IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

KELLY BRUMLEY,

Plaintiff,

v.

Case No. 2:19-cv-2694-MSN-cgc
JURY DEMAND

CORRECT CARE SOLUTIONS, LLC and
BILL KISSEL,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendants' Motion for Summary Judgment ("Motion") (ECF No. 13) filed April 6, 2020. Plaintiff responded in opposition on May 4, 2020. (ECF No. 15.) Defendants filed a reply in support of their Motion on May 18, 2020. (ECF No. 20.) For the reasons set forth below, Defendants' Motion is **GRANTED**.

BACKGROUND

Before diving into the facts specific to Plaintiff's claim, a short recitation of the procedural background and identification of the primary individuals involved is necessary.

Originally, this matter contained two plaintiffs—Kelly Brumley ("Plaintiff") and her former coworker, Crystal Tucker ("Ms. Tucker"). Plaintiff and Ms. Tucker are former employees of Defendant Correct Care Solutions, LLC, now named Wellpath, LLC[1] ("Defendant Wellpath"). Defendant Wellpath provides medical professionals to jails and prisons across the country to care

[1] After Plaintiff's separation, Defendant Correct Care Solutions, LLC underwent a corporate name change to Wellpath, LLC. (ECF No. 14 at PageID 94 n. 1.)

for incarcerated individuals. (ECF No. 16 at PageID 285.) At all times relevant to Plaintiff's lawsuit, Defendant Wellpath contracted with the Shelby County Health Department ("County") to provide medical services to inmates housed at the Shelby County Division of Corrections on Mullins Station Road in Memphis, TN ("DOC"). (*Id.*)

In the First Amended Complaint, Ms. Tucker alleged claims under Title VII for discrimination based on sex and race and retaliatory discharge and also claims under § 1981 for race discrimination and retaliatory discharge. (ECF No. 3 at PageID 19–22.) Plaintiff's claims in the First Amended Complaint were for retaliatory discharge under Title VII and retaliatory discharge under § 1981. (*Id.*) This Court dismissed Ms. Tucker's and Plaintiff's Title VII claims as time barred. (*See* ECF No. 6.) This Court also ordered that Plaintiff's and Ms. Tucker's claims be severed into separate actions. (*Id.*) Therefore, after severance, Plaintiff's retaliatory discharge claim pursuant to § 1981 is the only claim remaining in this matter.

Defendant Wellpath initially hired Plaintiff as the Nurse Educator at the DOC on November 28, 2011. (ECF No. 16 at PageID 287.) As the Nurse Educator, Plaintiff was responsible for conducting orientation for new employees and providing continuing education to Defendant Wellpath's employees. (*Id.*) At that time, Plaintiff reported to Director of Nursing ("DON") Anita Barbee ("Ms. Barbee"). (*Id.*) Ms. Barbee reported to Health Services Administrator ("HSA") Gary Soileau ("Mr. Soileau"). (*Id.*) Later, in April 2015, Janice Staggs-Webb ("Ms. Staggs-Webb") was hired as the new DON. (*Id.* at PageID 290.) Mr. Soileau was suspended sometime in May 2015 and was subsequently terminated, and in July 2015, Ms. Staggs-Webb became the HSA at DOC. (*Id.*) At all relevant times, Bill Kissel ("Defendant Kissel") was the Regional Vice President, Jail Operations for Defendant Wellpath. (ECF No. 3 at PageID 14.)

In October 2013, Plaintiff's Nurse Educator position was eliminated. (ECF No. 16 at PageID 287.) However, at the time Plaintiff's position was eliminated, a position for a Continuous Quality Improvement ("CQI") Nurse became available due to realignment of Defendant Wellpath's contract with the County. (*Id.*) Mr. Soileau advised Plaintiff she should apply for the CQI Nurse position, and after interviewing Plaintiff, Mr. Soileau offered her the position, which she accepted on November 1, 2013. (*Id.* at PageID 287–88.)

As the CQI Nurse, Plaintiff was responsible for Defendant Wellpath's infection control program and served as Defendant Wellpath's liaison to the DOC regarding infection control issues. (*Id.* at PageID 288.) Plaintiff was also required to "[m]aintain confidentiality with inmate and personnel records" and "[p]romote [an] environment of positive attitude, challenging professionalism, and enthusiasm for daily tasks." (*Id.*)

At the same time Plaintiff's Nurse Educator position was eliminated, the Assistant Director of Nursing position held by Plaintiff's coworker, Ms. Tucker, was also eliminated. (ECF No. 3 at PageID 16.) On July 17, 2014, Ms. Tucker filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination and retaliation. (*Id.*; ECF No. 20 at PageID 421.) On July 21, 2014, Plaintiff assisted Ms. Tucker with her EEOC charge by providing a statement in support of Ms. Tucker's EEOC charge. (ECF No. 20 at PageID 422; ECF No. 16 at PageID 296–97.) Plaintiff never provided her written statement to Mr. Soileau or Ms. Barbee. (ECF No. 16 at PageID 297.) However, Plaintiff believes that Mr. Soileau received a copy of Plaintiff's written statement via email from the Director of DOC, Rod Bowers ("Mr. Bowers"). (*Id.*) After Mr. Soileau was terminated, Plaintiff accessed Mr. Soileau's emails and specifically retrieved the email from Mr. Bowers to Mr. Soileau regarding Ms. Tucker's EEOC charge. (*Id.*) However, the email contained only Ms. Tucker's EEOC charge and did not include Plaintiff's written statement.

(*Id.*) Mr. Soileau testified that he could not remember how he became aware that Plaintiff had supported Ms. Tucker's EEOC charge. (ECF No. 20-2 at PageID 527.)

Around August 5, 2014, Plaintiff alleges she was threatened by Mr. Soileau when he came to her office and stated, "If you want to become successful, you surround yourself with good people . . . and if you want to be unsuccessful, you surround yourself with unsuccessful people. So people should always be cautious about the company they keep . . . ." (ECF No. 17-1 at PageID 320.) Mr. Soileau testified that he did not remember this specific conversation with Plaintiff, but that he would talk with Plaintiff frequently about his belief that "successful people surround themselves with successful people." (ECF No. 20-2 at PageID 528.)

Plaintiff also alleges that after she gave her statement supporting Ms. Tucker's EEOC charge, she was subjected to retaliation in that she was assigned additional tasks that were the responsibility of other employees, she was refused a phone stipend, she was given extra on-call scheduling, she was given inappropriate write-ups, she was excluded from meetings that were important to her job responsibilities, and she was eventually terminated from her job. (ECF No. 3 at PageID 17; ECF No. 16 at PageID 297–98.)

As to the extra "on call" scheduling, Ms. Barbee told Plaintiff that her on-call status was extended because Plaintiff had missed her on-call rotation the prior week. (ECF No. 16 at PageID 298.) Ms. Barbee also explained to Plaintiff that her not being included in particular meetings was unintentional. (*Id.*)

Plaintiff also alleges she received a decreased score on her annual performance evaluation as a result of supporting Ms. Tucker's EEOC charge, and that the decreased score had a "negative impact" on her "ability to obtain future promotions." (ECF No. 20 at PageID 429, 431.) However, Plaintiff cites to nothing in the record supporting how or if Defendant Wellpath utilized

performance evaluations in assessing promotions, and Plaintiff testified that she received a two percent raise in connection with the evaluation, which was consistent with raises she received after previous performance evaluations. (ECF No. 20-1 at PageID 467.)

Plaintiff also alleges that she was retaliated against by Kathy Duke ("Ms. Duke"), Mr. Soileau's administrative assistant. (ECF No. 20 at PageID 431.) She alleges that Ms. Duke was acting at Mr. Soileau's direction. (*Id.*) Plaintiff alleges that on or around July 13, 2015 during a meeting with Ms. Staggs-Webb and Regional Nurse Manager Lisa Mason ("Ms. Mason"), that Ms. Staggs-Webb and Ms. Mason told her that Ms. Duke "admitted that she was acting in a retaliatory manner at the direction of Mr. Soileau and that she knew [Plaintiff] was being treated unfairly." (*Id.* at PageID 435.) In support of her contentions, Plaintiff has submitted an audio recording she made of her meeting with Ms. Staggs-Webb and Ms. Mason. (*See* Exhibit M-001, ECF No. 17-1 at PageID 381.) However, Plaintiff's description of the conversation as reflected on the recorded audio is not entirely accurate. In the meeting, Plaintiff is told that Ms. Duke said "Gary (Mr. Soileau) instigated a lot of the stuff," and Ms. Duke "admitted that [Plaintiff] was not treated fairly." (*Id.* at 7:45.) The conversation does not reflect details as to what "stuff" was being referred to, and there is nothing indicating that Ms. Duke said she was acting at the direction of Mr. Soileau, or that any action taken by Ms. Duke was done in "retaliation." Later in the same conversation, Plaintiff references that her issues with Ms. Duke have being going on for three and a half years. (*Id.* at 46:57.) Plaintiff can also be heard stating, "Kathy (Ms. Duke) is just Kathy, but one day when I stood up to her in front of Gary (Mr. Soileau), from then on, she just hated me." (*Id.* at 47:56.)

Throughout Plaintiff's employment, she received warnings related to her attendance. (ECF No. 16 at PageID 288.) Plaintiff received attendance-related discipline on the following dates:

September 17, 2012; November 12, 2012; June 24, 2013; July 19, 2013; August 28, 2013; December 9, 2012; January 29, 2015; April 8, 2015; and April 24, 2015. (*Id.*)

Defendant Wellpath also received two calls on its Ethics and Compliance Reporting hotline related to Plaintiff's conduct, which resulted in Plaintiff receiving a verbal and then written warning. The first call was on November 6, 2014, and the caller stated that Plaintiff had been "constantly belittling him/her," and that Plaintiff had been "pushing her work" onto the caller, and that the caller believed Plaintiff was "trying to find things to get him/her written up." (ECF No. 16 at PageID 288–89.) Plaintiff does not dispute that this complaint was made but disputes the contents of the caller's accusations. (*Id.*) Plaintiff received a verbal warning as a result of this hotline complaint. (*Id.* at PageID 289.)

The second hotline call was received on March 2, 2015. (*Id.*) The caller reported that Plaintiff was "always mean and rude" and had "hung up the phone in the caller's face" when the employee called in to report being absent due to an illness. (*Id.*) Plaintiff does not dispute that the complaint was made but disputes the contents of the caller's accusations. Plaintiff received a written warning as a result of this hotline complaint, which noted that Plaintiff had received a verbal warning regarding similar behavior previously. (*Id.* at PageID 289–90.)

On April 28, 2015, another coworker, Licensed Practical Nurse Angela Catron ("Ms. Catron"), also made a complaint against Plaintiff in an email to Mr. Soileau. (*Id.* at PageID 290.) Ms. Catron's email described instances where she believed that Plaintiff had violated her confidentiality with respect to medical issues and was attempting to get Ms. Catron terminated. (*Id.*) Ms. Catron's email described Plaintiff's actions as "very unprofessional" and said Plaintiff had created a hostile work environment. (*Id.*) Plaintiff does not dispute that Ms. Catron sent an email to Mr. Soileau, but Plaintiff asserts that there was an ulterior motive behind Ms. Catron's

email. (*Id.*) Specifically, Plaintiff asserts that she observed Ms. Catron engaged in inappropriate behavior with an inmate and reported Ms. Catron's behavior several days prior to Ms. Catron's email. (*Id.* at PageID 291.)

Shortly thereafter, another employee reported to Plaintiff's supervisor, Ms. Staggs-Webb, that Plaintiff had accessed other employees' personnel files and was telling employees about other employees' compensation and salary information. (*Id.*) It was also reported to Ms. Staggs-Webb that Plaintiff was spreading rumors that Ms. Duke was allegedly having an affair and Plaintiff had attempted to "friend" Ms. Duke's husband on Facebook to inform him of the affair. (*Id.* at PageID 291–92.) Plaintiff disputes that she accessed personnel files, and instead claims she learned the information about employees' compensation through a meeting with Ms. Staggs-Webb in which raises for employees were discussed and because paperwork for another employee was "in plain sight" on Ms. Staggs-Webb's desk. (ECF No. 16 at PageID 291–92.) Plaintiff also denies that she ever spread any rumors about Ms. Duke. (*Id.* at PageID 292.)

Based on the reports received by Ms. Staggs-Webb, Defendant Wellpath requested that employees submit written statements. (*Id.*) On July 28, 2015, Ms. Duke submitted a written statement indicating that a coworker had reported to Ms. Duke that Plaintiff had said Ms. Duke was having an affair and that Plaintiff was attempting to friend Ms. Duke's husband on Facebook to tell him about the alleged affair. (*Id.* at PageID 292–93.) Ms. Duke's statement also reported that Plaintiff had repeatedly called Licensed Practical Nurse Christy Jones ("Ms. Jones") with work-related questions while Ms. Jones was off work. (*Id.*) Ms. Duke's statement also stated that many coworkers were concerned about Plaintiff accessing personnel files and personal information. (*Id.*)

On July 29, 2015, Ms. Jones submitted a written statement saying that Plaintiff had called her personal cell phone and told her, "you need to ask for more money because I know for a fact that the others are making more money than you." (*Id.* at PageID 293.) Ms. Jones' statement alleged that Plaintiff had specifically told her about the pay of two other coworkers. (*Id.*)

On July 30, 2015, Licensed Practical Nurse Carla Hawkins ("Ms. Hawkins") provided a written statement saying that Plaintiff had told Ms. Hawkins that Plaintiff had accessed a coworker's file and that the coworker was making $2.50 more an hour than Ms. Hawkins. (*Id.* at PageID 293–94.)

Registered Nurse DeShannon Williams ("Ms. Williams") also submitted a written statement accusing Plaintiff of inappropriate behavior and having knowledge of Ms. Williams' hourly rate and discussing it with others. (*Id.* at PageID 294.)

Plaintiff does not dispute that her coworkers submitted written statements, but she generally denies the allegations contained therein. (*Id.*at PageID 292–94.) Plaintiff also asserts that she informed her colleagues of the differences in pay because she wished to encourage her female coworkers to demand an increase in pay equal to that of a male colleague. (*Id.*)

On August 5, 2015, Plaintiff was called into an office with Ms. Staggs-Webb and Ms. Mason. (*Id.* at PageID 295.) Plaintiff was told that Employee Relations Specialist Julie Lindsey was also on the phone. (*Id.*) Plaintiff was advised that her employment was being suspended pending an investigation. (*Id.*) Plaintiff alleges that during this meeting, she was advised that she was being suspended for asking employees to support her EEOC claim and for informing female employees that they were not being paid equal to their male colleagues in similar positions. (ECF No. 20 at PageID 441.) In support of this contention, Plaintiff has submitted a small portion of this meeting that she secretly recorded. (*See* Exhibit M-002, ECF No. 17-1 at PageID 381.)

However, Plaintiff's contentions about what was said in the meeting are not entirely accurate. On the recording, the first part of the meeting is cut off, but after Plaintiff asks what the accusations are, an unknown speaker replies, "it's been reported that there's phone calls to people at home just about . . . things of a personal nature, personal pay, personal business, and spreading of rumors, we've discussed that part, and just causing a disharmony in the facility with the nurses amongst themselves." (*Id.*) That same day, Plaintiff was provided a Disciplinary Action Form reflecting a "Summary of the Incident" that provides "Employee created disharmony and discord in the workplace by gossiping and speaking disparagingly about team members to other team members." (ECF No. 20-1 at PageID 502.)

Plaintiff retained legal counsel following her suspension, and after discussions about whether Plaintiff would return to work following her suspension proved unsuccessful, Plaintiff's employment was terminated effective October 23, 2015. (ECF No. 16 at PageID 296.) Ms. Staggs-Webb recommended termination of Plaintiff's employment, which was subsequently approved. (*Id.*)

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 permits a party to move for summary judgment — and the Court to 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 party asserting the presence or absence of genuine issues of material facts must support its position either by "citing to particular parts of materials in the record," including depositions, documents, affidavits or declarations, stipulations, or other materials, or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). In ruling

on a motion for summary judgment, the Court must view the facts contained in the record and all inferences that can be drawn from those facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 907 (6th Cir. 2001). The Court cannot weigh the evidence, judge the credibility of witnesses, or determine the truth of any matter in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party may discharge this burden either by producing evidence that demonstrates the absence of a genuine issue of material fact or simply "by 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Where the movant has satisfied this burden, the nonmoving party cannot "rest upon its . . . pleadings, but rather must set forth specific facts showing that there is a genuine issue for trial." *Moldowan v. City of Warren*, 578 F.3d 351, 374 (6th Cir. 2009) (citing *Matsushita*, 475 U.S. at 586; Fed. R. Civ. P. 56). The nonmoving party must present sufficient probative evidence supporting its claim that disputes over material facts remain and must be resolved by a judge or jury at trial. *Anderson*, 477 U.S. at 248–49 (citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968)); *see also White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 475–76 (6th Cir. 2010). A mere scintilla of evidence is not enough; there must be evidence from which a jury could reasonably find in favor of the nonmoving party. *Anderson*, 477 U.S. at 252; *Moldowan*, 578 F.3d at 374.

The Court's role is limited to determining whether there is a genuine dispute about a material fact, that is, if the evidence in the case "is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Such a determination requires that the

Court "view the evidence presented through the prism of the substantive evidentiary burden" applicable to the case. *Id.* at 254. Thus, if the plaintiff must ultimately prove its case at trial by a preponderance of the evidence, on a motion for summary judgment the Court must determine whether a jury could reasonably find that the plaintiff's factual contentions are true by a preponderance of the evidence. *See id.* at 252–53.

Finally, if the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the movant is entitled to summary judgment. *Celotex*, 477 U.S. at 323. The Court must construe Rule 56 with due regard not only for the rights of those "asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury," but also for the rights of those "opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Id.* at 327.

DISCUSSION

The Court reviews § 1981 claims using the same analytical framework as Title VII claims. *Tennial v. United Parcel Service, Inc.*, 840 F.3d 292, 302 (6th Cir. 2016); *Wade v. Knoxville Utilities Bd.*, 259 F.3d 452, 464 (6th Cir. 2001); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 573 n.5 (6th Cir. 2000) ("The elements of prima facie case as well as the allocations of the burden of proof are the same for employment claims stemming from Title VII and § 1981."). "A plaintiff in a Title VII . . . action may establish retaliation either by introducing direct evidence of retaliation or by proffering circumstantial evidence that would support an inference of retaliation." *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 543 (6th Cir. 2008).

"Direct evidence is that evidence which, if believed, requires no inferences to conclude that unlawful retaliation was a motivating factor in the employer's action." *Id.* at 543–44.

"Circumstantial evidence, on the other hand, is proof that does not on its face establish [unlawful] animus, but does allow a factfinder to draw a reasonable inference that [unlawful activity] occurred" *Ondricko v. MGM Grand Detroit, LLC*, 689 F.3d 642, 649 (6th Cir. 2012).

Plaintiff cites no direct evidence of retaliation and instead relies on circumstantial evidence.[2] When a plaintiff advances a circumstantial case for retaliation, the *McDonnell Douglas* evidentiary framework used to assess discrimination claims applies. *Imwalle*, 515 F.3d at 544. The plaintiff has the initial burden to establish a prima facie case of retaliation by showing that (1) she engaged in protected activity; (2) this exercise of her protected activity was known to the defendant; (3) the defendant thereafter took an employment action adverse to the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action. *Id.* "[W]hen it comes to federal antidiscrimination laws like § 1981 . . . a plaintiff must demonstrate that, but for the defendant's unlawful conduct, [the] alleged injury would not have occurred." *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020) ("This ancient and simple 'but for' common law causation test, we have held, supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated when creating its own new causes of action.").

If plaintiff meets her burden of demonstrating a prima facie case of retaliation, the burden of production shifts to the defendant to provide a legitimate, nondiscriminatory reason for its actions. *Imwalle*, 515 F.3d at 562. Once the defendant meets its burden of producing a legitimate, nondiscriminatory reason, the burden of production shifts back to the plaintiff to demonstrate pretext. *Id.* The plaintiff may do so by demonstrating: "(1) the stated reason had no basis in fact;

[2] The Court also notes that both parties proceed as if direct evidence of retaliation is lacking in this case.

(2) the stated reason was not the actual reason; and (3) that the stated reason was insufficient to explain Defendant's action." *Logan v. Denny's, Inc.*, 259 F.3d 558, 567 (6th Cir. 2001). "[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown *both* that the reason was false, and that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) (emphasis in original). "To survive summary judgment a plaintiff need only produce enough evidence to support a prima facie case and to rebut, but not to disprove, the defendant's proffered rationale." *Griffin v. Finkbeiner*, 698 F.3d 584, 593 (6th Cir. 2012) (quoting *Blair v. Henry Filters, Inc.*, 505 F.3d 517, 532 (6th Cir. 2007)).

A. Plaintiff's Prima Facie Case

Defendants argue that Plaintiff's claim of retaliation pursuant to § 1981 fails because Plaintiff cannot establish a prima facie case. This Court agrees because Plaintiff has failed to present evidence of a causal connection between her protected activity and the alleged adverse employment actions.

1. Protected Activity or Conduct

As an initial matter, there is some dispute over the breadth of Plaintiff's protected activity or conduct at issue. In the Amended Complaint, Plaintiff avers that she was discharged in retaliation for submitting a statement in support of Ms. Tucker's EEOC charge. (*See* ECF No. 3 at PageID 18.) This is also consistent with Plaintiff's deposition testimony. (ECF No. 20-1 at PageID 468). Defendants do not dispute that this constitutes protected activity for purposes of Plaintiff's retaliation claim.

However, in her response to Defendant's Motion, Plaintiff alleges additional acts of protected activity or conduct, including: (1) filing her own EEOC charge; (2) informing Mr. Soileau and Ms. Barbee that she believed Ms. Duke was retaliating against her by falsely stating

that Plaintiff was not submitting reports in a timely manner; (3) reporting Ms. Duke to Ms. Staggs-Webb and Ms. Mason for other alleged retaliatory acts by Ms. Duke; and (4) informing female coworkers that a male coworker was being compensated at a higher hourly rate. (*See* ECF No. 15 at PageID 275–76.)

For purposes of Plaintiff's § 1981 retaliation claim, her only protected activity is her submission of a statement of support for Ms. Tucker's EEOC claim. The remaining activities Plaintiff alleges are not protected under § 1981 because they do not relate to racial discrimination. *See Jones v. Continental Corp.*, 798 F.2d 1225, 1231 (6th Cir. 1986) ("federal law is quite clear that § 1981 prohibits only race discrimination . . . ."). Accordingly, Plaintiff's only protected activity for purposes of her retaliation claim under § 1981 is her submission of a statement in support of Ms. Tucker's EEOC charge. This is sufficient to satisfy the first prong of a prima facie case.

2. Exercise of Protected Activity Known to the Defendant

The parties make no argument regarding whether Defendant Wellpath had knowledge of Plaintiff's protected activity. Therefore, for the purposes of deciding the Motion, the Court assumes Defendant Wellpath had knowledge of Plaintiff's protected activity, and Plaintiff has satisfied the second prong of a prima facie case.

3. Adverse Employment Action

In the discrimination context, an adverse employment action is "a materially adverse change in the terms and conditions of [a plaintiff's] employment" such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Redlin v. Gross Pointe Pub. Sch. Sys.*, 921 F.3d 599, 607 (6th Cir. 2019) (first quoting *Spees v. James Marine, Inc.*, 617 F.3d 380, 391 (6th Cir. 2010); then quoting

White v. Baxter Healthcare Corp., 533 F.3d 381, 402 (6th Cir. 2008)). However, an adverse employment action in the retaliation context is broader than in the discrimination context. *See Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 345 (6th Cir. 2008). It is "not limited to an employer's actions that solely affect the terms, conditions or status of employment, or only those acts that occur at the workplace." *Id.* An adverse employment action for a retaliation claim is one that "could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006).

The antiretaliation provisions of Title VII, which provide the analytical framework for review of this § 1981 claim, *see, e.g.*, *Tennial*, 840 F.3d at 302, "protect[ ] an individual not from all retaliation, but from retaliation that produces an injury . . . ." *Burlington*, 548 U.S. at 67. The type or severity of injury required to dissuade a reasonable worker from making or supporting a charge of discrimination has been described in different terms. In *Burlington*, the Supreme Court gave an example of an action that could be sufficiently injurious because it impacted "the employee's professional advancement . . . ." *Id.* at 69. Some Sixth Circuit cases have followed this example. *See Szeinbach v. Ohio State Univ.*, 493 F. App'x 690, 695 (6th Cir. 2012) (denying summary judgment because there were disputed material facts about whether an investigation "had a significant negative impact on [the plaintiff's] professional advancement"); *Lahar v. Oakland Cty.*, 304 F. App'x 354, 357 (6th Cir. 2008) (reprimands were not an adverse employment action because there was no evidence that they "affected [plaintiff's] . . . prospects for advancement"). Some Sixth Circuit cases describe the required action as something more specifically injurious. *See Cregget v. Jefferson Cty. Bd. of Educ.*, 491 F. App'x 561, 566 (6th Cir. 2012) ("A written reprimand, without evidence that it led to a materially adverse consequence such as lowered pay, demotion, suspension, or the like, is not a materially adverse employment action.").

Again, there is a dispute between the parties regarding what incidents constitute "adverse employment actions" for purposes of Plaintiff's retaliation claim. Defendant Wellpath does not dispute that Plaintiff's termination on October 23, 2015 constitutes an adverse employment action for purposes of her retaliation claim. However, Plaintiff asserts she also suffered the following adverse employment actions, which Defendant Wellpath disputes are adverse actions: (1) threats by her supervisor, Mr. Soileau; (2) Mr. Soileau's refusal to approve a cell phone allowance; (3) removal from meetings and conference calls that were directly relevant to Plaintiff's ability to perform her job; (4) assignment of additional job duties meant to inundate Plaintiff with more work than she could finish; (5) manipulation of Plaintiff's payroll records by Ms. Duke; (6) anonymous complaints about Plaintiff to Defendant Wellpath's Ethics and Compliance Reporting hotline; (7) increased general disciplinary write-ups; (8) a significant decrease in Plaintiff's score for her annual performance review; and (9) denied the opportunity to interview for promotions to Health Services Administrator or Director of Nursing. (ECF No. 15 at PageID 277–78.)

Plaintiff provides no details regarding most of these alleged adverse actions. Specifically, Plaintiff fails to provide any details as to how she was injured by Mr. Soileau's alleged threats; her removal from meetings or conference calls; the assignment of additional job duties; manipulation of her payroll records by Ms. Duke; the anonymous complaints to the Ethics and Compliance Reporting hotline about her; the disciplinary write-ups; or the decrease in her performance review score.

Plaintiff received a verbal, then a written, warning related to the calls received on Defendant Wellpath's Ethics and Compliance Reporting hotline. However, verbal warnings are not materially adverse consequences, *see Finley v. City of Trotwood*, 503 F. App'x 449, 454 (6th Cir. 2012), and Plaintiff has not cited any evidence in the record supporting that the written

warning injured her. Further, Plaintiff testified that despite the decrease in her performance review score, she received a two percent raise, which was consistent with raises she received after her other performance reviews. (ECF No. 20-1 at PageID 467.) Hence, Plaintiff's decreased performance review score is not an adverse action. *See White v. Baxter Healthcare Corp.*, 533 F.3d 381, 402 (6th Cir. 2008) ("plaintiff must point to a tangible employment action that she alleges she suffered, or is in jeopardy of suffering, because of the downgraded evaluation"). As to the other alleged adverse actions, Plaintiff provides no context, without which there is no way to discern whether Plaintiff was harmed by any of these incidents. Plaintiff does not point to any evidence that any of these actions affected Plaintiff's professional advancement, or resulted in lowered pay, demotion, suspension, or the like.

The alleged denial of the phone allowance by Mr. Soileau also does not rise to the level of an adverse action. Plaintiff admits that she does not know whether a CQI nurse prior to her ever had a phone allowance (*see* ECF No. 14-1 at PageID 178), and Plaintiff eventually received the phone allowance (*see* ECF No. 17-1 at PageID 322). Plaintiff does not allege that the delay in receiving the phone allowance impacted her professional advancement or otherwise injured her. The delay in receiving the phone allowance is a "trivial harm," and is not the type of action severe enough to "dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington*, 548 U.S. at 57.

Finally, as to the opportunity to interview for the Health Services Administrator ("HSA") and Director of Nursing ("DON") positions, the Court finds these could be adverse actions because they affected Plaintiff's professional advancement. However, Plaintiff's assertion that she was denied an opportunity to interview for the DON position is not supported by the record. Plaintiff's Declaration cited in support of this assertion merely states that Ms. Mason informed Plaintiff she

could apply for the DON position, and Plaintiff expressed that she was interested in applying for the position. Plaintiff cites to nothing in the record regarding denial of an interview for the DON position. Therefore, the Court will not consider Plaintiff's assertion that she was denied an opportunity to interview for the DON position. However, Plaintiff's termination and the denial of an opportunity to interview for the HSA position satisfy the third prong of a prima facie case because they constitute adverse employment actions.

4. Causal Connection

Plaintiff has satisfied the first three prongs of her prima facie case; however, Plaintiff has failed to demonstrate that there is a causal connection between her protected activity and either her termination or the denial of an opportunity to interview for the HSA position. The causal connection between the protected activity and the adverse employment action may be demonstrated in two ways: (1) through direct evidence; or (2) "through knowledge coupled with a closeness in time that creates an inference of causation . . . ." *Nguyen v. City of Cleveland*, 229 F.3d 559, 566 (6th Cir. 2000) (quoting *Parnell v. West*, No. 95-2131, 1997 WL 271751, at *2 (6th Cir. 1997)).

> Where an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation. But where some time elapses between when the employer learns of a protected activity and the subsequent adverse employment action, the employee must couple temporal proximity with other evidence of retaliatory conduct to establish causality.

Mickey v. Zeidler Tool & Tie Co., 516 F.3d 516, 525 (6th Cir. 2008). "To establish a causal connection between the protected activity and the adverse employment action, a plaintiff must present evidence 'sufficient to raise the inference that [her] protected activity was the likely reason for the adverse action.'" *In re Rodriguez*, 487 F.3d 1001, 1011 (6th Cir. 2007) (quoting *Walcott*

v. City of Cleveland, 123 F. App'x 171, 178 (6th Cir. 2005) (quoting *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997))).

As to Plaintiff's termination, Plaintiff provided her statement in support of Ms. Tucker's EEOC charge on July 21, 2014. (ECF No. 16 at PageID 296.) Plaintiff was initially suspended pending an investigation into reports of inappropriate behavior on August 5, 2015, and her employment was ultimately terminated on October 23, 2015. (*Id.* at PageID 295–96.) Thus, the protected activity occurred more than one year before Plaintiff's termination. This, without more, does not establish sufficient temporal proximity to support a finding of causation. However, Plaintiff alleges she "was subjected to a repeated pattern of retaliation over the span of a year," and that these incidents coupled with the timing of her termination supply the requisite causal connection. This Court disagrees. As discussed previously, Plaintiff provides no details or context regarding the alleged adverse actions she claims support an inference of a causal connection between her statement in support of Ms. Tucker's EEOC charge and her termination over a year later. With only vague accusations, this Court cannot infer that Plaintiff's protected activity was the "but for" cause of any adverse employment actions.

To the extent Plaintiff relies on her recorded conversation with Ms. Staggs-Webb and Ms. Mason to show a causal connection between any actions taken by Ms. Duke and Plaintiff's protected activity, her argument fails. The recording reflects an ongoing personal animus between Plaintiff and Ms. Duke and that Plaintiff believed Ms. Duke was "out to get her" and was attempting to undermine her job performance. However, Plaintiff has not submitted any evidence from which this Court could infer that Ms. Duke's actions were in retaliation for Plaintiff's support of Ms. Tucker's EEOC charge, and nothing in the recording supports this conclusion. In fact, Plaintiff's own statements on the recording suggest her feud with Ms. Duke predated Plaintiff's

support of Ms. Tucker's EEOC charge and stemmed from her "standing up" to Ms. Duke in front of Mr. Soileau. Therefore, Plaintiff has failed to demonstrate a causal connection between her protected activity and her termination.

Plaintiff also fails to establish a causal connection between her protected activity and the denial of an opportunity to interview for the HSA position. Plaintiff does not provide a specific date as to when the denial of the interview opportunity occurred, but it appears likely it was sometime between May 2015, when Mr. Soileau was initially suspended, and July 2015, when Ms. Staggs-Webb became the HSA. (*See* ECF No. 16 at PageID 290.) Again, this loose temporal proximity of 10 months to a one year is insufficient to support a finding of causation. Additionally, Plaintiff acknowledges she is unable to show who the ultimate decision-maker was regarding interviews for the HSA position, but she believes it was a collaborative effort between the County, DOC, and Defendant Wellpath (*see* ECF No. 20-1 at PageID 485–86), which also cuts against a finding of a causal connection.

In the absence of a causal connection, Plaintiff's prima facie case for her retaliation claim necessarily fails and Defendant Wellpath is entitled to summary judgment on Plaintiff's retaliation claim.

B. Pretext for Retaliation

Further, even if Plaintiff were able to make out a prima facie case of retaliation, Plaintiff cannot demonstrate that Defendant Wellpath's proffered legitimate, nondiscriminatory reasons for Plaintiff's termination were pretext for retaliation. Defendant Wellpath asserts that Plaintiff was terminated for causing disharmony in the workplace because she was inappropriately disclosing confidential personnel information about her coworkers and was allegedly attempting to reveal a coworker's alleged affair to that coworker's husband. (ECF No. 14-1 at PageID 115–18.)

Defendant Wellpath has submitted evidence that its actions were based upon statements submitted by Plaintiff's coworkers. (ECF No. 16 at PageID 292–96.) Although Plaintiff disputes many of the allegations set forth in her coworkers' statements, she does not dispute that her coworkers in fact submitted such statements. (*Id.*) Defendant Wellpath asserts that Plaintiff's behavior in disclosing confidential personnel information about her coworkers was contrary to Plaintiff's requirement to "[m]aintain confidentiality with inmate and personnel records" as set forth in the job description signed by Plaintiff. (ECF No. 16 at PageID 294.) In response, Plaintiff says she "disputes that it is inappropriate to report instances in which she believes employees are being treated differently because of their gender." (*Id.* at PageID 295.)

Plaintiff cannot create a question of fact regarding Defendant Wellpath's stated reason for her termination by asserting her subjective belief that her conduct did not violate the requirements of her job description. The Sixth Circuit has stated that "disputes about the interpretation of company policy do not typically create genuine issues of fact regarding whether a company's stated reason for an adverse employment action is a pretext designed to mask unlawful discrimination." *Sybrandt v. Home Depot*, 560 F.3d 553, 558–59 (6th Cir. 2009). The *Sybrandt* court relied on the "honest belief rule," which provides that "as long as an employer has an honest belief in its proffered nondiscriminatory reason for discharging an employee, the employee cannot establish that the reason was pretextual simply because it is ultimately shown to be incorrect." *Id.* at 559 (quoting *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001)).

Nevertheless, a court must "not blindly accept an employer's alleged business judgment in the face of a claim of discrimination." *Philbrick v. Holder*, 583 F. App'x 478, 486–87 (6th Cir. 2014) (citing *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 576 (6th Cir. 2003)). To rely

on the honest belief rule, the employer must show "that it made a 'reasonably informed and considered decision.'" *Id.* (citing *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998)).

There is insufficient evidence from which a jury could find pretext in this case. Based upon Ms. Catron's email to Mr. Soileau and other reports received by Ms. Staggs-Webb, Defendant Wellpath requested that employees submit written statements regarding Plaintiff's actions, which resulted in five coworkers submitting statements. Plaintiff was subsequently suspended pending an investigation into her behavior and was ultimately terminated several months later. Accordingly, Defendant Wellpath has shown that its decision to terminate Plaintiff was a "reasonably informed and considered decision." Plaintiff, on the other hand, has not provided evidence supporting an inference that Defendant Wellpath's proffered reason "had no basis in fact," that it "did not actually motivate the employer's conduct," or that it was "insufficient to warrant the challenged conduct." *White v. Columbus Metro. Housing Auth.*, 429 F.3d 232, 245 (6th Cir. 2005). Thus, even if Plaintiff had made out a prima facie case for retaliation, Defendant Wellpath has proffered legitimate, nondiscriminatory reasons for its actions, and Plaintiff has not shown those reasons were pretext for retaliation. Defendant Wellpath is therefore entitled to summary judgment on Plaintiff's retaliation claim on this basis as well.

C. <u>Claims Against Defendant Kissel</u>

Intentional race discrimination is prohibited under 42 U.S.C. § 1981 in the "'making and enforcing of contracts involving both public and private actors,' including 'the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'" *Johnson v. Fed. Express Corp.*, No. 2:14-cv-02511-STA-dkv, 2015 U.S. Dist. LEXIS 139470, at *43 (W.D. Tenn. Oct. 14, 2015) (quoting *Amini v. Oberlin*, 400 F.3d 350, 358 (6th Cir. 2006)). The analysis and conclusions

"concerning the Title VII claims apply equally to parallel claims brought under § 1981." *Jackson v. Bd. Of Educ. of Memphis City Sch. Of Memphis, Tenn.*, 494 F. App'x 539, 543 n. 1 (6th Cir. 2012). A § 1981 claim is "essentially the same as that of a claim under Title VII, [but] the two differ in one particular respect . . . — individual liability." *Wagner v. Merit Distrib.*, 445 F. Supp. 2d 899, 909 (W.D. Tenn. 2006) (citing *Allen v. Ohio Dep't of Rehab. & Corr.*, 128 F. Supp. 2d 483, 495 (S.D. Ohio 2001)).

To establish individual liability under § 1981, the individual defendant must have been personally involved in the discriminatory action. *Wagner*, 445 F. Supp. 2d at 909 (citing *Allen*, 128 F. Supp. 2d at 495). Failure to act may constitute direct involvement for purposes of discrimination under § 1981 if the person failing to act has knowledge of the alleged discriminatory action. *Wright v. Memphis Police Ass'n*, No. 14-2913-STA-dkv, 2015 U.S. Dist. LEXIS 67507, at *19 (W.D. Tenn. May 26, 2015); *see also Wagner*, 445 F. Supp. 2d at 909 (explaining the Second Circuit's decision and adopting the view that, even without direct involvement, gross negligence in the supervision of subordinates and failure to act may constitute personal involvement); *Patterson v. County of Oneida, N.Y.*, 375 F.3d 206, 226 (2d Cir. 2004).

First, the Court notes that in her response in opposition to Defendants' Motion for Summary Judgment, Plaintiff failed to respond to Defendants' arguments concerning individual liability for Defendant Kissel.

The Sixth Circuit's position on a plaintiff's abandonment of a claim is well established. "[A] plaintiff is deemed to have abandoned a claim when a plaintiff fails to address it in response to a motion for summary judgment." *Brown v. VHS of Mich., Inc.*, 545 F. App'x 368, 372 (6th Cir. 2013) (citing *Hicks v. Concorde Career Coll.*, 449 F. App'x 484, 487 (6th Cir. 2011) (holding that a district court properly declines to consider the merits of a claim when a plaintiff fails to

address it in a response to a motion for summary judgment); *Clark v. City of Dublin*, 178 F. App'x 522, 524–25 (6th Cir. 2006) (recognizing that the failure to respond properly to motion for summary judgment arguments constitutes abandonment of a claim)). As Plaintiff never addresses Defendants' arguments concerning Defendant Kissel's personal liability in her response to their Motion for Summary Judgment, she is deemed to have abandoned that claim. Accordingly, Defendant Kissel is entitled to judgment as a matter of law on the § 1981 retaliation claim against him.

Nevertheless, even considering the claim, Plaintiff's response does not contain any facts to support that Defendant Kissel was personally involved in either of the adverse actions here. Nor did Plaintiff put forth evidence to show that Defendant Kissel had knowledge of the adverse actions but failed to act. Accordingly, Plaintiff has failed to establish a prima facie case for retaliation against Defendant Kissel, and he is entitled to summary judgment.

CONCLUSION

For the reasons set forth above, Defendants' Motion for Summary Judgment is **GRANTED**. All claims in this matter against Defendant Wellpath and Defendant Kissel are **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED, this 21st day of September 2021.

s/ Mark S. Norris
MARK S. NORRIS
UNITED STATES DISTRICT JUDGE