No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Francette C Washington PETITIONER
(Your Name)

VS.

Virginia Rodriguez-ET-Al — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

☐ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

_____

_____

☑ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☑ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____

_____, or

☐ a copy of the order of appointment is appended.

Francette C Washington

State of Texas

County of Bexar

KRISTINA I DAVIDSON
Notary Public, State of Texas
My Comm. Exp. 04-21-2026
ID No. 12979164-3

This instrument was acknowledged before me on June 24 2022

By

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Francette C Washington — PETITIONER
(Your Name)

VS.

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Francette C Washington
(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Francette C Washington, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	$ N/A	$ 0	$ N/A
Self-employment	$ 0	$ N/A	$ 0	$ N/A
Income from real property (such as rental income)	$ 0	$ N/A	$ 0	$ N/A
Interest and dividends	$ 0	$ N/A	$ 0	$ N/A
Gifts	$ 300.00	$ N/A	$ 300.00	$ N/A
Alimony	$ 0	$ N/A	$ 0	$ N/A
Child Support	$ 0	$ N/A	$ 0	$ N/A
Retirement (such as social security, pensions, annuities, insurance)	$ 311.10	$ N/A	$ 311.10	$ N/A
Disability (such as social security, insurance payments)	$ 0	$ N/A	$ 0	$ N/A
Unemployment payments	$ 0	$ N/A	$ 0	$ N/A
Public-assistance (such as welfare)	$ 0	$ N/A	$ 0	$ N/A
Other (specify): None	$ 0	$ N/A	$ 0	$ N/A
Total monthly income:	$ 611.10	$ N/A	$ 611.10	$ N/A

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ N/A
N/A	N/A	N/A	$ N/A
N/A	N/A	N/A	$ N/A

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ N/A
N/A	N/A	N/A	$ N/A
N/A	N/A	N/A	$ N/A

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
Checking Security Service	$ 100.00	$ N/A
Checking USAA	$ 20.00	$ N/A
Savings Security Service	$ 5.00	$ N/A
Savings USAA	400.00	

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value N/A

☐ Other real estate
Value N/A

☐ Motor Vehicle #1
Year, make & model 2010 Altima Coupe
Value 3,700

☐ Motor Vehicle #2
Year, make & model N/A
Value

☐ Other assets
Description 401 K
Value $30,000

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$ N/A	$ N/A
N/A	$ N/A	$ N/A
N/A	$ N/A	$ N/A

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
N/A	N/A	N/A
N/A	N/A	N/A
N/A	N/A	N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ 0	$ N/A
Are real estate taxes included? ☐ Yes ☑ No Is property insurance included? ☐ Yes ☑ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 100.00-300.00	$ N/A
Home maintenance (repairs and upkeep)	$ 80.00	$ N/A
Food	$ 300.00	$ N/A
Clothing	$ 100.00	$ N/A
Laundry and dry-cleaning	$ 50.00	$ N/A
Medical and dental expenses	$ 23.22	$ N/A

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 200.00	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ 200.00	$ N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$ N/A
Life	$ 0	$ N/A
Health	$ N/A	$ N/A
Motor Vehicle	$ 80.00	$ N/A
Other: NONE	$ N/A	$ N/A
Taxes (not deducted from wages or included in mortgage payments)		
(specify): NONE	$ N/A	$ N/A
Installment payments		
Motor Vehicle	$ 0	$ N/A
Credit card(s)	$ 0	$ N/A
Department store(s)	$ 0	$ N/A
Other: NONE	$ 0	$ N/A
Alimony, maintenance, and support paid to others	$ N/A	$ N/A
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ N/A	$ N/A
Other (specify): N/A	$ N/A	$ N/A
Total monthly expenses:	$ 1333.22	$ N/A

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? N/A

If yes, state the attorney's name, address, and telephone number:
She's handling my case probono, I pay expenses.
Lauren Ray Anderson
247 E Lister
Shreveport L.A. 71101 (210) 957-9929

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? N/A

If yes, state the person's name, address, and telephone number: N/A

12. Provide any other information that will help explain why you cannot pay the costs of this case.
I have no Income at present, I became ill, had Major Open Heart Surgery and havent been able to work. I have been denied disability and spouse divorced me.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 6-24, 2022

Jeanette C Washington

State of Texas

County of Bexar

KRISTINA I DAVIDSON
Notary Public, State of Texas
My Comm. Exp. 04-21-2026
ID No. 12979164-3

This instrument was acknowledged before me on June 24 2022

By

No. _____

_____

IN THE

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_____

Francette C Washington PETITIONER
(Your Name)

VS.

_____ — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

☐ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

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☑ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☑ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____

_____, or

☐ a copy of the order of appointment is appended.

Francette C Washington
(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Francette Washington, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$_____	$_____	$_____	$_____
Self-employment	$_____	$_____	$_____	$_____
Income from real property (such as rental income)	$_____	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$_____	$_____
Gifts	$ 300.00	$_____	$_____	$_____
Alimony	$_____	$_____	$_____	$_____
Child Support	$_____	$_____	$_____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$ 311.10	$_____	$ 311.10	$_____
Disability (such as social security, insurance payments)	$_____	$_____	$_____	$_____
Unemployment payments	$_____	$_____	$_____	$_____
Public-assistance (such as welfare)	$_____	$_____	$_____	$_____
Other (specify): _____	$_____	$_____	$_____	$_____
Total monthly income:	$ 311.10	$_____	$ 311.10	$_____

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
_____	_____	_____	$_____
_____	_____	_____	$_____
_____	_____	_____	$_____

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
_____	_____	_____	$_____
_____	_____	_____	$_____
_____	_____	_____	$_____

4. How much cash do you and your spouse have? $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
Security Federal Credit Union	$ 100.00	$_____
USAA	$ 500.00	$_____
_____	$_____	$_____

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model 2010 Nissan Altima Coupe
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
_____	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$_____	$_____
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 180.00-200.00	$_____
Home maintenance (repairs and upkeep)	$_____	$_____
Food	$ 300.00	$_____
Clothing	$_____	$_____
Laundry and dry-cleaning	$_____	$_____
Medical and dental expenses	$ 23.22	$_____

	You	Your spouse
Transportation (not including motor vehicle payments)	$_____	$_____
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$_____	$_____
Life	$_____	$_____
Health	$_____	$_____
Motor Vehicle	$ 80.00	$_____
Other: _____	$_____	$_____
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$_____	$_____
Installment payments		
Motor Vehicle	$_____	$_____
Credit card(s)	$_____	$_____
Department store(s)	$_____	$_____
Other: _____	$_____	$_____
Alimony, maintenance, and support paid to others	$_____	$_____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$_____	$_____
Other (specify): _____	$_____	$_____
Total monthly expenses:	$_____	$_____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:
She's handling this (my) case pro-bono. I pay the expenses.

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.
I have no income at present I became ill had major open heart surgery and haven't been able to work I been denied disability and spouse divorced me.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 2, 2022

Jeanette C Washington
(Signature)

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Francette Washington, PETITIONER

vs.

VIA Metropolitan Transit, et al., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Lauren Ray Anderson, Esq.
Attorney for Ms. Francette Washington
247 E. Lister St.
Shreveport, Louisiana 71101
Phone no.: 210/957-9929

QUESTIONS PRESENTED

Does the Family and Medical Leave Act (FMLA) prohibit employers from placing employees in undesirable positions, temporarily and with the same pay, as retaliation for taking off work in order to attend to personal medical matters?

LIST OF PARTIES

VIA Metropolitan Transit, San Antonio, Plaintiff's employer

Virginia Rodriguez, employee of VIA, Plaintiff's supervisor

Andres Garza, VIA employee, Plaintiff's supervisor

Michael Martinez, VIA employee, Plaintiff's supervisor

RELATED CASES

None.

TABLE OF CONTENTS **PAGE**

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided Petitioner's case was March 8th, 2022. Petitioner did not file a request for rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

At issue in this case is the Family and Medical Leave Act (29 CFR Part 825), a federal law. Specifically, as it pertains to Plaintiff's case, the following statutes are questioned:

Subpart A - Coverage Under the Family and Medical Leave Act

§ 825.100 The Family and Medical Leave Act.

(c) An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits, and working conditions at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave;

§ 825.113 Serious health condition.

(a) For purposes of FMLA, *serious health condition* entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115.

§ 825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.

(a) *Transfer or reassignment.* If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee, a family member, or a covered servicemember, including during a period of recovery from one's own serious health condition, a serious health condition of a spouse, parent, son, or daughter, or a serious injury or illness of a covered servicemember, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily, during the period that the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. *See* § 825.601 for special rules applicable to instructional employees of schools.

(c) *Equivalent pay and benefits.* The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employer may

also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employer may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employer may proportionately reduce benefits such as vacation leave where an employer's normal practice is to base such benefits on the number of hours worked.

(d) *Employer limitations.* An employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employer to

make such a transfer will be held to be contrary to the prohibited acts of the FMLA.

(e) *Reinstatement of employee.* When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he or she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

§ 825.214 Employee right to reinstatement.

General rule. On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. *See also* § 825.106(e) for the obligations of joint employers.

§ 825.215 Equivalent position.

(a) *Equivalent position.* An equivalent position is one that is virtually identical to the employee's former position in terms

of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(e) *Equivalent terms and conditions of employment.* An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (*i.e.*, one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(4) FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes.

(f) *De minimis exception.* The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis, intangible, or unmeasurable aspects of the job.

STATEMENT OF THE CASE

Petitioner was an employee of VIA Metropolitan Transit, the bus system, in San Antonio, Texas. She began part-time, as a

telephone operator. Gradually, she worked her way up to become a full-time field representative, and she enjoyed this position very much.

In 2015, Petitioner had to undergo major open-heart surgery and required some FMLA leave. When she returned from that recuperation period, VIA insisted that Petitioner be placed in a position as a telephone operator, again.

As a telephone operator, VIA employees are expected to work in a noisy call center, sit on the phone, constantly, answering calls and giving bus information to customers, some of whom are often irate. It is a very hectic and chaotic environment. It is also a position which VIA has trouble staffing, with a high turnover rate, because it is such a stressful and undesirable position.

As a field representative, VIA employees are expected to be at a particular location, called Park and Rides, give information and sell passes and tickets, directly to customers. It is face-to-face interaction, and field representatives have more space, solitude, and freedom to exist and interact with the customers.

The position of field representative is much more low-stress than that of a telephone operator; and, said position as a field operator was more compatible with Petitioner's health condition, because of the low amount of stress involved. When

the doctors repaired Petitioner's heart, in 2015, they were not able to fully restore the heart into perfect working order. Petitioner was left with atrial fibrillation and instructed by her doctors to take the appropriate medication and limit stress, because people with atrial fibrillation are at a higher risk for stroke and heart attack. Having a low-stress job is extremely important to Petitioner, because her life depends on it.

People with heart conditions need to be consistently monitored by their healthcare providers, so they often require time off from normal work hours. Oftentimes, when Petitioner needed to take time off work, to address her healthcare, when she returned to work, she was placed back in the call center. Being placed in the undesirable position was in direct correlation to Petitioner taking time off work to attend to her healthcare matters.

Petitioner attempted to address these issues with VIA, through the grievance process, before finally quitting her job (after a visit to the emergency room). VIA was non-responsive and basically said "that is our policy, end of discussion."

Eventually, in 2019, Petitioner filed suit in state court, in San Antonio, Texas; and, Respondents removed it to Federal Court, in the Western District of Texas. Respondents filed numerous exceptions and requests for dismissal of Petitioner's

case, Petitioner responded, and the case was finally dismissed at the Summary Judgment phase of litigation.

In 2021, Petitioner appealed the Judgment of the District Court to the Fifth Circuit, and that court affirmed the District Court's decision.

REASONS FOR GRANTING THE PETITION

At issue herein this case is the condition and integrity of the American workforce. The pandemic taught people that they do not have to work for toxic employers. Here, VIA already had

trouble staffing their call center, because they could not provide their employees a more hospitable work environment. The decisions of the lower courts confirmed that it is OK for employers to place employees in undesirable positions, in conjunction with those employees taking FMLA leave, something the FMLA prohibits. Respondents say that the employee received the same pay, and it was only temporary; but, it was not the same condition and environment - one position was high stress, the other was low stress.

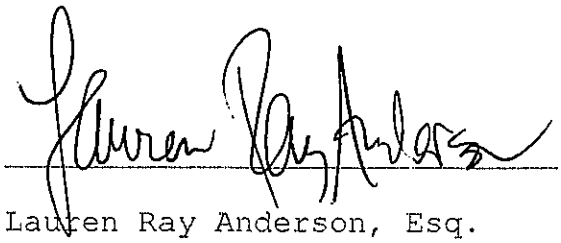
The future of the American workforce and large corporations turns on this issue - may big business continue to disregard the comfort and personal health of its employees for the sake of productivity?

People are not working, and people are irate at this time in history, because basic human rights are being denied. Will this Court continue to say that is OK?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Lauren Ray Anderson, Esq.
Attorney for Francette Washington
247 E. Lister St.
Shreveport, Louisiana 71101
Phone no.: 210/957-9929
lauren.ray.anderson@gmail.com

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Francette Washington, PETITIONER

vs.

VIA Metropolitan Transit, et al., RESPONDENTS

PROOF OF SERVICE

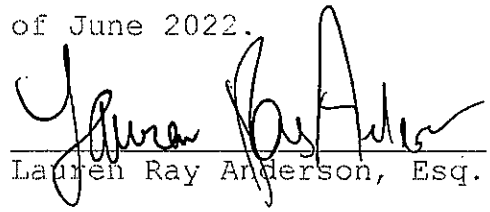
I, Lauren Ray Anderson, Esq., so swear and declare that on this date, June 3rd, 2022, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

VIA Metropolitan Transit, Virginia Rodriguez, Andres Garza, and Michael Martinez, to be served by and through their attorney of record, Donna McElroy, at 112 E. Pecan St., #1800, in San Antonio, Texas 78205.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 3rd day of June 2022.



Lauren Ray Anderson, Esq.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 8, 2022
Lyle W. Cayce
Clerk

No. 21-50347

FRANCETTE WASHINGTON,

Plaintiff—Appellant,

versus

VIRGINIA RODRIGUEZ; ANDRES GARZA; MICHAEL MARTINEZ; VIA METROPOLITAN TRANSIT,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:18-CV-316

Before WIENER, GRAVES, and DUNCAN, *Circuit Judges*.

PER CURIAM:*

Francette Washington appeals the district court's grant of summary judgment to the defendants-appellees in an action for retaliation under the Family Medical Leave Act (FMLA). *See* 29 U.S.C. § 2612. After

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

Appendix A

consideration of the briefs, record, and applicable law, the order of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FRANCETTE WASHINGTON,	)	
	)	
Plaintiff,	)	
	)	
V.	)	CIVIL ACTION NO. SA-18-CA-316-FB
	)	
VIRGINIA RODRIGUEZ, ANDRES GARZA, MICHAEL MARTINEZ, and VIA METROPOLITAN TRANSIT,	)	
	)	
Defendants.	)	

JUDGMENT

The Court considered the Judgment to be entered in this case. Pursuant to the Order Accepting Report and Recommendation of United States Magistrate Judge signed this date,

IT IS ORDERED, ADJUDGED and DECREED that the Report and Recommendation of United States Magistrate Judge (Docket Entry 107) is accepted pursuant to 28 U.S.C. § 636(b)(1) such that Defendants' Motions for Summary Judgment (Docket Entries 97, 98) are GRANTED and the individual Defendants' Motions to Strike (Docket Entries 101, 103, 105) are DENIED as MOOT.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the above styled and numbered cause is DISMISSED WITH PREJUDICE. Motions pending with the Court, if any, are Dismissed as Moot and this case is CLOSED.

It is so ORDERED.

SIGNED this 30th day of March, 2021.

FRED BIERY
UNITED STATES DISTRICT JUDGE

Appendix B

Tab 4

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FRANCETTE WASHINGTON, Plaintiff, V. VIRGINIA RODRIGUEZ, ANDRES GARZA, MICHAEL MARTINEZ, and VIA METROPOLITAN TRANSIT, Defendants.	CIVIL ACTION NO. SA-18-CA-316-FB

ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Before the Court is the Report and Recommendation of United States Magistrate (Docket Entry 107) concerning the Motions for Summary Judgment filed by Defendant VIA Metropolitan Transit ("VIA") (Docket Entry 97) and Defendants Rodriguez, Garza, and Martinez (Docket Entry 98), as well as the Opposed Motions to Strike (Docket Entries 101, 103, 105) filed by Defendants Rodriguez, Garza, and Martinez, along with plaintiff's written objections (docket no. 113) thereto and defendants' response (docket no. 114) to plaintiff's objections.

Where no party has objected to a Magistrate Judge's Report and Recommendation, the Court need not conduct a de novo review of the Report and Recommendation. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the Report and Recommendation and determine whether it is clearly erroneous or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 492 U.S. 918 (1989).

On the other hand, any Report and Recommendation to which objection is made requires de novo review by the Court. Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct a de novo review

Appendix C

when the objections are frivolous, conclusive, or general in nature. *Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

The Court has thoroughly analyzed the parties' submissions in light of the entire record. As required by Title 28 U.S.C. § 636(b)(1)(c), the Court has conducted an independent review of the entire record in this cause and has conducted a de novo review with respect to those matters raised by the objections. After due consideration, the Court concludes the objections lack merit.

IT IS THEREFORE ORDERED the Report and Recommendation of United States Magistrate (docket no. 107) is ACCEPTED pursuant to 28 U.S.C. § 636(b)(1) such that Defendants' Motions for Summary Judgment (Docket Entries 97, 98) are GRANTED and the individual Defendants' Motions to Strike (Docket Entries 101, 103, 105) are DENIED as MOOT.

IT IS FURTHER ORDERED that the above styled and numbered cause is DISMISSED WITH PREJUDICE. Motions pending with the Court, if any, are Dismissed as Moot and this case is CLOSED.

It is so ORDERED.

SIGNED this 30th day of March, 2021.

FRED BIERY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FRANCETTE WASHINGTON, Plaintiff, v. VIRGINIA RODRIGUEZ, ANDRES GARZA, MICHAEL MARTINEZ, and VIA METROPOLITAN TRANSIT, Defendants.	§ § § § § § § § § § §	SA-18-CA-316-FB (HJB)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

To the Honorable Fred Biery, United States District Judge:

This Report and Recommendation concerns the Motions for Summary Judgment filed by Defendant VIA Metropolitan Transit ("VIA") (Docket Entry 97) and Defendants Rodriguez, Garza, and Martinez (Docket Entry 98), as well as the Opposed Motions to Strike (Docket Entries 101, 103, 105) filed by Defendants Rodriguez, Garza, and Martinez. Pretrial matters in this case have been referred by the District Court to the undersigned for consideration. (*See* Docket Entry 25.)

For the reasons set out below, I recommend that the Defendants' Motions for Summary Judgment (Docket Entries 97, 98) be **GRANTED** and the individual Defendants' Motions to Strike (Docket Entries 101, 103, 105) be **DENIED AS MOOT**.

I. Jurisdiction.

Plaintiff Francette Washington alleges violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq.*; the Americans with Disabilities Act of 1990

Tab 5

("ADA"), 42 U.S.C. §§ 12112, *et seq.*; and the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§2601, *et seq.* (See Docket Entry 1.) The Court exercises original jurisdiction over these claims pursuant to 28 U.S.C. § 1331. I have authority to issue this Report and Recommendation pursuant to 28 U.S.C. § 636(b).

II. Background.

A. *Factual Background.*

Plaintiff began her employment with VIA around March 1994 as a part-time Information Field Representative. (Docket Entry 97-4, at 3–4.) During her employment, she applied for promotions to the positions of either full-time Telephone Operator or full-time Field Representative, but she was not promoted to either position. (*Id.* at 8.) On March 23, 2008, she once again applied for promotion to the position of full-time Information Field Representative and was awarded the position. (*Id.* at 7.) She has held no other positions at VIA.

The job description of an Information Field Representative includes "Receiv[ing] and distribut[ing] Lost and Found articles according to policy . . . .[and] [a]nswer[ing] customer inquiries regarding departures, arrivals, stops, destinations of scheduled buses, fares and general questions concerning transportation services and policies." (Docket Entry 97-14, at 1.) Some of the job responsibilities of a Field Representative include "answering customer inquiries promptly and accurately," "assist[ing] department in answering incoming phone calls pertaining to VIA's services and policies," and "other duties" as required. (*Id.* at 1–2.) Field Representatives are assigned to different VIA locations, known as Park and Ride locations, based on a bidding process.

(Docket Entry 97-12, at 2.) A Field Representative will remain at the Park and Ride location she has been assigned to until a change in staffing causes a vacancy; afterwards, reassignments to Park and Ride locations are once again determined through a bidding process. (*Id.*)

Part of a Field Representative's employment also involves work at the Information Center, a customer service call center. (Docket Entry 97-12, at 3.) Field Representatives are regularly assigned to the Information Center if they either unexpectedly miss work or return to work early in the middle of a pre-set scheduling period. (*Id.*) In order to assist customers, Field Representatives are required to have knowledge of bus routes, detour information, fare prices, special events, hours of operation, and other information. (Docket Entry 97-11, at 2.) VIA periodically issues written tests about these subjects to Field Representatives, although Field Representatives suffer no consequences for failing these examinations. (*Id.*) Plaintiff, however, claims these tests were designed just for her and that no other Field Representatives are required to take these tests. (Docket Entry 58, at 5.)

During her time as a VIA employee, Plaintiff had requested and been approved for FMLA leave at least three times. (Docket Entry 97-4, 10–21.) One request involved leave to care for her father, and another request involved time off for Plaintiff's open-heart surgery and recovery. (*Id.*) Each time, she returned to work with the same job title and with the same rate of compensation; Plaintiff alleges, however, that in retaliation for taking leave she was made to work at the Information Center instead of her normally scheduled Park and Ride location. (*Id.*)

On February 27, 2017, Plaintiff gave notice that she intended to resign from her job after going to the emergency room. (Docket Entry 97-4, at 42–44.) Plaintiff filed a charge of discrimination with the EEOC alleging discrimination and retaliation based on race, color, sex, age, disability, and genetic information; the EEOC issued a notice of right to sue on November 7, 2017. (Docket Entry 97-10.)

B. ***Procedural Background.***

Plaintiff originally filed this case on February 9, 2018, in the 288th Judicial District Court, Bexar County Texas. (Docket Entry 1-4, at 1.) The original petition named five individual Defendants: Virginia Rodriguez, Andrea Garza, Priscilla Ingle, Michael Martinez, and Sylvia Mendez. (*Id.*) Plaintiff stated in the caption that these Defendants were named "on behalf of VIA Metropolitan Transit"; however, VIA was not named as a defendant at that time, and Plaintiff requested service of process only as to the five individually named Defendants. (*Id.* at 1, 25.) Plaintiff's petition alleged causes of action for "Discrimination," "Retaliation," and "Harassment," and cited as applicable law Title VII, the FMLA, and the ADA. (*Id.* at 8–15.)

On April 9, 2018, the named Defendants removed the case to this Court on the basis of federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441. (Docket Entry 1.) These Defendants then moved to dismiss and for more definite statement. (Docket Entries 8, 9.) On August 2, 2018, the District Court granted these motions, dismissing any Title VII and ADA claims against the Defendants, allowing the FMLA claims against the Defendants to go forward, and requiring that Plaintiff file "an amended complaint which clearly and concisely explains

[P]laintiff's claims for retaliation brought under the FMLA." (Docket Entry 17, at 1; *see also* Docket Entry 16.)

On August 22, 2018, Plaintiff filed an "Amended Complaint Explaining Claims for Retaliation Brought Under the FMLA." (Docket Entry 22.) This document raised only the FMLA retaliation claim. (*Id.* at 12.) Along with the individual Defendants, VIA was named as a Defendant despite the fact that the complaint did not name VIA in the caption. After the amended complaint was filed, no summons was requested, issued, or served on VIA. On October 2, 2018, Plaintiff filed a motion for leave to file an amended complaint. (Docket Entry 49.) In the proposed amended complaint, Plaintiff finally named VIA as a Defendant in the caption, renewed her harassment and discrimination claims in addition to the retaliation claim, and again cited Title VII and the ADA in addition to the FMLA. (Docket Entry 49-1, at 1, 8–14.)

The cases against individual Defendants Jeffery Arndt, Sylvia Mendez, and Priscilla Ingle were then dismissed. (Docket Entry 54.) Additionally, any reasserted Title VII or ADA claims were dismissed against the remaining individual Defendants, Martinez, Rodriguez, and Garza . (*Id.*) The Court required Plaintiff to serve Defendant VIA, who was served on January 7, 2019. (Docket Entry 69.)

On November 20, 2020, Defendant VIA and the remaining individual Defendants filed their respective motions for summary judgment. (Docket Entries 97, 98.) Plaintiff appeared to respond only to the individual Defendants' motion, attaching two email exhibits as evidence. (Docket Entry 99.) The individual Defendants replied (Docket Entry 100), and Plaintiff filed a

sur-reply without seeking authorization from the Court (Docket Entry 102). Defendants sought to have the unauthorized sur-reply struck. (Docket Entry 103.) Defendants also sought to strike the two exhibits attached to Plaintiff's response (Docket Entries 99-1, 99-2), as inadmissible hearsay (Docket Entry 101). Plaintiff responded to Defendant's motion to strike her attachments (Docket Entry 104), and Defendants also moved to strike this response (Docket Entry 104) as being untimely (Docket Entry 105), a motion to which Plaintiff likewise responded (Docket Entry 106).

III. Analysis.

A. *Summary Judgement.*

A party is entitled to summary judgment under Federal Rule of Civil Procedure 56 if the record shows no genuine issue as to any material fact exists and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). A party against whom summary judgment is sought may not rest on the allegations or denials in her pleadings, but must come forward with sufficient evidence to demonstrate a "genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute concerning a material fact is "genuine," and therefore sufficient to overcome a summary judgment motion, "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting FED. R. CIV. P. 56).

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (citations omitted). "Although the evidence is viewed in the light most favorable to the nonmoving party, a nonmovant may not rely on 'conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence' to create a genuine issue of material fact sufficient to survive summary judgment." *Barrera v. MTC, Inc.*, No. SA-10-CV-665-XR, 2012 WL 1202296, at *2 (W.D. Tex. Apr. 10, 2012) (quoting *Freeman v. Tex. Dep't of Crim. Just.*, 369 F.3d 854, 860 (5th Cir. 2004)).

Based on the previous rulings in this case, Plaintiff's remaining claims are (1) Plaintiff's Title VII, ADA discrimination, ADA harassment, and FMLA claims against VIA, and (2) Plaintiff's FMLA claims against three remaining individual Defendants. This Report and Recommendation first considers the discrimination claims, then the harassment claim, and finally the FMLA claims.

1. *Plaintiff's Discrimination Claim against VIA under Title VII and the ADA.*

Title VII prohibits an employer from discriminating against an individual on the basis of race, color or sex. *See* 42 U.S.C. § 2000e-2. The ADA prevents discrimination against an individual with a disability on the basis of that disability. *See* 42 U.S.C. § 12112(a). When a plaintiff attempts to prove discrimination through circumstantial evidence, the Court must evaluate

her claims under the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). "Under the modified *McDonnell Douglas* approach, the plaintiff must first demonstrate a *prima facie* case of discrimination; the defendant then must articulate a legitimate, non-discriminatory reason for its decision . . . ; and, if the defendant meets its burden of production, the plaintiff must then offer sufficient evidence to create a genuine issue of material fact that either (1) the employer's reason is a pretext or (2) that the employer's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic." *Burrell v. Dr. Pepper/Seven Up Bottling Grp., Inc.*, 482 F.3d 408, 411–12 (5th Cir. 2007) (describing burden shifting analysis under Title VII); *see also Clark v. Champion Nat'l Sec., Inc.*, 952 F.3d 570, 582 (5th Cir. 2020) (describing burden shifting analysis under the ADA).

To establish a *prima facie* case of discrimination, Plaintiff must show that (1) she is a member of a protected class; (2) she was qualified for the position; (3) she was subject to an adverse employment action; and (4) there were other similarly situated employees outside of her protected class were treated more favorably. *See Standley v. Rogers*, 680 F. App'x 326, 327 (5th Cir. 2017) (quoting *Bryan v. McKinsey & Co., Inc.*, 375 F.3d 358, 360 (5th Cir. 2004)). Defendant VIA's argument centers around the third factor, whether Plaintiff suffered an adverse employment action. (Docket Entry 97, at 12.) Adverse employment actions are "ultimate employment decisions such as hiring, firing, demoting, promoting, granting leave, and compensating." *Stroy v. Gibson on behalf of Dep't of Veterans Affs.*, 896 F.3d 693, 699 (5th Cir. 2018) (internal quotations omitted). "This includes demotions or transfers to an objectively worse position, such

as one that is less prestigious or less interesting or provides less room for advancement." *Id.* (citing *Alvarado v. Tex. Rangers*, 492 F.3d 605, 613 (5th Cir. 2007)). "[A]n employment action that does not affect job duties, compensation, or benefits is not an adverse employment action." *Id.* (quoting *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 282 (5th Cir. 2004)).

The adverse employment actions that Plaintiff appears to allege in this case are (1) being "sent to the phones"—to work at the Information Center, and (2) being made to take written tests. (Docket Entry 99, at 8.) Plaintiff's allegations of being assigned to work at the Information Center parallel the allegations she makes in conjunction with her FMLA claim, and is discussed in Part III(A)(3)(a), *infra*. With regard to the tests, the evidence in the record suggests that tests about general knowledge relating to bus routes, detour information, special events and other similar information were routinely administered to Information Field Representatives.[1] (Docket Entry 97-11, at 2.) These written tests have been administered to Information Field Representatives at VIA for more than fifteen years. (*Id.*) While Plaintiff alleges in pleadings that these tests were created for her specifically and that no other employee were required to take these tests, she admitted in her deposition that she did not know if any other employees were made to take these written tests or not. (Docket Entry 97-4, at 24.) She also acknowledges that there were no official ramifications

[1] There is a factual dispute about whether Plaintiff was administered her first test in 2012, but the exact date of her first test is not material to the issue of harassment or discrimination.

for failing any of these tests besides being required to take it again. (*Id.*) Given this undisputed evidence, being made to take tests did not constitute an adverse employment action.

2. *Plaintiff's Harassment Claim under the ADA.*

In addition to protecting against discrimination, the ADA prohibits harassment on the basis of disability. To prevail on a claim of disability-based harassment, "the plaintiff must prove: (1) that she belongs to a protected group; (2) that she was subjected to unwelcome harassment; (3) that the harassment complained of was based on her disability or disabilities; (4) that the harassment complained of affected a term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt, remedial action." *Clark*, 952 F.3d at 585. The harassment perpetuated against the plaintiff must be sufficiently pervasive or severe as to alter the conditions of employment and create an abusive working environment. *Id.* In determining whether a work environment is abusive, the Court considers the entirety of the evidence in the record, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating as opposed to a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Id.*

Plaintiff alleges harassment based on repeated requests for doctor's notes to verify her FMLA leave, ridicule from her managers and supervisors about her condition, repeated calls during off-work hours while she was sick, and contact between her doctors and her managers. (Docket Entry 58, at 8.) There is no corroborating evidence regarding ridicule about Plaintiff's

disability or multiple calls being made to Plaintiff during her off hours. When asked during deposition how many times Defendants requested doctor's notes from her, Plaintiff could not remember, but knew that it had been "numerous." (Docket Entry 97-4, at 30–32.) Beyond this conclusory statement, there is evidence of only one instance of Defendants contacting Plaintiff's physician: an inquiry sent to Plaintiff's physician regarding the lifting and bending limitations he had imposed on Plaintiff while recovering from heart surgery, accompanied by photographs of the ways an Information Field Representative might have to rotate her torso in order to perform her job. (Docket Entry 97-16.) The letter requested information about whether Plaintiff would be able to complete the actions demonstrated. (*Id.*) This letter does not qualify as harassment, and Plaintiff's vague allusion to "numerous" requests for doctor's notes does not provide sufficient evidence to demonstrate the level of pervasiveness necessary to raise an issue on summary judgment. *See Clark*, 952 F.3d at 585–86.

Plaintiff indicates that she intends to rely on live testimony as evidence of her case, mainly her own testimony and contradictions found in the Defendant's testimony. (Docket Entry 99, at 4.) She also might rely on the testimony of others, such as former co-workers or healthcare professionals. (*Id.* at 4–5.) However, at the summary judgment stage, the nonmovant must produce more than a promise of future evidence to support her claims. *See* FED. R. CIV. P. 56; *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 49 (1st Cir. 1990). The evidence produced at this stage does not reveal a genuine issue of material fact which a reasonable jury might find in Plaintiff's

favor. Therefore, summary judgment should be granted as to Plaintiff's harassment claim under the ADA.

3. *Plaintiff's FMLA Claims.*

Plaintiff has made FMLA claims against both VIA and the individual Defendants. Both sets of claims fail.

a. Plaintiff's claim against VIA.

To succeed on a claim for retaliation under the FMLA, a plaintiff must show (1) that she was protected under the FMLA; (2) that she suffered an adverse employment decision; and (3) either (a) that she was treated less favorably than an employee who had not requested leave under the FMLA, or (b) that the adverse decision was made because she took FMLA leave. *Hunt v. Rapides Healthcare Sys., LLC*, 277 F.3d 757, 768 (5th Cir. 2001), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). VIA admits that Plaintiff was protected under the FMLA, but argues that she suffered no adverse employment decision and was neither treated less favorably than other employees who did not take leave under the FMLA, or treated adversely because she took such leave. (Docket Entry 97, at 18–19.)

Plaintiff acknowledges that, after each instance of FMLA leave, she returned to the same job title and compensation rate. (Docket Entry 97-4, at 10–21.) Instead, Plaintiff appears to allege that the main adverse employment decision she suffered was being "sent to the phones,"—*i.e.*, being assigned to work at the Information Center, a "notoriously undesirable job at VIA." (Docket Entry 99, at 1.) It is far from clear that being assigned to the Information Center is an adverse

action—answering customer phone calls and working at the Information Center is a part of the regular employment duties of an Information Field Representative. (*See* Docket Entry 97-14.) In any event, Defendant Rodriguez, a VIA Customer Services Supervisor, provides an explanation for the practice:

> I prepare the schedule ten (10) to fourteen (14) days in advance. Because the schedule is prepared in advance, Information Field Representatives are required to submit requests for vacation, appointments, or other time off two (2) weeks in advance, unless emergencies require otherwise. When there is an emergency or unpredictable medical issue, such as a sickness, we call on a "floater" or "roamer" Information Field Representative, who is not assigned a specific Park & Ride, to fill in for the absent individual.
>
> If an Information Field Representative does not timely communicate his or her plans to return from vacation, sick or medical leave, or any other absence, I am required to find coverage for his or her assigned Park and Ride. If that Information Field Representative returns from leave unexpectedly and a substitute has already been allocated to that individual's assigned Park and Ride, the returning Information Field Representative will be assigned to work at the Information Center for the day(s) or week the schedule has already been set. Once the next schedule is set, that Information Field Representative is returned to his or her assigned Park and Ride. These processes ensure the Information Field Representatives do not lose out on hours. Similarly, if an Information Field Representative has a personal appointment in the middle of a workday, the individual is assigned to work at the Information Center, so that another Information Field Representative may work at their Park and Ride for the entire day.

(Docket Entry 97-12, at 2–3 (paragraph numbers omitted).) Based on this affidavit evidence, even if being assigned to the Information Center somehow qualified as "adverse action," Plaintiff would be unable to show that she was treated less favorably than employees who had not requested leave

under the FMLA, or that the assignment decision her was made because she took FMLA leave. There is no evidence in the record to suggest that Plaintiff was assigned to the Information Center at a rate different than her coworkers based on her usage of FMLA leave. Nor can Plaintiff show that her FMLA leave was itself the cause of her assignment either in whole or in part. The causal link element is "established when the evidence demonstrates that the employer's decision[s were] . . . based in part on knowledge of the employee's protected activity." *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 684 (5th Cir. 2001) (citation omitted). In this case, Rodriguez's affidavit makes clear that the assignment was based solely on scheduling—the cause of the absence (be it FMLA leave, vacation, or otherwise) was irrelevant.

Although Plaintiff contends genuine issues of material fact exist, the only admissible evidence in the record reveals no dispute about the reason why Plaintiff was occasionally made to work at the Information Center rather than her regularly scheduled Park and Ride work.

A nonmovant may not rest on mere allegations or unsubstantiated assertions in pleadings at the summary judgement stage, but must instead produce admissible evidence of any facts genuinely in dispute. *See Barrera*, 2012 WL 1202296, at *2. Therefore, summary judgment should be granted as to this claim.[2]

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[2] For these same reasons, Plaintiff's other discrimination claims based on assignment to the Information Center also fail. *See* Part III(A)(1) *supra*.

b. Plaintiff's claim against the individual Defendants.

Like VIA, the three remaining individual Defendants argue that Plaintiff's FMLA claims fail on their merits; however, they also argue that Plaintiff cannot meet a threshold issue—that they qualify as her employers. (Docket Entry 98, at 6, 11.) For the reasons set out below, the Court should find that summary judgment should be granted for two individual Defendants—Rodriguez and Martinez—on the threshold "employer" issue. For the third individual Defendant—Garza—there may be a genuine dispute as to his status as an employer under the FMLA; however, there is no dispute that Plaintiff's retaliation claim fails on the merits.

i. *Status as an FMLA employer.*

For purposes of the FMLA, the term "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ." 29 U.S.C. § 2611(4)(A). This definition is substantially identical to that found in the Fair Labor Standards Act (FLSA). *Modica v. Taylor*, 465 F.3d 174, 186 (5th Cir. 2006). In FLSA cases, the Fifth Circuit has used the "economic reality" test when determining whether a party is an "employer" under this definition. *Gray v. Powers*, 673 F.3d 352, 354 (5th Cir. 2012). Under the economic reality test, courts must evaluate "whether the alleged employer: (1) possessed the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Id.* at 355 (citation and internal quotation marks omitted). Not every one of these tests must be met. *Orozco v. Plackis*, 757 F.3d 445, 448 (5th Cir. 2014). "The dominant theme in the case law is that

those who have operating control over employees within companies may be individually liable for FLSA violations committed by the companies," and that, due to the remedial purposes of the FLSA, courts "define employer more broadly than the term would be interpreted in traditional common law applications." *Id.* (citations and internal punctuation omitted).

Applying this test to the each of the three individual Defendants, there is no genuine dispute that two of them cannot qualify as Plaintiff's "employer."

Defendant Virginia Rodriguez. The evidence in the record reveals the following: Rodriguez serves as a Customer Service Supervisor for VIA. (Docket Entry 97-12, at 1.) Part of her job duties in this role include supervising Information Field Representatives, including Plaintiff while she was employed by VIA. (*Id.*) As part of this supervision, Rodriguez was responsible for occasionally adjusting time sheet information "for attendance and payroll purposes." (*Id.* at 2.) This means that she adjusts for discrepancies between planned hours and actual hours if, for example, an Information Field Representative input their hours early but ends up needing to take sick time or missing some time; she has done this for every Information Field Representative over the course of her employment. (*Id.* at 3–4.) As noted above, Rodriguez also prepares the weekly schedule for all Information Field Representatives, which is prepared fourteen days in advance. (*Id.* at 2, 4.) Rodriguez does not determine or know the compensation of Information Field

Representatives, does not make hiring or firing decisions[3], and does not maintain employment records. (*Id.* at 4–5.)

Based on these undisputed facts, Rodriguez was not Plaintiff's employer for FMLA purposes. Admittedly, there is enough evidence in the record to support a reasonable jury finding that Rodriguez controlled Plaintiff's schedule—although as explained above, determining the Park and Ride location at which an employee worked appears more objective rather than discretionary, being assigned to the Information Center is the result of disruption a preset schedule, and is not necessarily a managerial activity. (*See* Docket Entry 97-12, at 2–5.) However, Rodriguez did not have the authority to hire or fire Plaintiff, did not set Plaintiff's compensation rate, and did not maintain Plaintiff's employment records, the three other factors used to determine whether an individual is an "employer" under the FMLA. Even considering the dispute as to her control over Plaintiff's schedule, Defendant Rodriguez is entitled to summary judgment based on the lack of evidence as to the other three factors. *See Martin v. Spring Break '83 Prods., L.L.C.*, 688 F.3d 247, 253 (5th Cir. 2012) (holding that even if one factor of economic reality test is met, lack of evidence to support any other factor warrants summary judgment).

Defendant Michael Martinez. The evidence in the record clearly supports finding summary judgment is favor of Defendant Martinez. Like Rodriguez, Martinez works as a Customer

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[3] Rodriguez admits to encouraging Plaintiff to apply for full-time work when she was a part time Information Field Representative, but did not have any control once Plaintiff made the decision to apply.

Information Supervisor. (Docket Entry 97-13, at 1.) He supervises the Information Center where the customer service call center is located. (*Id.*) Part of this supervision includes administering written information tests about "basic knowledge of [an Information Field Representative's] job, which changes frequently (for example based on special events, Spurs games, Fiesta, etc.)." (*Id.* at 1–2.) Like Rodriguez, Martinez does not determine or know the compensation of Information Field Representatives, does not make hiring or firing decisions, and does not maintain employment records. (*Id.* at 3–4.) But unlike Rodriguez, Martinez has no role in employee schedules. Applying the economic reality rest, none of the factors suggest that Martinez was Plaintiff's employer; therefore, summary judgment should be granted as to him. *Martin*, 688 F.3d at 253.

Defendant Andres Garza. Defendant Garza is the Manager of Customer Relations for VIA. (Docket Entry 97-11, at 1.) According to Garza, he does not possess the authority to directly hire or terminate employees, but rather "make[s] recommendations which are reviewed and authorized or denied by my direct supervisor, Human Resources, and VIA's Equal Employment Office." (*Id.* at 4.) He directly and indirectly supervises Information Field Representatives, which includes creating written tests; the tests are administered by the Representative's immediate supervisor and Garza does not have access to any of the test results. (*Id.* at 3.) Garza also does not determine or approve FMLA leave; he only receives notice of approvals granted by Human Resources. (*Id.*) Garza did not set compensation rates for Plaintiff or maintain her employment records. (*Id.* at 3–4.)

As to the first economic reality factor, Garza does not have authority to make direct hiring or termination decisions, but he did play a direct role by recommending Plaintiff for her full-time position. (Docket Entry 97-11, at 4.) The ability to request removal or approval of an employee may be enough for a reasonable jury to believe that Garza had hiring and termination powers over Plaintiff. *See Itzep v. Target Corp.*, 543 F. Supp. 2d 646, 652 (W.D. Tex. 2008) (finding that defendant's request that independent contractor's employee no longer clean its stores was enough to raise of hiring and terminating authority; because independent contractor had no other stores where employee could work, request had effect of requiring termination). As to the second factor, the evidence supports a finding that Garza directly and indirectly supervised all the Information Field Representatives, and created some of the written tests required of all Information Field Representatives, but he did not create employee schedules, administer the tests, or see the test results. (Docket Entry 97-11, at 3.) As to the third or fourth factors, there is no evidence whatsoever to support a finding that Garza was Plaintiff's employer. Thus, while Plaintiff's case is weak, if the admissible evidence is viewed favorably to Plaintiff, a reasonable jury could conclude that Garza was Plaintiff's employer.

ii. *Retaliation.*

Even if Plaintiff can surpass the threshold "employer" hurdle as to Defendant Garza, she must also present evidence that raises a genuine dispute as to retaliation. However, no evidence exists in the record to support a *prima facie* case of retaliation under the FMLA against this Defendant. The undisputed evidence is that he had no role in scheduling Plaintiff's leave or return,

and while he did implement testing for Information Field Representatives (see Docket Entry 98-8, at 2), as previously noted there is no evidence that such testing was applied to Plaintiff in a retaliatory manner. *See* Part III(A)(3)(a) *supra*. Summary judgment should therefore be granted as to this Defendant as well.

B. ***Motions to Strike.***

As discussed above, considering all competent summary judgment in the record, summary judgment should be granted in favor of Defendants on all remaining claims in this case. Accordingly Defendants' motions to strike Plaintiff's pleadings (Docket Entries 101, 103, 105) may be denied as moot.

IV. Recommendation.

For the reasons set out above, I recommend that Defendants' Motions for Summary Judgment (Docket Entries 97, 98) be **GRANTED** and Defendants' Motions to Strike (Docket Entries 101, 103, 105) be **DENIED AS MOOT**.

V. Instruction for Service and Notice for Right to Object.

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested.

Written objections to this Report and Recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district

court. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). The party shall file the objections with the clerk of the court, and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149–52 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this Report and Recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

SIGNED on February 11, 2021.

Henry J. Bemporad
United States Magistrate Judge