United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 2, 2021
Lyle W. Cayce
Clerk

No. 21-30016
Summary Calendar

IONA SANDERS,

Plaintiff—Appellant,

versus

CHRISTWOOD, A LOUISIANA NON-PROFIT CORPORATION, IMPROPERLY NAMED AS CHRISTWOOD L.L.C.,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:17-CV-9733

Before DAVIS, DENNIS and HO, *Circuit Judges*.

PER CURIAM:*

This case involving claims under Title VII of the Civil Rights Act and the Louisiana Whistleblower Statute ("LWS") returns to this Court after we previously affirmed the district court's grant of summary judgment on the

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Appendix A

Title VII claims and remanded the case for the district court to reconsider the LWS claims. Plaintiff appeals the district court's grant of summary judgment on the LWS claims. We AFFIRM.

I. Background[1]

In 2008, Plaintiff, Iona Sanders, who is African-American, began working for Christwood, L.L.C., a nonprofit corporation that owns and operates a continuing-care retirement community in Covington, Louisiana. Sanders was promoted to the position of assisted living unit (ALU) director at some point between March 2015 and November 2016. On December 4, 2016, Christwood notified Louisiana's Department of Health that Sanders was the new ALU director.

On December 19, 2016, a resident of the ALU wandered off the premises and was found three hours later with hypothermia. Christwood was required to file an incident report with the state within 24 hours. Later that day, the nurse on duty, Ian Thompson, prepared a report and Sanders signed off on it. The report was submitted to Sanders's immediate supervisor, Tami Perry, who, as residential health services director, was responsible for overseeing Christwood's ALU, among other units.

Pertinent to this appeal, Perry asked Sanders to work with Thompson to redo or revise the report by noon the next day, but Sanders believed it was illegal and inappropriate to require Thompson to make changes to the report and did not order him to do so. That night, Perry emailed Sanders, reminding her that the report was due the next day, December 20, at noon. According to Perry, Sanders called her on December 21 and said that she had not

[1] Many of the facts in this case are taken verbatim from this Court's previous ruling in *Sanders v. Christwood*, 970 F.3d 558, 560-61 (5th Cir. 2020).

submitted the report. On December 24, Perry completed and submitted the incident report without Sanders's assistance.

Following the incident report debacle, Sanders was reassigned to a quality assurance coordinator position in Christwood's skilled nursing unit with the same pay, benefits, and hours as her previous position.[2] After Sanders's reassignment and an incident involving the administration of medication to residents, Sanders began to contest her reassignment at Christwood and characterized it as a demotion.[3] This episode eventually led to an end to her employment with Christwood.[4]

Sanders sued Christwood alleging intentional discrimination under Title VII of the Civil Rights Act related to her reassignment. She also brought claims under the LWS related to the incident report. In December 2018, Christwood moved for summary judgment, which the district court granted. We affirmed the district court's grant of summary judgment on Sanders's Title VII claims.[5] We remanded the case for the district court to consider the merits of the LWS claims after we determined—contrary to the district court—that Christwood was Sanders's "employer" under the LWS.[6]

In January 2021, the district court granted summary judgment in favor of Christwood on Sanders's LWS claims. The district court considered Sanders's argument that Christwood violated state law by not submitting the original draft of the incident report to the Louisiana Department of Health but ultimately determined that no state law was actually violated as required

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[2] *Sanders*, 970 F.3d at 561.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 566.

[6] *Id.* at 563-66.

by the LWS. Sanders timely appealed the district court's judgment, and in addition, seeks to relitigate issues decided in this Court's previous ruling.

II. Discussion

We review a grant of summary judgment de novo.[7] Summary judgment is proper "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.[8]

The numerous issues Sanders has briefed on appeal can be condensed to four categories: (1) issues related to Title VII on which this Court has already ruled; (2) new issues related to various claims and procedures not previously raised; (3) the merits of the district court's dismissal of her LWS claims; and (4) the denial of her motion to recuse the district judge.

With the exception of the dismissal of the LWS claims, none of the issues raised by Sanders are properly before this Court. Under the law of the case doctrine, "an issue of law or fact decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal."[9] The doctrine also extends to issues of law or fact decided "by necessary implication."[10] Thus, Sanders's arguments regarding this Court's prior disposition of the Title VII claims are barred by the law of

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[7] *Id.* at 561.

[8] Fed. R. Civ. P. 56(a).

[9] *Gene & Gene, L.L.C. v. BioPay, L.L.C.*, 624 F.3d 698, 702 (5th Cir. 2010) (quoting *Fuhrman v. Dretke*, 442 F.3d 893, 896 (5th Cir. 2006)).

[10] *In re Felt*, 255 F.3d 220, 225 (5th Cir. 2001); *DeJoria v. Maghreb Petroleum Expl., S.A.*, 935 F.3d 381, 394 (5th Cir. 2019), *as revised* (Aug. 16, 2019), *cert. denied*, 140 S. Ct. 2718 (2020).

the case doctrine.[11] Likewise, to the extent that Sanders raises new arguments not previously raised in the district court, we decline to consider them.[12]

We also decline to review the district court's denial of Sanders's motion to recuse. Sanders's notice of appeal designates that her appeal is taken "from the order granting Judgment entered in this action on 5 day of January, 2021." That judgment concerns the district court's grant of summary judgment on the LWS claims. A notice of appeal must designate the judgment or order being appealed, otherwise, this Court may lack jurisdiction to review the order.[13] Although we liberally construe defects in specifying judgments in a notice of appeal, we typically do not exercise jurisdiction to review an order outside of an explicitly designated order in the notice of appeal.[14] This is especially true when the non-designated order is not impliedly intended for appeal.[15] Because the January 5, 2021 order granting summary judgment is specifically designated in the notice of appeal, and that judgment and accompanying briefing do not involve issues related to the recusal motion, we decline to entertain Sanders's arguments related to the denial of her recusal motion.

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[11] Sanders has presented no argument that an exception to the law of the case doctrine applies, and we find no reason to reexamine the Title VII claims. *See Gene*, 624 F.3d at 702 ("Exceptions to the doctrine allow reexamination of issues decided on appeal only if (i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work a manifest injustice.") (internal quotations and citation omitted).

[12] *Est. of Duncan v. Comm'r of Internal Revenue*, 890 F.3d 192, 202 (5th Cir. 2018) ("This court will not consider arguments first raised on appeal . . . .").

[13] FED. R. APP. P. 3(c)(1)(B); *Warfield v. Fid. & Deposit Co.*, 904 F.2d 322, 325 (5th Cir. 1990).

[14] *Warfield*, 904 F.2d at 325.

[15] *Id.*

Thus, the district court's dismissal of Sanders's LWS claims related to the incident report is the only issue properly before this Court. In analyzing the LWS claims, the district court correctly determined that an employee seeking relief under the statute must establish that the employer was actually violating state law. The LWS provides:

> A. An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law:
>
> (1) Discloses or threatens to disclose a workplace act or practice that is in violation of state law.
>
> (2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of law.
>
> (3) Objects to or refuses to participate in an employment act or practice that is in violation of law.[16]

This Court and the Louisiana Supreme Court have held that, under the statute, it is the plaintiff-employee's burden to prove an *actual* violation of Louisiana law.[17] We agree with the district court's careful and detailed analysis that Sanders has not established and the record summary judgment evidence does not show that Christwood committed or encouraged any

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[16] LA. STAT. ANN. § 23:967(A).

[17] *Herster v. Bd. of Supervisors of Louisiana State Univ.*, 887 F.3d 177, 187 (5th Cir. 2018) ("[Plaintiff] must prove that LSU "committed an *actual* violation of [Louisiana] law.") (internal quotations and citation omitted); *Encalarde v. New Orleans Ctr. for Creative Arts/Riverfront*, 158 So. 3d 826, 826 (La. 2015) ("In order to bring an action under La. R.S. 23:967, the employee must establish the employer engaged in workplace conduct constituting an actual violation of state law.").

actual violations of the state laws that Sanders alleges were violated in her complaint.[18]

III. Conclusion

For the foregoing reasons and the reasons stated by the district court, the judgment of the district court is AFFIRMED.

[18] The district court evaluated (1) timely reporting under LA. ADMIN. CODE tit. 48 pt. I § 6871(F)(1); (2) retention of documents under LA. ADMIN. CODE tit. 48 pt. I § 6871(F)(6); and (3) Falsification of records under LA. REV. STAT. ANN. § 37:921 and LA ADMIN CODE tit. 46 pt. XLVII § 3405, 306. The district court found no violation regarding timely reporting since Sanders herself caused the untimely submission of the incident report that Christwood insisted be timely submitted. The district court found no violation regarding retention of documents because there was no proof that the initial incident report or other nurse's notes were destroyed. In addition, the district court determined that a separate draft report of the incident for submission to the state that was torn up during the drafting was not the type of document covered under the regulation. Even if it was, Sanders did not advise Christwood that discarding a draft would violate state law. With regard to falsification of records, the district court correctly determined that the applicable laws do not prevent Christwood from revising or supplementing an initial incident report for submission to the state.

United States Court of Appeals for the Fifth Circuit

No. 21-30016
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IONA SANDERS,

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CHRISTWOOD, A LOUISIANA NON-PROFIT CORPORATION, IMPROPERLY NAMED AS CHRISTWOOD L.L.C.,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:17-CV-9733

Before DAVIS, DENNIS, and HO, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
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NEW ORLEANS, LA 70130

June 24, 2021

Ms. Carol L. Michel
U.S. District Court, Eastern District of Louisiana
500 Poydras Street
Room C-151
New Orleans, LA 70130

No. 21-30016 Sanders v. Christwood
USDC No. 2:17-CV-9733

Dear Ms. Michel,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Majella A. Sutton, Deputy Clerk
504-310-7680

cc:
Ms. Christine S. Keenan
Ms. Iona Sanders

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IONA SANDERS	CIVIL ACTION
VERSUS	NO. 17-9733
CHRISTWOOD, L.L.C.	SECTION M (5)

ORDER & REASONS

Before the Court is the motion for summary judgment of Christwood, improperly named as "Christwood, L.L.C." ("Christwood").[1] Plaintiff Iona Sanders opposes the motion.[2] Christwood replies in further support of its motion,[3] and Sanders files a surreply in further opposition.[4] Having considered the parties' memoranda, the record, and the applicable law, the Court issues this Order & Reasons granting summary judgment and dismissing all remaining claims with prejudice.

I. BACKGROUND

This matter was brought as a claim of racial discrimination under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981, and a claim of retaliation under the Louisiana whistleblower statute, La. R.S. 23:967 ("LWS"). Christwood operates a retirement community consisting of independent living, assisted living, nursing, and memory care units.[5] Sanders, a registered nurse, began her employment with Christwood in September 2008.[6] Sanders alleges that in March 2015, she accepted a promotion to the position of assisted living unit director

[1] R. Doc. 100.
[2] R. Doc. 108. Sanders subsequently filed two amended oppositions to the motion for summary judgment correcting typographical errors. R. Docs. 114 & 125.
[3] R. Doc. 121.
[4] R. Doc. 131.
[5] R. Docs. 16 at 2; 52-5 at 4-5; 100-1 at 1-2.
[6] R. Docs. 52-5 at 10-11; 100-1 at 2.

Appendix B

("ALU Director"), which was offered to her by Christwood's associate executive officer, David Cook.[7] As the ALU Director, Sanders was responsible for the assisted living unit,[8] and she reported directly to Tami Perry, the residential health services director.[9] On December 4, 2016, Christwood prepared the key personnel paperwork with the State to list Sanders as the ALU Director.[10]

Each Christwood facility is considered an adult residential care provider ("ARCP") which is governed by specific regulations.[11] In particular, an ARCP "shall report to [the Health Standards Section of the Louisiana Department of Health] any incidents suspected of involving ... neglect," and "[t]he initial report of the incident or accident is due within 24 hours of occurrence or discovery of the incident." La. Admin. Code ("LAC") tit. 48, pt. I, § 6871(B)(2) & (C). Under Christwood's internal policy, Sanders, as ALU Director, was responsible for this reporting requirement.[12]

On December 19, 2016, an incident occurred in the assisted living unit that was required to be reported to the State.[13] A female resident suffering with dementia exited the building at 2:33 a.m. and was not helped back inside by staff members until 5:52 a.m.[14] Her temperature was 90.7 degrees Fahrenheit when she was eventually found between two parked cars.[15] She was taken to the emergency room to be treated for hypothermia, but was returned to Christwood later that day in good condition.[16]

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[7] R. Doc. 16 at 2. Christwood says she was offered the position in November 2016. R. Doc. 100-1 at 2.
[8] R. Docs. 100-1 at 2-3; 125 at 9-10.
[9] R. Docs. 52-5 at 27, 65; 100-1 at 2-3.
[10] R. Docs. 52-3 at 20; 100-1 at 2; 125 at 9.
[11] R. Docs. 100-1 at 2; 125 at 5.
[12] R. Docs. 52-5 at 191; 100-1 at 3-5.
[13] R. Docs. 100-1 at 3; 125 at 14.
[14] R. Docs. 52-5 at 127; 100-1 at 3-4; 125 at 14. This type of incident is called an "elopement."
[15] R. Docs. 100-1 at 4; 125 at 14.
[16] R. Docs. 100-1 at 4; 125 at 14.

Sanders attests that on that same morning, Ian Thompson, the nurse on night duty, called Sanders to report the incident.[17] She claims that he stated he last saw the resident inside at 4:45 a.m.[18] Sanders went to the hospital to check on the resident.[19] Sanders says that while she was there the resident's daughter-in-law said Thompson told her that he last saw the resident at 4:45 a.m.[20] The video footage showed that the resident left the building at 2:33 a.m. and was returned inside at 5:52 a.m.[21]

As the nurse on duty, Thompson was responsible for preparing an incident report. While Thompson was working on the report, Sanders says she heard Perry tell him, "Stick to what you know, Ian. Stick to what you know."[22] Thompson wrote on the nurse's notes attached to his report that he last saw the resident at 2:00 a.m.[23] Once Thompson completed his incident report, it was signed by both him and Sanders (the "Nurse's Incident Report").[24] Sanders alleges that she sent the Nurse's Incident Report to Cook for his signature.[25]

Because the incident involved neglect of a resident, a report – both oral and written – was due to the State within 24 hours. That afternoon Perry called Christopher Vincent of the Louisiana Department of Health to orally report the incident and assure him that a written report would be

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[17] R. Doc. 52-5 at 123-24.

[18] *Id.*

[19] *Id.* at 125.

[20] *Id.*

[21] R. Docs. 52-5 at 127; 100-1 at 3-4.

[22] R. Doc. 52-5 at 127.

[23] R. Doc. 52-10 at 9. Thompson wrote: "I'm also not sure of this time, but I think it was around 2:00 a.m. the next morning on the 19th of December. It might have been later. I don't remember." *Id.* Certified nursing assistants Kim Grainger and Kim Taylor, also on duty that night, were both dismissed for falsifying records when they reported the resident was last seen inside around 4:45 a.m. R. Docs. 52-5 at 139; 52-10 at 3-6. Thompson was also disciplined – by Sanders, among others – for his initially inaccurate oral statement of the time he last saw the missing resident indoors, but only with a written warning. R. Docs. 52-5 at 143-45; 52-12 at 5.

[24] R. Docs. 52-5 at 145; 52-10 at 7-8; 100-1 at 4.

[25] R. Doc. 52-5 at 145-46.

sent to him by lunch-time the next day, December 20, 2016.[26] Sanders witnessed the conversation and agreed that this phone call fulfilled the state-law requirement to report the incident within 24 hours.[27]

Perry reviewed the Nurse's Incident Report and determined that it did not adequately describe the incident and, for submission to the State, would need to be revised to include more of the facts called for by the state reporting regulation.[28] She instructed Sanders to redo the report, but Sanders refused on the grounds that, in her understanding, it was illegal to alter an incident report.[29] Sanders does not dispute that facts were missing from the Nurse's Incident Report, but argues that it would have been more appropriate to supplement the report in the form of a "late entry" or entries in "chronological order."[30] At 5:06 p.m., Perry emailed Sanders a suggested cover letter and stated: "I would also have Ian [Thompson] come in to complete an Incident Report with your guidance and suggestions. This must be faxed to Chris [Vincent] before lunch tomorrow since that is what I told him on the phone."[31]

Christwood alleges that on December 21, 2016, a day after the December 20th lunch-time deadline had passed, Sanders called Perry to tell her the report had not been submitted to the State.[32] Perry reported the lapsed deadline to her supervisor, Cook.[33] Sanders also called

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[26] R. Docs. 52-5 at 154; 100-1 at 4.

[27] R. Docs. 52-5 at 154-55; 100-1 at 4. "I can add that [the elopement incident] was reported within a 24-hour timeline." R. Doc. 52-5 at 201.

[28] R. Doc. 100-1 at 5.

[29] *Id.*

[30] R. Docs. 125 at 17-20; 131 at 2 & 16.

[31] R. Docs. 52-5 at 149-51; 52-12 at 6-7; 100-1 at 5.

[32] R. Doc. 100-1 at 6.

[33] *Id.* Perry emailed Cook on December 21, 2016, at 8:22 p.m. stating: "I was just notified by Iona [Sanders] that she has not sent any information to Vincent yet. This had to be in to him Tuesday before lunch. She blames this on you having the incident report. We need to talk about this in the morning." R. Doc. 52-10 at 13.

Thompson to tell him that Perry did not think his report was sufficient for submission to the State and that he should meet with Perry the next day.[34]

On December 22, 2016, Thompson called Sanders after meeting with Perry and asked her what to do.[35] Sanders told him that "I can't legally tell you to change anything" and advised him that "once a legal document is done, you can't redo it."[36] However, as she later testified in her deposition, Sanders was not aware of any law that would prohibit an ARCP from retaining the original incident report (the Nurse's Incident Report) and submitting to the State a revised document as the report required by state regulation.[37]

That same day, December 22, Sanders met with Cook and Perry to discuss the incident report.[38] Notwithstanding the directive Perry had given her on December 19, Sanders explained that no incident report had been faxed to Vincent because she was waiting for Cook's signature on the Nurse's Incident Report.[39] Cook allegedly returned the unsigned report to her at this time, stating, "It needs to be redone. I am not sending that."[40] Sanders said she "knew that this incident report was not a well-documented report, but it's done."[41] She explained that she could not ask anyone to change an incident report.[42] Cook responded that he was not telling her to change the incident report.[43] Perry added: "No one is saying to change the incident report but to state the

[34] R. Docs. 52-5 at 155; 100-1 at 6.
[35] R. Docs. 52-5 at 156; 100-1 at 6.
[36] R. Docs. 52-5 at 156-57; 100-1 at 6.
[37] R. Docs. 52-5 at 157-58; 100-1 at 6;
[38] R. Doc. 52-5 at 171, 343-44. Sanders says that at this meeting Cook also raised the issue of Sanders's previous failure to be present for the first day of a three-day unannounced visit by the State on September 6-8, 2016. *Id.* at 175. Cook indicated he should have fired her for that behavior. *Id.* at 179-80. But Sanders claims she had previously-approved time off for that visit and Perry told her she would handle it. *Id.* at 180-81.
[39] *Id.* at 184.
[40] *Id.*
[41] R. Docs. 52-5 at 184; 100-1 at 7.
[42] R. Doc. 52-5 at 185.
[43] R. Docs. 52-5 at 185; 100-1 at 7.

facts."[44] Sanders later testified that she did not believe that Cook and Perry's order to redo the report meant that the Nurse's Incident Report should be destroyed,[45] expressly stating that Perry "never once asked me to destroy the incident report."[46] Christwood asserts that Cook and Perry told Sanders to meet them the next day, Saturday, December 24, at 10:00 a.m., to properly complete the incident report for submission to the State.[47]

On December 24, 2016, Sanders arrived at Christwood around 2:30 p.m. to discover that Perry, Thompson, and another nurse had already been in that morning to redo the report.[48] Thompson told Sanders that Perry was halfway through rewriting the narrative report when, in frustration, she tore it up and opted to prepare and submit as the state-required report a timeline of events instead (the "Christwood Incident Report").[49] At 12:17 p.m., Perry emailed the Christwood Incident Report – a timeline of the elopement incident – to Vincent based on her interviews and the video footage.[50] On December 29, 2016, Sanders says she emailed Perry about sending a letter transmitting the Nurse's Incident Report to the State,[51] but Perry responded that it had already been taken care of.[52]

On Friday, January 27, 2017, Sanders met with Reverend Stephen Holzhalb, Christwood's executive officer, and Perry.[53] Holzhalb reassigned Sanders to the position of quality assurance coordinator in the skilled nursing unit where she would be responsible for preparing care plans and

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[44] R. Docs. 52-5 at 185; 100-1 at 7.
[45] R. Doc. 52-5 at 188.
[46] R. Docs. 52-5 at 152; 100-1 at 11.
[47] R. Doc. 100-1 at 6-7. Sanders says that Perry only stated she would come in on Saturday, without specifying a time. R. Doc. 52-5 at 185-86.
[48] *Id.* at 195.
[49] *Id.* at 196.
[50] R. Docs. 52-12 at 8-9; 100-1 at 7.
[51] R. Doc. 52-5 at 199.
[52] *Id.*
[53] R. Docs. 52-5 at 209-10; 100-1 at 8.

would retain the same pay and benefits she had as ALU Director.[54] At her deposition, Sanders agreed that writing care plans was neither degrading nor menial work[55] and that Holzhalb represented to her that the change was not a demotion.[56] Sanders, however, maintains it was a demotion.[57]

Over that weekend, Sanders did not inform Perry of a staffing shortage that resulted in a delay in delivering medication to some residents.[58] On Monday, January 30, 2017, Sanders received a letter formalizing her change in position.[59] In the letter, Christwood cited the lapses in reporting the elopement incident and in the medication delivery over the weekend as the reasons for the change.[60] Sanders was told to report the following day to begin her new position.[61] She never returned.[62] Under Christwood's policy, she was presumed to have resigned.[63]

Sanders filed this suit on September 27, 2017.[64] On December 5, 2018, Christwood filed a motion for summary judgment,[65] which the Court granted dismissing all of Sanders's claims with prejudice.[66] Sanders appealed the judgment.[67] On September 8, 2020, the Fifth Circuit affirmed this Court's dismissal of her discrimination claims, but vacated the dismissal of her whistleblower claims.[68] The Fifth Circuit explained: "Because the district court concluded that Christwood was

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[54] R. Docs. 52-5 at 209-10; 100-1 at 8. Sanders asserts that Holzhalb moved her because he liked the way she prepares documents. R. Doc. 52-5 at 209-10. Christwood claims she was reassigned as a result of her failure to properly report the elopement incident. R. Doc. 100-1 at 8.

[55] R. Docs. 52-5 at 218-19; 100-1 at 8.

[56] R. Doc. 52-5 at 210.

[57] R. Doc. 125 at 27.

[58] R. Doc. 100-1 at 9.

[59] R. Doc. 52-5 at 368.

[60] *Id.*

[61] *Id.*

[62] R. Docs. 52-5 at 223; 100-1 at 10.

[63] R. Doc. 100-1 at 10.

[64] R. Doc. 1.

[65] R. Doc. 52.

[66] R. Docs. 76 & 77.

[67] R. Doc. 78.

[68] R. Doc. 94.

not an employer [under the LWS], it did not address the remainder of the Sanders's LWS claim. In deference to the trial court's responsibility to review the record in the first instance, we vacate the dismissal of Sanders's LWS claim and remand for further proceedings consistent with this opinion as it relates to that claim."[69] Christwood filed the present summary-judgment motion to address Sanders's remaining LWS claim that she was demoted and constructively discharged for her failure to participate in a violation of state law.[70] Specifically, Sanders asserts that Christwood contravened state law by causing the incident report to be late in violation of LAC 48.I.6871(F)(1), failing to retain documents in violation of LAC 48.I.6871(F)(6), and falsifying records in violation of La. R.S. 37:921, LAC 46.XLVII.3405, and LAC 46.XLVII.306(T)(8)(i) & (k).[71]

II. PENDING MOTION

Christwood argues that Sanders has not made a *prima facie* case for an LWS claim because she cannot show that Christwood actually violated state law.[72] In the alternative, Christwood asserts that it had a legitimate, non-retaliatory reason for Sanders's change in position, namely, "unsatisfactory job performance."[73] Finally, Christwood invokes this Court's prior opinion to argue that there is no evidence that Sanders was constructively discharged.[74] In opposition, Sanders argues that Christwood violated state law when it did not submit the Nurse's Incident Report, without change, to the State.[75] She asserts that she was retaliated against for her refusal to

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[69] *Id.* at 13.

[70] R. Doc. 16 at 6.

[71] *Id.* at 4. In her surreply, Sanders raises new examples of Christwood's purported state-law violations including LAC 48.I.6869(D) & (E) (retention of records) and LAC 48.I.6865(B)(2) (staffing requirements) along with La. R.S. 37:961(4). R. Doc. 131 at 5 & 16-17. Because this is the first time these supposed violations are being raised by Sanders, they cannot form the basis of an LWS claim when she is only now informing her employer of them.

[72] R. Doc. 100-2 at 4-14.

[73] *Id.* at 15-18.

[74] *Id.* at 18-21 (citing R. Doc. 76).

[75] R. Doc. 125 at 52.

make Thompson change this report[76] and that Christwood's purported explanations for its actions against her are pretextual.[77]

III. LAW & ANALYSIS

A. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* A party moving for summary judgment bears the initial burden of demonstrating the basis for summary judgment and identifying those portions of the record, discovery, and any affidavits supporting the conclusion that there is no genuine issue of material fact. *Id.* at 323. If the moving party meets that burden, then the nonmoving party must use evidence cognizable under Rule 56 to demonstrate the existence of a genuine issue of material fact. *Id.* at 324.

A genuine issue of material fact exists if a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The substantive law identifies which facts are material. *Id.* Material facts are not genuinely disputed when a rational trier of fact could not find for the nonmoving party upon a review of the record taken as a whole. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *E.E.O.C.*

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[76] *Id.* at 42.
[77] *Id.* at 45-52.

v. Simbaki, Ltd., 767 F.3d 475, 481 (5th Cir. 2014). Unsubstantiated assertions, conclusory allegations, and merely colorable factual bases are insufficient to defeat a motion for summary judgment. *See Anderson*, 477 U.S. at 249-50; *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994); *Hopper v. Frank*, 16 F.3d 92, 97 (5th Cir. 1994). In ruling on a summary-judgment motion, a court may not resolve credibility issues or weigh evidence. *See Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 398-99 (5th Cir. 2008). Furthermore, a court must assess the evidence, review the facts, and draw any appropriate inferences based on the evidence in the light most favorable to the party opposing summary judgment. *See Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014); *Daniels v. City of Arlington*, 246 F.3d 500, 502 (5th Cir. 2001). Yet, a court only draws reasonable inferences in favor of the nonmovant "when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little*, 37 F.3d at 1075 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)).

After the movant demonstrates the absence of a genuine issue of material fact, the nonmovant must articulate specific facts showing a genuine issue and point to supporting, competent evidence that may be presented in a form admissible at trial. *See Lynch Props., Inc. v. Potomac Ins. Co.*, 140 F.3d 622, 625 (5th Cir. 1998); Fed. R. Civ. P. 56(c)(1)(A) & (c)(2). Such facts must create more than "some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. When the nonmovant will bear the burden of proof at trial on the dispositive issue, the moving party may simply point to insufficient admissible evidence to establish an essential element of the nonmovant's claim in order to satisfy its summary-judgment burden. *See Celotex*, 477 U.S. at 322-25; Fed. R. Civ. P. 56(c)(1)(B). Unless there is a genuine issue for trial that could support a judgment in favor of the nonmovant, summary judgment must be granted. *See Little*, 37 F.3d at 1075-76.

B. Louisiana Whistleblower Statute

Under the Louisiana whistleblower statute, "[a]n employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law ... [o]bjects to or refuses to participate in an employment act or practice that is in violation of law." La. R.S. 23:967(A)(3). "'Reprisal' includes firing, layoff, loss of benefits, or any discriminatory action the court finds was taken as a result of an action by the employee that is protected under Subsection A of this Section; however, nothing in this Section shall prohibit an employer from enforcing an established employment policy, procedure, or practice or exempt an employee from compliance with such." La. R.S. 23:967(C)(1); *see also Rayborn v. Bossier Par. Sch. Bd.*, 881 F.3d 409, 416 (5th Cir. 2018) ("To show constructive discharge in Louisiana, a plaintiff must show that 'the employer intended to and deliberately created such intolerable working conditions that the employee was forced into involuntary resignation.'") (quoting *Plummer v. Marriott Corp.*, 654 So. 2d 843, 849 (La. App. 1995)); *Kirmer v. Goodyear Tire & Rubber Co.*, 538 F. App'x 520, 528 (5th Cir. 2013) (holding that a service manager's transfer to a different store with the same pay and benefits did not constitute an adverse employment action even though he coincidentally made less in bonuses).

> To state a claim under Louisiana Revised Statutes § 23:967, [the employee] must plead facts sufficient to show that "(1) [the employer] violated the law through a prohibited workplace act or practice; (2) [the employee] advised [the employer] of the violation; (3) [the employee] then refused to participate in the prohibited practice or threatened to disclose the practice; and (4) [the employee] was fired as a result of [her] refusal to participate in the unlawful practice or threat to disclose the practice."

Richardson v. Axion Logistics, L.L.C., 780 F.3d 304, 306 (5th Cir. 2015) (quoting *Hale v. Touro Infirmary*, 886 So. 2d 1210, 1216 (La. App. 2004)); *see also Diaz v. Superior Energy Servs. LLC*, 341 F. App'x 26, 28 (5th Cir. 2009).

"In order to bring an action under La. R.S. 23:967, the employee must establish the employer engaged in workplace conduct constituting an actual violation of state law." *Encalarde v. New Orleans Ctr. for Creative Arts/Riverfront*, 158 So. 3d 826, 826 (La. 2015); *see also Malin v. Orleans Par. Commc'ns Dist.*, 718 F. App'x 264, 273 (5th Cir. 2018) ("To state a claim under [the LWS], an employee must show that his employer retaliated for reporting an actual violation of law."); *Wilson v. Tregre*, 787 F.3d 322, 326 (5th Cir. 2015) ("To qualify for protection under the Louisiana Whistleblower Statute, a plaintiff must prove that his employer committed an *actual* violation of state law.") (emphasis in original) (citing *Ross v. Oceans Behav. Hosp.*, 165 So. 3d 176, 180 (La. App. 2014), and *Mabry v. Andrus*, 34 So. 3d 1075, 1081 (La. App. 2010)). Reports of "possible" violations of state law are insufficient. *LaRavia v. Cerise*, 462 F. App'x 459, 464 (5th Cir. 2012). "A whistleblower claim ... requires proof of a causal link between the plaintiff's disclosure of a violation of state law and any acts of reprisal." *Watkins v. Recreation & Park Comm'n*, 594 F. App'x 838, 843 (5th Cir. 2014).

In her amended complaint, Sanders asserts that the actions taken by Christwood were in violation of LAC 48.I.6871(F)(1) & (F)(6), La. R.S. 37:921, LAC 46.XLVII.3405 and LAC 46.XLVII.306(T)(8)(i) & (k).[78] Sanders urges that Christwood violated state law when it did not submit the Nurse's Incident Report to the State in its originally-drafted form. However, none of these regulations requires that the first written report, without change, be the one ultimately submitted to the Louisiana Department of Health.

[78] R. Doc. 16 at 4.

1. Timely reporting under LAC 48.I.6871(F)(1)

"When an incident ... involves abuse or neglect of a resident, or entails any serious threat to the resident's health, safety or well-being, an ARCP director or designee shall immediately report verbally to the director and submit a preliminary written report within 24 hours of the incident to the department ... ." LAC 48.I.6871(F)(1). "After submission of the initial 24-hour report, a final report shall be submitted within five business days regardless of the outcome." *Id.* 48.I.6871(D). Sanders does not dispute that the incident was orally reported to the Louisiana Department of Health, testifying she believed that Perry's phone call satisfied the 24-hour reporting requirement under the law.[79]

The "preliminary written report" required by the regulation – which, here, took the form of the Christwood Incident Report and also constituted the "final report" – was not emailed to the State until December 24, 2016, well after the 24-hour deadline.[80] The regulation prescribes the eight categories of information to be contained in the report of an incident (including, for example, "circumstances under which the incident occurred; date and time the incident occurred; where the incident occurred"), but it does not prescribe a particular form for the report. Perry and Cook were concerned that the Nurse's Incident Report, as originally drafted, did not contain all of the "report contents" prescribed by the regulation, leading them to ask Sanders to redo the report and submit it to the State by lunch-time the day after Perry orally reported the incident to Vincent. Such a submission would have satisfied the 24-hour requirement for a preliminary written report. Sanders did not heed this directive. Thus, while the delay in submitting the preliminary written report may

[79] R. Doc. 52-5 at 154-55; *see also id.* at 201 ("I can add that [the incident] was reported within a 24-hour timeline."), and at 214-15 ("As far as state reporting within a 24-hour period, either the Director or the Director designee call [*sic*] the state.").

[80] R. Doc. 52-12 at 8-9.

constitute a technical violation of state law, it cannot form the basis of Sanders's LWS claim when she herself was responsible, in no small part, for the delay in reporting. *See, e.g., Kite v. Kite Bros.*, 74 So. 3d 1266, 1271 (La. App. 2011) (an employee did not have an LWS claim when he "actively participate[d in], if not orchestrate[d]" the alleged violation of state law). The crux of Sanders's position in this case is that only the Nurse's Incident Report as originally drafted and unrevised – and none other – could be submitted to the State to satisfy the regulatory requirement. Having signed the Nurse's Incident Report and delivered it to Cook, Sanders says she believed she had satisfied her own responsibility for reporting and ignored Perry's instruction to redo the report and submit it to Vincent the day after Perry's oral report to him. Hence, notwithstanding the considerable finger-pointing as to who was at fault for the failure to submit a preliminary written report within 24 hours, Sanders, at the very least, knew a report had not been turned in within the required time frame, and she did not advise Perry of the problem until after the 24-hour deadline had passed. Therefore, Sanders cannot make out a *prima facie* case of retaliation based on this purported violation of state law when she played a role in bringing it about, essentially by neglecting to blow the whistle on herself in time to allow her employer to avoid the violation.

2. Retention of documents under LAC 48.I.6871(F)(6)

"When an incident ... involves abuse or neglect of a resident, or entails any serious threat to the resident's health, safety or well-being, an ARCP director or designee shall ... document its compliance with all of the above procedures for each incident and keep such documentation (including any written reports or notifications) in the resident's file. A separate copy of all such documentation shall be kept in the provider's administrative file." LAC 48.I.6871(F)(6). In her amended complaint, Sanders alleges that the directive to revise the Nurse's Incident Report "required the destruction of the existing Incident Report, resulting in a willful destruction of

medical records,"[81] and that "[u]ltimately, Ms. Perry physically destroyed the Incident Report, and did not keep the documentation."[82]

There is no proof that Christwood destroyed documents relating to the elopement incident. At her deposition, Sanders admitted she did not believe that the order to redo the report meant that the Nurse's Incident Report should be destroyed.[83] Nor was she ever directed to destroy the Nurse's Incident Report.[84] In fact, the Nurse's Incident Report[85] remains on file at Christwood along with nurses' notes from the night of the incident produced by Thompson,[86] Grainger,[87] and Taylor.[88]

In opposing summary judgment, Sanders makes much of the point that Thompson "stated, 'Tami [Perry] got halfway through rewriting the Incident Report, and then, she tore it up.'"[89] Even if true, the Court is not convinced that *drafts* of a written report for submission to the State are the kind of documents meant to be preserved under this regulation. Regardless, Sanders never advised Christwood that destroying such drafts would constitute a violation of state law. Instead, her argument is that the Nurse's Incident Report, as originally drafted and unrevised, had to be the report submitted to the State because it was a binding legal document and to do otherwise was tantamount to its destruction. But this dogmatic position finds no authority in the language of §

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[81] R. Doc. 16 at 4.
[82] *Id.* at 5.
[83] R. Doc. 52-5 at 188.
[84] R. Docs. 52-5 at 152; 100-1 at 11.
[85] R. Doc. 52-10 at 7-8.
[86] *Id.* at 9.
[87] *Id.* at 3-4.
[88] *Id.* at 5-6.
[89] R. Doc. 52-5 at 196. Similarly, in her amended opposition, Sanders asserts that her own nurse's notes from that night were destroyed. R. Doc. 125 at 43. This claim fails because she provides no evidence of the notes, where they might be, or who she turned them over to at Christwood that would have had control over them. Even assuming this allegation is true, it still cannot form the basis of a whistleblower claim because Sanders never informed Christwood that it was violating state law for the destruction of documents. In her surreply, Sanders admits that she "was unaware [her] nurses' note [was] no longer in existence until discovery." R. Doc. 131 at 21. This is a new attempt at a *post hoc* justification for her whistleblower claim which lacks any evidentiary support.

6871(F)(6), and the Nurse's Incident Report, even assuming it is a legal document under some other authority, remains preserved. Therefore, Sanders does not have a viable LWS claim based on the alleged violation of LAC 48.I.6871(F)(6).

3. Falsification of records under La. R.S. 37:921, LAC 46.XLVII.3405, and LAC 46.XLVII.306(T)(8)(i) & (k)

Nurses can be disciplined when they are "unfit or incompetent by reason of negligence, habit, or other cause." La. R.S. 37:921(3). The Louisiana regulatory framework governing the nursing profession lists "falsifying records" as one of the "other causes" for disciplining a nurse. LAC 46.XLVII.3405(A)(j); *see also id.* 46.XLVII.306(T)(8)(i) (falsifying records) & (k) (delegating nursing tasks to others contrary to regulation). Sanders alleges that:

> ... Mr. Cook and Ms. Perry advised Plaintiff that the report should be altered before submitting it to the state as required. Specifically, Mr. Cook and Ms. Perry instructed Plaintiff to require the employee nurse to alter his account of the events. Upon information and belief, the changes sought by Mr. Cook and Ms. Perry would have inaccurately reported the statements of employees at or around the time of the event, among other items. ... Plaintiff refused to alter the initial Incident Report, a violation of state law. ... Upon information and belief, Defendant submitted an altered document in its place, prepared by another employee, in violation of state law.[90]

There is no evidence in this record on summary judgment that Christwood submitted to the State any records that were falsified in relation to the elopement incident. When at her deposition Sanders reviewed the final report Christwood submitted to the State, she admitted: "I'm not saying the document is inaccurate."[91] Instead, Sanders's contention is that submission to the State of any document other than the Nurse's Incident Report, as originally drafted and unrevised, amounted to a falsification of records even if there was nothing false in the report that was submitted.[92]

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[90] R. Doc. 16 at 4-5.

[91] R. Doc. 52-5 at 205-06.

[92] For example, Sanders argues that "An attempt to rewrite or remodified [*sic*] a signed document with a resident/patient medical information would give the appearance of concealing the initial information contained in the

Sanders may well have been taught in nursing school that a patient's records or nurse's notes should not be altered once recorded and that any corrections should be denoted as such, and then only as chronological entries, as she asserts.[93] But there is no indication in the regulations concerning an ARCP's reporting requirements that a preliminary or final written report to the State cannot be drafted and redrafted before a final product is ready for submission to the State. This is especially true when earlier documents supplying the raw material for the report – including, here, the Nurse's Incident Report – might have been short on the factual content prescribed by the regulation. Thus, the prudent act of revising and supplementing early and hurriedly-prepared documentation of an incident for the purpose of submitting a fully-compliant report to the Department of Health hardly amounts to the violation of state law (falsifying records) Sanders alleges. Sanders simply has not identified any state law or regulation providing that the first draft of an incident report, prepared by the on-duty nurse, must be the preliminary written report or final report submitted to the State under LAC 48.I.6871.[94]

When directing Sanders to revise the report, Perry and Cook explicitly instructed her to provide more facts and context for the elopement incident. There is no evidence they instructed her to falsify documents. In her December 22, 2016 meeting with Cook and Perry, Sanders recognized that the Nurse's Incident Report had problems, acknowledging to Cook, "I knew that this incident report was not a well-documented report, but it's done."[95] Yet, in the face of her

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original document," R. Doc. 131 at 12, and that "An attempt to rewrite … when the initial document is completed and signed would be consistent with falsifying medical records." *Id.* at 12-13.

[93] *Id.* at 16.

[94] R. Doc. 52-5 at 219. In response to a question at her deposition whether it was a violation of law to revise the report, Sanders replied: "That's a question for the Board of Nursing." *Id.* In other words, Sanders could point to no state law violated by Christwood's reworking of the Nurse's Incident Report, ahead of any submission to the State, so that the Christwood Incident Report, when submitted to the State, was more complete and hence compliant with the regulation's requirements for its contents.

[95] *Id.* at 184.

acknowledgment, Sanders still told Cook she could not tell anyone to change an incident report.[96] Cook again stated that he was not telling her to change the incident report prepared by Thompson.[97] Perry also stated: "No one is saying to change the incident report but to state the facts."[98]

True to these words, the Nurse's Incident Report, as originally drafted, was not altered and remains in Christwood's records. Perry and Cook merely asked Sanders to rework the report into a new document, by adding missing content, before it was submitted to the State as the preliminary written or final report mandated by LAC 48.I.6871. Nevertheless, in response, Sanders has repeatedly and consistently maintained that redoing the report for submission to the State was "illegal," but does so without providing evidence of any state law contravened by such action.[99] On this score, the Fifth Circuit's decision in *Thomas v. ITT Educational Services, Inc.*, 517 F. App'x 259 (5th Cir. 2013), is instructive. In *Thomas*, an instructor could not succeed on her Louisiana whistleblower claim when she only told her supervisors that their direction to accept and give credit for late assignments was "unethical." *Id.* at 263. The court found that she did not provide evidence of an actual violation of state law. *Id.* Similarly, while Sanders disagrees with the course of action chosen by her supervisors, she did not provide proof to them of an actual violation of state law. Nor does she now. Without an actual violation of state law, Sanders has no claim under the Louisiana whistleblower statute.

IV. CONCLUSION

Accordingly, for the foregoing reasons,

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[96] *Id.* at 185.
[97] *Id.*
[98] *Id.*
[99] *See, e.g.*, R. Doc. 131 at 2-4.

IT IS ORDERED that the motion of defendant Christwood for summary judgment (R. Doc. 100) is GRANTED.

IT IS FURTHER ORDERED that the remaining claims of plaintiff Iona Sanders are DISMISSED WITH PREJUDICE.

New Orleans, Louisiana, this 5th day of January, 2021.

BARRY W. ASHE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IONA SANDERS	CIVIL ACTION
VERSUS	NO. 17-9733
CHRISTWOOD, LLC	SECTION M (5)

JUDGMENT

In accordance with the Court's Order & Reasons granting the defendant's Motion for Summary Judgment, R. Doc. 132,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Christwood, improperly named as Christwood, L.L.C., and against plaintiff, Iona Sanders, DISMISSING plaintiff's claims with prejudice.

New Orleans, Louisiana, this 5th day of January, 2021.

BARRY W. ASHE
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IONA SANDERS	CIVIL ACTION
VERSUS	NUMBER: 17-09733
CHRISTWOOD, L.L.C.	SECTION: "M"(5)

ORDER ON MOTION
DECEMBER 23, 2020

APPEARANCES:

MOTION:

(1) Plaintiff's Motion to Recuse Judge (Rec. doc. 103).

_____: Continued to

_____: No opposition.

__1__: Opposition

ORDERED

_____: Dismissed as moot.

_____: Dismissed for failure of counsel to appear.

_____: Granted.

__1__: Denied. Although the Fifth Circuit has declined to adopt a *per se* rule on the timeliness of motions brought under 28 U.S.C. §455(a), "'... one seeking disqualification must do so at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification.'" *United States v. Sanford*, 157 F.3d 987, 988 (5th Cir. 1998), *cert. denied*, 526 U.S. 1089 (1999) (*quoting Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994)). *See also Andrade v. Chojnacki*, 338 F.3d 448, 459 n. 5 (5th Cir. 2003), *cert. denied sub nom.* 541 U.S. 935 (2004). Plaintiff's motion, which was filed on November

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20, 2020 and which implicates comments purportedly made by the undersigned during the course of a settlement conference that was held on June 18, 2018 (rec. doc. 28), comes far too late. *Sanford*, 157 F.3d at 989 (three-month delay). Moreover, the undersigned will not be presiding over the trial in this matter nor has he ruled upon any substantive, dispositive issues in the case. For these reasons, Plaintiff's motion to recuse is denied.

_____: Other.

MICHAEL B. NORTH
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IONA SANDERS	CIVIL ACTION
VERSUS	NO. 17-9733
CHRISTWOOD, L.L.C.	SECTION M (5)

ORDER & REASONS

Before the Court is the motion of plaintiff Iona Sanders, proceeding *pro se*, to recuse the district judge and magistrate judge in this case.[1] Defendant Christwood, improperly named as "Christwood, L.L.C." ("Christwood"), opposes the motion.[2] Having considered the parties' memoranda, the record, and the applicable law, the Court issues this Order & Reasons denying the motion to recuse the undersigned and the magistrate judge under 28 U.S.C. § 144, and transferring to the magistrate judge the motion to recuse him under 28 U.S.C. § 455.

I. BACKGROUND

This matter concerned allegations of racial discrimination under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981, and a claim of retaliation under the Louisiana whistleblower statute, La. R.S. 23:967. Christwood operates a retirement community consisting of independent living, assisted living, nursing, and memory care units.[3] Sanders, a registered nurse, began her employment with Christwood in September 2008,[4] and performed the

[1] R. Doc. 103.
[2] R. Doc. 109.
[3] R. Doc. 16 at 2.
[4] *Id.*

Appendix D

duties of the Assisted Living Unit Director from March 2015 until she left her employment with Christwood in January 2017.[5]

Sanders, then represented by counsel, commenced this suit in September 2017, and the case was randomly allotted to a district judge and to Magistrate Judge Michael B. North.[6] In the ensuing months, the parties and the Court engaged in preliminary scheduling and other pretrial actions. On June 18, 2018, the parties, together with their respective counsel, attended a settlement conference with the magistrate judge.[7] This was the only personal interaction the parties had with the magistrate judge. The parties were unable to reach a settlement at the conference, so the case proceeded to discovery. On July 12, 2018, Sanders's counsel was granted leave to withdraw and Sanders was permitted to proceed *pro se*.[8] On September 14, 2018, this case was transferred to the undersigned by random allotment.[9] On December 5, 2018, immediately after the discovery deadline passed and with a jury trial set for February 11, 2019,[10] Christwood filed a motion for summary judgment,[11] which the Court granted dismissing all of Sanders's claims with prejudice.[12] Sanders appealed the judgment.[13] On September 8, 2020, the Fifth Circuit affirmed this Court's dismissal of her discrimination claims, but vacated the dismissal of her whistleblower claims and remanded the case for further proceedings consistent with its opinion.[14]

On September 9, 2020, in order to get the case back on track in the district court, this Court ordered a status conference and required the parties to submit status reports "(1) advising the Court

[5] *Id.* at 2-3, 5.
[6] R. Docs. 1 & 2.
[7] R. Docs. 27 & 28.
[8] R. Docs. 29-31 & 33.
[9] R. Doc. 45.
[10] Trial was later continued and reset for August 5, 2019. R. Doc. 73.
[11] R. Doc. 52.
[12] R. Docs. 76 & 77.
[13] R. Doc. 78.
[14] R. Doc. 94.

of the issues they anticipate in preparing the case for trial, and (2) outlining what they perceive as the next steps to be taken in the case."[15] Both parties submitted reports.[16] In her report, Sanders provided her assessment of the case's status and asked that the case be set for trial before a jury.[17] In the section of her report identifying pretrial issues, Sanders stated, *inter alia*, that "the District Court's belief that 'the law is on the side of the business,' and other statements spoken to me in the presence of my former attorney placed the Plaintiff at a disadvantage throughout these court proceedings of having equality when seeking justice."[18] At the status conference on October 8, 2020, the parties discussed setting a deadline for dispositive motions, the setting and length of a jury trial, and Sanders's choice to proceed *pro se*.[19] The Court then specifically addressed with Sanders the sentence from her status report quoted above:

THE COURT: Okay. So I wanted to deal with one other matter, and this involves you, Ms. Sanders.

I'm reading your report, and there is a sentence in the report on Page 3 that I don't understand, so I need some clarification from you with respect to it.

It's at the bottom of Page 3 in Paragraph 1, the issues that the plaintiff anticipates in preparing the case for trial.

And it says, "Also the district court's belief that" -- and it's quoted -- "'the law is on the side of the business,'" closed quote, "and other statements spoken to me in the presence of my former attorney place the plaintiff at a disadvantage throughout these court proceedings in having equality in seeking justice."

Are you quoting me at that point --

MS. SANDERS: No, sir.

THE COURT: -- or are you trying to quote me?

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[15] R. Doc. 95.
[16] R. Docs. 96 & 97.
[17] R. Doc. 96.
[18] *Id.* at 3.
[19] R. Doc. 98.

MS. SANDERS: No, I'm not quoting you at that point, Judge. I'm not quoting you.

THE COURT: Okay. Who are you quoting and what does that refer to?

MS. SANDERS: I'm quoting Magistrate Judge North.

THE COURT: Okay. And do you understand what he meant by that?

MS. SANDERS: I'm quoting what he said.

THE COURT: Okay. Well, I can assure you [based] on my relationship in working with Judge North, that Judge North is not trying to convey to you that somehow your claims for you, as the plaintiff, are disfavored in the court in any way, shape, or form. If he was trying to convey anything to you, he was probably telling you that -- his estimation of how the law might apply.

So, you know, I want you to understand that this Court is open-minded and seeks to administer equal justice under the law for all sides. You should have no fear that your claims are somehow not going to be adjudicated in a fair and equitable fashion.

So I just wanted to convey that message to you. Do you understand that?

MS. SANDERS: I understand what you said.

THE COURT: Okay. All right. I can hear some skepticism in your voice, and I guess I'll just have to deal with that.

We just administer the law the way the law is handed down to us, and that's what we're going to continue to do in a fair and equitable way.

Ms. SANDERS: I understand what you said, Judge Ashe.

THE COURT: That's my pledge to you, and that's what we're going to do.[20]

On November 3, 2020, in accordance with the schedule established at the status conference, Christwood filed a motion for summary judgment directed to Sanders's whistleblower claims and

[20] R. Doc. 115 at 8-10.

set it for hearing on November 19, 2020.[21] On November 20, 2020, Sanders filed her opposition to the motion,[22] which was nine days late under Local Rule 7.5[23] and exceeded the page limit without leave of court under Local Rule 7.7.[24] On November 27, 2020 (16 days after her opposition was due), she moved for leave to file her opposition with excess pages,[25] which this Court granted, thereby allowing Sanders's late-filed and overlong opposition to be considered.[26] On December 10, 2020, Sanders moved to amend her opposition,[27] which this Court also granted and is now filed into the record.[28]

On the same day Sanders filed her opposition to Christwood's summary-judgment motion, she filed the present motion to recuse, which was itself marked deficient by the clerk of court for failure to set the motion for submission per Local Rule 7.2.[29] This Court ordered the motion to be set for submission on December 17, 2020.[30]

II. PENDING MOTION

Sanders asks that both the undersigned and Magistrate Judge North be recused from this case.[31] She argues that her "due process of the law is compromised as the District's Court [*sic*]

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[21] R. Doc. 100.

[22] R. Doc. 101.

[23] "Each party opposing a motion must file and serve a memorandum in opposition to the motion with citations of authorities no later than eight days before the noticed submission date." LR 7.5. Because the submission date for the motion for summary judgment was November 19, 2020, Sanders opposition was due on November 11, 2020. She filed her opposition on November 20, 2020, nine days late.

[24] "Except with *prior* leave of court, a trial brief or memorandum supporting or opposing a motion must not exceed 25 pages, excluding exhibits, and a reply brief or memorandum must not exceed 10 pages, excluding exhibits." LR 7.7 (emphasis added). Sanders's opposition was 54 pages. As a result, Sanders's opposition was marked as a deficient filing by the clerk of court. R. Docs. 101 & 102.

[25] R. Doc. 106.

[26] R. Doc. 107. The Court previously acted in like manner in regard to Sanders's late-filed opposition to Christwood's original motion for summary judgment, allowing Sanders's opposition and evidence to be considered. R. Docs. 59 & 75.

[27] R. Doc. 112.

[28] R. Docs. 113-114.

[29] "Counsel filing a motion must, at the time of filing, notice it for submission within a reasonable time." LR 7.2.

[30] R. Doc. 105.

[31] R. Doc. 103 at 1.

statement 'the law is on the side of the business,' and other statements made in the presence of my former attorney, were stated before the completion of the evidence presented in this claim."[32] Such statements hinder fair proceedings, she asserts, especially when made before all the evidence has been presented.[33] Sanders intimates that the judicial bias she says is reflected in these statements is confirmed by the Court's rulings in favor of Christwood.[34]

In opposition, Christwood argues that Sanders does not meet the standard for recusal or disqualification of a judge under either 28 U.S.C. § 144 or 28 U.S.C. § 455.[35] Under 28 U.S.C. § 144, Christwood asserts that Sanders has failed to attach the procedurally-required affidavit attesting to the judge's "'personal bias or prejudice.'"[36] Additionally, says Christwood, she has not timely filed the motion given the timing of her discovery of the purported bias over two years ago.[37] Under 28 U.S.C. § 455, Christwood argues that there is no extrajudicial act or sentiment that would indicate a "'personal bias or prejudice concerning a party.'"[38] Finally, Christwood asserts that there can be no evidence of bias as the facts of the case show that this Court has "gone to great lengths" to accommodate Sanders's noncompliant and untimely filings.[39]

III. LAW & ANALYSIS

The Supreme Court's "precedents set forth an objective standard that requires recusal when the likelihood of bias on the part of the judge 'is too high to be constitutionally tolerable.'" *Williams v. Pennsylvania*, 579 U.S. __, 136 S. Ct. 1899, 1903 (2016) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009)). "A motion to recuse must be strictly construed for

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[32] *Id.* at 2.
[33] *Id.*
[34] *Id.*
[35] R. Doc. 109 at 4.
[36] *Id.* (quoting 28 U.S.C. § 144).
[37] *Id.* at 6.
[38] *Id.* at 6-9 (quoting 28 U.S.C. § 455(b)(1)).
[39] *Id.* at 10-11.

form, timeliness, and sufficiency in order to guard against the danger of frivolous attacks on the orderly process of justice." *Danielson v. Winnfield Funeral Home of Jefferson, Inc.*, 634 F. Supp. 1110, 1113 (E.D. La. 1986). "To be timely, a motion to recuse must be filed as soon as practicable after discovery of the allegedly disqualifying facts." *Id.* at 1114. Motions to disqualify a judge can be brought under 28 USC § 144 or 28 U.S.C. § 455.

A. Recusal Under 28 U.S.C. § 144

Pursuant to 28 U.S.C. § 144, "[w]henever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." Section 144 "relates only to charges of actual bias." *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 483 (5th Cir. 2003). The affidavit "must meet the following requirements: (1) the facts must be material and stated with particularity; (2) the facts must be such that if true they would convince a reasonable man that a bias exists; and (3) the facts must show the bias is personal, as opposed to judicial, in nature." *Henderson v. Dep't of Pub. Safety & Corr.*, 901 F.2d 1288, 1296 (5th Cir. 1990).

Sanders has not submitted an affidavit alleging bias in this case. Therefore, under this section of the law, the motion to recuse must be dismissed. *See, e.g., United States v. Alexander*, 726 F. App'x 262, 262-63 (5th Cir. 2018) (affirming denial of recusal motion under 28 U.S.C. § 144 where movant failed to "submit the required affidavit delineating facts and reasons that would convince a reasonable person of the existence of bias"). However, even if the court were to attempt to construe her arguments as true, as would be proper if a sworn affidavit had been provided, she has not pointed to facts that would convince a reasonable person that the undersigned or the

magistrate judge has any actual personal bias against her or in favor of Christwood. Hence, Sanders has not met the requirements for recusal under 28 U.S.C. § 144.

B. Recusal Under 28 U.S.C. § 455

Pursuant to 28 U.S.C. § 455, "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. He shall also disqualify himself ... where he has a personal bias or prejudice concerning a party." 28 U.S.C. § 455(a) & (b)(1). To bring a petition "under § 455(a) and (b)(1), the movant 'must (1) demonstrate that the alleged comment, action, or circumstance was of "extrajudicial" origin, (2) place the offending event into the context of the entire trial, and (3) do so by an "objective" observer's standard.'" *Casby v. St. Charles Par. Sheriff's Off.*, 2014 WL 6684947, at *2 (E.D. La. Nov. 25, 2014) (quoting *Andrade v. Chojnacki*, 338 F.3d 448, 455 (5th Cir. 2003)). "[T]he relevant inquiry is whether a 'reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality.'" *Trevino v. Johnson*, 168 F.3d 173, 178 (5th Cir. 1999) (quoting *Health Servs. Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 800 (5th Cir. 1986)). In this context, the reasonable person is contemplated to be "a 'well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person.'" *Trevino*, 168 F.3d at 179 (quoting *United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995)).

Judicial statements made during the course of a case must be well out-of-bounds to warrant recusal. Opinions formed by the judge through the course of a case do not merit recusal for bias or partiality unless "they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). "[A] judge does not show bias merely because he has formed and expressed an opinion, in light of the evidence before him, regarding a plaintiff's ability to prove her case." *Raborn v. Inpatient Mgmt. Partners, Inc.*,

352 F. App'x 881, 884 (5th Cir. 2009). "Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky*, 510 U.S. at 555 (emphasis in original). "[E]xpressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display" do not establish bias or impartiality. *Id.* at 555-56.

Likewise, adverse judicial rulings are not sufficient grounds for recusal. "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky*, 510 U.S. at 555; *see Raborn*, 352 F. App'x at 884 ("An adverse ruling, by itself, is not evidence of bias."). "'[O]nly in the rarest circumstances'" can a judicial ruling evince "'the degree of favoritism or antagonism required' to warrant recusal." *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 581 (5th Cir. 2005) (quoting *Liteky*, 510 U.S. at 555). In the ordinary course, judicial rulings "are proper grounds for appeal, not for recusal." *Liteky*, 510 U.S. at 555; *see United States v. Landerman*, 109 F.3d 1053, 1066 (5th Cir. 1997). After all, "[i]t has long been regarded as normal and proper for a judge to sit in the same case upon its remand." *Liteky*, 510 U.S. at 551.

In this case, Sanders bases her request for recusal on statements that were not made by me or in my presence. She has identified no statement by the undersigned that would indicate *any* level of bias or impartiality, much less one deriving from an extrajudicial source or revealing the kind of favoritism or antagonism as would make fair judgment impossible. The undersigned has ruled against Sanders only once, dismissing her claims on summary judgment after careful

consideration of her arguments and extensive submissions, notwithstanding their untimeliness.[40] At that time, Sanders took the appropriate action for objecting to an adverse ruling, appealing the case and gaining some relief.[41] Adverse judicial rulings are not themselves indications of bias, but are the necessary product of the adversarial process and a judge's role as umpire. Therefore, as to the undersigned, Sanders has not satisfied the standard for recusal under 28 U.S.C. § 455.

The Court doubts that Sanders has met this standard relative to Magistrate Judge North, especially considering her two-year delay after the settlement conference before seeking his recusal. However, because her grounds for recusal reference specific statements he is alleged to have made, it is the prudent course to allow him to address this aspect of Sanders's motion. While the undersigned did his best to explain the specific statement Sanders attributes to Magistrate Judge North, as reflected in the transcript of my exchange with Sanders at the status conference,[42] Magistrate Judge North will know the context of the alleged statements and is better situated to weigh the merits of Sanders's motion under § 455 as related to such statements. Accordingly, because of the nature of Sanders's allegations, and "because motions to recuse typically are decided by the judge a party seeks to recuse," Sanders's motion to recuse Magistrate Judge North on the basis of § 455 is referred to him. *See, e.g., Gilbert v. Cates*, 2018 WL 6190802, at *3 (E.D. La. Nov. 28, 2018).

IV. CONCLUSION

Accordingly, for the foregoing reasons,

IT IS ORDERED that plaintiff Iona Sanders's motion to recuse (R. Doc. 103) is DENIED IN PART and REFERRED IN PART to the magistrate judge. The motion is denied in all respects

[40] R. Doc. 76.
[41] R. Doc. 94.
[42] R. Doc. 115 at 8-10.

under 28 U.S.C. § 144 and under 28 U.S.C. § 455 as it pertains to the undersigned, but the motion is referred to the magistrate judge to address the grounds alleged for his recusal under § 455 and for further proceedings consistent with this opinion.

New Orleans, Louisiana, this 18th day of December, 2020.

BARRY W. ASHE
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IONA SANDERS,	*	Docket No. 17-9733
Plaintiff,	*	
VS	*	October 8, 2020
CHRISTWOOD LLC, ET AL,	*	
Defendants.	*	Section M

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REPORTER'S OFFICIAL TRANSCRIPT OF THE TELEPHONIC STATUS CONFERENCE BEFORE THE HONORABLE BARRY ASHE, UNITED STATES DISTRICT JUDGE.

****

APPEARANCES:

For the Plaintiff:

Pro Se
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Franklinton, LA 70438

For the Defendants:

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REPORTED BY:

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OFFICIAL TRANSCRIPT

Appendix E

P R O C E E D I N G S

THE COURT: Good morning. This is Judge Ashe on the line. Is Ms. Charles on the line?

00:00:07 THE CASE MANAGER: Yes, Your Honor. Good morning.

THE COURT: And is the court reporter on the line?

THE COURT REPORTER: Yes, sir.

THE COURT: This is -- Ms. Charles, go ahead and call the case.

00:00:20 THE CASE MANAGER: Sure.

Civil Action 17-9733, *Sanders v Christwood LLC.*

THE COURT: And would counsel and the parties make their appearances, please.

MS. SANDERS: Iona Sanders, plaintiff *pro se.*

00:00:39 THE COURT: Good morning, Ms. Sanders.

MS. SANDERS: Good morning.

MS. KEENAN: Good morning, Your Honor. This is Christine Keenan on behalf of the defendant, Christwood.

THE COURT: Good morning, Ms. Keenan.

00:00:52 Okay. This matter is before the Court. We have a status conference this morning to address where we go from here with respect to the case. I appreciate each side having submitted their status reports. I've read the reports. There are a couple of preliminary issues that I'd like to address.

00:01:15 I'll address one now, and then I'll address one later,

and then we'll review the status reports.

One of the preliminary questions that I have is for you, Ms. Sanders.

Ms. Sanders, now that the case has been decided by the
00:01:32 Fifth Circuit on the summary judgment and the Louisiana whistleblower claim sent back to this Court for resolution, do you plan to continue to proceed *pro se* or do you plan to enroll counsel?

MS. SANDERS: I'm continuing *pro se*.

00:01:53 THE COURT: All right. I would encourage you to consider counsel. You know, I think that at this point it might be possible to engage counsel on a contingency basis, I don't know. But it's going to be difficult, I think, for you to continue to proceed *pro se* given all the deadlines.

00:02:16 But that's your choice. Okay?

So if you choose to proceed *pro se*, the Court is going to require that you heed all the deadlines and obey the rules of court. So if you choose to proceed *pro se*, please familiarize yourself with all of those rules.

00:02:39 Is that understood?

MS. SANDERS: Yes, that's understood. I will try to seek counsel, but if not, I will continue *pro se*.

THE COURT: Yes, ma'am. Okay, I appreciate that. Thank you.

00:02:50 So I've read the status reports. Just from my review,

it appears, you know, that plaintiff is asking the Court to go ahead and set the case for trial. That includes a pretrial conference date and then a trial date.

And that my review of the defendant's status report

00:03:13 is -- the only difference is that defendants are asking that I set a deadline for dispositive motions to be filed in connection with the whistleblower claim, since the merits of that claim were not previously addressed in connection with the dispositive motions that had been filed earlier. And then to also set a

00:03:39 trial date and pretrial conference date.

And, you know, the Court has reviewed the scheduling order that had previously been entered by the Court, and recognizes that discovery is long since over, so it seems like these are the only dates in play. Am I reading your --

00:03:57 MS. SANDERS: I'm sorry, Judge. I'm sorry to interrupt you -- and I don't mean to be rude, but I only requested a trial by jury, I didn't request a pretrial conference.

And I apologize for interrupting.

THE COURT: Oh, that's okay. But it is part of the

00:04:12 court's rules that there must be a pretrial conference in connection with any trial setting, so that's why I referred to it.

MS. SANDERS: Okay.

THE COURT: Okay. So am I reading the reports

00:04:25 correctly?

And I guess, Ms. Sanders, you kind of responded to that question before I completed the question, so it really wasn't an interruption.

From Ms. Keenan's side, am I capturing your status

00:04:41 report correctly?

MS. KEENAN: Yes, Your Honor. Thank you.

THE COURT: Okay. I do believe that what we should go ahead and do is set a dispositive motion deadline. The only thing that the dispositive motion is to address is the Louisiana

00:05:03 whistleblower claim.

So my question, I guess, for you, Ms. Keenan, since you plan to file it from your side, is how much time do you need in order to file the motion?

MS. KEENAN: That is a good question, Judge. I really

00:05:21 don't need that much time, honestly, because we've already completed discovery. Honestly, it's been a little while since I've gone back and looked at the deposition transcripts, but could you -- is 30 days asking too much? Could we get 30 days?

THE COURT: I don't think that's asking for too much in

00:05:38 the era in which we're presently living, because, as I understand it, Ms. Sanders is asking for a jury trial. And the last time this was set, the parties had estimated that the jury trial would be three days.

Is that still an accurate estimate of how long this --

00:05:57 the jury trial would take?

MS. KEENAN: Well, you know, now that we're down to really just one claim, I don't -- you know, we won't have nearly as much evidence.

THE COURT: Okay.

00:06:08 MS. KEENAN: So it might be more like two days.

I'll let Ms. Sanders chime in as to what her thoughts were, but we're just down to one claim whereas before we had quite a few claims, you know, within the race discrimination claim. There were quite a few claims in there that had to be

00:06:24 addressed, but now we're down to just one, and so I would imagine we could get it done in two depending on how you pick a jury, Judge. You know, I'm not sure.

THE COURT: I usually pick a jury in between 45 minutes and an hour and a half.

00:06:40 MS. KEENAN: Okay. Well, then, I would imagine -- I mean, honestly, you know, at the latest we would be done by the morning of the second day at the latest.

THE COURT: Do you agree, Ms. Sanders?

MS. SANDERS: As far as a jury trial, picking the jury?

00:06:58 THE COURT: As far as the length of the trial. Is two days going to be sufficient?

MS. SANDERS: Probably -- let's go with three.

THE COURT: Okay. Well, we'll plan for three and hope for two. I'm going to move this along. We're not going to, you

00:07:19 know, be dillydallying in terms of trying to work our way

through, because juries appreciate trying to get the trial done.

Obviously given where we are, the Court is not having any jury trials at this time, and the jury trials that we did have scheduled -- Ms. Charles, who is on the phone, is my case
00:07:47 manager -- and a lot of the first part of 2021 is already consumed with trial settings.

So at some point I'm going to turn this over to Ms. Charles -- actually convert this to a scheduling conference in order to pick a trial date and the pretrial conference date.
00:08:09 I'll stay on the phone to see if there are any questions related to that, but I want to deal with --

You know, so here's what we need to do, Ms. Charles, in connection with scheduling, is the scheduling order will need to set a dispositive motion deadline 30 days from today.

00:08:32 And then, you know, we'll pick the trial date and the pretrial conference date in the normal course of, you know, scheduling jury trials. But this is designated as a jury trial.

And then, Ms. Sanders, you know, you'll need to respond to the motion -- I'm not requiring that the defendant Christwood
00:09:05 file a motion. I'm just going to set a dispositive motion deadline.

If they do file a motion, Ms. Sanders, you will need to respond to the motion. It will need to be set for submission. And it will be briefed in accordance with the rules, so please
00:09:20 familiarize yourself with those. And if you need help with that,

I think you can talk to the *pro se* clerk about that.

So that's what we'll do with the scheduling.

Anybody have any questions about that?

And then I'll turn it over to Ms. Charles in a second.

00:09:38 Anybody have any questions?

MS. KEENAN: No, Your Honor. I think that sounds perfect.

MS. SANDERS: No.

THE COURT: Okay. So I wanted to deal with one other

00:09:47 matter, and this involves you, Ms. Sanders.

I'm reading your report, and there is a sentence in the report on Page 3 that I don't understand, so I need some clarification from you with respect to it.

It's at the bottom of Page 3 in Paragraph 1, the issues

00:10:07 that the plaintiff anticipates in preparing the case for trial.

And it says, "Also the district court's belief that" -- and it's quoted -- " 'the law is on the side of the business,'" closed quote, "and other statements spoken to me in the presence of my former attorney place the plaintiff at a disadvantage

00:10:29 throughout these court proceedings in having equality in seeking justice."

Are you quoting me at that point --

MS. SANDERS: No, sir.

THE COURT: -- or are you trying to quote me?

00:10:39 MS. SANDERS: No, I'm not quoting you at that point,

Judge. I'm not quoting you.

THE COURT: Okay. Who are you quoting and what does that refer to?

MS. SANDERS: I'm quoting Magistrate Judge North.

00:10:52 THE COURT: Okay. And do you understand what he meant by that?

MS. SANDERS: I'm quoting what he said.

THE COURT: Okay. Well, I can assure you on my relationship in working with Judge North, that Judge North is not

00:11:13 trying to convey to you that somehow your claims for you, as the plaintiff, are disfavored in the court in any way, shape, or form. If he was trying to convey anything to you, he was probably telling you that -- his estimation of how the law might apply.

00:11:42 So, you know, I want you to understand that this Court is open-minded and seeks to administer equal justice under the law for all sides. You should have no fear that your claims are somehow not going to be adjudicated in a fair and equitable fashion.

00:12:07 So I just wanted to convey that message to you. Do you understand that?

MS. SANDERS: I understand what you said.

THE COURT: Okay. All right. I can hear some skepticism in your voice, and I guess I'll just have to deal with

00:12:23 that.

We just administer the law the way the law is handed down to us, and that's what we're going to continue to do in a fair and equitable way.

MS. SANDERS: I understand what you said, Judge Ashe.

00:12:39 THE COURT: That's my pledge to you, and that's what we're going to do.

So Ms. Charles, I'm going to turn this over to you for you to go ahead and set the dispositive motion deadline for 30 days from today and then pick a trial date and a pretrial

00:12:59 conference date according to the calendar as you see it.

All right?

MS. SANDERS: Before you leave, Judge Ashe -- oh, I'm sorry. I'm sorry, I apologize.

Before you leave, how long do I have to respond to the

00:13:14 defense's dispositive motions?

THE COURT: That's prescribed in the rules.

MS. SANDERS: Okay.

THE COURT: So I need you to read the rules.

This is why attorneys are important. But you have the

00:13:28 right to proceed *pro se* if you choose to do that. If you do, you need to familiarize yourself with the rules of court. The rules of court explain to you how long you have to respond to the motions, and it has to do with --

MS. SANDERS: Okay.

00:13:43 THE COURT: -- when they file the motion. Okay? And

when it's set or noticed for submission.

But read the rules. If you have any questions about it, my understanding is that you can call the *pro se* clerk and get help from them. But I'm not in a position to try to, you know, explain that any further at this time.

00:14:09

MS. SANDERS: Yes, sir, I understand. I'll read it and get it done.

THE COURT: Yes, ma'am. I appreciate it. And I'm sure that you will.

00:14:21

So Ms. Charles -- and I'm going to hang on the phone if there are any questions. So I'm not leaving just yet, but I'm going to turn this over to Ms. Charles to do the scheduling.

THE CASE MANAGER: Thank you, Your Honor.

The parties -- if we could have you look to your own

00:14:37

calendars. The Court is currently setting jury trials in June of 2021. Our next availability would be June 21st of 2021.

MS. KEENAN: This is Christine Keenan. I have two trials already set back-to-back in June. Do you think we could look at July?

00:15:09

THE CASE MANAGER: The Court has available July 5th.

MS. KEENAN: That is open on my calendar.

MS. SANDERS: That's fine with me, too.

THE CASE MANAGER: All right. So we're going to go ahead and set this three-day jury trial to begin July 5th of

00:15:25

2021.

Our pretrial conference will be set three weeks prior to the selected trial date, which will be June 14th. Could we set the pretrial conference for June 15th at 2:00?

MS. KEENAN: So that is one of the weeks I'm in trial, so let me see. Hang on.

00:15:43

That trial ends June 16th.

THE CASE MANAGER: Could we possibly move that pretrial conference to the Friday, which I believe is June 18th, and can we hold that at 10:30?

00:16:00

MS. KEENAN: Yes, I can do that.

MS. SANDERS: That's fine with me.

THE CASE MANAGER: All right. So I believe we selected the trial and pretrial conference dates.

The dispositive deadline will be set within the

00:16:17

scheduling order that will issue shortly.

Judge, I'm going to go ahead and turn the conference back to you.

THE COURT: I think that's all we had for today unless there is anything that you, Ms. Sanders or Ms. Keenan, need to

00:16:30

raise with me.

MS. SANDERS: No, sir.

MS. KEENAN: No, sir, Your Honor. Thank you so much.

THE COURT: All right. Well, I thank you for participating. I want you-all to stay safe out there, you know.

00:16:39

I think this hurricane -- we dodged a bullet, but let's all pay

attention and continue to keep safe with COVID.

So good talking to you. Thank you.

MS. KEENAN: You as well.

MS. SANDERS: Thank you.

00:16:53 THE COURT: Thank you.

(Proceedings adjourned.)

* * * *

CERTIFICATE

I hereby certify this 11th day of December, 2020, that the foregoing is, to the best of my ability and understanding, a true and correct transcript of the proceedings in the above-entitled matter.

/s/ Mary V. Thompson

Official Court Reporter

OFFICIAL TRANSCRIPT

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IONA SANDERS	CIVIL ACTION
VERSUS	NUMBER: 17-09733
CHRISTWOOD, L.L.C.	SECTION: "M"(5)

ORDER ON MOTION
JANUARY 9, 2019

APPEARANCES:

MOTION:

(1) Plaintiff's Motion to Compel the Defendant to Produce Witnesses Contact Information (Rec. doc. 56).

_____: Continued to

_____: No opposition.

__1__: Opposition

ORDERED

_____: Dismissed as moot.

_____: Dismissed for failure of counsel to appear.

_____: Granted.

_____: Denied.

__1__: Other. Denied as having been filed beyond the deadline for filing non-evidentiary pre-trial motions and for failure to include the certification required by Rule 37(a)(1). Moreover, the discovery deadline has also passed. However, no later than two weeks prior to trial, Defendant shall provide Plaintiff with the contact information for or confirmation that it will

Appendix F

voluntarily agree to make the following individuals available at trial: Tami Perry, Ian Thompson, Ladonna Allen, Stephen Holahalb, Jamie Bell, Anna Thompson, Wilson Fuselier, and Laura Lunday.

MICHAEL B. NORTH
UNITED STATES MAGISTRATE JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IONA SANDERS	CIVIL ACTION
VERSUS	NUMBER: 17-09733
CHRISTWOOD, L.L.C.	SECTION: "E"(5)

ORDER ON MOTION
SEPTEMBER 5, 2018

APPEARANCES:

MOTION:

(1) Plaintiff's Motion for Protective Order (Rec. doc. 39).

_____: Continued to

_____: No opposition.

__1__: Opposition

ORDERED

_____: Dismissed as moot.

_____: Dismissed for failure of counsel to appear.

_____: Granted.

__1__: Denied. By seeking damages for "emotional distress and/or mental anguish ..." (rec. docs. 1, p. 5; 16, p. 6), Plaintiff has clearly put her medical condition at issue, thus entitling Defendant to the discovery of information pertaining to any mental or physical conditions which could have led to the claimed damages. *Williams v. NPC International, Inc.*, 224 F.R.D. 612, 613 (N.D. Miss. 2004); *Stogner v. Sturdivant*, No. 10-CV-0125, 2011 WL 4435254 at *5 (M.D. La. Sept. 22, 2011). Particularly given Defendant's willingness to limit its request for relevant medical information to a period of five years (rec. doc. 41, p. 6), within 10 days Plaintiff is to fully and completely answer Defendant's interrogatory Nos. 6 and 8 and to respond to Defendant's requests for

Appendix G

production Nos. 14 and 18, including executing the attached authorizations for the release of medical records. *Williams*, 224 F.R.D. at 613. Such information may be produced subject to the terms of the protective order in place in this litigation. (Rec. doc. 21).

_____: Other.

MICHAEL B. NORTH
UNITED STATES MAGISTRATE JUDGE

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
August 14, 2020
Lyle W. Cayce
Clerk

No. 19-30550

IONA SANDERS,

Plaintiff - Appellant

v.

CHRISTWOOD, a Louisiana Non-Profit Corporation, Improperly Named as Christwood L.L.C.,

Defendant - Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana

Before HIGGINBOTHAM, ELROD, and HAYNES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:*

Plaintiff Iona Sanders challenges the district court's summary judgment dismissal of her suit for intentional discrimination under two federal statutes and retaliation under Louisiana's Whistleblower Statute. We affirm the district court's dismissal of Sanders's discrimination claims, and we reverse as to the dismissal of her whistleblower claim and remand for further consideration.

* Judge Haynes concurs only as to Sections I – III.A. In Section III.B, the opinion holds that nonprofit organizations may be statutory "employers" under Louisiana's Whistleblower Statute. Judge Haynes would certify this issue to the Louisiana Supreme Court.

Appendix H

No. 19-30550

I

In 2008, Iona Sanders, who is African-American, began working for Christwood, L.L.C., a nonprofit corporation that owns and operates a continuing care retirement community in Covington, Louisiana. Sanders was promoted to the position of assisted living unit (ALU) director at some point between March 2015 and November 2016.[1] On December 4, 2016, Christwood notified Louisiana's Department of Health that Sanders was the new ALU director.

On December 19, 2016, a resident of the ALU wandered off the premises and was found three hours later with hypothermia. Christwood was required to file an incident report with the state within 24 hours.[2] Later that day, the nurse on duty, Ian Thompson, prepared a report and Sanders signed off on it. The report was submitted to Sanders's immediate supervisor, Tami Perry, who as residential health services director was responsible for overseeing Christwood's ALU, among other units.

Perry asked Sanders to work with Thompson to redo or revise the report by noon the next day, but Sanders believed it was illegal and inappropriate to require Thompson to make changes to the report and did not order him to do so. That night, Perry emailed Sanders, reminding her that the report was due the next day, December 20, at noon. According to Perry, Sanders called her on December 21 and said that she had not submitted the report. On December 24, Perry completed and submitted the incident report without Sanders's assistance.

On Friday, January 27, 2017, Perry and Christwood's Executive Director, the Reverend L. Stephen Holzhalb, decided to reassign Sanders from

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[1] The parties dispute the precise date, but it is immaterial for our purposes.

[2] *See* LA. ADMIN. CODE tit. 48, § 6871C (2020).

the ALU director position to the quality assurance coordinator position in Christwood's skilled nursing unit. Holzhalb told Sanders that she was being reassigned but would retain the same pay, benefits, and hours.

Over the weekend, a nurse could not make her shift, resulting in a staffing shortage and a delay in the administration of medication to the ALU residents. Sanders did not notify Perry of the delay.

Sanders met with Perry and Holzhalb on Monday morning, telling them, "I'm not taking a demotion." After the meeting, Holzhalb told Perry that the medication delay was an additional reason to reassign Sanders, though by that point the decision had already been made. Later that day, Perry and Christwood's HR director, Ladonna Allen, prepared a letter stating that Christwood was reassigning Sanders due to her failure to file the incident report within the mandated timeframe and her failure to notify "Residential Health Services of a nurse call in and [delay in] medication delivery to independent residents." Perry and Allen met with Sanders and gave her the letter. After Sanders did not call in or show up to work for the next two days, Christwood, concluding that Sanders had voluntarily resigned, ended her employment.

In September 2017, Sanders filed the instant suit against Christwood.[3] In December 2018, Christwood moved for summary judgment, which the district court granted. Sanders, proceeding *pro se*, appealed.

[3] After counsel withdrew nine months into the suit, Sanders represented herself for the remainder of the case.

II

We review a grant of summary judgment *de novo*.[4] Summary judgment is proper "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."[5]

III

Sanders asserts multiple claims of intentional discrimination under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as well as a claim of retaliation under Louisiana's Whistleblower Statute ("LWS").[6]

A

To state a prima facie case of intentional discrimination under Title VII, Sanders must demonstrate that she:

> (1) is a member of a protected group; (2) was qualified for the position at issue; (3) was discharged or suffered some adverse employment action by the employer; and (4) was replaced by someone outside h[er] protected group or was treated less favorably than other similarly situated employees outside the protected group.[7]

Because Sanders provides no direct evidence of racial discrimination, we apply the *McDonnell Douglas* burden-shifting framework.[8] Under this framework, the plaintiff "carr[ies] the initial burden under the statute of establishing a

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[4] *Burell v. Prudential Ins. Co. of Am.*, 820 F.3d 132, 136 (5th Cir. 2016).

[5] FED. R. CIV. P. 56(a).

[6] Sanders also maintains that the Court should not consider unsigned or undated documents submitted by Christwood in support of its summary judgment motion. Sanders, however, neither objected to nor moved to strike these documents in the district court. As a result, her challenge to the evidence is waived. *See Auto Drive-Away Co. of Hialeah v. I.C.C.*, 360 F.2d 446, 449 (5th Cir. 1966).

[7] *McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007) (per curiam). Because employment discrimination claims brought under § 1981 "are analyzed under the evidentiary framework applicable to claims arising under Title VII," we consider Sanders's § 1981 and Title VII claims together. *Lawrence v. Univ. of Tex. Med. Branch at Galveston*, 163 F.3d 309, 311 (5th Cir. 1999).

[8] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973).

prima facie case of racial discrimination."[9] Once the plaintiff has met this burden, it "shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[10] If the employer has articulated such a reason, then the plaintiff must show that the stated reason "was in fact pretext."[11]

In essence, Sanders asserts four claims of intentional discrimination. The first is rooted in Christwood's failure to timely list her with the state as the ALU director. The remaining claims are for discriminatory pay, discriminatory demotion, and constructive discharge.

1

Sanders maintains that as early as 2015, Christwood was required under state regulations to notify the state that she was the ALU director. But even if Sanders is correct, she fails to explain how she was adversely affected. This claim fails.

2

Sanders provides two arguments in support of her discriminatory pay claim. Sanders argues that she was not paid the "directors' annual bonus." The record establishes that Sanders was not part of the "Director's Group," a group of about 15 senior leaders that met on a weekly basis, and was therefore ineligible for the "annual Director's bonus." There is no indication that Sanders' exclusion from the group was due to race. According to Christwood's HR director, Christwood was downsizing and reorganizing the group.

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[9] *Id.* at 802.

[10] *Id.*

[11] *Id.* at 804. A plaintiff stating a discrimination claim may show either that the employer's stated reason was pretext or "that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed-motive[s] alternative)." *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004) (quoting *Rishel v. Nationwide Mut. Ins. Co.*, 297 F. Supp. 2d 854, 865 (M.D.N.C. 2003)).

Sanders's presence in the Group was not needed because Perry was a group member and continued to oversee the ALU. Likewise, since the administrator of the skilled nursing unit was a group member, the unit's director of nursing—a position held by two white women during the relevant period—was not. Similarly, Christwood removed its directors of environmental services and of special projects, both white, from the group and added a single plant director to the group instead. These examples undermine Sanders's claim that she should have been a member of the director's group because her title had the word "director" in it. We also note that Sanders's replacement as ALU Director, a white woman, was not a member of the Director's Group either. We see no basis for concluding that these explanations are merely pretextual.

Last, Sanders argues that she was paid less than Perry. She concedes, however, that there is no evidence in the record on Perry's compensation. Without this information, Perry cannot serve as a valid comparator. We conclude that Sanders's discriminatory pay claim fails.

3

Sanders argues that her reassignment from ALU director to quality assurance coordinator was a discriminatory demotion. She also argues that as a result of this demotion, she was forced to resign and was constructively discharged. We assume *arguendo* that Sanders has made out prima facie cases of discriminatory demotion and constructive discharge.

In response, Christwood maintains that it reassigned Sanders due to her mishandling of the "mandatory reporting incident, including her failure to timely submit the incident report to the State and her refusal to obtain a clarified incident report." Sanders does not dispute that Christwood has produced a legitimate, non-discriminatory reason for her termination.

She instead attempts to establish pretext by proving discriminatory intent. First, she argues that only African-American employees—two certified

nursing assistants (CNAs) and herself—were terminated or demoted because of the December 19 incident, while white employees—Thompson and Perry—were not. The two CNAs are inapt comparators as they were terminated for falsifying documents related to the incident. There is no indication that any other employee falsified documents. Thompson is also an improper comparator, as Sanders was involved in the decision to issue him a written warning. According to Christwood's HR director, Sanders told her that she did not want to terminate Thompson.

Next, Sanders argues that Perry received preferential treatment, as she was not disciplined for refusing to send the report to the state. But Perry never refused to send the report; she ordered Sanders to submit a report, and when Sanders ultimately failed to comply, prepared and submitted the report herself.[12] We therefore affirm summary judgment for Christwood on Sanders's intentional discrimination claims.

B

The Louisiana Whistleblower Statute provides: "An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law . . . [o]bjects to or refuses to participate in an employment act or practice that is in violation of law."[13] As the LWS does not define the term "employer," the district court looked to the Louisiana Employment Discrimination Law's (LEDL) definition of the term:

> (2) "Employer" means a person, association, legal or commercial entity, the state, or any state agency, board, commission, or political subdivision of the state receiving services from an employee and, in return, giving compensation of any kind to an employee. The provisions of this Chapter shall apply only to

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[12] We take no position as to whether Sanders was demoted for failing to submit the report or for refusing to comply with an unlawful order. Under either view, Sanders was not demoted due to race.

[13] LA. STAT. ANN. § 23:967A(3).

> an employer who employs twenty or more employees within this state for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. "Employer" shall also include an insurer, as defined in R.S. 22:46, with respect to appointment of agents, regardless of the character of the agent's employment. This Chapter shall not apply to the following:
>
> . . .
>
> (b) Employment of an individual by a private educational or religious institution or any nonprofit corporation . . . .[14]

Applying that definition and the exception for nonprofit corporations, the district court dismissed Sanders's LWS claim because Christwood, a nonprofit corporation, was not an employer under the statute. Sanders contends that the LEDL's definition of employer does not apply to the LWS.

As the Louisiana Supreme Court has not addressed this issue, we must make an "*Erie* guess" to determine what it would decide. "In making an Erie guess, we defer to intermediate state appellate court decisions, 'unless convinced by other persuasive data that the highest court of the state would decide otherwise.'"[15] Louisiana appellate courts have not considered whether the LEDL's exemption for nonprofit corporations applies to the LWS. They have, however, considered whether the LEDL's definition of an employer applies to the LWS.

Louisiana's appellate courts have adopted two different approaches to the LWS. The first traces back to a district court decision, *Dronet v. LaFarge Corporation*, which applied the Louisiana Civil Code's rules of construction to determine the meaning of "employer" under the LWS.[16] As one rule provides that the "words of a law must be given their generally prevailing meaning," the

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[14] *Id.* § 23:302(2).

[15] *Mem'l Hermann Healthcare Sys. Inc. v. Eurocopter Deutschland, GMBH*, 524 F.3d 676, 678 (5th Cir. 2008) (quoting *Herrmann Holdings Ltd. v. Lucent Techs. Inc.*, 302 F.3d 552, 558 (5th Cir. 2002)).

[16] No. 00–2656, 2000 WL 1720547, at *1–*2 (E.D. La. Nov. 17, 2000.).

court relied on Black's Law Dictionary for the ordinary meaning of "employer": "[O]ne for whom employees work and who pays their wages or salaries."[17] Since a different rule instructs that "[l]aws on the same subject matter be interpreted in reference to each other," the court also drew on the LEDL's definition of "employer."[18] The court ultimately concluded that because the defendant was not an employer "in the traditional sense" or "within the meaning of the [LEDL]," it was not an employer under the LWS.[19] The court did not address whether the LEDL's exclusions would also apply.

In *Ray v. City of Bossier City*, Louisiana's Second Circuit, relying on *Dronet*'s progeny, applied the LEDL's definition of employer—a person or entity "receiving services from an employee and, in return, giving compensation of any kind to an employee"—to determine whether the defendant supervisors were "employers" under the LWS.[20] The court explained that the LEDL provides a precise definition of employer that has been applied by courts "in cases where employment status is at issue."[21] The court also pulled from Louisiana case law, which has "uniformly held" that when "determining whether an employment relationship exists in other contexts, . . . the most important element to be considered is the right of control and supervision over an individual."[22] It then applied both tests, which yielded the same results. In another case, the state's Fourth Circuit, with little

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[17] *Id.* at *1 (quoting LA. CIV. CODE ANN. art. 11 (West 1999); BLACK'S LAW DICTIONARY 525 (6th ed. 1990)).

[18] *Id.* at *2 (quoting LA. CIV. CODE ANN. art. 13.).

[19] *Id.*

[20] 859 So. 2d 264, 272 (La. Ct. App. 2004) (emphasis omitted) (quoting LA. STAT. ANN. § 23:302(2)). *Ray* commanded full approval from only two members of the five-judge panel. Two judges dissented and one concurred.

[21] *Id.* (citing *Langley v. Pinkerton's Inc.*, 220 F. Supp. 2d 575 (M.D. La. 2002); *Jackson v. Xavier Univ. of La.*, No. 01-1659, 2002 WL 1482756, at *6 (E.D. La. July 8, 2002); *Jones v. JCC Holding Co.*, No. 01-0573, 2001 WL 537001, at *3 (E.D. La. May 21, 2001)).

[22] *Id.*

explanation, expressly adopted *Ray*'s reasoning and held that the defendant was the employer, as it "received services" from the plaintiff and in exchange "gave compensation."[23]

A unanimous three-judge panel of Louisiana's Third Circuit took a different approach, declining to extend the LEDL to the LWS.[24] The court argued that the text of the LEDL indicates the legislature intended the statute's definitions to apply only to Chapter 3-A of Title 23, which does not house the LWS. The LEDL states that its definitions are "[f]or purposes of *this Chapter*."[25] It also says, "The provisions *of this Chapter* shall apply only to an *employer* who employs twenty or more employees," and "*This Chapter* shall not apply to . . . [e]mployment of an individual by. . . any nonprofit corporation."[26] Moreover, the text of the LWS does not incorporate the LEDL's definitions or indicate that the legislature intended to do so. The court also concluded that the LEDL and LWS have distinct purposes: "prohibit[ing] discrimination" versus "provid[ing] a remedy to employees whose employers retaliate against them for exercising their individual right to report the employers' violations of state law."[27] As a result, it held that the LWS did not incorporate the LEDL's carve-out for employers with fewer than 20 employees.

Several district courts have considered whether the LEDL's nonprofit exclusion extends to the LWS. Most have concluded that it does not,[28] though

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[23] *Hanna v. Shell Expl. & Prod., Inc.*, 234 So. 3d 179, 188–89, 191 (La. Ct. App. 2017). *Hanna* was decided by a three-judge panel. Two of the judges concurred in the result but did not join the court's opinion.

[24] *Hunter v. Rapides Par. Coliseum Auth.*, 158 So. 3d 173, 177 (La. Ct. App. 2015).

[25] LA. STAT. ANN. § 23:302 (emphasis added).

[26] *Id.* § 23:302(2).

[27] *Hunter*, 158 So. 3d at 177–78 (internal citation omitted).

[28] *See, e.g., Miller v. Upper Iowa Univ.*, No. 19-00039, 2020 WL 882047, at *7–*10 (W.D. La. Feb. 21, 2020); *Norris v. Acadiana Concern for Aids Relief Educ. & Support*, 421 F. Supp. 3d 399, 403–06 (W.D. La. 2019); *Terry v. Acadiana Concern for Aids Relief Educ. & Support Inc.*, No. 18-01508, 2019 WL 2353226, at *7–*11 (W.D. La. Apr. 26, 2019), *report and recommendation adopted in part, rejected in part* 2019 WL 2353176 (W.D. La. May 31, 2019),

a handful have extended the carve-out to the LWS.[29] "The cases that have incorporated the LEDL's carve-out for non-profit organizations into the Whistleblower Statute do not consider the statutory text of either act and the context of the carve-outs but instead merely rel[y] on *Johnson*, *Dronet*, and other cases that looked solely to the" LEDL's clause defining "employer."[30] Indeed, neither they nor Christwood nor the amicus provide "an independent textual analysis of the LEDL's carve-out provisions."[31]

We apply both approaches employed by Louisiana's circuit courts. The Third Circuit's reasoning in *Hunter* does not support extending the nonprofit exception, as the LEDL's definition of employer and the nonprofit exception apply only to a chapter that does not include the LWS. The logic of *Dronet* (and by extension the Second and Fourth Circuit) provides no support either. First, tax status plays no part in the ordinary meaning of "employer."[32] Even under the LEDL, nonprofits are employers; the statute only says that they are not subject to the LEDL.[33] Next, per the Louisiana Civil Code, we interpret "[l]aws

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appeal dismissed on other grounds, No. 19-30547, 2019 WL 7494395 (5th Cir. Aug. 6, 2019); *Upshaw v. Bd. of Supervisors of S. Univ. & Agr. Coll.*, No. 10-184, 2011 WL 2970950, at *4 (M.D. La. July 19, 2011); *Knighten v. State Fair of La.*, No. 03-1930, 2006 WL 725678 (W.D. La. Mar. 21, 2006); *Guy v. Boys & Girls Club of Se. La., Inc.*, No. 04-2189, 2005 WL 517503, at *3–*4 (E.D. La. Feb. 16, 2005).

[29] *Sebble v. NAMI New Orleans, Inc.*, No. 17-10387, 2018 WL 929604, at *2 (E.D. La. Feb. 16, 2018); *Wilson-Robinson v. Our Lady of the Lake Reg'l Med. Ctr., Inc.*, No. 10-584, 2011 WL 6046984, at *2 (M.D. La. Dec. 6, 2011); *Jackson*, 2002 WL 1482756, at *6.

[30] *Miller*, 2020 WL 882047, at *10 (quoting *Norris*, 421 F. Supp. 3d at 406) (citing *Sebble*, 2018 WL 929604; *Jackson*, 2002 WL 1482756)).

[31] *Id.* (quoting *Norris*, 421 F. Supp. 3d at 406).

[32] *See, e.g.*, *Employer*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "employer" as "[a] person, company, or organization for whom someone works; esp., one who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages"); *Employer*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/employer (last visited July 22, 2020) (defining employer as "one that employs or makes use of something or somebody . . . . *especially* : a person or company that provides a job paying wages or a salary to one or more people").

[33] LA. STAT. ANN. § 23:302(2)(b).

on the same subject matter . . . in reference to one another."[34] To be sure, anti-discrimination statutes and whistleblower statutes concern *similar* subject matter—protecting employees from adverse actions—and this might justify *Dronet's* importation of the LEDL's definition of "employer." But the statutes do not concern the *same* subject matter, and similarity alone is not enough to justify incorporating all of the LEDL's exceptions and their underlying policy judgments. We therefore decline to extend the LEDL's exception for non-profits to the LWS.

As it is clear that Christwood was Sanders's employer, we need not decide whether the LEDL's definition of employer applies to the LWS. If it does, Christwood is Sanders's employer, as it "receiv[ed] services from [her] and, in return, g[ave] [her] compensation."[35] If it does not, we might look to the ordinary meaning of "employer"[36] or follow Louisiana case law, holding that "the most important element to be considered is the right of control and supervision over an individual."[37] Christwood was Sanders's employer under these approaches as well.

Because the district court concluded that Christwood was not an employer, it did not address the remainder of the Sanders's LWS claim. In deference to the trial court's responsibility to review the record in the first instance, we vacate the dismissal of Sanders's LWS claim and remand for further proceedings consistent with this opinion as it relates to that claim.

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[34] *Dronet*, 2000 WL 1720547, at *1 (quoting LA. CIV. CODE ANN. art. 13).

[35] LA. STAT. ANN. § 23:302(2).

[36] *Id.* § 1:3 ("Words and phrases shall be read with their context and shall be construed according to the common and approved usage of the language."); *see also* LA. CIV. CODE ANN. art. 11 ("The words of a law must be given their generally prevailing meaning.").

[37] *See Ray*, 859 So. 2d at 272.

IV

We affirm the district court's dismissal of Sanders's discrimination claims, vacate the dismissal of her LWS claim, and remand for further proceedings.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-30550

IONA SANDERS,

Plaintiff - Appellant

v.

CHRISTWOOD, a Louisiana Non-Profit Corporation, Improperly Named as Christwood L.L.C.,

Defendant - Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:17-CV-9733

Before HIGGINBOTHAM, ELROD, and HAYNES, Circuit Judges.*

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED IN PART and VACATED IN PART, and the cause is REMANDED to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

* Judge Haynes concurs only as to Sections I – III.A.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
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NEW ORLEANS, LA 70130

September 08, 2020

Ms. Carol L. Michel
U.S. District Court, Eastern District of Louisiana
500 Poydras Street
Room C-151
New Orleans, LA 70130

No. 19-30550 Iona Sanders v. Christwood
USDC No. 2:17-CV-9733

Dear Ms. Michel,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Whitney M. Jett, Deputy Clerk

cc:
Mr. Michael O. Adley
Ms. Christine S. Keenan
Mr. Charles M. Kreamer Sr.
Ms. Iona Sanders

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IONA SANDERS	CIVIL ACTION
VERSUS	NO. 17-9733
CHRISTWOOD, L.L.C.	SECTION M (5)

ORDER & REASONS

Before the Court is a motion filed by defendant Christwood, L.L.C. ("Christwood") for summary judgment on the racial discrimination and whistleblower claims filed by plaintiff Iona Sanders ("Sanders").[1] Having considered the parties' memoranda[2] and the applicable law, the Court grants Christwood's motion concluding (1) that Sanders cannot prevail on her racial discrimination claims because she did not demonstrate that she suffered an adverse employment action or that another similarly-situated employee of a different race received preferential treatment; and (2) that Christwood, as a non-profit institution, cannot be held liable under the Louisiana whistleblower statute.

I. BACKGROUND

This matter concerns allegations of racial discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981, and a claim of retaliation under the Louisiana whistleblower statute, La. R.S. 23:967. Christwood, a non-profit entity, operates a retirement community consisting of independent living, assisted living, nursing, and memory care

[1] R. Doc. 52.

[2] Sanders filed a memorandum in opposition to the motion. R. Doc. 55. (Sanders' opposition is submitted *pro se* and is less a brief addressing the factual and legal issues raised by Christwood's motion, than it is a 39-page unsworn and after-the-fact statement of Sanders' recollection of events.) Christwood filed a reply in further support of the motion. R. Doc. 68.

Appendix I

units.[3] Sanders, who is African-American and a registered nurse, began her employment with Christwood in September 2008.[4] Sanders alleges that in March 2015, she orally accepted a promotion to the position of assisted living unit director, which was offered to her by Christwood's vice associate executive director, David Cook ("Cook"), who is white.[5] According to Sanders, being a registered nurse is a required qualification for the directorship (which Christwood denies), and she performed the job duties of the position from March 2015 until she left her employment with Christwood in January 2017.[6] Sanders further alleges that, although she was performing the duties of the assisted living unit director, Tami Perry ("Perry"), who is white, a licensed practical nurse, and Sanders' supervisor, was listed with the State of Louisiana as holding the title. On December 5, 2016, Christwood filed the key personnel paperwork with the State to list Sanders as the assisted living unit director.[7] Sanders also alleges that she was promised a raise to $50,000 per year, but was not paid that amount, "despite representations in various pay documents that she made nearly $58,000 annually."[8] Moreover, Sanders alleges that she did not receive the annual director's bonus.[9] Sanders contends that her pay discrepancy and the failure to change the paperwork with the State were due to racial animus.[10]

Sanders also claims that she was constructively discharged due to racial discrimination.[11] Sanders alleges that on December 19, 2016, an incident occurred in the assisted living unit that was required to be reported to the State.[12] Sanders alleges that Perry and Cook asked her to alter

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[3] R. Doc. 16 at 2.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 2-3.
[7] *Id.* at 3.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 3-4.
[12] *Id.* at 3.

paperwork reporting the incident, and she refused.[13] Sanders further alleges that the African-American nursing personnel on duty at the time of the incident were fired, whereas the white nurse involved was not.[14] Sanders claims that Cook told her she "made oversights" in relation to the December 19, 2016 incident and a separate incident concerning the administration of medicine, and as a consequence, on January 30, 2017, she was demoted to a non-supervisory role, which forced her to resign, resulting in constructive discharge.[15] Further, Sanders alleges that she was constructively discharged for refusing to falsify records, which she claims is a violation of state law.[16]

II. PENDING MOTION

Christwood argues that it is entitled to summary judgment because Sanders cannot state a *prima facia* case of racial discrimination because she has failed to identify both an adverse employment action and a similarly-situated individual of a different race who was treated more favorably.[17] Christwood further argues that Sanders' whistleblower claim must be dismissed as a matter of law because La. R.S. 23:967 does not apply to non-profit institutions, such as Christwood.[18]

Sanders maintains that she has carried her burden on summary judgment with respect to her racial discrimination claim. For example, she responds that she was treated less favorably than Ian Thompson ("Thompson"), the white nurse on duty at the time of the December 19, 2016 incident, because only the black employees involved were fired or demoted, whereas the white

[13] *Id.* at 4-5.
[14] *Id.* at 5.
[15] *Id.*
[16] *Id.* at 6.
[17] R. Doc. 52-8 at 5-25.
[18] *Id.* at 2-3.

employee was not.[19] She also argues that she could not locate "any recent changes" to La. R.S. 23:967 that exempt non-profit entities from the law.[20]

III. LAW & ANALYSIS

A. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (citing Fed. R. Civ. P. 56(c)). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Id.* A party moving for summary judgment bears the initial burden of demonstrating the basis for summary judgment and identifying those portions of the record, discovery, and any affidavits supporting the conclusion that there is no genuine issue of material fact. *Id.* at 323. If the moving party meets that burden, then the nonmoving party must use evidence cognizable under Rule 56 to demonstrate the existence of a genuine issue of material fact. *Id.* at 324.

A genuine issue of material fact exists if a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1996). The substantive law identifies which facts are material. *Id.* Material facts are not genuinely disputed when a rational trier of fact could not find for the nonmoving party upon a review of the record taken as a

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[19] R. Doc. 55 at 10 & 34. In addition, Sanders asks the Court to consider other evidence of purported racial discrimination such as her exclusion from a directors' meeting and a directors' luncheon, her name not being on her office door, and her not receiving a master key. None of these incidents is alleged in the complaint. Further, none qualifies as an adverse employment action under Title VII. Thus, the Court will not consider them in analyzing the events that are alleged.

[20] *Id.* at 3.

whole. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Equal Emp't Opportunity Comm'n v. Simbaki, Ltd.*, 767 F.3d 475, 481 (5th Cir. 2014). "[U]nsubstantiated assertions," "conclusory allegations," and merely colorable factual bases are insufficient to defeat a motion for summary judgment. *See Anderson*, 477 U.S. at 249-50; *Hopper v. Frank*, 16 F.3d 92, 97 (5th Cir. 1994). In ruling on a summary judgment motion, a court may not resolve credibility issues or weigh evidence. *See Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 398-99 (5th Cir. 2008). Furthermore, a court must assess the evidence, review the facts, and draw any appropriate inferences based on the evidence in the light most favorable to the party opposing summary judgment. *See Tolan v. Cotton*, 572 U.S. 650, 656 (2014); *Daniels v. City of Arlington*, 246 F.3d 500, 502 (5th Cir. 2001). Yet, a court only draws reasonable inferences in favor of the nonmovant "when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)).

After the movant demonstrates the absence of a genuine dispute, the nonmovant must articulate specific facts and point to supporting, competent evidence that may be presented in a form admissible at trial. *See Lynch Props., Inc. v. Potomac Ins. Co. of Ill.*, 140 F.3d 622, 625 (5th Cir. 1998); Fed. R. Civ. P. 56(c)(1)(A) & (c)(2). Such facts must create more than "some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. When the nonmovant will bear the burden of proof at trial on the dispositive issue, the moving party may simply point to insufficient admissible evidence to establish an essential element of the nonmovant's claim in order to satisfy its summary judgment burden. *See Celotex*, 477 U.S. at 322-25; Fed. R. Civ. P.

56(c)(B). Unless there is a genuine issue for trial that could support a judgment in favor of the nonmovant, summary judgment must be granted. *See Little*, 37 F.3d at 1075-76.

B. Title VII

Title VII prohibits an employer from taking certain discriminatory actions against an individual "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). A plaintiff bringing claims under Title VII can use either direct or circumstantial evidence to prove her case of intentional discrimination. *Portis v. First Nat'l Bank of New Albany*, 34 F.3d 325, 328 (5th Cir. 1994). Direct evidence is "evidence that, if believed, proves the fact of discriminatory animus without inference or presumption." *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002). "Because direct evidence is rare, a plaintiff ordinarily uses circumstantial evidence to meet the test set out in *McDonnell Douglas* [*Corp. v. Green*, 411 U.S. 792 (1973)]." *Portis*, 34 F.3d at 328.

When a plaintiff relies on circumstantial evidence, as in this case, the plaintiff must first establish a *prima facie* case of discrimination by proving that: (1) she is a member of a protected class; (2) she was qualified for the position at issue; (3) she was the subject of an adverse employment action; and (4) she was treated less favorably because of membership in the protected class than were other similarly-situated employees who were not members of the protected class, under nearly identical circumstances. *Paske v. Fitzgerald*, 785 F.3d 977, 984-85 (5th Cir. 2015) (citation omitted). If a plaintiff makes this *prima facie* showing and thereby creates a presumption of discrimination, the burden shifts to the defendant to produce evidence of a legitimate, nondiscriminatory reason for the action or decision. *Buisson v. Bd. of Supervisors of the La. Cmty. & Tech. Coll. Sys.* 592 F. App'x 237, 243 (5th Cir. 2014) (citing *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007)). Then finally, the burden shifts back to the plaintiff to show that

the defendant's proffered reason is pretextual. *Id.* However, the "ultimate burden" of persuasion that there was discrimination remains with the plaintiff at "all times." *Raggs v. Miss. Power & Light Co.*, 278 F.3d 463, 468 (5th Cir. 2002) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000)).

Christwood concedes that Sanders, an African-American, is a member of a protected class, and that as a registered nurse she was qualified for the position at issue. However, Christwood argues that Sanders cannot establish a *prima facie* case of discrimination because she cannot demonstrate that she was subjected to an adverse employment action or that she was treated less favorably than a similarly-situated employee who was not a member of the protected class. Further, Christwood argues that Sanders cannot establish that she was constructively discharged because a reasonable employee in similar circumstances would not have felt compelled to resign.

The Fifth Circuit has adopted "a strict interpretation of the adverse employment element," under which "an employment action that 'does not affect job duties, compensation, or benefits' is not an adverse employment action." *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 282 (5th Cir. 2004) (quoting *Banks v. E. Baton Rouge Par. Sch. Bd.*, 320 F.3d 570, 575 (5th Cir. 2003)). "Rather, an adverse employment action consists of '*ultimate employment decisions* such as hiring, granting leave, discharging, promoting, and compensating.'" *Id.* (quoting *Felton v. Polles,* 315 F.3d 470, 486 (5th Cir.2002)) (emphasis in *Pegram*). Further, a demotion can qualify as an ultimate employment decision under Title VII. *Id.* (citing *Sharp v. City of Houston,* 164 F.3d 923, 933 n.21 (5th Cir. 1999)).

Sanders identifies four actions she claims amount to adverse employment decisions – Christwood's alleged failure to timely list her with the State as the assisted living unit director, failure to raise her pay when she was promoted to the assisted living unit director position,

demoting her to a non-supervisory position, and causing her constructive discharge by means of the alleged demotion. The issues regarding reporting Sanders' job title to the State, her pay, and the purported constructive discharge do not constitute adverse employment actions. And, although the demotion could be an adverse employment action, Sanders has failed to identify a similarly-situated employee who was treated more favorably.

First, the alleged failure to timely notify the State of Sanders' promotion to assisted living unit director does not qualify as an ultimate employment decision. Indeed, Sanders concedes that despite this alleged failure on Christwood's part, she was performing the job duties of the assisted living unit director. Nor is there any allegation or evidence that the failure to report the change in job title actually affected a decision about hiring, granting leave to, discharging, promoting, or compensating Sanders. To be sure, there is no allegation describing any adverse effect on Sanders arising from the failure to report the promotion to the State. Further, Christwood's director of human resources, Ladonna Allen ("Allen"), stated in her declaration that Sanders became the manager of the assisted living unit in April 2015, not the director.[21] Sanders offers no probative evidence to refute Allen's declaration.[22]

Next, Sanders' allegation regarding her pay has no merit. Sanders alleges that she was promised $50,000 per year, but did not receive that amount. However, the undisputed payroll evidence in the record proves that Sanders actually received a gross salary of $52,753.15 in 2015

[21] R. Doc. 52-4 at 7-8.

[22] Even if the failure to provide notice of the change in job title rose to the level of an adverse employment action, Sanders has not demonstrated that she was treated less favorably than a similarly-situated employee who was not in her protected class. Sanders points to Perry as her comparator on this issue, but Perry was not similarly situated since she had far more relevant work and management experience than Sanders. *See Ryburn v. Potter*, 155 F. App'x 102, 109 (5th Cir. 2005) (employees with more work experience are not similarly situated to those with less); *Wiseman v. New Breed Logistics, Inc.*, 72 F. Supp. 3d 672, 679-80 (N.D. Miss. 2014) (purported comparator had more experience and time in service than plaintiff so circumstances were not "nearly identical"). Nor did Sanders and Perry have the same supervisor or the same job duties.

and $57,955.38 in 2016, and before she quit in 2017, she was paid at the rate of $57,200 per year.[23] Further, the unrebutted summary judgment evidence establishes that Sanders was not entitled to the directors' annual bonus because she was not actually a part of the directors' group.[24] Allen stated in her declaration that Sanders was never a director of Christwood, and thus, not entitled to the directors' bonus, but was eligible for and received the employees' bonus that is funded by Christwood's residents.[25] Further, Allen stated that, when Sanders became the manager of the assisted living unit, her payroll code was changed to "AIL Director" for accounting purposes only, and was not a reflection of her actual position at Christwood.[26]

Third, Sanders alleges that she was demoted from assisted living unit director to a non-supervisory skilled nursing position as a quality assurance coordinator. A transfer to a different position that is "objectively worse – such as being less prestigious or less interesting or providing less room for advancement" can qualify as a demotion, even if there is no reduction in pay, title, or grade. *Stringer v. N. Bolivar Consol. Sch. Dist.*, 727 F. App'x 793, 799 (5th Cir. 2018); *Alvarado v. Tex. Rangers*, 942 F.3d 605, 612 (5th Cir. 2007). "However, where the evidence merely shows 'that a plaintiff was transferred from a prestigious and desirable position to another position, that evidence is insufficient to establish an adverse employment action.'" *Stringer*, 727 F. App'x at 799 (quoting *Pegram*, 361 F.3d at 283). Determining whether the new position is worse is an objective inquiry focusing on the qualities of the new position, not the employee's subjective preference for one position over another. *Alvarado*, 492 F.3d at 613-14 (citations omitted).

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[23] *Id.* at 2-10; R. Doc. 52-7 at 9.

[24] R. Doc. 52-4 at 4.

[25] *Id.* at 5-7.

[26] *Id.* at 7-8. And, again, Sanders has not pointed to any similarly-situated employee not in her protected class who was paid more than she was.

Allen's January 30, 2017 letter to Sanders explaining the decision to transfer Sanders from the assisted living unit director position to the quality assurance coordinator position indicates that the transfer is a demotion based on Sanders' poor performance in the director's position.[27] The letter clearly indicates that Sanders is being relieved of director's responsibilities, but would retain the same pay and benefits.[28] Although the transfer qualifies as a demotion, Sanders has presented no evidence to carry her burden of establishing the fourth prong of a *prima facie* case of racial discrimination – namely, that there was a similarly-situated employee who was not a member of her protected class and was treated more favorably.

When a Title VII plaintiff proffers a fellow employee as a comparator, she must demonstrate that the employment actions at issue were taken "under nearly identical circumstances," such as

> when the employees being compared held the same job or responsibilities, shared the same supervisor or had their employment status determined by the same person, and have essentially comparable violation histories. And, critically, the plaintiff's conduct that drew the adverse employment decision must have been ***nearly identical*** to that of the proffered comparator who drew dissimilar employment decisions. If the difference between the plaintiff's conduct and that of those alleged to be similarly situated accounts for the difference in treatment received from the employer, the employees are not similarly situated for the purposes of an employment discrimination analysis.

Lee v. Kansas City S. Ry. Co., 574 F.3d 253, 260 (5th Cir. 2009) (quotations, citations, and emphasis in original omitted) (emphasis added).

Sanders offers Thompson as a potential comparator. Sanders contends that she was treated less favorably than Thompson, a white nurse who was on duty at the time of the December 19, 2016 incident. According to Sanders, Thompson received only a warning in connection with the incident, whereas the African-American nursing employees involved, including her, were either

[27] R. Doc. 52-4 at 58.
[28] *Id.*

fired or demoted. Thompson and Sanders did not share nearly identical circumstances because different supervisors determined their status; indeed, Sanders was Thompson's supervisor.[29] In her declaration, Allen stated that Sanders herself made the decision to issue a written warning to Thompson, rather than fire him.[30] That Sanders acted in a supervisory capacity concerning the incident and the follow-up reporting, whereas Thompson did not, undermines the validity of Sanders' proposed comparator. Therefore, Sanders and Thompson were not subjected to nearly identical circumstances, and Sanders has not stated a *prima facie* case of racial discrimination based on the demotion.[31]

Finally, Sanders' constructive discharge claim also fails. Under the doctrine of constructive discharge, "an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes." *Penn. State Police v. Suders*, 542 U.S. 129, 141 (2004). Thus, "[a]n employer is responsible for a constructive discharge in the same manner that it is responsible for the outright discriminatory discharge of a charging party" under Title VII. *Id.* (quotation omitted). "In determining whether an employer's actions constitute a constructive discharge, [a court] ask[s] whether working conditions became 'so intolerable that a reasonable person in the employee's position would have felt compelled to resign.'" *Spencer v. Schmidt Elec. Co.*, 576 F. App'x 442, 452-53 (5th Cir. 2014) (quoting *Suders*,

[29] R. Doc. 52-4 at 8.

[30] *Id.* at 8-9.

[31] Moreover, Sanders' claim based on the demotion also fails because Christwood's decision to transfer her to a non-supervisory position was based on legitimate, nondiscriminatory reasons, which Sanders has not demonstrated to be pretextual. *See Auguster v. Vermillion Par. Sch. Bd.*, 249 F.3d 400, 402 (5th Cir. 2001); *Laxton v. Gap Inc.*, 333 F.3d 572, 578 (5th Cir. 2003); *Evans v. City of Houston*, 246 F.3d 344, 349-51 (5th Cir. 2001). Sanders offers no evidence or argument to discredit Christwood's reasons for her demotion (*viz.*, her failure to timely submit the incident report; her refusal to obtain a clarified, non-falsified incident report; and her failure to report the untimely administration of medicines), much less to demonstrate that they were motived by race.

542 U.S. at 141). Courts in the Fifth Circuit consider seven factors in determining whether a reasonable employee would feel compelled to resign:

> (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement or continued employment on terms less favorable than the employee's former status.

Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448, 453 (5th Cir. 2012) (citation omitted). "Discrimination alone, without aggravating factors, is insufficient for a claim of constructive discharge ...." *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 566 (5th Cir. 2001) (citations omitted).

Sanders argues that she felt compelled to resign after she was reassigned to a non-supervisory position in the skilled nursing unit. However, the record does not support that a reasonable employee would have felt compelled to resign. Sanders' reassignment did not result in a reduction in pay or benefits, or a change in hours.[32] Further, Sanders admitted at her deposition that the new role involved creating care plans and providing nursing care to residents, which is not menial or degrading, but rather is essential to patient care and work typically performed by registered nurses.[33] Moreover, there is no evidence that Sanders was subjected to any badgering, harassment, or humiliation to force her resignation, or that she was reassigned to work under a younger supervisor. Thus, Sanders has failed to state a claim for constructive discharge.

C. Louisiana Whistleblower Statute

Sanders alleges that she was demoted from her position as assisted living unit director and constructively discharged because she refused to participate in what she alleges to be an illegal practice of altering official paperwork. The Louisiana whistleblower statute, La. R.S. 23:967,

[32] R. Doc. 52-7 at 11-12.
[33] R. Doc. 52-5 at 215-19.

prohibits an employer from retaliating against an employee who reports, threatens to report, or refuses to participate in an illegal work practice. "Although the statute itself does not define 'employer,' courts have consistently applied the definition of 'employer' as set forth in La. Rev. Stat. § 23:302, Louisiana's general employment discrimination statute." *Sebble v. NAMI New Orleans, Inc.*, 2018 WL 929604, at *2 (E.D. La. Feb. 16, 2018) (citing *English v. Wood Group PSN, Inc.*, 2015 WL 5061164, at *10-11 (E.D. La. Aug. 25, 2015); *Langley v. Pinkerton's Inc.*, 220 F. Supp. 2d 575, 580 (M.D. La. 2002) (definitions of La. R.S. 23:302 apply to La. R.S. 23:967 regardless of the fact that section 967 is found in chapter 9 of title 23, collecting "miscellaneous provisions," rather than in chapter 3-A, which addresses "prohibited discrimination in employment"); *Johnson v. Hosp. Corp. of Am.*, 767 F. Supp. 2d 678, 691 n.2 (W.D. La. 2011)). Section 302(2)(b) exempts non-profit entities from the definition of employer. Accordingly, non-profit entities are not subject to Louisiana's whistleblower statute. *Sebble*, 2018 WL 929604, at *2 (citing *Jackson v. Xavier Univ. of La.*, 2002 WL 1482756, at *6 (E.D. La. July 8, 2002)); *accord Wilson-Robinson v. Our Lady of the Lake Reg'l Med. Ctr., Inc.*, 2011 WL 6046984, at *2 (M.D. La. Dec. 6, 2011) (concluding that a non-profit corporation is not an employer for purposes of La. R.S. 23:302 and 23:967)).

It is undisputed that Christwood is a non-profit entity. Thus, it is not subject to Louisiana's whistleblower statute. As such, Sanders fails to state a claim against Christwood under that law.

IV. CONCLUSION

Accordingly, for the reasons stated above,

IT IS ORDERED that Christwood's motion for summary judgment (R. Doc. 52) is GRANTED, and Sanders' claims are DISMISSED WITH PREJUDICE.

New Orleans, Louisiana, this 26th day of June, 2019.

BARRY W. ASHE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IONA SANDERS	CIVIL ACTION
VERSUS	NUMBER: 17-9733
CHRISTWOOD, LLC	SECTION: M (5)

JUDGMENT

In accordance with the Court's Order & Reasons granting the defendant's Motion for Summary Judgment, R. Doc. 76,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Christwood, improperly named as Christwood, L.L.C., and against plaintiff, Iona Sanders, **DISMISSING** plaintiffs' claims with prejudice.

New Orleans, Louisiana, this 27th day of June 2019.

BARRY W. ASHE
UNITED STATES DISTRICT JUDGE

APPENDIX J

POLICY: Critical Incident Reporting	Christwood
ISSUING AUTHORITY: Chief Operating Officer	Page 1 of 2
APPLICABLE TO: Christwood Retirement Community	Date: 6/2016

Policy Summary and Objective:
Christwood will report and document to the Department of Health and Hospitals any injuries, fights or physical confrontations, situations requiring the use of passive physical restraints, suspected incidents of abuse or neglect, unusual incidents and other situations or circumstances affecting the health, safety or well-being of a resident or residents.

Procedure:

1. The Nurse on duty will immediately verbally notify the Nursing Supervisor of accidents, incidents and other situations or circumstances affecting the health, safety or well-being of a resident or residents.

2. All Assisted Living staff will be trained on Incident reporting upon hire and annually.

3. When an incident involves abuse or neglect of a resident, death of a resident or entails any serious threat to the resident's health, safety or well-being, Christwood will:

a Ensures immediate verbal reporting by the staff nurse to the Director and Nursing Supervisor and preliminary written report within 24 hours of the incident;

b Ensures immediate notification of the Department of Health and Hospitals or Office of Elderly Affairs in the Office of the Governor, the Bureau of Licensing, Adult Protection Services in accordance with state law;

c Ensures immediate documented attempts to notify the next of kin or legal representative, as appropriate;

d Ensures immediate notification of the appropriate law enforcement authority, or other appropriate authorities, in accordance with state law; and,

e Ensures follow-up written report to the persons noted above and the Department of Social Services Bureau of Licensing.

4. Christwood will report to HSS any incidents suspected of involving abuse, neglect, misappropriation of personal property regardless of monetary value, or injuries of unknown origin. Injuries of unknown origin are defined as:

a. the source of the injury was not observed by any person or the source of the injury could not be explained by the resident; or

b. the injury is suspicious because of the extent of the injury or the location of the injury (e.g., the injury is located in an area not generally vulnerable to trauma).

c. the initial report of the incident or accident is due within 24 hours of occurrence or discovery of the incident.

d. After submission of the initial 24-hour report, a final report shall be submitted within five business days regardless of the outcome.

e. Report Contents. The information contained in the incident report shall include, but is not limited to the following:

1. circumstances under which the incident occurred;

2. date and time the incident occurred:

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Appendix J

POLICY: Critical Incident Reporting	Christwood
ISSUING AUTHORITY: Chief Operating Officer	Page 2 of 2
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3. where the incident occurred (bathroom, apartment, room, street, lawn, etc.);
4. immediate treatment and follow-up care;
5. name and address of witnesses;
6. date and time family or representative was notified;
7. symptoms of pain and injury discussed with the physician; and
8. signatures of the director, or designee, and the staff person completing the report.

5. When an incident results in death of a resident, involves abuse or neglect of a resident, or entails any serious threat to the resident's health, safety or well-being, the Assisted Living Director will:
1. submit a preliminary written report within 24 hours of the incident to the department;
2. notify HSS and any other appropriate authorities, according to state law and submit a written notification to the above agencies within 24 hours of the suspected incident;
3. immediately notify the family or the resident's representative and submit a written notification within 24 hours;
4. immediately notify the appropriate law enforcement authority in accordance with state law;
5. take appropriate corrective action to prevent future incidents and provide follow-up written report to all the above persons and agencies as per reporting requirements; and
6. document its compliance with all of the above procedures for each incident and keep such documentation (including any written reports or notifications) in the resident's file. A separate copy of all such documentation shall be kept in the provider's administrative file.