F.3d 201, 204 (6th Cir. 2015)(quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)).

McGarity seems to allege that BPS terminated her because she took her breaks duty free, meaning she did not communicate with her coworkers during her break. (ECF No. 64-1, PageID.949.) However, McGarity does not allege that BPS failed to properly compensate her for the time that she worked (including while on break) as required by the FLSA. (ECF No. 1.) As such, McGarity fails to state a cognizable claim under the FLSA, and BPS is entitled to summary judgment on this claim.

5. McGarity's Motion for Summary Judgment Should be Denied

Above, the Court fully analyzed the evidence and arguments proffered by McGarity in this case and explained why it fails to defeat BPS's motion for summary judgment. In light of that conclusion, it goes without saying that McGarity's motion for summary judgment, on which she

faces a "substantially higher hurdle," *Arnett*, 281 F.3d at 561, should be denied.

II. RECOMMENDATION

For the reasons set forth above, it is **RECOMMENDED** that McGarity's motion for summary judgment **(ECF No. 37)** be **DENIED** and BPS's motion for summary judgment **(ECF No. 55)** be **GRANTED**.

Dated: November 3, 2020
Ann Arbor, Michigan

s/David R. Grand
DAVID R. GRAND
United States Magistrate Judge

NOTICE TO THE PARTIES REGARDING OBJECTIONS

Within 14 days after being served with a copy of this Report and Recommendation and Order, any party may serve and file specific written objections to the proposed findings and recommendations and the order set forth above. *See* 28 U.S.C. §636(b)(1); Fed. R. Civ. P. 72(b)(2); E.D. Mich. LR 72.1(d)(1). Failure to timely file objections constitutes a waiver of any further right of appeal. *See Thomas v. Arn*, 474 U.S. 140, (1985); *United States v. Sullivan,* 431 F.3d 976, 984 (6th Cir. 2005). Only specific objections to this Report and Recommendation will be preserved for the Court's appellate review; raising some objections but not others will not preserve all objections a party may have. *See Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987); *see also Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 596-97 (6th Cir. 2006). Copies of any objections must be served upon the Magistrate Judge. *See* E.D. Mich. L.R. 72.1(d)(2).

A party may respond to another party's objections within 14 days after being served with a copy. *See* Fed. R. Civ. P. 72(b)(2); 28 U.S.C. §636(b)(1). Any such response should be concise,

and should address specifically, and in the same order raised, each issue presented in the objections.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on November 3, 2020.

s/Eddrey O. Butts
EDDREY O. BUTTS
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SASHA TRIESTE MCGARITY,

Plaintiff,

Civil Action No. 19-CV-11316

vs.

HON. BERNARD A. FRIEDMAN

BIRMINGHAM PUBLIC SCHOOLS,

Defendant.
_____/

OPINION AND ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND

This matter is presently before the Court on cross motions for summary judgment [docket entries 37 and 55] and on plaintiff's motion for leave to amend the complaint [docket entry 75]. Magistrate Judge David R. Grand has issued a report and recommendation ("R&R") in which he recommends that the Court deny plaintiff's summary judgment motion and grant defendant's summary judgment motion. Plaintiff has filed objections to the R&R. The Court has reviewed the parties' motion papers, the R&R, and plaintiff's objections. For the reasons stated below, the Court shall reject plaintiff's objections, accept the R&R, deny plaintiff's motion for summary judgment, grant defendant's motion for summary judgment, and deny plaintiff's motion for leave to amend the complaint.

This is an employment discrimination action in which plaintiff alleges that her employer, defendant Birmingham Public Schools, discriminated against her based on her race, thereby violating her rights under Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act ("FLSA"), when it discharged her in January 2019 from her position as a

probationary paraprofessional. She also claims that defendant retaliated against her for requesting a union representative at her termination hearing and for making various complaints and comments. Additionally, plaintiff claims that defendant subjected her to a hostile work environment. The magistrate judge concluded that summary judgment should be granted for defendant on plaintiff's discrimination and retaliation claims because no jury could find that defendant's nondiscriminatory explanation for discharging plaintiff was a pretext for race discrimination. The magistrate judge also recommended that summary judgment be granted for defendant on plaintiff's hostile work environment claim because plaintiff has presented no evidence that she was ever subjected to such an environment based on her race.

Plaintiff has filed objections to the R&R. The Court "must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). Objections must "(A) specify the part of the order, proposed findings, recommendations, or report to which a person objects; and (B) state the basis for the objection." E.D. Mich. LR 72.1(d)(1). The Court need not address objections that simply restate arguments the objecting party presented before the magistrate judge because such objections "fail to identify the specific errors in the magistrate judge's proposed recommendations." *Funderburg v. Comm'r of Soc. Sec.*, No. 15-10068, 2016 WL 1104466, at *1 (E.D. Mich. Mar. 22, 2016) (citation omitted). Further,

> [o]nly those objections that are specific are entitled to de novo review under the statute. *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986). "The parties have the duty to pinpoint those portions of the magistrate's report that the district court must specially consider." *Id.* (internal quotation marks and citation omitted). A general objection, or one that merely restates the arguments previously presented, does not sufficiently identify alleged errors on the part of the magistrate judge. *See VanDiver v. Martin*, 304

> F. Supp. 2d 934, 937 (E.D. Mich. 2004). An "objection" that does nothing more than disagree with a magistrate judge's determination, "without explaining the source of the error," is not considered a valid objection. *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991). Without specific objections, "[t]he functions of the district court are effectively duplicated as both the magistrate and the district court perform identical tasks. This duplication of time and effort wastes judicial resources rather than saving them, and runs contrary to the purposes of the Magistrate's Act." *Id.*

Rogers v. Ricks, No. 20-12100, 2020 WL 6305072, at *1 (E.D. Mich. Oct. 28, 2020).

In the present case, plaintiff has filed nineteen pages of objections (along with Exhibits A through P), but these objections and exhibits simply rehash the arguments she presented previously and do not explain how the magistrate judge erred in presenting the facts or analyzing the legal issues. Other "objections" plaintiff makes are not objections at all but simply statements of the facts as she believes them to be. *See, e.g.*, Pl.'s Objection 11: "In October, Weiss texted McGarity and asked if she wanted to donate money for flowers for Theys because her brother had passed. McGarity replied, yes. The Plaintiff brought the money into the LRC room. Theys was absent for a short time." Further, plaintiff's statement that the magistrate judge "ma[de] it clear that his decision is based upon the law and only the law," Pl.'s Obj. at 1, is hardly a basis for rejecting the R&R.

In short, plaintiff's objections are not sufficiently specific or substantive to constitute proper objections under Fed. R. Civ. P. 72, and therefore the Court declines to review them. Nonetheless, as noted above, the Court has independently reviewed the parties' motion papers and finds that the magistrate judge's R&R thoroughly, accurately, and fairly presents all of the relevant facts and analyzes them, as plaintiff acknowledges, "based upon the law." Defendant is entitled to summary judgment because no reasonable jury could find in plaintiff's

favor on any of her claims. Plaintiff was discharged because she refused to interact and communicate with the teachers she was hired to support and for disregarding the principal's specific instructions that she meet with these teachers to resolve this critical issue. There is not a shred of record evidence to suggest that plaintiff's race or her engagement in any protected activity played any role whatsoever in defendant's decision to discharge her. Nor is there a shred of evidence to suggest that plaintiff was subjected to a hostile work environment or that her rights under the FLSA were violated. In fact, the Court finds that plaintiff's case is so lacking in factual or legal support as to be frivolous and sanctionable under Fed. R. Civ. P. 11 and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (permitting an award of attorney fees against a non-prevailing Title VII plaintiff "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"). However, because the magistrate judge denied defendant's motion to sanction plaintiff and defendant has not objected to that order, this issue is moot unless overturned on appeal.

Plaintiff also seeks leave to amend her complaint. Her motion states in relevant part:

> 4. McGarity erroneously used FLSA when it should be NLSA, National Labor Relations Act for her claims.
>
> 5. McGarity failed to add BAP [Birmingham Association of Paraprofessionals] union as a defendant assuming BPS [Birmingham Public Schools] and BAP were one in the same.
>
> 6. McGarity would like to amend her claims for relief. As justice so requires, an employer with 300 or more employees if found liable for discrimination receive the maximum allowable penalty.
>
> 7. McGarity has battled with BPS for about 2 years. The courts

> goal is to put the plaintiff in a position as if this occurrence never happened. In light of this information, BPS unwillingness to settle, McGarity would like to increase her damages as the amended complaint entails.
>
> 8. Amended complaint is attached as an exhibit.
>
> 9. This request is not made for the purpose of delay and no prejudice will result to the Defendants by this Motion.

Pl.'s Mot. for Leave to Am. Compl. at 1-2. The motion is not supported by a brief. The only mention of BAP in the proposed amended complaint is that at the meeting where plaintiff was terminated, "Dalton, the union rep did not perform his due diligence in representing McGarity." Proposed Am. Compl. ¶ 19. For relief, plaintiff requests that the Court "[e]njoin . . . BAP for unfairly representing African American Employees in accordance with National Labor Standards Act." *Id.* at 6.

While the Court "should freely give leave [to amend] when justice so requires," Fed. R. Civ. P. 15(a)(2), the Court need not give leave where there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962). In the present case, the Court shall deny leave because of the extreme delay in bringing the motion and the futility of the proposed amendment. As for delay, plaintiff commenced this action in May 2019. If she had wished to sue her union, she should have done so then, not eighteen months later after the case has been vigorously litigated and it is on the verge of coming to an end. Plaintiff's only explanation for the delay, that she "erroneously used FLSA when it should be NLSA," makes no sense at all. Plaintiff indicated in her complaint that she sought "to enforce

rights to union representation," Compl. ¶ 1, but she neglected to name the BAP as a defendant.

Further, plaintiff's proposed claim against the BAP is futile, as plaintiff's only allegation is that the union representative "did not perform his due diligence in representing" her at the termination hearing. A union does not violate its duty of fair representation by failing to "perform . . . due diligence." Rather, "[a] breach of the duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Merritt v. Int'l Ass'n of Machinists & Aerospace Workers*, 613 F.3d 609, 619 (6th Cir. 2010) (citing *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)). Plaintiff's proposed claim against the BAP makes no such allegation and is therefore futile, as it "could not withstand a motion to dismiss." *Martin v. Assoc. Truck Lines, Inc.*, 801 F.2d 246, 248 (6th Cir. 1986).

For these reasons, the Court concludes that the magistrate judge has correctly analyzed the issues in this case and that his recommendation is sound. The Court also concludes that plaintiff should not be permitted to amend the complaint at this late date and in the manner she proposes. Accordingly,

IT IS ORDERED that plaintiff's objections to Magistrate Judge Grand's R&R are rejected.

IT IS FURTHER ORDERED that Magistrate Judge Grand's R&R is hereby accepted and adopted as the findings and conclusions of the Court.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is denied.

IT IS FURTHER ORDERED that defendant's motion for summary judgment is granted.

IT IS FURTHER ORDERED that plaintiff's motion for leave to amend the complaint is denied.

s/Bernard A. Friedman
Bernard A. Friedman
Senior United States District Judge

Dated: November 19, 2020
Detroit, Michigan

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on November 19, 2020.

s/Johnetta M. Curry-Williams
Case Manager

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SASHA MCGARITY,

Plaintiff,

vs.

BIRMINGHAM PUBLIC SCHOOLS,

Defendant.
_____/

Civil Action No. 19-CV-11316

HON. BERNARD A. FRIEDMAN

ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter is presently before the Court on plaintiff's motion for default judgment [docket entry 21]. Magistrate Judge Mona K. Majzoub has issued a report and recommendation ("R&R") in which she recommends that this motion be denied. Plaintiff has filed timely objections to the R&R.

The magistrate judge correctly notes that plaintiff's "motion for default final judgment" must be denied because plaintiff did not first obtain a clerk's default. By the time plaintiff sought a clerk's default in July 2019, defendant had already answered the complaint and therefore the clerk properly denied the requested clerk's default. Plaintiff is correct that defendant's answer was filed one day late (twenty-two days after defendant was served with process), but this does not change the fact that plaintiff must first obtain a clerk's entry of default under Fed. R. Civ. P. 55(a) before seeking a default judgment under Fed. R. Civ. P. 55(b). Nor has plaintiff shown how she was prejudiced by the answer being filed one day late. Accordingly,

IT IS ORDERED that Magistrate Judge Majzoub's R&R is hereby accepted and adopted as the findings and conclusions of the Court.

IT IS FURTHER ORDERED that plaintiff's motion for default judgment is denied.

s/Bernard A. Friedman
BERNARD A. FRIEDMAN
SENIOR UNITED STATES DISTRICT JUDGE

Dated: November 14, 2019
Detroit, Michigan