APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Filed: December 22, 2021

Barbrie Logan
3501 Woodward Avenue
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Mr. Brett J. Miller
Butzel Long
150 W. Jefferson Avenue
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Detroit, MI 48226

Re: Case No. 21-1149, *Barbrie Logan v. MGM Grand Detroit Casino*
Originating Case No. : 4:16-cv-10585

Dear Ms. Logan and Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Sharday S. Swain
Case Manager
Direct Dial No. 513-564-7027

cc: Ms. Kinikia D. Essix

Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION

No. 21-1149

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 22, 2021
DEBORAH S. HUNT, Clerk

BARBRIE LOGAN,	)	
	)	
Plaintiff-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE EASTERN DISTRICT OF
MGM GRAND DETROIT CASINO,	)	MICHIGAN
	)	
Defendant-Appellee.	)	

ORDER

Before: SUHRHEINRICH, COLE, and BUSH, Circuit Judges.

Barbrie Logan, a pro se Michigan resident, appeals the judgment of the district court granting summary judgment in favor of defendant-appellee, MGM Grand Detroit Casino ("MGM"), in Logan's civil action alleging employment discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

This appeal concerns, in part, Title VII's time limits for filing a charge with the Equal Employment Opportunity Commission ("EEOC"). Prior to seeking relief under Title VII, a plaintiff must obtain a "right to sue letter" from the EEOC. *Puckett v. Tenn. Eastman Co.*, 889 F.2d 1481, 1486 (6th Cir. 1989). In order to obtain such a letter, a claim of discrimination "shall be filed [with the EEOC] within one hundred and eighty days after the alleged unlawful employment practice[.]" 42 U.S.C. § 2000e-5(e)(1). Subsection 706(e) of Title VII extends the time to file a claim with the EEOC from 180 to 300 days if, like Michigan, the state is a "deferral

jurisdiction," meaning that it has a state law prohibiting the unlawful employment practice alleged and a state agency with authority to grant relief from such practice. 42 U.S.C. § 2000e-5(e)(1).

Logan's complaint alleged that MGM violated Title VII by discriminating against her based on her gender and retaliating against her when she filed internal complaints of discrimination. Logan explained that she began her employment with MGM as a culinary utility worker on August 1, 2007, and that she "was treated differently from similarly situated male employees with respect to the terms, conditions, and benefits of employment." She stated that she voiced her concerns to management and, on March 6, 2014, filed an internal complaint of discrimination. After that point, MGM allegedly retaliated against her. Logan claimed that the retaliatory behavior continued until she submitted her resignation on November 26, 2014, effective December 4, 2014. Logan filed a charge of sex discrimination and retaliation with the EEOC on July 8, 2015—216 days later. Logan filed her complaint on February 17, 2016.

MGM filed a motion for summary judgment, claiming that Logan's claims were time-barred as the result of a binding authorization form that Logan signed when she applied with MGM that required her to file a discrimination claim within six months. MGM also asserted that Logan's claims would be time-barred under the 300-day limitations period. Alternatively, MGM argued that Logan's claims lacked merit. Logan filed a response, asserting that she was entitled to the EEOC limitations period and that she endured continuing violations.

A magistrate judge concluded that the six-month limitations period was enforceable and that Logan's claims were time-barred. Over Logan's objections, the district court adopted the magistrate judge's report and granted MGM's motion for summary judgment.

Logan appealed, claiming that the six-month limitations period contained in the pre-employment form was not enforceable because it interfered with the EEOC's exclusive jurisdiction. In a matter of first impression, we concluded that the Title VII statute of limitations may not be contractually shortened for litigation and that Logan was entitled to a 300-day statutory limitations period. *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 826 (6th Cir. 2019). Although we noted that MGM had preserved a defense based on the 300-day limitations period, the timeliness of Logan's claims as measured by that period was not before the court, and we did

not resolve the question. *Id.* at 839 n.10. We reversed the district court's judgment and remanded the action to the district court for further proceedings.

On remand, MGM filed a renewed motion for summary judgment, arguing that Logan's claims were time-barred under the 300-day statute of limitations because she had not alleged an adverse employment action that occurred after September 11, 2014, which was 300 days prior to her July 8, 2015, filing with the EEOC. MGM asserted that any other claims were unexhausted. MGM also argued that Logan could not demonstrate a genuine dispute of material fact as to her discrimination or retaliation claims.

Logan responded that she suffered adverse employment actions throughout the entire course of her employment, including within the 300-day period prior to her EEOC filing. She also argued that acts outside that period should be included because she suffered a hostile workplace that resulted in her constructive discharge in December 2014.

A magistrate judge first determined that Logan could not claim a continuing violation or hostile work environment because she did not raise those claims in her EEOC charge and they were not exhausted. *Logan v. MGM Grand Detroit Casino*, No. 4:16-cv-10585, 2020 WL 5900969, at *4–6 (E.D. Mich. Aug. 24, 2020). Accordingly, the magistrate judge determined that any alleged acts of discrimination that occurred prior to September 11, 2014, were time-barred. *Id.* at *6. Of the acts alleged between September 12, 2014, and Logan's last day of employment on December 4, 2014, the magistrate judge concluded that MGM was entitled to summary judgment on three claims: first, on Logan's sex discrimination claims related to training, because any denial of training did not have an adverse effect on her employment; second, on her sex discrimination claims relating to a denial of overtime, because she did not present evidence that she was given fewer overtime opportunities than similarly situated male employees; and third, on her sex discrimination claims relating to job responsibilities, because she was not subject to an adverse employment action. *Id.* at *7–10. As for Logan's retaliation claims, the magistrate judge determined that Logan failed to establish that MGM took any adverse action against her that was causally connected to any protected activity. *Id.* at *12. Finally, the magistrate judge rejected

Logan's claim that she was constructively discharged and recommended granting MGM's motion for summary judgment. *Id.* at *13.

Logan filed seven "objections" to the report. The district court concluded that Logan's first three objections were not sufficiently specific to inform the court of the issues that she disputed. *Logan v. MGM Grand Detroit Casino*, No.16-10585, 2021 WL 75233, at *3 (E.D. Mich. Jan. 8, 2021). The district court overruled her remaining objections, adopted the magistrate judge's report, and granted MGM's motion for summary judgment. *Id.* at *3–5.

On appeal, Logan challenges the district court's rejection of her continuing violation and hostile work environment claims. She also asserts that the denial of training opportunities was an adverse employment action and that the assignment of more burdensome job duties was based on her gender. In connection with her job duties claim, she argues that she was unable to provide evidence supporting her claim because MGM failed to comply with discovery requests. Finally, she challenges the district court's denial of her overtime claims and her retaliation claims. Despite the district court's determination that some of Logan's objections to the magistrate judge's report were not specific, we assume for the sake of argument that Logan's objections preserved all of her claims for appeal. Because Logan has failed to address the rejection of her constructive discharge claim in her brief to this court, however, she has waived consideration of that issue. *See United States v. Johnson*, 440 F.3d 832, 845–46 (6th Cir. 2006).

We review the district court's grant of summary judgment de novo. *Laster v. City of Kalamazoo*, 746 F.3d 714, 726 (6th Cir. 2014). Summary judgment is appropriate when the evidence shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the burden of showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (ellipsis in original) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968)).

Logan first challenges the district court's determination that her claims of a continuing violation and hostile work environment were unexhausted, and she argues that failing to check the box marked "continuing violation" on her EEOC form should not be dispositive. Before filing suit in federal court, a Title VII plaintiff must exhaust her administrative remedies by filing a charge of discrimination with the EEOC and receiving a right-to-sue letter. *Peeples v. City of Detroit*, 891 F.3d 622, 630 (6th Cir. 2018). We review de novo a district court's determination that a plaintiff failed to exhaust her administrative remedies. *See Curry v. Scott*, 249 F.3d 493, 503 (6th Cir. 2001); *see also Hoover v. Timken Co.*, 30 F. App'x 511, 512–13 (6th Cir. 2002).

"As a general rule, a Title VII plaintiff cannot bring claims in a lawsuit that were not included in [her] EEOC charge." *Younis v. Pinnacle Airlines, Inc.*, 610 F.3d 359, 361 (6th Cir. 2010). A plaintiff's EEOC charge "must be 'sufficiently precise to identify the parties, and to describe generally the action or practices complained of.'" *Id.* (quoting 29 C.F.R. § 1601.12(b)). But because employees typically file EEOC charges without the benefit of legal assistance, "their *pro se* complaints are construed liberally, so that courts may also consider claims that are reasonably related to or grow out of the factual allegations in the EEOC charge." *Id.* at 362. "[W]here facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim." *Davis v. Sodexho*, 157 F.3d 460, 463 (6th Cir. 1998).

As Logan argues, the fact that she did not check the "continuing violation" box on the EEOC complaint form is not dispositive as to the scope of her charge. *See Weigel v. Baptist Hosp. of E. Tenn.*, 302 F.3d 367, 379–80 (6th Cir. 2002). But, beyond failing to check that box, Logan's EEOC charge did not contain factual allegations that supported a claim of either a continuing violation or a hostile work environment. Her charge stated that the dates the discrimination took place were from "9-12-2014" to "12-04-2014." She said that she was claiming "retaliation" and discrimination based on "sex" and explained:

> In or around March 2014, I served as union representative for a coworker filing a complaint of discrimination based on his national origin. In or around September 2014 and up through the end of my employment in December 2014, I was repeatedly denied overtime and opportunities for advancement in my position.

These allegations indicate a discrete period of time—September 2014 to December 2014—and a discrete violation—denial of overtime and advancement as the result of her sex and her union stewardship. These allegations do not reasonably indicate that her work environment as a whole was hostile or that, as she now claims, she had suffered discrimination as early as 2009. Because Logan's allegations would not prompt the EEOC to investigate a hostile work environment claim or a continuing violation claim, the district court did not err by concluding that Logan failed to exhaust her administrative remedies as to these claims and that her action was limited to allegedly discriminatory and retaliatory conduct that occurred between September 11, 2014, and December 4, 2014.

Logan next challenges the district court's findings with respect to her claims that she was discriminated against—i.e., denied training opportunities, assigned more burdensome job duties, and not offered overtime opportunities to which she was entitled—on the basis of her sex. "Title VII makes it 'an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex[.]'" *Risch v. Royal Oak Police Dep't*, 581 F.3d 383, 390 (6th Cir. 2009) (first alteration in original) (quoting 42 U.S.C. § 2000e-2(a)(1)). "[D]iscrimination claims under Title VII can be proven by direct or circumstantial evidence." *Ondricko v. MGM Grand Detroit, LLC*, 689 F.3d 642, 648–49 (6th Cir. 2012). "[D]irect evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999). Circumstantial evidence allows the factfinder to draw a reasonable inference that discrimination occurred. *Ondricko*, 689 F.3d at 649.

Title VII claims based on circumstantial evidence "are subject to the familiar burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 . . . (1973), as subsequently modified in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 . . . (1981)." *Risch*, 581 F.3d at 390. Under this framework, a plaintiff must first make out a prima facie case of discrimination; that is, she must demonstrate that (1) she is "a member of a protected

class"; (2) she suffered an adverse employment action; (3) she was qualified for the position; and (4) she was "treated differently than similarly situated non-protected employees." *Newman v. Fed. Express Corp.*, 266 F.3d 401, 406 (6th Cir. 2001).

Logan asserts that the district court erred by finding that a lack of training opportunities was not an adverse employment action. The district court based its conclusion on the fact that the denial of training opportunities did not materially impact the terms or conditions of Logan's employment. Logan counters by arguing that she was denied participation in a "Serve-Safe" course in April 2014 that was necessary for her to receive a five-year certification and that Jordan Wade, a male coworker, received training that she did not receive.

Decisions to deny or grant optional training are usually not adverse actions but are "within the realm of the employer's business judgment." *Vitt v. City of Cincinnati*, 97 F. App'x 634, 639–40 (6th Cir. 2004). Although "a deprivation of increased compensation as the result of a failure to train constitutes an adverse employment action," *Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 710 (6th Cir. 2007), there is no adverse employment action where the training does not lead to a change in benefits or pay. *See Lindsey v. Whirlpool Corp.*, 295 F. App'x 758, 768 (6th Cir. 2008). Even if the training could help the plaintiff receive future promotion, courts have not found adverse employment actions where the possibility of a promotion is speculative. *See Vaughn v. Louisville Water Co.*, 302 F. App'x 337, 345 (6th Cir. 2008).

The district court did not err by finding that Logan's allegations did not identify adverse employment actions. Logan did not allege that the denial of any training opportunities resulted in a loss of pay, a loss of responsibility, or a change in her employment status. Further, Logan's assertion that she was denied participation in a Serve-Safe course that prevented her from receiving a certification is not relevant to her complaint because the course was taught in April 2014—prior to the relevant time period. Finally, although Logan asserted in her summary judgment response that, with more training, "she could prepare herself for promotional opportunities," her claims regarding promotion are speculative and do not establish an adverse employment action.

Logan next challenges the district court's conclusion with respect to her claims that she was assigned more burdensome and menial tasks than her male counterparts. She asserted in her

response to MGM's motion for summary judgment that she was required to lift and carry more than 500 pounds of produce and supplies and that a supervisor ordered more stock when Wade, her male coworker, was off work than when Logan and Wade were working together. In her appellate brief, she asserts that the defendant had the idea that she, as a woman, would be overwhelmed by the physical labor and resign. However, Logan had no proof—aside from her own belief—that she put more stock away than her coworkers. In her deposition, she acknowledged that she did not know how much stock Wade had to put away on days that she was not working. Further, Logan does not dispute that putting away stock was one of her job duties. Accordingly, Logan could not establish that the amount of stock that she had to put away on some days altered her job duties in such a way as to constitute an adverse employment action. And to the extent that Logan claims that her inability to substantiate this claim was due to MGM's failure to comply with a discovery request, she forfeited this argument by failing to raise it before the district court. *See Berkshire v. Dahl*, 928 F.3d 520, 530 (6th Cir. 2019).

Next, Logan challenges the district court's findings related to her discrimination claims based on the denial of overtime opportunities. The denial of overtime can be considered an adverse employment action, *see Montgomery v. Honda of Am. Mfg., Inc.*, 47 F. App'x 342, 349 (6th Cir. 2002), but Logan did not demonstrate that a genuine dispute of material fact existed as to her overtime claim. In particular, MGM submitted an attendance and overtime analysis that showed that, from September 11, 2014, to December 3, 2014, Logan worked 20.75 hours of overtime and Wade worked 17.75 hours of overtime. In response, Logan provided payroll records from two male employees who were cooks, not culinary utility workers, and thus not similarly situated to her. She also provided an overtime analysis for October 2014, which stated that she worked 6.75 hours of overtime and Wade worked 11.5 hours. Although Logan asserts that MGM's analysis should not have been believed over her own, her analysis covered only the month of October. Even taking her assertions as true, she provided no evidence of the amount of overtime she and Wade worked during the other relevant parts of the time period to dispute MGM's evidence.

On appeal, Logan appears to acknowledge that she worked more overtime than Wade, but she asserts that the issue is not who worked more overtime but whether Logan was denied overtime

to which she was "contractually entitled." Accepting Logan's current assertion as true, the fact remains that Logan did not demonstrate a prima facie case that she was denied overtime, which was fatal to her gender discrimination claim. The district court did not therefore err by concluding that summary judgment in favor of MGM was proper on Logan's claims of discrimination.

Finally, Logan challenges the district court's grant of summary judgment in favor of MGM on her retaliation claims. She asserts that the district court erred by failing to find that the following adverse actions were taken in retaliation for her filing a grievance about being denied overtime: she was ordered to prepare a large amount of potato puree although it was her male coworker's turn to prepare it; male coworkers used profanity and made offensive comments about women but were not disciplined when Logan complained; and human resources personnel left a union meeting when Logan started to speak.

To establish a prima facie claim of retaliation, a plaintiff must establish four elements: "(1) she engaged in a protected activity; (2) her exercise of such protected activity was known by the defendant; (3) thereafter, the defendant took an action that was materially adverse to the plaintiff; and (4) a causal connection existed between the protected activity and the materially adverse action." *Rogers v. Henry Ford Health Sys.*, 897 F.3d 763, 775 (6th Cir. 2018) (internal quotations and citation omitted).

The district court did not err in granting summary judgment in favor of MGM on Logan's retaliation claims because none of the conduct cited constitutes an adverse employment action. First, as discussed above, the assignment of job duties—even for more burdensome tasks—does not constitute an adverse action and Logan does not dispute that preparing potato puree is within her job description. As for male coworkers' comments and profanity, Logan cannot establish, without specific allegations about this isolated instance, that it constituted an adverse action. *See Hunter v. Sec'y of U.S. Army*, 565 F.3d 986, 997 (6th Cir. 2009). Last, Logan's conclusory statement that human resources personnel left a union meeting when Logan began to speak also failed to demonstrate that she suffered an adverse action. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). Logan therefore failed to demonstrate a genuine issue of material fact that she was subject to materially adverse employment actions.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

No. 21-1149

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 28, 2022
DEBORAH S. HUNT, Clerk

BARBRIE LOGAN,

Plaintiff-Appellant,

v.

MGM GRAND DETROIT CASINO,

Defendant-Appellee.

ORDER

BEFORE: SUHRHEINRICH, COLE, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BARBRIE LOGAN,

Plaintiff,

v.

Civil Case No. 16-10585
Honorable Linda V. Parker

MGM GRAND DETROIT CASINO,

Defendant.
_____/

OPINION AND ORDER REJECTING PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S AUGUST 24, 2020 REPORT AND RECOMMENDATION AND GRANTING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT

On February 17, 2016, Plaintiff Barbrie Logan commenced this lawsuit against her former employer, Defendant MGM Grand Detroit Casino, alleging sex discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964. The matter has been referred to Magistrate Judge Anthony P. Patti for all pretrial matters. (ECF No. 18.) It is presently before the Court on Defendant's Second Motion for Summary Judgment (ECF No. 67), filed after the Sixth Circuit Court of Appeals, as a matter of first impression, held Plaintiff's claims are not barred by the six-month limitations period in her employment contract, *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 826 (6th Cir. 2019). Magistrate Judge Patti issued a Report and Recommendation ("R&R") on August 24, 2020,

recommending that the Court grant Defendant's motion. (ECF No. 75.) After receiving an extension of time to do so, Plaintiff filed objections to the R&R on September 25, 2020 (ECF No. 78), to which Defendant has responded (ECF No. 79).

Magistrate Judge Patti's R&R

In the R&R, Magistrate Judge Patti first concludes that the 300-day limitations period applicable to Title VII actions bars Plaintiff's claims arising from conduct before September 11, 2014, as she filed her EEOC charge on July 8, 2015.[1] (*Id.* at Pg ID 1687-94.) Magistrate Judge Patti rejects Plaintiff's assertion that all of the conduct she now describes demonstrates a continuing violation of Title VII and concludes that Plaintiff failed to properly exhaust any potential continuing violation or hostile work environment claim. (*Id.*)

Turning to the alleged misconduct that is not time-barred, Magistrate Judge Patti holds that Defendant is entitled to summary judgment because Plaintiff fails to demonstrate a genuine issue of material fact to support her claims of sex discrimination, retaliation, or constructive discharge. Magistrate Judge Patti

[1] Notwithstanding this finding, Magistrate Judge Patti did consider Plaintiff's claim that she was denied participation in a Serve-Safe course offered in April 2014. The Court presumes that Magistrate Judge Patti considered this event because Plaintiff could conceivably show that she suffered an adverse action during the relevant period as a result of not receiving this training, although she does not.

construes Plaintiff's EEOC charge and her federal court Complaint as claiming "retaliation for engaging in protected activity or representing fellow employees in discrimination grievances as a union steward and sex discrimination on three bases: (1) training opportunities; (2) overtime; and (3) terms and conditions of employment, including job responsibilities." (*Id.* at Pg ID 1693-94.)

As to Plaintiff's claim of sex discrimination related to training, Magistrate Judge Patti finds no evidence that the lack of training opportunities amounted to an adverse employment action under Title VII. (*Id.* at Pg ID 1695-98.) Plaintiff fails to show that the denial of any training opportunities materially impacted the terms or conditions of her employment. (*Id.*)

With respect to Plaintiff's discrimination claim based on overtime, Magistrate Judge Patti finds only one of her comparators, Jorden Wade, to be similarly situated. (*Id.* at Pg ID 1701.) This is because Plaintiff and Wade filled culinary utility (CU) positions, whereas Plaintiff's remaining "comparators" were cooks. Magistrate Judge Patti concludes that the unrebutted evidence for the relevant period (September 11 to December 4, 2014) reflects that Plaintiff worked more overtime than Wade. (*Id.*)

Turning to Plaintiff's claim that she was given more burdensome tasks and subjected to derogatory treatment when compared to similarly situated male employees, Magistrate Judge Patti first finds that Plaintiff's allegations describe

"nothing more than a mere inconvenience or simple alteration of job duties ... with no discernable relationship to sex beyond Plaintiff's unsupported personal belief that she was treated differently than male employees." (*Id.*, at Pg ID 1704 (internal citation omitted).)

Magistrate Judge Patti next concludes that Plaintiff fails to establish a prima facie case of retaliation based on her protected activity. (*Id.* at Pg ID 1705-10.) Magistrate Judge Patti finds that Plaintiff fails to show that Defendant took an action affecting the terms or conditions of her employment because of her protected activity, for the same reasons that she fails to establish an adverse action to support her discrimination claim. (*Id.* at Pg ID 1707.) Moreover, Magistrate Judge Patti finds that Plaintiff fails to demonstrate a causal connection between any alleged protected activity and the actions against her. (*Id.* at 1708-09.) Searching the evidence, Magistrate Judge Patti sees no temporal connection between Plaintiff's protected activity and the adverse actions alleged; nor does he see evidence that the individuals engaged in the alleged adverse actions against Plaintiff were aware of her protected activity. (*Id.* at 1709-10.)

Lastly, Magistrate Judge Patti concludes that Plaintiff's constructive discharge claim fails because she does not establish a prima facie case of sex discrimination or retaliation. (*Id.* at Pg ID 1711-12.) Stated differently, Plaintiff

fails to show that she was subjected to a work environment or working conditions that would lead a reasonable person to quit. (*Id.*)

Standard of Review

When objections are filed to a magistrate judge's R&R on a dispositive matter, the Court "make[s] a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Nevertheless, the Court "is not required to articulate all of the reasons it rejects a party's objections." *Thomas v. Halter*, 131 F. Supp. 2d 942, 944 (E.D. Mich. 2001) (citations omitted). A party's failure to file objections to certain conclusions of the R&R waives any further right to appeal on those issues. *See Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Likewise, the failure to object to certain conclusions in the magistrate judge's report releases the Court from its duty to independently review those issues. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985).

The purpose of filing objections is to focus the district judge's "attention on those issues—factual and legal—that are at the heart of the parties' dispute." *Id.* at 147. Thus, a party's objections must be "specific." *Cole v. Yukins*, 7 F. App'x 354, 356 (6th Cir. 2001) (citations omitted). "The filing of vague, general, or conclusory objections does not meet the requirement of specific objections and is tantamount to a complete failure to object." *Id.* (citing *Miller v. Currie*, 50 F.3d

373, 380 (6th Cir. 1995)). Moreover, objections that merely restate arguments previously presented, do not sufficiently identify alleged errors on the part of the magistrate judge. *Senneff v. Colvin*, No. 15-cv-13667, 2017 WL 710651, at *2 (E.D. Mich. Feb. 23, 2017) (citing cases). An objection that does nothing more than disagree with a magistrate judge's conclusion, or simply summarizes what has been argued before, is not considered a valid objection. *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505, 508 (6th Cir. 1991); *Watson v. Jamsen*, No. 16-cv-13770, 2017 WL 4250477, at *1 (E.D. Mich. Sept. 26, 2017).

Plaintiff's Objections

In her September 25 filing, Plaintiff asserts seven "objections" to the R&R. (ECF No. 78.)

Objections Nos. 1-3

Plaintiff's first three objections are not sufficiently specific to inform the Court of the factual and/or legal issues she disputes. *Thomas*, 474 U.S. at 147. In her first "objection," Plaintiff simply quotes Magistrate Judge Patti's recommendation to grant Defendant's motion. (ECF No. 78 at Pg ID 1724.) In her second "objection," Plaintiff only relates facts concerning her applications to work for Defendant and her hiring in 2007, and then makes the conclusory assertions that she was discriminated against, subjected to retaliation, and treated with hostility during her employment. (*Id.* at Pg ID 1724-25.) In her third

objection, Plaintiff recites the Supreme Court's instruction in *Haines v. Kerner*, 404 U.S. 519 (1972), that courts must liberally construe the filings of pro se parties. *Id.* at 520. Plaintiff then lists the categories of evidence submitted by both parties in support of and in opposition to Defendant's summary judgment motion. Plaintiff does not specify, however, how the magistrate judge failed to heed the Supreme Court's guidance or what evidence the magistrate judge failed to consider.

Objection Nos. 4 & 5

The Court construes Plaintiff's fourth and fifth objections as challenging Magistrate Judge Patti's determination that the continuing violation doctrine does not apply and that she is barred from basing her Title VII claims on conduct that occurred before September 11, 2014. In her fourth objection, Plaintiff lists "occurrences" going back to January 2009, which she asserts are "a culmination of an offensive, intimidating, and hostile work environment that originated because of Plaintiff's sex." (*See* ECF No. 78 at Pg ID 1727-43.) In her fifth objection, Plaintiff takes issue with Magistrate Judge Patti's observation that she did not check the "continuing violation" box on the EEOC Charge form.

However, as Magistrate Judge Patti correctly states, a plaintiff must properly exhaust administrative remedies before filing a Title VII action. *Younis v. Pinnacle Airlines, Inc.*, 610 F.3d 359, 361-62 (6th Cir. 2010). The EEOC "charge

must be 'sufficiently precise to identify the parties, and to describe generally the action or practices complained of.'" *Id.* at 361 (quoting 29 C.F.R. § 1601.12(b)). "As a general rule, a Title VII plaintiff cannot bring claims in a lawsuit that were not included in his [or her] EEOC charge." *Id.* (citing 42 U.S.C. § 2000e–5(f)(1); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)). Nevertheless, because EEOC charges are typically filed by aggrieved employees without the assistance of counsel, Sixth Circuit precedent allows for a liberal construction of such filings finding that "courts may also consider claims that are reasonably related to or grow out of the factual allegations in the EEOC charge." *Id.* at 362 (citing *Randolph v. Ohio Dep't of Youth Servs.*, 453 F.3d 724, 732 (6th Cir. 2006)). "As a result, 'when facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim.'" *Id.* (brackets omitted) (quoting *Davis v. Sodexho*, 157 F.3d 460, 463 (6th Cir. 1998)).

Regardless of how liberally the Court construes Plaintiff's EEOC Charge or whether she checked the "continuing violation" box on the form, Plaintiff did not allege or preserve a continuing violation or hostile work environment claim. Plaintiff alleges in her EEOC Charge that around March 2014 she served as a union representative for a coworker claiming national origin discrimination and that "[i]n or around 2014 and up through the end of [her] employment in December

2014, [she] was repeatedly denied overtime and opportunities for advancement in [her] position." (ECF No. 67-17 at Pg ID 1415.) She specifically identifies the dates the discrimination took place as between September 12 and December 4, 2014. (*Id.*) There is no mention, reference, or suggestion that Plaintiff suffered retaliation or discrimination beyond the four-month period set forth on her EEOC charge (i.e., September through December 2014). As such, this Court concurs with Magistrate Judge Patti that Plaintiff failed to exhaust any claims relating to conduct occurring prior to September 11, 2014, and that those claims therefore cannot be asserted here. *See Younis*, 610 F.3d at 362.

As Magistrate Judge Patti correctly states in the R&R, a court is not required to scour the record or search out facts from the record to determine if there are genuine issues of material of fact. *See* Fed. R. Civ. P. 56(c)(1) ("A party asserting that a fact cannot be or is genuinely disputed" must designate specifically the materials in the record supporting the assertion, "including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials."); *see also Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989) ("the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact") (citing *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034 (D.C. Cir. 1988)); *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989),

cert. denied 494 U.S. 1091 (1990) ("A district court is not required to speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim."). In response to Defendant's summary judgment motion, Plaintiff refers to her declaration to support her claims, and in that declaration, she lists in chronological order events that occurred during her employment, which the Court presumes Plaintiff believes are discriminatory in nature. (*See* ECF No. 72 at Pg ID 1145.) While Plaintiff cites to only limited paragraphs from her declaration in her response brief, the Court will touch on the other events described in the declaration—provided they fall within the relevant time period—to the extent they were not already addressed by Magistrate Judge Patti or are not otherwise addressed here.

Specifically, Plaintiff refers to: (i) chefs verbally "reprimand[ing]" female team members, but not male team members, for things they said (ECF No. 72-1 at Pg ID 1538-39, ¶¶ 27, 29); (ii) the failure to include in the meeting notes her complaints at union meetings on October 9 and 30, 2014 (*id.* at Pg ID 1541-42, ¶¶ 31-33); (iii) her inquiry about getting a back brace with supervisor Keith on or about November 21, 2014 (*id.* at Pg ID 1546-47, ¶ 40); and, (iv) that she, unlike co-worker Wade, complained at union meetings and this was why she was retaliated against (*id.* at Pg ID 1548, ¶ 42). As to items one through three, as

alleged, Plaintiff fails to establish that she suffered an adverse action. *See Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006) ("petty slights or minor annoyances" do not qualify as adverse actions); *Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999) ("certain threats or deprivations are so de minimis that they do not rise to the level of being constitutional violations"). Moreover, Plaintiff offers no proof to suggest that the omission of her statements from union meeting minutes or Keith's handling of the back brace issue resulted in Plaintiff being treated differently than male employees. As to the last item, Plaintiff fails to establish a causal connection between her union meeting complaints and any materially adverse action.

Objection No. 6

Plaintiff challenges the accuracy of the overtime analysis Defendant provided in support of its summary judgment motion (ECF No. 15), contending that Magistrate Judge Patti failed to compare it with Plaintiff's analysis (ECF No. 72-2 at Pg ID 1665.)

Plaintiff's analysis, however, does not create a genuine issue of material fact with respect to whether Wade was offered more overtime work than Plaintiff. During October 2014—the limited period covered in Plaintiff's chart—Plaintiff worked more overtime than Wade when one omits the eight hours of overtime Wade performed on a day when Plaintiff already was working. (*See* ECF No. 72-2

at Pg ID 1665.) Clearly Plaintiff could not be offered overtime to fill the needed position when she already was scheduled to work. Moreover, Plaintiff's analysis does not undermine Defendant's chart, which provides a broader picture in that it covers the period from August 2, 2014 to November 8, 2014. Defendant's evidence reflects that Plaintiff actually worked more overtime hours than Wade when one subtracts the hours he worked because Plaintiff was sick, called off, or was already working. (*See* ECF No. 67-15.)

Objection No. 7

In her final objection, Plaintiff argues that Exhibit E to Defendant's summary judgment motion (ECF No. 67-6) fails to establish that the job of putting away stock fell only to CUs. However, even if individuals in other positions are responsible for this job duty, Plaintiff does not create a genuine issue of material fact relevant to her claims based on job assignments. Plaintiff still has not shown that she was required to put away stock because of her gender. Even if this responsibility belonged to a broader class of employees, but was assigned only to CUs, this merely shows unequal treatment based on job categories rather than a suspect classification.

The Court concurs with Magistrate Judge Patti's conclusion that Plaintiff fails to demonstrate a prima facie case of discrimination or retaliation based on her assertion that she was given more burdensome and unreasonable job duties.

Conclusion

For the reasons set forth above, the Court rejects Plaintiff's objections to the August 24, 2020 R&R. Defendant did not object to Magistrate Judge Patti's recommendation that the Court deny its request for attorney's fees and costs. This Court, therefore, is adopting the recommendations in Magistrate Judge Patti's R&R.

Accordingly,

IT IS ORDERED that Defendant's Second Motion for Summary Judgment (ECF No. 67) is **GRANTED**.

IT IS SO ORDERED.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: January 8, 2021

I hereby certify that a copy of the foregoing document was mailed to counsel of record and/or pro se parties on this date, January 8, 2021, by electronic and/or U.S. First Class mail.

s/ R. Loury
Case Manager

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BARBRIE LOGAN,

Plaintiff,

v.

MGM GRAND DETROIT CASINO,

Defendant.
_____/

Case No. 4:16-cv-10585
District Judge Linda V. Parker
Magistrate Judge Anthony P. Patti

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION TO GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT UNDER FED. R. CIV. P. 56(a) (ECF No. 67)

I. RECOMMENDATION: The Court should **GRANT** Defendant's motion for summary judgment (ECF No. 67), and with no remaining claims, dismiss the case. However, the Court should **DENY** Defendant's request for an award of costs and attorney fees associated with this motion (ECF No. 67, PageID.1177,1206), as the issues on which this recommendation is based merited review by the Court.

II. REPORT

A. Background

1. Factual Background

Plaintiff Barbrie Logan filed this lawsuit *in pro per* against Defendant MGM Grand Detroit Casino ("MGM"),[1] alleging sex discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964. (ECF No. 1, ¶¶ 1-2, PageID.2.) The alleged facts underlying Plaintiff's complaint begin on August 1, 2007, the date she began her employment as a "culinary utility person" (CU) at MGM. (ECF No. 1, ¶ 7, PageID.2.) As a condition of employment, she paid dues and/or fees to UNITE HERE, Local 24, the labor union (ECF No. 1, ¶ 10, PageID.2), and began serving as a union steward around May 2008 (ECF No. 1, ¶ 11, PageID.3). According to Plaintiff, throughout her employment with MGM, she was treated differently than similarly situated male employees with regard to overtime and training opportunities as well as job duties, and was subjected to derogatory comments. (ECF No. 1, ¶¶ 12-13, 24, 26, PageID.3-4.) The specific dates listed in the complaint, though, are all from 2014. (ECF No. 1, ¶¶ 15, 17-19, 21-23, 25, 27, PageID.3-4.) Plaintiff ultimately submitted her resignation from employment at MGM on November 26, 2014, effective December 4, 2014. (ECF No. 1, ¶ 27, PageID.4; ECF No. 67-8; ECF No. 72, Exhibit 9, PageID.1575.)

[1] According to Defendant, "[t]he proper entity to be named is MGM Grand Detroit, LLC[.]"

The factual background of the case was further summarized by the Sixth Circuit on appeal from the District Court's decision to grant MGM's initial summary judgment motion in this case:

> [Plaintiff's] resignation was, she alleges, "due to discrimination caused by her employer" and therefore a constructive discharge. R. 42, PageID 820. On July 8, 2015—216 days later—[Plaintiff] filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) against MGM. In the Charge of Discrimination, [Plaintiff] alleged that she "was subjected to different terms and conditions of employment based on [her] sex . . . and in retaliation for . . . participation in protected activity." R. 40-17, PageID 779. The EEOC investigated [Plaintiff's] allegation and issued her a right-to-sue letter in November 2015. On February 17, 2016—440 days after resigning—[Plaintiff] sued MGM for discrimination under Title VII.
>
> MGM moved for summary judgment, arguing that [Plaintiff's] employment agreement required her to commence any action arising out of her employment within six months and that her failure to do so barred her claim. The magistrate judge assigned to the case agreed with MGM and issued a Report and Recommendation to that effect. The district court adopted the Report and Recommendation and entered summary judgment in favor of MGM. [Plaintiff] timely appealed.

Logan v. MGM Grant Detroit Casino, 939 F.3d 824, 826 (6th Cir. 2019).

Ultimately, the Sixth Circuit reversed, holding that Plaintiff was entitled to a 300-day statutory limitations period because "a contractually shortened limitation period, outside of an arbitration agreement, is incompatible with the grant of substantive rights and the elaborate pre-suit enforcement mechanisms of Title VII. *Logan*, 939 F.3d at 839. Notably for consideration of MGM's instant motion for summary judgment (ECF No. 67), the court also stated:

> We note that MGM has preserved a statute-of-limitations defense based on the 300-day limitation period of Title VII. In its motion for summary judgment, MGM averred that "even if the limitations waiver were not considered, Plaintiff's Title VII claims are subject to a 300-day limitation period." R. 40, PageID 559. Some of [Plaintiff's] claims may be time-barred, even using a 300-day limitation period. Because that question was not before us, we will not resolve it here.

Id. at 839 n. 10.

2. Instant Motion

Following the Sixth Circuit's reversal, MGM filed a second motion for summary judgment, arguing entitlement to judgment as a matter of law because: (1) applying the 300-day statute of limitations, Plaintiff's claims are time-barred; and (2) regardless, Plaintiff cannot demonstrate a genuine issue of material fact as to her Title VII discrimination or retaliation claims. (ECF No. 67.) In response, Plaintiff asserts that: (1) the 300-day limitations period spanned from September 11, 2014 to the time she filed her EEOC Charge on July 8, 2015, and a number of discriminatory acts occurred during that time period which led to her constructive dismissal; (2) the Court may also consider unlawful employment actions taken by MGM prior to September 11, 2014, because she is alleging continuous discriminatory conduct as part of a hostile work environment; and (3) she "has sufficiently set forward evidence that she was routinely assigned more burdensome tasks, denied overtime and training opportunities offered to male coworkers, and treated less favorably than male coworkers in retaliation for her union activity and

representation o[f] other female coworkers[.]" (ECF No. 72, PageID.1439; *see also* PageID.1453.) Finally, MGM filed a reply brief arguing that: (1) Plaintiff's claims are time-barred and fail to state disparate treatment based on gender; (2) Plaintiff failed to report any discrimination she alleges suffering after September 11, 2014; (3) Plaintiff cannot now claim a "continuing violation" as she never raised such a claim in her EEOC Charge; and (4) the Court should decline to consider the declaration attached to Plaintiff's response because it contains accusations that contradict her deposition testimony and are unsupported. (ECF No. 74.)

B. Standard

Under Federal Rule of Civil Procedure 56, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it might affect the outcome of the case under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court "views the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party." *Pure Tech Sys., Inc. v. Mt. Hawley Ins. Co.*, 95 F. App'x 132, 135 (6th Cir. 2004).

"The moving party has the initial burden of proving that no genuine issue of material fact exists . . . ." *Stansberry v. Air Wis. Airlines Corp.*, 651 F.3d 482, 486

(6th Cir. 2011) (internal quotations omitted); *cf.* Fed. R. Civ. P. 56(e)(2) (providing that if a party "fails to properly address another party's assertion of fact," the court may "consider the fact undisputed for purposes of the motion"). "Once the moving party satisfies its burden, 'the burden shifts to the nonmoving party to set forth specific facts showing a triable issue.'" *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 453 (6th Cir. 2001) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

The nonmoving party "must make an affirmative showing with proper evidence in order to defeat the motion." *Alexander v. CareSource*, 576 F.3d 551, 558 (6th Cir. 2009); *see also Lee v. Metro. Gov't of Nashville & Davidson Cty.*, 432 F. App'x 435, 441 (6th Cir. 2011) ("The nonmovant must . . . do more than simply show that there is some metaphysical doubt as to the material facts[.] . . . [T]here must be evidence upon which a reasonable jury could return a verdict in favor of the non-moving party to create a genuine dispute.") (internal quotation marks and citations omitted). In other words, summary judgment is appropriate when the motion "is properly made and supported and the nonmoving party fails to respond with a showing sufficient to establish an essential element of its case[.] . . ." *Stansberry*, 651 F.3d at 486 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

The fact that Plaintiff is *pro se* does not reduce her obligations under Rule 56. Rather, "liberal treatment of *pro se* pleadings does not require lenient treatment of substantive law." *Durante v. Fairlane Town Ctr.*, 201 F. App'x 338, 344 (6th Cir. 2006). In addition, "[o]nce a case has progressed to the summary judgment stage, . . . 'the liberal pleading standards under *Swierkiewicz* [*v. Sorema, N.A.*, 534 U.S. 506, 512-13 (2002)] and [the Federal Rules] are inapplicable.'" *Tucker v. Union of Needletrades, Indus., & Textile Employees*, 407 F.3d 784, 788 (6th Cir. 2005) (quoting *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004)). The Sixth Circuit has made clear that, when opposing summary judgment, a party cannot rely on allegations or denials in unsworn filings and that a party's "status as a pro se litigant does not alter [this] duty on a summary judgment motion." *Viergutz v. Lucent Techs., Inc.*, 375 F. App'x 482, 485 (6th Cir. 2010); *see also United States v. Brown*, 7 F. App'x 353, 354 (6th Cir. 2001) (affirming grant of summary judgment against a *pro se* plaintiff because he "failed to present any evidence to defeat the government's motion").

C. Discussion

1. Applying the 300-day statute of limitations, any allegations of discrimination or retaliation that occurred prior to September 11, 2014, are time-barred

In holding that Plaintiff is entitled to a 300-day statutory limitations period, *Logan*, 939 F.3d at 839, the Sixth Circuit summarized the relevant law as follows:

> The EEOC process begins with a "charge" filed by the victim of discrimination. Generally, the charge must be filed with the EEOC "within 180 days of the occurrence of the alleged unlawful employment practice." *EEOC v. Commercial Office Prod. Co.*, 486 U.S. 107, 110 (1988) (citing 42 U.S.C. § 2000e-5(e)). However, the filing period may be extended to 300 days in jurisdictions that have "State or local law prohibiting the unlawful employment practice alleged," 42 U.S.C. § 2000e-5(d), and "a State or local agency with authority to grant or seek relief from such practice," *id.* § 2000e-5(e)(1). Within such jurisdictions, known as "deferral jurisdictions," the 300-day limitation period applies so long as the complaining employee has "instituted proceedings with [the applicable] State or local agency." *Id.*; 29 C.F.R. § 1601.13.

Logan, 939 F.3d at 827.

Neither Plaintiff nor MGM challenge application of the 300-day statutory limitations period, and both agree that Plaintiff filed her EEOC Charge on July 8, 2015, 300 days from September 11, 2014. (ECF No. 67, PageID.1192; ECF No. 72, PageID.1453.) However, the agreement between the parties ends there. Plaintiff argues not only that she was subjected to a number of discriminatory acts – between September 11, 2014 and December 4, 2014 – that led to her constructive discharge, but also that none of her claims are time-barred because discriminatory and retaliatory actions taken by MGM prior to September 11, 2014, are evidence of continuing discriminatory conduct as part of a hostile work environment. (ECF No. 72, PageID.1453-1454.) In contrast, MGM argues that Plaintiff failed to assert a continuing violation of Title VII in her EEOC Charge, listing there only that the alleged discrimination occurred between September and December 2014. (ECF

No. 67, PageID.1192-1193; ECF No. 74, PageID.1674-1675.) For the reasons that follow, I agree.

The Sixth Circuit "has recognized that an ongoing, continuous series of discriminatory acts may be challenged if one of those discriminatory acts occurred within the limitations period." *Phillips v. Cohen*, 3 F. App'x 212, 218 (6th Cir. 2001). In other words, "[i]f a plaintiff can show that the defendant has engaged in a continuing violation, then a court may consider all relevant actions allegedly taken pursuant to an employer's discriminatory policy or practice, including those that would otherwise by time-barred. *Id.* There are two types of continuing violations. "The first arises from an ongoing series of discriminatory acts, the second from a long-standing policy of discrimination." *Dendinger v. Ohio*, 207 F. App'x 521, 526 (6th Cir. 2006).

In *Nat'l R.R. Passenger Corp. v. Morgan*, the Supreme Court distinguished related discrete acts of discrimination (with the exception of hostile work environment claims) from continuing violations as follows:

> Morgan argues that the statute does not require the filing of [an EEOC] charge within 180 or 300 days of each discrete act, but that the language requires the filing of a charge within the specified number of days after an "unlawful employment *practice*." "Practice," Morgan contends, connotes an ongoing violation that can endure or recur over a period of time. In Morgan's view, the term "practice" therefore provides a statutory basis for the . . . continuing violation doctrine. This argument is unavailing, however, given that 42 U.S.C. § 2000e-2 explains in great detail the sorts of actions that qualify as "[u]nlawful employment practices" and includes among such practices numerous

> discrete acts. There is simply no indication that the term "practice" converts related discrete acts into a single unlawful practice for the purposes of timely filing.

536 U.S. 101, 110-11 (2002) (internal citations omitted). Thus, "discrete discriminatory acts are not actionable if time-barred, even when they related to acts alleged in timely filed charges[,]" and the EEOC charge "must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred." *Id.* at 113.

Unlike discrete acts of discrimination, discrimination that is part of a hostile work environment

> "occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. Such claims are based on the cumulative effect of individual acts . . . . In determining whether an actionable hostile work environment claim exists, the Court must look to 'all the circumstances,' including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

Ferguson v. Snow, 185 F. App'x 456, 462 (6th Cir. 2006) (quoting *Morgan*, 536 U.S. at 116).

Plaintiff would like the Court to consider all of the individual acts of "discrimination" listed in the declaration attached to her summary judgment response and raised at her deposition to find a continuing violation of Title VII, and to conclude that the 300-day statute of limitations need not be enforced. In

other words, she would like the Court to find that alleged acts of discrimination which occurred prior to September 11, 2014 are not time-barred, and to consider those acts when evaluating her Title VII claims. (ECF No. 72, PageID.1452-1454.) But the Court should focus instead on the allegations in Plaintiff's EEOC Charge itself, and in her complaint.

A plaintiff must properly exhaust administrative remedies before filing a Title VII action by satisfying the following prerequisites: "(1) timely file a charge of employment discrimination with the EEOC; and (2) receive and act upon the EEOC's statutory notice of the right to sue ('right-to-sue letter')." *Granderson v. Univ. of Mich.*, 211 F. App'x 398, 400 (6th Cir. 2006). The EEOC "charge must be 'sufficiently precise to identify the parties, and to describe generally the action or practices complained of.'" *Younis v. Pinnacle Airlines, Inc.*, 610 F.3d 359, 361 (6th Cir. 2010) (quoting 29 C.F.R. § 1601.12(b)).

In her July 8, 2015 EEOC Charge under the heading "Discrimination Based On," Plaintiff checked the boxes for "sex" and "retaliation," and under "Date(s) Discrimination Took Place," she listed the earliest as September 12, 2014, and the latest as December 4, 2014. Notably, in that same section of the Charge, she left unchecked the box for "Continuing Action." (ECF No. 67-17; ECF No. 72, PageID.1415.) For "The Particulars," she stated:

> I began employment with the above named employer on August 1, 2007 and was last employed as Culinary Utility.

> In or around March 2014, I served as union representative for a coworker filing a complaint of discrimination based on national origin. In or around September 2014 and up through the end of my employment in December 2014, I was repeatedly denied overtime and opportunities for advancement in my position.
>
> Similarly situated comparators who did not engage in protected activity and who are not of my sex were granted these opportunities and overtime instead of me.
>
> I believe I was subjected to different terms and conditions of employment based on my sex (female) and in retaliation for my participation in protected activity in violation of the Civil Rights Act of 1964, as amended.

(ECF No. 67-17; ECF No. 72, PageID.1415.)

Based on the above, I see no way to conclude that, in her EEOC Charge, Plaintiff alleged, let alone preserved, a continuing violation or hostile work environment claim. Not only did she fail to check the box for a continuing violation, but she also made clear both in the body and in the form portion of the Charge that the alleged discrimination took place specifically over a four-month period between September and December 2014. (ECF No. 67-17; ECF No. 72, PageID.1415.) Nor does Plaintiff appear to allege a continuing violation or hostile work environment claim in her complaint.

"As a general rule, a Title VII plaintiff cannot bring claims in a lawsuit that were not included in his EEOC charge." *Younis*, 610 F.3d at 361. However,

> because aggrieved employees—and not attorneys—usually file charges with the EEOC, their *pro se* complaints are construed liberally, so that courts may also consider claims that are reasonably

> related to or grow out of the factual allegations in the EEOC charge. *See Randolph v. Ohio Dep't of Youth Servs.*, 453 F.3d 724, 732 (6th Cir. 2006). As a result, "whe[n] facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim." *Davis v. Sodexho*, 157 F.3d 460, 463 (6th Cir. 1998).

Younis, 610 F.3d at 362. Although in her complaint Plaintiff asserts generally that *throughout her employment*, she was treated differently than similarly situated male employees, subjected to derogatory comments about sex, and given more burdensome and unreasonable job duties than similarly situated male team members (ECF No. 1, ¶¶ 12-13, 26, PageID.3-4), she only alleges specific facts related to these claims from 2014 (albeit some prior to September 11, 2014) (ECF No. 1, ¶¶ 17, 19, 21-22, 25, 27, PageID.3-4).

Accordingly, Plaintiff failed to exhaust any potential continuing violation or hostile work environment claim, and any claims related to discriminatory and unlawful employment practices that allegedly occurred prior to September 11, 2014, are time-barred. The Court must, then, determine what claims remain, as Plaintiff includes a significant amount of alleged discriminatory and retaliatory acts in her summary judgment response that occurred well outside the relevant time period. When narrowed down to September 11, 2014, through her last day of employment on December 4, 2014, and looking to her EEOC Charge and complaint, Plaintiff appears to claim retaliation for engaging in the protected activity or representing fellow employees in discrimination grievances as a union

steward, and sex discrimination on three bases: (1) training opportunities; (2) overtime; and (3) terms and conditions of employment, including job responsibilities. I will consider each in turn.

2. Plaintiff's claim of sex discrimination

Where, as is the case here, sex discrimination claims under Title VII are based on circumstantial evidence, the burden-shifting framework in *McDonnell-Douglas Corp. v Green*, 411 U.S. 792, 802-04 (1973), applies. *White v. Baxter Health Corp.*, 533 F.3d 381, 391 (6th Cir. 2008). "Under this framework, the plaintiff bears the initial 'not onerous' burden of establishing a *prima facie* case of discrimination by a preponderance of the evidence." *Id.* "To establish a *prima facie* case of employment discrimination, a plaintiff must demonstrate that: (1) he is a member of a protected class; (2) he was qualified for his job; (3) he suffered an adverse employment decision; and (4) he was replaced by a person outside the protected class or treated differently than similarly situated non-protected employees." *Id.*

If a plaintiff establishes a *prima facie* case of discrimination or retaliation, the burden shifts to the defendant to provide a legitimate, non-discriminatory reason for the employment decision. *McDonnell-Douglas*, 411 U.S. at 802. Finally, if the defendant offers such a reason, the burden shifts to the plaintiff to show that the proffered reason is merely a pretext for discrimination. *Id.* at 804.

However, the burden of persuasion rests with the plaintiff at all times. *Hunter v. Sec'y of the Army*, 565 F.3d 986, 996 (6th Cir. 2009).

a. MGM is entitled to summary judgment on Plaintiff's sex discrimination claim related to training

Again, Plaintiff claims sex discrimination in part on the basis that she was denied training opportunities offered to male coworkers. (ECF No. 1, ¶ 24, PageID.4.) Specifically, upon a review of Plaintiff's deposition transcript and other documents attached to the instant motion and response, as well as the declaration Plaintiff attached to and cited throughout her response, she alleges that she was denied participation in a Serve-Safe course offered in April 2014, before the time period at issue (Pl. Dep. Trans., ECF No. 67-2, PageID.1231-1232), and left out of on-the-job training that a male CU Jorden Wade was provided (ECF No. 67-2, PageID.1232-1234), about which she complained at union grievance meetings from September to November 2014 (Plaintiff's Declaration, Exhibit 8, ECF No. 72, PageID.1545; BOH Meeting Minutes 10/30/14, Exhibit 6, ECF No. 72, PageID.504). However, even viewing this evidence in a light most favorable to Plaintiff, she has failed to establish a *prima facie* case of employment discrimination on this basis because she has not met her burden of showing that the alleged lack of training opportunities amounted to an adverse employment action under Title VII.

An adverse employment action requires a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *White*, 533 F.3d at 402 (citation omitted). The employment action must be "more disruptive than a mere inconvenience or an alteration of job responsibilities." *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 461 (6th Cir. 2000) (internal quotation marks omitted); *see also id.* at 462 ("*[D]e minimis* employment actions are not materially adverse and, thus, not actionable.").

Courts have held that for failure to train to constitute an adverse action, an employee must show that "his inability to attend such training had [a] material impact on the terms and conditions of his employment." *Wheeler v. Chertoff*, No. C 08-1738 SBA, 2009 WL 2157548, at *6 (N.D. Cal. July 17, 2009) (citing *Shakelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 406-07 (5th Cir. 1999) (denial of employee training does not constitute an adverse employment action covered by Title VII where it does not tend to result in a change of employment status, benefits or responsibilities)); *see also Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 710 (6th Cir. 2007) (holding that a "deprivation of increased compensation as the result of a failure to train constitutes an adverse employment action"); *Clegg v. Arkansas Dep't of Corr.*, 496 F.3d 922, 928 (8th Cir. 2007) (holding that denial of training does not constitute an adverse employment action

absent a further showing that it "had any impact on [the employee's] eligibility for benefits such as a promotion or pay raise").

As the Sixth Circuit explained in *Creggett v. Jefferson Cty. Bd. of Ed.*, 491 F. App'x 561 (6th Cir. 2012), in finding that the plaintiff had not established that failure to provide training was an adverse employment action:

> Creggett has proffered no evidence to suggest that either training was required or that failure to attend the training would result, or has resulted, in any demotion, loss of pay, loss of responsibility, or other materially adverse effect. . . . Without evidence of this sort, mere denial of a supplemental training, even if other employees were allowed to attend the training, is not an adverse employment action.

Creggett, 491 F. App'x at 567 (citing *Lindsey v. Whirlpool Corp.*, 295 F. App'x 758, 768 (6th Cir. 2008) ("Defendant's failure to provide plaintiff with extra training does not constitute an adverse employment action.")). *See also Young v. CSL Plasma Inc.*, No. 15-cv-10080, 2016 WL 1259103, at *3 (E.D. Mich. Mar. 31, 2016) ("The 'mere denial of a supplemental training, even if other employees were allowed to attend the training, is not an adverse employment action' unless 'failure to attend the training would result, or has resulted, in any demotion, loss of pay, loss of responsibility, or other materially adverse effect.'") (quoting *Creggett*).

The same is true here. As MGM asserts, attaching and citing to Plaintiff's deposition testimony (ECF No. 67, PageID.1196, 1203; ECF No. 74, PageID.1675-1676), she has provided no proof that any alleged denial of training resulted in a loss of pay or promotion, loss of responsibility, or change in employment status.

Indeed, beyond vaguely asserting that other employees had the opportunity to work special events because they had been training in plating (Pl. Dep. Trans., ECF No. 67-2, PageID.1232-1233)[2], and testifying that she needed the skills to be promoted or to get a job outside of MGM (ECF No. 67-2, PageID.1233-1234), she provided no evidence of material impact. And these conclusory and speculative assertions are insufficient for Plaintiff's claim to survive summary judgment. As the Sixth Circuit stated in *Vaughn v. Louisville Water Co.*, 302 F. App'x 337, 345 (6th Cir. 2008):

> [A]lthough "a deprivation of increased compensation as the result of a failure to train constitutes an adverse employment action," *Clay* [], 501 F.3d [at] 710 [], Vaughn has failed to present any evidence that she was passed up for promotions because of her inability to attend the Leadership Institute training. She only alleges that the training "would have . . . allow[ed] me to be able to be promoted to another position . . . when and if something else opened up." But her own conclusory assertions as to the value of the training and her ability to receive promotions are insufficient to survive summary judgment. *See Arendale v. City of Memphis*, 519 F.3d 587, 605 (6th Cir. 2008).

Accordingly, MGM is entitled to judgment as a matter of law on Plaintiff's claim that it discriminated against her on the basis of sex by denying her training opportunities afforded to similarly situated male employees.

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[2] Plaintiff testified that, "I don't know exactly what they would do at the parties, because I was never involved, but just felt that I was being left out, and that I was missing out on some valuable training." (Pl. Dep. Trans at 89, ECF No. 67-2, PageID.1233.) When pressed, she admitted that, "I don't know who else it was offered to, because it wasn't offered to me." (Pl. Dep. Trans. at 90, ECF No. 67-2, PageID.1233.)

b. MGM is also entitled to summary judgment on Plaintiff's sex discrimination claim based on allegations related to overtime

Plaintiff alleges that she was subjected to sex discrimination in violation of Title VII because she was denied overtime opportunities afforded to similarly situated male employees. (ECF No. 1, ¶¶ 12, 24, 30, PageID.3-4; ECF No. 67-17; ECF No. 72, PageID.1415.) MGM argues that Plaintiff cannot establish her *prima facie* case of sex discrimination on this basis because she has failed to demonstrate that a similarly situated person outside of her protected class received more favorable treatment related to overtime during the relevant time period – September 11 to December 4, 2014. (ECF No. 67, PageID.1196-1197; ECF No. 74, PageID.1672-1673.)

The denial of overtime opportunities can constitute an adverse employment action. *Broska v. Henderson*, 70 F. App'x 262, 267-68 (6th Cir. 2003). However, to survive summary judgment, Plaintiff must establish a genuine issue of material fact that she was treated differently than similarly situated male employees with respect to overtime.

To satisfy the similarly situated requirement, a plaintiff must show that the comparator employee is similar "in all of the relevant aspects." *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998). The Sixth Circuit has described the "similarly situated" element as follows:

> To be deemed "similarly situated," the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992) (internal quotations and citations omitted). "Differences in job title, responsibilities, experience, and work record can be used to determine whether two employees are similarly situated." *Leadbetter v. Gilley*, 385 F.3d 683, 691 (6th Cir. 2004).

In her summary judgment response, Plaintiff asserts that she was denied overtime opportunities afforded to similarly situated male employees, including Jorden Wade, a fellow CU at MGM. (ECF No. 72, PageID.1447-1449, 1455-1456.) Indeed, as evidenced by BOH meeting notes attached to her response as well as to MGM's motion, Plaintiff complained of overtime issues in September and October 2014. (Exhibits 4-6, ECF No. 72, PageID.1500-1504; *see also* ECF No. 67-11, 67-13, 67-16.) Following her complaint at the September 25, 2014 meeting that she was not offered overtime on September 22, 2014 as were the employees of Cucina, *another restaurant in the casino which at the time had no CU* (Exhibit 4, ECF No. 72, PageID.1500), Plaintiff was awarded four hours of overtime pay at the union meeting on October 2, 2014 (Exhibit 5, ECF No. 72, PageID.1502). And the notes for the October 30, 2014 BOH union meeting read:

> OT is not being offered to Barbrie. There has been no replacement for the TM that left and OT is being offered to Sous Chef's but not to her. On 10/28/14 Jorden Wade a CU was called in for 3 hours of OT the day before Sweetest Day to do prep work for the next day. Barbrie feels she is being overlooked for OT and also learning other areas of food prep. OT should be posted for TM to sign up for OT.

(ECF No. 67-16.)

Despite Plaintiff's complaints, however, an attendance and overtime analysis produced by MGM in support of the instant motion demonstrates that from September 11, 2014 to December 4, 2014, the time period at issue, Plaintiff worked 20.75[3] hours of overtime while Wade worked 17.75.[4] (ECF No. 67-15; Exhibit 6, ECF No. 72, PageID.1504.) And Plaintiff offers nothing to address or rebut that evidence beyond her declaration, which simply asserts that Wade was given more overtime opportunities than her. (Exhibit 8, ECF No. 72, PageID.1541, 1545, 1563.) Instead, she attached to her response overtime records for male MGM employees McKenzie Smith and James Northern (Exhibit 14, ECF No. 72-1, PageID.1586-1594), both of whom were cooks, *not CUs*, and thus not similarly situated to Plaintiff. (*see* ECF No. 67-2, PageID.1241; ECF No. 67-15,

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[3] MGM mistakenly asserts in its reply brief that Plaintiff worked 21.75 hours of overtime during the relevant time period. (ECF No. 74, PageID.1672-1673.)

[4] Wade's total includes eight hours of overtime worked on October 28, 2014. The October 30, 2014 BOH union meeting notes indicate that Wade worked three hours of overtime at Cucina on October 28, 2014, but Plaintiff herself handwrote that he actually worked eight hours of overtime that day. (Exhibit 6, ECF No. 72, PageID.1504.)

PageID.1395, 1397, 1399, 1402, 1405.) *Leadbetter*, 385 F.3d at 691 ("Differences in job title, responsibilities, experience, and work record can be used to determine whether two employees are similarly situated."). Moreover, the simple fact that Plaintiff was paid for four hours of overtime after her September complaints, or that a sign-up sheet for overtime was implemented after she complained that Wade was given overtime on October 28, 2014, do not create a genuine issue of material fact that she was given fewer overtime opportunities than similarly situated male employees.

Accordingly, the Court should find that Plaintiff has failed to establish a *prima facie* case of sex discrimination on the basis of overtime, and that MGM is entitled to judgment as a matter of law on that claim.

c. Job Responsibilities

Finally, Plaintiff claims sex discrimination in violation of Title VII based on allegations that she was given more burdensome tasks and subjected to derogatory treatment in comparison to similarly situated male employees. (ECF No. 1, ¶¶ 9, 12-22, 25-26; ECF No. 67-17; ECF No. 72, PageID.1415.) From Plaintiff's summary judgment response and the documents attached, as well as her deposition

testimony attached to MGM's motion, it appears Plaintiff's specific allegations related to this claim, narrowed to the relevant time period,[5] are as follows[6]:

- More stock was ordered to be put away on the days she worked in comparison to Wade, and/or she received less help than Wade in putting away stock. (ECF No. 67-2, PageID.1228-1229, 1257-1258; Exhibit 8, ECF No. 72, PageID.1532-1535.)

- On November 8, 2014, Chef Derek berated her for asking him to resolve a disagreement between her and Wade as to *whose turn it was to prepare the potato puree*, a burdensome task she was given more often than her male counterpart. (ECF No. 67-2, PageID.1225-1227, 1229; Exhibit 8, ECF No. 72-1, PageID.1539-1540.)

- On November 13, 2014, a BOH union meeting was abruptly adjourned before she could speak. (ECF No. 72-1, PageID.1539.)

Although the assignment of more burdensome tasks may amount to an adverse employment action, *Bush v. Lumileds, LLC*, 2018 WL 4610867 (E.D. Mich. Sept. 26, 2018) (citing *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008)), the Court should find that, even viewing the allegations in a light most

[5] Plaintiff makes specific assertions of more burdensome job responsibilities and derogatory comments throughout her summary judgment response, but many of them allegedly occurred prior to the relevant time period. Further, for many, she cites to pages of her attached declaration that either do not exist, or do not say what she purports them to.

[6] To develop this list, I relied on the specific assertions Plaintiff makes in her response, rather than scouring the entire 64-page declaration to which she often cites generally throughout her brief. *Thomas v. Abercrombie & Fitch Co.*, 301 F.Supp.3d 749, 754 (E.D. Mich. 2008) ("The Court has no duty to scour the record to find factual support for a party's claims.").

favorable to Plaintiff, she has failed to establish any adverse employment action on the basis of the above assertions. Each can be characterized as nothing more than a mere inconvenience or simple alteration of job duties, *Bowman*, 220 F.3d at 461, with no discernable relationship to sex beyond Plaintiff's unsupported personal belief that she was treated differently than male employees. For example, Plaintiff testified that she was often asked to put away more stock than Wade, her male CU counterpart, and that there was always more stock to put away when Wade was not there, but admitted that she had no way of knowing whether Wade had to do the same when she was not there. (ECF No. 67-2, PageID.1228-1229.) And she claims that Chef Derek yelled at her rather than Wade on November 8, 2014 with regard to whose turn it was to make the potato puree, but she also testified that it was she who asked Chef Derek to resolve the dispute rather than arriving at a resolution amongst themselves. (ECF No. 67-2, PageID.1225-1229.) *See Watson v. City of Cleveland*, 202 F. App'x 844, 854 (6th Cir. 2006) (holding that a plaintiff's personal belief that she suffered from adverse employment actions motivated by sex are insufficient to avoid summary judgment). Further, even if assumed true, one incident of being interrupted at a union meeting (ECF No. 72-1, PageID.1539) does not amount to a significant change in employment status or benefits. *White*, 533 F.3d at 402. Accordingly, Plaintiff has failed to establish a *prima facie* case of sex discrimination on the basis of job responsibilities and

derogatory treatment, and MGM is entitled to judgment as a matter of law on this claim.

3. Plaintiff's claim of retaliation

Plaintiff also claims she was retaliated against in violation of Title VII in the form of fewer training and overtime opportunities and more burdensome job tasks, although the exact basis of her allegations is unclear. In her EEOC Charge, she stated: "In or around March 2014, I served as union representative for a coworker filing a complaint of discrimination based on his national origin. In or around September 2014 and up through the end of my employment in December 2014, I was repeatedly denied overtime and opportunities for advancement in my position." (ECF No. 67-17; ECF No. 72, PageID.1415.) But in her complaint, she alleges generally that "Defendant retaliated against [her] for having complained about Defendant's discriminatory employment practices . . . in violation of Title VII." (ECF No. 1, ¶ 36, PageID.5.) Then in her summary judgment response, Plaintiff appears to combine the two theories of retaliation, asserting both that she represented others in grievances involving discrimination which led to retaliation (ECF No. 72, PageID.1444), and that following her own personal October 30, 2014 overtime grievance and the "potato puree incident" on November 8, 2014, she "was subjected to continued disparate treatment in retaliation for [her]active representation of herself and others in union meetings" (ECF No. 72, PageID.1445,

1456-1457).[7] Regardless, for the reasons that follow, the Court should find that Plaintiff has failed to establish a *prima facie* case of retaliation in violation of Title VII.

> The elements of a retaliation claim are similar but distinct from those of a discrimination claim. To establish a *prima facie* case of retaliation under Title VII, Plaintiff must demonstrate that: "(1) he engaged in activity protected by Title VII; (2) his exercise of such protected activity was known by the defendant; (3) thereafter, the defendant took an action that was "materially adverse" to the plaintiff; and (4) a causal connection existed between the protected activity and the materially adverse action." *Jones v. Johanns,* 264 Fed.Appx. 463, 466 (6th Cir. 2007) (citing *Abbott v. Crown Motor Co., Inc.,* 348 F.3d 537, 542 (6th Cir. 2003)[.]

Laster v. City of Kalamazoo, 746 F.3d 714, 730 (6th Cir. 2014). Retaliation may apply to "not only the filing of formal discrimination charges with the EEOC, but also complaints to management and less formal protests of discriminatory employment practice." *Id.* at 729-730. MGM asserts that Plaintiff failed to demonstrate any of the elements of a *prima facie* case of retaliation, but the Court need only focus on the third and fourth elements –that MGM took a materially adverse action against Plaintiff and that a causal connection existed between any protected activity and that materially adverse action.

"The 'materially adverse action' element of a Title VII retaliation claim is substantially different from the 'adverse employment action' element of a Title VII

[7] Plaintiff also discusses retaliation for union activities well prior to the relevant time period. (ECF No. 72, PageID.1443-1444.)

[sex] discrimination claim." *Laster*, 746 F.3d at 719. To establish this third element of a *prima facie* retaliation claim under Title VII, a plaintiff need only show that "a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 731 (quotation marks and citations omitted). Thus, the "burden of establishing a materially adverse employment action is less onerous in the retaliation context than in the anti-discrimination context." *Id.* (internal quotation marks and citations omitted).

However, for the same reasons as described in great detail above, Plaintiff fails to make out a *prima facie* case of retaliation in violation of Title VII because she has presented insufficient evidence to create a genuine issue of material fact that MGM took materially adverse actions against her with respect to overtime or job responsibilities. Again, the record evidence demonstrates that she received more overtime hours than Wade during the relevant time period (ECF No. 67-15; Exhibit 6, ECF No. 72, PageID.1504), that her overtime issues were addressed and resolved at union meetings, and that her allegations of more burdensome job responsibilities amounted to mere inconveniences at most.[8] Thus, I cannot

[8] In addition to potato puree and stocking duties, Plaintiff complained at her deposition of having to crack more crab legs than Wade and having to make Oyster Rockefeller sauce more often than male counterparts. (ECF No. 67-2,

conclude that a reasonable employee would have found the same actions materially adverse.

Further, to the extent Plaintiff alleges that she received fewer training opportunities as a form of retaliation, she fails to overcome summary judgment. Defendant asserts that Plaintiff "cannot show causation." (ECF NO. 67, PageID.1200.) *See* Fed. R. Civ. P. 56(c)(2). Even assuming, *arguendo*, that Plaintiff did in fact receive fewer training opportunities than other employees, she has failed to support her assertion of a causal connection between the lack of opportunities and any alleged protected activity. *Laster*, 746 F.3d at 730; *see* Fed. R. Civ. P. 56(e).

"Title VII retaliation claims 'must be proved according to traditional principles of but-for causation,' which 'requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.'" *Laster*, 746 F.3d at 731 (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, ___ U.S. ___, ___; 133 S.Ct. 2517, 2533; 186 L.Ed.2d 503 (2013)); *see*

PageID.1227-1228.) Even if true, these can hardly be considered materially adverse actions. *See Halfacre v. Home Depot, U.S.A., Inc.*, 221 F. App'x 424, 432 (6th Cir. 2007) ("The purpose of Title VII's anti-retaliation provisions is to prohibit 'employer actions that are likely to deter victims of discrimination from complaining to the EEOC, the courts, and their employers,' and 'normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence.'") (quoting *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 2415, 165 L.Ed.2d 345 (2006)).

also Hnin v. TOA (USA), LLC, 751 F.3d 499, 508 (7th Cir. 2014) ("'R]etaliation claims under Title VII require traditional but-for causation, not a lesser "motivating factor" standard of causation.'" (*quoting Reynolds v. Tangherlini*, 737 F.3d 1093, 1104 (7th Cir. 2013) (*citing Nassar*, 133 S.Ct. at 2534). In her EEOC Charge, Plaintiff stated that in March 2014, she served as a union representative for a coworker filing a complaint of discrimination, and then from September to December 2014, was repeatedly denied opportunities for advancement (ECF No. 67-17; ECF 72, PageID.1415), and she makes a similar claim in her complaint (ECF No. 1, ¶¶ 14, 24, 36, PageID.3-5). In her summary judgment response, however, Plaintiff discusses training and protected activity, but does not directly connect the two with specific dates or actors, nor provide citation to the record in support of her claim that MGM retaliated against her by denying her training opportunities.

Nevertheless, even looking through the documents attached to the summary judgment motion and Plaintiff's response, Plaintiff fails to establish a causal connection between any protected activity and denial of training opportunities and, thus, a *prima facie* case of retaliation under Title VII. In her declaration, she stated that she attended several BOH Union Meetings from September to November 2014 and repeatedly complained about training opportunities (Exhibit 8, ECF No. 72, PageID.1545), which is borne out by the minute notes for an October 30, 2014

union meeting attached to Plaintiff's response (ECF No. 72, PageID.1504), and she testified at her deposition that she was denied training opportunities (ECF No. 67-2, PageID.1231-1234), but a review of both the declaration and deposition transcripts reveal no specific connection between those complaints and the denial of training opportunities, either temporally[9] or otherwise. She never states, for example, that anyone in attendance at the October 30, 2014 union meeting in which she complained about a lack of training opportunities or any other person with knowledge of her alleged protected activity contributed to the decision to deny her training during the relevant period. And without more than the conclusory allegations that she participated in protected activity, and was denied training opportunities in retaliation, Plaintiff cannot establish a but-for causal connection between the two.

Accordingly, the Court should conclude that, even viewing the evidence in a light most favorable to Plaintiff, she has failed to establish a *prima facie* case of retaliation in violation of Title VII, and MGM is entitled to summary judgment on that claim. There is no genuine issue of fact regarding whether Plaintiff suffered a materially adverse action as a result of her participation in protected activity.

[9] Further, to the extent Plaintiff makes a general temporal proximity argument with regard to retaliation (ECF No. 72, PageID.1456-1457), "[t]emporal proximity alone generally is not sufficient to establish causation." *Kenney v. Aspen Technologies, Inc.*, 965 F.3d 443, 448-449.

4. Constructive Discharge

Should the Court agree with my recommendation that Plaintiff has failed to establish a *prima facie* case of sex discrimination or retaliation under Title VII, her argument that she was constructively discharged (ECF No. 72, PageID.1446-1449) also fails.

"A constructive discharge occurs when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." *Laster*, 746 F.3d at 727 (internal quotations and citations omitted). "To demonstrate a constructive discharge, Plaintiff must adduce evidence to show that 1) the employer deliberately created intolerable working conditions, as perceived by a reasonable person, and 2) the employer did so with the intention of forcing the employee to quit." *Id.* at 727-28.

Plaintiff asserts in her summary judgment response that she was constructively discharged. Specifically, she states:

> Plaintiff has suffered embarrassment, was ostracized, subjected to verbal attacks and intimidation, missed overtime opportunities, denial of on-the-job training, denial of promotional opportunities, and males were given more overtime opportunities, on-the-job training, and routinely assigned more favorable job assignments. It is for the jury as trier of fact to determine whether [MGM's] sex-based discrimination and subsequent retaliation rendered Plaintiff's work environment unbearable, compelling her to resign.

(ECF No. 72, PageID.1448-1449 (citation omitted).) However, "[c]onstructive discharge is not a standalone claim; rather, it is a means of proving the adverse action element of a prima facie discrimination case." *Gosbin v. Jefferson Cty. Commissioners*, No. 2:14-cv-2640, 2017 WL 5653503, at *9 (S.D. Ohio Mar. 29, 2017) (citing *Logan v. Denny's, Inc.*, 259 F.3d 558, 567 (6th Cir. 2001)). Indeed, a plaintiff must show more than a Title VII violation to prove constructive discharge. *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1080 (6th Cir. 1999). It follows, then, that because Plaintiff has failed to establish a *prima facie* case of either sex discrimination or retaliation under Title VII, her assertion that she was constructively discharged also fails. And contrary to Plaintiff's hyperbolic assertion, I cannot conclude, nor do I find that a reasonable juror would conclude, that "[a]ny reasonable person in Logan's shoes would similarly have been compelled to resign as a result of enduring the insufferable working conditions Plaintiff was forced to accept." (ECF No. 72, PageID.1447.)

D. Conclusion

The Court should **GRANT** Defendant's motion for summary judgment (ECF No. 67). However, the Court should **DENY** Defendant's request for an award of costs and attorney fees associated with this motion (ECF No. 67, PageID.1177,1206), as it cites no legal basis for the request. *See McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) ("'[I]ssues adverted to in a

perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones.'") (quoting *Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Comm'n*, 59 F.3d 284, 293-94 (1st Cir. 1995)) (citation omitted). Furthermore, the award of attorney fees and costs under Title VII is within the Court's discretion, 42 U.S.C. § 2000e-5(k), and Plaintiff's claims were not frivolous, unreasonable, groundless, or brought in bad faith. *See E.E.O.C v. Peoplemark, Inc.*, 732 F.3d 584, 590-91 (6th Cir. 2013); *Patterson v. United Steelworkers of America*, 381 F.Supp.2d 718, 721 (N.D. Ohio, 2005) ("[I]t is clear that just because a plaintiff in a civil rights case loses on summary judgment does not mean that the case was frivolous or brought in violation of the standard quoted above. It is possible, even probable, that a plaintiff had well founded beliefs of being wronged, but was unable to sustain the burden required at law to sustain his position and avoid an adverse result on a motion for summary judgment.").

III. PROCEDURE ON OBJECTIONS

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within 14 days of service, as provided for in Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(d). Failure to file specific objections constitutes a waiver of any further right

of appeal. *Thomas v. Arn*, 474 U.S. 140, 144 (1985); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505, 508 (6th Cir. 1991). Filing objections that raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sec'y of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers, Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to Local Rule 72.1(d)(2), any objections must be served on this Magistrate Judge.

Any objections must be labeled as "Objection No. 1," and "Objection No. 2," *etc.* Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the objections in length and complexity. Fed. R. Civ. P. 72(b)(2); E.D. Mich. LR 72.1(d). The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," *etc.* If the Court determines that any objections are without merit, it may rule without awaiting the response.

Dated: August 24, 2020

s/Anthony P. Patti
Anthony P. Patti
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

EEOC Form 161 (11/09)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To: **Barbrie Logan**
34259 Sandpebble Drive
Sterling Heights, MI 48310

From: **Detroit Field Office**
477 Michigan Avenue
Room 865
Detroit, MI 48226

☐ *On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR §1601.7(a))*

EEOC Charge No.	EEOC Representative	Telephone No.
471-2015-02642	Kiron R. Kothari, Investigator	(313) 226-7809

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

☐ The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.

☐ Your allegations did not involve a disability as defined by the Americans With Disabilities Act.

☐ The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.

☐ Your charge was not timely filed with EEOC; in other words, you waited too long after the date(s) of the alleged discrimination to file your charge

☒ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

☐ The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

☐ Other *(briefly state)*

- NOTICE OF SUIT RIGHTS -

(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this notice**; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.**

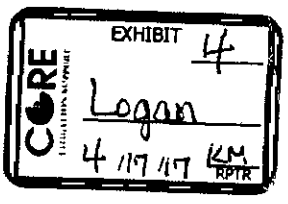
On behalf of the Commission

Enclosures(s)

for Webster N. Smith,
District Director

11/17/2015
(Date Mailed)

cc: **MGM GRAND DETROIT, LLC**
c/o Gary W. Klotz
Butzel Long Attorneys and Counselors
150 West Jefferson
Suite 100
Detroit, MI 48226



APPENDIX F

Rev 04/11 **STATE OF MICHIGAN** Form 1850

MICHIGAN ADMINISTRATIVE HEARING SYSTEM

DECISION

MGM GRAND DETROIT LLC
1777 3RD ST
DETROIT, MI 48226

BARBRIE LOGAN
34259 SANDPEBBLE DR
STERLING HEIGHTS, MI 48310

ADMINISTRATIVE LAW JUDGE: MICHAEL WAKELEY
SSN: XXX-XX-3119

Appeal No.: 15-036950-UA
Case No.: 3620749

JURISDICTION

On May 22, 2015, Employer timely appealed a May 5, 2015 Unemployment Insurance Agency (Agency) Adjudication which held that Employer's April 30, 2015 response to an earlier adjudication, issued by the Agency on February 13, 2015, was late without good cause under Section 32a(2) of the Michigan Employment Security Act (Act). The earlier adjudication held Claimant was not disqualified for benefits under the voluntary leaving provisions of Section 29(1)(a) of the Act.

APPEARANCES

A telephone hearing was held in Detroit, Michigan on June 22, 2015 at which time the following participated:

Barbrie Logan, Claimant; and
David Blanton, Human Resources Business Partner, witness for Employer.

ISSUE

Did Appellant/Employer establish good cause for filing a late protest to the involved Determination?

APPLICABLE LAW

Section 32a states:

(2) The unemployment agency may, for good cause, including any administrative clerical error, reconsider a prior determination or redetermination after the 30-day period

has expired and after reconsideration issue a redetermination affirming, modifying, or reversing the prior determination or redetermination, or transfer the matter to an administrative law judge for a hearing. A reconsideration shall not be made unless the request is filed with the unemployment agency, or reconsideration is initiated by the unemployment agency with notice to the interested parties, within 1 year from the date of mailing or personal service of the original determination on the disputed issue.

R 421.210 Unemployment insurance benefit filing requirements; definitions.

(2) As used in this rule:

(e) "Good cause for late filing of a new, additional, or reopened claim" and "good cause for late reporting to file a continued claim" means that there is a justifiable reason, determined in accordance with a standard of conduct expected of an individual acting as a reasonable person in the light of all the circumstances, that prevented a timely filing or reporting to file as required by this rule. Examples of justifiable reasons that the agency may consider as constituting good cause include any of the following:

(i) Acts of God.
(ii) Working or reliance on a promise of work that did not materialize.
(iii) Closing of agency offices, or the failure of the agency's telephonic or electronic equipment, during scheduled hours of operation.
(iv) Delay or interruption in the delivery of mail or the delay or interruption of information by telephonic or other means by a business or governmental agency entrusted with the delivery of mail or of messages by telephonic or other means.
(v) Personal physical incapacity or the physical incapacity or death of a relative or ward of either the individual or the individual's spouse or of any person living in the same household as the individual claiming benefits.
(vi) Attendance at a funeral.
(vii) Incarceration.
(viii) Jury duty.

The appellant was advised by this Administrative Law Judge that whenever a request for redetermination or reconsideration is received after the expiration of the 30-day protest or appeal period, good cause for reconsideration of the prior determination or redetermination must be established.

IMPORTANT: TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME

This Order will become final unless an interested party takes ONE of the following actions: (1) files a written, signed, request for rehearing/reopening to the Administrative Law Judge OR (2) files a written, signed, appeal to the Michigan Compensation Appellate Commission at P.O. Box 30475, Lansing, MI 48909-7975 (Facsimile: 517-241-7326), OR (3) files a direct appeal, upon stipulation, to the Circuit Court on or before:

July 23, 2015

I hereby certify that I personally mailed envelopes, properly addressed to each of the parties at their respective addresses as listed on the face of this document. In each envelope a true copy of the Administrative Law Judge Decision or Order was enclosed. In addition, a copy of this Decision/Order was sent to the Agency by facsimile at the number provided by the Agency.

N. Sosa	Detroit	June 23, 2015
Name	City Mailed	Date Mailed

(SEE ATTACHED SHEET)

FINDINGS OF FACT

Employer received the Agency's February 13, 2015 Notice of Determination. Due to Employer changing computer systems in which it tracked unemployment cases, and a new employee responsible for unemployment claims, Employer lost track of the Determination until late April 2015. Employer filed its protest on April 30, 2015, soon after locating the Determination.

REASONING AND CONCLUSIONS OF LAW

Employer bears the burden of establishing good cause for its late protest. Here, Employer had an employee new to working unemployment cases and was transitioning from one computer system to another. As a result, it lost the Agency's February 13, 2015 Notice of Determination and did not file a protest until six weeks later. Although Employer put forth a reasonable explanation as to why it filed its protest so late, the explanation does not amount to good cause. The protest was filed late solely due to Employer's own actions and internal operations, which under the circumstances are not good cause. Because Employer filed its protest late without good cause, the Agency's February 13, 2015 adjudication remains in effect. Consequently, Claimant is not disqualified for benefits under Section 29(1)(a) of the Act.

ORDER

The Agency's May 5, 2015 Adjudication is affirmed. Employer has not shown good cause to support its late response to the Agency's adjudication dated February 13, 2015.

The Agency adjudication dated February 13, 2015 remains in effect. Claimant is not disqualified for benefits under Section 29(1)(a) of the Act.

Decision Date: June 23, 2015

MICHAEL WAKELEY
ADMINISTRATIVE LAW JUDGE

APPENDIX G

UIA 1302
(Rev. 11-14)
Rick Snyder
GOVERNOR

State of Michigan
Department of Licensing and Regulatory Affairs
Unemployment Insurance Agency
3024 W Grand Blvd, Detroit, MI 48202
www.michigan.gov/uia

LARA LICENSING AND REGULATORY AFFAIRS

Authorized By
MCL 421.1 et seq.
Sharon Moffett-Massey
DIRECTOR

[redacted] DETROIT V

BARBRIE LOGAN
34259 SANDPEBBLE DR
STERLING HEIGHTS MI 48310-5557

Mail Date: **February 13, 2015**
Letter ID: **L0018213948**
CLM: **C3968101-0**
Name: **BARBRIE LOGAN**

Notice of Determination

Case Number:	0-003-620-749	BYB:	January 25, 2015
SSN:	###-##-3119	Employer Number:	1336019-000
Claimant:	BARBRIE LOGAN	Involved Employer:	MGM GRAND DETROIT LLC

Issues and Sections of Michigan Employment Security Act involved: Voluntary Quit and 29(1)(a).

You quit your job with MGM GRAND DETROIT LLC on December 03, 2014 due to discrimination.

You were subjected to discrimination which continued after the employer was made aware of it. You gave your employer the opportunity to resolve the problem. Your leaving was with good cause attributable to the employer.

You are not disqualified for benefits under MES Act, Sec. 29(1)(a).

Calculation of interest and penalty amount is shown later on this form.

If you disagree with this determination, refer to "Protest Rights" on the reverse side of this form.

LARA is an Equal Opportunity Employer/Program.