UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

June 09, 2023

Mr. Jeffrey P. Colwell
United States District Court for the District of Colorado
Office of the Clerk
Alfred A. Arraj U.S. Courthouse
901 19th Street
Denver, CO 80294-3589

RE: **22-1216, Rolland v. Aurora Retirement, et al**
Dist/Ag docket: 1:20-CV-02338-RMR-STV

Dear Clerk:

Pursuant to Federal Rule of Appellate Procedure 41, the Tenth Circuit's mandate in the above-referenced appeal issued today. The court's April 12, 2023 judgment takes effect this date. With the issuance of this letter, jurisdiction is transferred back to the lower court.

Please contact this office if you have questions.

Sincerely,

Christopher M Wolpert
Clerk of Court

cc: Allison Joy Dodd
Ronnie R. Rolland Sr.
Kristina M. Wright

CMW/sds

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FILED
United States Court of Appeals
Tenth Circuit

April 12, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RONNIE R. ROLLAND, SR.,

Plaintiff - Appellant,

v.

AURORA RETIREMENT, LLC, d/b/a Cherry Creek Retirement Village, LLC; CENTURY PARK ASSOCIATES, LLC,

Defendants - Appellees.

No. 22-1216
(D.C. No. 1:20-CV-02338-RMR-STV)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HARTZ**, **KELLY**, and **BACHARACH**, Circuit Judges.

Ronnie R. Rolland, Sr., appeals the district court's order granting summary judgment in favor of his former employer, Cherry Creek Retirement Village

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

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(CCRV),[1] on his claims alleging retaliation and a hostile work environment. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Factual Background

Mr. Rolland, who is African American, worked as a housekeeper for CCRV. According to CCRV, beginning in July 2019, it received complaints from residents that Mr. Rolland did not properly clean their apartments. He disputed that his performance was substandard.

Mr. Rolland alleged that on August 13, 2019, his immediate supervisor, Rodney Rudolph, accused him of telling an associate that Mr. Rudolph never worked. Mr. Rolland claimed Mr. Rudolph yelled at him and threated to "get [him] back." R. at 660 (internal quotation marks omitted). Before that incident, Mr. Rolland had not had any issues with Mr. Rudolph. Mr. Rolland reported the incident to the Executive Director of the facility, Dennis Veen. Two days later, Mr. Veen met with Mr. Rolland and Mr. Rudolph to discuss Mr. Rolland's job performance and his complaints about Mr. Rudolph. This was the first time Mr. Rolland complained about Mr. Rudolph to anyone at CCRV.

According to CCRV, his job performance did not improve after the meeting. Mr. Veen met with him again to discuss the continued concerns about his job performance. On August 27, Mr. Rolland gave Mr. Veen a document titled "Title

[1] In his complaint, Mr. Rolland also named Century Park Associates as a defendant, but he did not distinguish between it and CCRV, and the motion for summary judgment referred to the defendants collectively as CCRV. The district court adopted that approach, as do we.

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VII Protected Activity Complaint for Correction." R. at 780-84. He said Mr. Rudolph was aware that he had a disability, but he did not provide specifics about the disability. He claimed Mr. Rudolph yelled "in a loud aggressive man[n]er" during the August 13 incident. R. at 780. He also said Mr. Rudolph wanted him to be fired because Mr. Rudolph was having an inappropriate sexual relationship with a female employee and continuing the relationship would be easier if Mr. Rolland were gone. Finally, he complained that his work schedule had been changed.

Over the next month, CCRV managers met with Mr. Rolland three times to discuss a possible transfer to another department, his job performance issues, his relationship with co-workers and supervisor, and expectations going forward. At the third meeting, Mr. Rolland was given a corrective action form that identified performance issues and stated that he had made an inappropriate "racial comment" during a department meeting. R. at 786. The form said he was expected to improve his performance and relationships with co-workers within two weeks. Mr. Rolland denied that he had performance issues or engaged in any inappropriate conduct. According to CCRV, Mr. Rolland received additional job training, and on one occasion, Mr. Veen and Mr. Rudolph shadowed him while he cleaned apartments, offering training and suggestions for improvement, which he failed to implement.

Within a week of receiving the corrective action form, Mr. Rolland asked to review his personnel file. When he was notified of the request the next day, Mr. Veen asked Mr. Rolland to check in about the personnel-file request at the end of his shift. Mr. Rolland did not check in with Mr. Veen.

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The next day, Mr. Rolland gave Mr. Veen a document titled "Second Title VII Protected Activity Complaint," asserting that he had been subjected to "retaliation and [a] hostile working environment [and] false write-up reports intentional[l]y." R. at 791. Specifically, he claimed the corrective action allegations were false and that Mr. Rudolph was harassing and retaliating against him for submitting the first document and for complaining at a department meeting that Mr. Rudolph "was being discriminatory . . . towards [Mr. Rolland] as compared to another non-Black employee that [Mr. Rudolph] was addressing at the meeting." R. at 793-95.

The following day, Mr. Veen scheduled a time for Mr. Rolland to review his personnel file. Soon after reviewing his file, Mr. Rolland resigned in a document titled "Notice of Constructive Discharge/Exiting Notice." R. at 800. He said he was "forced to quit [his] position" at CCRV because of "continued harassment, retaliation, [and] discrimination/creating a[] hostile work environment that interfere[d] with [his] performance." *Id.* He also said CCRV created an "intolerabl[e]" work environment in retaliation for his written and oral complaints and that allegations about his poor performance were unfounded. *Id.*

Mr. Rolland sued CCRV, asserting three Title VII claims: race discrimination, retaliation, and hostile work environment/harassment. Because he does not pursue his race discrimination claim on appeal, we do not address it here and focus instead only on the other two claims. For his hostile work environment/harassment claim, Mr. Rolland alleged that CCRV unlawfully harassed him and created a hostile work environment by imposing what he characterized as a baseless workplace corrective

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action against him and because Mr. Rudolph falsely accused him of making racial slurs during a meeting. For his retaliation claim, Mr. Rolland alleged that CCRV retaliated against him and constructively discharged him for complaining about Mr. Rudolph at the department meeting and in the two documents he gave Mr. Veen.

CCRV filed a motion for summary judgment, which Mr. Rolland opposed. He also moved to exclude two affidavits CCRV submitted in support of its motion. A magistrate judge recommended that the district court grant the motion for summary judgment and deny the motion to exclude. On de novo review, the district court overruled Mr. Rolland's objections, adopted the magistrate judge's recommendation, granted summary judgment for CCRV, and denied the motion to exclude.

II. District Court's Order

A. Summary Judgment

In ruling on CCRV's motion for summary judgment, the district court considered Mr. Rolland's claims using the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Under that framework, Mr. Rolland had the initial burden of establishing a prima facie case of hostile work environment/harassment and retaliation. *See id.* at 802. The court held that he failed to meet his burden for either claim.

The district concluded that Mr. Rolland failed to meet his burden of showing a prima facie case because he presented no evidence of "race-based harassment, let alone harassment that rises to the level of a hostile work environment." R. at 1236 (footnote omitted); *see Bolden v. PRC Inc.*, 43 F.3d 545, 551 (10th Cir. 1994)

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(a plaintiff claiming a racially hostile work environment must show that "the harassment was pervasive or severe enough to alter the terms, conditions, or privilege of employment," and that it "was racial or stemmed from racial animus"; "[g]eneral harassment" that is not race-based is not actionable (internal citations omitted)).

For his retaliation claim, Mr. Rolland alleged that CCRV retaliated against him and constructively discharged him for complaining about Mr. Rudolph at the department meeting and in the two documents he gave Mr. Veen. Construed liberally, his pleadings asserted claims under both the participation clause and the opposition clause of Title VII. The court first concluded that he failed to establish a prima facie case under the participation clause because he had not filed an EEOC claim or otherwise "participated . . . in an investigation, proceeding, or hearing under" Title VII, 42 U.S.C. § 2000e-3(a).

With respect to his claim under the opposition clause, the court held that Mr. Rolland's oral complaint and first written complaint were not protected activity that supported a Title VII claim because they did not complain about unlawful discrimination. *See Vaughn v. Epworth Villa*, 537 F.3d 1147, 1150 (10th Cir. 2008) (to establish a prima facie case of retaliation, the plaintiff must show he engaged in protected activity, he suffered an adverse employment action, and there was a causal connection between the protected activity and the adverse action). Specifically, his complaint at the meeting accused Mr. Rudolph of general harassment, not of conduct that violated Title VII. And although Mr. Rolland's first letter used the term "Title VII Protected Activity," R. at 780, referred to "retaliation" and a "hostile working

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environment," *id.*, and said he has a disability, it did not identify the disability, assert that he was discriminated against based on his disability, or describe conduct that violated Title VII.[2] Instead, it alleged that Mr. Rudolph wanted Mr. Rolland to be fired so he could continue an affair with a co-worker.

The district court concluded that Mr. Rolland's second letter constituted protected activity because it asserted that Mr. Rudolph discriminated against him based on race. But the court noted that the only events that occurred after he sent the letter were (1) Mr. Veen scheduled a time for him to review his file, (2) Mr. Rolland reviewed the file, and (3) he resigned. It thus concluded the evidence did not support a reasonable inference that he suffered an adverse employment action as a result of sending that letter. In so concluding, the court held the evidence did not establish a claim for constructive discharge because, other than Mr. Rudolph's August 13 comment, Mr. Rolland did not "set forth any evidence detailing specific actions taken against him that he believes rendered the workplace environment intolerable." R. at 1229. And the court found that the corrective action form did not constitute constructive discharge because "negative performance evaluations do not establish constructive discharge without evidence that the reviews set the employee on a dead-end path towards termination," *id.* (brackets and internal quotation marks omitted), and there was no evidence that the form was the first step toward

[2] Mr. Rolland did not assert a claim under the Americans with Disabilities Act or allege that this letter constituted protected activity because it raised the issue of sex discrimination or sexual harassment against the co-worker.

Mr. Rolland's inevitable termination. *See Rivero v. Bd. of Regents of Univ. of N.M.*, 950 F.3d 754, 761 (10th Cir. 2020) (constructive-discharge plaintiff must show he resigned because employer discriminated against him "to the point where a reasonable person in his position would have felt . . . [he] had *no other choice* but to quit"; evidence that he resigned of his "own free will, even if as a result of the employer's actions," is insufficient to survive summary judgment (internal quotation marks omitted)); *Tran v. Trs. of State Colls. in Colo.*, 355 F.3d 1263, 1267 (10th Cir. 2004) (corrective actions and negative performance reviews are insufficient to show constructive discharge). Indeed, the court noted that the evidence suggested otherwise given that the form said he had two weeks to improve his performance and he was not terminated after that two-week period. Thus, his evidence did not raise a triable question about whether CCRV's actions made working conditions so difficult that a reasonable person in his position would have felt compelled to resign.

B. Motion to Exclude

The evidence Mr. Rolland sought to exclude was statements in two employees' affidavits and one affiant's contemporaneous notes concerning Mr. Rolland's job performance. The district court determined that disputed facts in the affidavits "may have been referenced generally in the [magistrate judge's] recitation of the statement of facts, [but] those facts were not relied on in any way by the magistrate judge in making his recommendation." R. at 1310. Accordingly, the district court adopted the magistrate judge's recommendation and denied the motion to exclude as moot.

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III. Discussion

On appeal, Mr. Rolland claims the district court: (1) erred by granting summary judgment on his hostile work environment/harassment claim; (2) mistakenly required a showing of racial discrimination to support his retaliation claim; (3) improperly relied on inadmissible hearsay in granting summary judgment and erred by denying his motion to exclude; and (4) violated his right to due process by granting summary judgment without affording him the opportunity to seek punitive damages at trial.

We review de novo the district court's decision granting CCRV's motion for summary judgment. *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1118 (10th Cir. 2014). "Summary judgment is appropriate '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.'" *Id.* (quoting Fed. R. Civ. P. 56(a)).

"We review a district court's evidentiary rulings at the summary judgment stage for abuse of discretion." *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006).

Because Mr. Rolland is proceeding without counsel, we construe his filings liberally. *See Ledbetter v. City of Topeka*, 318 F.3d 1183, 1187 (10th Cir. 2003).[3]

[3] CCRV argues that we lack jurisdiction over the appeal because Mr. Rolland's briefs do not comply with the Federal Rules of Appellate Procedure. Briefing deficiencies may result in waiver or forfeiture, *see Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007); *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005); *Eateries, Inc. v. J.R. Simplot Co.*, 346 F.3d 1225, 1232

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But we "cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

Having considered Mr. Rolland's first three arguments under the appropriate standards of review, we discern no reversible error in the district court's decision. The district court applied the correct legal standards, and we agree with its thorough and well-reasoned analysis. We therefore affirm the grant of summary judgment and denial of the motion to exclude for substantially the same reasons stated in the district court's order of July 6, 2022, which adopted the magistrate judge's recommendation dated June 1, 2022.

We do not address Mr. Rolland's fourth argument because he did not raise the issue in district court so did not preserve it for appeal. *See Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 724 (10th Cir. 1993). We nevertheless note that where, as here, the opposing party (i.e., Mr. Rolland) had notice and an opportunity to be heard and the district court reviewed the parties' briefs and supporting materials before entering judgment, the entry of judgment without a trial does not violate either the right to due process or to a trial. *See Shannon v. Graves*, 257 F.3d 1164, 1167 (10th Cir. 2001) (jury trial); *Curley v. Perry*, 246 F.3d 1278, 1284 (10th Cir. 2001) (due process).

(10th Cir. 2003), but they do not affect our jurisdiction. And Mr. Rolland's pro se briefs are sufficient to avoid waiver and forfeiture.

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IV. Conclusion

The judgment is affirmed.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-02338-RMR-STV

RONNIE R. ROLLAND, SR.,

Plaintiff,

v.

AURORA RETIREMENT, LLC, d/b/a Cherry Creek Retirement Village, LLC, and CENTURY PARK ASSOCIATES, LLC,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Scott T. Varholak

This matter comes before the Court on Defendants' Motion for Summary Judgment [#80] ("Defendants' Motion") and Plaintiff's Motion of Objection and Argument in Opposition to Defendant's Summary Judgment Motion to Exclude Insufficient Defective Hearsay Document Evidence Supporting Defendant's Summary Judgment Motion Rule F.R.E. 801, et seq./Rule 56, F.R.C.P. et seq. [#82] ("Plaintiff's Motion"). Both Motions have been referred to this Court. [#83] The Court has carefully considered the Motions and related briefing, the entire case file, and the applicable case law, and has determined that oral argument would not materially assist in the disposition of the instant Motions. For the following reasons, this Court respectfully **RECOMMENDS** that Defendants' Motion be **GRANTED** and Plaintiff's Motion be **DENIED AS MOOT**.

B.

I. UNDISPUTED FACTS

This action arises out of Plaintiff Ronnie R. Rolland Sr.'s employment with Defendant Aurora Retirement Village, LLC, d/b/a Cherry Creek Retirement Village ("ARV"). [*See generally* #64] Except where expressly noted, the relevant facts are undisputed.[1]

On March 11, 2019, Plaintiff—who is African American—was hired as a floor technician at CCRV's[2] long-term care facility in Aurora, Colorado. [#80, SOF1; *See also id.* at 1 (stating that Plaintiff is African American), #85 at 1 (same)] On June 1, 2019, Plaintiff was transferred to a housekeeper position. [*Id.* at SOF2] Plaintiff's immediate supervisor was Rodney Rudolph, an African-American male, and the Executive Director of the facility was Dennis Veen, a Caucasian male. [*Id.* at SOF3, SOF8]

Defendants maintain that, beginning in July 2019, CCRV received complaints from residents that Plaintiff did not properly clean their apartments. [*Id.* at SOF5] According

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[1] Plaintiff filed two responses to Defendants' Motion, both entitled "Plaintiff's Reply Motion and Objections in Opposition to Defendant's Summary Judgment Motion." [##81, 85] Though substantially similar, there are slight differences between the two responses. [*Id.*] The Court will thus treat the latter filed response as an amended response (the "Amended Response"). [#85] The undisputed facts are drawn the Statement of Undisputed Facts set forth in Defendants' Motion [#80 at 2-7] and Plaintiff's response to those facts as set forth in the Amended Response [#85 at 4-12]. The Court refers to the sequentially numbered facts set forth in the Statement of Undisputed Facts as "SOF#." The Court periodically cites directly to the exhibits submitted with the parties' briefing on the Motion to provide additional context as well as to address certain facts purportedly disputed by Plaintiff.

[2] Plaintiff's Amended Employment Discrimination Complaint (the "Complaint") [#64] is somewhat convoluted and difficult to follow. Plaintiff names both ARV and Century Park Associates, LLC ("Century Park") as Defendants in this action, but does not distinguish between the two Defendants. [*Id.*] Defendants' Motion likewise treats ARV and Century Park as a singular entity and refers to them collectively as CCRV. [#80 at 1] The Court will thus follow the parties' lead and refers to Defendants collectively as CCRV, without distinguishing between the two Defendants.

B.

to Defendants, two residents refused to have Plaintiff clean their apartments, one resident complained about dust, and another resident complained that Plaintiff did not know how to make a bed. [*Id.*] Plaintiff disputes that his performance was substandard. [#85 at SOF5]

On August 13, 2019, Mr. Rudolph accused Plaintiff of telling the CCRV front desk associate that Mr. Rudolph never works and "sits on his ass." [#80, SOF6; *see also* #80-4 at 118:14-122:3 (Plaintiff's deposition testimony describing incident)] Mr. Rudolph told Plaintiff that he "was going to get [Plaintiff] back" and that Plaintiff was "going to be crying." [#80-4 at 118:14-122:3] Prior to that date, Plaintiff had not had any issues with Mr. Rudolph. [#80, SOF7] On August 15, 2019, Mr. Veen met with Plaintiff and Mr. Rudolph. [*Id.* at SOF8] At that time, Plaintiff made various comments about Mr. Rudolph. [*Id.*] This was the first time that Plaintiff complained about Mr. Rudolph to anyone at CCRV. [*Id.* at SOF9]

On August 26, 2019, Plaintiff visited his doctor for "anxiety/depression related to work supervisory related issues" and was prescribed medication. [*Id.* at SOF12] The next day, Plaintiff submitted to Mr. Veen a handwritten letter entitled "Title VII Protected Activity Complaint for Correction" (the "August 27 Letter"). [*Id.* at SOF13; #80-6] In the August 27 Letter, Plaintiff indicated that Mr. Rudolph was aware that Plaintiff had a disability, but did not provide any specifics about the disability. [#80-6 at 1] Plaintiff then described the August 13 incident in which Mr. Rudolph yelled at Plaintiff and complained that Mr. Rudolph changed Plaintiff's schedule. [*Id.* at 1-3] Finally, Plaintiff indicated that Mr. Rudolph wanted Plaintiff fired because Mr. Rudolph was having an affair with his assistant and continuing the affair would be easier if Plaintiff was not around. [*Id.* at 3-5]

B.

On September 3, 2019, Plaintiff saw his doctor again for supervisory stress issues. [#80, SOF15] That same day, Mr. Veen and CCRV's Regional Director of Operations, Telia Wendell, met with Plaintiff to discuss Plaintiff's job performance issues and expectations moving forward.[3] [*Id.* at SOF14] According to Defendants, on September 24, 2019, Mr. Rudolph and the facility's Business Manager, Jennifer Garner, again met with Plaintiff to discuss complaints that Plaintiff did not fold or deliver laundry, a fact that Plaintiff disputes. [*Id.* at SOF16; #85, SOF16]

On or about October 1, 2019, Mr. Veen provided Plaintiff with a Corrective Action Form. [##80-4 at 147:2-12; 80-8] The Corrective Action From asserted that Plaintiff had not changed linens in an apartment for several weeks, had delivered wrong sheets to an apartment, and had made a resident's bed with another resident's sheets. [#80-8] The Corrective Action Form also asserted that a resident had requested that Plaintiff not clean their apartment. [*Id.*] Finally, the Corrective Action Form stated that Plaintiff made a racial comment in a department meeting. [*Id.*] The Corrective Action Form indicated that Plaintiff had been previously warned about performance issues. [*Id.*] It stated that Plaintiff was expected to improve his performance issues and relationships with coworkers within two weeks and that this was his final warning. [*Id.*] Plaintiff disputes that he had performance issues or engaged in any inappropriate conduct. [#80-4 at 147:13-18]

Plaintiff maintains that, also on October 1, 2019, he signed an Education Acknowledgment Form indicating that Plaintiff needed training in the folding of tablecloths and placing linens on the correct shelf. [##64 at 5; 85, SOF20; 80-10] A substantially

[3] Defendants maintain that Mr. Veen and Ms. Wendell discussed with Plaintiff a possible transfer to another department, but Plaintiff disputes that assertion. [*Id.* at SOF14; #85, SOF14]

B.

similar Education Acknowledgment Form was apparently placed in Plaintiff's personnel file, but the date of October 1 appears to have been altered to reflect a date of October 2.[4] [##80-9; 80-10] Defendants maintain that Mr. Rudolph completed another Education Acknowledgment Form on October 7, 2019, stating that Plaintiff needed training in housekeeping and cleaning of apartments. [##80, SOF21; 80-11] Though the October 7 Education Acknowledgment Form purports to contain Plaintiff's signature, Plaintiff maintains that he never signed the form and had never seen the form prior to litigation. [##80-11; 85, SOF21]

On October 7, 2019, Plaintiff asked to review his personnel file. [#80, SOF22] Mr. Veen was not notified of Plaintiff's request until the end of the day. [*Id.*] The next day, Mr. Veen asked Plaintiff to check in about the personnel file request at the end of his shift. [*Id.* at SOF23] Plaintiff did not check in with Mr. Veen because, according to Plaintiff, he forgot. [*Id.*]

On October 8, 2019, Plaintiff submitted to Mr. Veen another handwritten letter, this one entitled "Second Title VII Protected Activity Complaint" (the "October 8 Letter") [*Id.* at SOF 24; #80-12] In the letter, Plaintiff described his complaints as: "retaliation and hostile working environment/subjecting employee to false write-up reports intentionally." [#80-12 at 1] Plaintiff further asserted that, at some unspecified meeting, Plaintiff had accused Mr. Rudolph of discriminating against Plaintiff "as compared to another non-Black employee that he was addressing at the meeting" (the "Oral Complaint"). [*Id.* at 3-5] Plaintiff then accused Mr. Rudolph of retaliating against Plaintiff and harassing Plaintiff

[4] The purported October 2, 2019 Education Acknowledgment Form also indicated that training was conducted on September 9, 2019, a fact not included in the October 1, 2019 Education Acknowledgment Form. [##80-9; 80-10]

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in response to the August 27 Letter and the Oral Complaint. [*Id.* at 1-5] In particular, Plaintiff complained that the statements in the Corrective Action Form were false and were made in retaliation for the August 27 Letter and the Oral Complaint. [*Id.* at 3-5]

On October 9, 2019, Mr. Veen scheduled a time for Plaintiff to review his personnel file. [#80, SOF25] On October 14, 2019, Plaintiff reviewed his personnel file but he was not allowed to copy it. [*Id.* at SOF27; #80-4 at 170:6-10] On October 27, 2019, Plaintiff sent Mr. Veen a handwritten letter entitled "Notice of Constructive Discharge/Exiting Notice" (the "October 27 Letter"). [#80-13] In the October 27 Letter, Plaintiff stated that he was "forced to quit [his] position" at CCRV because of "continued harassment, retaliation, discrimination/creating a[] hostile work environment that interferes with [his] performance." [*Id.* at 1] Plaintiff further stated that the "intolerable" environment was in retaliation for his submission of the August 27 Letter and the October 8 Letter and that allegations about Plaintiff's poor performance were unfounded. [*Id.* at 1-3]

On August 6, 2020, Plaintiff, proceeding pro se, filed the instant lawsuit against ARV and Century Park. [#1] Construed liberally, the operative Complaint brings three Title VII claims: (1) discrimination based on race, (2) retaliation, and (3) hostile work environment. [#64] On November 3, 2021, Defendants filed Defendants' Motion seeking summary judgment on each of Plaintiff's claims. [#80] Plaintiff has responded to Defendants' Motion [#85] and filed Plaintiff's Motion, which seeks to exclude three affidavits filed with Defendants' Motion [#82]. Defendants have filed a consolidated response to Plaintiff's Motion and reply brief in support of Defendants' Motion. [#86]

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II. STANDARD OF REVIEW

Summary judgment is appropriate only 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); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Henderson v. Inter–Chem Coal Co., Inc.*, 41 F.3d 567, 569 (10th Cir. 1994). The movant bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact, which the movant may do "simply by pointing out to the court a lack of evidence . . . on an essential element of the nonmovant's claim" when the movant does not bear the burden of persuasion at trial. *Adler v. Wal–Mart Stores, Inc.*, 144 F.3d 664, 670–71 (10th Cir. 1998). If the moving party bears the burden of proof at trial, "the moving party must establish, as a matter of law, all essential elements of the [claim or affirmative defense on which summary judgment is sought] before the nonmoving party can be obligated to bring forward any specific facts alleged to rebut the movant's case." *Pelt v. Utah*, 539 F.3d 1271, 1280 (10th Cir. 2008). In other words, the moving party "must support its motion with credible evidence showing that, if uncontroverted, the moving party would be entitled to a directed verdict." *Rodell v. Objective Interface Sys., Inc.*, No. 14-CV-01667-MSK-MJW, 2015 WL 5728770, at *3 (D. Colo. Sept. 30, 2015) (citing *Celotex Corp.*, 477 U.S. at 331). If the movant carries its initial burden, the burden then shifts to the nonmovant "to go beyond the pleadings and set forth specific facts that would be admissible in evidence in the event of trial." *Adler*, 144 F.3d at 671 (quotation omitted).

"[A] 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (quoting *Anderson v. Liberty Lobby,*

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Inc., 477 U.S. 242, 249 (1986)). Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require submission to a jury. *See Anderson*, 477 U.S. at 248–49; *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1136 (10th Cir. 2000); *Carey v. U.S. Postal Serv.*, 812 F.2d 621, 623 (10th Cir. 1987). Evidence, including testimony, offered in support of or in opposition to a motion for summary judgment must be based on more than mere speculation, conjecture, or surmise. *Bones v. Honeywell Int'l Inc.*, 366 F.3d 869, 875 (10th Cir. 2004). A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable jury could return a verdict for either party. *Anderson*, 477 U.S. at 248. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)). In reviewing a motion for summary judgment, the Court "view[s] the evidence and draw[s] reasonable inferences therefrom in the light most favorable to the non-moving party." *See Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1213 (10th Cir. 2002).

"A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). "The *Haines* rule applies to all proceedings involving a pro se litigant." *Id.* at 1110 n.3. The court, however, cannot be a pro se litigant's advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

B.

III. ANALYSIS

Defendants' Motion seeks summary judgment on each of Plaintiffs' claims. [#80] Plaintiff's Motion seeks to exclude from summary judgment consideration three affidavits submitted with Defendants' Motion. [#82] The Court addresses each Motion below.

A. Plaintiff's Race Discrimination Claim

Plaintiff's Complaint asserts a claim for unlawful race discrimination. [#64 at 2] Under Title VII, it is unlawful for an employer to "discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). "[A]n unlawful employment practice is established," if the plaintiff can demonstrate that his race "was a motivating factor for any employment practice, even though other factors also motivated the practice." *Id.* § 2000e-2(m). A Title VII plaintiff can prove a disparate treatment claim "either (1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or (2) by using the burden-shifting framework set forth in [*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)]." *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1345 (2015).

"Direct evidence is evidence that—if believed—proves the existence of a fact in issue without inference or presumption." *Eddy v. City and Cnty. of Denver*, No. 15-cv-02539-MSK-STV, 2018 WL 1470196, at *12 (D. Colo. Mar. 26, 2018) (citing *Punt v. Kelly Servs.*, 862 F.3d 1040, 1047-48 (10th Cir. 2017)). Plaintiff has failed to cite to any direct evidence of discrimination. As a result, Plaintiff must rely upon the burden-shifting framework set forth in *McDonnell Douglas*.

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Under that framework, to make a prima facie case, a plaintiff must show that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position at issue; and (4) he was treated less favorably than others not in the protected class.[5] *Piercy v. Maketa*, 480 F.3d 1192, 1203 (10th Cir. 2007). Defendants argue that Plaintiff has failed to present evidence showing that he suffered an adverse employment action. [#80 at 9-10] The Court agrees.

An adverse employment action "includes significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Piercy*, 480 F.3d at 1203 (quotation omitted). But "a mere inconvenience or an alteration of job responsibilities" does not qualify as an adverse employment action. *Id.* (quotation omitted). Likewise, "[m]inor or trivial employment actions do not rise to the level of 'adverse actions,' and 'not everything that makes an employee unhappy is [] actionable.'" *White v. Schafer*, 738 F. Supp. 2d 1121, 1134 (D. Colo. 2010) (quoting *Robinson v. Cavalry Portfolio Servs., LLC*, 365 F. App'x 104, 114 (10th Cir. 2010)), *aff'd*, 435 F. App'x 764 (10th Cir. 2011).

Plaintiff first argues that he was discriminated against when Defendants denied Plaintiff a copy of his personnel file. [#85 at 13] But denying Plaintiff a copy of his personnel file is the type of minor or trivial action that does not constitute an adverse employment action. *Tehan v. Sacred Heart Univ.*, No. 3:06cv267 (PCD), 2008 WL

[5] If the plaintiff succeeds in making a prima facie case, then the employer must have an opportunity to articulate some legitimate, non-discriminatory reason for its action. *Young*, 135 S. Ct. at 1345. If the employer articulates such a reason, then the burden shifts back to the plaintiff to prove the employer's proffered reason was pretextual. *Id.*

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11417096, at *11-12 (D. Conn. Sept. 17, 2008) (denying employee access to her personnel file does not constitute an adverse employment action); *Martin v. Nw. Mut. Life Ins. Co.*, Nos. 05-C-209, 05-C-1097, 2008 WL 360448, at *6 (E.D. Wis. Feb. 8, 2008) (employer's failure to timely provide plaintiff with his personnel file after he was terminated did not qualify as an adverse employment action). This is especially true considering that CCRV allowed Plaintiff to *review* his file, just not *copy* it. And, in any event, Plaintiff has not identified any other employees who were permitted to copy their personnel files and, as a result, Plaintiff has failed to establish that he was treated less favorably than others not in the protected class.[6] Accordingly, Plaintiff has failed to make a prima facie case of race discrimination with respect to being denied a copy of his personnel file.

Alternatively, Plaintiff argues that he was constructively discharged. [#85 at 17] "[C]onstructive discharge is an adverse employment action." *Strickland v. United Parcel Serv.*, 555 F.3d 1224, 1230 n.4 (10th Cir. 2009). A constructive discharge claim has two elements: (1) Plaintiff was unlawfully discriminated against by the employer "to the point where a reasonable person in his position would have felt compelled to resign," and (2) plaintiff actually resigned. *Rivero v. Bd. of Regents of Univ. of New Mexico*, 950 F.3d 754, 761 (10th Cir. 2020) (quoting *Green v. Brennan*, 136 S. Ct. 1769, 1777 (2016)).

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[6] Plaintiff argues that "comparison to similar[ly] situate[d] employees is not required as part of a plaintiff['s] prima fac[ie] case" and that instead he is only required to show "circumstances giving rise to [an] inference of discrimination." [#85 at 13 (citing *Sorbo v. United Parcel Serv.*, 432 F.3d 1169, 1173 (10th Cir. 2005)]. But Plaintiff also fails to identify any evidence of circumstances by which the Court can infer that discriminatory action took place. Indeed, Plaintiff fails to present any evidence that the decision to not permit him to copy the file was made based on race. Plaintiff likewise does not produce evidence which supports his argument that the documents in his file were created fraudulently for the purpose of race discrimination, nor that the two documents in question—even if fraudulent—qualify as an adverse employment action. [*See* #85 at 14]

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To succeed on a constructive discharge claim, a plaintiff must show that the conditions of employment were objectively intolerable and that she had "no other choice but to quit." *Id.* (quotation and emphasis omitted). "The plaintiff's burden in a constructive discharge case is substantial . . . because a constructive discharge requires a showing that the working conditions imposed by the employer are not only tangible or adverse, but intolerable." *EEOC v. PVNF, LLC*, 487 F.3d 790, 805 (10th Cir. 2007) (quoting *Tran v. Trs. of the State Colls. in Colo.*, 355 F.3d 1263, 1270-71 (10th Cir. 2004)).

Here, Plaintiff has not presented any evidence of conditions that could support a constructive discharge claim. Besides the August 13 comment by Mr. Rudolph, Plaintiff has failed to set forth any evidence detailing specific actions taken against him that he believes rendered the workplace environment intolerable. And even in Plaintiff's October 27 Letter—in which he purportedly provides notice of his constructive discharge—Plaintiff merely states that his workplace was intolerable due to "continued harassment, retaliation, discrimination," without providing any specific examples of such harassment, retaliation, or discrimination. [#80-13]

Nor does the fact that Plaintiff was given a Corrective Action Form constitute a constructive discharge. "[N]egative performance evaluations do not establish constructive discharge without evidence that the reviews set the employee on a 'dead-end path towards termination.'" *Moore-Stovall v. Shinseki*, 969 F.Supp.2d 1309, 1327 (D. Kan. 2013) (quoting *Fischer v. Avanade, Inc.*, 519 F.3d 393, 411 (7th Cir. 2008)). Plaintiff has failed to provide any evidence that his Corrective Action Form was the first step in a dead-end path towards termination. Indeed, the Corrective Action Form itself indicated that Plaintiff had two weeks to improve his performance [#80-8] and, notably,

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Plaintiff was not terminated after that two-week period. [*See* ##80-4 (Corrective Action Form dated October 1, 2019); 80-13 (Plaintiff's notice of constructive discharge dated October 27, 2019)] And while it may be true that Plaintiff was unhappy at the end of his tenure working for Defendants, "not every unhappy employee has an actionable claim of constructive discharge pursuant to Title VII." *Block v. Kwal-Howells, Inc.*, 92 F. App'x 657, 662 (10th Cir. 2004) (quoting *Bolden v. PRC, Inc.*, 43 F.3d 545, 552 (10th Cir.1994)); *see also Anderson v. Clovis Mun. Schs.*, 265 F. App'x 699, 707 (10th Cir. 2008) ("[Plaintiff] may have felt 'ganged up on' and 'alone oftentimes,' but given the objective standard, an employee's subjective feelings or beliefs are not relevant in a constructive discharge claim." (quotation omitted)); *cf. Acrey v. Am. Sheep Indus. Ass'n*, 981 F.2d 1569, 1574 (10th Cir. 1992) (finding supervisor's continuous harassment made it nearly impossible for Plaintiff to continue performing her job, showing a constructive discharge). Accordingly, the Court respectfully RECOMMENDS that Defendants' Motion be GRANTED with respect to Plaintiff's race discrimination claim and that summary judgment be entered in favor of Defendants on that claim.

B. Plaintiff's Title VII Retaliation Claim

Plaintiff's Complaint seeks to bring a Title VII retaliation claim pursuant to both the participation clause and the opposition clause of 42 U.S.C. § 2000e-3(a). [#64 at 3] "The 'participation clause' provides that an employer may not retaliate against an employee 'because [the employee] has . . . *participated in any manner* in any investigation, proceeding, or hearing under' Title VII." *Vaughn v. Epworth Villa*, 537 F.3d 1147, 1151 (10th Cir. 2008) (alterations in original) (quoting 42 U.S.C. § 2000e-3(a)). "The participation clause is designed to ensure that Title VII protections are not undermined by

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retaliation against employees who use the Title VII process to protect their rights." *Id.* (quoting *Brower v. Runyon*, 178 F.3d 1002, 1006 (8th Cir. 1999)). "The 'opposition clause,' meanwhile, provides that an employer may not retaliate against an employee 'because he has opposed any practice made an unlawful employment practice' by Title VII." *Id.* (quoting 42 U.S.C. § 2000e-3(a)). The distinction is important because the Tenth Circuit has concluded that the participation clause affords broader protection to employees than does the opposition clause. *Id.* at 1151-52.

To the extent Plaintiff seeks to base his retaliation claim on the participation clause, that claim fails. The Tenth Circuit has made clear that "the participation clause applies only when an employee 'has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter'"—that is, in a formal EEOC proceeding. *Poff v. Okla. ex rel. Okla. Dep't of Mental Health & Substance Abuse Servs.*, 683 F. App'x 691, 703 (10th Cir. 2017); *see also Littlejohn v. City of N.Y.*, 795 F.3d 297, 316 (2d Cir. 2015) ("[T]he participation clause only encompasses participation in formal EEOC proceedings; it does not include participation in an internal employer investigation unrelated to a formal EEOC charge." (quotation omitted)). While the Tenth Circuit has not "addressed the limits of this clause," it has refused to apply the clause to a case where the adverse action did not have "anything to do with a pending EEOC complaint or investigation." *Poff*, 683 F. App'x at 703; *see also Mackley v. TW Telecom Holdings, Inc.*, No. 12-2774-SAC, 2013 WL 1502034, at *3 (D. Kan. April 10, 2013) (noting district courts in the Tenth Circuit have held "that the participation clause does not extend its protection to internal investigations conducted before Title VII proceedings begin"). Here, Plaintiff has not provided evidence that Defendants took any

action after Plaintiff initiated a formal EEOC proceeding and, indeed, it appears that Plaintiff did not file his charge of discrimination until December 11, 2019, nearly two months after he resigned from CCRV. [#1 at 88] Accordingly, the Court respectfully RECOMMENDS that Defendants' Motion be GRANTED to the extent Plaintiff's retaliation claim is premised upon the participation clause.

With respect to the opposition clause, Title VII makes it unlawful to retaliate against an employee for opposing employment practices made unlawful by the statute. 42 U.S.C. § 2000e-3(a). The Tenth Circuit has recognized three elements of a Title VII retaliation claim: (1) the plaintiff engaged in protected opposition to discrimination; (2) the plaintiff suffered an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action. *Petersen v. Utah Dep't of Corrs.*, 301 F.3d 1182, 1188 (10th Cir. 2002).

The first time that Plaintiff complained to anyone at CCRV about Mr. Rudolph—or anyone else at CCRV—was during the August 15, 2019 meeting between Plaintiff, Mr. Rudolph, and Mr. Veen. [#80, SOF8-9] But Plaintiff has failed to present any evidence that he asserted during that meeting that Mr. Rudolph had engaged in conduct violative of Title VII. And because "Title VII does not prohibit all distasteful practices by employers," opposition to employer's conduct is only protected by Title VII "if it is opposition to a 'practice made an unlawful employment practice by [Title VII].'" *Peterson*, 301 F.3d at 1188 (alteration in original) (second quoting 42 U.S.C. § 2000e-3(a)). As a result, Plaintiff did not engage in protected opposition to discrimination during the August 15 meeting, and that meeting cannot form the basis for Plaintiff's retaliation claim. *See Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1262-63 (10th Cir. 1998) (noting a

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prima facie case for a retaliation claim under the opposition prong requires that plaintiff engaged in opposition to Title VII discrimination); *Mackley*, 2013 WL 1502034, at *2 (finding that plaintiff's participation in internal investigation did not constitute opposition clause retaliation because "a prerequisite of a retaliation claim is that the conduct retaliated against be protected conduct"); *see also* 42 U.S.C. § 2000e-3(a) (making it unlawful to retaliate against an employee for opposing "any practice *made an unlawful employment practice* by this subchapter") (emphasis added).

Similarly, while Plaintiff entitled the August 27 Letter "Title VII Protected Activity Complaint for Correction," that letter does not actually assert any conduct violative of Title VII—in particular, it does not indicate that Plaintiff had been discriminated against on the basis of his race.[7] [#80-6] Instead, Plaintiff indicated that Mr. Rudolph wanted Plaintiff fired so that Mr. Rudolph could continue an affair with a co-worker.[8] [*Id.*] So, once again, the August 27 Letter does not constitute protected activity and cannot form the basis for a retaliation claim. *See Gunnell*, 152 F.3d at 1262; *Mackley*, 2013 WL 1502034, at *2; *see also* 42 U.S.C. § 2000e-3(a).

In the October 8 Letter, Plaintiff for the first time asserted that Mr. Rudolph had discriminated against Plaintiff.[9] [#80-12] That letter thus constitutes protected activity.

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[7] Plaintiff indicated in the letter that he has a disability, but neither identified the disability nor asserted that Mr. Rudolph was discriminating against him based upon his disability. [#80-6] In any event, Plaintiff has not brought an Americans with Disabilities Act retaliation claim.

[8] Plaintiff has not argued that he was retaliated against for raising the issue of sex discrimination or sexual harassment against the co-worker.

[9] In that letter, Plaintiff indicated that he had earlier made the Oral Complaint accusing Mr. Rudolph of discriminating against him. [#80-12 at 3-5] But the letter does not indicate when the Oral Complaint occurred, and Plaintiff has otherwise failed to present any evidence of that Oral Complaint.

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But Plaintiff has failed to allege any adverse employment action occurring after that date. Indeed, the only actions occurring after that date are: (1) Mr. Veen scheduled a time for Plaintiff to review his personnel file, (2) Plaintiff reviewed his personnel file, and (3) Plaintiff sent the October 27 Letter.[10] Since, for the reasons stated above, Plaintiff was not constructively discharged when he sent the October 27 Letter, none of the actions occurring after Plaintiff sent the October 8 Letter constitute an adverse employment action, and Plaintiff therefore cannot establish a link between the October 8 Letter and any adverse employment action. Accordingly Plaintiff's retaliation claim based upon the opposition clause fails and the Court respectfully RECOMMENDS that Defendants' Motion be GRANTED with respect to Plaintiff's retaliation claim.

C. Plaintiff's Hostile Work Environment Claim

Finally, Plaintiff's Complaint purports to allege a hostile work environment claim. [#64 at 3] A workplace "permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment

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[10] Defendants allege that, on October 11, 2019, Mr. Veen and Mr. Rudolph shadowed Plaintiff while he cleaned apartments and offered training suggestions. [#80, SOF26] Plaintiff has disputed that fact, stating instead that Mr. Veen and Mr. Rudolph "s[a]t in the livin[g]room of an apartment . . . to vindictively gather poor work performance about Plaintiff." [#85, SOF26] But Plaintiff does not offer any evidence that any action was taken as a result of this alleged gathering of information, and a change in supervision does not constitute an adverse employment action. *Tran v. Trs. of the State Colls. in Colo.*, 355 F.3d 1263, 1267 (10th Cir. 2004) (finding change in supervision did not constitute adverse employment action because such action "does not extend to a mere inconvenience or an alteration of job responsibilities" (quotation omitted)); *Keller v. Crown Cork & Seal USA, Inc.*, 491 F. App'x 908, 915 (10th Cir. 2012) ("[Plaintiff] generally complains about strict application of policies, increased supervision, write-ups, means and methods of communication with her supervisors, and restrictions on her employment relationships. . . . [T]hese issues are in the nature of ordinary workplace tribulations; they do not rise to materially adverse actions sufficient to support a claim of retaliation."). Beyond the events on October 11, Plaintiff has not offered any evidence of allegedly retaliatory conduct occurring after the October 8 Letter.

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and create an abusive working environment" constitutes a hostile work environment under Title VII. *MacKenzie v. City and Cnty. of Denver*, 414 F.3d 1266, 1280 (10th Cir. 2005), *abrogated on other grounds by Lincoln v. BNSF Ry. Co.*, No. 17-3120, 2018 WL 3945875 (10th Cir. Aug. 17, 2018). A plaintiff thus may succeed in proving a hostile work environment claim either on the pervasiveness of the race-based harassment or based upon its severity. *Id.* General harassment, however, is not actionable. *Marks v. Sessions*, No. 16-cv-02106-WYD-MEH, 2017 WL 4278498, at *4 (D. Colo. Sept. 27, 2017). Rather, the harassment must be based on a protected class—in this case, Plaintiff's race. *See id.* Moreover, Title VII does not "establish 'a general civility code,' for the workplace." *Id.* (*quoting Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)). "Accordingly, 'the run-of-the-mill boorish, juvenile, or annoying behavior that is not uncommon in American workplaces is not the stuff of a . . . hostile work environment claim.'" *Id.* (*quoting Morris v. City of Colo. Springs*, 666 F.3d 654, 664 (10th Cir. 2012)).

In considering whether a plaintiff has presented evidence sufficient to support the finding of a hostile work environment, "[t]he severity and pervasiveness of the conduct must be judged from both an objective and a subjective perspective." *O'Shea v. Yellow Tech. Servs., Inc.*, 185 F.3d 1093, 1097 (10th Cir. 1999). "[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Id.* at 1098 (quoting *Oncale*, 523 U.S. at 81). "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances . . . includ[ing] the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance;

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and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). "In demonstrating these factors, the plaintiff 'must show more than a few isolated incidents' of enmity." *Sidlo v. Millercoors, LLC*, 718 F. App'x 718, 728 (10th Cir. 2018) (quoting *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1223 (10th Cir. 2015)).

Here, Plaintiff has failed to provide evidence of any race-based harassment,[11] let alone harassment that rises to the level of a hostile work environment. Indeed, Plaintiff's response fails to even address Defendants' argument that Plaintiff has failed to provide evidence of any race-based harassment. Accordingly, the Court respectfully RECOMMENDS that Defendants' Motion be GRANTED with respect to Plaintiff's hostile work environment claim.

D. Plaintiff's Motion

Plaintiff's Motion seeks to exclude three affidavits from the Court's consideration of Defendant's Motion. [#82] Because the Court has issued its Recommendation on Defendants' Motion without considering any of the disputed facts from those affidavits, if the District Court adopts this Court's Recommendation, the Court respectfully RECOMMENDS that Plaintiff's Motion be DENIED AS MOOT.

IV. CONCLUSION

For the foregoing reasons, the Court respectfully **RECOMMENDS** that Defendant's Motion for Summary Judgment [#80] be **GRANTED**, that Plaintiff's Motion of

[11] Indeed, the only evidence presented by any party that discusses race is a disputed allegation made by *Defendant* stating that *Plaintiff* made inappropriate racial comments. [*See* #80-8 (Corrective Action Form stating that Plaintiff made a racial comment in a department meeting)].

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Objection and Argument [#82] be **DENIED AS MOOT**, and that judgment enter in favor of Defendants.[12]

DATED: June 1, 2022

BY THE COURT:

s/Scott T. Varholak
United States Magistrate Judge

[12] Within fourteen days after service of a copy of this Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings of fact, legal conclusions, and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *Griego v. Padilla (In re Griego)*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings of fact, legal conclusions, and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings of fact, legal conclusions, and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (holding that the district court's decision to review magistrate judge's recommendation *de novo* despite lack of an objection does not preclude application of "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (finding that cross-claimant waived right to appeal certain portions of magistrate judge's order by failing to object to those portions); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (finding that plaintiffs waived their right to appeal the magistrate judge's ruling by failing to file objections). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (holding that firm waiver rule does not apply when the interests of justice require review).

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Regina M. Rodriguez

Civil Action No. 20-cv-2338-RMR-STV

RONNIE R. ROLLAND, SR.,

Plaintiff,

v.

AURORA RETIREMENT, LLC, d/b/a Cherry Creek Retirement Village, LLC, and CENTURY PARK ASSOCIATES, LLC.

Defendants.

ORDER ADOPTING MAGISTRATE JUDGE RECOMMENDATION

On June 1, 2022, at ECF 91, Magistrate Judge Scott T. Varholak issued a Recommendation on the Defendants' Motion for Summary Judgment (ECF 80) and the Plaintiff's Motion of Objection and Argument in Opposition to Defendant's Summary Judgment Motion to Exclude Insufficient Defective Hearsay Document Evidence Supporting Defendant's Summary Judgment Motion (ECF 82). Magistrate Judge Varholak recommends that the Defendants' motion be granted and the Plaintiff's motion be denied as moot. The Plaintiff filed an objection to the Recommendation, at ECF 92. The Court has received and considered the Recommendation, the Objection, the record, and the pleadings. After de novo consideration, the Court **OVERRULES** the Plaintiff's objection and **ADOPTS** the Recommendation.

This Court is required to make a de novo determination of those portions of a magistrate judge's recommendation to which a specific objection has been made, and it may accept, reject, or modify any or all of the magistrate judge's findings or recommendations. Fed. R. Civ. P. 72(b).

The Magistrate Judge first recommends that the Court grant the Defendants' motion for summary judgment on Plaintiff's race discrimination claims. Magistrate Judge Varholak found that the Plaintiff has failed to establish that he suffered an adverse employment action, an essential element of his claim. The Magistrate Judge also found that the Plaintiff has failed to establish constructive discharge, in the alternative.

The Magistrate Judge secondarily recommends that the Court grant the Defendants' motion as to Plaintiff's Title VII retaliation claim. To the extent that that claim was premised on the participation clause, Magistrate Judge Varholak found that the Plaintiff has not identified any evidence that the Defendants took any action after the Plaintiff initiated formal EEOC proceedings, and Plaintiff's claim therefore fails as a matter of law. To the extent that Plaintiff's claim is premised on the opposition clause, Magistrate Judge Varholak found that the Plaintiff has not presented evidence that he engaged in protected opposition to discrimination.

Finally, the Magistrate Judge recommends that the Court grant the Defendants' motion as to Plaintiff's hostile work environment claim. Magistrate Judge Varholak found that the Plaintiff has failed to provide any evidence of race-based harassment.

The Plaintiff, proceeding pro se, filed an objection to the Magistrate Judge's recommendation. The Plaintiff first objects to Magistrate Judge Varholak's observation, at footnote 2, that:

> Plaintiff names both ARV and Century Park Associates, LLC ("Century Park") as Defendants in this action, but does not distinguish between the two Defendants. [Id.] Defendants' Motion likewise treats ARV and Century Park as a singular entity and refers to them collectively as CCRV. [#80 at 1] The Court will thus follow the parties' lead and refers to Defendants collectively as CCRV, without distinguishing between the two Defendants.

ECF 91, p. 2. Responding to this statement, the Plaintiff presents arguments regarding jurisdiction. Judge Varholak's Recommendation, however, is not premised on jurisdiction. These arguments therefore do not persuade the Court that Magistrate Judge Varholak's findings were incorrect.

The Plaintiff also presents arguments related to the affidavits that he sought to exclude as hearsay in his own motion (ECF 82). Magistrate Judge Varholak recommends that the Plaintiff's motion be denied as moot because he recommends granting the Defendants' motion without reliance on any of the disputed facts in those affidavits. The Plaintiff argues that the magistrate judge erred because he included the disputed statements in his Recommendation. On review of the briefing and the Recommendation, however, it appears that, while the disputed facts may have been referenced generally in the Recommendation's recitation of the statement of facts, those facts were not relied on in any way by the magistrate judge in making his recommendation. Reviewing this issue *de novo*, the Court therefore declines to find that the magistrate judge's findings were incorrect.

The Plaintiff also raises a series of arguments aimed at disputing the facts asserted by the Defendants. The Plaintiff argues that he never harassed the front desk associate, Maria Anderson. This fact, however, was neither relied upon by the magistrate judge in making his recommendation, nor is it material to the outcome of the Plaintiff's claims here. The Plaintiff also argues that the actions of Defendant Rudolph made him feel unsafe, and the Plaintiff makes a number of general allegations of wrongdoing by the Defendant. The Plaintiff's arguments, however, do not address the elements of his claims that the magistrate judge determined were unsupported.

The Plaintiff also appears to suggest that Defendants' motion should not be granted because the Plaintiff was permitted to amend his complaint to add allegations of aggravating factors for fraudulent alteration and forgery. The Plaintiff does not provide, nor is the Court aware, of any legal authority for such an argument. Nor does the Plaintiff's citation to other legal authority support a finding of in his favor here. Reviewing the Defendants' arguments, and considering the motion for summary judgment *de novo*, the Court agrees with the magistrate judge's determination that the Plaintiff has not presented evidence to support any of his causes of action. For these reasons, and the reasons set forth in the Recommendation, the Defendants' motion for summary judgment is **GRANTED.**

Accordingly, the Court **ORDERS:**

1. The Plaintiff's Objection to the Recommendation is **OVERRULED;**
2. The Recommendation, ECF 91, is **ACCEPTED** and **ADOPTED**;
3. The Defendant's Motion for Summary Judgment, ECF 80, is **GRANTED**;

4. Plaintiff's Motion of Objection and Argument, ECF 82, is **DENIED as moot**;

5. Judgment shall be entered in favor of the Defendants.

DATED: July 6, 2022

BY THE COURT:

REGINA M. RODRIGUEZ
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

June 1, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RONNIE R. ROLLAND, SR.,

Plaintiff - Appellant,

v.

AURORA RETIREMENT, LLC, d/b/a Cherry Creek Retirement Village, LLC, et al.,

Defendants - Appellees.

No. 22-1216
(D.C. No. 1:20-CV-02338-RMR-STV)
(D. Colo.)

ORDER

Before **HARTZ**, **KELLY**, and **BACHARACH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Additional material from this filing is available in the Clerk's Office.