No. _____

In The Supreme Court of the United States

ANGELA JOSEPH,

Petitioner,

v.

DENIS RICHARD MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

APPENDIX

Angela Joseph
1102 Woodside Drive
Flint, MI 48503
(810) 869-8694
josep009@hotmail.com

Pro se Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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No. 21-1736

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ANGELA JOSEPH,
Plaintiff-Appellant,
v.
DENIS RICHARD MCDONOUGH, Secretary of Veterans Affairs,
Defendant-Appellee.

ORDER

Before: GUY, SUHRHEINRICH, and STRANCH, Circuit Judges.

Angela Joseph, a Michigan resident proceeding pro se, appeals the district court's grant of summary judgment to the Secretary of the Department of Veterans Affairs ("Secretary"). 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).

Joseph, a physician born in India, filed a complaint against the Secretary for monetary and injunctive relief, alleging that, during her probationary employment period, she was subjected to employment discrimination on the basis of her race and national origin and retaliation in violation of Title VII of the Civil Rights Act of 1964. Joseph worked as a hospitalist at the Aleda E. Lutz Veterans Affairs ("VA") Medical Center in Saginaw, Michigan from 2016 until the termination of her employment in August 2018. In May 2018, five staffers at the VA Medical Center raised complaints about Joseph's care of three patients. After reviewing the incidents, Sally Lewis, the assistant chief of medicine, and Dr. Anthony Albito, the chief of medicine, recommended to Dr. Barbara Bates, the Saginaw VA chief of staff, that Joseph be suspended pending further review.

Joseph's clinical privileges were later administratively suspended. Bates assigned two uninvolved employees to investigate one of the patient incidents, and she arranged for Dr. Richard Schildhouse, the section chief for hospital medicine at the Ann Arbor VA Healthcare System, to review the other incidents. Schildhouse concluded that Joseph did not meet the required standard of care during either incident. Albito subsequently requested, and Bates approved, the convening of a summary review board to consider Joseph's conduct. The summary review board concluded that Joseph exercised poor medical judgment in the three patient incidents and recommended terminating her employment. Bates approved the recommendation.

On July 12, 2021, a magistrate judge recommended granting the Secretary's motion for

summary judgment. Joseph objected to the recommendation and moved the district court to stay its consideration until the Secretary could respond to evidence that she recently obtained. That evidence consisted of a letter from the Thrift Savings Plan ("TSP"), dated May 25, 2021, noting that Joseph's TSP service computation date was March 14, 2016. Joseph claimed that the letter was relevant because it addressed when her probationary employment period ended. The district court adopted the magistrate judge's recommendation and granted summary judgment to the Secretary. The court also denied Joseph's motion for a stay because the TSP letter was available prior to the magistrate judge's recommendation, the Secretary had responded to the letter, and the letter was irrelevant to the Secretary's motion for summary judgment.

On appeal, Joseph argues that the district court erred by denying her motion for a stay and granting summary judgment to the Secretary. We review de novo a district court's grant of summary judgment. *Pucci v. Nineteenth Dist. Ct.*, 628 F.3d 752, 759 (6th Cir. 2010). Summary judgment is appropriate where the evidence, viewed in the light most favorable to the non-moving party, shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. *Id.* at 759-60.

Joseph first argues that the district court erred by granting summary judgment to the Secretary on her claim of discrimination. A discrimination claim under Title VII that is based on circumstantial evidence, such as Joseph's, is analyzed under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See*

Briggs v. Univ. of Cincinnati, 11 F.4th 498, 508 (6th Cir. 2021). Under that framework, the plaintiff must first establish a prima facie case of discrimination by producing evidence that she is a member of a protected class, she suffered an adverse employment action, she was qualified for the position, and she was replaced by someone outside the protected class or treated differently than similarly situated, non-protected employees. *Id.* If the plaintiff makes a prima facie case, the defendant must articulate a legitimate, non-discriminatory reason for its action. *Id.* If the defendant does so, the plaintiff must produce evidence that the proffered reason was a mere pretext for discrimination. *Id.* at 508-09.

Assuming that Joseph made a prima facie case of discrimination, the Secretary set forth a legitimate, non-discriminatory reason for terminating her employment by relying on the findings of Dr. Schildhouse and the summary review board that Joseph's patient care was substandard. *See Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806, 814-15 (6th Cir. 2011) (noting that, to meet its burden, a defendant need only present evidence raising a genuine dispute of fact as to whether it discriminated against the plaintiff); *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 707 (6th Cir. 2006). Thus, the burden shifts to Joseph to show that the proffered reason for her termination was a mere pretext for discrimination. A plaintiff "may establish pretext by showing that the proffered reason '(1) has no basis in fact; (2) did not actually motivate the adverse employment action; or (3) was insufficient to warrant the adverse action.'" *Sybrandt v. Home Depot, U.S.A., Inc.*, 560 F.3d 553,

558 (6th Cir. 2009) (quoting *Ladd v. Grand Trunk W. R.R.*, 552 F.3d 495, 502 (6th Cir. 2009)).

Joseph first argues that she can demonstrate pretext based on the evidence relating to when her probationary employment period ended. In its motion for summary judgment, the Secretary contended that Joseph was a probationary employee from October 30, 2016, until her termination on August 27, 2018. Joseph contended in response that she was appointed as a full-time staff member on June 29, 2016, and that her probation period ended two years later. The parties presented evidence showing that (1) in October 2016, the VA recognized that, although Dr. Bates approved Joseph's permanent appointment in June 2016, Joseph could not begin at that time due to agency regulations, and (2) Joseph did not begin the permanent position until October 2016. Joseph's argument fails to show pretext because she has not explained how the evidence relating to her probationary status casts doubt on the proffered reason for her termination in 2018.

Joseph next argues generally that she can demonstrate pretext based on (1) the composition of the summary review board, which did not comply with agency regulations, and (2) Bates's solicitation of Dr. Schildhouse's opinion, which was not contemplated by agency regulations. The summary review board included Dr. John MacMaster, a family practitioner; Dr. Nazzareno Liegghio, a psychiatrist; Dr. Mark Greenwell, a family physician who was the director of an emergency room; and Virginia Rolland, a nurse practitioner who did not sign the board's recommendation. Joseph's arguments fail to show pretext. She does not show that Dr. Schildhouse or

any of the board members were biased against her. Nor does she explain how the composition of the board or Bates's solicitation of Schildhouse's opinion suggests that the proffered reason for her termination was pretextual.

Joseph next argues that she can demonstrate pretext based on the fact that an appeals board panel that considered whether to report Joseph to the National Practitioner Data Bank or to the state medical board concluded that she met the standard of care in each of the three cases giving rise to the termination of her employment. That evidence is insufficient to establish pretext because it provides only "an alternative assessment" of Joseph's performance rather than establishing that Dr. Bates's termination decision was "so unreasonable as to be pretext for discrimination." *See Davis v. Univ. of Louisville*, No. 21-6240, 2022 WL 16730039, at *3 (6th Cir. Nov. 7, 2022); *see also Loyd v. Saint Joseph Mercy Oakland*, 766 F.3d 580, 590-91 (6th Cir. 2014) (explaining that under the "honest-belief rule," an employer is entitled to summary judgment on pretext even if its conclusion is later shown to be mistaken, so long as it made a reasonably informed and considered decision before taking the adverse employment action).

Joseph next argues that she can demonstrate pretext under the cat's paw theory of liability because Lewis and nurse Christina Tokarski improperly influenced Dr. Bates to engage in a discriminatory employment action. Cat's paw "refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *Bose v.*

Bea, 947 F.3d 983, 989 (6th Cir. 2020) (quoting *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 484 (10th Cir. 2006)); *see Flowers v. WestRock Servs., Inc.*, 979 F.3d 1127, 1134 (6th Cir. 2020) (noting that the biased subordinate's conduct must be a proximate cause of the adverse employment action). "However, when a decisionmaker makes a decision based on an independent investigation, any causal link between the subordinate's retaliatory animosity and the adverse action is severed." *Roberts v. Principi*, 283 F. App'x 325, 333 (6th Cir. 2008).

Joseph cannot establish pretext based on the cat's paw theory of liability because she did not present evidence that Bates's decisionmaking process was influenced in any significant way by Tokarski or Lewis, as opposed to the independent opinions of Dr. Albito, Dr. Schildhouse, and the summary review board, which reached its conclusion after reviewing all the relevant evidence.

Joseph also argues that the district court erred by granting summary judgment to the Secretary as to her retaliation claim. "Title VII prohibits discriminating against an employee because that employee has engaged in conduct protected by Title VII." *Laster v. City of Kalamazoo*, 746 F.3d 714, 729 (6th Cir. 2014). "[A] Title VII retaliation claim can be established 'either by introducing direct evidence of retaliation or by proffering circumstantial evidence that would support an inference of retaliation.'" *Id.* at 730 (quoting *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 538 (6th Cir. 2008)). Because Joseph relies on circumstantial evidence, we analyze her claim under the *McDonnell Douglas* burden-shifting framework. *See id.* To make a prima facie case of retaliation, a plaintiff must produce evidence

that she engaged in protected activity, the defendant knew of the activity, the defendant took a materially adverse action against the plaintiff, and there was a causal connection between the protected activity and adverse action. *Id.*

The district court properly granted summary judgment to the Secretary as to Joseph's retaliation claim because she did not present evidence that she engaged in protected activity. Joseph contends that she engaged in protected activity by (1) sending an email in support of nurse manager, Mikailu Sorie, who was under investigation, and (2) supporting a grievance filed by nurse's aide, Gabriel Mirelez, that contested disciplinary action taken against Mirelez due to his alleged failure to set a bed exit alarm. "For a plaintiff to demonstrate a qualifying 'protected activity,' he must show that he took an 'overt stand against suspected illegal discriminatory action.'" *Khalaf v. Ford Motor Co.*, 973 F.3d 469, 489 (6th Cir. 2020) (quoting *Blizzard v. Marion Tech. Coll.*, 698 F.3d 275, 288 (6th Cir. 2012)). Joseph's email in support of Sorie does not qualify as protected activity because, although it separately mentioned Sorie's national origin and the term "retaliation," it did not assert any claim of illegal discriminatory action. *See Jackson v. Genesee Cnty. Rd. Comm'n*, 999 F.3d 333, 345 (6th Cir. 2021) (noting that a vague charge of discrimination does not qualify as protected activity); *Khalaf*, 973 F.3d at 490. Likewise, the evidence concerning Joseph's support of Mirelez's grievance does not show that Joseph ever suggested that illegal discriminatory action had occurred.

Finally, Joseph argues that the district court erred by denying her motion for a stay pending the Secretary's response to her newly presented letter

from the TSP. The district court did not err in denying a stay because, by the time it adopted the magistrate judge's recommendation, the Secretary had responded to Joseph's newly presented evidence. And, in any case, the letter discussing Joseph's TSP service computation date had no bearing on the Secretary's summary judgment motion because it did not suggest that the proffered reason for Joseph's termination was pretextual, which was its only possible relevance.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

/S/ Deborah S. Hunt, Clerk

FILED: September 23, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 19-cv-10828

Judith E. Levy
United States District Judge

Mag. Judge Anthony P. Patti

Angela Joseph,
Plaintiff,

v.

Secretary of the Department of Veterans Affairs,
Defendant.

ORDER ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION [41], DENYING PLAINTIFF'S MOTION TO STAY [43], AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [27]

On July 21, 2021, Magistrate Judge Anthony P. Patti issued a Report and Recommendation ("R&R") recommending that the Court grant Defendant's motion for summary judgment (ECF No. 41).

On July 26, 2021, Plaintiff timely filed fifteen objections to the R&R under Federal Rule of Civil Procedure 72(b)(2) and Eastern District of Michigan

Local Rule 72(d). (ECF No. 42.) Also on July 26, 2021, Plaintiff filed a motion to stay the proceedings pending "further information from Defendant" regarding allegedly newly discovered evidence. (ECF No. 43.)

For the reasons set forth below, Plaintiff's motion to stay is denied, her objections are overruled, and the R&R is adopted. Accordingly, Defendant's motion for summary judgment is granted.

I. Background

The Court adopts by reference the background set forth in the R&R, having reviewed it and found it to be accurate and thorough. (ECF No. 41, PageID.1241–1251.)

II. Legal Standard

A party may object to a magistrate judge's report and recommendation on dispositive motions, and a district judge must resolve proper objections under a de novo standard of review. 28 U.S.C. § 636(b)(1)(B)–(C); Fed. R. Civ. P. 72(b)(1)–(3). "For an objection to be proper, Eastern District of Michigan Local Rule 72.1(d)(1) requires parties to 'specify the part of the order, proposed findings, recommendations, or report to which [the party] objects' and to 'state the basis for the objection.'" *Pearce v. Chrysler Group LLC Pension Plan*, 893 F.3d 339, 346 (6th Cir. 2018). Objections that restate arguments already presented to the magistrate judge are improper, *Coleman-Bey v. Bouchard*, 287 F. App'x 420, 422 (6th Cir. 2008) (citing *Brumley v. Wingard*, 269 F.3d 629, 647 (6th

Cir. 2001)), as are those that dispute the general correctness of the report and recommendation. *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995).

Moreover, objections must be clear so that the district court can "discern those issues that are dispositive and contentious." *Id.* (citing *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991)); *see also Thomas v. Arn*, 474 U.S. 140, 147 (1985) (explaining that objections must go to "factual and legal" issues "at the heart of the parties' dispute"). In sum, Plaintiff's objections must be clear and specific enough that the Court can squarely address them on the merits. *See Pearce*, 893 F. 3d at 346.

III. Analysis

A. Motion to Stay

Plaintiff requests a stay of the proceedings so that Defendant and the Veteran's Administration ("VA") can "investigate" and respond to allegedly newly discovered evidence relevant to Plaintiff's probationary status. (ECF No. 43, ECF No. 48). Because a stay is unnecessary, Plaintiff's request is denied.

Plaintiff's motion is based on a Thrift Savings Plan letter which, she alleges, shows that the start date for her employment was inaccurately calculated. (ECF No. 43, PageID.1297.) The letter is not newly discovered evidence; it predates the R&R by two months. *Id.* Nor is it relevant. Plaintiff claims it raises questions about her status as probationary employee. *Id.* But the Magistrate Judge already held, correctly, that she cannot question this status

after having relied on it to gain this Court's subject matter jurisdiction. (ECF No. 41, PageID.1257- 58.)[1] Finally, Plaintiff has now received Defendant's response to the evidence and the Court has had the benefit of reviewing that response. (ECF No. 46.)

Accordingly, Plaintiff's motion to stay is denied and the Court will proceed to consider her objections to the R&R.

B. Objections 1-2

Plaintiff's first two objections challenge the Magistrate Judge's findings regarding the makeup of the Summary Review Board ("SRB"). Plaintiff argues that the Magistrate Judge failed to recognize that (1) the inclusion of a Nurse Practitioner and (2) the lack of hospitalists on the SRB constitute evidence of pretext. (ECF No. 42, PageID.1276-77.) Plaintiff is incorrect.

The SRB consisted of three physicians and a nurse practitioner (ECF No. 41, PageID.1259; ECF No. 30-25, PageID.1018-19.) Plaintiff first argues that the nurse was not qualified to sit on the Board and claims the R&R wrongly decided this issue against her.[2] But the Magistrate Judge did not make

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[1] Plaintiff's objection to this part of the R&R is addressed below.

[2] Whether a nurse practitioner could sit on the SRB ultimately depends on whether she is considered a qualified individual from *another* profession or a lower-ranked individual from *Plaintiff's* profession. *See* VA Handbook, Pt. II, Chap. 3, §3(a) (providing that "Board members must be at a grade and level that is equal to or higher than that of the candidate being considered) and §4 (providing that "qualified individuals from other occupations may be appointed") (ECF No. 33-3, PageID.1197.) The application of these rules was also

a factual finding regarding the nurse's qualifications. Instead, he held that "*even if*" the nurse's inclusion was in error, such an error would not show that her employer's proffered reason for terminating her was merely pretextual. (ECF No. 41, PageID.1261) That conclusion was unquestionably correct. The SRB was assembled by the Acting Medical Center Director, Dr. Thomas Campana. (ECF No. 27-17, PageID.418 at 21:2-24:20.) Plaintiff does not accuse Campana of bias and does not argue that anyone else was involved in picking the SRB members. At no point during the summary judgment proceedings did Plaintiff explain how the inclusion of a nurse—even if wrong—could establish that the reasons given for her termination were a pretext for unlawful discrimination. Nor does she explain this in her objection. It must therefore be overruled.

Plaintiff's other complaint about the SRB—that it contained no other hospitalists—fares no better. As the R&R notes, Plaintiff does not explain why the SRB would be required to contain any hospitalists. (ECF No. 41, PageID.1260.) In any event, two members of the SRB *were* "hospitalists" in all but title. A "hospitalist is a physician who must master the specific skill set and knowledge required to treat and care for patients in the hospital."[3] The SRB contained the director of an emergency room and the supervisor of primary care at the same hospital that

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considered during the SRB review itself. (ECF No. 42, PageID.1277.) Ultimately it was decided that the nurse practitioner would not sign the final recommendation (ECF No. 27-34.)

[3] *See* American Board of Physician Specialties, *Hospitalist*, https://www.abpsus.org/hospitalist. Plaintiff does not allege she has any qualifications, such as Board Certification, beyond having mastered these skills.

employed Plaintiff, both clearly physicians skilled at treating patients in a hospital (ECF No. 30-25, PageID.1018-19; ECF No. 27-34.)

Accordingly, the Magistrate Judge rightly concluded that the SRB's makeup was not factual evidence supporting pretext. Objections 1 and 2 are overruled.

C. Objection 3

Plaintiff also objects to the Magistrate Judge's conclusion that the VA's consultation with Dr. Schildhouse did not constitute evidence of pretext. (ECF No. 42, PageID.1278-79.) This objection simply restates her argument before the Magistrate Judge that the consult with Dr. Schildhouse was a deviation from standard practice. *Compare* (ECF No. 30, PageID.702) *with* (ECF No. 42, PageID.1279.) It is therefore improper. *Coleman-Bey*, 287 F. App'x at 422. The objection is also unpersuasive on its merits. Plaintiff again fails to explain why her supervisor's decision to seek a second opinion before sending her case to the SRB—a layer of review she admits was not required (ECF No. 41, PageID.1262)—constitutes evidence of pretext or bias. The Magistrate Judge correctly concluded that it does not. Accordingly, objection 3 is overruled. D.

Objection 4

The fourth objection repeats Plaintiff's prior argument that the Appeals Board's decision in her favor constitutes evidence of pretext. (ECF No. 42, PageID.1281.) She does not explain why. Perhaps the favorable determination is meant to show that

her employer's reason for termination—alleged inadequate care in three separate cases—had "no basis in fact." *E.g. Oliver v. Federated Mut. Ins. Co.*, 341 Fed. App'x 108, 110 (6th Cir. 2009) (citing *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir. 2000)). But, as the R&R explained, that is not convincing.

First, the Appeals Board considered Plaintiff's Board Certification, not her employment. (ECF No. 30-15.) They issued no opinion about the appropriateness of Plaintiff's termination. Second, even if the Appeals Board had found that Plaintiff's termination was unwarranted, that alone would not constitute evidence of pretext. "[A]s long as an employer has an honest belief in its proffered nondiscriminatory reason for discharging an employee, the employee cannot establish that the reason was pretextual simply because it is ultimately shown to be incorrect." *Sybrandt v Home Depot, U.S.A., Inc.*, 560 F.3d 553, 559 (6th Cir. 2009) (quoting *Majewski v. Auto Data Proc. Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001)); see also *Briggs v. Univ. of Cincinnati*, No. 20-4133, 2021 WL 378657, at *11 (6th Cir., Aug. 26, 2021)).

Accordingly, the fourth objection is overruled.

E. Objections 5-10

Plaintiff's next six objections each concern the Magistrate Judge's conclusion that summary judgment is appropriate on the issue of "cat's paw" liability. (ECF No. 42, PageID.1281-87.) Taken together they form an improper repetition of Plaintiff's entire summary judgment argument on this point. (*See* ECF No. 30, PageID.702-706);

Coleman-Bey, 287 F.App'x at 422. Indeed, Plaintiff's discussion of objections 5-10 contains no fewer than 52 citations to her own summary judgment briefing and no citations at all to anything else. (ECF No. 52, PageID.1282-1287.) Nevertheless, the Court has considered Plaintiff's objections. They misunderstand the applicable standard and must be overruled.

Liability for employment discrimination can be appropriate where an unbiased decisionmaker is misled by biased employees into making an adverse employment decision. The elements of such "cat's paw liability" are that (1) the biased employees must have "*intended*...to cause an adverse employment action" and (2) their discriminatory actions must be "a proximate cause of the ultimate employment action." *Chattman v. Toho Tenax America, Inc.*, 686 F.3d 339, 350-51 (6th Cir. 2012) (quoting *Staub v. Proctor Hospital*, 562 U.S. 411, 422 (2011)).

Plaintiff contends that a "clique of white nurses," especially nurses Lewis and Tokarski, targeted her on the basis of her race and national origin, disrespected her, and ultimately caused her termination. (ECF No. 42, PageID.1284-85.) The Magistrate Judge rejected this theory because Plaintiff had not raised a material issue of fact as to the element of causation. (ECF No. 41, PageID.1265-66.)

Plaintiff objects by repeating her allegations of discriminatory behavior on the part of the nurses at Lutz. (ECF No. 42, PageID.1281- 87.) But this is to misunderstand both the applicable law and the Magistrate Judge's decision. The Court is satisfied that Plaintiff raises an issue of fact as to discriminatory behavior at Lutz by some of her

colleagues and does not read the R&R to find otherwise. But to survive summary judgment, Plaintiff must show that there is a dispute about a *material* fact, i.e., a fact that might affect the outcome of her case. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 577 U.S. 242, 248 (1986). A showing of discriminatory or biased conduct alone is not sufficient. Plaintiff would need to raise evidence suggesting that the conduct was intended to cause, and did proximately cause, her termination. *Chattman*, 686 F.3d at 350-51.

Here, Plaintiff does not allege that any of the complaints which resulted in her termination were motivated by racial bias. Instead, she suggests that "Tokarski and Lewis encouraged the complaints." (ECF No. 42, PageID.1284.) But Plaintiff points to nothing concrete in the record to substantiate such a causal link.[4] The complaints at issue did not come from either nurse—they came from colleagues Plaintiff admits were unbiased. Even if Tokarski and Lewis' hostile attitude—combined with Lewis' misrepresentations to Plaintiff's supervisor—could raise a factissue regarding their intent, it could not show proximate causation.

Accordingly, the Magistrate Judge correctly rejected Plaintiff's cat's paw theory of liability and objections 5-10 are overruled.

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[4] In Objection 9, Plaintiff argues that the Appeals Board determination in her favor shows that the SRB was biased by Nurse Lewis' testimony. For the reasons already discussed, the Appeals Board decision does not call the integrity of the SRB review into question.

F. Objections 11-12

Plaintiff's next objections concern the Magistrate Judge's recommendation that the Court grant summary judgment against her retaliation claim. In objections 11 and 12, she maintains that the Magistrate Judge incorrectly concluded that she did not engage in protected behavior when she supported Mikailu Sorie and Gabriel Mirelez. (ECF No. 42, PageID.1287-88.) Her objections are overruled.

For purposes of a Title VII retaliation claim, protected activity includes complaints of allegedly unlawful practices. *Curry v. SBC Comm's, Inc.*, 669 F.Supp.2d 805, 531 (E.D. Mich. 2009) (citing *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 721 (6th Cir. 2008)). Such complaints must do more than make a "vague charge of discrimination." *Id.* (citing *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989)). For instance, Booker held that a complaint regarding charges alleged to be the product of "ethnocentrism" was insufficiently specific to constitute protected activity. *Booker*, 879 F.2d. at 1313.

Plaintiff notes she supported two colleagues who faced disciplinary action. In the first case, Plaintiff submitted a letter in support of Sorie, an employee who was born in Sierra Leone. Plaintiff's letter mentioned Sorie's ethnicity and background but did not make any charges of discrimination. (ECF No. 27-38, PageID.673.) It does mention "trumped up charges," but attributes them to the fact that Sorie angered her superiors, not to racism. *Id.* In the second case, neither Plaintiff nor anyone else as much as alluded to discrimination. (See ECF No. 27-

36, PageID.666.) Hence, the Magistrate Judge correctly held that neither case constituted protected activity under Title VII. Objections 11 and 12 must therefore be overruled.

G. Objection 13

In her thirteenth objection, Plaintiff argues that the Magistrate Judge incorrectly found that she failed to show the causation element of her retaliation claim. (ECF No. 42, PageID.1289.) Plaintiff's causation argument mirrors that of her discrimination claim. *Id.* As discussed above, the Magistrate Judge correctly rejected that argument. Accordingly, objection 13 is overruled.

F. Objection 14

Plaintiff's fourteenth objection challenges the Magistrate Judge's finding that she failed to establish, as part of her *prima facie* discrimination case, that she was replaced by a white physician. (ECF No. 42, PageID.1290.) Although the Magistrate Judge questioned the strength of Plaintiff's argument on this point, he assumed throughout that she had established her *prima facie* case. (ECF No. 41, PageID.1254.) The R&R concluded her discrimination claims failed for other reasons, discussed at length above. Because this objection is mooted by rulings on other objections and does not correctly identify a factual finding made by the Magistrate Judge, it is overruled.

H. Objection 15

Finally, Plaintiff objects to the Magistrate Judge's conclusion that the issue of her probationary status was irrelevant to the summary judgment motion and should not be considered. (ECF No. 42, PageID.1291.) Plaintiff's counsel conceded during oral argument that she was a probationary employee and that she would have been required to file an administrative claim before filing in this Court had she been a fulltime non-probationary employee. (ECF No. 44, PageID.1343.) Plaintiff appears to argue that she should be considered a full-time employee for purposes of the pretext element of her claim, while also maintaining that she was a probationary employee for purposes of "this case" (*Id. See also* ECF No. 42, PageID.1291.) As the Magistrate Judge correctly held, Plaintiff cannot have it both ways. Objection 15 is overruled.

IV. Conclusion

For the reasons set forth above, the Court ADOPTS the Magistrate Judge's R&R. (ECF No. 41.) Plaintiff's Motion to Stay is DENIED (ECF No. 43) and Defendant's motion for summary judgment is GRANTED. (ECF No. 27.)

IT IS SO ORDERED.

Dated: September 23, 2021

s/Judith E. Levy
Ann Arbor, Michigan JUDITH E. LEVY
United States District Judge

FILED: July 12, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 19-cv-10828

Judith E. Levy
United States District Judge

Mag. Judge Anthony P. Patti

Angela Joseph,
Plaintiff,
v.

Secretary of the Department of Veterans Affairs,
Defendant.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION TO GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT UNDER FED. R. CIV. P. 56(a) (ECF No. 27)

I. RECOMMENDATION: The Court should **GRANT** Defendant's motion for summary judgment (ECF No. 27) and dismiss the case.

II. REPORT

A. Background

1. Factual Background

Plaintiff Angela Joseph filed this lawsuit against her former employer, Defendant Secretary of the Department of Veterans Affairs, on March 20, 2019, claiming race and national origin discrimination as well as retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (ECF No. 1, PageID.8-9, ¶¶ 43-57.) The factual background of the case, gleaned from Plaintiff's complaint and the evidence attached to the summary judgment briefing, is as follows.

Plaintiff, who is of Indian descent, became a full-time physician at the Aleda E. Lutz Veterans Affairs Medical Center in 2016 and served as a hospitalist until her termination in August 2018. (ECF No. 1, PageID.2, 7, ¶¶ 8-9, 40; Exhibit 1, Savino Dep. Trans., p. 21, ECF No. 27-2, PageID.160.) Full-time VA physicians serve a two-year probationary period. (Exh. 1, pp. 20-21, ECF No. 27-2, PageID.159-160.) *See* 38 U.S.C. § 7403.[1] The events which ultimately led to Plaintiff's termination as a probationary physician involved her care of three patients in May 2018.

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[1] Plaintiff challenges Defendant's calculation of her probationary period in her response to Defendant's motion for summary judgment (ECF No. 30, PageID.691-692), which will be addressed in greater detail below.

a. Patient 1

Plaintiff saw "Patient 1" at Lutz on the morning of May 7, 2018, and again that afternoon. (Exhibits 2, Plaintiff's Dep. Trans., pp. 273-276, ECF No. 27-3, PageID.230, ECF No. 30-3, PageID.766; Exhibit 12, Plaintiff's Notes, ECF No. 30-13, PageID.872-875.) He had a history of COPD. (Exhibit 3, Discharge Summary, ECF No. 27-4, PageID.266.) According to respiratory therapist Noelita Cicinelli, at approximately 4:15 p.m., she received a call from Plaintiff with an order to place Patient 1 on a non-rebreather mask with oxygen and to perform an arterial blood gas (ABG) test. (Exhibit 6, Cicinelli Decl., ECF No. 27-7, PageID.305, ¶ 7.) Cicinelli suggested instead that Plaintiff place Patient 1 on BiPap, as it would be more appropriate for a COPD patient than a non-rebreather mask would, and Plaintiff then placed the suggested order. (Exh. 6, ECF No. 27-7, PageID.305-306, ¶¶ 8-12.) In contrast, Plaintiff's notes regarding her care of Patient 1 indicate simply that she ordered the ABG and BiPap, and she testified to the same. (Exh. 2, pp. 281-282, ECF No. 30-3, PageID.768; Exh. 12, ECF No. 30-13, PageID.873.) Ultimately, Cicinelli filed a "Report of Contact" criticizing Plaintiff's decision to originally order a non-rebreather mask. (Exh. 6, ECF No. 27-7, PageID.306, ¶ 14; Exhibit 7, Cicinelli Report of Contact, ECF No. 27-8.)

b. Patient 2

Plaintiff treated "Patient 2," a male veteran in his eighties suffering from leukemia, over the course of two days on May 7 and 8, 2018. (Exh. 2, pp. 295-

298, ECF No. 27-3, PageID.235-236; Exhibit 8, Patient 2 Medical Records, ECF No. 27-9, PageID.311.) Patient 2 presented at Lutz's transfusion clinic on May 7 at which time Plaintiff ordered two units of blood because Patient 2's hemoglobin levels indicated heavy bleeding. (Exh. 2, p. 299, ECF No. 27-3, PageID.236; Exh. 8, ECF No. 27-9, PageID.382-384.) Unbeknownst to Plaintiff, Nurse Theresa Thompson discharged Patient 2 that evening (Exh. 8, ECF No. 27-9, PageID.379), prompting Plaintiff to call and advise that he return to Lutz the next day due to his "low...inadequate" hemoglobin levels (Exh. 2, pp. 307-311, ECF No. 27-3, PageID.238-239). When Patient 2 returned that next day, he passed rusty stool, which indicates new bleeding. (Exh. 2, p. 318, ECF No. 27-3, PageID.241; Exh. 8, ECF No. 27-9, PageID.374.) Nurse Andrea Jimenez-Traubenkraut's notes from that day indicate that she informed Plaintiff of Patient 2's rusty stool (Exh 8, ECF No. 27-9, PageID.374), but at her deposition, Plaintiff denied such knowledge (Exh. 2, p. 317, ECF No. 27-3, PageID.241).

Plaintiff testified, in contrast, that the white urgent care physician on duty when Patient 2 arrived at the transfusion clinic asked that she admit Patient 2, despite his desire not to be admitted. (Exh. 2, pp. 33-36, ECF No. 30-3, PageID.736; Exhibit 13, Plaintiff's Presentation to the Professional Standards Board, ECF No. 30-14, PageID.915-922; Exhibit 15, Plaintiff's Notes RE: Patient 2, ECF No. 30-16.) According to Plaintiff, chief of medicine Dr. Anthony Albito advised her to follow the physician's directive, and when she recounted the events to assistant chief of medicine Sally Lewis, a white nurse-practitioner, Lewis said:

"'Dr. Albito is trying to protect you. The physician that you're dealing with is -- was a former chief over here, and the nurses will all follow her, and she is white and you are not.'" (Exh. 2, pp. 33-36, ECF No. 30-3, PageID.736.)

On May 10, 2018, nurse Thompson, who had discharged Plaintiff on May 7, e-mailed nurse manager Christina Tokarski to question Plaintiff's decision not to admit Patient 2 given the seriousness of his condition. (Exhibit 10, Thompson E-mail Exchange, ECF No. 27-11, PageID.395-396.) Nurse manager Tokarski forwarded the e-mail to Sally Lewis without comment. (Exh. 10, ECF No. 27-11.)

c. Patient 3

Finally, on the afternoon of May 8, 2018, "Patient 3," a Lutz dental unit employee, suffered a heart attack and a Code Blue was called, for which Plaintiff was in charge. (Exhibit 11, Patient 3 Medical Records, ECF No. 27-12, PageID.399-402.) According to handwritten notes on the Code Blue/Medical Emergency Report, Plaintiff was asked multiple times if Patient 3 should be placed on a heart monitor, and Plaintiff said "no." (Exh. 11, ECF No. 27-12, PageID.399.) However, Plaintiff testified that, in actuality, she refused the request of respiratory therapist Cathy Archambault and nurse Cheryl Hirn to use an automated external defibrillator (AED) because the proper preparatory steps had not been taken. (Exh. 2, pp. 353-356, ECF No. 30-3, PageID.781.)

That same day, respiratory therapists Cicinelli and Archambault filed a Report of Contact with their supervisor Rhonda Muhammad, challenging

Plaintiff's conduct during Patient 3's Code Blue. (Exhibit 12, Report of Contact, ECF No. 27-13; Exhibit 13, Muhammad E-mail, ECF No. 27-14.) Muhammad forwarded the report to Dr. Albito, Sally Lewis, and patient safety coordinator Sara Schroeder. (Exh. 13, ECF No. 27-14.) On May 9, nurse practitioner Carol Little, who also responded to Patient 3's Code Blue, filed her own Report of Contact, challenging Plaintiff's conduct. (Exhibit 14, Little Report of Contact, ECF No. 27-15.) And, finally, nurse Misty Jacobs e-mailed nurse manager Tokarski to complain of Plaintiff's failure to attach Patient 3 to a monitor. (Exhibit 15, Jacobs E-mail, ECF No. 27-16.)

On May 10, 2018, Sally Lewis, then acting chief of medicine while Dr. Albito was away, e-mailed Dr. Barbara Bates, the Saginaw VA chief of staff, regarding Plaintiff's care of Patients 1, 2, and 3, and recommended that Plaintiff be suspended pending a full clinical review. (Exhibit 19, Lewis E-mail, ECF No. 27-20.) In so doing, she referenced Dr. William Trimble as a source of information regarding the Code Blue. (Exh. 19, ECF No. 27-20, PageID.470.) However, Dr. Trimble testified that Sally Lewis incorrectly summarized his statements on the incident in that e-mail. (Exhibit 19, Trimble Dep. Trans., pp. 27-32, ECF No. 30-20, PageID.993-994.)

Dr. Bates, rather than immediately suspend Plaintiff, asked two employees—Carol Dopp and Dr. Kathy Lewis—to gather facts regarding the Code Blue incident. (Exhibit 16, Bates Dep. Trans., pp. 46-48, ECF No. 27-17, PageID.424.) Dopp and Dr. Lewis interviewed employees involved in the incident, but did not interview Plaintiff, and drafted and e-mailed a report to Dr. Bates on June 18, 2018. (Exh. 16, pp.

46-48, ECF No. 27-17, PageID.424; Exhibit 20, Code Blue Report, ECF No. 27-21; Exhibit 21, Dopp E-mail, ECF No. 27-22.)

At the request of Dr. Bates and Sally Lewis, Dr. Albito reviewed the complaints made against Plaintiff upon his return. (Exh. 16, pp. 48-49, ECF No. 27-17, PageID.424-425; Exhibit 22, Albito Dep. Trans., pp 82-83, ECF No. 27-23, PageID.513.) In so doing, he drafted a memorandum to Dr. Bates on May 16, 2018, recommending that Plaintiff be put on administrative suspension effective immediately pending an "Administrative Board Investigation." (Exh. 22, pp. 65, 83-85, ECF No. 27-23, PageID.509, 513-514; Exhibit 23, Albito Memo, ECF No. 27-24.)

Dr. Bates then arranged for a review of Plaintiff's treatment of Patients 1 and 2 by Dr. Richard Schildhouse, section chief for hospital medicine at the Ann Arbor VA (Exh. 16, pp. 55-56, ECF No. 27-17, PageID.426), asked Dr. Albito to speak with Plaintiff about the incidents (Exh. 22, pp. 85-86, ECF No. 27-23, PageID.514; Exhibit 24, Bates E-mail Chain, ECF No. 27-25, PageID.552), and spoke with Plaintiff personally about the incidents (Exh. 16, pp. 60-61, 64-65, ECF No. 27-17, PageID.427-429). In her affidavit, Dr. Bates described Plaintiff's demeanor during these conversations as "nasty" and "belligerent," comments she acknowledged as rude during her deposition. (Exh. 16, pp. 60-61, 64-65, ECF No. 27-17, PageID.427-429.) Ultimately, Dr. Bates suspended Plaintiff's privileges, relying heavily, she testified, on Dr. Albito's opinions regarding Plaintiff's conduct during the incidents. (Exh. 16, pp. 99-100, ECF No. 27-17, PageID.437.) Plaintiff was informed of the suspension and pending investigation of her patient

care in a May 21, 2018 letter. (Exhibit 25, Sraon Letter, ECF No. 27-26.)

On June 19, 2018, Dr. Schildhouse sent Dr. Bates the results of his review, labeling Plaintiff's care of Patients 1 and 2 as a "level 3" using the peer review system metric, which indicates that Plaintiff failed to meet the Standard of Care. (Exh. 22, p. 202, ECF No. 27-23, PageID.543; Exhibit 26, Schildhouse Review E-mail, ECF No. 27-27.) Dr. Bates forwarded the review to Dr. Albito, stating that the conclusion provided "cause to seriously look at a summary Review Board" (SRB) to evaluate Plaintiff's conduct (Exhibit 27, E-mail, ECF No. 27-28, PageID.563), which Dr. Albito then requested on July 2, 2018 with Dr. Bates's approval (Exhibit 28, Albito Memo, ECF No. 27-29).

Plaintiff received notification of the SRB hearing on July 16, 2018 (Exhibit 29, SRB Notice, ECF No. 27-30), and was subsequently provided the evidence file that would be before the SRB (Exhibit 30, Evidence File Index, ECF No. 27-31). The SRB's hearing notes indicate that it interviewed Sally Lewis and Plaintiff, accompanied by an attorney, and reviewed each of the incidents at issue, ultimately recommending Plaintiff's termination. (Exhibit 31, SRB Notes, ECF No. 27-32; Exhibit 33, SRB Action, ECF No. 27-34.) In so doing, it took issue with Plaintiff's care of Patients 1, 2, and 3. (Exh. 31, ECF No. 27-32, PageID.574; Exh. 33, ECF No. 27-34; *see also* ECF No. 27, PageID.136.) The SRB also reviewed a fourth incident, not discussed above, but it found no issue with Plaintiff's care in that incident. (*See* Exh. 33, ECF No. 27-34, PageID.660.)

Dr. Bates approved and signed the SRB's recommendation on August 3, 2018 (Exh. 33, ECF No. 27-34, PageID.661), and sent Plaintiff a letter terminating her employment (Exhibit 34, Termination Letter, ECF No. 27-35). The letter explained that Plaintiff would "receive information via a separate notice regarding [her] opportunity for a fair hearing and appeal *to determine whether or not the reason(s) for the revocation of [her] privileges should be reported to the National Practitioner Data Bank (NPDB)* in accordance with VHA Handbook 1100.19 and VHA Handbook 1100.17." (Exh. 34, ECF No. 27-35, PageID.663 (emphasis added).) Plaintiff did appeal, and the Appeals Board determined that she met the Standard of Care in all three cases; thus, she was not reported to the NPDB. (Exhibit 14, Appeals Board Panel Results, ECF No. 30-15.)

Plaintiff filed the instant lawsuit on March 20, 2019, claiming race and national origin discrimination as well as retaliation in violation of Title VII. (ECF No. 1, PageID.8-9, ¶¶ 43-57.) She alleges that nurse manager Tokarski and Sally Lewis joined together to bring about the complaints that led to her termination because of her race and/or national origin (ECF No. 1, PageID.5, 8, ¶¶ 26, 44-47), and that Defendant retaliated against her in response to her support of two other non-white employees who had also experienced discrimination. (ECF No. 1, PageID.3-4, ¶¶ 15-16, 23, 53-55).

2. Instant Motion

On October 1, 2021, Defendant filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56(a), asserting that Plaintiff's discrimination and

retaliation claims under Title VII fail as a matter of law, and that Plaintiff did not mitigate her damages. (ECF No. 27, PageID.139-148.) The introduction to Plaintiff's response in opposition, filed on November 2, 2020, summarizes her arguments as follows:

> The VA's motion for summary judgment should be denied. [Plaintiff] has established her *prima facie* cases of national origin and race discrimination, and retaliation, in violation of Title VII, and has strong indirect evidence of the VA's discriminatory intent and retaliatory animus.
>
> * * *
>
> [Plaintiff], because she was nonwhite and of Indian national origin, was targeted by a clique of white nurses, led by Christina Tokarski and abetted by Sally Lewis, with a series of complaints and Reports of Contact based on false allegations regarding [Plaintiff's] decisions and actions in treating patients. [Plaintiff's] vocal support of two nonwhite nurses also targeted by these white nurses added retaliatory animus to the ongoing discriminatory animus of the white nurses.

(ECF No. 30, PageID.690-691.) Plaintiff also asserts in her response that she was no longer a probationary employee at the time of her termination. (ECF No. 30, PageID.690-692.)[2]

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[2] I note that Plaintiff provides as Exhibit 1 to her response brief a list labeled "Defendant's Statement of Material Facts," and

Finally, Defendant filed a reply brief, arguing: (1) Plaintiff's disagreement with the review of her patient care does not establish pretext; (2) Plaintiff was a probationary employee at the time of her termination; (3) Defendant did not deviate from, or violate, its peer review process; (4) the SRB was properly composed; (5) the Appeals Board's ultimate finding is not evidence of pretext; and (6) Plaintiff's "cat's paw" theory of liability fails. (ECF No. 33, PageID.1142-1148.) On May 6, 2021, the Court held a hearing via Zoom technology and took the motion under advisement.

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

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states by number in Footnote 1 of her brief which facts she disputes. (*See* ECF No. 30, PageID.691, n. 1; ECF No. 30-2.)

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)).

C. Discussion

1. Plaintiff's claim of race and national origin discrimination

a. *Prima facie* case

Plaintiff claims she suffered race and national origin discrimination in violation of Title VII when nurse Tokarski and Sally Lewis, both white, collaborated to bring about and contribute to the patient care complaints that ultimately led to her termination. (ECF No. 1, PageID.5, 8, ¶¶ 26, 44-47.) Where, as is the case here, 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 Healthcare 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.*

Although Defendant does not argue that Plaintiff failed to meet her burden of establishing a *prima facie* case of discrimination for purposes of the instant motion (ECF No. 27, PageID.139), whether Plaintiff actually did so is questionable. With regard to the fourth element, specifically, Plaintiff alleges in her complaint that Dr. Galina Gladka, a white physician and friend of Dr. Albito, was hired as her replacement. (ECF No. 1, PageID.4, 7, ¶¶ 25, 35.) She makes the same assertion in her response to the instant motion, referencing her own deposition testimony (Exh. 2, pp. 138-144, ECF No. 30-3,

PageID.753-754), Sally Lewis's deposition testimony (Exhibit 7, Lewis Dep. Trans., pp. 68-69, ECF No. 30-8, PageID.824-825), and Dr. Albito's deposition testimony (Exhibit 6, Albito Dep. Trans., pp 145-148, ECF No. 30-7, PageID.814).

However, Plaintiff largely mischaracterizes the testimony she cites. For instance, when asked who filled Plaintiff's position, Sally Lewis stated: "Let me think. I might be able to -- it might have been Dr. Gladka. No, she was already working. I don't recall who filled that position." (Exh. 7, pp. 68-69, ECF No. 30-8, PageID.824-825.) Further, Dr. Albito acknowledged at his deposition statements from a previous affidavit that he offered Plaintiff's position to Dr. Tom Abalo, of Chinese descent, but clarified that although Drs. Abalo and Gladka were hired for physician positions, no opening existed for Plaintiff's position specifically. (Exh. 6, pp. 145-148, ECF No. 30-7, PageID.814.) Thus, Plaintiff has essentially supported the assertion that Dr. Gladka filled her position with only her own deposition testimony. In any case, even assuming, *arguendo*, that Plaintiff has established a *prima facie* case of race and national origin discrimination, the Court should find that Defendant is entitled to summary judgment on the claim because Plaintiff has failed to demonstrate a genuine issue of fact with regard to pretext.

b. Pretext

If a plaintiff establishes a *prima facie* case of discrimination, the burden shifts to the defendant to provide a legitimate, non-discriminatory reason for the employment decision. *McDonnell Douglas*, 411 U.S. at 802. When a 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 U.S. Army*, 565 F.3d 986, 996 (6th Cir. 2009).

> Plaintiffs may establish pretext by showing that the proffered reason: "(1) has no basis in fact; (2) did not actually motivate the adverse employment action; or (3) was insufficient to warrant the adverse action." *Ladd v. Grand Trunk W. R.R., Inc.*, 552 F.3d 495, 502 (6th Cir. 2009) . . . . A "plaintiff may also demonstrate pretext by offering evidence which challenges the reasonableness of the employer's decision to the extent that such an inquiry sheds light on whether the employer's proffered reason for the employment action was its actual motivation." *White*, 533 F.3d at 393 (citation and internal quotation marks omitted).

Sybrandt v. Home Depot, U.S.A., Inc., 560 F.3d 553, 558 (6th Cir. 2009).

Defendant has most certainly provided a legitimate, non-discriminatory reason for Plaintiff's termination—multiple complaints regarding her patient care and the review of those complaints by several individuals and the SRB, which ultimately determined that Plaintiff did not meet the Standard of Care for Patients 1, 2, or 3. (Exh. 31, ECF No. 27-32; Exh. 34, ECF No. 27-35.) Plaintiff offers several arguments as to why Defendant's explanation is a

pretext for discrimination, but none are sufficiently supported by the record to establish a genuine issue of material fact.

In her response brief, Plaintiff asserts that she:

> presented strong evidence of pretext in the VA's deviation from its established policy regarding the composition of an SRB—most notably, the VA chose no hospitalist or other member with expertise similar to [hers], and improperly included a Nurse Practitioner as a member. It deviated from its established practice in making the unexplained "error" regarding the date of her appointment as a full-time, permanent staff physician. And it deviated from its established policy or practice in its "curbside consult" with Schildhouse, rather than using its formal Peer Review process. Finally, the appeal panel's determination that [her] care of Patients 1, 2, and 3 met the Standard of Care is strong evidence of pretext in the SRB's examination of those cases.

(ECF No. 30, PageID.711.) The above, Plaintiff argues, supports a "cat's paw" theory of liability:

> The VA's cat's paw liability is highlighted by the SRB's reliance on information from [Sally] Lewis (and the white nurses who targeted [Plaintiff]) regarding the three cases. As explained in [Plaintiff's] Statement above, Lewis (and the white nurses who targeted [Plaintiff]) misrepresented

> [Plaintiff's] actions; this is exemplified by Lewis's false statements regarding her discussion with Trimble about Patient 3, statements which Trimble said were false.

(ECF No. 30, PageID.712.) I will address each assertion below.

i. Probationary status

First, Plaintiff appears to raise the allegation regarding possible expiration of her probationary status for the first time in her response to the instant motion, rather than in her pleadings, yet Plaintiff's counsel conceded at the motion hearing that his client does not wish to challenge her status, and only raises the issue in support of her pretext argument. Specifically, counsel stated: "For purposes of this case, we are conceding that she was treated as a probationary employee." However, even if the Court ignores this concession and runs with the proposition that she was a full-time employee, as such, she would have been a federal employee subject to an entirely different procedure, including the need to make an administrative claim and pursue her litigation in the Court of Claims. In fact, this Court would lack any jurisdiction over Plaintiff's case, let alone the present summary judgment motion. As a result, I see no reason for the Court to examine Plaintiff's probationary status at all, for purposes of Plaintiff's pretext argument or otherwise. Nor do I believe that she can have it both ways: "probationary" for purposes of subject matter

jurisdiction and a "full-time hire" for evidentiary purposes.[3]

ii. Composition of the Summary Review Board and Appeals Board decision

I turn next to Plaintiff's argument that the composition of the Summary Review Board serves as evidence that Defendant's proffered explanation for her termination is simply a pretext for discrimination. VA Handbook 5021, Part III, and VA Handbook 5005, Part II, govern employment actions involving probationary physicians, as well as the make-up of Summary Review Boards, also referred to as Professional Standards Boards. (*See* Exhibit 2, Berghoff Decl. and Attachments, ECF No. 33-3.) VA Handbook 5005, part II, chapter three, Section C, Part 3 states, in part: "Board members must be at a grade and level that is equal to or higher than that of the candidate being considered. Board membership should also be sufficiently broad to cover the range of practice within an occupation and where possible include all grades and levels within an occupation." (Exh. 2, ECF No. 33-3, PageID.1197.) And under Section C, Part 4:

> Whenever possible, PSBs will be composed of three or five employees from the same occupation as the individual being considered. When three or five members

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[3] Defendants assert, in their reply brief, that the VA Board mistakenly voted to approve Plaintiff for a full-time appointment on June 28, 2016 before she had taken a required drug test, but corrected the mistake on October 13, 2016. (ECF No. 33, PageID.1142-1143.)

> from the same occupation are not available, appropriately qualified individuals from other occupations may be appointed, provided the board is composed of a majority of the employees from the occupation involved . . . .

(Exh. 2, ECF No. 33-3, PageID.1197-1198.)

Plaintiff's SRB consisted of John C. MacMaster, a family practitioner and then supervisor of primary care at Lutz, Nazzareno Liegghio, a psychiatrist, Mark Greenwell, director of the emergency room and a family physician by training, and Virginia Rolland, a nurse practitioner. (Exhibit 23, MacMaster Dep. Trans., pp. 10, 21-24, ECF No. 30-24, PageID.1018-1019; Exh. 33, ECF No. 27-34.) Thus, three of the four board members were physicians, like Plaintiff. (*See* VA Handbook 5005, part II, chapter three, Section C, Parts 3 & 4, Exh. 2, ECF No. 33-3, PageID.1197-1198.) Plaintiff insists that the lack of a "hospitalist" calls the SRB's composition and, thus, proffered reason for termination, into question. (ECF No. 30, PageID.700.) However, she cites no provision of the VA Handbook or alternative authority containing such a requirement, and in his declaration, Human Resources Specialist Eric Berghoff stated that the three physician SRB members had employment grade levels equal to or higher than Plaintiff's on the date of her review (Exh. 2, ECF No. 33-3, PageID.1167, ¶ 16), and that "[a]lthough there is no requirement to have a physician on the board serving in the same category role as [Plaintiff], both MacMaster and Greenwell were qualified to fill a hospitalist role at the Saginaw VA facility because they met all the requirements for

the job" (Exh. 2, ECF No. 33-3, PageID.1167, ¶ 17). It also bears noting that "hospitalist" is a VA job category (Exh. 2, ECF No. 33-3, PageID.1167, ¶ 11), and Plaintiff's counsel could not confirm at the hearing that "hospitalist" is considered a specific medical specialty.[4] Regardless, Plaintiff's counsel admitted at the hearing that Plaintiff held no board certifications and disavowed any argument that simply because the members of the SRB are white, the SRB was biased.

Plaintiff also takes issue with the nurse practitioner on her SRB, but did not cite, in her response brief or at the motion hearing, any VA policy or other authority forbidding a nurse practitioner from participating in an SRB reviewing the care of a physician. And, as Defendant points out in its reply brief (ECF No. 33, PageID.1145), under VA Handbook 5005, part II, chapter three, Section C, Part 4, nurse practitioner Rolland could be considered an appropriately qualified individual

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[4] According to the American Board of Physician Specialties:

> A hospitalist is a physician who must master the specific skill set and knowledge required to treat and care for patients in the hospital. Many physicians choose to work primarily in hospitals and self-identify as hospitalists, yet they are board certified in a specialty, such as Internal Medicine or Family Practice Medicine, that does not accurately reflect their experience and level of competence in providing treatment, diagnosing illnesses, coordinating with other medical personnel, and other duties of a hospitalist.

However, the American Board of Hospital Medicine (ABHM) has made available board certification in Hospital Medicine. *See* https://www.abpsus.org/hospitalist/.

from another profession (see Exh. 2, ECF No. 33-3, PageID.1197-1198). Furthermore, even if nurse practitioner Rolland's inclusion could be considered error under the circumstances at issue here, such error does not establish a genuine issue of fact regarding pretext. The SRB was otherwise properly composed, as described above, and although Dr. MacMaster testified at his deposition that had the fourth member of the SRB been a physician, it is possible the Board's recommendation may have been different (Exhibit 23, MacMaster Dep. Trans., p. 35, ECF No. 30-24, PageID.1021), nurse practitioner Rolland did not sign the final recommendation; the three physicians did (Exh. 33, ECF No. 27-34).

Nor should the Court find a genuine issue of disputed fact that Defendant's proffered reason for termination was pretext on the basis of Plaintiff's assertions regarding use of the VA's peer review process or the Appeals Board's decision. Plaintiff argues that Defendant violated its own peer review process by soliciting a consultation from Dr. Schildhouse and that the deviation is evidence of pretext. (ECF No. 30, PageID.701-702.) In so doing, she cites to her own testimony that Dr. Schildhouse is not a part of the formal peer review system at Lutz (*see* Exh. 2, pp. 245-247, ECF No. 30-3, PageID.763), and Dr. Bates's testimony that Dr. Schildhouse's review should be considered more of a "curbside consult" than a formal review (*see* Exhibit 11, Bates Dep. Trans., pp. 69-70, ECF No. 30-12, PageID.861). Again, however, Plaintiff provides no indication beyond her own testimony that Dr. Schildhouse's consultation violated VA policy, and I fail to see how affording Plaintiff an additional layer of review demonstrates pretext. If anything, it

demonstrates an additional level of thoroughness, care, and caution being exercised with respect to terminating her employment. Those in authority sought a second opinion. Further, to any extent Plaintiff argues that the consultation represents a differentiation, and that this differentiation in and of itself creates a genuine issue regarding pretext, Dr. Bates testified at her deposition that she sought similar outside review in the case of a radiologist a couple of years prior. (Exhibit 16, Bates Dep. Trans., pp. 69-70, ECF No. 27-17, PageID.430.)

It is also true, as Plaintiff asserts (ECF No. 30, PageID.702), that the Appeals Board ultimately found that Plaintiff met the Standard of Care for Patients 1, 2, and 3 (Exhibit 14, Appeals Board Panel Results, ECF No. 3-15), stating:

> Panel members unanimously agreed that [Plaintiff's] clinical privileges based on the above cases do not warrant revocation. There were no findings during this review to support substandard care, professional incompetence or professional misconduct. Therefore, no report to the National Practitioner Data Bank or State Medical Board is required.

(Exh. 14, ECF No. 30-15.) But this does not create a genuine issue of fact regarding pretext, as the SRB independently reviewed each case, after both Drs. Albito and Schildhouse believed such review was necessary, with input from witnesses including Plaintiff, and made its decision with Plaintiff's *employment* in mind, as opposed to her standing with the National Practitioner Data Bank

or State Medical Board, which deal with licensure, clinical privileges, and national reporting. Moreover, even if the Appeals Board determined that the SRB made a mistake, mistakes alone do not prove pretext for discrimination. *See Sybrandt*, 560 F.3d at 559 (6th Cir. 2009) ("'[A]s long as an employer has an honest belief in its proffered nondiscriminatory reason for discharging an employee, the employee cannot establish that the reason was pretextual simply because it is ultimately shown to be incorrect.'") (quoting *Majewski v. Auto. Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001)). "'The key inquiry in assessing whether an employer holds such an honest belief is whether the employer made a reasonably informed and considered decision before taking the complained-of action.'" *Sybrandt*, 560 F.3d at 559 (quoting *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 598-99 (6th Cir. 2007)). On the basis of the facts summarized above, it is clear the SRB and Defendant did so here.

iii. Cat's paw

Finally, the Court should reject Plaintiff's "cat's paw" theory of liability. Plaintiff does not allege discriminatory animus on the part of any of the individuals who filed complaints related to her care of Patients 1, 2, and 3, Drs. Schildhouse or Albito, or the SRB members, and Plaintiff's counsel explicitly stated at the motion hearing that Plaintiff had no direct evidence of racial animus with respect to those individuals. Instead, she largely relies on a cat's paw theory of liability, asserting that Dr. Bates, the ultimate decisionmaker, relied on discriminatory

and retaliatory information from nurse Tokarski and Sally Lewis. (ECF No. 30, PageID.690, 712.)

> "In the employment discrimination context, 'cat's paw' refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 484 (10th Cir. 2006), *cert. dismissed*, 549 U.S. 1334, 127 S.Ct. 1931, 167 L.Ed.2d 583 (2007); *see also Arendale v. City of Memphis*, 519 F.3d 587, 604 n. 13 (6th Cir. 2008) ("When an adverse hiring decision is made by a supervisor who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias, this Court has held that the employer may be held liable under a 'rubber-stamp' or 'cat's paw' theory of liability.").

Roberts v. Principi, 283 F. App'x 325, 333 (6th Cir. 2008). "Under this theory, the subordinate, not the nominal decisionmaker, is the driving force behind the employment action. When a decisionmaker acts in accordance with a retaliator's bias 'without [him]self evaluating the employee's situation,' the retaliator 'clearly causes the tangible employment action, regardless of which individual actually' enforces the adverse transfer or termination." *Id.* (quoting *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998)). "Imposing liability on the employer in this context is in accord with the

agency principles and polices underlying Title VII." *Id.*

Again, Plaintiff asserts that "because she was nonwhite and of Indian national origin, [she] was targeted by a clique of white nurses, led by Christina Tokarski and abetted by Sally Lewis, with a series of complaints and Reports of Contact based on false allegations regarding [her] decisions and actions in treating patients." (ECF No. 30, PageID.690, 702-706.) The record, however, demonstrates otherwise. First, although Sally Lewis recommended to Dr. Bates that Plaintiff be suspended pending a full clinical review of the relevant cases (Exh. 19, ECF No. 27-20, PageID.470), neither she nor nurse Tokarski made any of the original complaints that were substantiated by the Summary Review Board and ultimately led to Plaintiff's termination—those regarding Patients 1, 2 and 3—a fact which Plaintiff's counsel admitted at the motion hearing. Those complaints were made by others, against whom Plaintiff's counsel concedes there to be no "direct or indirect" evidence of discriminatory animus.

Second, Plaintiff cites overwhelmingly to her own testimony regarding Tokarski and Sally Lewis's alleged bias against her. Examples include Plaintiff's deposition testimony that Dr. Albito warned that her skin color made her a target (Exh. 2, pp. 129-130, 160-167, ECF No. 30-3, PageID.752, 757-759), and that nurse Tokarski, who is white, was hostile towards Plaintiff and other people of color (Exh. 2, pp. 97-98, 110, ECF No. 30-3, PageID.745, 747). But personal belief of discrimination, alone, is insufficient to create an inference of discrimination. *Watson v. City of Cleveland*, 202 F. App'x 844, 854

(6th Cir. 2006) ("Watson's personal belief that she and others suffered from adverse employment actions motivated by racial discrimination cannot help Watson avoid summary judgment."). *See also Chappell v. GTE Prods. Corp.*, 803 F.2d 261, 268 (6th Cir. 1986) ("Mere personal beliefs, conjecture and speculation are insufficient to support an inference of age discrimination.").

Finally, Plaintiff fails to provide sufficient evidence of any meaningful connection between alleged discriminatory animus on the part of nurse Tokarski or Sally Lewis and the subject complaints against her, the review of those complaints, including by the SRB, or Dr. Bates's ultimate termination decision. Respiratory therapist Cicinelli filed the Report of Contact for Patient 1. (Exh. 6, ECF No. 27-7, PageID.306, ¶ 14; Exh. 7, Report of Contact, ECF No. 27-8.) With regard to Patient 2, nurse Thompson e-mailed nurse manager Tokarski to complain of Plaintiff's care, but Tokarski simply forwarded the e-mail to Sally Lewis without comment. (Exh. 10, ECF No. 27-11.) For Patient 3, several employees complained of Plaintiff's care—respiratory therapists Cicinelli and Archambault to their supervisor Muhammad, nurse practitioner Little, and nurse Jacobs—but not nurse Tokarski or Sally Lewis. (Exh. 12, ECF No. 27-13; Exh. 13, ECF No. 27-14; Exh. 14, ECF No. 27-15; Exh. 15, ECF No. 27-16.) Thus, although nurse Tokarski and Sally Lewis may have received or been privy to some of the complaints, Plaintiff has presented no evidence beyond her own speculation that they initiated or encouraged them.

Sally Lewis did, as Plaintiff asserts, potentially misrepresent or misstate comments made by Dr.

Trimble regarding Patient 3 in her e-mail to Dr. Bates recommending Plaintiff's suspension pending review of her care of Patients 1, 2, and 3 (Exh. 19, ECF No. 27-20; Exh. 19, pp. 27-32, ECF No. 30-20, PageID.993-994), but this fact does not negate the reviews of Plaintiff's patient care conducted by Dr. Schildhouse or the SRB. Plaintiff also asserts that Sally Lewis provided biased testimony to the SRB, but the SRB heard testimony from Sally Lewis and Plaintiff, and reviewed the medical records and other material provided (Exh. 30, ECF No. 27-31; Exh. 31, ECF No. 27-32; Exh. 33, ECF No. 27-34), which Plaintiff's counsel also admitted at the motion hearing. And Plaintiff's counsel conceded that Plaintiff has no evidence of discriminatory animus on the part of the SRB members. Furthermore, beyond Dr. Bates's reference to Plaintiff as "nasty" and "belligerent" (Exh. 16, pp. 60-61, 64-65, ECF No. 27-17, PageID.427-429), language which Plaintiff subjectively considers to be racially charged,[5] Plaintiff asserts only that the SRB and Dr. Bates, the ultimate decisionmaker, relied upon discriminatory input from nurse Tokarski and Sally Lewis (ECF No. 30, PageID.712). However, the SRB relied on a full range of evidence. As described above, Dr. Bates testified that she largely relied on their recommendation for her termination decision, and Plaintiff has failed to present additional

[5] The Court questioned Plaintiff's counsel on why the adjectives "nasty and belligerent" should be considered "arguably...racially loaded language," or what basis there is for construing the word *nasty* as connoting a racial animus, as opposed to just describing impolite or uncouth behavior. Counsel conceded that there is no basis for a racially charged inference, other than Plaintiff's own subjective belief and her testifying that "that's the way she received the comments."

evidence of their influence on Dr. Bates's ultimate decision sufficient to create a genuine issue of fact regarding pretext. In fact, Dr. Bates initiated many levels of review (by employees Dopp and Kathy Lewis, Dr. Albito, and Dr. Schildhouse) before even convening the SRB. Furthermore, Dr. Albito, who Plaintiff's counsel believes to be a person of color and of Asian origin, like Plaintiff, reviewed the complaints against Plaintiff upon his return from the Philippines and authored a memo, the concluding section of which states, in pertinent part: "Lapses in decision making, not following proper protocols, not listening [to] suggestions and intimidating other staff, put patients at Risk and Jeopardize[d] their safety. I strongly recommend that this provider be put on Administrative suspension effectively immediately and an Administrative Board Investigation be conducted as soon as possible." (Exh. 22, pp. 82-84, ECF No. 27-23, PageID.513; Exh. 23, ECF No. 27-24, PageID.550; Exh. 28, ECF No. 27-29.) For these reasons, the Court should grant summary judgment on Plaintiff's discrimination claim.

2. Plaintiff's retaliation claim

Plaintiff claims Defendant retaliated against her in violation of Title VII because she engaged in protected activity—namely supporting the complaints of nurse manager Mikailu Sorie and nurses aid Gabriel Mirelez. (ECF No. 1, PageID.8-9, ¶¶ 53, 54.) For the reasons that follow, the Court should also grant Defendant summary judgment on Plaintiff's retaliation claim.

"As with a Title VII discrimination claim, a Title VII retaliation claim can be established 'either by introducing direct evidence of retaliation or by proffering circumstantial evidence that would support an inference of retaliation.'" *Laster v. City of Kalamazoo*, 746 F.3d 714, 730 (6th Cir. 2014) (quoting *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 538 (6th Cir. 2008)). As Plaintiff has proffered only circumstantial evidence, her claim must be analyzed under the *McDonnell Douglas* burden-shifting framework. *See Laster*, 746 F.3d at 730.

> 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; (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, 746 F.3d at 730. 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 practices." *Id.* at 729-30.

The Court should grant summary judgment on Plaintiff's retaliation claim because, even viewing the evidence in a light most favorable to her, she has failed to produce evidence sufficient to demonstrate a genuine issue of fact either that she engaged in protected activity or that a causal connection existed between such activity and the suspension of her privileges or termination.

a. Protected activity

First, Plaintiff overstates her alleged protected activity. In her complaint, Plaintiff alleges that she e-mailed Drs. Bates and Albito to advise that Sorie had been discriminated against on the basis of his race and national origin (ECF No. 1, PageID.4, ¶¶ 21-22), but the evidence presented demonstrates that although she referenced Sorie's national origin, she made no claim of race or national origin discrimination in her e-mail, instead stating:

> [Sorie] is a very honest, decent person and very solution oriented, and I have found nothing but professionalism from him. There is a kind of simplicity about him being raised in a different culture, growing up very poor in a village in Sierra Leone, one of many children of the many wives of his father. I don't think he even had shoes to wear until he came to the US, sponsored by a family to study.
>
> Therefore, I was very disturbed to learn that he is being investigated from what I have heard from several people on, "trumped up

> charges, that he did not do, but because he pissed off people at the top, and now he has been sent down to Urgent Care so Chris Tokarski can break him". I was shocked, I asked why no one has spoken up, and they say, it is "because they are picking on him now, and they will do it to me next". These are exactly their words, not mine. In other words they are afraid of retaliation. I have also heard that [Sorie] has been at this VA for 16 years, and he has not been involved in inappropriate behavior. He is an intelligent person with a lot to contribute. He is a good man.

(Exh. 37, ECF No. 27-38, PageID.673.) And Plaintiff's testimony at her deposition that she was alluding to national origin discrimination in the e-mail (Exh. 2, pp. 211-212, ECF No. 30-3, PageID.760), is insufficient to demonstrate a genuine issue of material fact that she engaged in protected activity. *See Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 469 (6th Cir. 2012) ("[I]n order to obtain Title VII's retaliation protections, Wasek must have had 'a reasonable and good faith belief' that the harassing acts he was reporting were Title VII violations.'").

With regard to Mirelez, Plaintiff alleges: "In or around December 2017, a Hispanic nurses-aid named Gabriel Mirelez filed a grievance. [Plaintiff] supported Mirelez's grievance, helping Mirelez retain his position. Lewis and Bates were aware that [Plaintiff] supported the grievance, as [Plaintiff] wrote to Human Resources supporting Mirelez's position." (ECF No. 1, PageID.4, ¶ 23.) Plaintiff was

interviewed by Human Resources specialist Berghoff regarding Mirelez's grievance seeking to overturn discipline for failing to set a bed alarm. However, the record demonstrates that both Plaintiff and Berghoff agree Mirelez did not raise discrimination in his grievance (Exhibit 35, Berghoff Decl., ECF No. 27-36, PageID.666, ¶ 9; Exh. 2, p. 202, ECF No. 27-3, PageID.212), and that Berghoff's summary of Plaintiff's responses to his interview questions, to which Plaintiff explicitly made no corrections, did not contain any allegations of discrimination (Exh. 2, pp. 68-69, ECF No. 27-3, PageID.178-179; Exh. 35, ECF No. 27-36, PageID.666-667, ¶¶ 9-10; Exhibit 36, Berghoff Summary E-mail, ECF No. 27-37). *See Wasek*, 682 F.3d at 469.

b. Causation

Furthermore, even if Plaintiff has presented sufficient evidence to create a material factual dispute regarding protected activity, the Court should find that she is unable to establish causation. "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*, 570 U.S. 338, 360; 133 S.Ct. 2517; 186 L.Ed.2d 503 (2013)); *see 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)).

Plaintiff asserts that she

> emailed Bates "to let Dr. Bates know that there was discriminatory behavior," even though she was "not saying it directly." Ex. 2 at 211:25-212:11. The evidence, taken in the light most favorable to [Plaintiff], shows that Lewis and Tokarski were aware of [Plaintiff's] protected activity, and retaliatory complaints by nurses, led by Tokarski, escalated following [Plaintiff's] protected activity. The evidence also demonstrates that [Plaintiff's] participation in the investigation of Mirelez's grievance was protected activity.

(ECF No. 30, PageID.713.) In so doing, she cites to her own deposition testimony that Sally Lewis was aware she supported Mirelez. (ECF No. 30, PageID.708 (citing Exh. 2, p. 70, ECF No. 30-3, PageID.742).) However, as described in great detail above, she fails to provide sufficient evidence of any meaningful connection between the alleged discriminatory animus of nurse Tokarski and Sally Lewis and the complaints made against her with regard to Patients 1, 2, and 3, the SRB recommendation, or Dr. Bates's ultimate termination decision. Nor does she provide evidence of Bates's retaliatory animus, beyond her own assertions, which, regardless, would not negate the independent review of Plaintiff's care conducted by the SRB. Accordingly, for the same reasons provided

above with regard to her discrimination claim, Plaintiff cannot demonstrate a genuine issue of material fact that but for her support of Sorie and Mirelez, she would have maintained her medical privileges and employment.

3. Mitigation

Should the Court agree with my above recommendation, it need not address Defendant's argument that Plaintiff failed to mitigate her damages. (ECF No. 27, PageID.148.)

D. Conclusion

The Court should **GRANT** Defendant's motion for summary judgment (ECF No. 27) and dismiss the case.

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: July 12, 2021

/s/ Anthony P. Patti
UNITED STATES MAGISTRATE JUDGE

FILED: March 15, 2023

No. 21-1736

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANGELA JOSEPH,
Plaintiff-Appellant,

v.

DENIS RICHARD MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Defendant-Appellee.

ORDER

BEFORE: GUY, SUHRHEINRICH, and STRANCH, 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

/s/ Deborah S. Hunt, Clerk

*Judge Davis recused herself from participation in this ruling.

DEPARTMENT OF VETERANS AFFAIRS
Aleda E. Lutz VA Medical Center
1500 Weiss Street
Saginaw, Ml 48602

In Reply Refer To: 655/00

November 6, 2018

Angela Joseph, MD
1102 Woodside Dr.
Flint, Ml 48503

SUBJ: Results of Appeals Panel

This letter is to notify you that the results of the Appeals Panel Report on the revocation of your clinical privileges held on October 11, 2018 were returned. The Panel found no findings of substandard care, professional misconduct, or professional incompetency regarding the three cases presented.

Due to the findings of this Panel there will be no report in your name to the National Practitioner Data Bank, or to the State Licensing Board of Michigan where you hold a medical license, per VHA Handbook 1100.19. Your privileges will be expired in good standing as of August 27,2018.

Sincerely,

/s/ BARBARA BATES, MD, MBA

Acting Medical Center Director