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United States Court of Appeal
Tenth Circuit

January 17, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DOROTA PETERSON,

Plaintiff - Appellant,

v.

STAPLES INC. HUMAN RESOURCES,

Defendant - Appellee.

No. 24-8041
(D.C. No. 1:23-CV-00059-SWS)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **LUCERO**, and **PHILLIPS**, Circuit Judges.

Plaintiff-Appellant Dorota Peterson was employed by Staples the Office Superstore, LLC (Staples).[1] About two years into her tenure at Staples, a male employee complained to management that Ms. Peterson was sexually harassing him. Staples investigated the allegations and found them to be substantiated. Staples then terminated Ms. Peterson based on its zero-tolerance sexual harassment policy.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

[1] The district court noted Ms. Peterson incorrectly identified the defendant in this case as "Staples, Inc. Human Resources." R., vol. 2 at 463 n.1.

Ms. Peterson subsequently filed a pro se complaint against Staples, alleging she was wrongfully terminated. She brought federal claims under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA), as well as state law claims for defamation, libel, and slander. Staples moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss the state law claims and two of the Title VII claims for discrimination and retaliation based on sex. The district court granted that motion.

After discovery, Staples moved for summary judgment under Federal Rule of Civil Procedure 56 on Ms. Peterson's ADEA claim and her Title VII claims for hostile working environment, retaliation, and discrimination based on national origin. The district court granted the motion and entered judgment in favor of Staples. The court also awarded Staples its costs as the prevailing party.

Proceeding pro se, Ms. Peterson now appeals. Exercising jurisdiction under 28 U.S.C. 1291, we affirm.

We liberally construe pro se filings, but we "cannot take on the responsibility of serving as a litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (internal quotation marks omitted). And pro se litigants must "follow the same rules of procedure that govern other litigants." *Id.*

Ms. Peterson argues the district court erred in granting summary judgment for Staples. But she makes only conclusory assertions that Staples's motion for summary judgment contained factual errors and that the district court incorrectly

decided the facts in granting the motion—she provides no citations to the record to support these assertions.

Federal Rule of Appellate Procedure 28 requires the appellant to set forth "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(8)(A). Even construing Ms. Peterson's brief liberally, we agree with Staples that she has waived appellate review of any challenges to the district court's summary judgment ruling by failing to support her argument with citations to the record and legal authority. *See Pignanelli v. Pueblo Sch. Dist. No. 60*, 540 F.3d 1213, 1217 (10th Cir. 2008) (citing Rule 28 and concluding appellant had waived appellate review of her claim and her request to reverse the district court's grant of summary judgment on that claim by failing to cite any legal authority or record evidence to support the claim); *Garrett*, 425 F.3d at 841 (citing Rule 28 and concluding pro se appellant had waived appellate review of district court's dismissal order due to inadequate briefing where the brief "consist[ed] of mere conclusory allegations with no citations to the record or any legal authority for support").

Ms. Peterson appears to raise three other issues related to non-dispositive orders involving discovery and costs. The first issue involves the court's denial of her motion to deem facts admitted that she filed when Staples failed to initially respond to all her requests for admissions. The magistrate judge denied the motion because Staples did submit supplemental responses fully answering the requests, and there was no prejudice to Ms. Peterson from the delay. The second issue relates to a

motion to compel she filed. The district court did not rule on that motion separately, but it denied all outstanding motions as moot at the end of its summary judgment ruling, and the motion to compel was one of the outstanding motions. Finally, Ms. Peterson raises an issue related to costs. The Clerk of the district court awarded Staples costs as the prevailing party, but Ms. Peterson moved the court to "[r]etax" the costs, suggesting it would be a financial hardship for her to pay them. Supp. R., vol. 2 at 99. A magistrate judge denied that motion.

Staples argues these issues are not properly presented on appeal because Ms. Peterson did not object to the orders resolving them. We disagree with Staples as to its reasoning for disposing of these issues. The district court resolved the motion to compel in the final order that is before us on appeal. Staples has not cited any authority that would require Ms. Peterson to file a separate objection to a ruling in a final order in addition to filing a notice of appeal. So that discovery issue is properly before this court.

As for the other two issues, the failure to object to a magistrate judge's non-dispositive order can result in a waiver on appeal. *See Sinclair Wyo. Refin. Co. v. A & B Builders, Ltd.*, 989 F.3d 747, 783 (10th Cir. 2021). But this waiver rule does not apply when "a *pro se* litigant has not been informed of the time period for objecting and the consequences of failing to object." *Morales-Fernandez v. I.N.S.*, 418 F.3d 1116, 1119 (10th Cir. 2005). In the two orders Ms. Peterson is challenging, the magistrate judge did not notify her that she needed to object to them to preserve

appellate review. Given these circumstances, it is not appropriate to apply this waiver rule based on Ms. Peterson's failure to object to the magistrate judge's orders.

We conclude, however, that Ms. Peterson has waived appellate review on a different basis—her failure to adequately brief how the district court abused its discretion in resolving the discovery and costs issues, *see King v. PA Consulting Grp., Inc.*, 485 F.3d 577, 590 (10th Cir. 2007) (reviewing discovery ruling for abuse of discretion); *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1233 (10th Cir. 2001) (reviewing costs award for abuse of discretion). Ms. Peterson does not engage with the reason the district court denied her motion to deem facts admitted—that Staples corrected its deficiencies, and she did not suffer any prejudice in the delay. She simply makes the conclusory assertion that Staples "did not follow Federal Discovery Rules" and the district court "favor[ed]" Staples "regarding Discovery Rules." Aplt. Br. at 5. On the motion to compel, she asserts the "district court blocked [her] regarding discovery issues in this case regarding Federal Rule 26," *id.*, but she does not explain what she means by this assertion or include any cites to her motion to compel or to Staples's response to that motion. Finally, on the costs issue, Ms. Peterson does not appear to recognize that costs are generally awarded to the prevailing party, *see* Fed. R. Civ. P. 54(d)(1) ("Unless a federal statute, these rules, or a court order provides otherwise, costs . . . should be allowed to the prevailing party."). Staples was the prevailing party in this case. Ms. Peterson contends it does not "make logical sense" that the district court denied her motion to retax costs, but she provides no legal authority to support her argument. Aplt. Br. at 9.

As with her argument on the district court's summary judgment ruling, Ms. Peterson has not adequately briefed her arguments on these issues. She again relies on conclusory assertions without any citations to the record or legal authority. She has therefore waived appellate review of these issues. *See Garrett*, 425 F.3d at 841.

Accordingly, we affirm the district court's judgment.[2]

Entered for the Court

Gregory A. Phillips
Circuit Judge

[2] We note that we would have reached the same result even without waiver based on the reasoning in the district court's very thorough 42-page decision.

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

DOROTA PETERSON,

Plaintiff,

v.

STAPLES INC. HUMAN RESOURCES,

Defendant.

Case No. 1:23-CV-059-SWS

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This case is brought by a *pro se* Plaintiff, Ms. Dorota Peterson ("Plaintiff"), who alleges that she was wrongfully terminated from her employment at the Staples office supply store in Jackson Hole, Wyoming because of her age, Polish nationality, and in retaliation for protected workplace conduct, and that she further suffered a hostile working environment at Staples. (ECF No. 1.) According to Plaintiff's complaint, she is 55 years old, and originally from Poland, having immigrated to the United States in 2003. (Id. at 4.)

The matter now comes before the Court on Staples the Office Superstore, LLC's ("Staples" or "Defendant")[1] motion for summary judgment. (ECF Nos. 43, 47.) Staples moves to dismiss Plaintiff's four remaining claims against it, which assert: (1) age discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*; (2) discrimination based

[1] Plaintiff's complaint (ECF No. 1) incorrectly identifies the Defendant in this case as "Staples, Inc. Human Resources" when the proper Defendant—and author of the pending motion for summary judgment—is "Staples the Office Superstore, LLC." (ECF Nos. 7 at 1, n. 1; 47 at 1.) As stated by this court in ruling on the 12(b)(6) motion to dismiss, it appears that the requirements of Fed. R. Civ. P. 15(c)(1)(C) have been met, which would allow an amendment of the complaint to substitute a party and relate back to the date of the original complaint due to an error in a party's name. (ECF No. 7 at 1, n.1). However, neither party has filed a motion to amend, and absent such a motion, the Court will not *sua sponte* amend the Plaintiff's Complaint to substitute a party. *See* Fed. R. Civ. P. 15(a).

on national origin under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*; (3) retaliation in violation of Title VII, 42 U.S.C. § 2000e–3(a); and (4) hostile working environment under Title VII, 42 U.S.C. § 2000e-2. (ECF Nos. 1; 7 at 11.)[2] Plaintiff filed a response in opposition to Defendant's motion for summary judgment (ECF No. 48) and Staples filed a reply in support of its motion. (ECF No. 50). This matter is scheduled to proceed to a bench trial on June 3, 2024. (ECF No. 17.)

However, the Court finds that under the framework established in *McDonell Douglas Corp v. Green*, 411 U.S. 792 (1973), Plaintiff has failed to establish genuine disputes of material fact for her remaining *prima facie* claims and has failed to create a dispute of fact showing that Staples' proffered legitimate, non-discriminatory explanation for her termination was pretext. Therefore, summary judgment is granted in Staples' favor and all of Plaintiff's remaining.

FACTUAL BACKGROUND[3]

Plaintiff was hired as a Print and Marketing Sales Associate at the Jackson, Wyoming Staples store location on or around January 22, 2018. (ECF Nos. 47 at 4, ¶ 8; 48 at 6, ¶ 8.) At the time Plaintiff was interviewed and hired, she was over the age of forty and had a Polish accent. (ECF Nos. 47 at 4, ¶ 9; 48 at 6, ¶ 9.) Staples maintains an "Associate Handbook" which was made available to Plaintiff and all other employees upon their hiring, and which contains an express "zero tolerance" sexual harassment policy, specifically prohibiting "unwanted sexual advances . . . leering, making sexual gestures . . . touching, assault, impeding or blocking movements." (ECF Nos. 47 at 2–3, ¶¶ 1, 4; 48 at 4–5, ¶ 1, 4.) The Associate Handbook encourages

[2] Plaintiff's other claim for Discrimination and Retaliation based on sex under Title VII of the Civil Rights Act of 1964 as well as Plaintiff's Wyoming State law claims for defamation, libel, and slander were dismissed in the Court's ruling on the 12(b)(6) motion to dismiss. (ECF No. 7 at 11.)

[3] The following facts are undisputed unless noted. The remaining facts as relevant to the motion for summary judgment are detailed in the discussion section below.

employees to immediately report suspected sexual harassment which will result in Staples launching a mandatory investigation into the allegation. (ECF Nos. 47 at 3, ¶ 5; 48 at 6 ¶ 5.) The parties agree that Plaintiff was aware of the sexual harassment policy and knew that any employee could be discharged from employment if a claim of sexual harassment is substantiated against them. (ECF Nos. 47 at 3, ¶ 6; 48 at 6 ¶ 6.)

During Plaintiff's employment with Staples, Plaintiff received positive performance reviews and raises in compensation. (ECF Nos. 47 at 4, ¶ 10; 48 at 7, ¶ 10.) Throughout her employment, Plaintiff contacted Staples Human Resources ("HR") phoneline to raise questions about her employee benefits. (ECF Nos. 47 at 4, ¶ 11; 48 at 7, ¶ 11.)

The May 16, 2019 Incident

On May 16, 2019 Plaintiff was involved in a workplace incident with Sales Associate Lucinda Thompson ("Ms. Thompson"), and Plaintiff was accused of shoving or pushing Ms. Thompson in the store. (ECF Nos. 47 at 4, ¶ 12; 48 at 7, ¶ 12.) On May 16 and May 17, 2019 Plaintiff exchanged a series of text messages with Store Manager Amanda Rivera ("SM Rivera"), complaining about mistreatment by the employee she allegedly pushed. (ECF No. 48-1 at 39–43.) Plaintiff was suspended as a result of the incident with Ms. Thompson, after which Plaintiff called Staples HR phoneline to discuss her suspension with HR Representative Timothy Shanahan ("HR Rep. Shanahan"). (ECF Nos. 47 at 4, ¶¶ 13–14; 48 at 7, ¶¶ 12–13; 48–1 at 33–34.) The parties do not dispute that following an HR investigation, it was found that Staples HR needed to be consulted before Plaintiff was suspended and that Plaintiff should be paid for the day she was suspended. (ECF No. 47-9 at 2; 48-1 at 33.)

The Sexual Harassment Investigation

On February 6, 2020, an 18 or 19-year-old Sales Associate named Christian Hernandez

("Mr. Hernandez") brought a complaint of sexual harassment against Plaintiff to the Jackson, Wyoming Staples' General Manager Chris Sabatka ("GM Sabatka"). (ECF Nos. 47 at 5, ¶ 17; 47-1 at 9, 14; 48 at 8, ¶ 17.) Mr. Hernandez reported that Plaintiff had rubbed her breasts against him on two separate occasions and that Plaintiff had winked at him while they were working together. (ECF Nos. 47 at 5, ¶ 17; 48 at 8, ¶ 17.) GM Sabatka notified Staples' HR Department of the complaint, and Staples Senior Specialist – Associate Relations Laurene Tompkins ("HR Rep. Tompkins") took charge of the mandatory investigation required under Staples' policy. (ECF No. 47 at 3, 5, ¶¶ 5, 18, 19; 48 at 6, 9, ¶¶ 5, 18, 19.) As part of that investigation, HR Rep. Tompkins interviewed, took notes, and obtained written statements from Mr. Hernandez and from a purported witness of the sexual harassment, Sales Associate Jay Trowbridge ("Mr. Trowbridge"). (ECF No. 47 at 5, ¶¶ 20–22; ECF No. 48 at 20–22.) On February 19, 2020, HR Rep. Tompkins and GM Sabatka also conducted an interview with Plaintiff regarding the allegations against her of sexual harassment. (ECF Nos. 47 at 6, ¶ 24; 48 at 10 ¶ 24.) During that interview, Plaintiff defended herself, denied the accusations, and leveled other accusations against her coworkers, but she did not write or sign a written statement. (ECF Nos. 47 at 6, ¶¶ 25–26; 48 at 10 ¶¶ 25–26.)

Plaintiff's Texts on February 19, 2020

After her interview concluded on February 19, 2020, Plaintiff wrote a series of text messages to GM Sabatka and Staples District Manager Sam Fletcher ("DM Fletcher") reporting that her coworker Mr. Trowbridge would complain to her of his wages and benefits and that he always "looked for [Plaintiff's] chest" which Plaintiff felt was harassment. (Plaintiff's Exhibits 13 and 22; ECF No. 48-1 at 31, 49–50.)

Plaintiff's Termination on February 20, 2020

Although Plaintiff argues that the Staples investigation was conducted in "bad faith," it is

not contested that HR Rep. Tompkins concluded through her investigation that the allegations that Plaintiff had violated Staples' zero tolerance sexual harassment policy had been "substantiated," and so she recommended that Plaintiff's employment be terminated. (ECF Nos. 47 at 7, ¶ 29; ECF Nos. 48 at 11, ¶ 29.) GM Sabatka agreed with HR Rep. Tompkin's recommendation, and so, on the morning of February 20, 2020, GM Sabatka and DM Fletcher called Plaintiff and notified her that she was terminated from employment at Staples, effective immediately. (ECF Nos. 47 at 7, ¶ 34; 48 at 12, ¶ 34.)

Plaintiff's Post-Termination Complaints

On February 20, 2020, after Plaintiff's employment with Staples had already been terminated, Plaintiff called Staples' Human Resources phone line and informed "that she was just told [by] her [General Manager] that she was terminated . . . [a]nd feels like this is due to . . . discrimination, [and] would like this to be investigated." (ECF Nos. 47 at 8, ¶ 36; 47-10 at 2; 48 at 13 at 36.) The following day, February 21, 2020, Plaintiff also sent an email to staplesbenefits@staples.com, alleging:

> I WAS TERMINATED BECAUSE [Mr. Hernandez] REPORT ME TO HR ABOUT SEXUAL ASSAULT WITCH [sic] HE CAN PETITION NOW NONIMMIGRANT STATUS USCIS FORM I-918 EXPIRES 4/30/21 SO HE HAS ONLY 1 YEAR LEFT [TO] BE NOT DEPORTED BY ICE. . . . I WANT HELP YOU GUYS I[']M VERY GOOD WITH EMMIGRATION [sic] I DID ALL BYSELF [sic] BEFORE BECOMING US CITIZEN . . . WAS VERY NICE WORK FOR STAPLES SO SAD WE HAVE ONLY NUMBER 1558030.

(ECF No. 47 at 8, ¶ 38; 47-11; 48 at 13, ¶ 38.) Plaintiff filed her *pro se* complaint in this Court, alleging employment discrimination, over three years later on April 7, 2023. (ECF No. 1.)

LEGAL STANDARD

1. **Summary Judgment Standard**

"The court shall 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). A dispute is genuine "if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way," and it is material "if under the substantive law it is essential to the proper disposition of the claim." *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013) (quotations omitted).

In considering a summary judgment motion, the Court views the record and all reasonable inferences that might be drawn from it in the light most favorable to the party opposing summary judgment. *Dahl v. Charles F. Dahl, M.D., P.C. Defined Ben. Pension Trust*, 744 F.3d 623, 628 (10th Cir. 2014). The moving party has "both the initial burden of production on a motion for summary judgment and the burden of establishing that summary judgment is appropriate as a matter of law." *Kannady v. City of Kiowa*, 590 F.3d 1161, 1169 (10th Cir. 2010) (quoting *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2003)). If the moving party carries this initial burden, the nonmoving party may not rest on its pleadings, but must bring forward specific facts showing a genuine dispute for trial as to those dispositive matters for which it carries the burden of proof. *Id.* (citing *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996)).

"[A] party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quotations omitted). At summary judgment, a party moving or opposing summary judgment may cite "to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). However, a court "can consider only admissible evidence in reviewing an order

granting summary judgment." *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038 (10th Cir. 2020). While "the form of evidence produced by a nonmoving party at summary judgment may not need to be admissible at trial, the content or substance of the evidence must be admissible." *Johnson v. Weld Cty., Colo.*, 594 F.3d 1202, 1209 (10th Cir. 2010) (quotations omitted). Nevertheless, a nonmovant cannot successfully oppose summary judgment using statements that come to the court "only through inadmissible hearsay." *Id.* at 1219. Likewise, testimony "grounded on speculation does not suffice to create a genuine issue of material fact to withstand summary judgment." *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 876 (10th Cir. 2004).

"In addition to the standards applicable to all summary judgment motions" a further consideration arises in this case because Plaintiff opposes summary judgment without the assistance of counsel. *Hammad v. Bombardier Learjet, Inc.*, 192 F. Supp. 2d 1222, 1228 (D. Kan. 2002). "It has long been the rule that *pro se* pleadings, including complaints and pleadings connected with summary judgment, must be liberally construed." *Id.* While this rule "requires the court to look beyond a failure to cite proper legal authority, confusion of legal theories, and poor syntax or sentence construction" it does not "require this court to assume the role of advocate for the *pro se* litigant." *Id.* Therefore, even in *pro se* cases, a "court has no duty to search the record for a litigant to find evidence supporting that litigant's summary judgment interests." *Hampton v. Barclays Bank Delaware*, 478 F. Supp. 3d 1113, 1121–22 (D. Kan. 2020), *aff'd*, 2021 WL 3237082 (10th Cir. July 30, 2021).

2. The *McDonnell Douglas* Framework

Plaintiff has not presented any direct evidence of discrimination to support her claims, such as "oral or written statements on the part of a defendant showing a discriminatory motivation[.]" *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1225 (10th Cir. 2000). Therefore, the

Court must "determine if there is sufficient indirect evidence of discrimination for [Plaintiff] to survive summary judgment" under the burden-shifting framework first set forth in *McDonell Douglas Corp v. Green*, 411 U.S. 792 (1973). *Id.* The framework consists of three steps:

> At the first step of the analysis, a plaintiff must establish a *prima facie* case of [employment] discrimination. If the plaintiff succeeds, the burden of production then shifts to the employer to identify a legitimate, nondiscriminatory reason for the adverse employment action. Once the employer advances such a reason, the burden shifts back to the plaintiff to prove the employer's proffered reason was pretextual.

Frappied, 966 F.3d at 1056 (quotations omitted).

The three-part *McDonnell Douglas* framework applies to each of Plaintiff's claims for discrimination, retaliation, and hostile work environment based on her age under the ADEA and her national origin under Title VII. *Jones v. Oklahoma City Pub. Sch.*, 617 F.3d 1273, 1279 (10th Cir. 2010) ("Having concluded that *McDonnell Douglas* applies to ADEA claims . . ."); *Lucero v. Sandia Corp.*, 495 F. App'x 903, 907 (10th Cir. 2012) (applying the *McDonnell Douglas* test to the plaintiff's claims of age and national origin discrimination); *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1221–24 (10th Cir. 2015) (applying the *McDonnell Douglas* test to the plaintiff's claim of racially hostile work environment); *Pinkerton v. Colorado Dep't of Transp.*, 563 F.3d 1052 (10th Cir. 2009) ("Where the plaintiff seeks to prove a Title VII retaliation claim through indirect or circumstantial evidence, the burden-shifting analysis of *McDonnell Douglas Corp.* . . . applies."); *West v. Norton*, 376 F. Supp. 2d 1105, 1120 (D.N.M. 2004) ("In the absence of direct evidence, claims of age, race, national origin, gender discrimination, hostile work environment, and retaliation are all subject to the burden shifting framework that the Supreme Court established in *McDonnell Douglas Corp. v. Green* . . . .").

DISCUSSION

"In the summary judgment context, a plaintiff initially must raise a genuine issue of

material fact on each element of the *prima facie* case[.]" *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997). As such, the Court begins by examining each of Plaintiff's *prima facie* claims under the ADEA and Title VII before proceeding to the two remaining steps of the *McDonnell Douglas* framework, if appropriate.

1. **Plaintiff's Claim for Hostile Working Environment Under Title VII**[4]

Beginning with Plaintiff's claim for hostile working environment under Title VII,

> to avoid summary judgment at the *prima facie* stage, a plaintiff must present evidence that creates a genuine dispute of material fact as to whether "the workplace is permeated with discriminatory intimidation, ridicule, and insult[] that is sufficiently severe or pervasive to alter the conditions of the victim's employment." *Hall v. U.S. Dep't of Labor*, 476 F.3d 847, 851 (10th Cir. 2007) (quoting *Davis v. U.S. Postal Serv.*, 142 F.3d 1334, 1341 (10th Cir. 1998)).

Lounds, 812 F.3d at 1222. To satisfy her burden, a plaintiff must identify specific evidence from which a reasonable jury could find four elements:

> (1) she is a member of a protected group; (2) she was subject to unwelcome harassment; (3) the harassment was based on [a legally-protected status]; and (4) due to the harassment's severity or pervasiveness, the harassment altered a term, condition, or privilege of the plaintiff's employment and created an abusive working environment.

Id. (quoting *Harsco Corp. v. Renner*, 475 F.3d 1179, 1186 (10th Cir. 2007)). Importantly, the hostile work environment must be based on the Plaintiff's protected class or discriminatory animus toward that class. *Faragalla v. Douglas Cnty. Sch. Dist. RE 1*, 411 F. App'x 140, 152 (10th Cir. 2011) ("the harassment must be based on the plaintiff's protected class or stem from discriminatory animus toward her protected class."); *Rodriguez v. Brown*, 2022 WL 3453401, at *3 (10th Cir. Aug. 18, 2022) (upholding summary judgment when the plaintiff "failed to present sufficient

[4] It is not evident that Plaintiff has stated a claim for hostile working environment based on age under the ADEA. However, in an abundance of caution, the Court also assesses the summary judgment record for Plaintiff's evidence of harassment based on age because claims for hostile working environment under the ADEA have been recognized by the Tenth Circuit Court of Appeals. *See MacKenzie v. City & Cnty. of Denver*, 414 F.3d 1266 (10th Cir. 2005), *abrogated on other grounds by Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166 (10th Cir. 2018).

evidence from which a reasonable jury could find that the conduct of which she complained was "because of" her race, sex, and/or national origin.").

Here, Defendant argues that Plaintiff's claim for hostile working environment under Title VII cannot survive summary judgment because (1) her allegations are based on unsupported hearsay and conclusory allegations; (2) the harassing statements that Plaintiff alleges she suffered were not related to her age or national origin, rendering them unactionable; (3) none of Plaintiff's alleged treatment was severe or pervasive; and (4) Staples neither knew nor had reason to know of Plaintiff's allegedly hostile environment because Plaintiff did not report it. (ECF No. 47 at 20–26.)

4.1 The May 16, 2019 Incident with Lucinda Thompson

In support of its motion for summary judgment, Defendant asserts that the only time before the investigation leading to her termination that Plaintiff raised a complaint regarding so-called "harassment" was on May 17, 2019, which involved an incident that had occurred the day prior. (ECF Nos. 47 at 4, ¶¶ 12–15; 47-8 at 2.) The parties agree that the incident on May 16, 2019 involved an allegation that Plaintiff had shoved another employee named Lucinda Thompson during the workday. (ECF Nos. 47 at 4, ¶¶ 12–15; 48 at 7, ¶ 12.) The evidence provided by Plaintiff is uncontested that, as a result of this incident, Plaintiff was suspended for a day on May 17, 2019 by GM Sabatka and SM Rivera. (ECF Nos. 48-1 at 33, 39–43.) The parties agree that Plaintiff called Staples HR on May 17, 2019 and spoke to HR Rep. Timothy Shanahan regarding her suspension. (ECF Nos. 47 at 4, ¶ 14; 48 at 7, ¶ 14.) HR Rep. Shanahan's notes indicate that he determined that "while [Store Manager Rivera's] intentions were good, HR needs to be partnered with [sic] before any suspension" and that Plaintiff should be paid for the day she was suspended. (ECF No. 47-9 at 2; 48-1 at 33.) Nothing in HR Rep. Shanahan's notes indicate that Plaintiff complained to him about harassment at all, much less that the incident with Ms. Thompson or her

subsequent suspension constituted harassment based on Plaintiff's age or national origin. (Id.)

Indeed, it is undisputed that before contacting HR to complaint about the incident from May 16, 2019, Plaintiff had contacted Staples HR on numerous occasions to ask questions about her benefits, personal time off, and sick time. (ECF Nos. 47 at 4, ¶ 11; 48 at 7, ¶ 11.) This demonstrates that Plaintiff was fully aware of the avenues by which she could contact HR to report any harassment or hostile working environment. However, there is no record of Plaintiff complaining about age or national origin harassment throughout all contacts with Staples HR during her employment, including on May 17, 2019. (ECF No. 47–8 at 1–3.)

Plaintiff nevertheless contends that she told GM Sabatka and SM Rivera about "harassment . . . by Lucinda Thompson" which she alleges was never investigated by Staples. (ECF No. 48 at 23.) Plaintiff cites screenshots of a string of messages sent to "Amanda" on May 16 and May 17, 2019—concerning the incident where Plaintiff allegedly pushed Ms. Thompson. (ECF No. 48-1 at 39–43.) In those messages, Plaintiff informs SM Rivera that she told Ms. Thompson to "stop jumping on me" and to stop saying in front of customers that Plaintiff "should grow up And . . . be adult." (ECF No. 48-1 at 41.) Plaintiff also complained that Ms. Thompson had "[defamed] my character [in] front of [several] people and talk[s] about me all the time" and writes that she had complained to GM Sabatka about her treatment by Ms. Thompson on a previous occasion. (ECF No. 48-1 at 41–42.) Nothing in these text messages, however, raises a complaint that Ms. Thompson had harassed Plaintiff *because* of her age or national origin. Indeed, rather than alleging that Ms. Thompson denigrated her for being older, Plaintiff complained that Ms. Thompson was telling her to "grow up" and act like an adult. Nowhere in the texts does Plaintiff even allude to any harassing statements referring to her Polish nationality. Therefore, Plaintiff has produced no evidence that on May 16 or 17, 2019 she made her superiors aware of harassment by another

employee which was based on one of the protected categories to which Plaintiff belonged.

4.2 "Harassment" Unrelated to Plaintiff's Age or National Origin

In further support of its contention that Plaintiff never complained of or suffered harassment based on age or national origin, Defendant cites to GM Sabatka's sworn statement wherein he declares that Plaintiff never made a verbal or written complaint to him "related to discrimination, harassment, retaliation, or any other workplace issue;" nor did GM Sabatka witness any "harassing, discriminatory, or retaliatory behavior" against Plaintiff by any Staples' employee. (ECF No. 47-2 at 2, ¶¶ 7–9.) A sworn statement by Sales Associate Trowbridge likewise declares he never witnessed nor was he aware of harassing, discriminatory, or retaliatory behavior toward Plaintiff from anyone at Staples." (ECF No. 47-3 at 2, ¶ 5.)

In attempting to create a genuine issue of material fact for her *prima facie* hostile work environment claim, Plaintiff argues GM Sabatka and Mr. Trowbridge are "liars" who should be "impeached" and precluded from offering testimony. (ECF No. 48 at 22.) To support this contention, she cites her own "Exhibit 34" entitled "Notes" in which she sets forth a litany of incidents during her employment at Staples which Plaintiff has labeled "harassment." (ECF No. 48-1 at 123–126.) There are three problems with the evidence Plaintiff attempts to use to avoid summary judgment on her claims.

First, Plaintiff's Exhibit 34, while signed by Plaintiff, was not attested to be true and correct under penalty of perjury. 28 U.S.C. § 1746 "authorizes parties to submit unsworn declarations in lieu of affidavits, provided that the declarations state that they are 'true and correct' and are made 'under the penalty of perjury,' among other things." *Vazirabadi v. Denver Health & Hosp. Auth.*, 782 F. App'x 681, 687 (10th Cir. 2019) (emphasis in original); *Estrada v. Cook*, 166 F. Supp. 3d 1230 (D.N.M. 2015) ("an unsworn declaration must be signed 'under penalty of perjury' to have

the same force and effect as an affidavit.")[5] Therefore, Plaintiff's Exhibit 34, entitled "Notes," is not evidence upon which Plaintiff can rely to create a dispute of material fact to oppose summary judgment.

Second, even if the Court were to consider the contents of the "Notes" filed as Plaintiff's Exhibit 34, the instances of alleged "harassment" identified therein do not support a *prima facie* claim for hostile working environment based on Plaintiff's age or national origin. No doubt, Plaintiff was treated unkindly in some of the interactions which she identifies as "harassment." For example, Plaintiff states that GM Sabatka once asked her "why people don't like you[?]", told her not to wear a hat, and denied her request to take a 15-minute break to go to the bathroom. (ECF No. 48-1 at 123–124). Plaintiff also notes that Store Manager Jose Hernandez did not let her borrow his personal heater and did not help her at a busy end of her shift. (ECF No. 48-1 at 124.) While perhaps unkind and uncomfortable, none of the above incidents indicate an age or nationality-based animus toward Plaintiff. *Faragalla*, 411 F. App'x at 152; *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (explaining that courts must ensure that Title VII "does not become a 'general civility code.'"). Plaintiff states in a conclusory fashion that she felt that these actions were taken because of her age, gender, and nationality, and that the other employees did not like her because she "was from Europe and . . . was older than most of them." *Id.* at 123–24. Plaintiff, however, provides no evidence or explanation as to why that was her belief. Her link between the above incidents and animus based on age or national origin is grounded entirely on speculation, which cannot "suffice to create a genuine issue of material fact to withstand summary judgment." *Bones*, 366 F.3d at 876.

[5] An affidavit is "a voluntary declaration of facts written down and sworn to by a declarant, usually before an officer authorized to administer oaths." *Vazirabadi*, 782 F. App'x at 687 (citing *Affidavit, Black's Law Dictionary* (11th ed. 2019)). Plaintiff's Exhibit 34 is most certainly not an affidavit.

Third, Plaintiff's Exhibit 34 only identifies three isolated incidents described by Plaintiff as "harassment" which could be conceivably construed to have referenced her national origin (but not her age). Nevertheless, they are inadequately severe or pervasive as a matter of law to support a *prima facie* claim for hostile working environment under Title VII. To survive summary judgment on a hostile work environment claim, a plaintiff must produce evidence to convince a rational factfinder "that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Penry v. Fed. Home Loan Bank of Topeka*, 155 F.3d 1257 (10th Cir. 1998). The evidence must be enough that a rational factfinder could find that "(1) the harassing conduct was 'severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive'; and (2) that plaintiff 'subjectively perceived the environment to be abusive.'" *Glover v. NMC Homecare, Inc.*, 106 F. Supp. 2d 1151, 1167–68 (D. Kan. 2000), *aff'd*, 13 F. App'x 896 (10th Cir. 2001) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

"Whether an environment is hostile or abusive 'can be determined only by looking at all the circumstances . . . [including] 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.'" *Id.* at 1168 (quoting *Davis v. United States Postal Serv.*, 142 F.3d 1334, 1341 (10th Cir. 1998)). The United States Supreme Court has been clear 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*, 524 U.S. at 788. Furthermore, the Tenth Circuit Court of Appeals has rejected hostile work environment claims in the Title VII employment context based on a single

or only a few isolated instances of animosity toward the plaintiff's protected class. *Wilkins v. Chevron*, 370 Fed. App'x 919, 920 n.2 (10th Cir. 2010) (noting three isolated instances are insufficient to state a hostile work environment claim); *Glover*, 106 F. Supp. 2d at 1167–68 *aff'd*, 13 F. App'x 896 (two instances insufficient).

Here, in Plaintiff's Exhibit 34 entitled "Notes", Plaintiff first claims that her fellow employees would ask her to repeat herself on the radio, and Store Manager Jose Hernandez would say on the radio that he could not understand Plaintiff. (Id.) Second, in about October 2019, Plaintiff describes a situation where she was in the "employee room" when she overhead Ms. Thompson speaking to another employee about how, at her other place of employment, she had "made some girl from Eastern Europe cry" and questioned why this Eastern European girl "[came] to my land?" (ECF No. 48-1 at 125.) Third, Plaintiff also states that in October 2019, Mr. Trowbridge approached her and complained about his benefits, and then remarked how "all people from Eastern Europe come and take the jobs." (Id.)

Even if Plaintiff's flawed Exhibit 34 is considered, it fails to show that Plaintiff's work environment was permeated with discriminatory intimidation, ridicule, and insult to create an abusive working environment. None of the incidents described above are particularly severe. Not a single event involved any physical threat or touching of Plaintiff. Indeed, one of the comments regarding Eastern European people was not even made directly to Plaintiff, as it was apparently only made within earshot. The alleged incidents involving her coworkers asking her to repeat things on the radio, while perhaps subjectively constituting underhand criticism of Plaintiff's foreign accent, it may objectively only reflect a very real workplace difficulty in understanding the accent of someone whose first language is not English. Even making all inferences in Plaintiff's favor, such a difficulty is best described as trivial, and Plaintiff fails to specify how often or

pervasively she was criticized by her coworkers and superiors when using the radio. Furthermore, while Plaintiff contends that the statements regarding Eastern Europeans made her feel "extremely uncomfortable", she does not explain or allege how it interfered with her work performance. The Court concludes that totality of the circumstances regarding Plaintiff's evidence presents the quintessential case of an employee faced with "isolated incidents" of "simple teasing" and "offhand comments" which cannot create an objectively hostile or abusive work environment, and which was almost entirely unrelated to her age or national origin.

In sum, Plaintiff fails to establish a *prima facie* case of Title VII hostile working environment under the *McDonnell Douglas* analysis because (1) Plaintiff fails to submit admissible evidence in support of her claims; (2) even if Plaintiff's evidence is considered, she mostly identifies instances of "harassment" unrelated to her age or nationality, (2) the only incidents conceivably related to her national origin were neither severe nor pervasive, and (3) there is no evidence that Plaintiff brought any harassment based on her age or national origin to her superiors or to Staples HR before the incident which led to her firing. As such, summary judgment is granted in Defendant's favor for Plaintiff's Title VII hostile work environment claim.

2. Plaintiff's *Prima Facie* Claim for Discrimination Based on National Origin Under Title VII

Turning to Plaintiff's *prima facie* claim for national origin discrimination, "Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended, prohibits employment discrimination on the basis of . . . national origin." *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (citing 42 U.S.C. § 2000e–2(a)(1) ("It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . national origin[.]"))To set forth a *prima facie* case for national origin discrimination, a plaintiff

must establish:

> (1) she is a member of a protected class, (2) she suffered an adverse employment action, (3) she qualified for the position at issue, and (4) she was treated less favorably than others not in the protected class.

Khalik v. United Air Lines, 671 F.3d 1188, 1192 (10th Cir. 2012); *Throupe v. Univ. of Denver*, 988 F.3d 1243, 1252 (10th Cir. 2021) ("a plaintiff can raise an inference of discrimination by showing differential treatment. For example, it is sufficient to show that the employer treated the plaintiff differently from similarly situated employees who are not part of the plaintiff's protected class."). "An employee is similarly situated if he [(1)] shares the same supervisor, [(2)] is subject to the same standards governing performance evaluation and discipline, and [(3)] has similar relevant employment circumstances, such as work history." *Throupe*, 988 F.3d at 1252. When comparing employment circumstances and a work history which involves disciplinary treatment, a similarly situated employee must be one who was not in the same protected class as the plaintiff but who "engaged in conduct of 'comparable seriousness'" to a plaintiff's misconduct. *E.E.O.C. v. PVNF, L.L.C.*, 487 F.3d 790, 801 (10th Cir. 2007).

Defendant argues that Plaintiff cannot establish a *prima face* case of national origin discrimination under Title VII because Plaintiff fails to produce evidence which could convince a reasonable factfinder that her discharge was "because of" her national origin, and she fails to produce any evidence of a substantially similar employee who was not Polish and who was treated more favorably than Plaintiff. (ECF No. 47 at 12–14.) The Court agrees.

In moving for summary judgment, Defendant has cited sworn declarations by HR Rep. Tompkins and GM Sabatka who both state that in deciding to terminate Plaintiff her national origin was not considered, and instead, the only basis for her termination was the determination that she had violated Staples' sexual harassment policy. (ECF Nos. 47-1 at 4, ¶ 23; 47-2 at 3, ¶ 20.) Plaintiff

has not argued, identified, or offered evidence of a non-Polish employee who was similarly situated to Plaintiff, and who was treated more favorably after having been investigated for misconduct of comparable seriousness to sexual harassment. Such a failure is fatal to her Title VII national origin discrimination claim.

At most, Plaintiff argues that a sales associate named Maribel Ocasio Santana ("Ms. Ocasio Santana") was terminated a "couple months" before Plaintiff's firing, but Plaintiff alleges that like her, Ms. Ocasio Santana was discriminated against by GM Sabatka based on Ms. Ocasio Santana's age and national origin. (ECF No. 48 at 16.) Plaintiff cites no evidence which would show that Ms. Ocasio Santana was similarly situated to Plaintiff but not in the same protected class as Plaintiff, such as evidence identifying the national origin of Ms. Ocasio Santana. Nor does Plaintiff provide evidence showing whether Ms. Ocasio Santana was under investigation for some form of misconduct like sexual harassment. Indeed, Plaintiff's unsupported assertion that Ms. Ocasio Santana was terminated by GM Sabatka indicates that if Ms. Ocasio Santana was similarly situated to Plaintiff, she was not treated more favorably than Plaintiff at all.

Plaintiff nevertheless asserts that she was treated "less favorably" than her coworkers, again citing to her "Notes" contained in Exhibit 34. For example, Plaintiff asserts that she, unlike other employees, would put on the register "nonstop," that other employees would get hugs from GM Sabatka, and that she was not allowed to wear hats and "hoodies" like other employees. (ECF No. 48-1 at 126–27.) Once again, however, Plaintiff's Exhibit 34 is not proper evidence to be considered on summary judgment as an unsworn statement that was not made under penalty of perjury. Furthermore, even if considered, the above instances are not "adverse employment actions" because they do not constitute a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision

causing a significant change in benefits." *Throupe*, 988 F.3d at 1252. At most, they can only collectively be described as "mere inconvenience." *Id.* Plaintiff also does not explain how the other employees at issue were similarly situated to her or how this "unfavorable" treatment was in any way connected to her national origin. Because Plaintiff fails to show a similarly situated employee outside of her protected class who was treated more favorably, Plaintiff fails to satisfy her *prima facie* burden under Title VII claim for national origin discrimination, and summary judgment must be granted in Defendants' favor.

3. Plaintiff's *Prima Facie* Claim for Age Discrimination Under the ADEA

Defendant also argues that Plaintiff fails to establish a *prima facie* case of age discrimination under the ADEA because Plaintiff fails to allege or produce any evidence that her age was the "but-for cause" of her termination—the adverse employment action at issue.[6] (ECF No. 47 at 11–12.) Defendants urge that the only evidence in the record referring to Plaintiff's age is hearsay, the age-reference does not support an inference of age discrimination, and Plaintiff's age at the time of her hiring and the age of her supervisors, creates an inference against age discrimination. (Id.)

Defendants are correct that at trial a Plaintiff "must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the 'but-for' cause of the challenged employer decision." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 178 (2009). However, the McDonnell Douglas analysis is used to "determine if there is sufficient indirect evidence of

[6]An adverse employment action "is a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. . . . But a mere inconvenience or an alteration of job responsibilities does not qualify as an adverse action." *Throupe*, 988 F.3d at 1252 (quotations omitted). The Tenth Circuit Court of Appeals "generally do[es] not consider standard workplace investigations to be adverse employment actions." *Lincoln v. Maketa*, 880 F.3d 533, 543 (10th Cir. 2018). Therefore, the mere fact that Plaintiff was investigated before being terminated does not constitute a separate, actionable adverse employment action. As discussed below, the Court also concludes Plaintiff's alleged "hostile working environment" was neither severe nor pervasive. As such, no hostile working environment in this case constitutes an adverse employment action.

discrimination for [Plaintiff] to survive summary judgment" on her claims for discrimination. *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1225 (10th Cir. 2000). Here, at summary judgment, Plaintiff attempts to show her ADEA claim through circumstantial evidence, arguing that she was fired and replaced by a younger employee. (ECF No. 48 at 15.) Therefore, Plaintiff is not required to "present direct evidence of discrimination to establish a *prima facie* case" under the first step of the *McDonnell Douglas* test. *Denison v. Swaco Geolograph Co.*, 941 F.2d 1416, 1420 (10th Cir. 1991). Instead, "[i]n termination cases, the elements of a *prima facie* age discrimination case are typically that the plaintiff was '(1) within the protected class of individuals 40 or older; (2) performing satisfactory work; (3) terminated from employment; and (4) replaced by a younger person, although not necessarily one less than 40 years of age.'" *Frappied*, 966 F.3d at 1056 (quoting *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1146 (10th Cir. 2008)).[7]

The "elements of a *prima facie* case under the *McDonnell Douglas* framework are neither rigid nor mechanistic, and their purpose is the establishment of an initial inference of unlawful discrimination warranting a presumption of liability in plaintiff's favor." *Id.* (quoting *Adamson*, 514 F.3d at 1146.) Therefore, the fourth element of an ADEA *prima facie* case "is a flexible one that can be satisfied differently in varying scenarios." *Plotke v. White*, 405 F.3d 1092, 1100 (10th Cir. 2005). For example, when a plaintiff is not replaced by a younger worker, . . . a plaintiff may satisfy the fourth element with a more general showing that his discharge 'occurred under circumstances which give rise to an inference of discrimination.'" *Bolton v. Sprint/United Mgmt. Co.*, 220 F. App'x 761, 767 (10th Cir. 2007) (citing *Plotke*, 405 F.3d at 1100). As such, "the critical *prima facie* inquiry in all cases is whether the plaintiff has demonstrated that the adverse

[7] In moving for summary judgment Defendant quotes, without correct citation, the standard for age discrimination for an adverse employment action not resulting in termination.

employment action occurred under circumstances which give rise to an inference of unlawful discrimination." *Adamson*, 514 F.3d at 1151 (quotations omitted).

It is undisputed by the parties that Plaintiff was over 40 at the time of her hiring and that she was terminated from her employment. (ECF Nos. 47 at 9; 48 at 9.) Defendants also do not appear to dispute that Plaintiff was performing satisfactory work before the events leading to her discharge because the parties agree that "[d]uring her employment, Plaintiff received positive reviews and raises in compensation. (ECF Nos. 47 at 4, ¶ 10; 48 at 7, ¶ 10.) Defendants argue, nonetheless, that Plaintiff fails to produce admissible evidence "to demonstrate that her termination took place in circumstances giving rise to an inference of age discrimination", which speaks to the fourth element of the *McDonnell Douglas* framework. (ECF No. 47 at 11.)

Here, Plaintiff has failed to adduce evidence that she was *replaced* by a younger employee. It is a low burden to make a *prima facie* case of age discrimination, as illustrated in *Bedell v. American Yearbook Co., Inc.*, 17 F. Supp. 2d 1227, 1232 (D. Kan. 1998). In that case the plaintiff asserted a claim under the ADEA, and her employer disputed whether the plaintiff was replaced by a younger person—"the fourth element of a *prima facie* case." *Id.* The employer argued that the plaintiff had not been replaced, but merely that the job had been automated. *Id.* However, in *Bedell*, the court found that the employer acknowledged that a younger employee was trained to perform part of the plaintiff's job duties, and a deposition in the summary judgment record showed this younger employee had been trained to replace the plaintiff while she was on vacation. *Id.* Although, "[n]either party has produced any employment records, testimony of [the younger employee], or any other evidence in support of their relative positions", the court nevertheless concluded that the evidence in the record was enough to create a factual dispute for summary judgment on the plaintiff's *prima facie* claim of age discrimination. *Id.*

Notwithstanding the analysis in *Bedell*, the Sixth Circuit Court of Appeals has elucidated a rule which this course finds persuasive. In *Barnes v. Gencorp*, 896 F.2d 1457, 1465 (6th Cir. 1990), the Sixth Circuit held that a plaintiff "is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or the work is redistributed among other existing employees already performing related work. A person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties." *Id.*

Here, Plaintiff argues, without citing any evidence, that she was replaced "by [the] youngest worker Christian Hernandez hired without benefits." (ECF No. 48 at 15, 16.) However, it is undisputed that Mr. Hernandez already worked at Staples at the time of Plaintiff's firing, because Mr. Hernandez was the coworker who Plaintiff allegedly sexually harassed at work shortly before her termination. Unlike the summary judgment record in *Bedell*, Plaintiff cites no evidence to show that Mr. Hernandez was hired or reassigned to take over Plaintiff's duties upon her termination instead of her duties simply being absorbed by the other employees at Staples' Jackson location generally.

At most, Plaintiff cites her own testimony which she made under oath during an employment benefits hearing with the Wyoming Department of Workforce Services on April 17, 2020. (Plaintiff's Exhibit 28.) During that hearing, she indicated that at some point before her firing she had helped train Mr. Hernandez to work on the cash register at the Staples store. (Plaintiff's Exhibit 28 at 1:35:50.) Plaintiff asserts that in her position as a sales associate, she almost always worked at the cash register before she was fired. (ECF No. 48 at 6.) However, GM Sabatka testified under oath during the hearing with the Wyoming Department of Workforce Services that both Plaintiff and Mr. Hernandez were employed as sales associates in the Jackson, Wyoming Staples store. (Exhibit 28 at 29:51 and 33:04.) Therefore, the mere fact that Plaintiff

trained Mr. Hernandez to perform some work required of a sales associate does not show that Mr. Hernandez "replaced" Plaintiff, particularly because he had already been hired and assigned to a sales associate position *before* Plaintiff was fired.[8]

More importantly, Plaintiff has not provided any evidence showing that once she vacated her sales associate position after being terminated, Mr. Hernandez was specifically reassigned to perform Plaintiff's duties, rather than her duties being redistributed among all the sales associates at Staples already doing related work. For example, if Plaintiff worked exclusively on the cash register, as she alleges, she has produced no evidence that Mr. Hernandez was subsequently assigned to work exclusively on the cash register after Plaintiff's firing. Such evidence is necessary because Plaintiff and Mr. Hernandez were not the only sales associates working at the Staples store when Plaintiff was fired, and at least two other employees, Jay Trowbridge and Lucinda Thompson—whose age is not indicated in the record—also worked in the role of sales associates. (Exhibit 28 at minute 41:45.) As such, there is no reason to believe that Mr. Hernandez replaced her any more than any other sales associate working at Staples. Nor is there any reason to believe that her duties were not simply redistributed amongst the other existing sales associates. Without that evidence, Plaintiff has, in effect, merely picked an existing coworker who she knew was younger than her to argue—without evidence—that this younger person somehow "replaced" her. As such, Plaintiff's assertion that she was replaced by Mr. Hernandez is predicated solely on speculation which fails to create a genuine issue of material fact that she was replaced by a younger employee.[9]

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[8] Although inadmissible to oppose summary judgment as a statement not made under penalty of perjury, in Plaintiff's "Exhibit 34" entitled "Notes," Plaintiff indicates that she was told that other sales associates "would rotate through the register every 2 hours." (ECF No. 48-1 at 126.) Therefore, according to Plaintiff, all sales associates worked on the cash registers.

[9] Plaintiff also maintains that she was replaced by a younger, non-benefitted employee because she was more costly to maintain on Staples' payroll as a full-time benefitted employee with health insurance. (ECF No. 48 at 15, 16.) However, this argument cuts against her contention that she was replaced by Mr. Hernandez, because it implies that

Nonetheless, as mentioned above, "when a plaintiff is not replaced by a younger worker, which appears to be the case here, a plaintiff may satisfy the fourth element with a more general showing that his discharge occurred under circumstances which give rise to an inference of discrimination." *Bolton*, 220 F. App'x at 766 (quotations omitted). Although Plaintiff failed to produce evidence that she was replaced by a younger employee, the ultimate inquiry is whether she has produced evidence giving rise to an inference of age discrimination. This inquiry is similar to the showing required to establish pretext, so the Court will nevertheless proceed to the last two steps of the *McDonnell Douglas* analysis on Plaintiff's ADEA claim. *See id.* (The "pretext review may properly encompass evidence supporting the *prima facie* case.") In that analysis, the Court concludes that Plaintiff fails to establish pretext or an inference that her termination occurred under circumstances giving rise to an inference of age discrimination.

4. Plaintiff's *Prima Facie* Claim for Retaliation Under Title VII

However, before proceeding to the second and third steps of the *McDonnell Douglas* analysis, Defendant also move for summary judgment on Plaintiff's *prima facie* claim for retaliation under Title VII, arguing that there is no evidence by which a factfinder could conclude that (1) Plaintiff engaged in protected activity before her termination; (2) nor is there evidence that Plaintiff's termination was causally connected to any protected conduct. (ECF No. 47 at 16–19.) Title VII prohibits retaliation by an employer against an employee, "because [s]he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e–3(a). The *prima facie* case for retaliation under Title VII requires the plaintiff to show:

> (1) that she engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection existed between the protected activity and the materially

Plaintiff's full-time position was not given to Mr. Hernandez, but rather, that Mr. Hernandez continued working as a part-time sales associate without benefits. However, Plaintiff has offered no evidence regarding whether Mr. Hernandez remained a part-time or became a full-time employee after her firing.

adverse action.

Khalik, 671 F.3d at 1193 (quotations omitted).

As indicated by the first element of the *prima facie* case, "[o]pposition to an employer's conduct is protected by § 2000e–3(a) only if it is opposition to a practice made an unlawful employment practice by Title VII." *Petersen v. Utah Dep't of Corr.*, 301 F.3d 1182, 1188 (10th Cir. 2002) (quotations omitted.) Because Title VII "does not prohibit all distasteful practices by employers", a plaintiff who opposes "plain vanilla rude and unfair conduct" does not oppose discrimination made unlawful by Title VII, unless the opposed practice is based on a protected category under Title VII. *Id.* (finding that an employee's opposition to her employer's conduct was not protected by Title VII unless the mistreatment was based on "race or religion.") Opposition can be protected from retaliation even if the employee is wrong about the alleged violation of Title VII by her employer, but the employee must have a "good faith belief that Title VII had been violated." *Id.* (quotation omitted). Furthermore, to establish a causal connection, an employer's superiors must know that the plaintiff was engaging in protected opposition under Title VII for a subsequent adverse employment action to constitute retaliation. *Id.* ("An employer's action against an employee cannot be *because* of that employee's protected opposition unless the employer knows the employee has engaged in protected opposition.").

As already discussed above regarding Plaintiff's hostile work environment claim, there is no evidence Plaintiff complained of mistreatment by any employee or supervisor at Staples based on her national origin before the investigation which led to her firing. At most, Plaintiff complained to her supervisors about plain vanilla rude mistreatment which she suffered from coworkers like Lucinda Thompson. However, once Plaintiff was accused of sexual harassment on February 19, 2020, Plaintiff cites three statements she made to Staples HR and her supervisors, which she argues

constitute Title VII protected conduct. (ECF No. 48 at 13, 20.)

First, the parties agree that after Plaintiff was accused of sexual harassment by Mr. Hernandez, she was interviewed by HR Rep. Tompkins with GM Sabatka serving as a witness. (ECF Nos. 47 at 6, ¶ 24; 48 at 10, ¶ 24.) In Staples' interrogatory answers provided to Plaintiff, Defendant acknowledges that during that interview, "[i]n response to being questioned about her conduct, Plaintiff stated that she thought everyone was picking on her because she was Polish." (ECF No. 48-1 at 73.) However, the Tenth Circuit Court of Appeals "generally do[es] not consider standard workplace investigations to be adverse employment actions." *Lincoln v. Maketa*, 880 F.3d 533, 543 (10th Cir. 2018). Therefore, although Plaintiff may have subjectively felt that she was being accused of sexual harassment and investigated because she "was Polish," the standard workplace investigation which Staples was required to pursue under its zero-tolerance sexual harassment policy cannot itself constitute an adverse employment action under the second element of the *prima facie* case of Title VII retaliation. Furthermore, there is no evidence in the record which Plaintiff has cited to explain why she had a good-faith belief that her coworkers' complaints and the subsequent workplace investigation was in any way related to her Polish national origin at the time of the February 19th interview. Because testimony "grounded on speculation" is not adequate to oppose summary judgment, the mere fact that Plaintiff levelled an allegation that she was being investigated because "she was Polish" is not enough standing alone to establish that she had a good faith belief that she was opposing a workplace practice made unlawful by Title VII. *Bones*, 366 F.3d at 876.

The second instance when Plaintiff argues she engaged in protected conduct under Title VII occurred shortly after the interview concluded with HR Rep. Tompkins and GM Sabatka on February 19, 2020. (ECF No. 48 at 20.) Sometime after the interview but on that same day, Plaintiff

introduced screenshots of text messages she sent to GM Sabatka and DM Fletcher which reads:

> Hello it's me Dorota Peterson I [was] suspend[ed] from work because somebody [lied] about me to Hr also I need [to] report [an] employee named Jay he always talk[s] to me about management he complained about his wages all the time and his benefits he also ask[ed] me [several] time[s] about [my] benefits also [a] couple weeks ago he did [a] bad survey about [the] store. Jay always look for my chest I feel like he [harasses] me in work thank you!

(Plaintiff's Exhibit 13, ECF No. 48-1 at 49.) While this text messages raises several allegations about Plaintiff's coworker Jay, stating that he complains about his wages and benefits, nothing in this text message opposes a "practice" by Staples based on Plaintiff's national origin. Although Plaintiff's allegation that "Jay" "look[ed] for [Plaintiff's] chest" perhaps pertains to an allegation of sexual harassment by a coworker, it has nothing to do with Plaintiff's Polish nationality. Furthermore, Plaintiff's sex-based discrimination and retaliation claims under Title VII were dismissed pursuant to Staples' 12(b)(6) motion to dismiss because Plaintiff failed to exhaust her administrative remedies as to those claims. (ECF No. 7 at 10.) Because this text message to her supervisors contains no opposition to an unlawful practice under Title VII, based on Plaintiff's Polish national origin, this text message cannot be used to state a *prima facie* case for Plaintiff's remaining Title VII retaliation claim.

Third, it is not in dispute that on February 20, 2020, after Plaintiff's employment with Staples had been terminated, Plaintiff called Staples' Human Resources phone line and informed "that she was just told [by] her [General Manager] that she was terminated . . . [a]nd feels like this is due to . . . discrimination, [and] would like this to be investigated." (ECF Nos. 47 at 8, ¶ 36; 47-10 at 2; 48 at 13 at 36.) However, because this complaint of discrimination was made after Plaintiff had already been terminated, her termination could not have constituted a retaliatory act, and therefore her complaint to Staples HR fails to support a *prima facie* claim for retaliation under Title VII. For the foregoing reasons, Plaintiff fails to establish a *prima facie* Title VII retaliation

claim based on her national origin, and summary judgment must also be granted in Defendants' favor on this claim.

5. The Proffered Legitimate, Non-Discriminatory Reason

Despite determining that Plaintiff has failed to state a *prima facie* claim for discrimination, retaliation, or a hostile work environment under either Title VII or the ADEA, assuming arguendo that Plaintiff had met her low burden to establish *prima facie* claims, the Court nevertheless concludes (1) Staples has identified a legitimate, non-discriminatory reason for Plaintiff's discharge, and (2) Plaintiff has failed to show that this non-discriminatory reason is a pretext to mask an age-based, national-origin based, or retaliatory motive by Staples.

As alluded-to multiple times throughout this order, Defendant argues that Staples had a legitimate, non-discriminatory reason for terminating Plaintiff based on an investigation by Staples which led it to conclude that Plaintiff had violated Staples' sexual harassment policy. (ECF No. 47 at 14.) A defendant's burden is "exceedingly light" to establish a legitimate, non-discriminatory reason for its challenged actions under step two of the *McDonnell Douglas* framework. *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1173 (10th Cir. 2007). It "only requires that the defendant explain its actions against the plaintiff in terms that are not facially prohibited by" Title VII or the ADEA. *E.E.O.C. v. Flasher Co.*, 986 F.2d 1312, 1317 (10th Cir. 1992). Here, the Court finds that Defendant's burden has been easily met.

While disputing the veracity of the complaint against her, Plaintiff does not dispute that on February 6, 2020, Mr. Hernandez complained to GM Sabatka that Plaintiff had rubbed her breasts on him twice and that she had winked at him while they were working together. (ECF Nos. 47 at 5, ¶ 17; 48 at 8, ¶ 17.) After the incident was reported, HR Rep. Tompkins investigated the complaint, interviewing Mr. Hernandez and obtaining a written statement from him. (ECF Nos.

47 at 5, ¶ 19; 47-1 at 12; 48 at 8, ¶ 19.) Mr. Hernandez's written statement was included as Exhibit B to HR Rep. Tompkins' unsworn statement taken under penalty of perjury, and states:

> On January 20th, I was standing near the computer and printer, coding out returns. Dorota approached from behind rubbing her breasts on my arm, I couldn't move away. She backed off once Jay began to approach the register. Jay later told me to report it to Chris. Dorota winks at me when I walk by the register or when I[']m there making me feel uncom[fortable]. [There] was an other [sic] incident where She rubbed her breast on my arm in mid [D]ecember, no one witnessed it, but I was [too] embar[assed] to report it.

(ECF No. 47-1 at 12.) HR Rep. Tompkins also interviewed and obtained a written statement from sales associate Trowbridge as part of her investigation, who reported that he witnessed the incident on January 20, 2020. (ECF No. 47 at 5, ¶ 22.) Plaintiff maintains that Trowbridge lied in his statements to HR Rep. Tompkins, but does not dispute that he was contacted as part of the investigation. (ECF No. 48 at 10, ¶ 22.) Mr. Trowbridge's statement, included as Exhibit C to HR Rep Tompkins' unsworn statement made under penalty of perjury, relates the following:

> On January 20, 2020, Martin Luther King Day, I was in the laptop section of the store. I looked down toward the Customer Service area . . . and Christian and Dorota were in the customer service area. Christian was working on the computer. I saw Dorota approach Christian. She deliberately approached Christian and there was full body contact between Christian and Dorota. Dorota then moved her upper body so that her breasts deliberately moved on Christian's right arm. I believe that Dorota saw me approaching the Customer Service area and backed away.

(ECF No. 47-1 at 13.) Mr. Trowbridge also wrote that he talked to Mr. Hernandez about what he saw, and although Mr. Hernandez "was very embarrassed and upset about the incident" and "appeared reticent about reporting the incident", Trowbridge advised him to report the event to GM Sabatka as an instance of "unwanted sexual harassment." *Id.*

The parties also agree that HR Rep. Tompkins also interviewed Plaintiff on February 19, 2020 as part of her investigation, and that GM Sabatka was present. (ECF Nos. 47 at 6, ¶ 24; 48 at 10, ¶ 24.) According to HR Rep. Tompkins' unsworn statement made under penalty of perjury,

Plaintiff was interviewed but refused to make a written statement; therefore, GM Sabatka wrote down a statement which HR Rep. Tompkins believes to be a correct and accurate recitation of statements made by Plaintiff during the interview. (ECF No. 47-1 at 3.) In the statement, attached to HR Rep. Tompkins unsworn statement as Exhibit D, GM Sabatka wrote that "Dorota has made it very clear that she has never rubbed her breasts against Christian. She also said to me that she never intended to wink at Christian. If she did it was only a mistake." (ECF No. 47-1 at 15.)

HR Rep. Tompkins writes in her unsworn declaration that "I concluded that the allegations of sexual harassment against Plaintiff were substantiated based on the information and statements gathered during my investigation." (Id. at 4, ¶ 19.) HR Rep. Tompkins therefore "recommended to Plaintiff's manager, Chris Sabatka, that Plaintiff's employment be terminated." (Id. at 4, ¶ 22.) HR Rep. Tompkins further represents that she did "not consider Plaintiff's age, her national origin or ancestry, her performance, or any prior workplace complaints raised by Plaintiff during the HR investigation at any time, or when [she] recommended that Plaintiff's termination from employment due to the substantiated and significant violations of Staples' zero tolerance sexual harassment policy." (Id. at 4, ¶ 23.)

In support of Staples' motion for summary judgment, GM Sabatka also executed an unsworn statement made under penalty of perjury. (ECF No. 47-2.) GM Sabatka's statement is consistent with that of HR Rep. Tompkins, stating that "[b]ased on the substantiated and significant violations of Staples' zero tolerance sexual harassment policy, Staples' HR recommended Plaintiff's employment be terminated." (Id. at 3, ¶ 18.) GM Sabatka informs that he "agreed with the recommendation to terminate Plaintiff's employment due exclusively to the substantiated violations of Staples' zero tolerance harassment policy" and denies that he considered "Plaintiff's age, her national origin or ancestry, her performance, or any prior workplace complaints raised by

Plaintiff" when he determined that Plaintiff should be terminated. (Id. at 3, ¶¶ 19–20.) Therefore, "[e]arly the morning of February 20, 2020, District Manager Sam Fletcher and [GM] Chris Sabatka called Plaintiff and advised Plaintiff she was terminated from employment effective immediately." (Id. at 3, ¶ 21.) According to GM Sabatka, "Plaintiff did not raise a complaint of discrimination, harassment, or retaliation on the phone call where I advised Plaintiff she was being terminated." (Id. at 3, ¶ 22.)

The Court concludes that the aforementioned evidence introduced by Staples into the summary judgment record is adequate to meet its "exceedingly light" burden of explaining that Staples fired Plaintiff not for a facially prohibited reason under Title VII or the ADEA, but rather because an investigation by Staples Human Resources concluded that Plaintiff violated Staples' sexual harassment policy.

6. Pretext

The burden now shifts back to the Plaintiff to show that the legitimate, non-discriminatory and non-retaliatory reason offered by Staples was pretext. *Frappied*, 966 F.3d at 1056. To show pretext, "[t]he plaintiff is not required to come forward with direct evidence of discriminatory intent. He is only required to show 'that the employer's proffered justification is unworthy of credence.'" *Merrick v. N. Nat. Gas Co., Div. of Enron Corp.*, 911 F.2d 426, 429 (10th Cir. 1990). "Pretext can be shown by such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Lobato v. New Mexico Env't Dep't*, 733 F.3d 1283, 1289 (10th Cir. 2013) (quoting *Morgan,* 108 F.3d at 1323). Importantly, when considering whether the proffered reason was pretextual, the Court must "examine the facts as they appear to

the person making the decision[,] not the plaintiff's subjective evaluation of the situation." *Id.* (quoting *Luster v. Vilasck*, 667 F.3d 1089, 1093 (10th Cir. 2011)). The examination asks "not whether the employer's proffered reasons were wise, fair or correct, but whether [the employer] honestly believed those reasons and acted in good faith upon those beliefs." *Id.* (quoting *Luster*, 667 F.3d at 1094).

A plaintiff's "unsubstantiated allegation" that the employer's "explanation was false cannot serve as evidence of pretext." *Hysten v. Burlington N. Santa Fe Ry. Co.*, 415 F. App'x 897, 905 (10th Cir. 2011). Therefore, when alleged misconduct leads to the plaintiff's termination, it does not matter whether the misconduct *actually* happened, what matters is whether the employer's decision-makers *believed* in good faith that it did. *Id.* ("It matters not whether Mr. Hysten actually made a threatening statement—what matters is whether BNSF decision-makers believed in good faith that he did.").

Defendant contends that Plaintiff has not and cannot produce evidence showing that the reason for her termination was pretext. (ECF No. 47 at 15–16.) The Court agrees. Plaintiff raises three grounds to argue pretext: (1) that her coworkers at Staples are "liars"; (2) Staples' investigation into her conduct was unprofessional and conducted in bad faith; and (3) that Mr. Hernandez was a non-citizen who falsely accused Plaintiff of sexual harassment to obtain an immigration benefit. Because all three grounds lack merit, Plaintiff fails to establish pretext and all her remaining claims shall be dismissed.

6.1 Plaintiff's Coworkers' Credibility

Plaintiff repeatedly argues that "SA Jay Trowbridge and SA Christian Hernandez . . . are Liars and . . . fabricated [the] incident" of sexual harassment so that Plaintiff would be fired, in order "to harass Plaintiff toward her National Origin[.]" (ECF No 48 at 17–18.) She asserts that

the witness statements from Mr. Trowbridge and Mr. Hernandez "are all fabricated, inconsisten[t] and false." (Id at 19.) However, it is not enough for Plaintiff merely argue that her coworkers who complained about her conduct are "liars" and that the investigation into her alleged misconduct was conducted in "bad faith." Plaintiff must instead affirmatively adduce evidence that the decisionmakers in her termination, HR Rep. Tompkins and GM Sabatka, could not have honestly believed her coworker's testimony over her own and therefore, that their decision to terminate her was in bad faith." *Hysten*, 415 F. App'x 897, 905 (an "unsubstantiated allegation" that the "explanation was false cannot serve as evidence of pretext.")

In attempting to substantiate her showing of pretext, Plaintiff cites Mr. Trowbridge's written statement submitted during the HR investigation which states that on January 20, 2020 he was "in the laptop section of the store", whereas HR Rep. Tompkins notes' of her interview with Mr. Hernandez indicate that he told her that "Jay [Trowbridge] was near us, near the soda machine about 10 feet away." (ECF Nos. 48 at 17–18; 48-1 at 114, 119.) Plaintiff also makes much out of the delay Mr. Hernandez took to report two incidents of sexual harassment, which he finally reported on February 6, 2020 although the alleged harassing acts by Plaintiff occurred in December 2019 and on January 20, 2020. (ECF No. 48 at 10.) Plaintiff argues that Staples' sexual harassment policy requires timely oral or written reporting of harassment. (ECF No. 48 at 10.)

However, at their core, the allegations against Plaintiff are "he-said, she-said" type allegations. Mr. Hernandez said that Plaintiff rubbed her breasts on him and winked at him, and Plaintiff denies that she did so. Unfortunately for Plaintiff, there was another witness corroborated the "he-said" allegation raised by Mr. Hernandez against Plaintiff. While Plaintiff contends that both Mr. Hernandez and the witness are "liars" and that their statements are "all fabricated, inconsisten[t] and false," Staples HR nonetheless had a good faith basis to believe Hernandez and

Trowbridge's version of events over Plaintiff's. The statements submitted by Trowbridge and Hernandez at the time of Plaintiff's firing were consistent as to the of the alleged sexual harassment (January 20, 2020); the circumstances of the incident (Hernandez was working on a computer); the type of sexual contact (Plaintiff moved and rubbed her breasts on Hernandez's arm); that Plaintiff stopped the contact when she saw Trowbridge approaching; that Hernandez was embarrassed and uncomfortable; and that Trowbridge had counseled Hernandez to report the incident despite Hernandez's embarrassment and reluctance to report Plaintiff. (*Compare* ECF No. 47-1 at 12 *with* ECF No. 47-1 at 13–14.) Both accounts also consistently explained the delay in Mr. Hernandez reporting Plaintiff to management—because he was embarrassed. The mere fact that Hernandez may have estimated that Trowbridge was standing by the soda machine at the time of the incident, while Trowbridge estimates that he was standing in the laptop section, does not show those who made the decision to fire Plaintiff were acting in bad faith or that Staples' proffered justification is unworthy of credence, particularly when the overwhelming majority of the key facts and details of the two accounts were consistent.

Even so, Plaintiff asserts that GM Sabatka is also a "liar" because at some point during Plaintiff's hearing before the Wyoming Division of Workforce Services, he had testified that "I don't know who actually did what" with regard to the alleged incident of sexual harassment involving Plaintiff. (ECF No. 28 at 47:15.) GM Sabatka's testimony in that hearing, however, when considered as a whole, clarifies the context of this statement. Throughout his testimony, GM Sabatka repeats that he was not personally a witness to the alleged sexual harassment involving Plaintiff, and felt "like I'm kinda stuck in the middle of this, and . . . again . . . I don't know, I'm not trying to accuse anybody, I'm just trying to do my job the way I'm supposed to handle this, and I don't have any . . . I don't know who actually did what." (Exhibit 28 at 46:24–47:27). He

affirmed in his testimony that his role was to report the incident to Human Resources, and that they would do whatever they had to do. (Exhibit 28 at 46:27–47:29). According to GM Sabatka's testimony, HR determined whether or not to terminate Plaintiff. (Exhibit 28 at 46:29–38.) In his closing remarks, GM Sabatka repeated, "[a]gain, I'm kinda the middleman in this. I did not witness this. . . . Dorota, Jay, and Christian were all good employees of mine, and I just wanna get past this." (Exhibit 28 at 1:29:58–1:30:20.)[10]

Nothing about this above testimony was inconsistent with GM Sabatka's unsworn statement under penalty of perjury where he states that Staples HR "completed its investigation into the allegations of sexual harassment against Plaintiff and deemed the allegations to be substantiated" and so recommended that Plaintiff be terminated. (ECF No. 47-2 at 3, ¶ 17). GM Sabatka does not state that he witnessed Plaintiff's alleged misconduct, or that he made his own factual conclusions regarding what happened during the incident which led to the complaints against Plaintiff. (ECF No. 47-2 at 3.) Instead, consistent with his testimony before the Wyoming Division of Workforce Services, he states he merely "agreed with the recommendation to terminate Plaintiff's employment" after Staples HR's investigation found the allegation "substantiated" that Plaintiff had violated the Staples' sexual harassment policy. (ECF No. 47-2 at 3, ¶¶ 18–19.) Therefore, while GM Sabatka represented before the Wyoming Division of Workforce Services that he was an unwilling participant in a messy matter involving three "good employees," his testimony was not inconsistent with his unsworn declaration that he ultimately agreed with Staples' HR's recommendation and decided to terminate Plaintiff's employment after the investigation's findings were made.

[10] Furthermore, when questioned during the hearing before the Wyoming Division of Workforce Services about where everyone was standing at the time of the incident, General Manager Sabatka testified: "All of it makes sense, by everything that I have heard, what Jay [Trowbridge] has stated today, what he has written down, . . . it all makes sense in sequence." (Exhibit 28 at 1:21:19–1:21:50).

In sum, it matters not whether Plaintiff *in fact* sexually harassed Mr. Hernandez, but rather, what matters is that the decisionmakers in Plaintiff's firing found that Mr. Hernandez's and Mr. Trowbridge's reports of sexual harassment by Plaintiff were substantiated. HR Rep. Tompkins and GM Sabatka both stated that this was the only basis for Plaintiff's termination. This Court will not now "act as a 'super personnel department,' second guessing employers' honestly held (even if erroneous) business judgments" based only on Plaintiff's unsubstantiated allegations that her coworkers and managers were "liars." *Hysten*, 415 F. App'x at 905.

6.2 Whether the Investigation was Conducted in Good Faith

Plaintiff nevertheless argues that HR Rep. Tompkins' "investigation was not professionally conducted" and was done in "bad faith" toward Plaintiff—masking a discriminatory decision to terminate Plaintiff based on allegedly "fabricated statements." (ECF No. 48 at 17.) She attempts to make this showing by relying on various aspects of the investigation. First, she cites the fact that she was only given one-and-half hours to defend herself from the allegation of sexual harassment during her interview with HR Rep. Tompkins and GM Sabatka on February 19, 2020. (ECF No. 48 at 20.) However, given the relatively simple allegations against her—that she had rubbed her breasts on a coworker on two occasions (one of which was witnessed)—Plaintiff offers no explanation as to why a one-and-a-half-hour interview was not an adequate and good-faith opportunity for Plaintiff to be heard regarding the allegations leveled against her. Indeed, the summary judgment record indicates that Plaintiff had ample time to do a variety of explaining, as HR Rep Tompkins' notes from that interview, attached to her sworn statement as Exhibit A, reflect that Dorota stated: "I am a full-time sales associate. I am happy working here. I don't think I ever winked at Christian, but I tell him thank you for his help. I never rub my breast on him. That is 400% a lie." (ECF No. 47-1 at 9.) After making that statement, Plaintiff then continued:

> I know too much about people in the store. I report to the government about Staples. I am from Poland, but I am a citizen here. Customers love me and people are jealous of me. It's not true, I never put my breast on him. Hearing this makes me open my eyes. If I have to take it to a lawyer I will. My husband will be very angry and take it to the President of Staples. The people here play games with people and I don't like that.

(Id. at 9.)[11] According to HR Rep. Tompkins' notes, which are not contested by Plaintiff, during the interview Plaintiff "continued stating that she was reporting on Staples to the government and alleged that the people who worked here were not citizens, but she was." (Id. at 9.)

Plaintiff argues that further evidence of bad faith is that there was never an investigation by Staples into her allegations and "complaints about national origin discrimination" which she made during the interview. (ECF No. 48 at 19.) However, as already discussed at length above, Plaintiff has not cited any evidence which shows that she ever complained about national origin discrimination during her interview with HR Rep. Tompkins and GM Sabatka. There is certainly no evidence in HR Rep. Tompkins' notes, because Plaintiff merely stating "I am from Poland" cannot be construed by a reasonable factfinder to mean that Plaintiff was complaining of national origin discrimination. Instead, the undisputed evidence shows HR Rep. Tompkins told Plaintiff that Plaintiff's allegations could be investigated if made at the proper time and place. After Plaintiff had raised a variety of tangential and irrelevant information during the interview, HR Rep. Tompkins advised her that "I was only interested in finding out about the allegation of sexual harassment against her and if she had other concerns, she was free to open a ticket to have them investigated." (ECF No. 47-1 at 9.) She also told Plaintiff that it "was her right" not to sign a statement and that she could contact a lawyer or "anyone she deemed necessary." (Id.) As such, Plaintiff was given ample time to answer the allegations at hand, during which time she raised

[11] While Plaintiff argues in her brief that she never made statements "that [I] work for *Polish Government*" during the interview, elsewhere in her brief she acknowledges she complained "of illegal activity in [the] store and that Plaintiff will report Staples to [the] Government[.]" (ECF No. 48 at 11.)

matters not within the ambit of the matter being investigated but was not precluded from raising them at another time.

In attempting to show pretext for age discrimination, Plaintiff also alleges that HR Rep. Tompkins said in the interview that "I should know better [to] not harass [a] younger 19[-]year[-]old[] because Plaintiff is older." (ECF No. 48 at 15.) Plaintiff cites no evidence in the record to support that this statement was ever made during the interview, and such a statement is only referenced in Plaintiff's unverified complaint. There, Plaintiff alleges that she told HR Rep. Tompkins that Plaintiff was a "52 years old and [a] mature woman who is happily married and would never do anything like this. [HR Rep. Tompkins] told me that since I'm an older mature woman that I should know better because he [Mr. Hernandez] is only 19 years old." (ECF No. 1 at 5.)

However, "a party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleadings[.]" *Anderson*, 477 U.S. at 248 (quotations omitted). Plaintiff cannot therefore rely on a statement contained only in her own unverified Complaint to create a dispute of material fact regarding pretext for age discrimination. But even if the Court were to consider such a statement and assume Plaintiff's allegation were true, the context in which the statement was made fails to create an inference of age discrimination.

First, the summary judgment record is uncontested that Mr. Hernandez, the alleged victim of Plaintiff's harassment, was only 18 or 19 years old at the time of the alleged incident. (ECF No. 47-1 at 9, 14.) Second, even according to Plaintiff, it was *she*—not HR Rep. Tompkins—who brought up Plaintiff's age when Plaintiff mentioned that she was "52 years old and [a] mature woman." (ECF No. 1 at 5.) Third, according to Plaintiff, once she had brought up her own age, HR Rep. Tompkins merely noted that because Plaintiff's statement was true, as the older

employee, Plaintiff should have known better than to sexually harass a teenage coworker. (ECF No. 1 at 5.) HR Rep. Tompkins statement—if it was made at all—was therefore only made in the context of the sexual harassment investigation then being pursued against Plaintiff. Accordingly, the mere fact Plaintiff's age was discussed in comparison to her alleged victim, particularly after Plaintiff brought it up, does not create a dispute of fact for a reasonable factfinder to conclude that her firing was pretext for age discrimination. In sum, none of the above interactions cited by Plaintiff indicate that the investigation conducted into allegations of sexual harassment against Plaintiff was done unprofessionally, in "bad faith," or to mask a discriminatory motive.

6.3 Christian Hernandez's Immigration Status

Finally, Plaintiff spills a great amount of ink in her brief alleging that Mr. Hernandez had an improper motive to accuse her of sexual harassment in order to obtain an immigration benefit. (*See e.g.* ECF No. 48 at 3.) Two days after her termination, Plaintiff first wrote an email to staplesbenefits@staples.com contending that Mr. Hernandez had reported her for "SEXUAL ASSAULT" in order to petition for a nonimmigrant status and avoid deportation by U.S. Immigration and Customs Enforcement ("ICE"). (ECF No. 47 at 8, ¶ 38; 47-11; 48 at 13, ¶ 38.) At some unspecified time after her firing, Plaintiff also reported Mr. Hernandez to an ICE agent who advised Plaintiff to contact the U.S. Citizenship and Immigration Service ("USCIS") with her information regarding "benefits fraud." (Plaintiff's Exhibit 26 at ECF No. 48-1 at 100.) On March 12, 2024, over four years after her termination, USCIS responded to a subpoena received from Plaintiff which sought production "of documents regarding benefit fraud", but USCIS denied Plaintiff's request because the subpoena "does not specify in sufficient detail what information is being sought from the [Department of Homeland Security] or how the information being sought is relevant to any ongoing investigation, legal proceeding, or other matter in which you are

engaged." (Plaintiff's Exhibit 27 at 48-1 at 101–102.) Not to be deterred, Plaintiff obtained an unsworn, written statement by an individual named Jose Feliz Sanchez, dated March 16, 2024, which alleges that Mr. Sanchez, a resident of the "small community in Victor, [Idaho]" told Plaintiff's husband that Mr. Hernandez wanted to "claim sexual assault/harassment in USA so he can Apply[] for Im[m]igration form I-918 and become US Citizen." (Plaintiff's Exhibit 25 at 48-1 at 99.) This statement is unsworn, not made under penalty of perjury, and provides no basis for Mr. Sanchez's knowledge—much less a basis of knowledge which is not derived from inadmissible hearsay. Indeed, Defendant disputes Plaintiff's contentions, introducing Mr. Hernandez's I-9 from October 25, 2019—three months before Plaintiff's termination—wherein Mr. Hernandez's U.S. citizenship was confirmed by USCIS' E-Verify program and he was subsequently authorized for full employment by Staples. (Defendant's Exhibit H, ECF No. 47-12.)

Ultimately, however, the question of Mr. Hernandez's immigration status is of no value to the Court in deciding Defendant's motion for summary judgment. All the "evidence" which Plaintiff has adduced in an attempt to show Mr. Hernandez's improper motive was obtained after her firing, some years later. She first made an allegation regarding this motive two days *after* her termination, to the Staples Benefits email address. Plaintiff therefore cites no evidence showing that she even raised Mr. Hernandez's corrupt motive to HR Rep. Tompkins or GM Sabatka during the investigation into Plaintiff's alleged sexual harassment. At most, HR Rep. Tompkins' notes show that Plaintiff "alleged that the people who worked [at Staples] were not citizens, but she was." (ECF Nos. 47-1 at 9; 48-1 at 114.)

However, the summary judgment record shows that the only information which Staples had in its possession at the time of Plaintiff's firing regarding Mr. Hernandez's citizenship (his Form I-9), indicated to Staples that he was a U.S. citizen. (Defendant's Exhibit H, ECF No. 47-

12.) There can be no inference of pretext if Plaintiff never raised the possibility of Mr. Hernandez's improper motive before she was fired. Even if such a charge was raised as an unsubstantiated allegation, it was also contrary to the records which Staples had in its possession at that time. Therefore, Plaintiff's allegations regarding Mr. Hernandez do not show that she was fired in bad faith by the decisionmakers at Staples.

Even if the Court were to find that there was a dispute of fact regarding whether Mr. Hernandez was motivated to lie about Plaintiff, her allegations provide no support to Plaintiff's complaint during her interview that she was getting picked on "because she was Polish." (ECF No. 48-1 at 73.) Mr. Hernandez could have accused anyone of sexual harassment, American or Polish, young or old, male or female in order to obtain the benefit which Plaintiff alleges he was seeking. Plaintiff's age and national origin would have had no bearing on his ability to secure that immigration benefit. Plaintiff's allegation therefore also has no bearing on whether the accusations made against Plaintiff, the subsequent investigation, and Plaintiff's firing were pretextual for retaliation or discrimination based on her age or national origin. Plaintiff's argument certainly does not create an inference Staples used Mr. Hernandez's allegation as a pretext to fire Plaintiff for a reason which violated Title VII or the ADEA.

In conclusion, Plaintiff has entirely failed to create a dispute of material fact upon which a factfinder could rationally find that Staples' proffered reason for her firing is "unworthy of credence and hence infer that [Staples] did not act for the asserted non-discriminatory reasons." *Lobato*, 733 F.3d at 1289. In making that finding, the Court simultaneously determines that Plaintiff has failed to create a dispute of fact that her termination occurred under circumstances giving rise to an inference of age discrimination for purposes of her *prima facie* ADEA claim.

CONCLUSION AND ORDER

Even construing Plaintiff's *pro se* opposition to summary judgment liberally, Plaintiff has failed to create a dispute of material fact for each of the *prima facie* claims remaining in her Complaint and has failed to create an issue of material fact that the legitimate, non-discriminatory and non-retaliatory reason Staples gave for Plaintiff's termination was pretext. Therefore, Defendant Staples the Office Superstore, LLC's Motion for Summary Judgment (ECF Nos. 43, 47) is **GRANTED**. Summary judgment is hereby entered in Defendant's favor on all of Plaintiff's claims. The Clerk of Court's Office shall enter judgment in Defendant's favor and close this case.

IT IS FURTHER ORDERED that all pending motions, Plaintiff's "Motion for Partial Summary Judgment" (ECF Nos. 44, 45, 46), and the two pending motions *in limine* (ECF Nos. 53, 54), are **DENIED AS MOOT**.

DATED: May 20th, 2024.

Scott W. Skavdahl
United States District Judge