APPENDIX F

Eleventh Circuit Denied Appeal

The Eleventh Circuit denied the appeal without a written explanation.

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-90033

EVELYN THOMAS,

Petitioner,

versus

QUICKTRIP CORPORATION,

Respondent.

Petition for Permission to Appeal from the
United States District Court for the
Northern District of Georgia
D.C. Docket No. 1:23-cv-03964-SDG

Before WILLIAM PRYOR, Chief Judge, and BRANCH, and LAGOA, Circuit Judges.

BY THE COURT:

Petitioner's petition for permission for interlocutory review pursuant to 28 U.S.C. § 1292(b) is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EVELYN THOMAS, Plaintiff, v. QUIK TRIP STORE 769 and QUIK TRIP STORE 786, Defendants.	CIVIL ACTION FILE NO. 1:23-cv-03964-SDG-LTW

MAGISTRATE JUDGE'S
FINAL REPORT AND RECOMMENDATION

Plaintiff Evelyn Thomas, who is proceeding *pro se*, filed the above-styled employment discrimination action on September 5, 2023. [Doc. 1]. Plaintiff Thomas asserts claims for race discrimination and retaliation against Defendants Quik Trip Store 769 and Quik Trip Store 786 (collectively, "Defendant" and/or "QuikTrip") under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, ("Title VII"). [Doc. 3 at 1, 6]. Plaintiff's Title VII claims are based on workplace incidents that occurred in March 2020 and November 2022. [Id. at 4, 7]. Both Plaintiff and Defendant have brought motions for summary judgment under Federal Rule of Civil Procedure 56. [Docs. 37, 44].

I. PRELIMINARY ISSUES AND FACTS

The Court's Local Rules require the movant for summary judgment to provide a "separate, concise, numbered statement of the material facts to which the movant contends there is no genuine issue to be tried." LR 56.1(B)(1), N.D. Ga. Local Rule 56.1(B)(1) also provides:

> Each material fact must be numbered separately and supported by a citation to evidence proving such fact. The Court will not consider any fact: (a) not supported by a citation to evidence (including page or paragraph number); (b) supported by a citation to a pleading rather than to evidence; (c) stated as an issue or legal conclusion; or (d) set out only in the brief and not in the movant's statement of undisputed facts.

Id. The respondent to the summary judgment motion is required to provide responses to each of the movant's numbered undisputed material facts. LR 56.1(B)(2), N.D. Ga. In addition, the Local Rules state:

> This Court will deem each of the movant's facts as admitted unless the respondent: (i) directly refutes the movant's fact with concise responses supported by specific citations to evidence (including page or paragraph number); (ii) states a valid objection to the admissibility of the movant's fact; or (iii) points out that the movant's citation does not support the movant's fact or that the movant's fact is not material or otherwise has failed to comply with the provisions set out in LR 56.1(B)(1).

LR 56.1(B)(2)(a)(2), N.D. Ga. The respondent is also required to include: "A statement of additional facts which the respondent contends are material and present a genuine issue for trial. Such separate statement of material facts must meet the requirements set out in LR 56.1(B)(1)." LR 56.1(B)(2)(b), N.D. Ga.

Compliance with Local Rule 56.1 is the "only permissible way . . . to establish a genuine issue of material fact" in response to the moving party's assertion of undisputed facts. Reese v. Herbert, 527 F.3d 1253, 1268 (11th Cir. 2008). "The proper course in applying Local Rule 56.1 at the summary judgment stage is for a district court to disregard or ignore evidence relied on by the respondent—but not cited in its response to the movant's statement of undisputed facts—that yields facts contrary to those listed in the movant's statement." Id. The Court must then review the movant's statement of undisputed facts and ensure – by, "[a]t the least, . . . review[ing] all of the evidentiary materials submitted in support of the motion for summary judgment" – that the movant's statement of facts is, in fact, supported. Id. at 1269 (quoting United States v. One Piece of Real Property, 363 F.3d 1099, 1101-02 (11th Cir. 2004)) (internal quotation marks omitted).

Defendant QuikTrip properly filed a Statement of Undisputed Material Facts [Doc. 44-1] in support of its summary judgment motion [Doc. 44]. Plaintiff subsequently filed a document titled "Plaintiff Motion to Deny Undisputed Material Facts for Defense Motion Summary Judgment" [Doc. 46] and another document titled "Plaintiff Motion of Undisputed Material Facts for Motion Summary Judgment" [Doc. 50]. The clerk's office properly recognized that these filings are not motions. Instead, they appear to be Plaintiff's response [Doc. 46] in opposition to Defendant's summary

judgment motion and Plaintiff's attempt to assert facts [Doc. 50] which support her claims. But these filings are not in compliance with the Local Rules, and they include few citations to the record. [Docs. 46, 50].

Although Plaintiff has moved for summary judgment, she did not file an accompanying statement of material facts as required by the Local Rules. [Doc. 37]. Plaintiff's motion is also woefully deficient in terms of substance. In her two-page summary judgment motion, Plaintiff states that she is entitled to summary judgment on her employment discrimination claims because she "is needed in Jamaica to help begin planning the funeral" for her father, and because Defendant's leadership did not prevent escalation of verbal altercations in the workplace. [Id.]. Plaintiff, however, offers no substantive arguments in support of her claims and, like her other filings, she includes almost no citations to the record. [Id.]. In addition, for the reasons discussed below, the Court finds that Defendant's summary judgment motion must be granted. The undersigned, thus, **RECOMMENDS** that Plaintiff's Motion for Summary Judgment [Doc. 37] be **DENIED**.

Plaintiff also has not offered a response which "directly refute[s] the material facts set forth in [Defendant QuikTrip's] statements of material facts with specific citations to evidence, and it otherwise failed to state a valid objection to the material facts." Williams v. Slack, 438 F. App'x 848, 850 (11th Cir. 2011). Thus, under the

Local Rules, the "Court will deem each of the movant's facts as admitted" insofar as the record supports each fact. In addition, to the extent Plaintiff's various "motions" consist of conclusory allegations, legal conclusions, or statements which are unsupported by the record, they will not be considered by the Court. In accordance with the foregoing principles, the following facts are deemed to be true for the limited purpose of evaluating Defendant QuikTrip's Motion [Doc. 44] for Summary Judgment.

Defendant QuikTrip Corporation operates more than 150 gasoline retail convenience stores in the Atlanta, Georgia market. [Doc. 44-1, Defendant's Statement of Undisputed Material Facts ("DSMF") ¶ 1]. Each store has a Store Manager who reports to a Store Supervisor. [Id.]. Jay Fuston was a Store Supervisor who supervised numerous QuikTrip stores and Store Managers in the Atlanta area. [DSMF ¶ 2]. Under QuikTrip policy and practice, Store Managers had no authority to issue reprimands, warnings, or other discipline to, or dismiss, store employees without his approval. [Id.]. Boris Stephens, who identifies as African American, was a Store Manager for Store 786 in 2021 and 2022. [DSMF ¶ 3].

Defendant QuikTrip maintains an Equal Employment Opportunity Policy which provides for equal treatment of all persons and expressly "prohibits discrimination in employment, promotion, demotion, transfer, recruiting, layoff, termination, training, benefits, or wages of employees." [DSMF ¶ 10]. QuikTrip also maintains a

disciplinary action policy and a harassment policy that Plaintiff received training regarding. [DSMF ¶ 11]. Plaintiff admits that she was aware of QuikTrip's grievance or dispute resolution policy and harassment policy but never filed a grievance under either policy. [Id.]. The Disciplinary Action Policy provides for written reprimands and warnings short of dismissal. [DSMF ¶ 11; Smith Declaration ("Dec."), Ex. 2].

On March 9, 2020, Plaintiff Evelyn Thomas was hired as a part-time store clerk and assigned to work at QuikTrip Store 769. [DSMF ¶ 12]. In this position, Plaintiff was responsible for providing quality customer service, completing all tasks and upkeep assigned to her shifts, and meeting operating standards by complying with and supporting QuikTrip policies and procedures. [Id.].

On August 19, 2020, Plaintiff was issued a written reprimand for unacceptable human resources skills for misconduct she engaged in on July 25, 2020. [DSMF ¶ 13]. Specifically, while working at Store 769, Plaintiff got into a verbal altercation in the full-service counter/kitchen area with an Assistant Manager on duty in which Plaintiff used profane language in front of customers. [Id.]. Plaintiff claimed she was "just being a bully, just being a mean girl." [Id.]. In Plaintiff's deposition, she described the relevant Assistant Manager as being Hispanic. [DSMF ¶ 14]. Plaintiff's Store Supervisor, Jay Fuston, observed Plaintiff on video using profane language toward this employee in front of customers and other employees on duty. [DSMF ¶ 15].

Plaintiff now alleges that her July 25, 2020 altercation occurred because she was being bullied by the Assistant Manager, but she admits that she did not make any complaint of bullying or harassing behaviors under QuikTrip's no harassment policy regarding this Assistant Manager. [DSMF ¶ 17]. Plaintiff testified that she did not make such a complaint "[b]ecause if you want to be a bully and a mean girl, then just bring it." [Id.]. Plaintiff admits that she used threatening or profane language toward the Assistant Manager during the relevant July 25, 2020 altercation. [DSMF ¶ 18].

Because Plaintiff's misconduct during the altercation created an uncomfortable store environment, Fuston decided to transfer Plaintiff to Store 786, a training store for new store clerk trainees, to provide Plaintiff a fresh start with a new team. [DSMF ¶ 19]. Plaintiff did not object to this transfer at the time. [Id.]. Plaintiff admits that during all relevant times, Fuston never said anything that would indicate that he had a bias or prejudice against her or against African Americans. [DSMF ¶ 20].

On September 27, 2021, Plaintiff became a full-time clerk at Store 786. [DSMF ¶ 21]. On November 24, 2021, Plaintiff was promoted to Relief Assistant Manager, which resulted in additional job duties and increased pay. [Id.]. The promotion was recommended by her Store Manager Boris Stephens and approved by Fuston. [Id.].

On January 10, 2022, Plaintiff stepped back down to part-time clerk at her own request. [DSMF ¶ 22]. Plaintiff admits that she made this request because she was

more comfortable in her prior role. [Id.]. While at Store 786, Boris Stephens told Plaintiff on more than one occasion to remain professional and not get confrontational with employees or customers when she disagreed with them. [DSMF ¶ 23]. Plaintiff testified that the only time she became irate with customers was when they were rude to her. [Id.]. According to Plaintiff, "If you rude to me, I'm going to be rude to you. You going to be disrespectful to me, I'm going to be disrespectful to you." [Id.]. On multiple occasions, Stephens had to pull Plaintiff back from confrontations with customers when she would use profane language and become irate and unprofessional. [DSMF ¶ 24]. Stephens had previously counseled Plaintiff on this conduct. [Id.].

As a training store, Store 786 employed Clerk Trainers who were not responsible for any employees or tasks outside of training new hires. [DSMF ¶ 25]. Trainees are the responsibility of the assigned Clerk Trainer and Store Clerks were not supposed to interfere with how this training was conducted. [Id.].

On November 9, 2022, Plaintiff engaged in another altercation with Clerk Trainer Alicia Hale, and Plaintiff was issued another reprimand pursuant to QuikTrip's disciplinary policy on November 15, 2022. [DSMF ¶ 26]. On this occasion, Hale was training new hires how to perform tasks in the kitchen, and she had the prep bar open while training them to make sandwiches. [DSMF ¶ 27]. The practice of leaving the prep bar open while training people to make sandwiches was not unusual. [Id.].

Hale stepped into the back room quickly and when she returned, she saw that Plaintiff was in the kitchen closing the prep bar, nearly on one of Hale's trainee's hands. [DSMF ¶ 28]. Hale heard Plaintiff telling her trainees that the prep bar always needed to be closed. [Id.]. Hale asked Plaintiff why she was in the kitchen as she was not supposed to be there while Hale was training new hires. [DSMF ¶ 29]. In response, Plaintiff began yelling at Hale and telling her that she did not know how to operate the kitchen.[1] [Id.]. Hale attempted to walk away, but Plaintiff followed Hale around the store, raised her voice, and began yelling "dumb blonde" at Hale. [DSMF ¶¶ 29, 30]. Hale started crying and called Division Training Manager Corey Landress on the phone. [Id.]. Hale went to the backroom to calm down and Plaintiff followed her into the backroom before finally leaving her alone. [Id.]. Upon receiving Landress' approval, Hale sent her trainees home early and left early herself due to the tension caused by Plaintiff's conduct. [DSMF ¶ 32].

Landress investigated the incident the next day by speaking with witnesses and reviewing video footage. [DSMF ¶ 33]. Upon review of the video footage, Landress saw Plaintiff almost run into the kitchen and slam the prep bar shut while a trainee was making an order. [DSMF ¶ 34]. Landress then saw Plaintiff yelling and pointing at

[1] In Plaintiff's deposition, she described Hale as a "light-skinned African American." [DSMF ¶ 31].

Hale while an employee named Bella held Plaintiff back. [Id.]. On the recording, Landress heard Plaintiff yelling at Hale and calling her a "dumb blonde." [Id.]. Landress also saw Hale go into the backroom to finish washing dishes and Plaintiff walk to the backroom doorway and continue yelling at Hale. [DSMF ¶ 35]. Hale said nothing, then walked away and clocked out. [DSMF ¶ 35]. Landress reported his findings to Store Manager Boris Stephens because Plaintiff was one of Stephens' employees. [DSMF ¶ 36].

Plaintiff admits that following this incident, she did not think that she could continue working in the same store where Hale would be training people. [DSMF ¶ 37]. Stephens recommended that Plaintiff be issued a written reprimand due to her misconduct, and Store Supervisor Jay Fuston approved the reprimand because of the severity of the misconduct and because Plaintiff had been counselled in the past about remaining professional and not getting confrontational with employees or customers. [DSMF ¶ 38]. Fuston and Stephens concluded that Plaintiff needed to be transferred to another store on account of her behavior as she needed to be removed from further interactions with Clerk Trainers. [DSMF ¶ 39]. Fuston believed this would provide Plaintiff with an opportunity for a fresh start and give her a chance to succeed. [Id.].

After reviewing the situation, neither Landress (Hale's supervisor), Stephens, nor Fuston believed that Hale required discipline for any of her conduct during the

incident as they determined that Plaintiff instigated the altercation and then pursued Hale. [DSMF ¶ 40]. Stephens stated that part of the reason he recommended a written reprimand for Plaintiff was that he had previously encountered multiple situations where he had to pull Plaintiff back from confrontations with customers where she would use profane language and become irate and unprofessional, and he had previously counseled her on this conduct. [DSMF ¶ 41]. Stephens issued Plaintiff a written reprimand on November 15, 2022, and informed her that she was being transferred to Store 774 to give her a fresh start and to avoid further interactions with the training team. [DSMF ¶ 42]. Plaintiff did not object to this transfer and agreed that she should not have behaved as she did during the incident with Hale. [DSMF ¶ 43]. Stephens informed Plaintiff of the transfer and she said, "Alright Mr. B." [Id.].

On November 20, 2022, Plaintiff sent an email to QuikTrip's corporate office in Atlanta complaining about the food standards at Store 786. [DSMF ¶ 44]. Plaintiff's complaint had nothing to do with discrimination or retaliation. [Id.]. Plaintiff never filed a grievance with respect to any discipline she received. [DSMF ¶ 45]. Plaintiff's complaint to corporate was about how the Store altered the fresh food dates on food and how operations were conducted. [Id.]. Plaintiff's complaint was that there was "all around just laziness and morale and just, like not caring. And then it just got worse with the misrepresenting of the dates of Alicia Hale." [Id.].

Division Manager Marc Milburn received Plaintiff's email and assigned Personnel Coordinator Charon Donaldson (African American) to investigate Plaintiff's complaint of discriminatory and/or retaliatory transfer. [DSMF ¶ 46]. Following an investigation, Donaldson concluded that she did not believe any of the other employees Plaintiff had identified as receiving preferential treatment had engaged in any conduct that merited discipline or had engaged in conduct similar to the disrespectful and unprofessional conduct exhibited by Plaintiff. [Id.].

Following Plaintiff's transfer to Store 774, Plaintiff indicated that she was not happy with her transfer and communicated that she no longer wanted to work at a store that Jay Fuston supervised. [DSMF ¶ 47]. Fuston accommodated this request by transferring Plaintiff to Store 755, a QuikTrip store that Fuston did not supervise. [Id.]. Plaintiff did not consider this action to be discriminatory. [Id.]. After the 2022 transfer, Plaintiff did not change how she went about her daily activities. [DSMF ¶ 48].

On March 6, 2023, Plaintiff resigned her employment with QuikTrip. [DSMF ¶ 53]. In her resignation notice, Plaintiff commented: "Worst organization I have worked for. Penalizes the good employees and not the trash employees. I should not have been transferred in the first place." [Id.]. Plaintiff testified that the employees who worked at Store 786 were lazy and incompetent. [DSMF ¶ 54]. Plaintiff rescinded her

resignation on March 31, 2023, stating her application to Yale had been deferred a year and she needed a job. [Id.].

Plaintiff filed a charge of discrimination against QuikTrip Corporation with the EEOC and the Georgia Commission on Equal Opportunity on March 10, 2023. [DSMF ¶ 5]. In the charge, Plaintiff alleged that on or around November 19, 2022, she notified QuikTrip of discrimination she was facing. [DSMF ¶ 6; Doc. 43-11, Plaintiff's Deposition ("Pla. Dep."), Ex. 10]. Plaintiff also alleged that on November 23, 2022, she was transferred to a less desirable location and received a reduction in pay. [Id.]. According to Plaintiff, she was not given a reason for the transfer or the pay reduction, and she was subjected to race discrimination and retaliation. [Id.]. The only incident referenced in Plaintiff's EEOC charge was the discipline and transfer in November 2022. [DSMF ¶ 7; Pla. Dep., Ex. 10].

Plaintiff admitted that she did the things that she was disciplined for in 2020 and 2022. [DSMF ¶ 55]. Plaintiff felt like she had been singled out for discipline while the other employees, Gracia Alvarado and Alicia Hale, were not disciplined. [Id.]. Plaintiff admits that following the disciplinary actions she received, her rate of pay was not reduced. [DSMF ¶ 56]. During her QuikTrip employment, Plaintiff was paid on an hourly basis for hours worked at a set hourly rate. [DSMF ¶ 57]. She and other clerks were paid a bonus based on store profit and a separate bonus based on customer

and food service, tied to the number of hours worked. [Id.]. However, there was no agreement to compensate her on a percentage of profits or revenue generated. [Id.].

Plaintiff was always paid consistently with QuikTrip policy for her position and tenure. [DSMF ¶ 59]. If her pay went down it was only because her hours went down. [DSMF ¶ 59]. She could always make up hours by working at other Stores. [Id.]. QuikTrip records show that for a period of time following her transfer from Store 786, Plaintiff was able to receive on average 40 or more hours of work at the primary store, or other Stores, for the periods identified in the records. [DSMF ¶ 62]. Plaintiff has not looked for a job since her employment with QuikTrip ended. [DSMF ¶ 63]. She decided to go back to school rather than look for another job. [Id.].

Plaintiff was issued a right to sue notice from the EEOC on September July 27, 2023, and filed a Complaint in this court on September 18, 2023. [DSMF ¶ 64]. In her Complaint, Plaintiff alleged discrimination based on her race and retaliation for engaging in protected activities under Title VII. [Id.]. Plaintiff's Complaint named individual QuikTrip locations as Defendants, but in her deposition, she acknowledged that the only entity she is suing is QuikTrip Corporation. [DSMF ¶ 65]. Plaintiff's Complaint identifies two specific incidents of discrimination occurring: one in March 2020 and one in November 2022. [DSMF ¶ 66]. In Plaintiff's deposition, she

confirmed that her only allegations of discrimination and retaliation are related to her respective transfers following her March 2020 and November 2022 altercations. [Id.].

Additional facts will be set forth as necessary during discussion of Plaintiff's claims.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "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). The movant bears the initial responsibility of asserting the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Apcoa, Inc. v. Fidelity Nat'l Bank, 906 F.2d 610, 611 (11th Cir. 1990). The movant is not required, however, to negate its opponent's claim; the movant may discharge its burden by merely "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325. After the movant has carried its burden, the non-moving party is then required to "go beyond the pleadings" and present competent evidence designating specific facts showing that there is a genuine disputed issue for trial; the non-moving party may meet its burden through affidavit and deposition testimony, answers to interrogatories, and the like. Id. at 324 (quoting Fed. R. Civ. P. 56(e)).

While the court is to view all evidence and factual inferences in a light most favorable to the non-moving party, Nat'l Parks Conservation Ass'n v. Norton, 324 F.3d 1229, 1236 (11th Cir. 2003), "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original). A fact is material when it is identified as such by the controlling substantive law. Id. at 248. Moreover, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citations omitted). Instead, "the nonmoving party must present evidence beyond the pleadings showing that a reasonable jury could find in its favor." Fickling v. United States, 507 F.3d 1302, 1304 (11th Cir. 2007) (citing Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990)). An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." Anderson, 477 U.S. at 249-50. Thus, the Federal Rules mandate the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of *every* element essential to that party's case on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322.

III. DISCUSSION

Plaintiff Thomas asserts claims for race discrimination and retaliation under Title VII against Defendant QuikTrip. [Doc. 3 at 1, 6]. Plaintiff's claims are based on workplace incidents that occurred in March 2020 and November 2022. [Id. at 4, 7]. Defendant has moved for summary judgment pursuant to Rule 56 on Plaintiff's claims based on the pleadings, statements of material facts, and exhibits submitted to the Court. [Doc. 44].

A. Harassment and Obstruction of Justice

The Court notes that on the form Complaint, Plaintiff checked the box marked "harassment," but she has not explained in any way how she was allegedly subjected to harassment or a hostile work environment. [Doc. 3 at 6]. In her Complaint, Plaintiff also alleged "obstruction of justice" and accused QuikTrip of "having contacts in the EEOC to not investigate the case." [Id.]. But Plaintiff testified that her only evidence in support of this allegation is that QuikTrip's submitted position included the named investigator being the EEOC contact in relation to Plaintiff's charge, and because QuikTrip was copied on the notice of right to sue. [DSMF ¶ 67; Pla. Dep. at 93-95]. Plaintiff has failed to explain on what basis she brings a claim for obstruction of justice. Also, "federal criminal law does not support a private cause of action for obstruction of justice, and the one federal statute that provides a civil cause of action for obstruction

applies to court proceedings not applicable to this case." Smith v. Subway Inc., No. 2:19-CV-592-RAH-SMD, 2020 WL 5870421, at *2 (M.D. Ala. Aug. 28, 2020), report and recommendation adopted, No. 2:19-CV-592-RAH, 2020 WL 5848672 (M.D. Ala. Oct. 1, 2020) (citing Davis v. Broward County, Fla., No. 11-61819-CIV, 2012 WL 279433, at *8 (S.D. Fla. Jan. 31, 2012)). Accordingly, to the extent Plaintiff brings harassment and obstruction of justice claims, these claims must be dismissed.

B. EEOC Charge

Defendant argues summary judgment is warranted on Plaintiff's Title VII claims to the extent these claims are based on any incident that occurred in 2020. [Doc. 44 at 14-15]. According to Defendant, these claims are time-barred because Plaintiff did not file a timely charge of discrimination with the EEOC. [Id.]. Defendant also contends that Plaintiff's Title VII claims based on any 2020 incident or adverse action are barred because Plaintiff failed to exhaust her administrative remedies. [Id.]. The undersigned agrees.

The Eleventh Circuit has held that "[b]efore filing suit under Title VII . . . , a plaintiff must exhaust the available administrative remedies by filing a charge with the EEOC." Anderson v. Embarq/Sprint, 379 F. App'x 924, 926 (11th Cir. 2010) (citing 42 U.S.C. § 2000e-5(e)(1)). Filing a charge of discrimination at the administrative level is a condition precedent to filing suit on the claim. See Giles v. BellSouth

Telecommunications, Inc., 542 F. App'x 756, 758 (11th Cir. 2013). The Eleventh Circuit has held that a "plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Gregory v. Georgia Dep't of Human Resources, 355 F.3d 1277, 1280 (11th Cir. 2004) (citations and internal quotation marks omitted). "The purpose of this exhaustion requirement is that the [EEOC] should have the first opportunity to investigate the alleged discriminatory practices to permit it to perform its role in obtaining voluntary compliance and promoting conciliation efforts." Id. at 1279 (quoting Evans v. U.S. Pipe & Foundry Co., 696 F.2d 925, 929 (11th Cir. 1983)) (internal quotation marks omitted).

Pursuant to 42 U.S.C. § 2000e-5(e), a Title VII litigant must file an EEOC charge of discrimination within 180 days of the alleged discriminatory act. See Bourne v. School Bd. of Broward County, 508 F. App'x 907, 909 (11th Cir. 2013) (citing Thomas v. Florida Power & Light Co., 764 F.2d 768, 769 (11th Cir. 1985)); 42 U.S.C. § 2000e-5(e) ("A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred."). It is critical to the EEOC administrative process that the employer receive timely notice of the basis of the claims of discrimination. See Manning v. Chevron Chem. Co., LLC, 332 F.3d 874, 878 (5th Cir. 2003) ("One of the central purposes of the employment discrimination charge is

to put employers on notice of 'the existence and nature of the charges against them.'") (quoting EEOC v. Shell Oil Co., 466 U.S. 54, 77 (1984)); Wilkerson v. Grinnell Corp., 270 F.3d 1314, 1317-18 (11th Cir. 2001). The failure to file a charge with the EEOC within the 180-day time period bars a plaintiff's Title VII claims. See Pijnenburg v. West Georgia Health Sys., Inc., 255 F.3d 1304, 1305 (11th Cir. 2001); Ross v. Buckeye Cellulose Corp., 980 F.2d 648, 662 (11th Cir. 1993).

Plaintiff brings Title VII claims based on incidents that occurred in 2020. [Doc. 3 at 4, 7]. Plaintiff, however, waited until March 10, 2023, to file a charge of discrimination with the EEOC. [Doc. 43-11]. This was more than two years after the allegedly discriminatory acts took place in 2020. Therefore, any Title VII claim that Plaintiff seeks to bring based on incidents or actions that occurred in 2020 are time-barred. See Pijnenburg, 255 F.3d at 1305 ("It is settled law that in order to obtain judicial consideration of [a Title VII] claim, a plaintiff must first file an administrative charge with the EEOC within 180 days after the alleged unlawful employment practice occurred.").

Plaintiff's Title VII claims based on events in 2020 are also barred because she never filed an EEOC charge which included these actions. When a plaintiff asserts a claim in her complaint that is not reasonably related to the allegations in her EEOC charge, the court must find that the plaintiff has failed to exhaust her administrative

remedies related to the claim. See Hillemann v. University of Central Fla., 167 F. App'x 747, 749-50 (11th Cir. 2006) (per curiam) (affirming district court's dismissal of plaintiff's Title VII claims for retaliation and discrimination based on race and sex because his EEOC charge factually supported only an age discrimination failure to hire claim). Here, Plaintiff alleged in her March 2023 EEOC charge that Defendant subjected her to race discrimination and retaliation when it transferred her to a different job location and reduced her pay on November 23, 2022. [Doc. 43-11]. Plaintiff did not mention any other adverse action, and she specifically alleged that the date the discrimination began and ended was November 23, 2022. [Id.]. The scope of the EEOC investigation which could reasonably be expected to grow out of Plaintiff's charge would not include an investigation into allegations of discrimination from two years beforehand in 2020. With respect to Plaintiff's Title VII claims based on events in 2020, the Court finds that Plaintiff has failed to exhaust her administrative remedies.

For these reasons, it is **RECOMMENDED** that Defendant's summary judgment motion [Doc. 44] be **GRANTED** on Plaintiff's Title VII claims to the extent these claims are based on adverse actions in 2020, and that these claims be **DISMISSED WITH PREJUDICE**.

C. Retaliation Claim

Plaintiff alleges in her Complaint that Defendant subjected her to retaliation in violation of Title VII. [Doc. 3]. As previously noted, Plaintiff alleged in her March 2023 EEOC charge that Defendant retaliated against her when it transferred her to a different job location and reduced her pay on November 23, 2022. [Doc. 43-11]. Title VII prohibits employers from retaliating against employees for certain protected practices. Specifically, the statute provides, in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). In University of Texas Southwestern Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013), the Supreme Court held that a plaintiff bringing a Title VII retaliation claim "must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer."

Because Plaintiff relies on circumstantial evidence, her Title VII retaliation claim is evaluated using the burden-shifting framework established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Mealing v. Georgia Dep't of Juvenile Justice, 564 F. App'x 421, 427 n.9 (11th Cir. 2014) ("We conclude that the McDonnell Douglas framework continues to apply after the Supreme

Court's Nassar, holding that a plaintiff must demonstrate 'but-for' causation when making a Title VII retaliation claim."). Under this framework, the allocation of burdens and order of presentation and proof are as follows: (1) the plaintiff has the burden of proving a *prima facie* case of retaliation; (2) if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant to articulate some legitimate, non-retaliatory reason for the action taken against the employee; and (3) should the defendant carry this burden, the plaintiff must have an opportunity to prove that the legitimate reason offered by defendant was a pretext for retaliation. See McDonnell Douglas, 411 U.S. at 802-05.

To establish a *prima facie* case of retaliation, an employee must prove that: (1) she engaged in statutorily protected activity; (2) she suffered an adverse employment action; and (3) there was a causal link between the protected activity and the adverse action. See Mealing, 564 F. App'x at 427; Bryant v. Jones, 575 F.3d 1281, 1307-08 (11th Cir. 2009) (citations omitted). "In order for an employee engaging in opposition activity to be protected under the anti-retaliation provision of Title VII, he or she must be opposing conduct that is made an 'unlawful employment practice' by Title VII. Title VII defines an 'unlawful employment practice' as, *inter alia*, discrimination against an employee 'with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national

origin.'" Pinder v. John Marshall Law School, LLC, 11 F. Supp. 3d 1208, 1263 (N.D. Ga. 2014) (quoting 42 U.S.C. § 2000e-2(a)), reconsideration denied, 2014 WL 2858658 (N.D. Ga. June 23, 2014). "Unfair treatment, absent discrimination based on race, sex, or national origin, is *not* an unlawful employment practice under Title VII." Coutu v. Martin County Board of County Commissioners, 47 F.3d 1068, 1074 (11th Cir. 1995) (emphasis in original).

Plaintiff alleged that she was subjected to retaliation when she was transferred on November 23, 2022. But Plaintiff is unable to show that she engaged in protected activity. On November 20, 2022, Plaintiff sent an email to QuikTrip's corporate office in Atlanta complaining about the food standards within Store 786. [DSMF ¶ 44]. However, Plaintiff's complaint had nothing to do with discrimination, harassment, or retaliation, but only about how the store was being run. [Id.]. Plaintiff's complaint to corporate was about how the Store altered the fresh food dates which constituted an OSHA violation.[2] [DSMF ¶¶ 44, 68]. Plaintiff also complained about how operations

[2] It does not appear that Plaintiff seeks to bring a claim based on OSHA. But even if she did, such a claim would be subject to dismissal because "there is no private right of action under" OSHA. Palmer v. City of Atlanta, No. 1:08-CV-1400-TCB, 2009 WL 10702620, at *3 (N.D. Ga. Feb. 17, 2009), report and recommendation adopted, No. 1:08-CV-1400-TCB, 2009 WL 10702630 (N.D. Ga. Mar. 11, 2009) (citing Jeter v. St. Regis Paper Co., 507 F.2d 973, 976 (5th Cir. 1975) (noting that there is not even the "slightest implication that Congress considered OSHA creating a private right of action for violation of its terms")).

were conducted, and she asserted that there was "all around just laziness and morale and just, like not caring. And then it just got worse with the misrepresenting of the dates of Alicia Hale." [DMSF ¶ 44].

None of these complaints qualify as protected activity under Title VII. See Langford v. Magnolia Advanced Materials, Inc., No. 1:15-CV-1115-AT-JFK, 2017 WL 5203048, at *15 (N.D. Ga. Jan. 3, 2017), report and recommendation adopted, No. 1:15-CV-1115-AT, 2017 WL 5202889 (N.D. Ga. Feb. 13, 2017), aff'd, 709 F. App'x 639 (11th Cir. 2017) (holding that "an employee who has reported OSHA violations or complained about unsafe working conditions has not engaged in statutorily protected activity"). In order for a court to find that an employee's opposition qualifies as protected speech, "the employee must, at the very least, communicate her belief that discrimination is occurring to the employer. It is not enough for the employee merely to complain about a certain policy or certain behavior of coworkers and rely on the employer to infer that discrimination has occurred." Webb v. R & B Holding Co., Inc., 992 F. Supp. 1382, 1389 (S.D. Fla. 1998). Because Plaintiff did not engage in protected activity, she cannot establish a *prima facie* case of retaliation.[3] It is, therefore,

[3] Even assuming that Plaintiff were able to establish a *prima facie* case of retaliation, summary judgment would be warranted because Defendant has offered a legitimate, nondiscriminatory reason for transferring Plaintiff—namely, her misconduct—and she is unable to show that this reason was pretextual.

RECOMMENDED that Defendant's Motion [Doc. 44] for Summary Judgment be **GRANTED** on Plaintiff's Title VII retaliation claim [Doc. 3].

D. Race Discrimination Claim

Plaintiff alleges that Defendant subjected her to race discrimination in violation of Title VII. [Doc. 3]. Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race[.]" 42 U.S.C. § 2000e-2(a)(1). As previously noted, Plaintiff included in her March 2023 EEOC charge an allegation that Defendant subjected her to race discrimination when it transferred her to a different job location and reduced her pay on November 23, 2022. [Doc. 43-11].

In a disparate treatment action, the plaintiff carries the burden of demonstrating that the defendant has unlawfully discriminated against her. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981). Because Plaintiff Thomas relies on circumstantial evidence of racial discrimination, one way she can establish that Defendant unlawfully discriminated against her "is by navigating the now-familiar three-part burden-shifting framework established by the Supreme Court in McDonnell Douglas," discussed above. Lewis v. City of Union City, Georgia, 918 F.3d 1213, 1217 (11th Cir. 2019). As previously noted, the allocation of burdens and order of presentation and proof are: (1) the plaintiff has the burden of proving a *prima*

facie case of discrimination; (2) if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the action taken against the employee; and (3) should the defendant carry this burden, the plaintiff must have an opportunity to prove that the legitimate reason offered by the defendant was a pretext for discrimination. See McDonnell Douglas, 411 U.S. at 802-05.

A plaintiff can establish a *prima facie* case of racial discrimination by showing the following: (1) she belongs to a protected class; (2) she was subjected to an adverse employment action; (3) she was qualified to perform the job in question; and (4) her employer treated "similarly situated" employees outside her protected class more favorably. See Lewis, 918 F.3d at 1220-21, 1235. The Court finds that Plaintiff is able to establish the first and third *prima facie* elements. Plaintiff is a member of a racially protected class because she is African American. [DSMF ¶ 4]. The evidence also reveals that Plaintiff was at least minimally qualified for her position as a store clerk. [DSMF ¶¶ 12, 21]; see Richey v. City of Lilburn, 127 F. Supp. 2d 1250, 1259 (N.D. Ga. 1999) ("Generally, in the context of a Title VII prima facie analysis, 'qualified' refers to basic qualifications rather than optimal performance.") (citing Carter v. Three Springs Residential Treatment, 132 F.3d 635, 643-44 (11th Cir. 1998) (holding that a Title VII plaintiff must show he was minimally qualified for the job)).

The second *prima facie* element requires Plaintiff to show that she suffered an adverse employment action. Plaintiff alleges that her transfer in November 2022 constitutes an adverse action. Plaintiff was transferred from Store 786 to Store 774. [DSMF ¶ 42]. Shortly thereafter, Plaintiff indicated that she was not happy with her transfer and communicated that she no longer wanted to work at a store that Jay Fuston supervised. [DSMF ¶ 47]. Fuston accommodated this request by transferring Plaintiff to Store 755, a QuikTrip store that Fuston did not supervise. [Id.]. The Court finds that a reasonable jury could not conclude that either of Plaintiff's transfers rose to the level of an adverse employment action.

"Not all employer actions that negatively impact an employee qualify as 'adverse employment actions.'" Howard v. Walgreen Co., 605 F.3d 1239, 1245 (11th Cir. 2010) (citation omitted). "Rather, only those employment actions that result in 'a *serious and material* change in the terms, conditions, or privileges of employment' will suffice." Id. (citation omitted) (emphasis in original). In other words, the adversity must be more than "some de minimis inconvenience or alteration of responsibilities." Doe v. DeKalb County School District, 145 F.3d 1441, 1453 (11th Cir. 1998). "'Moreover, the employee's subjective view of the significance and adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances.'" Howard, 605 F.3d at 1245 (citation omitted).

Although Plaintiff asserted that Defendant reduced her pay when it transferred her, the record reveals that both before and after Plaintiff's transfers, she was paid consistently with QuikTrip policy for her position and tenure. [Doc. 43-11; DSMF ¶ 59]. If Plaintiff's pay went down it was only because her hours went down. [Id.]. Plaintiff admitted that at all times she was paid consistently with QuikTrip policy for what her pay rate should be for her level, years of experience, and position. [DSMF ¶ 60]. Plaintiff also admitted that any reduction in the aggregate amount of pay that she received following her November 2022 transfer from Store 786 was solely because she was working less hours at different locations. [DSMF ¶ 61]. Finally, Plaintiff admitted that even at the locations that she was transferred to following her transfer from Store 786—Store 774 and then Store 775 upon Plaintiff's request—she could have picked up hours that would have allowed her to work the number of hours consistent with her schedule at Store 786. [Id.].

The record reveals that there was no reduction in Plaintiff's wages, prestige, or responsibilities when she was transferred. And courts have held that "purely lateral transfers—transfers that do not involve a demotion in form or substance—do not rise to the level of an actionable adverse employment action." West v. Butler County Bd. of Educ., 614 F. Supp. 3d 1050, 1065 (M.D. Ala. 2022), appeal dismissed, No. 22-12657-A, 2022 WL 16833690 (11th Cir. Sep. 27, 2022) (citing Martin v. Eli Lilly &

Co., 702 F. App'x 952, 958 (11th Cir. 2017) (finding that purely lateral transfers are not adverse); Duble v. FedEx Ground Package Sys., Inc., 572 F. App'x 889, 895 (11th Cir. 2014) (per curiam) (same); Hinson v. Clinch County Bd. of Educ., 231 F.3d 821, 829 (11th Cir. 2000) ("In a Title VII case, a transfer to a different position can be 'adverse' if it involves a reduction in pay, prestige or responsibility.")). Because Plaintiff is unable to show that she was subjected to a materially adverse action when she was transferred in November 2022, the Court finds that she cannot establish a *prima facie* case of race discrimination.

Assuming that Plaintiff were able to show that she suffered an adverse action, the final *prima facie* element requires Plaintiff to prove "that she was treated differently from another 'similarly situated' individual–in court-speak, a 'comparator.'" Lewis, 918 F.3d at 1217 (citation omitted). The Eleventh Circuit has held that "the proper test for evaluating comparator evidence is neither plain-old 'same or similar' nor 'nearly identical,'" but rather, "similarly situated in all material respects." Id. at 1218. Ordinarily, a similarly situated comparator will have engaged in the same basic conduct or misconduct as the plaintiff, will have been under the same supervisor and subject to the same policies, and will have shared the plaintiff's employment or disciplinary history. Id. at 1227-28.

Plaintiff Thomas has not cited to evidence that would permit a reasonable jury to conclude that she was treated less favorably than "a similarly situated employee outside of her protected class." McQueen v. Wells Fargo, 573 F. App'x 836, 838 (11th Cir. 2014). Plaintiff cites Clerk Trainer Alicia Hale as a comparator. [Doc. 46 at 5]. But like Plaintiff, Hale is African American. [DSMF ¶¶ 4, 31]. Furthermore, Plaintiff has failed to point to evidence that she and Hale engaged in similar misconduct. Plaintiff contends that Hale violated "food safety awareness policy for four months." [Doc. 46 at 5]. But Plaintiff's misconduct involved an altercation on November 9, 2022, when she yelled at Hale and told her that she did not know how to operate the kitchen. [DSMF ¶¶ 26, 29]. Hale attempted to walk away, but Plaintiff followed Hale around the store, raised her voice, and began yelling "dumb blonde" at Hale. [DSMF ¶¶ 29, 30]. Hale started crying and called Division Training Manager Corey Landress on the phone. [Id.]. Landress reviewed the video footage and saw Plaintiff yelling and pointing at Hale while an employee named Bella held Plaintiff back. [Id.]. On the recording, Landress could hear Plaintiff yelling at Hale and calling her a "dumb blonde." [Id.]. Landress then saw Hale go into the backroom to finish washing dishes and Plaintiff walk to the backroom doorway and continue yelling at Hale before Hale, without saying anything, walked away and clocked out. [DSMF ¶ 35].

A reasonable jury viewing this evidence could not conclude that the misconduct of Plaintiff and Hale were "similarly situated in all material respects." Lewis, 918 F.3d at 1218. "Because Plaintiff cannot establish a prima facie case of discrimination, the Court need not analyze Defendants' proffered legitimate, nondiscriminatory reasons for Plaintiff's transfer." Harris v. Jackson, No. 1:19-CV-5849-MLB-JKL, 2022 WL 5240396, at *15 n.34 (N.D. Ga. July 18, 2022), report and recommendation adopted as modified, No. 1:19-CV-5849-MLB, 2022 WL 4596343 (N.D. Ga. Sep. 30, 2022).[4]

In sum, although Plaintiff asserts that Defendant violated Title VII by transferring her in November 2022 on the basis of race, Plaintiff is unable to establish a *prima facie* case of racial discrimination.[5] Plaintiff cannot show that her lateral transfer to another store was a materially adverse employment action. She also has not cited to evidence showing that Defendant treated similarly situated employees outside her protected class more favorably. Because Plaintiff has failed to "carry the initial

---

[4] The Court also finds that Plaintiff has failed to cite to "a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011) (citation and internal quotation marks omitted).

[5] In addition, Defendant has asserted that it transferred Plaintiff in November 2022 because of her misconduct when she yelled at Hale, told her that she did not know how to operate the kitchen, and called her a "dumb blonde." [DSMF ¶¶ 26, 29, 30]. Plaintiff has not pointed to any evidence that Defendant's proffered legitimate, nondiscriminatory reason was a pretext for discrimination.

burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act[,]" the Court finds that Plaintiff's racial discrimination claim must be dismissed. Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977). It is, therefore, **RECOMMENDED** that Defendant's Motion [Doc. 44] for Summary Judgment be **GRANTED** on Plaintiff's Title VII discrimination claim based on race.

IV. CONCLUSION

Based on the foregoing reasons and cited authority, the Court **RECOMMENDS** that Plaintiff Thomas' Motion for Summary Judgment [Doc. 37] be **DENIED**. The Court further **RECOMMENDS** that Defendant QuikTrip's Motion for Summary Judgment [Doc. 44] be **GRANTED** in its entirety and that all of Plaintiff's claims [Doc. 3] be **DISMISSED WITH PREJUDICE**.

As this is a Final Report and Recommendation and there are no other matters pending before this Court, the Clerk is **DIRECTED** to terminate this reference.

SO REPORTED AND RECOMMENDED, this 8 day of November, 2024.

Linda T. Walker

LINDA T. WALKER
UNITED STATES MAGISTRATE JUDGE

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