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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-30843

United States Court of Appeals
Fifth Circuit

FILED

August 31, 2017

Lyle W. Cayce
Clerk

JOANNE STONE,

Plaintiff - Appellant

v.

LOUISIANA DEPARTMENT OF REVENUE,

Defendant - Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:12-CV-3022

Before BARKSDALE, DENNIS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Joanne Stone worked for the Louisiana Department of Revenue ("Department"). She filed a complaint with the Equal Employment Opportunity Commission ("EEOC") and ultimately sued the Department in federal district court, alleging race discrimination, harassment, and retaliation under Title VII, as well as defamation under Louisiana law. The district court

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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dismissed all of her claims. Stone appealed; we remanded her retaliation and defamation claims for further proceedings. The Department later moved for summary judgment as to Stone's remaining claims. The district court granted the motion.¹ Stone appeals. We AFFIRM.

I

Stone worked in the Department's New Orleans office as a Revenue Tax Auditor II from 2001 to 2010. In early 2010 Stone, who is black, filed an internal grievance with the Department alleging that her supervisor, Vendetta Lockley—also black—had discriminated against her on the basis of her race. Stone alleged that Lockley had harassed her in a number of ways, including questioning her ability to meet deadlines, not approving audit hours in time to be counted towards Stone's year-end production numbers, and accusing her of losing paperwork. The Department agreed to transfer Stone to its Houston office; she was transferred in late 2010.

Meanwhile, just before her transfer to Houston, Stone filed a complaint against the Department with the EEOC alleging race discrimination and retaliation. She later amended the complaint to add a claim for harassment based on her race. The EEOC issued Stone a right to sue letter in 2013, and she timely filed suit in federal district court, adding a state law defamation claim. The Department moved to dismiss Stone's suit under Federal Rule of Civil Procedure 12(b)(6). The district court granted the motion, refused to exercise supplemental jurisdiction over Stone's state defamation claim, and dismissed her case. Stone appealed. We concluded that Stone's retaliation claim survived the Department's motion to dismiss, but only "for events

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occurring after May 2010.” *Stone v. La. Dep’t of Revenue*, 590 F. App’x 332, 341 (5th Cir. 2014) (per curiam). We also reversed the district court’s dismissal of her state defamation claim and remanded to the district court for further proceedings. *Id.* at 342.

Discovery began. The parties exchanged myriad discovery requests, answered interrogatories, and conducted depositions. The Department ultimately moved for summary judgment in December 2015, more than a year after our remand. The district court issued a thoroughly-reasoned order granting the Department’s motion. Stone now appeals.

II

We review a grant of summary judgment de novo, applying the same standard as the district court. *E.E.O.C. v. Rite Way Serv., Inc.*, 819 F.3d 235, 239 (5th Cir. 2016) (citing *Davis v. Fort Bend Cty.*, 765 F.3d 480, 484 (5th Cir. 2014)). “Summary judgment is appropriate only when the record reveals ‘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)). When reviewing a grant of summary judgment, “[w]e interpret all facts and draw all reasonable inferences in favor of the nonmovant.” *Id.* (citing *Ion v. Chevron USA, Inc.*, 731 F.3d 379, 389 (5th Cir. 2013)). It is also true, however, that “[c]onclusory” affidavits and allegations “are not sufficient to defeat a motion for summary judgment.” *Young v. Equifax Credit Info. Servs., Inc.*, 294 F.3d 631, 639 (5th Cir. 2002) (citing *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985)).

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III

Stone appeals the district court's grant of summary judgment as to: (1) her state law defamation claim; and (2) her Title VII retaliation claim. We address each in turn.

A. Defamation

In Louisiana, a plaintiff alleging defamation must prove four elements: “(1) a false and defamatory statement concerning another; (2) an unprivileged communication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury.” *Bellard v. Gautreaux*, 675 F.3d 454, 464 (5th Cir. 2012) (citing *Costello v. Hardy*, 864 So.2d 129, 139 (La. 2004)). In addition—relevant to Stone's case—under Louisiana law, an ex-employer who is asked to provide a reference for an employee and “provides accurate information about a current or former employee's job performance or reasons for separation shall be immune from civil liability and other consequences of such disclosure provided such employer is not acting in bad faith.” La. R.S. 23:291(A); *see also Butler v. Folger Coffee Co.*, 524 So.2d 206, 206 n.1 (La. Ct. App. 1988) (“Communications between a previous employer and a prospective employer . . . enjoy a qualified or conditional privilege. Such a communication is not actionable when made in good faith.”).

Stone's defamation argument on appeal is somewhat convoluted. She does not directly identify any defamatory statement made by an employee of the Department. On a generous construction, it appears she is arguing that her manager, Lockley, defamed her by providing negative references to prospective employers. Stone cannot point to any statement actually made by Lockley to a bona fide prospective employer. Rather, Stone explains that she hired third-party reference checking companies to call Lockley and pose as prospective employers in order to see what the content of Lockley's reference

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would be. During one of those faux “interviews,” Lockley noted that she felt that Stone lacked “organizational skills.”

Stone contends that Lockley’s statement regarding her lack of organizational skills was defamatory. She concedes that the Department can only be held liable for that statement if it was made in bad faith. *See* La. R.S. 23:291(A). Yet, despite this concession, Stone makes no argument whatsoever that Lockley’s statement about her organizational skills was made in bad faith. Indeed, Lockley was concerned about Stone’s organizational skills for some time before the alleged defamatory statement. On Stone’s 2010 “performance planning and review” form, for example, Lockley expressed concern about disorganization in Stone’s presentation of data during a complex audit. Thus, the record evidence indicates that Lockley, in her role as Stone’s supervisor, was genuinely concerned about Stone’s organizational skills. In response, Stone can muster only conclusory statements to the effect that Lockley’s statement to the reference checker was “intolerable” and “deliberate.” In the absence of any substantiated argument that Lockley’s allegedly defamatory statement was made in bad faith, Stone’s defamation claim fails pursuant to Louisiana law.

B. Retaliation

“A plaintiff establishes a *prima facie* case of retaliation by showing (i) [s]he engaged in a protected activity, (ii) an adverse employment action occurred, and (iii) there was a causal link between the protected activity and the adverse employment action.” *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 657 (5th Cir. 2012) (citing *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 523 (5th Cir. 2008)). In the context of a Title VII retaliation claim, an employment action is “materially adverse” if “it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”

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Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67–68 (2006) (internal quotation marks omitted).²

Stone argues that Lockley retaliated against her in a number of ways. Specifically, Stone alleges that Lockley: (1) gave Stone an inaccurate performance evaluation soon after her EEOC complaint was filed; (2) did not properly credit Stone’s end-of-year production numbers; (3) falsely accused Stone of misplacing a form; and (4) convinced Stone’s new supervisor in Houston to deny Stone’s telecommuting privileges.

None of these allegations is availing, however, because Stone is unable to establish a “causal link” between the protected activities—i.e. her complaints—and any alleged adverse employment actions. This is so because Stone cannot point to any record evidence to show that Lockley was aware of her EEOC complaint when the alleged retaliation took place. And if Lockley did not know about the complaint, then her alleged actions could not have been taken in retaliation therefrom. To be sure, Stone repeatedly *states* that Lockley knew about the complaint, but the only record evidence she points to in support is her own brief in opposition to summary judgment below. That brief in turn cited to a deposition of Lockley’s that was not put into the record. The district court noted the omission of Lockley’s deposition in the record before it, explaining that the record was therefore “unclear as to whether Lockley had knowledge that Stone engaged in the protected activity.”³ Stone effectively

² The district court seems to have erroneously applied this circuit’s previous standard for adverse employment action in retaliation suits—a standard that was expressly abrogated by *Burlington*. This evident error was harmless, however, because—as we explain below—Stone’s retaliation claim fails on the third causality prong.

³ The district court concluded that Stone’s retaliation argument failed on the second prong—holding that she could not establish that an adverse employment action was taken against her—and therefore did not reach the issue of causality. We “may affirm the district court’s judgment on any basis supported by the record,” however. *United States v. Chacon*, 742 F.3d 219, 220 (5th Cir. 2014). And because we decide Stone’s appeal on the causality

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invites us to accept her characterization of Lockley's deposition testimony on faith. In the absence of any genuine record evidence tending to show that Lockley knew about Stone's EEOC complaint, Stone's retaliation arguments must fail.

IV

The district court's judgment is **AFFIRMED**.

prong, we need not reach the issue of whether Lockley's alleged behaviors would qualify as adverse employment actions for purposes of retaliation.

App.2a

ORDER OF THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT
(AUGUST 31, 2017)

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Defendant–Appellee.

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Appeal from the United States District Court for the
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Before BARKSDALE, DENNIS, and CLEMENT,
Circuit Judges.

PER CURIAM□

Appellant Joanne Stone, proceeding pro se, appeals
the district court’s dismissal of her Title VII and
state law defamation claims against Appellee

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Stone contends that Lockley’s statement regarding her lack of organizational skills was defamatory. She concedes that the Department can only be held liable for that statement if it was made in bad faith. See La. R.S. 23:291(A). Yet, despite this concession, Stone makes no argument whatsoever that Lockley’s statement about her organizational skills was made in bad faith. Indeed, Lockley was

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"A plaintiff establishes a prima facie case of retaliation by showing (i) [s]he engaged in a protected activity, (ii) an adverse employment action occurred, and (iii) there was a causal link between the protected activity and the adverse employment action." *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 657 (5th Cir. 2012) (citing *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 523 (5th Cir. 2008)). In the context of a Title VII retaliation claim, an employment action is "materially adverse" if "it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

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None of these allegations is availing, however, because Stone is unable to establish a “causal link” between the protected activities—i.e. her complaints—and any alleged adverse employment actions. This is so because Stone cannot point to any record evidence to show that Lockley was aware of her EEOC complaint when the alleged retaliation took place. And if Lockley did not know about the complaint, then her alleged actions could not have been taken in retaliation therefrom. To be sure, Stone repeatedly states that Lockley knew about the complaint, but the only record evidence she points to in support is her own brief in opposition to summary judgment below. That brief in turn cited to a deposition of Lockley’s that was not put into the record. The district court noted the omission of Lockley’s deposition in the record before it, explaining that the record was therefore “unclear as to whether

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Lockley had knowledge that Stone engaged in the protected activity.”³ Stone effectively invites us to accept her characterization of Lockley’s deposition testimony on faith. In the absence of any genuine record evidence tending to show that Lockley knew about Stone’s EEOC complaint, Stone’s retaliation arguments must fail.

IV

The district court’s judgment is AFFIRMED.

³ The district court concluded that Stone’s retaliation argument failed on the second prong—holding that she could not establish that an adverse employment action was taken against her—and therefore did not reach the issue of causality. We “may affirm the district court’s judgment on any basis supported by the record,” however. *United States v. Chacon*, 742 F.3d 219, 220 (5th Cir. 2014). And because we decide Stone’s appeal on the causality prong, we need not reach the issue of whether Lockley’s alleged behaviors would qualify as adverse employment actions for purposes of retaliation.

UNITED STATES DISTRICT COURT EASTERN
DISTRICT OF LOUISIANA

JOANNE STONE CIVIL ACTION
VERSUS NO: 12-3022
LOUISIANA DEPARTMENT OF REVENUE
UNITED STATES MAGISTRATE JUDGE KAREN
WELLS ROBY

ORDER & REASONS

Before the Court is the Louisiana Department of Revenue's ("Department") Motion for Summary Judgment (R. Doc. 78) seeking an Order from the Court to dismiss Joanne Stone's remaining Title VII retaliation claim and her state law defamation claim. The motion is opposed.

R. Doc. 93. The Department also filed a reply memorandum to the opposition R. Doc. 96.

I. Factual Background

Joanne Stone, the Plaintiff, is an African-American woman who worked as a Revenue Tax Auditor II for the Louisiana Department of Revenue. Stone initially worked in the New Orleans office from July 17, 2001, until August 23, 2010. Sometime between August 23, 2010, and September 7, 2010,¹ she transferred to the Department's Houston, Texas, office where she worked until she resigned on March 26, 2012. On August 12, 2010, Stone filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging race discrimination and retaliation against the Department. See R. Doc. 35-2, p. 27. She later amended her complaint to include a claim for harassment based on her race on December 7, 2010. Stone was issued a right to sue letter on September 20, 2012, and timely filed suit in this Court on December 20, 2012. See R. Doc. 1, p. 14.

¹ The exact date that Stone transferred is not mentioned in the record. However, counsel agreed to a stipulation that Stone's start date was sometime between August 23, 2010, and September 7, 2010. R. Doc. 78-3, p. 69.

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Stone alleges that while employed by the Department her supervisor, Vendetta Lockley, who is also an African-American woman, harassed her by questioning her ability to meet deadlines, failing to give her credit for audits that she completed, giving her “desk audits” which had lower assets than those assigned to her white colleagues, not approving audit hours in time to be counted towards her year-end production numbers, and accusing her of losing paperwork. Stone alleges that Lockley’s discrimination against her became so intense that she filed an internal grievance with the Department on May 12, 2010, which was mitigated because the Department arranged a transfer for Stone to the Houston office.

Stone also alleges that Lockley created a hostile work environment when she accused her of losing an audit document and that she purposely delayed her transfer to the Houston office. Once in the Houston office, Stone alleges that her telecommuting days were reduced from the three days per week that she had in New Orleans to one day per week in Houston. Stone contends that Lockley caused the decreased telecommute hours. See R. Doc. 26, p. 13-14.

Stone later requested an out-of-state position near her home in Mobile, Alabama. Her request was denied.

Stone alleges that the denial was based on her race as similar requests from white employees were granted.

See R. Doc. 26-1, p. 112. Stone claims that she was forced to resign on March 26, 2012, because of continued harassment and hostile work conditions. She later filed a second EEOC charge on February 28, 2013, alleging race discrimination, retaliation, constructive discharge, and harassment for the same dates she alleged in the first charge.²

On October 4, 2013, the Department filed a Motion to Dismiss (R. Doc. 30) seeking an Order to dismiss Stone’s claims arguing that they: (1) were barred by res judicata; (2) Stone failed to establish a prima facie case for each claim; and (3) she failed to exhaust her

² The EEOC concluded its investigation and issued a Notice of Right to sue on June 10, 2013. The Notice state that the EEOC closed the charge because the “charging party has filed suit in federal court.” Doc. 35-2, p. 29.

administrative remedies. See R. Doc. 30. The Court granted the Department's motion finding that Stone failed to state a claim pursuant to Rule 12(b)(6) and dismissed the action. R. Doc. 41.

Stone sought review from the United States Court of Appeal for the Fifth Circuit. The Fifth Circuit affirmed the Court's dismissal of Stone's discrimination and harassment claims but reversed and remanded Stone's retaliation and defamation claims. See R. Doc. 66-1, p. 15. The Fifth Circuit limited Stone's retaliation claim to events that occurred after May 2010.³

As to the instant motion, the Department seeks dismissal of Stone's remaining retaliation and defamation claim. It argues that Stone's defamation claim must be dismissed because: (1) she fails to allege that a Department employee made a defamatory statement; (2) the Department, as Stone's former employer, is immune from civil liability for disclosure of information regarding her prior employment to a prospective employer unless the statement was knowingly false and deliberately misleading; and (3) Stone has not established that the Department provided any statement regarding her employment to a prospective employer. R. Doc. 78-2, p. 4-5. With respect to her retaliation claim, the Department argues that Stone: (1) has not established that Lockley had knowledge of her prior Title VII protected activity (i.e. the filing of her discrimination grievance) and (2) did not experience an adverse employment action while employed by the Department. *Id.* at 7-9.

In opposition, Stone contends that: (1) her defamation claim has not been "processed fully through discovery" and that her deposition transcript which is attached to the Department's instant motion is "still under consideration"; (2) Lockley knew that Stone lodged a discrimination grievance against her; (3) she was the victim of an adverse employment action

³ The Fifth Circuit determined that "[t]he majority of Stone's allegations supporting her claim for retaliation occurred prior to her filing an internal grievance in May 2010 and the EEOC charge in August 2010. Any facts claimed as retaliation prior to May 2010 do not have a causal connection between the protected activity and the adverse employment action." R. Doc. 66-1, p. 14.

when Lockley restricted her telecommute days, incorrectly claimed that some of her audits were late, and delayed her transfer to the Houston office, and (4) the Department has withheld discovery regarding her job performance and evaluation. R. Doc. 93, p. 1-3.

II. Standard of Review

Federal Rule of Civil Procedure (“Rule”) 56(a) provides that summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A fact is “material” if resolving that fact in favor of one party could affect the outcome of the suit. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986); *Poole v. City of Shreveport*, 691 F.3d 624, 626-27 (5th Cir. 2012).

Where the moving party bears the burden of proof at trial as the plaintiff, or as a defendant asserting an affirmative defense, that party must support its motion with “credible evidence . . . that would entitle it to directed verdict if not controverted at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 331, 106 S. Ct. 2548 (1986). In such a case the moving party must “establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor.” *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (emphasis in original); see also *Access Mediquip L.L.C. v. United Healthcare Ins. Co.*, 662 F.3d 376, 378 (5th Cir. 2011).

Credible evidence may include depositions, documents, affidavits, stipulations, admissions, interrogatory answers, or other materials. Fed. R. Civ. P. 56(c). Moreover, in evaluating a motion for summary judgment by the party with the underlying burden of proof, the Court considers the substantive evidentiary burden of proof that would apply at the trial on the merits. *Anderson*, 477 U.S. at 252. The moving party’s burden is therefore “understandably

heavier” where that party is the plaintiff. *S. Snow Mfg. Co. v. Snow Wizard Holdings, Inc.*, 829 F. Supp. 2d 437, 447 (E.D. La. 2011).

Once the moving party has made its showing, the burden shifts to the non-moving party to produce evidence that demonstrates the existence of a genuine issue of fact. *Engstrom v. First Nat. Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995) (citing *Celotex*, 477 U.S. at 322–24). All justifiable inferences are to be drawn in the non-moving party’s favor. *Anderson*, 477

U.S. at 255. However, “[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for Summary Judgment.” *Brown v. City of Houston, Tex.*, 337 F.3d 539, 541 (5th Cir. 2003) (internal citations omitted); see also *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996) (stating that “mere conclusory allegations” are insufficient to defeat a motion for summary judgment). Though the Court may not evaluate evidence on a motion for summary judgment, the Court may make a determination as to the “caliber or quantity” of evidence as part of its determination of whether sufficient evidence exists for the fact-finder to find for the non-moving party. *Anderson*, 477 U.S. at 254.

Moreover, credibility determinations have no place in summary judgment proceedings. See *Lindsey v. Prive Corp.*, 987 F.2d 324, 327 n. 14 (5th Cir. 1993); *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291, 294 (5th Cir. 1987). The non-movant’s summary judgment evidence must be taken as true. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A Court view facts in the light most favorable to the non-movant and draw all reasonable inferences in his favor. *Brothers v. Klevenhagen*, 28 F.3d 452, 455 (5th Cir. 1994). If the non-movant sets forth specific facts in support of allegations essential to her claim, a genuine issue of material fact is presented, and summary judgment is inappropriate. *Id.* Summary judgment may be improper, even though the basic facts are undisputed, if the ultimate facts in question

are to be inferred from them, and the parties disagree regarding the permissible inferences that can be drawn from the basic facts. *Winters v. Highlands Insurance Company*, 569 F.2d 297, 299 (5th Cir. 1978). “(T)he choice between permissible inferences is for the trier of facts.” *Nunez v. Superior Oil Co.*, 572 F.2d 1119 (5th Cir. 1978). Where a jury is called for, the litigants are entitled to have the jury choose between conflicting inferences from basic facts. *Id.*

III. Analysis

A. Defamation

The Department argues that: (1) Stone’s complaint fails to identify a defamatory statement; (2) there is no admissible evidence that the Department knowingly made statements that were false and conveyed with the intention to mislead or deceive the recipient; and (3) Stone has not provided evidence that anyone within the Department provided statements to her prospective employers. R. Doc. 78-2, p. 3-6.

In opposition, Stone contends that her defamation claim still needs additional discovery and that her deposition transcript which is attached to the Department’s instant motion is “still under consideration.” R. Doc. 93-1, p. 2. Further, she argues that pursuant to Federal Rule of Civil Procedure 56(d) when supported by an affidavit as to why she, as the nonmovant, cannot present facts essential to justify her opposition, the Court may: (1) defer considering the motion or deny it, (2) allow time to obtain affidavit or declarations or to take discovery, or (3) issue any other appropriate order. R. Doc. 93-1, p. 4.

The Department also submitted a reply memorandum to support the subject instant motion. It argues that Stone’s contention that additional discovery must occur before the Court rules on her defamation claim is unfounded because she has taken at least six depositions and propounded numerous discovery requests since the matter was remanded from the Fifth Circuit.

R. Doc. 96, p. 3. It also notes that Stone has conducted five depositions of her potential employers who have all testified that they did not call the Department for employment information regarding Stone. *Id.* at 4. As an initial point, the Court is not persuaded by Stone's argument that because discovery has not been completed in this case, Federal Rule of Civil Procedure 56(d) should apply. This rule states that: [i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. Civ. P. 56(d). Stone has not provided an affidavit nor has she presented any declaration providing an explanation as to why she cannot present facts to justify her position.

The record reflects that Stone's defamation and retaliation claims were remanded from the Fifth Circuit on December 17, 2014. R. Doc. 66. Discovery on these claims ensued with August 11, 2015 deadline. See R. Docs. 62; 68. Stone filed a Motion to Continue Trial and All Dates (R. Doc. 71) on August 1, 2015, and thereafter the Court extended the discovery period until January 12, 2016. R. Doc. 73. The discovery period was extended again to September 21, 2016, after Stone's previous counsel withdrew. R. Doc. 92. Neither party has filed a discovery motion to bring a dispute to the Court's attention since remand. Stone undoubtedly has had ample time to conduct discovery and the Court is not persuaded by Stone's argument that her defamation claim has not been fully processed through discovery. The Court will now address the substance of Stone's defamation claim. Under Louisiana law, Stone must prove the following four elements to establish a *prima facie* case for defamation: (1) a false and defamatory statement concerning another; (2) an unprivileged communication to a third party; (3) fault (negligence or greater) on the part of the defendant; and (4) resulting injury. See *Bellard v. Gautreaux*, 675 F.3d 454, 461 (5th Cir. 2012). (citing *Costello v. Hardy*, 864 So.2d 129, 139 (La. 2004)). If even one of

the required elements is lacking, the cause of action fails. *Cooksey v. Steward*, 938 So. 2d (La.App.2d 2006).

Further, under Louisiana revised statute 23:291(a) “any employer that, upon request by a prospective employer or a current or former employee, provides accurate information about a current or former employee’s job performance or reasons for separation shall be immune from civil liability and other consequences of such disclosure provided such employer is not acting in bad faith. An employer shall be considered to be acting in bad faith only if it can be shown by a preponderance of the evidence that the information disclosed was knowingly false and deliberately misleading.” La R.S. 23:291(a).

Thus, “communications between a former employer and prospective employers of an employee enjoy a conditional or qualified privilege, and such a communication is not actionable when made in good faith for legitimate purposes.” *Butler v. Folger Coffee Co.*, 524 So.2d 206 (La.App. 4th Cir. 1988). A “good faith” statement, privileged from a claim of defamation, is defined as a statement made with reasonable grounds for believing its truth; only when lack of such reasonable grounds is found can it be said that the person uttering the statement is actuated by malice or ill will. *Chapman v. Ebeling*, 945 So.2d 222, 228 (La.App. 2d Cir. 2006).

For example, in *Bellard v. Gautreaux*, 675 F.3d 454 (5th Cir. 2012), Plaintiff was dismissed from a sheriff training program for falling asleep in class and allegedly making inappropriate sexual comments. *Id.* at 457. He requested a name clearing hearing but was denied. Thereafter, Plaintiff filed suit against the Sheriff. He claimed that the Sheriff defamed him by telling people, including the Chief of Police of the Baton Rouge Police Department which was a prospective employer, outside of the Sheriff’s Office about his sexual harassment allegation. *Id.* at 459. The District Court summarily dismissed the defamation claim and the Fifth Circuit affirmed. The Fifth Circuit reasoned, in part, that “any information relayed to [the Police Department] by the Sheriff’s

office personally is protected under Louisiana law which protected information provided by a former employer to a prospective employer.” Id. at 465. Similarly, in *Livingston v. Gavilo*, 2006 WL 37029, at *4 (W.D. La. Jan. 5, 2006), the United States District Court for the Western District of Louisiana held that the Plaintiff failed to establish that her former employer acted in bad faith when she gave an unfavorable evaluation to her prospective employer. There, the Plaintiff was terminated from her job teaching parenting classes for a non-profit organization. Id. at *1. She was terminated because of discrepancies in her time records. Id. After her termination, the former employer provided an employment reference to her prospective employer that she was terminated because of the time sheet discrepancies. Id. at 2. In applying the subject Louisiana statute, the Court reasoned that the Plaintiff “has not demonstrated that [the former employer] relied on inaccurate information when she provided a reference to the [prospective employer], nor that [the reference] was knowingly false and deliberately misleading. Id. at *4.

Here, Stone claims that she suffered from defamation due to the Department, in particular Vendetta Lockley, giving poor references to her prospective employers which resulted in her not being hired for positions she sought. R. Doc. 78-3, p. 82. Stone paid two reference-checking companies,⁴ in particular CheckYouReference.com, to call the Department to assess what her references may have been to prospective employers. She states that Lockley told the reference

⁴ Stone was unable to recall the name of the second reference checking company. See R. Doc. 78-3, p. 85-87. Stone stated that a “reference checker is a company that you can, you know, tell them to call your employer and just get a reference on you, just to see what they say or what they may be indicating to your future employers.” Id. at 82.

checker that she lacked organizational skills. R. Doc. 78-3, p. 82. She further alleges that during her job interview with the Mobile, Alabama Department of

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Treasury the interviewer “frowned” and “shook his head”⁵ when he referred to the reference he received from the New Orleans Office regarding her. She suspects that the negative reception she received from the interviewer reveals that personnel in the New Orleans Office gave her an unfavorable reference. However, Stone also stated that she does not have written documentation as to who the interviewer spoke to or the statements that he received.⁶ Moreover, Stone stated that during her interview for a position with a company that does account payables for McDonalds, the interviewer mentioned that the position only requires organizational skills. R. Doc. 78-3, p. 95.⁷ Given that the reference checker that she hired reported that Lockley stated that she lacked organizational skills, Stones suspects that interviewer’s reference to organizational skills as a job requirement is an indication that Lockley continued to tell prospective employers that she was disorganized. Id. 8

The record reflects that Lockley repeatedly stated that she considered Stone to be disorganized. An example is Stone’s state employee performance planning and review (PPR) form. The form which is dated August 19, 2010, shows that Lockley reported that Stone

5 R. Doc. 78-3, p. 91.

6 “Q. Has he [the interviewer with the Mobile, Alabama Department of Treasury] ever told you a name of the persons he spoke with on this phone call? A. He said ‘New Orleans Office.’ He didn’t give a name” R. Doc. 78- 3. p. 95.

7 “So when I went on this interview, he was like, “All you have to do for this job is just have organizational skills. And that’s an easy job. You just have to be organized to do it. So he was referring to the same thing that is listed on the actual reference checker, that they said on there when they spoke to Vendetta.” Id. at 95.

8 “Q. Has anybody told you about any reference checks they’ve made to the Louisiana Department of Revenue or your former supervisor at the Department of Revenue? A. Oh, yes. This, I guess, Al Sessions, he

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told me that he called the number on the application and – you know, he’s like making all these signs and faces and doing, you know, all of this (indicating). And he said, you know, ‘I called the number in New Orleans,’ you know and he was making faces, showing discontent, disdain, you know.” R. Doc. 78-3, p. 89.

completed a complex audit and that, although it appeared that she grasped the concepts, as the audit progressed her performance declined as there was an increase in mistakes and disorganization in the presentation of data. R. Doc. 78-9, p. 3.

Stone received a 330 rating score for the reporting period which put her on the high-end of the “Solid Sustained Performance”⁹ tier which is the third tier of five performance tiers. The tiers above “Solid Sustained Performance” are “Outstanding” and “Exceeds Expectations.” R. Doc. 78-9, p. 18. The rating tiers below “Solid Sustained Performance” are “Needs Improvement” and “Poor.” Id. A score of 330 essentially means that Stone was an average employee. Lockley repeated her view that Stone lacked organizational skills to Rex Christensen who is an investigation agent with CheckYourReference.com on October 14, 2013. R. Doc. 78- 11, p. 2. In response to the question, “Can you describe some areas where there may be room for improvement?”, Lockley stated, “I would say organization skills, She wasn’t as organized as I would have liked her to be.” R. Doc. 78- 11, p. 4.

In total, the record reflects that Lockley, when prompted, provided her evaluation of Stone’s work performance in good faith. Outside of Stone’s conjectures, the record is void of any evidence that Lockley or any other person with the Department provided statements that were knowingly false and deliberately misleading. The Court finds that under these circumstances, Stone has not created a genuine issue of fact that the Department acted in bad faith. Therefore, the state law defamation claim is summarily dismissed with prejudice.

B. Retaliation

The Department argues that the record is void of

evidence that Stone engaged in any activity protected by Title VII prior to the alleged retaliatory incidents. R. Doc. 78-2, p. at 7. It further argues that Stone did not face retaliation, as it was she who requested relocation to the

9 The numerical scale for the "Solid Sustained Performance" tier is 250 points to 349 points.

Houston office and agreed to delay her relocation because of illness and the need to complete her New Orleans files before leaving. Id. at 7-8. Furthermore, it asserts that Stone never faced an adverse employment action as Lockley gave her a "Solid Sustained Performance" and recommended her for a merit increase which, the Department argues, is evidence of her trying to advance rather than hinder Stone's professional development. Id. at 8. Lastly, the Department argues that Stone's claim is filled with "workplace criticisms and job scrutiny" that do not rise to the level of an adverse employment action for the purpose of a retaliation claim. Id. at 9-10.¹⁰ In response, Stone contends that during her deposition she testified that Lockley retaliated against her for filing her EEOC grievance by restricting her telecommute days and incorrectly claiming that some of her audits were late. R. Doc. 93, p. 2. Stone also argues that contrary to the Department's position, it caused the delay in her transfer to the Houston office. Id. Further, Stone contends that Lockley testified that she knew of the grievance that Stone filed against her. Id. Stone also argues that the Department has failed to respond fully to her discovery requests regarding: (1) a rating level of 3 compared with rating levels of 4 for paid raises and promotions and (2) her request for production for audited cases in which the Department gave her credit, those in which she did not receive credit, and those that were not returned in time of her end of the year production numbers. R. Doc. 93, p. 1. Title VII prohibits retaliation against employees who engage in protected conduct," such as filing a charge of harassment or discrimination. *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 325 (5th Cir. 2002). To prevail on a Title VII retaliation claim, the Stone

must establish that

(1) that she participated in an activity protected by the Title VII; (2) that her employer took an

10 The Department filed a reply memorandum in which it reasserts that there is no evidence that the prior formal grievance involved any accusation of Title VII discrimination or that Lockley had knowledge of Stone's original formal inter-departmental grievance which is the only possible grievance that forms the basis of her remaining retaliation claim. Further, the Plaintiff has failed to provide evidence that the subject grievance involved any alleged Title VII discrimination to serve as the basis of her retaliation claim. R. Doc. 96, p. 1-3.

adverse employment action against them; and (3) that her participation in the protected activity caused the adverse employment action. *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 651- 652 (5th Cir. 2012) (citing *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 523 (5th Cir. 2008)). If the plaintiff establishes all three elements, then the burden shifts to the employer to show a legitimate and non-retaliatory reason for its adverse employment action. If the employer can show a legitimate and non-retaliatory reason, then the burden shifts back to the plaintiff to demonstrate that the employer's reasoning for the adverse employment action is pretext for retaliation against the plaintiff. *Pineda v. United Parcel Ser., Inc.*, 360 F.3d 483, 486-87 (5th Cir. 2004).

Under Title VII, a plaintiff may engage in protected activity if she may make a charge, testify, assist, or participate in any manner in an investigation, proceeding, or hearing under Title

VII. *Id.* An informal complaint to a supervisor regarding an unlawful employment practice may satisfy the opposition requirement of a Title VII retaliation claim." *Tureaud v. Grambling State Univ.*, 294 Fed.Appx. 909, 914-15 (5th Cir. 2008). "To establish a causal link between the protected activity and the adverse employment decision, the evidence must demonstrate that the decision maker had knowledge of the protected activity." *Id.* Here, Stone

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engaged in a protected activity by filing an internal complaint with the Department on May 12, 2010, and an EEOC charge on August 12, 2010.¹¹

Moreover, for purposes of a retaliation claim, an adverse employment action is one that “a reasonable employee would have found . . . materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of

¹¹ “An informal complaint to a supervisor regarding an unlawful employment practice may satisfy the opposition requirement of a Title VII retaliation claim.” *Tureaud v. Grambling State Univ.*, 294 Fed.Appx. 909, 914- 15 (5th Cir. 2008).

discrimination.” *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). “[T]he significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.” *Id.* at 69. Normally, “petty slights, minor annoyances, and simple lack of good manners will not create such deterrence.” *Id.* at 68.

Further, the Fifth Circuit has limited actionable retaliatory conduct to mean “ultimate employment decision” such as “such as hiring, granting leave, discharging, promoting, and compensating.” *McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir.2007).¹² An employment action that “does not affect job duties, compensation, or benefits” is not an adverse employment action. *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 282 (5th Cir. 2004). Allegations of unpleasant work meetings, verbal reprimands, improper work requests, and unfair treatment do not constitute actionable adverse employment actions. *King v. Louisiana*, 294 F. App’x 77, 85 (5th Cir. 2008) (citing *Breaux v. City of Garland*, 205 F.3d 150, 158 (5th Cir. 2000)).

The record is unclear as to whether Lockley had knowledge that Stone engaged in the protected activity of filing a grievance against her for discrimination, as Lockley’s deposition transcript which is cited in Stone’s opposition is not in the record.

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13 However, irrespective of whether Lockley knew that Stone complained of discrimination, the facts at issue turn on the second element – whether she suffered an adverse employment action (i.e. whether Lockley retaliated against Stone by hindering her professional development, impeding her transfer to the Houston office, and limiting her telecommuting privileges).

12 Major changes in compensation, duties, and responsibilities constitute ultimate employment actions.

Pegram, 361 F.3d at 282 n. 8 (citing Hunt v. Rapides Health Care Sys., LLC, 277 F.3d 757, 770 (5th Cir.2001)).

13 The Department argues that: “Plaintiff cites pages nine and ten of Mrs. Lockley’s deposition to argue that she had knowledge of plaintiff original formal grievance. However, plaintiff’s counsel at Mrs. Lockley’s deposition never clarified which of plaintiff’s many grievances she had been informed of.” R. Doc. 96, p. 2.

Here, Stone has not established that she suffered an adverse employment action while employed by the Department. As noted above, to constitute an adverse employment action the act must be materially adverse that would dissuade a reasonable worker from making or supporting a charge of discrimination. Regarding events that occurred after May 2010, Stone alleges that Lockley retaliated against her by not giving her credit for all of her audited cases, delayed her transfer to Houston, purposely delayed in returning audit cases to her in an effort to affect negatively her end-of-the-year production numbers, and convinced her supervisors in Houston to limit her telecommuting privileges. See R. Doc. 93-1, p. 2. However, based on Stone’s deposition transcript, her transfer to the Houston office was delayed by her own desire to close out her files in New Orleans before she transferred. R. Doc. 78-3, p. 65.¹⁴ Stone also testified that during the time she was trying to close out cases she was out on sick leave from the end of July 2010

until August 17, 2010, which further delayed her Houston transfer Id. at 63. Ultimately, Stone agreed with Jay Frost, the director, to delay her transfer until August of 2010. Id. at 66.

The transcript also reveals that the Houston office did not allow its employees to telecommute until June or July of 2011 and permitted telecommuting two days a week. Id. at 45. When the Houston office allowed its employee to telecommute, Stone was allowed to telecommute one day a week. Id. at 57.

Although the Fifth Circuit has not specially addressed whether restriction of telecommuting constituted an adverse employment action, numerous federal courts have held that denying an employee's request to telecommute is not an adverse employment action for 14 "Q: "All right, So were they completed before you went out on sick leave?" A. "I completed the one that I had – that I was suppose to complete. I remember working in the office and completing the ones that I mentioned that I was supposed to complete. I had waiver on the others ones." Q: Okay. "What day were you expecting to go to the Houston office?" A: "I actually was going to leave I think earlier in July, but I wanted to make sure everything that I everything I can just turn in ahead of – you know, before I left. But when I saw that I was constantly being targeted, I decided that it was best that I just go ahead on now." R. Doc. 78-3, p. 65

purpose of Title VII. See *Allbritain v. Tex. Dep't of Ins.*, 2014 WL 272223, at *10 (W.D.Tex., Jan. 23, 2014) (citing *Lewis v. CareCore Nat'l LLC*, 2012 WL 3704985, *9 (D.Colo. May 30, 2012) ("Even if Plaintiff was inconvenienced by having to commute to work as opposed to telecommute from home, a mere inconvenience is not an adverse employment action.") (internal citations omitted); *Homberg v. UPS*, , 2006 WL 2092457, at *9 (D.Kan. July 27, 2006) (noting "district courts in other jurisdictions have consistently held that the denial of a request to work from home is not adverse employment action"); *Haas v. Zurich N. Am.*, 2006 WL 2849699, at *4 (N.D.Ill. Sep.29, 2006) ("The fact that [plaintiff's supervisor] did not permit Ms. Haas to work from home every time she requested is also not an adverse employment action.").

The Court is not persuaded by Stone's argument that the Court should rule in her favor because the Department has refused to respond fully to her discovery requests concerning: (1) her rating level of 3 as compared with rating levels of 4 for pay raises and professional promotions and (2) her request for production of audit cases in which she was given credit, those in which she was not given credit, and ones that were not returned in time for her end of the year production numbers. R. Doc. 93, p. 1.

The Court notes that this case has been pending for over three years and a half. During this time, the record reflects that Stone never filed a motion to compel to seek an Order from the Court compelling production of materials that she now argues the Department failed to produce. Moreover, there is also no evidence that Stone propounded the mentioned discovery requests as there are no such requests in the record nor did she attach the request to her opposition. Even assuming that Stone has the information that she seeks which relates to her job performance and what she perceives as a negative evaluation, negative performance evaluations, even if undeserved, are not adverse employment actions. *Thompson v. Exxon Mobil Corp.*, 344 F. Supp.

2d 971, 982 (E.D. Tex. 2004) (citing *Sweeney v. West*, 149 F.3d 550, 556 (7th Cir. 1998) (“[N]egative performance evaluations, standing alone, cannot constitute an adverse employment action.”)).

Stone testified that she was never disciplined by Lockley or anyone else when she worked in the New Orleans office. R. Doc. 78-3, p. 81. In addition, her wages never decreased. *Id.* Perhaps most importantly, Lockley who Stone alleged retaliated against her, in fact, recommended her for a merit increase for her

work performance during 2010 prior to her relocation. R. Doc. 78-9, p. 1. Stone has therefore failed to establish that she suffered an adverse employment action during her employment with the Department. Accordingly, the retaliation claim is summarily dismissed with prejudice.

IV. Conclusion

Accordingly

IT IS ORDERED that the Louisiana Department of Revenue's Motion for Summary Judgment (R. Doc. 78) is GRANTED.

New Orleans, Louisiana, this 13th day of July 2016.

ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NOVEMBER 5, 2014)

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

JOANNE STONE,

Plaintiff–Appellant,

v.

LOUISIANA DEPARTMENT OF REVENUE,

Defendant–Appellee.

No. 14–30204

Appeal from the United States District Court for the
Eastern District of Louisiana USDC,
No. 2:12–CV–3022

Before DAVIS, DeMOSS, and ELROD,
Circuit Judges.

PER CURIAM*

Appellant Joanne Stone, proceeding *pro se*,
appeals the district court's dismissal of her Title VII
and state law defamation claims against Appellee

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

Louisiana Department of Revenue. For the following reasons, we AFFIRM the district court's dismissals of Stone's discrimination and harassment claims, we REVERSE the district court's dismissals of Stone's retaliation and defamation claims, and we REMAND to the district court for further proceedings consistent with this opinion.

I.

Stone, an African American, worked as a Revenue Tax Auditor for the Louisiana Department of Revenue. She initially worked in the New Orleans office from July 2001 until August 2010. Stone then transferred to the Department's Houston office, where she was employed until her resignation in March 2012. On August 12, 2010, Stone filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging race discrimination and retaliation. She later amended her charge to include allegations of harassment based on her race. The EEOC issued Stone a right to sue letter on her claims for her discrimination, harassment, and retaliation claims. On December 12, 2012, Stone filed suit in the United States District Court, alleging constructive discharge. She amended her suit on September 12, 2013, to include allegations of racial discrimination, harassment, and retaliation.

To support her claims of discrimination and harassment, Stone alleges that her supervisor, Vendetta Lockley, intended to eliminate Stone's position within the New Orleans Department. To further this agenda, Stone asserts that Lockley began to harass Stone by questioning Stone's work

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performance in meeting audit targets,¹ despite Lockley having previously indicated that Stone and the employees in her group had met their audit targets. Stone also asserts that Lockley failed to give her credit for all Stone's audit hours, approved completed audit hours too late to be counted toward Stone's year-end production number, and assigned Stone to "desk audits," which she alleges had lower assets than the audits assigned to a Caucasian co-worker. She further alleges that her Caucasian co-workers were assigned as lead auditors, and a racially derogatory comment was made about African Americans.

Stone alleges that Lockley created a hostile working environment when Lockley accused Stone of losing an audit document. Stone asserts that this accusation slowed down her transfer to Houston and reduced her telecommuting privileges. She further alleges that her telecommuting days were reduced from three days per week to one day per week due to the relationship between her former manager in New Orleans and her new manager in Houston. She asserts that Caucasian employees were granted more telecommuting privileges. Stone further alleges a hostile work environment was created when Lockley and another supervisor searched for the missing audit document in her office without Stone's permission.

In April 2011, Stone requested an out-of-state position near her home in Mobile, Alabama. Her request was denied. She renewed her request in

¹ Employees' work included "chargeable" audit hours and non-audit hours, which were not chargeable to the office.

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August 2011. That request was also denied. Stone alleges the denials were based on her race because Caucasian employees were being granted similar requests. In February 2012, Stone submitted a letter of resignation, which she later withdrew. In March 2012, Stone required time off due to illness. Stone's supervisor Elsie Thomas informed her that her leave would be approved after she obtained a note from her physician, which would then be verified by human resources. Stone asserts that this constituted harassment and contributed to a hostile work environment. Stone alleges that this continued harassment ultimately led to her second resignation letter on March 26, 2012. Her final day of employment with the Department was April 9, 2012.

To support her claim of constructive discharge, Stone argues that she was forced to resign after the Department refused her requests to either continue to telecommute three days a week or permit her to conduct out-of-state audits near her home in Alabama.

On February 28, 2013, Stone filed a second EEOC charge alleging race discrimination, retaliation, constructive discharge, and harassment for the same dates covered in her first EEOC charge. The EEOC issued a right to sue letter on the second charge, closing the investigation due to Stone's filing suit in federal court.

Before the district court, the Department filed a Motion to Dismiss and, Alternatively, Motion for Summary Judgment, alleging that Stone's claims were barred by res judicata, that Stone failed to state a prima facie case for her Title VII claims, and that

Stone failed to exhaust her administrative remedies or the claims were prescribed. The parties consented to proceed before a magistrate judge. The magistrate judge declined to dismiss Stone's complaint as barred by res judicata, but granted the motion to dismiss for failing to state a claim pursuant to Rule 12(b)(6). Stone timely appealed.

II.

A.

The Department argues that Stone's suit is barred by res judicata. Stone filed a lawsuit against the Department in September 2012, seeking reversal of the denial of her unemployment benefits. The court dismissed the lawsuit with prejudice on Stone's own motion. The Department argues that Stone was asserting her Title VII claims in that lawsuit, citing to her discussion of her EEOC charges and the attachment of the EEOC charge to the complaint. The magistrate judge found that Stone's current suit was not barred by res judicata.

Res judicata bars the litigation of claims that were previously litigated or should have been raised in an earlier suit. *See Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 571 (5th Cir.2005). This court reviews de novo "the res judicata effect of a prior judgment." *Id.* "Dismissal under Rule 12(b)(6) on res judicata grounds is appropriate when the elements of res judicata are apparent on the face of the pleadings." *Murry v. Gen. Servs. Admin.*, 553 Fed.Appx. 362, 364 (5th Cir.2014) (citing *Kansa Reinsurance Co. v. Cong. Mortg. Corp. of Tex.*, 20 F.3d 1362, 1366 (5th Cir.1994)).

There are four elements that must be met for a claim to be barred by res judicata: whether (1) “[t]he parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded to a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions.” *Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925, 934 (5th Cir.1999) (internal quotations and citations omitted).

It is clear from the context of the complaint in the first lawsuit that Stone was raising one claim—reversal of the denial of her unemployment benefits by a state administrative review board. While it is true that Stone discussed facts that also support her Title VII claims, and attached her EEOC charge to the complaint, her reference to the EEOC charge and its underlying facts was to counter the administrative board’s finding that she was “merely dissatisfied with her employment” and was therefore deemed to have quit. Such discussion does not, as the defendants contend, establish that Stone was “clearly attempting” to litigate her Title VII claims. In fact, Stone states in her complaint that her EEOC claims were still being investigated, evidencing that she did not intend to raise specific Title VII claims.

Importantly, the only claim Stone raised a state law claim over which the federal court had no jurisdiction. A claim for unemployment benefits must be filed in the state district court of the domicile of the claimant. *See* LA. REV. STAT. ANN. § 23:1634. Because the district court did not have jurisdiction over the lawsuit, there could be no final judgment from a court of competent jurisdiction.

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Because at least one element for res judicata to apply cannot be satisfied, we find that the district court did not err in denying the Department's motion to dismiss based on res judicata.

B.

Having determined that the lawsuit underlying this appeal is not barred by res judicata, we must next determine which of Stone's claims are ripe for our review.

1. Exhaustion and Timeliness of 2013 EEOC Charge

The Department argues that Stone did not exhaust her administrative remedies with respect to her 2013 EEOC charge. Specifically, the Department asserts that the 2013 EEOC charge was not perfected, as there is no evidence that a signed, verified charge was filed with the EEOC. The Department argues that the only evidence of a charge is a notice of the filing of the charge from the EEOC, which states "a copy of the perfected charge will be mailed to you once it has been received from the Charging Party." Alternatively, the Department argues that the 2013 charge was untimely as it was not filed within 300 days of the last complained of discriminatory conduct.

Stone has not produced a signed, verified charge evidencing that her 2013 charge was perfected. Instead, she produced a letter from an EEOC investigator certifying that it received a charge of discrimination on February 25, 2013, and a notice of dismissal from the EEOC, dismissing the

investigation of the 2013 charge on the basis that Stone had filed a federal lawsuit.

We pretermite whether Stone perfected her 2013 EEOC charge, because even if she had, the charge was untimely. Stone was required to file an employment discrimination claim with a designated state agency or the EEOC within 300 days of the alleged unlawful employment action. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109(2002) (citing 42 U.S.C. § 2000e-5(e)(1)). "A claim is time barred if it is not filed within these time limits." *Id.*

Stone asserts that the filing of her 2013 charge was timely under the "continuing violations" doctrine. The continuing violation doctrine "reliev[es] a plaintiff of establishing that all of the complained-of conduct occurred within the actionable period if the plaintiff can show a series of related acts, one or more of which falls within the limitations period." *Huckabay v. Moore*, 142 F.3d 233, 238 (5th Cir.1998) (quoting *Messer v. Meno*, 130 F.3d 130, 134-35 (5th Cir.1997)). The plaintiff must "show an organized scheme leading to and including a present violation, such that it is the cumulative effect of the discriminatory practice, rather than any discrete occurrence, that gives rise to the cause of action." *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 352 (5th Cir.2001). Stone fails to identify any discriminatory conduct occurring later than March 31, 2012, the date of her resignation. Thus, Stone had until January 25, 2013, to timely file claims of discrimination based on her 2013 EEOC charge.

Because she did not file until February 28, 2013, her 2013 discrimination charge was untimely.²

2. Exhaustion of 2010 EEOC Charges

The Department argues that Stone's complaint includes allegations not raised in her 2010 EEOC charge and therefore she did not exhaust her administrative remedies as to these allegations. In her August 2010 EEOC charge, Stone alleged race discrimination and harassment. In her November 2010 EEOC charge, she included allegations of retaliation. In her untimely 2013 EEOC charge, Stone alleged disparate treatment and/or disparate impact. In her complaint filed with the district court,

² Stone also argues that her claim is not time barred due to equitable tolling. Stone argues that the deadline to file her 2013 charge should be tolled due to her unsuccessful attempts to have counsel appointed by the court. The plaintiff has the burden of providing a sufficient factual basis for tolling the filing deadline. *Conaway v. Control Data Corp.*, 955 F.2d 358, 362 (5th Cir.1992). This court has applied equitable tolling when (1) a suit is pending between the parties in the incorrect forum; (2) the claimant is unaware of facts supporting her claim because the defendant intentionally concealed them; and (3) the claimant is misled by the EEOC about her rights. *See Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 880 (5th Cir.2003). We have also found equitable tolling excused an untimely filing "in rare and exceptional circumstances when a plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." *Lovett v. Barbour Intern., Inc.*, 211 Fed.Appx. 281, 283 (5th Cir.2006) (per curiam) (unpublished) (citation and internal quotation marks omitted). Although this list is not exhaustive, Stone has not provided any arguments or cited to any case law that would support equitable tolling.

Stone alleged constructive discharge for the first time.

“Title VII requires employees to exhaust their administrative remedies before seeking judicial relief.” *Huckabay*, 142 F.3d at 239 (internal citations omitted). An employee may file a lawsuit “not only upon the specific complaints made by the employee’s initial EEOC charge, but also upon any kind of discrimination like or related to the charge’s allegations, limited only by the scope of the EEOC investigation that could reasonably be expected to grow out of the initial charges of discrimination.” *Fellows v. Universal Rests., Inc.*, 701 F.2d 447, 451 (5th Cir.1983). “[A] charging party’s rights should [not] be cut off merely because [s]he fails to articulate correctly the legal conclusion emanating from his factual allegations.” *Simmons-Myers v. Caesars Entm’t Corp.*, 515 Fed.Appx. 269, 272 (5th Cir.2013) (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462 (5th Cir.1970)). We must determine whether the EEOC charge “stated sufficient facts to trigger an EEOC investigation and to put an employer on notice of the existence and nature of the charges”. *Id.* at *2 (citing *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 878 (5th Cir.2003); *Sanchez*, 431 F.2d at 462).

Stone did not allege any facts in her 2010 EEOC charges that reasonably encompass her later claims for constructive discharge, disparate impact or disparate treatment. *See Pacheco v. Mineta*, 448 F.3d 783, 788–92 (5th Cir.2006). At the time she filed her 2010 EEOC charge she was still employed with the Department. Stone also fails to identify a facially neutral Department policy or practices that was applied to her in a discriminatory way. *See Stout v.*

Baxter Healthcare Corp., 282 F.3d 856, 860 (5th Cir.2002). She further failed to allege facts sufficient to show she suffered disparate treatment. In her EEOC charge, she states only that she saw her supervisor “react differently” by making a face when an African American co-worker arrived late and have no reaction when a Caucasian employee arrived late. In her amended charge she stated that a Caucasian co-worker was not required to quote “applicable law” when presenting audits, but Stone was. This also is insufficient to trigger an EEOC investigation and to put an employer on notice of a disparate treatment claim. *See Manning*, 332 F.3d at 878; *Sanchez*, 431 F.2d at 462.

Thus, Stone’s subsequent claims fall outside “the scope of the EEOC investigation” and could not reasonably be expected to grow out of her initial charge of race discrimination and harassment. As such, Stone has failed to exhaust her administrative remedies on these later raised claims.

C.

Stone argues that the district court erred in granting the Department’s motion to dismiss on her claims for race discrimination, harassment, and retaliation pursuant to Federal Rule of Civil Procedure 12(b)(6). We review a district court’s dismissal pursuant to Rule 12(b)(6) de novo, accepting all wellpleaded facts as true and viewing all well-pleaded facts in the light most favorable to the plaintiff. *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 854 (5th Cir.2012) (en banc). To survive dismissal, a plaintiff must plead “enough facts to state a claim to relief

that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). However, the complaint must allege enough facts to move the claim “across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678 (citations omitted). The court may not go outside the complaint, but it may consider documents attached thereto. *Kennedy v. Chase Manhattan Bank USA, NA*, 369 F.3d 833, 839 (5th Cir.2004). Because Stone is proceeding *pro se*, her pleadings are held “to less stringent standards than formal pleadings drafted by lawyers.” *Calhoun v. Hargrove*, 312 F.3d 730, 733 (5th Cir.2002) (internal quotation and citations omitted).

The district court applied incorrect standards when it dismissed Stone’s discrimination, harassment, and retaliation claims for failure to plead a *prima facie* case. Although the *McDonnell Douglas* framework governs the standard of proof at trial, “a plaintiff need not make out a *prima facie* case of discrimination in order to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim.” *Raj v. Louisiana State Univ.*, 714 F.3d 322, 331 (5th Cir.2013). The district court, by requiring Stone “to make a showing of each prong of the *prima facie* test . . . at the pleading stage,” improperly substituted “an ‘evidentiary standard’ for a ‘pleading requirement.’” *Id.* (quoting *Swierkiewicz v. Sorema*

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N.A., 534 U.S. 506, 512 (2002)). Applying *McDonnell Douglas* at the pleading stage is particularly problematic where, as here, the plaintiff alleges direct evidence of discrimination. As the Supreme Court has explained:

“[I]f a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case. . . . It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.”

Swierkiewicz, 534 U.S. at 511–12. We will address Stone’s claims under the proper standard, examining whether Stone has “pleaded factual content [that] allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678; see *Sobranes Recovery Pool I, LLC v. Todd & Hughes Const. Corp.*, 509 F.3d 216, 221 (5th Cir.2007) (“[T]his court may affirm the district court’s judgment on any grounds supported by the record. . . .(internal quotation marks omitted)). Although Stone need not plead a prima facie case, she is not exempt from her obligation to “allege facts sufficient to state all the *elements* of her claim.” *Mitchell v. Crescent River Port Pilots Ass’n*, 265 Fed.Appx. 363, 370 (5th Cir.2008) (quoting *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, 346 (4th Cir.2006)).

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1. Stone's Discrimination Claims

Title VII makes it unlawful for an employer “to fail or refuse to hire or 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. . . .42 U.S.C. § 2000e–2(a)(1). We use the shorthand term “adverse employment action” to refer to an employment decision that negatively affects the compensation, terms, conditions, or privileges of employment. *See Pegram v. Honeywell, Inc.*, 361 F.3d 272, 281–82 (5th Cir.2004). In the context of a racial discrimination claim, adverse employment actions involve “ultimate employment decisions” such as hiring, firing, demoting, promoting, granting leave, and compensating. *See Alvarado v. Tex. Rangers*, 492 F.3d 605, 612 (5th Cir.2007); *Pegram*, 361 F.3d at 282. Because an adverse employment action is an element of a racial discrimination claim, a plaintiff must allege that she suffered an adverse employment action because of racial discrimination. *See Raj*, 714 F.3d at 331.

Stone did not sufficiently allege that she suffered an adverse employment action. Stone alleges that she was denied telecommuting privileges that were granted to Caucasian employees. She also alleges that she was assigned “desk audits,” which have lower assets than the audits assigned to Caucasian employees. Stone further alleges that Caucasians were assigned as lead auditors. She alleges that her performance was called into question by her supervisor and that her supervisor improperly delayed approval of her audit hours, which impacted Stone’s year end production numbers. Finally, Stone

alleges that she was subjected to a racially derogatory remark from her supervisor.

Even under liberal reading of Stone's complaint, the only fact she alleges that could implicate an "ultimate employment decision" was that she was denied the opportunity to be a lead auditor. However, Stone fails to allege facts suggesting that being a lead auditor was akin to being denied a promotion, would affect her compensation, or otherwise be considered a benefit rising to the level of an ultimate employment action. In fact, the entirety of her allegations about being a lead auditor is that her supervisor "once assigned the white employee, Annette Broadway as lead on the out-of-state audit even though [Stone] had more experience and time within the department." This allegation, without more, does not provide enough factual content to state a plausible claim for relief. Because Stone has failed to allege that she suffered an adverse employment action, she has failed to state a claim for racial discrimination.

2. Stone's Harassment Claims

To state a claim for harassment based on a hostile work environment theory, a plaintiff must allege, *inter alia*, that she was harassed because of her race, affecting a condition or privilege of her employment. *See Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir.2002). To affect a condition or privilege of employment, the harassment must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Id.* (internal quotations and citations omitted). "Whether an

environment is hostile or abusive depends on a totality of circumstances, focusing on factors such as the frequency of the conduct, the severity of the conduct, the degree to which the conduct is physically threatening or humiliating, and the degree to which the conduct unreasonably interferes with an employee's work performance." *Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 194 (5th Cir.1996).

Stone alleges that Lockley, her supervisor, created a hostile working environment by accusing Stone of losing an audit document, which had the effect of slowing Stone's transfer to Houston and reducing her telecommuting privileges. She also alleges that Lockley assigned Stone more "desk audits," which have lower assets than the audits assigned to Caucasian employees, that Lockley incorrectly called her performance into question, and that her supervisor improperly delayed approval of her audit hours, which impacted Stone's year end production numbers. She further alleges that her telecommuting days were reduced from three days per week to one day per week due to the relationship between her former manager in New Orleans and her new manager in Houston. Additionally, Stone alleges a hostile work environment was created when Lockley and another supervisor searched for the missing document in her office without Stone's permission. Finally, Stone alleges that the Department's request that she obtain a doctor's note constituted harassment.

We agree with the magistrate judge that Stone failed to allege facts that, taken as true, demonstrate that she faced harassment "sufficiently severe or pervasive to alter the conditions of [her] employment

and create an abusive working environment.” *Ramsey*, 286 F.3d at 268. As such, the magistrate judge properly dismissed Stone’s harassment claims.

3. Stone’s Retaliation Claim

“Title VII prohibits retaliation against employees who engage in protected conduct,” such as filing a charge of harassment or discrimination. *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 325 (5th Cir.2002). To state a claim for retaliation in violation of Title VII, the plaintiff must allege that her employer took an adverse employment action against her in retaliation for engaging in protected conduct. Notably, the standard for establishing an adverse employment action in the retaliation context differs from the standard in the discrimination context. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 66–68 (2006) (noting that the anti-retaliation provisions of Title VII are broader than the anti-discrimination provisions). For purposes of a retaliation claim, an adverse employment action is one that “a reasonable employee would have found . . . materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Id.* at 68 (internal quotations and citations omitted). “[T]he significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.” *Id.* at 69. Normally, “petty slights, minor annoyances, and simple lack of good manners will not create such deterrence.” *Id.* at 68.

The standard for adverse employment action is tied to the challenged retaliatory act, “not the

underlying conduct that forms the basis of the Title VII complaint.” *Id.* The majority of Stone’s allegations supporting her claim for retaliation occurred prior to her filing an internal grievance³ in May 2010 and the EEOC charge in August 2010. As such, any facts claimed as retaliation prior to May 2010 do not have “a causal connection between the protected activity and the adverse employment action.” *See McCoy*, 492 F.3d at 556–57.

As for events occurring after May 2010, Stone alleges that Lockley singled her out by not giving her credit for all of her audited cases, returned her audited cases too late to be counted toward Stone’s end-of-the-year production numbers, delayed Stone’s transfer to Houston by falsely accusing her of misplacing a form, and convinced Stone’s supervisors in Houston to limit Stone’s telecommuting privileges. We conclude that these actions “might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Burlington N.*, 548 U.S. at 68. Taking Stone’s allegations as true, Lockley retaliated against Stone by hindering her professional development, impeding her physical transfer to a new office, and limiting her telecommuting privileges once she arrived in Houston. Especially in light of the less stringent standards applied to *pro se* pleadings, this is enough to state a claim for retaliation. *Cf. Burlington N.*, 548 U.S. at 69 (“[T]o retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee’s professional

³ The internal grievance was mitigated upon Stone’s transfer to the Houston office.

advancement might well deter a reasonable employee from complaining about discrimination.”); *Rodriguez–Vives v. Puerto Rico Firefighters Corps of Puerto Rico*, 743 F.3d 278, 285 (1st Cir.2014) (holding that plaintiff stated claim for retaliation where employer denied her certain assignments and “subjected her to repeated unpleasant and inequitable treatment.”); *Crawford v. Carroll*, 529 F.3d 961, 974 (11th Cir.2008) (“[Plaintiff] suffered a materially adverse action in the form of the unfavorable performance review she received (that affected her eligibility for a merit pay increase) after she complained of racial discrimination.”). Accordingly, we reverse the district court’s judgment with regard to Stone’s retaliation claim.

III.

After dismissing Stone’s federal claims, the district court declined to exercise supplemental jurisdiction over Stone’s state law defamation claim. Because we now reverse the dismissal of Stone’s retaliation claim, we also reverse the district court’s dismissal of Stone’s state law claim.

IV.

For the foregoing reasons, we AFFIRM the district court’s dismissal of Stone’s discrimination and harassment claims, we REVERSE the district court’s dismissal of Stone’s retaliation claim and her state law defamation claim, and we REMAND to the district court for further proceedings consistent with this opinion.

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JUDGMENT OF THE UNITED STATES
MAGISTRATE JUDGE ENTERING JUDGMENT IN
FAVOR OF DEFENDANT
(FEBRUARY 12, 2014)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOANNE STONE,

Plaintiff-Appellant,

v.

LOUISIANA DEPARTMENT OF REVENUE,

Defendant-Appellee.

No: 12-3022

This matter having come before the Court on consent of the parties pursuant to 28 U.S.C. § 636(c), for the reasons separately assigned in the Court's written opinion; accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED that there is judgment in favor of the defendant, the Louisiana Department of Revenue, and against the plaintiff, Joanne Stone, dismissing with prejudice Stone's claims of disparate impact, constructive discharge, race discrimination, retaliation and harassment.

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/s/ Karen Wells Roby
United States Magistrate Judge

New Orleans, Louisiana,
this 12th day of February, 2014.

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ORDER AND REASONS OF THE
UNITED STATES MAGISTRATE JUDGE
RECOMMENDING DISMISSAL OF
DEFENDANT'S CLAIMS
(FEBRUARY 12, 2014)

UNITED STATES DISTRICT COURT
E.D. LOUISIANA

JOANNE STONE,

Petitioners,

v.

LOUISIANA DEPARTMENT OF REVENUE,

Respondent.

Civil Action No. 12-3022

996 F.Supp.2d 490

KAREN WELLS ROBY, United States Magistrate
Judge.

Before the Court is Defendant, the Louisiana Attorney General of the State of Louisiana, through its Department of Revenue's ("Department") Motion to Dismiss, Alternatively, Motion for Summary Judgment (R. Doc. 30) of Plaintiff, Joanne Stone's

(“Stone”)¹ complaint. The Motion is opposed. *See* R. Doc. 35. A reply to the opposition was also filed. *See* R. Doc. 39. The underlying motion was noticed for submission on November 13, 2013, and heard on the briefs on that date. *See* R. Doc. 36.

I. Background

Stone is an African American female, who worked as a Revenue Tax Auditor II of the Department. *See* R. Doc. 1, pp. 1, 15.² She alleges that she worked out of the Department’s New Orleans, Louisiana office, from July 17, 2001, until August 23, 2010, before transferring to the Department’s Houston, Texas office, where she worked until she resigned by letter on March 26, 2012. *See* R. Doc. 20–4, p. 166; R. Doc. 26–1, p. 73–76; R. Doc. 26–2, p. 91.

Stone originally instituted this action on December 20, 2012, alleging that she was discriminated against pursuant to Title 42 U.S.C. § 2000e, 42 U.S.C. §§ 1983 and 1985 because her request to telecommute was denied due to her race,

¹ On some documents attached to Stone’s Complaint Stone is apparently referred to as “Joanne Rhea.” *See* (R. Doc. 1, pp. 14–15). Although not explained, the Court construes the change in last name to mean that Stone changed her last name between the time certain events in question occurred, and the time she filed the instant suit.

² Although Stone amended her complaint as directed by this Court, her allegations remain substantively identical to her first complaint, which was filed on December 20, 2012. The main difference is that all her allegations were plead under 42 U.S.C. § 1983 and § 1985, which were improper. *See* R. Doc. 1, p. 1.

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as white employees were allowed to telecommute. *See* R. Doc. 1. Stone alleges that she requested the opportunity to work from home and initially did not receive a response. Eventually though, Stone alleges that she was allowed to telecommute and work from her home in Alabama on Monday, Tuesday and Wednesday of each week. She alleges that she worked in the New Orleans office on Thursday and Friday of each week.

Stone alleges that she later learned that her employer would prefer to eliminate the position rather than permit her to continue to work in accordance with her telecommuting schedule. She alleges that beginning in November 2009, her supervisor, Vendetta Lockley ("Lockley"), who is also African American,³ began singling her out and questioning her via email regarding her case chargeable audit hours versus non-audit hours, which were chargeable to the office. Stone construed Lockley's inquiries as harassment, because two days before her inquiry, Lockley sent an email to the group indicating that every employee was on target. *See* R. Doc. 26-1, p. 19. Stone's complaint alleges that this email was the beginning of what she characterizes as a series of racially discriminatory and harassing behavior by Lockley towards her. *See* R. Doc. 26, p. 5-8.

Specifically, Stone alleges that Lockley singled her out by not giving her credit for all the audited cases she handled, thereby lowering her production

³ Vendetta Lockley's title was "Tax Revenue Audit Manager," as indicated by the attachments in the record.

amount; returning her completed audit cases back to her too late to be counted toward the end of the year production number, allegedly making racially derogatory comments about African Americans being lazy and slow, and by giving desk audits which had "lower assets than those assigned to another white employee, Annette Broadway." *See* R. Doc. 26, p.5–8.

Stone complained that the desk audits she received contained fewer assets than desk audits given to her white coworkers, that Lockley accepted audits from white coworkers without reference to any legal basis, and that only her white coworkers were assigned as lead auditor on out of state audits. *Id.* Stone's complaint also alleges that Lockley's discrimination against her became so intense, that she filed an internal grievance with the Department on May 12, 2010, which was mitigated because the department arranged a transfer for Stone to the Houston, Texas office. *Id.* at 7.

Stone's transfer was allegedly approved on July 8, 2010, and scheduled to be completed in August 2010. *Id.* *See also* R. Doc. 26–2, p. 47. Stone alleges that shortly before her transfer was completed, sometime in July 2010, Lockley accused her of losing a client's "waiver of prescription form," which was required to be signed and submitted before December 2009. *Id.* Stone alleges that Lockley's attempt to stop and/or slow down her transfer to Houston and alter her telecommuting privilege by claiming that she did not complete several time-sensitive assignments, constituted a hostile work environment. *Id.* at 7, 13, 25. Furthermore, Stone alleges that she was humiliated by Lockley, Wayne Lockhart ("Lockhart"), a Revenue Tax Supervisor, and Sikandra Clark

(“Clark”), a Computer Audit Specialist Manager, when they publically searched through the files in her office, allegedly looking for the waiver of prescription form. *See* R. Doc. 26, p. 7, 13.

Stone filed her first charge of discrimination, with the Equal Employment Opportunity Commission (“EEOC”) on August 12, 2010, alleging race discrimination and retaliation against the Department for Lockley’s discriminatory treatment of Stone, in comparison to Caucasian, Annette Broadway. *See* R. Doc. 26–2, p. 47–52.⁴ In addition to her charge, she filed a declaration with the EEOC stating that Lockley harassed her because of her race, by accusing her of losing the prescription document and subjecting her to a humiliating search. *Id.* Stone also alleged that five other black employees at the Department left because of Lockley’s alleged racial harassment. *See* R. Doc. 26–2, p. 47. She formally amended her charge on December 7, 2010, to include “racial harassment,” which allegedly occurred at the latest date of September 9, 2010. *Id.*

⁴ Charge # 461–2010–01884, R. Doc. 26–2, p. 42. The EEOC concluded its investigation on September 20, 2012 by issuing a Notice of Right to Sue dated September 20, 2012, which stated that the EEOC was “unable to conclude that the information obtained establishes violations of the statutes.” *See* R. Doc. 1, p. 14; R. Doc. 26–2, p. 36. Stone also filed a subsequent EEOC Charge on November 22, 2010, alleging race, retaliation and harassment due to her Lockley’s conduct. Stone’s Complaint was signed on December 19, 2012, and docketed on December 20, 2012. Both dates are within the 90–day period allowable for bringing suit pursuant to the EEOC’s September 20, 2012. *See infra*, n. 16

Stone ultimately completed her transfer to the Houston office sometime in September, 2010, during the pendency of the investigation of the charge with the EEOC. *See* R. Doc. 26–1, p. 26–28. However, after approximately eight months of working in the Houston office, Stone alleges that her telecommuting work days were reduced from three days to one, in April 2011, which she attributes to the Director, Jay Frost’s relationship with her manager Kevin Richard (“Richard”) and old supervisor, Lockley. *See* R. Doc. 26, p. 10.

Because of the change and reduction of her telecommuting schedule, Stone alleges that on April 5, 2011, she renewed her request to be considered for an out-of-state position in or near Mobile, Alabama. *See* R. Doc. 26–1, p. 112. She again renewed her request on August 4, 2011, but was denied even though other white employees were allegedly granted the right to telecommute. *Id.* at 114. Having not received a transfer, on February 29, 2012, Stone sent a formal letter of resignation to Richard stating that her final work day would be March 21, 2012. *See* R. Doc. 26–1, p. 117. She rescinded this letter on March 7, 2012, stating that she was upset about her work situation because she wanted to be able to work from home during the entire week. *See* R. Doc. 26–1, p. 116.

However, on March 14–15, 2012, Stone emailed her then supervisor, Elise Thomas (“Thomas”) indicating that she needed several more days of leave because she was not feeling well and needed to go to the doctor. *See* R. Doc. 35–2, p. 30. Thomas responded that Stone’s leave “may” be approved upon her bringing a note from her physician, which would

need to be verified by Human Resources. *Id.* According to Stone, Thomas' email stating that she may be required to have a verified doctors note prior to obtaining leave approval, constituted harassment and a hostile work environment, which ultimately led to Stone's sending of another formal letter of resignation on March 26, 2012, which provided that her final day would be April 9, 2012. *See* R. Doc. 26-1, p. 115.

On December 12, 2012, Stone filed the instant action, alleging that she was constructively discharged and forced to resign as a result of the Department's refusal to allow her either to (1) maintain her three day a week telecommute from Alabama or (2) assign her to conduct out of state audits. *See* R. Doc. 26, p. 3, 13-14. She alleges that she suffered emotionally, financially, and sustained damages as a result of the emotional distress and poor references she allegedly received.⁵

On February 28, 2013, Stone filed a second EEOC charge in which alleged race discrimination, retaliation, constructive discharge, and harassment for the same dates she alleged in the first charge she

⁵ Stone's initial complaint alleges nearly two dozen counts which the Court has consolidated as: (1) racial discrimination, (2) hostile work environment/constructive discharge, (3) retaliation, and (4) defamation, for clarity. Stone's complaint improperly alleged that her claims arose under 42 U.S.C § 1983 and § 1985, which the Department sought to dismiss pursuant to 12(b)(6), on February 28, 2013. *See* R. Doc. 1, p. 1; R. Docs. 4, 5. On March 20, 2013, the presiding U.S. District Judge dismissed with prejudice Stone's allegations as to her claims for relief, because Stone failed to properly address her entitlement to relief under 42 U.S.C § 1983 and § 1985. *See* R. Doc. 8, p. 1.

filed with the EEOC, from the dates of August 25, 2010, through April 30, 2012. *See* R. Doc. 35–2, p. 27. The EEOC concluded its investigation and issued a Notice of Right to Sue dated June 10, 2013, which stated that the EEOC closed the charge because the “charging party has filed suit in federal court.” *See id.* at 29.

On September 12, 2013, as directed by this Court,⁶ Stone filed an amended complaint into the record.⁷ The crux of her amended complaint appears to be that she was not allowed to telecommute full-time due to her race, and that the Department allegedly threatened to discipline her for “engaging in the EEOC” process by questioning and denying her requests for leave, time off, and to work full-time from home.” *See* R. Doc. 26–2, p.59–62.

As to the instant motion, on October 4, 2013, the Department filed a Motion to Dismiss, and Alternatively, Motion for Summary Judgment,

⁶ On July 23, 2013, Stone filed an *ex parte* motion for Leave to File for Default Judgment, (R. Doc. 20), which was denied by this Court on August 19, 2013. In this Court’s Order of denial on said motion, the undersigned also ordered that “Stone shall file an Amended Complaint into the record specifically addressing her Title VII claims no later than 20 days after the issuance of this Order.” (R. Doc. 22).

⁷ Stone’s amended complaint alleges (1) race discrimination, (2) retaliation, (3) harassment, (4) hostile work environment / constructive discharge, (5) disparate treatment and (6) defamation, but removed references to 42 U.S.C § 1983 and 1985. She properly asserted her claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (“Title VII”), and “any other Civil Rights Act that applies.” *See* R. Doc. 26, p. 2–3.

seeking to dismiss Stone's complaints for failing to state a claim upon which relief can be granted and/or alternatively as a matter of law pursuant to Federal Rules of Civil Procedure 56. *See* R. Doc. 30, p. 1. Specifically, the Department claims that (1) Stone's suit is barred by res judicata, (2) Stone cannot state a *prima facie* case for any of the Title VII claims she alleges, and (3) Stone's Title VII claims have not been administratively exhausted and/or are prescribed. *Id.* Stone has opposed the underlying motion. *See* R. Doc. 35. The Department has filed a reply to Stone's opposition. *See* R. Doc. 36.

II. Standard of Review

Rule 12(b)(6) provides that a complaint may be dismissed for failure to state a claim upon which relief may be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A Rule 12(b)(6) motion to dismiss must be read in conjunction with Rule 8(a) of the Federal Rules of Civil Procedure. *Gallentine*, at 795; citing *Twombly*, 550 U.S. at 555.

Accordingly, a district court should not dismiss a complaint for failure to state a claim unless a plaintiff has failed to plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570; accord *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 796 (5th Cir.2011); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 742 (5th Cir.2008). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere

conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at 557). “While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” *Id.* at 679. In other words, to state a cognizable cause of action, the complaint must allege sufficient facts to “nudge” the claims “across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570.

Nevertheless, the court “must construe the complaint in the light most favorable to the plaintiff and draw all reasonable inferences in the plaintiff’s favor.” *Elsensohn v. St. Tammany Parish Sheriff’s Office*, 530 F.3d 368, 372 (5th Cir.2008). But the plaintiff’s complaint “[must] be stated with enough clarity to enable a court or an opposing party to determine whether a claim is sufficiently alleged.” *Gallentine v. Housing Authority of City of Port Arthur, Texas*, 919 F.Supp.2d 787, 794 (E.D.Tex.2013); *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir.2001) *cert. denied*, 536 U.S. 960 (2002); (citing *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir.1989)). The “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); accord *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir.2007); *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir.2007), *cert. denied*, 552 U.S. 1182 (2008).

Generally, the “court’s analysis should focus exclusively on what appears in the complaint and its

proper attachments.” *Gallentine*, 919 F.Supp.2d at 794; *Wilson v. Birnberg*, 667 F.3d 591, 595 (5th Cir.2012). See e.g., *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 261 (5th Cir.1999); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir.1996); *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir.1992). The court may, however, consider matters that are outside the pleadings if those materials are matters of public record. See *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 286 (5th Cir.2006) (citing *Davis v. Bayless*, 70 F.3d 367, 372 n. 3 (5th Cir.1995)); *Cinel v. Connick*, 15 F.3d 1338, 1343 n. 6 (5th Cir.), *cert. denied*, 513 U.S. 868 (1994).

The Fifth Circuit has also held that a Court may also consider documents attached to a motion to dismiss, without converting it into a motion for summary judgment, if the documents are referred to in the complaint and are central to the plaintiff's claim. *Gines v. D.R. Horton, Inc.*, 699 F.3d 812, 820 (5th Cir.2012); *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir.2004); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir.2000) (citing *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir.1993)). Moreover, “Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law.” *Gallentine*, at 794–95, citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (citing *Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), *abrogated on other grounds by Twombly*, 550 U.S. at 563).

Rule 12 states that a motion raising defenses listed therein, including Rule 12(b)(6), “must be made before pleading if a responsive pleading is

allowed.” (emphasis added). Because the Department has filed a motion to dismiss raising affirmative defenses therein, the underlying motion is timely pursuant to Rule 12(b)(6). *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir.1999). However, in ruling on a Rule 12(b)(6) motion to dismiss, the Court cannot look beyond the pleadings, and must “accept as true those well-pleaded factual allegations in the complaint.” *See Hall v. Hodgkins*, 305 Fed.Appx. 224, 227 (5th Cir.2008); *citing Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir.1994); *Test Masters Educ. Serv’s., Inc. v. Singh*, 428 F.3d 559, 570 (5th Cir.2005). *See also Norris v. Hearst Trust*, 500 F.3d 454, 461 n. 9 (5th Cir.2007).

III. Analysis

The Department alleges that Stone’s claims in this suit should be dismissed because she filed a previous lawsuit in this court against them on September 20, 2012.⁸ The defendant alleges that Stone, dismissed the earlier filed suit on her own motion with prejudice on November 19, 2012. As a result of the previous lawsuit, the Department contends that the doctrine of res judicata applies to this claim such that it should be dismissed.

Stone in contrast contends that her claims are not barred by res judicata. Stone points out that she filed for unemployment benefits in both Texas and Louisiana and she was told to pursue her unemployment claim in Louisiana. She alleges that she did not know where to appeal the denial of her

⁸ See No. 12-2182, *Stone v. La. Dept. of Revenue*.

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unemployment benefits, so she initially filed it in this court, but later dismissed it because this court lacked jurisdiction over her Texas Workforce Commission unemployment claim.

The doctrine of res judicata “forecloses relitigation of claims that were or could have been raised in a prior action.” *Steen v. Harvey*, 247 Fed.Appx. 511, 514 (5th Cir.2007); (*Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 312–13 (5th Cir.2004)) (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). One concept of res judicata, referred to as claim preclusion, treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same claim or cause of action. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 578–79 (1974). Under claim preclusion, the effect of a judgment extends to the litigation of all issues and / or claims relevant to the same claim, that were or could have been advanced in support of the cause of action, between the same parties, whether or not those issues or claims were raised at trial. *In re Howe*, 913 F.2d 1138, 1144 (5th Cir.1990). *See Koerner v. Garden Dist. Ass’n*, 2002 WL 31886728, at *8, n. 40 (E.D.La. Dec. 23, 2002).

To determine if claim preclusion is applicable, four conditions must be met: (1) the parties in the later action must be identical to, or at least in privity with the parties in the prior action, (2) the judgment in the prior action must have been rendered by a court of competent jurisdiction, (3) the prior actions must have concluded with a final judgment on the merits, and (4) the same claims or cause of action must be involved in both suits. *Ellis v. Amex Life Ins. Co.*, 211 F.3d 935, 937 (5th Cir.2000).

The Fifth Circuit however, has provided that generally, a res judicata or claim preclusion contention “cannot [first] be brought in a motion to dismiss, [as] it should be plead as an affirmative defense.” *Hall*, 305 Fed.Appx. at 227; quoting *Test Masters*, 428 F.3d at 570, n. 2. But, this Circuit has emphasized that an opposing party must challenge the Defendant’s use of a motion to dismiss or to invoke res judicata, “or such argument will be waived.” *Id.* See also 5B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1357 at 721, 728 (3d ed. 2004) (providing that under some circumstances affirmative defenses such as res judicata have been considered on a motion to dismiss).

Therefore, even if this Circuit has previously barred a party’s assertion of res judicata for the first time as a motion to dismiss, if the opposing party, even a *pro se* petitioner, does not challenge or preserve the right to challenge the assertion of res judicata, it is waived. See e.g., *Hall*, at 227; *Longoria v. Dretke*, 507 F.3d 898, 901 (5th Cir.2007). Here, Stone’s opposition does not raise the Department’s procedural failure to assert res judicata as an affirmative defense. Instead, she challenges it from a substantive position. Therefore, the Court finds that Stone has waived the procedural objection, as her opposition only substantively challenges the application of res judicata, and not the Department’s failure to first answer and affirmatively plead res judicata, rather than asserting it first in its motion to dismiss. As a result, the court shall analyze the substance of the Department’s res judicata defense by addressing each of the factors below:

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A. Res Judicata

1. The Parties to Both Actions Are Identical

The Department contends that the parties in Stone's earlier suit, No. 12-2182, *Stone v. La. Dept. of Revenue*, and the instant action, are identical: *See* R. Doc. 30-2, pp. 1-2. Stone's opposition does not address this argument. *See* R. Doc. 35-1, p. 3.

Because Stone and the Department are involved in both cases in the same capacities, Stone individually on her own behalf, and the Department in its same capacity, the Court finds that the parties are identical for purposes of res judicata. This factor weighs in favor of res judicata.

2. Judgment in First Action Is Rendered by a Court of Competent Jurisdiction

The Department argues that this factor is undeniably satisfied, as the Eastern District of Louisiana was a Court of competent jurisdiction to hear Stone's appeal of the "Administrative Judge's Decision" on their disqualification of her claim of unemployment benefits. *See* No. 12-2182, *Stone v. La. Dept. of Rev.*, R. Doc. 3, p. 1.

Stone's argument against this factor is not stated with specificity, however, the Court interprets that because she filed for unemployment benefits with both Texas and Louisiana Workforce Commission offices, the Louisiana Office improperly processed her claim, "because it is against the law to have two claims ongoing at the same time." *See* R. Doc. 35-1, p. 2. Stone contends that she, in error,

sought an appeal of the denial of her unemployment benefits claim in this Court, because it was determined that the Texas Workforce Commission had jurisdiction over the matter, and not this Court, so she dismissed the appeal voluntarily for lack of jurisdiction. The Defendant does not address this issue.

Louisiana Revised Statute 23:1634 provides that the review of the denial of a claim for unemployment benefits shall be in the District Court of the domicile of the claimant. *See* La.Rev.Stat. 23:1634. At the time Stone filed the claim here, she lived between Texas and Alabama, but not in Louisiana. The statute also provides that if a claimant is not domiciled in Louisiana at the time of filing the petition for review, "the petition or request [. . .] may be filed in the district court of the parish in which the claimant was domiciled at the time the claim was filed or in the parish in which the Louisiana Workforce Commission is domiciled." *See id.* Stone filed this claim in Louisiana, but improperly in the federal court, rather than the state district court as contemplated by La.Rev.Stat. 23:1628.

La.Rev.Stat. § 1628 provides that an appeals for the denial of unemployment benefits are to be heard by an appeal tribunal approved by the Governor. *See* La.Rev.Stat. § 1628. This Court has not been designated as such a tribunal, nor has it been selected by the Governor. As such, Stone seeking review of the administrative denial of her unemployment benefits in this court is improper, as this Court does not have jurisdiction over an

administrative claim. This factor weighs against res judicata.

**3. The First Action Concluded with a
Final Judgment on the Merits**

The Department argues that Stone's dismissal of her initial action with prejudice constitutes a final judgment on the merits. *See* R. Doc. 30-2, pp. 1-2. Stone does not address this argument.

A dismissal of an action with prejudice normally constitutes a final judgment for purposes of res judicata, and bars a later suit on the same cause of action. *See Ray v. Kindred Hosp.*, 2013 WL 4041334, at *2-3 (S.D.Tex. Aug. 6, 2013); citing *Matter of W. Texas Mktg. Corp.*, 12 F.3d 497, 501 (5th Cir.1994) (quoting *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 534 (5th Cir.1978) ("[i]t is clear that a stipulation of dismissal with prejudice, or, for that matter, a [voluntary] dismissal with prejudice at any stage of a judicial proceeding, normally constitutes a final judgment on the merits which bars a later suit on the same cause of action") (quoting *Astron Indus. Assocs., Inc. v. Chrysler Motors Corp.*, 405 F.2d 958 (5th Cir.1968)) (internal quotation omitted)). *See e.g., Vela v. Manning*, 469 Fed.Appx. 319, 322 (5th Cir.2012). However, because this Court was not one of competent jurisdiction to hear Stone's administrative denial claim, the Court finds that Stone's voluntary dismissal is not a final judgment on the merits for purposes of res judicata. Having determined that the second and third factors have not been met, the Court does not reach the fourth factor. Because the Court finds that res judicata does not bar Stone's claims of

discrimination, it will now consider the merits of the motion.

B. Failure to Exhaust

The Department contends that Plaintiff's purported February 2013 EEOC charge has not properly been administratively exhausted, as Stone has failed to establish that a signed, verified charge was submitted to the EEOC. *See* R. Doc. 30-2, p. 4. Specifically, the Department contends that Stone attached the notice of the February 28, 2013, charge of discrimination to her complaint, which alleged race and retaliatory discrimination, as well as harassment and constructive discharge.

However, this notice does not include a copy of the perfected EEOC charge. Instead, the notice states that "a copy of the perfected charge (EEOC Form 5) will be mailed to you once it has been received from the Charging Party." *See id.*, citing R. Doc. 26, p. 17. Because the Department has yet to receive a copy of the perfected charge, it contends that there is no proof as to whether or not a signed, verified charge was ever filed. Therefore, the Department argues that Stone has failed to establish that she exhausted her administrative remedies as to her February 28, 2013 EEOC Charge.

In the alternative, the Department argues that even if Stone submitted a signed, verified 2013 EEOC Charge, any of the claims asserted therein are untimely, and should be dismissed, as the charge was filed more than 300 days after the date of the last day of the alleged discriminatory conduct. *See* R. Doc. 30-2, p. 5, citing *Huckabay v. Moore*, 142 F.3d

233 (5th Cir.1998); *Rhyce v. Martin*, 2002 WL 31654971 (E.D.La.11/21/02).

In opposition, Stone contends that she properly exhausted her administrative remedies, as she suffered from ongoing and continuing discriminatory and retaliatory actions from the Department, therefore her claims are not prescribed. *See* R. Doc. 35, p. 2. In further support of her argument, Stone attached a letter from an EEOC investigator, dated October 17, 2013, certifying that the EEOC received a charge of discrimination, number 461-2013-00849, from Stone on February 25, 2013. *See* R. Doc. 35-2, p. 28. Stone also included the EEOC's Notice of Dismissal, dated June 10, 2013, which provided that the EEOC was closing its investigation on the grounds that Stone had already filed suit in federal court. *Id.* at 29. Stone's opposition however, does not include the actual EEOC charge she filed.

1. Proof of the 2013 EEOC Charge

For an EEOC filing to be considered a properly filed charge of discrimination, it must contain an allegation, the name of the charged party, and a request for remedial action. *See Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008).⁹

Here, Stone attached the Notice of the Charge of Discrimination, dated February 28, 2013, which

⁹ Although the Court in *Federal Express Corp.*, see *supra*, provided the requirements for an EEOC charge involving an ADEA claim, numerous courts across the country have extended its holding to Title VII. *Asongwe v. Washington Mut. Card Servs. & subsidiaries*, No. 3:09-CV-0668, 2009 WL 2337558 (N.D.Tex. July 29, 2009) (citations omitted).

alleged race and retaliatory discrimination, as well as harassment and constructive discharge. Stone also attached the “right to sue” notice, dated June 10, 2013; and a certified letter from the EEOC, dated October 17, 2013, providing that it received an EEOC charge of discrimination from Stone on February 25, 2013. *See* R. Doc. 35–2, pp. 37–29. As such, Stone has established that she has at least filed an EEOC charge, and received a right to sue notice against the Department.

However, Stone does not include a copy of the perfected EEOC charge, nor does she include an intake questionnaire, or any part of the investigatory file from the February 2013 charge, which may indicate the remedial action she wishes to seek. The only document attached making reference to a perfected charge is the notice, which states that “a copy of the perfected charge (EEOC Form 5) will be mailed [] once it has been received from the Charging Party.” *See* R. Doc. 26, p. 17.

Even though Stone does not attach a perfected charge to the complaint, the Court finds that this scenario is factually distinguishable from that of *Asongwe*, as discussed above. There, the plaintiff did not attach any formal charge or notice thereof to her complaint, but instead, attempted to use the initial intake questionnaire as evidence of a completed charge. Here, although the Department does not have a copy of the completed charge, it does have a certification that one was filed against it, and the notice thereof, which properly alleges the claims of relief: harassment, discrimination based on race, retaliation and constructive discharge—for which

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Stone seeks relief. *See* R. Doc. 35-2, p. 27-29.¹⁰ Therefore, the Court finds that Stone has exhausted her administrative remedies as to the filing of a 2013 EEOC charge.

2. Timeliness of the 2013 EEOC Charge

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, prohibits discrimination on the basis of race, color, religion, sex, or national origin in federal and private employment. However, an employment discrimination plaintiff “must exhaust her administrative remedies before she may pursue claims in federal court.” *Elwakin v. Target Media Partners Operating Co., LLC*, 2012 WL 669068, at *3 (E.D.La. Feb. 29, 2012); *see Porter v. Adams*, 639 F.2d 273, 276 (5th Cir.1981) (noting that exhaustion is “an absolute prerequisite” to suit under § 2000e(16)); *Templeton v. Western Union Tel. Co.*, 607 F.2d 89, 91 (5th Cir.1979) (*per curiam*); (“[C]ourts have no jurisdiction to consider Title VII

¹⁰ *See e. g., Chenzira v. Cincinnati Children’s Hosp. Med. Ctr.*, No. 11-cv-00917, 2012 WL 6721098 (S.D.Ohio Dec. 27, 2012), where the Ohio Court distinguished the ruling of *Asongwe*, finding that an intake questionnaire was enough to help stop the running of prescription on Plaintiff’s claims, and establish that Plaintiff had exhausted his administrative remedies, as the questionnaire was construed as a “charge” because it included the address and telephone number of the Defendant, the number of employees that worked for Defendant, and a statement indicating whether Plaintiff had sought the assistance of any government agency regarding the matter, which even absent an affidavit, to be construed as a request for remedial action.

claims as to which the aggrieved party has not exhausted administrative remedies.”).

In order to exhaust her administrative remedies, a plaintiff must first file a timely charge with the EEOC and receive a statutory notice of the “right-to-sue” letter. *Elwakin*, 2012 WL 669068, at *3; *Asongwe v. Washington Mut. Card. Servs. & subsidiaries*, No. 3:09-CV-0668, 2009 WL 2337558 at *3 (N.D.Tex. July 29, 2009). Although the filing of an EEOC Charge is not a jurisdictional prerequisite, it is a precondition to filing suit in district court. *See Dao v. Auchan Hypermarket*, 96 F.3d 787, 788–89 (5th Cir.1996). And, “§ 2000e–5(f)(1) provides that a civil action must be commenced ‘within ninety days’ after the charging party has received a ‘right-to-sue’ letter from the EEOC or state or local agency.” *See* 42 U.S.C. § 2000e–5(f)(1); *Nilsen v. City of Moss Point, Miss.*, 621 F.2d 117, 120 (5th Cir.1980).

The time limit provisions of the Title VII establish the following procedures for filing discrimination charges with the EEOC. As a general rule, a complainant must file a discrimination charge with the EEOC within 180 days of the occurrence of the alleged unlawful employment practice. *See* § 706(e) of Title VII, 78 Stat. 260, 42 U.S.C. § 2000e–5(e). If a complainant initially institutes proceedings with a state or local agency with authority to grant or seek relief from the practice charged, the time limit for filing with the EEOC is extended to 300 days. *See e.g., E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107 (1988).

As such, a Title VII plaintiff must file a charge of discrimination with the EEOC within 300 days of

learning of the alleged unlawful employment action. *Grice v. FMC Technologies Inc.*, 216 Fed.Appx. 401, 405 (5th Cir.2007); citing *Huckabay v. Moore*, 142 F.3d 233, 238 (5th Cir.1998); *see also* 42 U.S.C. § 2000e-5(e)(1). However, “[e]ach discriminatory act starts a new clock for filing charges alleging that act.” *Grice*, 216 Fed.Appx. at 405 (internal citations omitted).

Therefore, an EEOC charge must be filed within the 300-day time period after the discrete discriminatory act occurred, unless there is a showing of the rather unusual circumstance of a “continuing violation.” *Nat’l R.R. Pass. Corp. v. Morgan*, 536 U.S. 101, 113, 113 (2002); *Kimble v. Georgia Pac. Corp.*, 245 F.Supp.2d 862, 870 (M.D.La.2002) *aff’d*, 67 Fed.Appx. 248 (5th Cir.2003). *See* 42 U.S.C. § 2000e-5(e)(1); *Celestine v. Petroleos de Venezuela, SA*, 266 F.3d 343, 351 (5th Cir.2001).¹¹

Here, Stone’s complaint alleges that the discriminatory acts began in November 2009 and ended on March 31, 2012, when she resigned from her employment. In contrast, her 2013 EEOC charge alleges discriminatory conduct which occurred between August 25, 2010, and April 30, 2012, the

¹¹ The continuing violation theory would relieve a Plaintiff “of establishing that all of the discriminatory conducted [alleged] occurred within the 300-day period if she could show a series of related acts, with one or more of those acts falling within the limitations period.” *Kimble*, 245 F.Supp.2d at 870-71; citing *Berry v. Bd. of Supervisors of L. S. U.*, 715 F.2d 971, 979 (5th Cir.1983). *See also Hendrix v. City of Yazoo City, Miss.*, 911 F.2d 1102, 1103-04 (5th Cir.1990); *Rendon v. AT & T Tech.*, 883 F.2d 388, 395-96 (5th Cir.1989).

same dates which are alleged in her November 22, 2010, EEOC Charge. *See* R. Doc. 35–2, p. 27; *see also* R. Doc. 26–1, p. 4.¹² The record shows that Stone’s alleged discrimination ended on March 31, 2012, when she resigned from her employment. *See* R. Doc. 35–2, p. 27. She therefore had 300 days¹³ from the last date of this alleged discrimination, or by January 25, 2013, to timely file a charge of discrimination. However, the actual charge was not filed until February 28, 2013, 334 days after the date of the last alleged discriminatory act. Therefore, Stone’s 2013 charge of discrimination is untimely filed.

C. Merits of the 2010 EEOC Charge

The Department argues that (1) some of Stone’s Title VII claims set forth in her amended complaint,

¹²This Circuit’s precedent clearly establishes that “in Title VII cases the limitations period starts running when the plaintiff knows of the discriminatory act, not when the plaintiff perceives a discriminatory motive behind the act.” *Rivers v. Geithner*, 548 Fed.Appx. 1013, 1017, 2013 WL 6623542, at *3 (5th Cir. Dec. 17, 2013); citing *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1217 n. 2 (5th Cir.1992) (citing *Merrill v. Southern Methodist University*, 806 F.2d 600, 605 (5th Cir.1986) (emphasis original)); *Chapman v. Homco, Inc.*, 886 F.2d 756, 758 (5th Cir.1989); *see also Phillips v. Leggett & Platt, Inc.*, 658 F.3d 452, 455 (5th Cir.2011) (“Limitation period begins on the date of alleged unlawful employment action.”)

¹³In a state that provides a state or local administrative mechanism to address complaints of employment discrimination, a Title VII plaintiff must file a charge of discrimination with the EEOC within 300 days after learning of the alleged conduct. *Huckabay v. Moore*, 142 F.3d 233 (5th Cir.1998).

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were not included in the 2010 EEOC charge, and should be dismissed for failure to exhaust; and (2) for those claims that were included in the 2010 EEOC charge, Stone fails to state a *prima facie* case as for her claims of retaliation, discrimination, harassment, hostile work environment, and defamation and should be dismissed.

1. Stone's Title VII Claims Not Included in Her 2010 EEOC Charges¹⁴

The Department contends that some of Stone's Title VII claims set forth in her amended complaint were not included in the 2010 EEOC Charges she filed, and should thus be dismissed for failure to exhaust administrative remedies. *See* R. Doc. 30-2, p. 6.

In opposition, Stone contends that the "discriminatory and retaliatory actions" of the Department were ongoing and therefore have been administratively exhausted. *See* R. Doc. 35-1, p. 4. She references the February 2013 EEOC Charge, and the letter certifying the charge, dated October 17, 2013. *Id.* However, she makes no other specific arguments in opposition.

"In order to exhaust her administrative remedies, a plaintiff must first file a timely charge with the EEOC and receive notice of right to sue." *Elwakin*, 2012 WL 669068, at *3. "An employment

¹⁴ Stone filed two EEOC Charges, the first on August 20, 2010, alleging race discrimination and harassment. She filed a subsequent EEOC Charge, on November 30, 2010, alleging race discrimination, retaliation and harassment. *See* R. Doc. 26-2, p. 66, 78.

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discrimination suit can be dismissed where it is not based on or related to the specific claims made in the plaintiff's Charge of Discrimination." *Elwakin*, at *3; quoting *Fine v. GAF Chem. Corp.*, 995 F.2d 576, 578 (5th Cir.1993).

In the August, 2010 EEOC charge, Stone alleges race discrimination and harassment. In the November 2010 EEOC charge, she alleges race discrimination, retaliation and harassment against the Department. However, she later amends this charge to include allegations of racial harassment against the Department occurring as late as September 9, 2010. *See* R. Doc. 26-1, p. 4; R. Doc. 26-2, p. 42, 57. However, neither of these charges reference her claims of constructive discharge, or disparate impact and / or disparate treatment.¹⁵

Title VII complaint may only encompass discrimination like or related to allegations contained in the [EEOC] charge and growing out of such allegations during the pendency of the case before the Commission. *Blanchet v. Chevron / Texaco Corp.*, 368 F.Supp.2d 589, 602 (E.D.Tex.2004); citing *National Ass'n of Gov't Employees v. City Pub. Serv. Bd.*, 40 F.3d 698, 711 (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir.1970));

¹⁵ Although Stone's 2013 charge references "constructive discharge" as analyzed earlier in the Court's opinion, the 2013 charge is untimely and shall therefore not be considered by this Court. Stone does not allege disparate impact in either the 2010 or the 2013 charge. *See* R. Doc. 35-2, p. 27.

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Accordingly, the scope of the complaint is limited to 'the discrimination stated in the charge itself or developed in the course of a reasonable [EEOC] investigation of that charge.' *Blanchet*, 368 F.Supp.2d at 602; citing *Nat. Ass'n of Gov't Employees*, 40 F.3d at 712 (quoting *King v. Seaboard Coast Line R.R. Co.*, 538 F.2d 581, 583 (4th Cir.1976)); see *Thomas v. Texas Dep't of Crim. Justice*, 220 F.3d 389, 395 (5th Cir.2000); *Clark*, 18 F.3d at 1279–80; *Sanchez*, 431 F.2d at 465–66. Thus, "the failure to assert a claim of discrimination in an EEOC charge and/or its lack of development in the course of a reasonable investigation of that charge precludes the claim from later being brought in a civil suit." *Id.*

Although the Fifth Circuit has consistently "affirmed the long standing principle that a claim is not reasonably expected to grow out of a plaintiff's EEOC Charge where the claim is not alleged in the charge," the Court has recognized some exceptions to the exhaustion requirement.¹⁶ "First, a Title VII cause of action may be based 'not only on the specific allegations made by the employee's initial EEOC charge, but also upon any kind of discrimination like or related to the charge's allegations, limited only by the scope of the EEOC investigation that could reasonably be expected to grow out of the initial charges of discrimination.' *Tropez v. Veneman*, No. Civ. A.03–2156, 2004 WL 1596541, at *5 (E.D.La. July 16, 2004); (quoting *Dollis v. Rubin*, 77 F.3d 777,

¹⁶ See *Ellzey v. Catholic Charities Archdiocese of New Orleans*, 833 F.Supp.2d 595, 601 (E.D.La.2011); *Kebiro v. Walmart*, 193 Fed.Appx. 365, 367 (5th Cir.2006).

781 (5th Cir.1995); *see also Clark v. Kraft Foods, Inc.*, 18 F.3d 1278, 1280 (5th Cir.1994)).

In *Tropez*, this Court cited to the Fifth Circuit's decision in *Clark v. Kraft Foods, Inc.*, for the proposition that where a plaintiff has failed to properly exhaust her administrative remedies before filing suit, this Court lacked proper subject matter jurisdiction to hear the claim. *Tropez*, at *5; *see Clark*, 18 F.3d at 1280. In *Clark*, the plaintiff "filed an administrative charge with the EEOC alleging sexual harassment and retaliation . . . [then before the Court] the plaintiff further alleged disparate treatment on the basis of gender." *Id.* The Fifth Circuit concluded that "the district court had jurisdiction to reach the merits of the claim because an EEOC investigation of the claim was a 'reasonable consequence' of the plaintiff's administrative charge and supporting documentation." *Id.* Further, the Fifth Circuit stated that "the Court has jurisdiction over new acts of discrimination which may have occurred after the first complaint was filed as long as the discriminatory acts are part of the same grievance." *Id.* *See also Ray v. Freeman*, 626 F.2d 439, 443 (5th Cir.1980).

In applying this principle to the facts in *Tropez*, this Court distinguished the "reasonable consequence" exception from *Clark*. In *Tropez*, the Court found that because Plaintiff did not allege or formally raise any claim of race or sexual discrimination, the agency was not given the opportunity to adjudicate these issues, thereby Plaintiff did not properly exhaust her administrative remedies with respect to the claims she first raised in

this Court. *Tropez*, at *5. Accordingly, this Court dismissed these claims for failure to properly exhaust her administrative remedies. (See also *Ellzey v. Catholic Charities Archdiocese of New Orleans*, 833 F.Supp.2d 595, 600–601 (E.D.La.2011) (This Court dismissed Plaintiff's claims for sexual harassment and or retaliatory discharge for failure to exhaust her administrative remedies as the charge Plaintiff filed with the EEOC did not allege sexual or any type of harassment or retaliatory discharge, which is what Plaintiff's entire case rested on); *Teffera v. North Texas Tollway Authority*, 121 Fed.Appx. 18, 21 (5th Cir.2004) (noting that where plaintiff did not check the retaliation box on his EEOC charge, plaintiff did not exhaust his claim with the EEOC and therefore could not bring the claim in a civil action)).

a. Disparate Impact

Here, Stone raised “disparate impact” for the first time in the amended complaint she filed on September 12, 2013. See e.g., R. Doc. 26. Although she attempted to assert this claim in the 2013 charge, the Court has already determined that the 2013 charge is untimely and not administratively exhausted. Because this court only has jurisdiction over the claims addressed in Stone's EEOC charge, Stone's assertion of the disparate impact claim now, when she failed to include any allegations of it in either of her 2010 EEOC charges,¹⁷ is fatal to her claim. See e.g., *Jones v. Delta Towing, LLC*, 512 F.Supp.2d 479, 486 (E.D.La.2007) (Zainey, J.); citing *Mills v. Wal-Mart Stores Inc.*, 2002 WL 83644

¹⁷ See *supra*, n. 4, 16.

(E.D.La. Jan. 17 2002) (where a plaintiff's EEOC charge made reference to a hostile work environment claim, but made no mention of retaliation, and plaintiff failed to check any other box to indicate other forms of discrimination, the Court dismissed Plaintiff's retaliation claim based on failure to exhaust the procedural administrative remedies, as the EEOC instructions directed plaintiff to check all boxes of discriminatory acts that may have applied); *see also Gage v. Greer Indus., Inc.*, 2001 WL 1018793, at *2 (N.D.Tex. Aug. 16, 2001) (court found that plaintiff's claim of race discrimination could not be reasonably expected to grow out of her EEOC charge of sexual discrimination and constructive discharge as race discrimination is not "like or related" to the charges presented before the EEOC). As such, the Court finds that Stone's disparate impact claim has not been administratively exhausted, and must be dismissed.

b. Constructive Discharge

Stone's amended complaint also raises "constructive discharge" as a claim, although it was not raised as a claim in either of her 2010 EEOC Charges. Similar to the Court's decision in *Johnson v. Hospital Corp. of America*, where a plaintiff checked the boxes on the EEOC charge for discrimination based on race and retaliation, describing the discriminatory acts against her as demotion and harassment, but failed to allege or mention constructive discharge or forced resignation as a claim of discrimination, the Court finds that Stone has failed to provide adequate notice to the Department of this claim. Therefore this claim must

be dismissed for failure to provide adequate notice and to exhaust administrative remedies. *Johnson*, 767 F.Supp.2d 678, 700 (W.D.La.2011); *Jones v. Delta Towing*, 512 F.Supp.2d, 479 (E.D.La.2007). See e.g., *Blanchet*, 368 F.Supp.2d at 602 (“Several district courts have recently applied these principles to disallow a variety of claims not raised in the EEOC charge.”); (*Harvill v. Westward Communications, LLC*, 311 F.Supp.2d 573, 585 (E.D.Tex.2004) (refusing to allow a constructive discharge claim that was not asserted in the EEOC charge as constructive discharge does not grow out of harassment allegations)); *Stewart v. May Dep’t Stores*, 294 F.Supp.2d 841, 848–49 (M.D.La.2003) (precluding the plaintiff, “by the four corners of her document,” from asserting race discrimination claim because her EEOC charge did not have the appropriate box checked); *Seppy v. City of Irving*, No. Civ. A. 3:00–CV–386–R, 2002 WL 1592609, at *4 (N.D.Tex. July 18, 2002) (finding that the plaintiff’s race, gender, retaliation, and hostile work environment claims were barred because she checked only the national origin and age discrimination boxes on the EEOC charge); *Winegarner v. Dallas County Schools*, 1999 WL 325028, at *2 (N.D.Tex. May 19, 1999) (holding that treatment on the job and constructive discharge are separate and distinct discriminatory events; thus, constructive discharge claim was beyond scope of the charge) (citing *Chester v. American Telephone and Telegraph Co.*, 907 F.Supp. 982, 987 (N.D.Tex.1994), *aff’d*, 68 F.3d 470 (5th Cir.1995), *cert. denied*, 516 U.S. 1141 (1996)). As such, the Court finds that Stone’s constructive

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discharge claim has not been administratively exhausted, and must be dismissed.¹⁸

2. The Merits of the Claims Stone Asserted in Her 2010 EEOC Charge

a. Retaliation & Discrimination

The Department seeks dismissal of Stone's retaliation and discrimination claims because she fails to establish that she suffered from an adverse employment action.

Title VII provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion . . . [] national origin, . . . or because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-2(a)(1), 3(a).

In order to state a claim for retaliation, Stone must allege (1) she was engaged in protected activity, (2) she was subjected to an adverse employment action, and (3) there was a causal connection between the protected activity and the adverse employment

¹⁸ Even if the Court found that Stone had exhausted her constructive discharge claim to assert in this Court, Stone's complaint alludes to, but provides no explanation, argument or authority in support of any constructive-discharge claim she has. It would therefore be waived for failing to state a claim as a matter of law. *See e. g., Brew v. Weyerhaeuser NR Co.*, 537 Fed.Appx. 309, 313-14 (5th Cir.2013); (quoting *United States v. Scroggins*, 599 F.3d 433, 446 (5th Cir.2010)).

action. *McCoy v. City of Shreveport*, 492 F.3d 551, 556–57 (5th Cir.2007).

1. Engaged in a Protected Activity

Here, the parties do not contest that Stone filed an internal complaint with the Department on May 12, 2010, and an EEOC charge on August 12, 2010, alleging race discrimination and retaliation against the Department for Lockley's discriminatory treatment of Stone. *See* R. Doc. 26–2, p. 47–52.¹⁹ Therefore, Stone has satisfied the first element of her *prima facie* case of retaliation.

2. Suffered an Adverse Employment Action

As to (2), the Fifth Circuit has analyzed the “adverse employment action” element in a stricter sense than some other circuits to include only “ultimate” employment decisions, “such as hiring, granting leave, discharging, promoting, and compensating.” *Langley v. Dept. of Interior*, 2001 WL 392497, at *6 (E.D.La. Apr. 18, 2001). *See Harrison v. Corrections Corporation of America*, 476 Fed.Appx. 40, 45 (5th Cir.2012); *Kent v. Vicksburg Healthcare, LLC*, 2012 WL 1556511, at *12 (S.D.Miss. Apr. 30, 2012) (“[D]ismissal is obviously an adverse employment action.”); (*McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir.2007)); *Turner v. Novartis*

¹⁹ As to (1), “protected activities” include opposition of any unlawful employment practice, or, in connection with a Title VII proceeding, such as “making a charge, testifying, assisting or participating in an investigation, proceeding, or hearing.” *See* 42 U.S.C. § 2000e–3(a); *Douglas v. DynMcDermott Petroleum Op. Co.*, 144 F.3d 364, 372 (5th Cir.1998).

Pharmaceuticals, 2011 WL 901022, at *5 (E.D.La. Mar. 11, 2011) (Roby, M.J.) (quoting *Green v. Adm'rs of Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir.2002)).

As such, an adverse employment action, for purposes of Title VII, does not include decisions made by an employer that serve only to limit an employee's opportunities for promotion but do not affect his job duties, compensation, or benefits. *Banks v. E. Baton Rouge Parish Sc. Bd.*, 320 F.3d 570, 575 (5th Cir.2003); *Davis v. Miss. Transp. Comm'n*, 618 F.Supp.2d 559, 564 (S.D.Miss.2009). Title VII also does not intend to include other employment-related decisions that may "have some tangential effect on an ultimate employment decision, but are not ultimate employment decisions in and of themselves." *Jeffery v. Dallas County Medical Examiner*, 37 F.Supp.2d 525, 529 (N.D.Tex.1999); (citing *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.), *cert. denied*, 522 U.S. 932 (1997)). The Fifth Circuit has provided several examples of allegations that do not amount to an ultimate employment decision. For example, hostility from fellow employees, having personal items stolen and the aftermath of such behavior does not amount to an ultimate employment decision. *Jeffery*, 37 F.Supp.2d at 529; *Mattern*, 104 F.3d at 707. Denial of "administrative complaints and internal grievances," as well as informal criticisms, or changing an employee's work schedule or hours are "merely administrative decisions" that do not constitute an "ultimate employment decision as contemplated by Title VII." *Id.* See *Benningfield v. City of Houston*, 157 F.3d 369, 377 (5th Cir.1998).

However, formal reprimands that lead to termination or directly effect an employees compensation and or benefits, may constitute ultimate employment decisions. *Id.*

Here, Stone does not allege sufficient facts that she suffered an adverse employment action while employed at the Department. "To constitute prohibited retaliation, an employment action must be materially adverse, one that would 'dissuade[] a reasonable worker from making or supporting a charge of discrimination'." See *Stewart v. Miss. Transp. Com'n*, 586 F.3d 321, 331 (5th Cir.2009); citing *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). "The purpose of this objective standard is 'to separate significant from trivial harms' and 'filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing'." *Id.* As such, even if an adverse action is intended by the employer as retaliation, it must still satisfy this materiality standard. *Stewart*, 586 F.3d at 331; citing *White*, 548 U.S. at 67-68 (explaining that Title VII's anti-retaliation provision "protects an individual from not all retaliation").

Here, Stone alleges that Lockley, who is an African American, and was also her New Orleans supervisor, displayed conduct toward her which amounted to retaliation, when she allegedly singled her out by not giving her credit for all of her audited cases, returned her audit cases too late to be counted toward her end of the year production number, by allegedly making racially derogatory comments about African Americans being lazy and slow, and by

giving desk audits which had “lower assets than those assigned to another white employee, Annette Broadway.” *See* R. Doc. 26, p. 5–8. As a matter of law, these allegations do not rise to the level of material adversity necessary to establish an adverse employment action.

Instead, these accusations fall into the category of “petty slights, minor annoyances, and simple lack of good manners” that the Supreme Court has recognized are not actionable retaliatory conduct. *Stewart*, 586 F.3d 321, 332; citing *White*, 548 U.S. at 68. Because Title VII “does not set forth ‘a general civility code for the American workplace,’ these actions would not and did not dissuade Stone from making a charge of discrimination. *Id.* (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998)).

Stone also characterizes Lockley’s accusations that she misplaced a client’s “waiver of prescription” form in July 2010 as retaliation, and an attempt to alter her telecommuting privileges as well as halt her approved transfer to Houston, Texas office. *See* R. Doc. 26–2, p. 47. Stone also contended that Lockley’s attempt to stop and/or slow down her transfer and alter her telecommuting privileges amounted to what she characterizes as hostile work environment. *Id.* at 7, 13, 25. Much like the analysis of the claims made before her internal grievance was filed, Stone’s categorization of Lockley’s “accusation” is not enough to amount to an “ultimate employment decision” as Stone was still permitted to transfer to Houston, and continued telecommuting even in light of what she believed was retaliatory conduct.

Stone also alleges that Thomas, her Texas supervisor, attempted to halt her requests for leave by requiring her to provide documentation from a doctor after requesting sick leave. However, the evidence supports that Stone's supervisor sought documentation because of the numerous leave requests she submitted days in advance of the time she was ill. Furthermore, the email communications between Thomas and Stone evidence that she was not denied any leave requests, rather she was asked to provide documentation for future sick leave requests because of the volume of the requests.

Lastly, Stone voluntarily resigned from the Department by a second letter, dated March 26, 2012, which provided that her final day would be April 9, 2012. Although Stone attempts to construe her resignation as a constructive discharge, which would amount to an adverse employment action,²⁰ Stone fails to include any such allegations in her EEOC charge. Aside from constructive discharge, Stone's allegations do not amount to an adverse employment action that could serve as a basis of either a retaliation or race discrimination claim. Thus, the Court finds that Stone has failed to state a *prima facie* claim of retaliation as a matter of law. Having determined that the second factor necessary

²⁰ Constructive discharge is an adverse employment action for which a Title VII plaintiff may use to establish a *prima facie* case of retaliation. In order to do so, plaintiff "must prove that 'working conditions would have been so difficult or unpleasant that a reasonable person in [her] shoes would have felt compelled to resign.' *Harvill*, at 440; citing *Landgraf v. USI Film Products*, 968 F.2d 427, 429–30 (5th Cir.1992) (quoting *Bourque v. Powell Electrical Mfg. Co.*, 617 F.2d 61, 65 (5th Cir.1980)).

to state a claim of retaliation has not been met, the Court does not reach the third factor. Because an adverse employment action is also necessary to establish a successful claim of race discrimination, the Court finds that Stone fails to establish a prima facie case of both retaliation and race discrimination.

b. Racial Harassment

The Department seeks dismissal of Stone's harassment claims on the grounds that she was not subjected to unwelcome harassment based on race, as her supervisor was also African American. The Department also seeks dismissal on the grounds that Stone fails to allege any affect on a term, condition, or privilege of her employment as a result of the alleged harassment being objectively offensive, hostile or abusive. *See* R. Doc. 30-2, p.7-8.

A plaintiff may establish a Title VII violation based on racial harassment / discrimination creating a hostile work environment. *Carrera v. Commercial Coating Serv's Intern., Limited*, 422 Fed.Appx. 334, 337 (5th Cir.2011); citing *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir.2002). "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To do so, a complainant must establish a prima facie case that (1) they belong to a protected group; (2) they were subjected to unwelcome harassment; (3) the harassment was based on race; (4) the harassment affected a term, condition, or privilege of employment; and (5) that the Department knew or should have known of the harassment and failed to take prompt remedial

action. *Carrera*, 422 Fed.Appx. at 337; *Ramsey*, 286 F.3d at 268.

The well-established five part test was revised by the Supreme Court ruling that “in Title VII harassment cases, where the harassment is allegedly committed by a supervisor with immediate (or successively higher) authority over the harassment victim, the plaintiff employee needs to satisfy only the first four of the elements listed above.” *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 353–54 (5th Cir.2001); citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). Once the plaintiff makes the four-part showing that they have been harassed by a supervisor, the “employer is subject to vicarious liability to a victimized employee” for the supervisor’s conduct. *Id.*

Here, because Lockley was one of Stone’s supervisor, the Court shall apply the four part test. As stated above, the parties do not contest that as an African American, Stone is a member of a protected class. However, Stone provides nothing more than unsubstantiated, vague allegations that she suffered from racial harassment from her supervisor, Lockley. Specifically, Stone alleges that Lockley “singled her out” by asking her to reduce her non-audit hours, when she was believed to be on the proper progress track. See R. Doc. 26–1, p. 12, 13, 19. Stone also alleges that before her transfer to the Houston office was completed, Lockley accused her of losing a client’s “waiver of prescription form,” and for failing to complete several time-sensitive assignments, in an attempt to stop and/or slow down her transfer to Houston and alter her telecommuting privileges. See R. Doc. 26–2, p. 7, 13, 25.

As the Department contends, Stone has failed to establish that the alleged harassment affected a term or condition of her employment. To affect a term or condition of employment, harassment must be “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive [or hostile] working environment.” *Carrera*, at 337; *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).²¹ This determination requires that we apply

²¹ Courts have cautioned that “[t]he mere utterance of an . . . epithet which engenders offensive feelings is not enough” to establish a hostile work environment. *Harris*, 510 U.S. at 23. “A recurring point in [Title VII] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’ ” *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (internal quotation marks omitted). “These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a general civility code. Properly applied, they will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.” *Elwakin*, 901 F.Supp.2d at 753; *Faragher*, 524 U.S. at 788 (internal quotation marks omitted). *See also DeAngelis*, 51 F.3d at 594 (finding that specific attempts to target the plaintiff with boorish, chauvinistic language were set in the context of an attempt at “humor”).

Courts in the Fifth Circuit have found that hostile work environment claims must be constant and pervasive, and isolated incidents do not qualify. *Elwakin*, at 753–54; *see e. g., Hernandez v. Yellow Transportation, Inc.*, 670 F.3d 644 (5th Cir.2012) (finding no hostile work environment where, over ten-year period, employee was called a racially derogatory term on one occasion and saw a poster or letter derogatory towards hispanics on another); *Jones v. Continental Cuisine, Inc.*, 353 F.Supp.2d 716, 720 (E.D.La.2004) (finding no hostile work environment from one use of the term “N—”). In sum, “[w]hile a single or an isolated incident can give rise to [a] . . . claim if it

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a “totality-of-the-circumstances test that focuses on the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Carrera*, at 337; *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 347 (5th Cir.2007); see also *Elwakin v. Target Media Partners Operating Co. LLC*, 901 F.Supp.2d 730, 753 (2012); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993). The conduct complained of must be either severe or pervasive, but need not be both. *Harvill v. Westward Communications, L.L.C.*, 433 F.3d 428, 434–35 (5th Cir.2005).

Stone alleges that she was humiliated by Lockley, Lockhart, and Clark, when they publically searched through the files in her office, allegedly looking for the waiver of prescription form. See R. Doc. 26, p. 7, 13. Stone also seems to correlate her reduced number of telecommuting hours while in the Houston, Texas office to her local supervisor’s relationship with Lockley, which she believes constitutes her claim that Lockley’s racial

is severe enough, these claims are rare and usually involve physical violence.” *Melson v. Chetofield*, No. 08–3683, 2009 WL 537457, at *4 (E.D.La. Mar. 4, 2009) (Vance, J.). Even a series of utterances, without more, is unlikely to qualify as a hostile work environment. *Cuthbertson v. Am. Fed. of Gov’t Employees*, 2012 WL 4321742, at *3 (N.D.Tex. Sept. 21, 2012) (finding that three statements in which employee’s mentor referred to him as a “young white boy,” that he had only gotten his job “because [he is] white,” and that one “can’t trust a white committee because the white guys are always out to steal money from the local” were insufficient to demonstrate a hostile work environment).

harassment was so severe that it constituted a hostile work environment. These allegations however, do not amount to constant, pervasive activities as required by the Fifth Circuit. If anything, Stone's allegations represent isolated events of disagreement between she and her supervisor, which fail to state a claim of harassment, or of a hostile work environment that may constitute harassment as a matter of law.²² *Elwakin*, at 753–54; see e.g., *Hernandez v. Yellow Transportation, Inc.*, 670 F.3d 644 (5th Cir.2012).

Here, Stone fails to establish that she was subjected to unwelcome harassment which was based on her race. The evidence also supports that any alleged harassing activities that took place did not affect Stone's employment, as she was not only permitted to transfer to the Houston, Texas office

²² To properly allege a claim for hostile work environment under Title VII, a party must prove “(1) [racially] discriminatory intimidation, ridicule and insults which are (2) sufficiently severe or pervasive that they (3) alter the conditions of employment and (4) create an abusive working environment.” *Elwakin v. Target Media Partners Operating Co., LLC*, 2013 WL 2443790, at *11 (E.D.La. June 4, 2013); *DeAngelis v. El Paso Municipal Police Officers Ass’n*, 51 F.3d 591, 594 (5th Cir.1995) (finding that four printed derogatory references directed specifically at plaintiff at irregular intervals over two and a half years did not constitute sufficient hostility as a matter of law); *Cavalier v. Clearlake Rehabilitation Hospital, Inc.*, 2008 WL 2047997, at *4–*5 (S.D.Tex. May 12, 2008) (extending DeAngelis hostile work environment test to case involving allegations of racial discrimination). Moreover, the employer must have actual or constructive knowledge of the discrimination. *Elwakin*, 2013 WL 2443790, at *11; *Jones v. Flagship Int’l*, 793 F.2d 714, 721 (5th Cir.1986).

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upon request, but also still allowed telecommuting privileges through her time at the Houston, Texas office. As such, the Court finds that Stone has failed to state a claim as to her harassment claim.

3. Stone's State-Law Defamation Claim

The Department seeks dismissal of Stone's defamation claim for failing to state a claim upon which relief may be granted. Here, Stone alleges that she suffered from defamation due to the Department allegedly giving her poor references. *See* R. Doc. 26, p. 9. Specifically, she alleges that during her job interview with the Mobile, Alabama Department of Treasury, she was "frowned at" when the interviewer referenced the New Orleans, Louisiana office. *Id.* Based on the alleged facial gesture, she assumes that the Department's New Orleans office made defamatory statements about her character.

Louisiana defines defamation as "a tort involving the invasion of a person's interest in his or her reputation and good name." *Fietz v. Southland Nat. Ins. Co.*, 484 F.Supp.2d 535, 549 (W.D.La.2007); *Kennedy v. Sheriff of East Baton Rouge*, 2005-1418 (La.7/10/06), 935 So.2d 669, *citing Costello v. Hardy*, 03-1146 (La.1/21/04), 864 So.2d 129. "Statements are defamatory only if the words, taken in context, tend to injure the person's reputation, to expose the person to public ridicule, to deter others from associating or dealing with the person, or to deprive the person of public confidence in his or her occupation." *Davis v. Borskey*, 660 So.2d 17, 22 (La.1995).

In order to establish a claim for defamation in Louisiana, plaintiffs must prove: "1) a false and defamatory statement concerning another; 2) an unprivileged publication to a third party; 3) fault (negligence or greater) on the part of the publisher; and 4) resulting injury." *Id.* Fault is malice, actual or implied. *Id.* As stated above, Stone characterizes the interviewer's reaction as evidence that the New Orleans office gave her a poor reference, which she assumes amounts to "defamation or something." *See* R. Doc. 26, p. 9.

Because of the liberal pleading standard of Rule 12(b)(6), the Court finds that Stone has at least alleged a prima facie case of defamation, as she contends that the Department, made an allegedly false statement, by giving her a poor reference to a third party, which has resulted in an injury.

However, defamation is a state law cause of action, for which this Court has supplemental jurisdiction over, pursuant to 28 U.S.C. § 1367. Federal court jurisdiction over pendent state-law claims is "now governed by 28 U.S.C. § 1367, which provides that in any civil action in which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." *See Rhyne v. Henderson Cnty.*, 973 F.2d 386, 395 (5th Cir.1992); citing 28 U.S.C. § 1367(a) (West Supp.1992).

Under § 1367(c)(3), "the district court may decline to exercise supplemental jurisdiction over a

claim under subsection (a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction." *Id.* Because this Court is dismissing the remainder of Stone's claims over which it has original jurisdiction, the Court declines to exercise supplemental jurisdiction over Stone's remaining state-law defamation claim. *Rhyne*, 973 F.2d at 395; *see also Noble v. White*, 996 F.2d 797 (5th Cir.1993) (where the Fifth Circuit held that a district court was justified in declining to exercise its supplemental jurisdiction over state law claims). Therefore Stone's defamation claim is dismissed without prejudice, but may be filed in an appropriate state court tribunal.

IV. Conclusion

Accordingly,

IT IS ORDERED that the Department of Revenue's ("Department") Motion to Dismiss, Alternatively, Motion for Summary Judgment (R. Doc. 30) is DENIED IN PART and GRANTED IN PART.

IT IS DENIED as to the Department's motion to dismiss based on res judicata.

IT IS FURTHER DENIED as to the Department's motion to dismiss based on failure to exhaust based on the proof of the 2013 EEOC Charge.

IT IS GRANTED as to all claims asserted in Plaintiff, Joanne Stone's 2013 EEOC Charge based on prescription.

IT IS FURTHER GRANTED as to Plaintiff, Joanne Stone's claims of disparate impact and

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constructive discharge, as raised in the 2013 EEOC charge, for failure to exhaust.

IT IS FURTHER GRANTED as to Plaintiff, Joanne Stone's claims of retaliation, race discrimination and harassment, as raised in the 2010 EEOC charge, for failing to state a prima facie claim.

IT IS FURTHER ORDERED that this Court is declining to exercise jurisdiction over Plaintiff, Joanne Stone's state law claim of defamation. Therefore Stone's claim of defamation is **DISMISSED WITHOUT PREJUDICE**.

/s/ Karen Wells Roby
United State Magistrate Judge

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ORDER OF THE COURT OF APPEALS DENYING
THE PETITION FOR REHEARING
(DECEMBER 9, 2014)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOANNE STONE,

Plaintiff - Appellant,

v.

LOUISIANA DEPARTMENT OF REVENUE,

Defendant - Appellee.

No. 14-30204

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

Before DAVIS, DeMOSS, and ELROD,
Circuit Judges.

PER CURIAM

IT IS ORDERED that appellant's motion for
leave to file petition for rehearing out of time is
GRANTED. IT IS FURTHER ORDERED that the
petition for rehearing is DENIED.

/s/ Harold J. Demoss
United State Circuit Judge

ORDER OF THE COURT OF APPEALS
DENYING THE PETITION FOR REHEARING
(OCTOBER 17, 2017)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOANNE STONE,

Plaintiff - Appellant,

v.

LOUISIANA DEPARTMENT OF REVENUE,

Defendant - Appellee.

No. 16-30843

Appeal from the United States District Court for
the Eastern District of Louisiana, New Orleans
Before BARKSDALE, DENNIS, and CLEMENT,
Circuit Judges.

PER CURIAM

IT IS ORDERED that appellant's motion for leave
to file petition for rehearing out of time is
DENIED.

/s/ Edith Brown Clement

EDITH BROWN CLEMENT

UNITED STATES CIRCUIT JUDGE