APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12257-AA

CLYDE DANDRIDGE,
Plaintiff - Appellant,

versus

WAL-MART STORES, INC.,
Defendant - Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(Filed: April 21, 2021)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, Chief Judge, JORDAN and GRANT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

APPENDIX B

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12257

D.C. Docket No. 6:19-cv-00385-PGB-GJK

CLYDE DANDRIDGE,

Plaintiff-Appellant,

versus

WAL-MART STORES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(Filed: February 10, 2021)

Before WILLIAM PRYOR, Chief Judge, JORDAN and GRANT, Circuit Judges.

PER CURIAM:

Clyde Dandridge appeals the summary judgment entered in favor of Walmart, Inc., and against his complaint of discrimination and retaliation under the Florida Civil Rights Act. Walmart removed this action to the district court based on diversity of citizenship. 28 U.S.C. §§ 1332, 1441, 1446. We affirm.

"We review a summary judgment ruling *de novo*, viewing the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion." *Essex Ins. Co. v. Barrett Moving & Storage, Inc.*, 885 F.3d 1292, 1299 (11th Cir. 2018) (citation omitted). Summary judgment should be granted only when "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 genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Quigg v. Thomas Cty. Sch. Dist.*, 814 F.3d 1227, 1235 (11th Cir. 2016).

Dandridge argues that the district court erred when it granted summary judgment against his claim of racial discrimination based on the failure to promote him to several positions because he met the objective qualifications for the promotions and the district court erroneously relied on Walmart's subjective evaluations to determine that he was unqualified for them. He also argues that he proved that Walmart's proffered reasons for failing to promote him were pretextual because the promoted individuals were equally or less qualified than himself and because Walmart systematically stifled the promotion of black employees while advancing white employees.

Claims of discrimination under the Florida Act are reviewed using the same analytical framework as used for claims under Title VII of the Civil Rights Act of 1964. *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998). Both Title VII and the Florida Act prohibit employment discrimination based on race, color, religion,

sex, or national origin. 42 U.S.C. § 2000e-2(a)(1); Fla. Stat.§ 760(2). We do not consider "whether employment decisions are prudent or fair" but instead determine "whether unlawful discriminatory animus motivates a challenged employment decision." *Damon v. Fleming Supermarkets of Fla., Inc.*,196 F.3d 1354, 1361 (11th Cir. 1999).

The district court committed no error in granting summary judgment against Dandridge's claim of racial discrimination for any failure to promote him. Dandridge presented no evidence that he was qualified for the positions or that the individuals hired for those positions had lesser or equal qualifications. The job description for the three store manager positions for which Dandridge applied stated that an applicant must be proficient in the competency area of "Leads Inventory Flow Process." That is, the individual must manage the flow process "to ensure merchandise is replenished and in-stock" as well as monitor and evaluate the facility "to identify problems with inventory flow and signs of shrinkage, and take[] appropriate corrective action." Dandridge received a score of "Development Needed" in the category of "Leads Inventory Flow Process" in his performance evaluations in 2011, 2013, 2015, and 2016. And he had been coached for zoning issues and shrinkage. Moreover, the individuals selected for the positions had superior qualifications. For four of the six positions—manager of store #4142 and the three fresh operations manager positions—the selected individuals all had previous experience as a store manager of either Walmart or another "big-box retailer," and Dandridge admitted he lacked that experience. For the manager position at store #3629, the selected individual, unlike Dandridge, was recommended by other market managers and had no coaching issues. For the manager position at store #649, the selected individual had three more years of experience as a comanager than Dandridge.

Dandridge also failed to present any evidence that Walmart's proffered reasons for its hiring decisions were

false and a pretext for discrimination. That is, Dandridge failed to prove that Walmart's proffered reasons were so implausible, inconsistent, and contradictory that a reasonable factfinder could find them unworthy of credence, and he failed to present evidence that the true motivation for any lack of promotion was racial discrimination. Dandridge argues that he is more qualified than the individuals selected because he has a bachelor's degree, but he presented no evidence that the successful applicants lacked college degrees. And the job descriptions for the manager positions did not mention a college degree as a minimum or preferred qualification. Dandridge also provided no evidence to support his self-serving assertion that Walmart stifled the promotion of black employees.

Dandridge argues that the district court erred in granting summary judgment against his claims of retaliation. He contends that he presented sufficient evidence of a casual nexus between his protected activities and the alleged retaliatory actions. And he argues that Walmart's proffered reasons for its actions were a pretext for retaliation. The Florida Act prohibits an employer from retaliating against an employee for opposing any practice made unlawful by the Act. *See* Fla.Stat. § 760.10(7). That prohibition too is patterned after the prohibition in Title VII, and claims of retaliation are reviewed using the same framework. *Wilbur v. Corr. Servs. Corp.*, 393 F.3d 1192, 1195 n.1 (11th Cir. 2004).

The district court again did not err. For Count Two, Dandridge failed to establish a prima facie case of retaliation because he did not prove a causal connection between the protected activity and the adverse action. An almost three-year gap separated Dandridge's complaint of January 2013 and the refusal to promote him in September 2015. And he presented no evidence that Walmart's proffered reasons for not promoting him in September 2015 were a pretext for discrimination. For Count Three, Dandridge failed to establish a prima facie case of

retaliation because he failed to prove that he had engaged in protected activity. Dandridge alleged that he was issued a written coaching on July 28, 2015, because he sent an email on July 1, 2015, about not being promoted, but his email failed to mention any alleged discrimination, racial or otherwise. Dandridge also presented no evidence that the individual who issued the written coaching was aware of his email or of any protected activity. Dandridge's claim under Count Four fails because he presented no evidence that Walmart's proffered reason for issuing a written coaching on August 23, 2016, was false. Dandridge received the written coaching for failing to zone the store properly, for leaving consumable areas not completely worked, and for failing to ensure that carts were stored away. For Count Five, even if we were to assume that his transfer to another store following the incident on November 1, 2016, qualified as an adverse employment action, Dandridge's claim would fail as a matter of law. Dandridge presented no evidence that the decisionmaker knew of Dandridge's earlier EEOC charge. So Dandridge failed to establish a causal connection between the protected activity and the alleged adverse action.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No: 6:19-cv-385-Orl-40GJK

CLYDE DANDRIDGE,

Plaintiff,

v.

WAL-MART STORES, INC.,

Defendant.

ORDER GRANTING DEFENDANTS MOTION FOR SUMMARY JUDGEMENT

(Filed: May 18, 2020)

ORDER

This cause comes before the Court on Defendant's Motion for Summary Judgment(Doc. 33 (the "**Motion**")), the response (Doc. 45), and the reply thereto (Doc. 47). Upon consideration and review of the record as cited by the parties in their respective briefs, the Motion is due to be granted.

I. BACKGROUND

Plaintiff Clyde Dandridge brings this action against his former employer, Defendant Wal-Mart Stores, Inc. ("**Walmart**"), seeking damages under the Florida Civil Rights Act of 1992, Fla. Stat. § 706.01 ("**FCRA**"). Plaintiff alleges he suffered racial discrimination by Walmart through his coachings, transfer, termination, and his non-selection for promotions. (Doc. 1-3). Plaintiff further alleges

that Walmart retaliated against him for reporting discriminatory conduct. (*Id.*).

Plaintiff, who is African American, began working for Walmart on February 20, 2001, as an hourly Associate at the Walmart store in Titusville, Florida. (Doc. 36-1, 27:12–28:8). In August 2003, Plaintiff was promoted to the role of Assistant Store Manager. (*Id.*30:17–31:2). In October 2009, he transferred to a store in Port Orange, Florida, as a Co-Manager. (*Id.* 38:22–25, 40:2–8). In late 2016, Plaintiff transferred to a store in Melbourne,Florida. (*Id.* 43:13–18). Plaintiff possesses a bachelor's degree in Business Administration from Barry University. (*Id.* 10:13–21).

A. Plaintiff's Coachings and Complaints to Management

Throughout his employment, Plaintiff received disciplinary warnings from various supervisors for work performance issues. Plaintiff also complained to Human Resources numerous times regarding alleged discrimination and mistreatment by said supervisors.

Walmart maintains a Coaching for Improvement Policy, which provides for three levels of coachings—First, Second, and Third. (*Id.* 53:22–54:6). Under this policy, an Associate may receive only one level of coaching in a 12-month period. (*Id.* 54:10–15). If an Associate receives a coaching and engages in misconduct within 12 months, the Associate will receive a higher level of coaching. (*Id.*). An Associate is subject to termination if he receives a Third Written Coaching and then receives another coaching.(*Id.* 54:25–55:9).

On December 5, 2005, Plaintiff received his First Written Coaching from the Store Manager for "possible loss of life due to poor handling, loss of sales due to poor sanitation throughout the food side of the store[, and b]ad press for company due to poor sanitation."(Doc. 39-1, Ex. 8). On March

22, 2006, Plaintiff received a Second Written Coaching for not reacting in a "timely manner to the condition of the store" and "not showing skills to lead or direct his associates . . . causing loss of sales and profit by not having the shelves filled." (*Id.* Ex. 9). On March 23, 2007, a new supervisor, at the direction of an interim Store Manager, issued Plaintiff a First Written Coaching for permitting a vendor to "bring in and work up merchandise without checking it in first," which could "easily cause shrink."(*Id.* Ex. 10).[1]

On November 21, 2008, Plaintiff sent an email to Walmart executive Rosalind Brewer regarding his efforts to be promoted during his seven-year tenure with the company. (Doc. 45-3). He noted that he had applied for promotions around 20 times and never had an interview while his coworkers applied less frequently and received interviews and promotions. (*Id.*). He expressed concern that many of these coworkers did not have as much work experience as him and that he even trained many of these coworkers before their subsequent promotions. (*Id.*). Plaintiff also alleges that he complained that another African American associate was denied promotions as well. (Doc. 45, p. 2).

On December 13, 2010, Plaintiff's supervisor, Store Manager Kevin Robinson, issued Plaintiff a First Written Coaching for Plaintiff's failure to zone and stock the store properly each night. (Doc. 39-1, Ex. 12). The coaching stated that the "impact caused by not zoning and stocking the store correctly leads to higher morale issues and poor

[1] At his deposition, Plaintiff claimed he was issued this coaching in retaliation for making a complaint to the Ethics Hotline on March 15, 2007, regarding store violations and a hostile work environment. (Doc. 36-1, 76:7–23; Doc. 45, p. 2; Doc. 45-1). However, this coaching was issued more than 300 days before Plaintiff filled his September 19, 2016 EEOC Charge, and therefore, the related claim is time-barred. EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1271 (11th Cir. 2000) ("Only those claims arising within 300 days prior to the filing of the EEOC's discrimination charge are actionable. Because the EEOC filed its charge on June 25, 1991, discriminatory acts occurring prior to August 29, 1990, are outside the scope of this action."). Furthermore, there is no mention of this incident in his Complaint. (Doc. 1-3).

customer service throughout the day." (*Id.*). Robinson issued Plaintiff a Second Written Coaching on September 5, 2011, because Plaintiff failed to leave the store "ready for business" at the end of the shift. (*Id.* Ex. 14). Robinson noted in the coaching that Plaintiff had not made any improvements in either back room in the three nights he had worked—"no prepped pallets, not organizing binned pallets on floor for counting, [and] freezers left in an unorganized fashion." (*Id.*).

On January 15, 2013, Robinson issued Plaintiff a First Written Coaching after Plaintiff incorrectly assigned a Maintenance Associate to work in the Electronics Department. (Doc. 39-1, Ex. 16). The coaching indicated that such behavior could lead to potential shrink, floors not being cleaned to expectations, and customer complaints for unanswered store phone calls. (*Id.*). Plaintiff claims there was no policy that prohibited this behavior. (Doc. 45, p. 4). Shortly after the coaching, Plaintiff complained to Market Human Resources Manager Cathy Luffy about a comment Robinson made to him in December 2012—before the coaching. (Doc. 37-1, 154:14–155:1).[2] According to Plaintiff, Robinson told him that "I'm going to make it my New Year's resolution to demote you." (*Id.* 153:3–21). When confronted by Human Resources, Robinson denied making the statement and said there must have been a misunderstanding. (Doc. 35-1, 36:5–24). He claimed that he instead told Plaintiff that he needed to show improvement or that "next year might be his last year." (*Id.*). Nevertheless, Robinson apologized to Plaintiff at the direction of Human Resources. (*Id.* 36:17–24). Robinson later became Market

[2] During his deposition, Plaintiff maintained this coaching was discriminatory because other white Co-Managers used Maintenance Associates in other capacities without discipline. (*Id.* 136:18–137:19). Plaintiff also contends this coaching was issued as retaliation for reporting the New Year's incident to Human Resources. (Doc. 45). However, this coaching was issued more than 300 days before Plaintiff filled his September 19, 2016 EEOC Charge, and therefore, the related claim is time-barred. *Joe's Stone Crabs*, 296 F.3d at 1271.

Manager,a position in which he exercised influence over who was promoted in his district. (*Id.* 51:15–53:9, 54:8–11). For a considerable amount of time that Plaintiff worked for Walmart, he was assigned to Robinson's district. (Doc. 45, p. 3).

During his deposition, Plaintiff testified about alleged instances in which Robinson engaged in inappropriate behavior. First, Plaintiff claimed Robinson would throw a handheld device called a Telxon toward him when he would get angry. (Doc. 37-1, 144:5–21). Plaintiff never reported this behavior to Ethics and acknowledged that he did not know whether Robinson was trying to hit him. (*Id.* 147:3–13, 151:19–152:1). Second, Plaintiff testified that Robinson once told him to put a vest on "so we can see you better"when he was in a group of individuals. (*Id.* 166:10–20). Plaintiff perceived this comment to be racial. (*Id.* 167:22–168:1). He did not report the incident. (*Id.*).

In early July 2015, Plaintiff emailed Regional Human Resource Director Glenn Weinger to complain about his continued inability to be promoted. (Doc. 45-8). Then, On July 28, 2015, Plaintiff's new supervisor, Store Manager Katarzyna Marinez, issued him a First Written Coaching for "Facility/Housekeeping Standards" after Plaintiff observed Associates blocking a fire exit with pallets but did not instruct them to remove the pallets immediately. (Doc. 39-1, Ex. 20). Marinez advised Plaintiff that this behavior could potentially cause safety issues by the fire door being blocked. (*Id.*). Notably, Walmart received a compliance violation from a third-party auditor because of his incident. (Doc. 34-1, 63:25–64:2). When an auditor issues a compliance violation to Walmart, the Associate who is responsible for the violation generally receives a coaching. (*Id.* 97:18– 22). All Associates had received training related to safety issues posed by not having an open path to a fire exit door. (*Id.* 64:6–65:1).

On July 1, 2016, Marinez issued Plaintiff a Second

Written Coaching after he failed to zone the store and "left the store in unacceptable conditions" before departing from his shift (Doc. 39-1, Ex. 20). Plaintiff was responsible for the store's condition as the highest member of store management on the overnight shift. (Doc. 34-1, 71:11–15). The coaching indicated that Plaintiff's behavior impacted the first and second shift Associates who were required to perform extra work to ready the store. (Doc. 39-1, Ex. 20). Plaintiff also over-forecasted hours for the Customer Availability Program Team Associates by 50 hours. (*Id.*). The Market Manager, who arrived at the store that morning at the same time as Marinez, directed Marinez to coach the Associate who was responsible for the store not being zoned, which resulted in Plaintiff's Second Written Coaching. (Doc. 34-1, 70:16–71:10, 98:2–20).

Plaintiff alleges that Marinez set him up to fail because she would tape off bins in the back where inventory should have been placed, leaving him with no space to place overstock. (Doc. 37-1, 212:8–213:13). Therefore, he could not properly do his job because of Marinez's actions limiting where he could place overstock. (*Id.* 214:8–215:3).He stated that taping off bins was "against company program" because he wanted "to put merchandise in the bins and [Marinez was] preventing [him] from putting merchandise in bins." (*Id.* 215:4–10). However, Marinez testified there was no policy stating bins cannot be taped off at Walmart, and she taped bins to facilitate the store's switch to a new system for processing inventory—at the suggestion of her Market Manager. (Doc. 34-1, 74:10–75:7). The switch between systems was made company-wide. (*Id.*). Furthermore, Marinez maintains that Plaintiff was not held accountable for inventory not being in its proper place as part of this process, but instead he was held accountable for other pallets and carts of inventory being left out on the floor. (*Id.* 81:15–82:1).

After Plaintiff received the Second Written Coaching from Marinez on July 2, 2016,Plaintiff contacted Weinger to

lodge a complaint about the coaching. (Doc. 45-5). Plaintiff also contacted Market Manager Darin Mooney about the "unfair writeup." (Doc. 45, p. 4; Doc. 45-7). According to Weinger, Plaintiff did not allege that Marinez discriminated against him when she issued the coaching. (Doc. 41-1, p. 1). Instead, Weinger maintains that Plaintiff stated that the coaching was unfair. (*Id.*). Plaintiff contends that he brought up concerns related to discrimination. (Doc. 45, p. 4). Upon review, Weinger upheld the coaching. (Doc. 41-1, p. 1).

Plaintiff also spoke to Weinger about concerns he had after finding a bullet casing in the store's Community Affairs Office at the desk he typically used to complete his paperwork. (Doc. 45-5). Plaintiff alleges that he told Weinger that the bullet casing was placed above his desk as an act of intimidation. (Doc. 45, p. 4). He speculated that someone left the bullet casing at this desk on purpose, as a threat to him, knowing he would eventually sit at this desk. (Doc. 37-1, 228:25–234:8). At his deposition, Plaintiff testified he believed Marinez left the bullet casing on the desk or had knowledge about it, because she also had a bullet casing "above her head where she sit[s] at her desk." (Doc. 36-1, 16:7–18-3; Doc. 37-1, 224:20–24). Weinger maintains that at the time of the report, Plaintiff never implicated Marinez and never stated the bullet casing was related to his race or an act of retaliation. (Doc. 41-1, ¶ 7). Weinger was unable to substantiate Plaintiff's claim that the shell was placed on the desk as a threat to him, in part because Plaintiff acknowledged that the desk was not specifically assigned to him. (*Id.* ¶ 8). Furthermore, Weinger speculated that loose bullets from damaged boxes of ammunition may be stored in the locked management office of stores that sell firearms, such as the store at issue. (*Id.* ¶ 6).

On August 8, 2016, Plaintiff contacted Human Resources and the Ethics Hotline to report an Associate who used a racial slur and showed other Associates his tattoos supporting white supremacy. (Doc. 37-1, 239:4–18; Doc. 40-1). Plaintiff did not witness the incident, but another

Associate reported it to Plaintiff. (Doc. 37-1, 239:24–240:6; Doc.40-1, ¶ 4). After receiving this report from the Associate, Plaintiff discussed the incident with Marinez, and they agreed Plaintiff should follow Walmart's reporting policy. (Doc. 37-1, 243:24–244:18). The Ethics Department assigned Plaintiff to investigate the allegations. (*Id.* 245:1–6). On August 13, 2016, the Associate who allegedly engaged in the racist conduct was terminated for another reason. (Doc. 34-1, 79:1–6). Accordingly, the Ethics case was closed because the allegations could not be substantiated without the subject Associate's participation in the investigation. (Doc. 40-1, ¶ 4).

On August 23, 2016, Marinez issued Plaintiff a Third Written Coaching for failing to zone the store, leaving consumable areas not completely worked, and not putting away carts. (Doc. 39-1, Ex. 23). The coaching noted that this behavior impacts customer service, adds more work for other shifts, and lowers morale. (*Id.*). After the coaching, Plaintiff complained to Weinger and Market Human Resources Manager Allison Doll that the coaching was unfair. (Doc. 37-1, 270:1–5). He told Doll he felt Marinez was discriminating against him based on his race. (*Id.*). Doll and the then-Market Manager reviewed Plaintiff's coaching and concluded it was appropriately issued based on Plaintiff's performance. (Doc. 40-1, ¶ 7). Notably, they reviewed other coachings at the store and found other, non-African American managers had been coached by Marinez. (*Id.*). They further found that other African American managers had not received any coachings from Marinez. (*Id.*).

On September 26, 2016, Plaintiff filed a formal complaint of employment discrimination with the EEOC. (Doc. 39-1, Ex. 1). In the complaint, Plaintiff alleged he was subjected to various acts of discrimination and retaliation by Walmart. (*Id.*). He claimed Marinez selectively coached him for "directives/responsibilities she instituted for the store," which were not company policy. (*Id.*). He further alleged that she did not coach any of his white peers who were "equally

responsible for following the same directives she instituted." (*Id.*). He described the incident with the bullet casings and stated that "nothing was done" despite his many reports to Human Resources. (*Id.*).

On November 1, 2016, Plaintiff alleges that Marinez terminated him for not zoning the store and for other imperfections that she allegedly found in the store. (Doc. 45, p. 5).Specifically, he maintains that Marinez told him he was terminated and demanded that he turn in his keys and radio on the spot. (Doc. 37-1, 277:24–278:5). Marinez disputes having terminated Plaintiff. Instead, she claims she informally coached Plaintiff regarding his performance and instructed him to go home, advising him that they should both contact Human Resources to determine the next steps. (Doc. 34-1, 73:24–74:4, 89:16– 90:11). Plaintiff acknowledges that he did not complete any termination paperwork and never stopped receiving his regular pay from Walmart. (Doc. 37-1, 278:13–23, 281:15– 282:7).

Within a few days of the incident with Marinez, Mooney instructed Plaintiff to report to the Sanford store as a Co-Manager receiving the same pay. (*Id.* 284:16-285:8). After working there for a couple of weeks, Doll informed Plaintiff he would be transferring to a Co-Manager position at a store in Melbourne. (*Id.* 285:9-18). The transfer was approved by Robinson, who was now the Market Manager, despite a policy precluding a transfer due to Plaintiff's Third Written Coaching. (Doc. 38-1, 307:23–308:12). On November 27,2016, Plaintiff began working at the Melbourne store. (*Id.* 298:15–19). The Melbourne store was closer to Plaintiff's home than the Port Orange store. (*Id.* 308:24–309:1). However, Plaintiff maintains that he told Doll that he didn't want to go to Melbourne, but instead wanted to be promoted or transferred the Cocoa store. (*Id.* 308:17–20).

On January 23, 2018, Plaintiff complained to Market Manager Jeffrey Worthy about a comment made by Plaintiff's new supervisor, Camilla Roundtree, during a staff meeting.

(Doc. 39-1, Ex. 2). Both Worthy and Roundtree are African American. Plaintiff alleged that during a pre-shift meeting with at least 25 other Associates on the topic of Sexual Harassment and Inappropriate Behavior, Roundtree said "if you all have a problem with harassment or retaliation, see Clyde." (*Id.*). Plaintiff maintains that all the Associates laughed, and he felt embarrassed and victimized. Specifically, he thought Roundtree was mocking him because he had filed the EEOC charge. (*Id.*). At his deposition, Plaintiff admitted he did not know whether Roundtree had any knowledge of his EEOC charge. (Doc. 38-1, 299:23–300:2). Notably, Plaintiff was one of the members of management to which Associates could report claims of harassment. (*Id.* 300:4–301:12). After talking to Roundtree and Plaintiff, Worthy was unable to substantiate Plaintiff's claim that Roundtree behaved inappropriately. (Doc. 43-1).

B. Plaintiff's Applications for Promotions

Plaintiff applied for six positions at Walmart within 365 days of his September 19, 2016 EEOC charge. (Doc. 4-1, ¶ 9). Three of these applications were for the position of Store Manager. The job description for the position lists "leading inventory process" as one of the required competencies. (Doc. 38-1, 309:16–11:18). Plaintiff received scores of "needs improvement" in the category of "leads inventory flow process" on his 2011, 2013, 2015, and 2016 annual performance evaluations, and many of his coachings described herein occurred due to his zoning failures. (*Id.*; Doc. 39-1, Exs. 13, 17, 19, 25). He received a score of "solid performer" in this category on his 2012, 2014, and 2017 annual performance reviews. (Doc. 39-1, Exs. 15, 18, 24). Plaintiff's overall performance rating on the reviews from 2010 to 2018 was "solid performer." (Doc. 39-1, Exs. 11, 13, 15, 17, 18, 19, 21, 24).

First, in September 2015, Plaintiff applied to be a Store Manager at Store 649 in Titusville, Florida. (Doc. 40-1, ¶ 10). Robinson was the Hiring Manager for this position.

(*Id.*). He did not select Plaintiff for an interview because he determined that he was not one of the top three most qualified candidates. (*Id.*). The selected applicant had been a Co-Manager for three years longer than Plaintiff. (*Id.*). Second, in December 2015, Plaintiff applied to be a Store Manager at Store 4142 in Orlando, Florida. (*Id.* ¶ 11). The Hiring Manager did not select Plaintiff for an interview and ultimately chose an internal candidate who had prior experience as a Store Manager at both Walmart and Lowes. (*Id.*). Plaintiff did not have this type of experience. (Doc. 38-1, 315:9–24). Third, Plaintiff applied to be a Store Manager at Store 3629 in Port Orange. (Doc. 40-1, ¶ 12). At the time, Plaintiff had an active performance-based Written Coaching from July 28, 2015. (*Id.*). The three individuals selected to interview for the position had no active coachings. (*Id.*). The selected candidate was personally recommended for the position by two different Market Managers. Plaintiff did not have any such recommendations. (*Id.* ¶ 14).

In February 2016, Plaintiff also applied for three different Fresh Operations Manager positions. (*Id.* ¶ 15). Walmart did not select Plaintiff for interviews. (*Id.*). All three individuals selected for these positions had prior experience as a Store Manager of a big-box retailer. (*Id.*). Plaintiff did not have this type of experience. (Doc. 38-1, 315:9–24).

C. Plaintiff's Termination

In the beginning of 2018, Walmart instituted a company-wide restructuring that reduced the number of Co-Managers from four to two per store. (Doc. 43-1, ¶ 7). To effectuate the restructuring, the Market Managers instructed their Store Managers to rank their Co-Managers on four or five competencies. As a team, the Market Managers and Store Managers met and reviewed the rankings. (*Id.*). The Co-Managers ranked in the bottom 20 percent were identified for layoff, and the Market Managers then met and reviewed the decisions to ensure the ratings were consistent. (*Id.*).

Plaintiff was ranked in the bottom 20 percent of Co-Managers. (*Id.* ¶ 8). He was identified and later confirmed for layoff. (*Id.*). Worthy was the ultimate decision-maker in Plaintiff's termination. (*Id.*). All Co-Managers impacted by this restructuring were offered 60 days to find a new position with Walmart. (*Id.*). Plaintiff did not apply for another position, and accordingly, his employment was terminated on March 30, 2018. (*Id.*).

Eleven Co-Managers in Plaintiff's Market were terminated as part of the restructuring. (*Id.* ¶ 9). Nine were white, one was Hispanic, and one was African American (Plaintiff). (*Id.*). The other terminated Co-Manager at Plaintiff's store was white. (*Id.*).

II. STANDARD OF REVIEW

A court may only "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials" to support its position that it is entitled to summary judgment. Fed. R. Civ. P. 56(c)(1)(A). "The burden then shifts to the non- moving party, who must go beyond the pleadings, and present affirmative evidence to show that a genuine issue of material fact exists." *Porter v. Ray*, 461 F.3d 1315, 1320 (11th Cir. 2006). "The court need consider only the cited materials" when resolving a motion for summary judgment. Fed. R. Civ. P. 56(c)(3); *see also HRCC, LTD v. Hard Rock Café Int'l (USA), Inc.*, 703 F. App'x 814, 816–17 (11th Cir. 2017) (per curiam) (holding that a district court does not err by limiting its review to the evidence cited

by the parties in their summary judgment briefs).[3]

An issue of fact is "genuine" only if "a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a genuine dispute of material fact exists, the Court must read the evidence and draw all factual inferences therefrom in the light most favorable to the non-moving party and must resolve any reasonable doubts in the non-movant's favor. *Skop v. City of Atlanta, Ga.*, 485 F.3d 1130, 1136 (11th Cir. 2007). Summary judgment should only be granted "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co., Ltd. v. Zenith RadioCorp.*, 475 U.S. 574, 587 (1986).

III. DISCUSSION

Plaintiff alleges he suffered racial discrimination in violation of the FCRA when Walmart passed him over for promotions, transferred him to different stores, gave him Written Coachings, and terminated him. Plaintiff also alleges Walmart retaliated against him for reporting discriminatory conduct in violation of the FCRA. Claims under the FCRA are analyzed using the same framework as Title VII claims. *Albra v. Advan, Inc.*, 490 F.3d826, 834 (11th Cir. 2007).

A. Race Discrimination Claim (Count I)

1. Transfer, Termination, and Coachings

To establish a *prima facie* case of race discrimination, the plaintiff must show: (1) he is a member of a protected class; (2) he was subjected to an adverse employment action;

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[3] "Unpublished opinions are not controlling authority and are persuasive only insofar as their legal analysis warrants." Bonilla v. Baker Concrete Const., Inc., 487 F.3d 1340, 1345 (11th Cir. 2007).

(3) the defendant treated similarly-situated employees, outside of his protected class, more favorably than he was treated; and (4) he was qualified to do the job. *Burke-Fowler v. Orange Cty.*, 447 F.3d 1319, 1323 (11th Cir. 2006).

Once the plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to rebut the presumption of discrimination with evidence of a legitimate, nondiscriminatory reason for the adverse employment action. *Combs v. Plantation Patterns,* 106 F.3d 1519, 1528 (11th Cir. 1997) (citing *McDonnell Douglas Corp. v. Green*,411 U.S. 792, 802 (1973.). "This burden is one of production, not persuasion" and is "exceedingly light." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 142 (2000); *Meeks v. Comput. Assocs. Int'l*, 15 F.3d 1013, 1019 (11th Cir. 1994). Thus, "[t]o satisfy that burden of production, '[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.'" *Combs*, 106 F.3d at 1528 (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). If the employer produces evidence of a legitimate, nondiscriminatory reason for the adverse action, the plaintiff is afforded the opportunity to show that the employer's stated reason is a pretext for discrimination. *Combs*, 106 F.3d at 1528.

a. Transfer

Plaintiff alleges he was subjected to race discrimination when Walmart transferred him on November 27, 2016, from the Port Orange store to the Melbourne store after his incident with Marinez. To establish an adverse employment action, Plaintiff must show he suffered "a significant change in employment status, such as a hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)."[A] purely lateral transfer . . . if not

accompanied by any change in position, title, or salary,and that does not require significant retraining or result in loss of prestige or opportunities for promotion is not an adverse employment action." *Greene v. Loewenstein, Inc.*, 99 F. Supp. 2d 1373, 1382 (S.D. Fla. 2000). Plaintiff's transfer to the store in Melbourne had no impact on his position, title, or salary, and it did not require retraining or result in lost opportunities. (Doc. 37-1, 284:16-285:8). The Melbourne store was also closer to Plaintiff's home than the Port Orange store. (Doc. 38-1, 308:24–309:1).[4] Accordingly, Plaintiff has failed to establish a *prima facie* case of discrimination as to the transfer.

b. Termination

As to Plaintiff's claim regarding his termination, the Court finds that the claim is barred because it is outside the scope of his EEOC charges. The undisputed evidence shows that in Plaintiff's Second EEOC Charge, filed after he was terminated, Plaintiff alleged only retaliation. (Doc. 39-1, Ex. 2). Plaintiff did not dispute this fact in his response to Walmart's Motion. (Doc. 45). Thus, Plaintiff failed to exhaust the required administrative remedies for a discrimination claim based on his termination. *See Alexander v. Fulton Cty.*, 207 F.3d 1303, 1332 (11th Cir. 2000) (finding a "plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination").

Furthermore, Plaintiff failed to establish his *prima face* case of discrimination based on his termination because he cannot show that Walmart treated similarly situated

[4] In his response, Plaintiff describes the Melbourne store as an "undesirable work location." (Doc. 45, p. 23). However, Plaintiff does not give any indication as to what makes this store "undesirable." This conclusory allegation does not create a genuine issue of fact. *See Cooper v. Southern Co.*, 390 F.3d 659, 745 (11th Cir. 2004) (holding summary judgment was appropriate where the plaintiff relied on conclusory allegations based entirely on her own subjective beliefs).

employees, outside of his protected class, more favorably. Specifically, of the 11 Co- Managers in Plaintiff's Market that were terminated as part of the restructuring, nine were white, one was Hispanic, and one was African American (Plaintiff). (*Id.*).

Additionally, even assuming Plaintiff could establish a *prima facie* case, Walmart presented a legitimate, nondiscriminatory reason for terminating him—that he was ranked in the bottom 20 percent of Co-Managers as identified by the Store Managers and confirmed by the Market Managers during the company-wide restructuring. (Doc. 43-1, ¶ 8). Plaintiff has provided no evidence and presented no argument establishing that this reason was pretextual.

Thus, Plaintiff has not met his burden of showing a *prima facie* case of race discrimination or shown that Walmart's nondiscriminatory reason for his termination was pretextual.

c. Coachings

The Court now addresses Plaintiff's race discrimination claims stemming from his various coachings and related incidents. Plaintiff claims that Marinez selectively coached him for "directives/responsibilities she instituted for the store," which were not company policy. (Doc. 39-1, Ex. 1). He further alleged that she did not coach any of his white peers who were "equally responsible for following the same directives she instituted." (*Id.*).

First, the Court notes that it has doubts whether Plaintiff can establish his *prima face* case of discrimination based on Marinez's coachings. Plaintiff alleges that Marinez did not coach his white peers for the same directives she coached him on. (Doc. 39-1, Ex. 1). However, the evidence shows Marinez coached other non-African American managers, and that other African American managers had

not received any coachings from Marinez. (Doc. 40-1, ¶ 7). This undermines the third prong requiring Plaintiff to establish that Walmart treated similarly situated employees, outside of his protected class, more favorably than he was treated.

However, even assuming Plaintiff can establish his *prima facie* case, Walmart has produced a legitimate, nondiscriminatory reason for the coachings issued against Plaintiff—that he failed to properly conduct his job responsibilities. *Cuddleback v. Fla. Bd.Of Educ.*, 381 F.3d 1230, 1236 (11th Cir. 2004) (holding that performance issues constitute a legitimate, nondiscriminatory reason for an adverse employment action). Accordingly, the burden shifts back to Plaintiff to establish that this proffered reason is a pretext for discrimination. In his response, Plaintiff merely states that "as this Court is aware, the Plaintiff may rely upon the same evidence used in the *prima facie* claim to establish pretext. In this case the Plaintiff chooses to do exactly this." (Doc. 45, p. 20). Plaintiff goes on to say there are lapses in Walmart's explanation but does not elaborate beyond this empty assertion. The Court reminds Plaintiff that the "ultimate burden of persuasion is on the employee," *Sims v. MVM, Inc.*, 704 F.3d 1327, 1332–33 (11th Cir. 2013), and that he must "introduce significantly probative evidence showing that the asserted reason is merely a pretext for discrimination," *Zaben v. Air Prods. & Chems., Inc.*, 129 F.3d 1453, 1457 (11th Cir. 1997). Plaintiff has failed to do so.

From a review of the record, and with little assistance or guidance from Plaintiff, the Court is unable to conclude that Walmart's legitimate, nondiscriminatory reason for the coachings is pretext for discrimination. As far back as 2005, Plaintiff was repeatedly coached for performance-related misconduct. He was coached by numerous supervisors over the course of twelve years, and these coachings are detailed and well-documented.Furthermore, the coachings issued by Marinez were often at the direction of a third party or reviewed and upheld by a third party. For instance, Marinez

issued the July 28, 2015 First Written Coaching after Walmart received a compliance violation from a third-party auditor due to the fire exit door being blocked. (Doc. 34-1, 63:25–64:2). When an auditor issues a compliance violation to Walmart, the Associate who is responsible for the violation generally receives a coaching. (*Id.* 97:18–22). Similarly, Marinez issued the July 1, 2016 Second Written Coaching after the Market Manager, who arrived at the store that morning at the same time as Marinez, directed Marinez to coach the Associate who was responsible for the store not being zoned. (*Id.* 70:16–71:10, 98:2–20). Finally, Doll and the then-Market Manager reviewed Plaintiff's August 23, 2016 Third Written Coaching issued by Marinez and concluded it was appropriate based on Plaintiff's performance.

Accordingly, summary judgment is due to be granted for Walmart on the race discrimination claims based on the coachings, transfer, and termination.

2. *Promotions*

To establish a *prima face* case of race discrimination based on failure to promote,the plaintiff must show: (1) that he was a member of the protected group of persons; (2) he was qualified for the position and he applied for it; (3) he was not considered for the position despite his qualifications; and (4) equally or less qualified individuals outside of his protected class were considered or hired for the position. *Underwood v. Perry Cty. Comm'n*, 431 F.2d 788, 794 (11th Cir. 2005). Once the plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to rebut the presumption of discrimination with evidence of a legitimate, nondiscriminatory reason for the adverse employment action. *Combs*, 106 F.3d at 1528.

The Court finds Plaintiff failed to establish his *prima facie* case. Specifically, Plaintiff did not provide evidence to show that he was qualified for the positions he applied for or that equally or less qualified individuals were hired for the

position. *See Underwood*,431 F.2d at 794. For the three Store Manager positions Plaintiff applied for, the job description listed "leading inventory process" as one of the required competencies. (Doc. 48-1, Ex. 25). This includes managing the inventory flow process "to ensure merchandise is replenished and in-stock" as well as monitoring and evaluating the facility "to identify problems with inventory flow and signs of shrinkage." (*Id.*). Plaintiff received scores of "needs improvement" in the category of "leads inventory flow process" on his 2011, 2013, 2015, and 2016 annual performance evaluations. (Doc. 38-1, 309:16–311:18; Doc. 39-1,Exs. 13, 17, 19, 25). Many of his coachings described herein occurred due to his zoning failures. For instance, Plaintiff's First Written Coaching from December 13, 2010, stated that Plaintiff failed to zone and stock the store properly each night. (Doc. 39-1, Ex. 12). Similarly, Plaintiff received his March 23, 2007 First Written Coaching for permitting a vendor to "bring in and work up merchandise without checking it in first," which could "easily cause shrink." (*Id.* Ex. 10).

Furthermore, the selected applicants possessed qualifications that Plaintiff lacked. "To be a proper comparator for purposes of the fourth prong, the employee must be similarly situated to the plaintiff in all relevant aspects." *Johnson v. Coffee Cty. Comm'n*,714 F. App'x 942, 946–47 (11th Cir. 2017) (internal quotations omitted). With respect to four of the six promotions at issue, the selected applicants had more experience than Plaintiff, including previous Store Manager experience. (Doc. 40-1, ¶¶ 11, 15). Plaintiff acknowledged he did not have this type of experience. (Doc. 38-1, 315:9–24). For the other two positions, the selected applicants had either been a Co-Manager for longer, did not have any active coachings at the time of selection (unlike Plaintiff), or received recommendations from Store Managers. (Doc. 40-1, ¶¶ 10, 12). Therefore, Plaintiff failed to establish his *prima facie* case because he did not show he was qualified for the position or that equally or less qualified applicants were selected. *See*

Johnson, 714 F. App'x at 947 (affirming summary judgment on failure-to-promote claim where selected applicant held license the plaintiff lacked).

Even if Plaintiff established his *prima facie* case, he failed to show that Walmart's legitimate nondiscriminatory reason for its hiring decision—that the other applicants were more qualified—is merely a pretext for discrimination. *See Wilson v. B/E Aerospace, Inc.*,376 F.3d 1079, 1090 (11th Cir. 2004). To establish pretext, Plaintiff must show his race was more likely than not the reason Walmart failed to hire him or show Walmart's explanation is not worthy of belief. *See Underwood*, 431 F.2d at 794. Plaintiff argues thatWalmart's reason is pretextual because he was more qualified for the promotions. (Doc. 45, pp. 14–20). In support of this contention, he points to his long tenure at Walmart, his education, his initial promotions in 2003 and 2009, and his "solid performer" ratings on his annual performance reviews.

In a non-selection case, the plaintiff cannot establish pretext by "simply arguing or even by showing that he was better qualified than" the selected applicant. *Springer v. Convergys Customer Mgmt. Grp.*, 509 F.3d 1344, 1349 (11th Cir. 2007). "A plaintiff must show that the disparities between the successful applicant's and her own qualifications were of such a weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff." *Brooks v. Cty. Comm'n of Jefferson Cty.*, 446 F.3d 1160, 1163 (11th Cir. 2006) (internal quotations omitted). Plaintiff has failed to make such a showing. Contrary to Plaintiff's assertions, the evidence shows that the selected applicants held superior qualifications over the Plaintiff through their managerial experience, recommendations, longer tenure, and lack of disciplinary warnings. Accordingly, Plaintiff's claim for race discrimination based on failure to promote fails. Walmart is entitled to summary judgment in its favor onthe claim.

B. Retaliation Claims (Counts II–V)

Once again, the *McDonnell Douglas* burden-shifting framework applies, so Plaintiff bears the initial burden of showing a *prima facie* case of retaliation. To establish a *prima facie* case of retaliation, Plaintiff must demonstrate three elements: (1) he engaged in protected activity, (2) he suffered an adverse employment action, and (3) the adverse employment action was causally related to his protected activity. *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1454 (11th Cir. 1998). If Plaintiff establishes a *prima facie* case, the burden of production shifts to Walmart to articulate a legitimate, nondiscriminatory explanation for its challenged decisions. *Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 798 (11th Cir. 2000). A legitimate, nondiscriminatory explanation rebuts the presumption of discrimination raised by the *prima facie* case, and the burden of production shifts back to Plaintiff to prove that Walmart's reasons were a pretext for intentional discrimination or retaliation. *St Mary's Honor Ctr. v. Hicks*, 509 U.S.502, 507 (1993) (quoting *Burdine*, 450 U.S. at 255). In analyzing retaliation claims, the Court "must be careful not to allow [plaintiffs] to simply litigate whether they are, in fact, good employees." *Rojas v. Florida*, 285 F.3d 1339, 1342 (11th Cir. 2002).

Plaintiff alleges Walmart retaliated against him in four instances: (1) by denying him a promotion in September 2015 because he complained on January 16, 2013, about Robinson's comment stating "I'm going to make it my New Year's resolution to demote you" (Count II); (2) by Marinez issuing him the July 28, 2015 First Written Coaching less than a month after he complained to Human Resources about his continued inability to be promoted (Count III); (3) by Marinez issuing him the August 23, 2016 Third Written Coaching in retaliation for his August 8, 2016 complaint about another Associate engaging in racist behavior (Count IV); and (4) by Marinez terminating him for zoning issues on November 2, 2016, in retaliation for his September 26, 2016

EEOC charge (Count V). (Doc. 1-3).

In Count II, Plaintiff asserts that Robinson retaliated against him by denying his promotion application in September 2015 because Plaintiff reported the New Year's comment in January 2013. As previously discussed, the selected applicant for the September 2015 promotion had been a Co-Manager for three years longer than Plaintiff.(Doc. 40-1, ¶ 10). Choosing a more qualified candidate is a legitimate, nondiscriminatory reason for not promoting Plaintiff. *See Wilson*, 376 F.3d at 1090. Plaintiff offers no evidence of pretext besides baldly arguing he was better qualified for the position. This argument is not enough. *See Lee v. GTE Fla.*, 226 F.3d 1249, 1254 (11th Cir. 2000) ("[A] plaintiff cannot prove pretext by simply showing that she was better qualified than the individual who received the position that she wanted."). Accordingly, Count II fails.

As to Count III, Plaintiff cannot establish he engaged in a protected act because there is no evidence that any of his complaints prior to the July 28, 2015 First Written Coaching had anything to do with race or any other protected status. In his Complaint, Plaintiff alleges Marinez issued him the coaching after he emailed Weinger on July 1, 2015, about being passed over for promotional opportunities. (Doc. 1-3). However, there is no evidence Plaintiff made any reference to race in that email. (Doc. 45-8). Moreover, Plaintiff has presented no evidence Marinez was aware of this email to Weinger. Thus, the record evidence is insufficient to raise a genuine issue of material fact suggesting Plaintiff put his supervisors on notice that he was complaining about prohibited discriminatory conduct. *See Blow v. Va. Coll.*, 619 F. App'x 859, 864 (11th Cir. 2015) (emails that did not mention race or claim disparate treatment because of race did not constitute protected expression). Accordingly, Plaintiff did not establish a *prima facie* case of retaliation as to Count III.

Similarly, as to Count V, Plaintiff cannot establish

that Marinez had knowledge of the alleged protected activity forming the basis of his retaliation claims. "A plaintiff satisfies [the causal] element if he provides sufficient evidence of knowledge of the protected expression and that there was a close temporal proximity between this awareness and the adverse action." *Higson v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004).

Plaintiff provides no evidence that Marinez knew of Plaintiff's September 26, 2016 EEOC charge.[5] Plaintiff contends, without citation to the record or case law, "a reasonable inference can be made that [Marinez] was aware of the Plaintiff's protected activity" because her immediate supervisor was Robinson, the Market Manager. (Doc. 45, p. 21). Although all reasonable inferences arising from the undisputed facts should be made in favor of Plaintiff, "an inference based on speculation and conjecture is not reasonable." *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1482 (11th Cir. 1985). The Court declines to make this inference without any further evidence that Marinez knew about the protected activity. Thus, the alleged protected act could not have caused the alleged adverse action. *See Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1197 (11th Cir. 1997) (holding the plaintiff must show that the corporate agent who took the adverse action was aware of the plaintiff's protected expression).

Even assuming Plaintiff can establish a *prima facie* case of retaliation as to all counts, Plaintiff's retaliation claims fail for Counts II through V because Plaintiff did not carry his burden of producing evidence to permit a reasonable finding of pretext. *See Brungart*, 231 F.3d at 798.

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[5] As to the protected activity serving the basis of Count IV, Plaintiff testified at his deposition that he told Marinez about the racial incident. (Doc. 37-1, 244:1). Viewing the record in the light most favorable to Plaintiff, it can be inferred that Marinez knew about his Ethics Hotline complaint regarding the incident. However, as discussed below, Count IV fails because Plaintiff did not demonstrate pretext.

Walmart alleges that Plaintiff received coachings and missed promotions because his performance did not meet company expectations. (Doc. 33, p. 16). This assertion is supported by the well-documented record of performance-related coachings Plaintiff received from various supervisors as far back as 2005. According to the Eleventh Circuit, performance issues constitute a legitimate, nondiscriminatory reason for an adverse employment action.

Cuddleback, 381 F.3d at 1236. In response, Plaintiff seems to attempt to show that Walmart's reason was pretextual by arguing that he was written up for "essentially housekeeping issues" and was "never written up for policy violations or for substantive issues regarding the performance of his job duties." (Doc. 45, p. 21).

To permit a finding of pretext, Plaintiff must provide evidence which shows that Walmart's "proffered reason was false and that the true motive for the action was discriminatory." *St Mary's Honor Ctr.*, 509 U.S. at 515. "If the proffered reason is one that might motivate a reasonable employer, a plaintiff cannot recast the reason but must meet it head on and rebut it." *Wilson*, 376 F.3d at 1088 (11th Cir. 2004). The Court will not act "as a super-personnel department that reexamines an entity's business decisions . . . rather, we limit our inquiry to 'whether the employer gave an honest explanation of its behavior.'" *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991).

Plaintiff has provided no evidence that Walmart's reason was false and that the true motive for its actions was discriminatory. *See St Mary's Honor Ctr.*, 509 U.S. at 515.At most, Plaintiff claims Walmart disciplined him and failed to promote him because of "housekeeping issues" outside the scope of policy violations. (Doc. 45, p. 21). Assuming this is true, Plaintiff still fails to establish how this shows that his supervisors harbored any discriminatory animus toward him or retaliated against him. *See Silvera v. Orange Cty. Sch. Bd.*, 244 F.3d 1253, 1261 (11th Cir. 2001) ("Pretext

means more than a mistake on the part of the employer; pretext means a lie, specifically a phony reason for some action."). Most of the coachings at issue involved Plaintiff's failure to zone the store properly each night, which is one of the required competencies of Plaintiff's role as Co- Manager. (Doc. 39-1, Ex. 5). For instance, the August 23, 2016 Third Written Coaching, which serves the basis for Count IV, was given by Marinez because Plaintiff failed to zone the store, left consumable areas not completely worked, and did not put away carts. (Doc.39-1, Ex. 23). The job description for Co-Manager specifically states the position requires"manag[ing] the inventory flow process (for example, on-hand accuracy, staffing, managerial routines) to ensure merchandise is replenished and in-stock." (*Id.*). Therefore,the record shows that Plaintiff was written up for failing to adequately perform the requiredcompetencies of his role as Co-Manager.

Furthermore, these write-ups were often given at the direction of third parties and reviewed by upper-level management. *See supra* Section III.A.1.c. For instance, the August 23, 2016 Third Written Coaching was reviewed by Doll and the then-Market Manager, who concluded it was appropriately issued based on Plaintiff's performance. (Doc. 40-1, ¶ 7). Similarly, Marinez gave Plaintiff the July 28, 2015 First Written Coaching after Walmart received a compliance violation from a third-party auditor due to the fire exitdoor being blocked. (Doc. 34-1, 63:25–64:2). These facts, which Plaintiff does not dispute in his Response, further undermine a finding that the coachings were based on "a lie [or]a phony reason." *See Silvera*, 244 F.3d at 1261.

The Court finds that Plaintiff has not provided evidence that Walmart's reasons were false and that the true motive for its actions was discriminatory. Accordingly, Plaintiff has failed to satisfy his burden of producing evidence to permit a reasonable finding that Walmart's legitimate, nondiscriminatory reasons for his adverse employment actions were pretextual. Walmart's motion for summary judgment on the claims of retaliation is due to be

granted.

IV. CONCLUSION

For the aforementioned reasons, Defendant's Motion for Summary Judgment (Doc. 33) is **GRANTED**. The Clerk of Court is **DIRECTED** to enter judgment in favor of Defendant, and thereafter, to close the case.

DONE AND ORDERED in Orlando, Florida on May 18, 2020.

"s/ Paul G. Byron"

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record Unrepresented Parties