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

CAROLYN E. GRAHAM,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 13-cv-02541-STA-tmp**
	)	
JACOB J. LEW, Secretary of the Treasury,	)	
	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

Before the court by order of reference is defendant Jacob J. Lew, Secretary of the Treasury's ("IRS") Motion for Summary Judgment, filed on January 20, 2015.[1] (ECF No. 20.) Plaintiff Carolyn E. Graham filed a response in opposition on March 13, 2015.[2] (ECF No. 22.) For the reasons below, it is recommended that the IRS's Motion for Summary Judgment be granted.

I. PROPOSED FINDINGS OF FACT

The IRS filed a Statement of Undisputed Material Facts along with its Motion for Summary Judgment. (ECF No. 36.)

[1]Pursuant to Administrative Order No. 2013-05, entered on April 29, 2013, this case has been assigned to the magistrate judge for management of all pretrial matters.

[2]Graham filed her response after the court entered an Order to Show Cause on February 26, 2015. (ECF No. 21.)

Graham's two-page response, however, does not comply with the Local Rules of this court. Specifically, Local Rule 56.1(b) provides as follows:

> Any party opposing the motion for summary judgment must respond to each fact set forth by the movant by either: (1) agreeing that the fact is undisputed; (2) agreeing that the fact is undisputed for the purpose of ruling on the motion for summary judgment only; or (3) demonstrating that the fact is disputed. Each disputed fact must be supported by specific citation to the record. Such response shall be filed with any memorandum in response to the motion. The response must be made on the document provided by the movant or on another document in which the non-movant has reproduced the facts and citations verbatim as set forth by the movant. In either case, the non-movant must make a response to each fact set forth by the movant immediately below each fact set forth by the movant. In addition, the non-movant's response may contain a concise statement of any additional facts that the non-movant contends are material and as to which the non-movant contends there exists a genuine issue to be tried. Each such disputed fact shall be set forth in a separate, numbered paragraph with specific citations to the record supporting the contention that such fact is in dispute.

Local Rule 56.1(b). Graham did not respond to each fact set forth by the IRS, demonstrate that the IRS's facts are in dispute by citing to the record or attaching admissible evidence, or support any of her own facts with citations to the record. Therefore, the court will consider only the IRS's Statement of Undisputed Material Facts for the purpose of deciding the instant motion. See Lee v. Swift Transp. Co. of Ariz., LLC, No. 2:12-cv-02230-JTF-tmp, 2014 WL 897407, at *2 (W.D. Tenn. Mar. 6, 2014) ("Moreover, [plaintiff's] statement

does not comply with Local Rule 56.1(b) . . . Therefore, the court will rely on Defendant's Statement of Material Facts in deciding the instant motion."); Iqbal v. Pinnacle Airlines, Inc., 802 F. Supp. 2d 909, 914-15 (W.D. Tenn. 2011) (deeming as undisputed facts to which plaintiff did not respond as required by the local rules); see also Goodbar v. Technicolor Videocassette of Mich., Inc., No. 09-2553, 2010 WL 5464796, at *2 n.5, 6 (W.D. Tenn. Dec. 30, 2010); Akines v. Shelby Cnty. Gov't, 512 F. Supp. 2d 1138, 1147-48 (W.D. Tenn. 2007); U.S. Liability Ins. Co. v. NTR, Inc., No. 06-2159B/A, 2007 WL 1461660, at *1 n.1 (W.D. Tenn. May 16, 2007); Thornton v. Fed. Express Corp., No. 05-2247, 2007 WL 188573, at *2 n.2 (W.D. Tenn. Jan. 22, 2007).

Carolyn Graham was formerly employed as a full-time seasonal Data Transcriber with the Processing Division of the IRS Memphis Submission Processing Center. (Def.'s SUMF ¶ 1; HT 33-34; IF 209).[3] She was terminated during her probationary period on August 4, 2000, for unacceptable performance. (Id.) She was then rehired in January 2001 as a full-time seasonal Data Transcriber, and later transitioned into a clerk position.

[3]"SUMF" refers to the IRS's Statement of Undisputed Material Facts. (ECF No. 20-2.) "HT" refers to the hearing transcript to EEOC No. 490-2011-00085X, which is attached as Exhibits 1 and 2 to the IRS's motion. "IF" refers to the administrative investigative file, which is attached as Exhibit 3 to the motion.

(IF 6, 20, 207-08.) She was subject to a reduction-in-force ("RIF") in September 2005. (IF 20, 206). She filed a complaint with the Equal Employment Opportunity Commission ("EEOC") on May 25, 2005, while under the supervision of Mary Naylor. (Def.'s SUMF ¶ 10; IF 56, 210.) That case was closed on June 29, 2006. (IF 212.) Aside from the instant complaint, Graham's 2005 complaint was the last time Graham engaged in protected activity. (Def.'s SUMF ¶ 10.)

From November 30, 2009, to December 7, 2009, the IRS posted vacancy announcement 10MEI-WIX0024-0303-04DS, for a job as a clerk ("Clerk Vacancy"). (Def.'s SUMF ¶ 3; HT 117-19; IF 109.) Graham, who was not employed with the IRS at the time and therefore considered an "external" applicant, applied for the Clerk Vacancy. (Def.'s SUMF ¶¶ 4, 6; IF 20, 206.) As an external applicant, she was subject to a background investigation that included a fingerprints check, tax check, and an Automated Labor and Employee Relations Tracking System ("ALERTS") check, prior to being considered for hire.[4] (Def.'s SUMF ¶ 5; HT 71, 75-76, 117, 127; IF 87.) In reviewing applications for the Clerk Vacancy, all applicants who cleared the background investigation were marked as potential hires,

[4]Although Graham was rehired in 2001 (after she had been terminated for unacceptable performance), the ALERTS system was not implemented until 2006. In other words, the IRS did not use the ALERTS system at the time it rehired Graham in 2001. (Def.'s SUMF ¶ 2; HT 127-28.)

while all applicants who were flagged as having an issue were bypassed. (HT 78-80, 117.) Although Graham made the "best qualified list," she was not selected for the position because her ALERTS check revealed she had been terminated in 2000 for unsatisfactory performance during her probationary period. (IF 81, 101-02, 105.) Because the Clerk Vacancy needed to be filled quickly for the tax season, the selecting officials bypassed those candidates who failed their background checks in favor of those who had not, without conducting any further investigation. (Def.'s SUMF ¶ 7; HT 78-80; 117-19.) Fifteen individuals were selected to fill the Clerk Vacancy. (HT 69-70.) Graham was not selected for the position because she did not clear the required background investigation. (Def.'s SUMF ¶¶ 8-9; HT 78-80, 117; IF 101-02, 105.)

Human Resources Specialist Ethel Shorter was responsible for making the selections for the Clerk Vacancy, in collaboration with Human Resources Specialist Danette Gilcrease. (Def.'s SUMF ¶ 12; HT 73-74, 116.) Shorter did not know Graham, was not aware of her prior protected activity, and did not discuss any of the applications with Naylor during the selection process. (Def.'s SUMF ¶ 13; HT 63-65, 78; IF 51, 69-70, 81, 84-85.) Likewise, Gilcrease did not know Graham and was not aware of her prior protected activity. (Def.'s SUMF ¶ 14; HT 119.) Rosalyn Hurt was the Department Manager for Campus Support, and

all new hires under the Clerk Vacancy were to work in her department. (Def.'s SUMF ¶ 15; HT 142; IF 91-92.) As the manager responsible for new hires, Hurt's name was listed as the selecting official after selectees for the Clerk Vacancy were determined. (HT 88.) Hurt signed off on the selections made by the Human Resources Department. (HT 142, 144-45.) Hurt did not know Graham, and was not aware of her prior protected activity. (Def.'s SUMF ¶ 16; HT 149-50; IF 91-92.) Although Naylor was aware of Graham's prior protected activity, she did not participate in the selection process for the Clerk Vacancy. (Def.'s SUMF ¶ 11; HT 54-56.)

On July 18, 2013, Graham filed a *pro se* complaint against the IRS, pursuant to Title VII of the Civil Rights Act of 1964. (ECF No. 1.) Graham alleges that she was overlooked and was not selected for the Clerk Vacancy, even though she had the qualifications, experience, skill, and knowledge for the position. (Id. ¶ 10.) She claims that "[t]here is no evidence in the record indicating [she] was flagged in the ALERTS system or who made the decision to enter information." (Id.) She alleges that "[t]his is the same job I was RIF from in 09/30/2005, Memphis Internal Revenue Service Center, department of Campus Support." (Id.) In the present motion, the IRS argues that it is entitled to summary judgment because Graham has not established her *prima facie* claim of retaliation.

Specifically, the IRS argues that (1) the relevant decision-makers had no knowledge of Graham's prior protected activity; (2) there is insufficient evidence of a causal connection between her protected activity and her non-selection for the Clerk Vacancy; and (3) even if Graham has sufficiently demonstrated her *prima facie* case, the IRS has presented a legitimate, non-discriminatory reason for its decision not to hire Graham, and Graham cannot show that the proffered reason is a pretext for unlawful retaliation.[5]

II. PROPOSED CONCLUSION OF LAW

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 provides that "[t]he 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); see also Geiger v. Tower Auto., 579 F.3d 614, 620 (6th Cir. 2009). In reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. v.

[5]Graham's response in opposition to the Motion for Summary Judgment addresses other actions taken by the IRS that she believes constitutes "unfair labor practice." For example, she appears to question the RIF in 2005 and the IRS's employment decision regarding a tax examiner job that she recently applied for but did not receive. The court will not address these additional allegations, which are outside the scope of the allegations contained in her complaint.

Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted). "The moving party bears the initial burden of production." Palmer v. Cacioppo, 429 F. App'x 491, 495 (6th Cir. 2011) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Once the moving party has met its burden, "the burden shifts to the nonmoving party, who must present some 'specific facts showing that there is a genuine issue for trial.'" Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 200 (6th Cir. 2010) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "[I]f the nonmoving party fails to make a sufficient showing on an essential element of the case with respect to which the nonmovant has the burden, the moving party is entitled to summary judgment as a matter of law." Thompson v. Ashe, 250 F.3d 399, 405 (6th Cir. 2001). "The central issue is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Palmer, 429 F. App'x at 495 (quoting Anderson, 477 U.S. at 251-52) (internal quotation marks omitted).

B. Retaliation

"Title VII forbids employer retaliation against employees for making a charge, testifying, assisting or participating in a Title VII investigation, proceedings, or hearing." Goodsite v. Norfolk S. Ry. Co., No. 3:11CV1166, 2013 WL 3943505, at *5 (N.D.

Ohio July 31, 2013) (citing Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 59 (2006)). To establish a *prima facie* case of retaliation, a plaintiff must show that he or she (1) engaged in activity protected by Title VII; (2) this exercise of protected rights was known to the employer; (3) the employer thereafter took adverse employment action against the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment. Morris v. Oldham Cnty. Fiscal Court, 201 F.3d 784, 792 (6th Cir. 2000); see also Wright v. AutoZone Stores, Inc., 951 F. Supp. 2d 973, 996 (W.D. Mich. 2013) (citing Morris, 201 F.3d at 792).

The burden-shifting framework used for discrimination claims in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), also applies to retaliation claims. Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 523 (6th Cir. 2008). Under this framework, if the plaintiff establishes a *prima facie* case, then the burden of production shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for [its action]." Spengler v. Worthington Cylinders, 615 F.3d 481, 492 (6th Cir. 2010) (quoting McDonnell Douglas, 411 U.S. at 802). Should the defendant meet its burden of production, the burden shifts back to the plaintiff "to identify evidence from which a reasonable jury could conclude that the proffered reason is actually a pretext for unlawful [retaliation]." Blair v. Henry

Filters, Inc., 505 F.3d 517, 524 (6th Cir. 2007), abrogated on other grounds by Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009). "A plaintiff can demonstrate pretext by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." Dews v. A.B. Dick Co., 231 F.3d 1016, 1021 (6th Cir. 2000).

With respect to Graham's *prima facie* case, the IRS does not dispute that Graham engaged in protected activity by filing her charge in 2005, or that she suffered an adverse employment action when she was not selected to fill the Clerk Vacancy. Rather, the IRS argues that Graham has failed to present sufficient evidence from which a reasonable jury could find that the relevant IRS decision-makers were aware of Graham's prior protected activity or that there was a causal connection between her protected activity and the adverse employment action.

1. Knowledge of Protected Activity

First, the IRS argues that Graham has failed to present sufficient evidence from which a reasonable jury could find that the individuals responsible for making the hiring decision were aware of Graham's prior protected activity. The court agrees. Ethel Shorter and Danette Gilcrease (the Human Resources Specialists) were responsible for making the selections for the Clerk Vacancy, and Rosalyn Hurt (Department Manager for Campus

Support) signed off on the selections made by the Human Resources Department. It is undisputed that none of these individuals knew Graham or knew about her 2005 complaint. It is also undisputed that although Graham's supervisor in 2005, Mary Naylor, was aware of the prior protected activity, Naylor did not participate in the selection process for the Clerk Vacancy. Based on these facts, no reasonable jury could find that the individuals who participated in the hiring process knew of Graham's prior protected activity. See, e.g., Stephens v. Erickson, 569 F.3d 779, 787-88 (7th Cir. 2009). Thus, the IRS is entitled to summary judgment.

2. Causation

Second, the IRS argues that Graham has failed to present evidence from which a reasonable jury could find a causal link between her prior protected activity and the adverse employment action. Again, the court agrees. At the time the Clerk Vacancy was posted, Graham was not employed by the IRS and therefore was treated as an external applicant. Graham was subjected to the same background check as the other external applicants. In reviewing the applications, the IRS bypassed all of the applicants who were flagged as having an issue in their background checks. The ALERTS system flagged Graham due to her termination in 2000 for unacceptable performance, thus excluding her from further consideration for the position. It is

undisputed that she was subjected to the same background investigation as other external applicants and her application was treated the same as those for other applicants who had issues in their background investigation.

Moreover, as the IRS argues in its motion, the temporal proximity between her protected activity and the adverse employment action does not support an inference of a causal connection. Courts have held that a "significant gap in time between the protected activity and the adverse action cannot give rise to an inference of a retaliatory motive." Strouss v. Mich. Dep't of Corrs., 250 F.3d 336, 344 (6th Cir. 2001). Furthermore, "it does appear that the Sixth Circuit finds that anything over six months is generally insufficient, standing alone, to establish a causal connection." Foust v. Metro. Sec. Servs., Inc., 829 F. Supp. 2d 614, 629 (E.D. Tenn. 2011). In this case, at least three years separate Graham's protected activity and her non-selection for the Clerk Vacancy. Because Graham has not presented evidence to support a causal connection to satisfy her *prima facie* case, the IRS is entitled to summary judgment.

III. RECOMMENDATION

For the above reasons, it is recommended that the IRS's Motion for Summary Judgment be granted.[6]

Respectfully submitted,

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

July 27, 2015
Date

NOTICE

WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THIS REPORT AND RECOMMENDED DISPOSITION, ANY PARTY MAY SERVE AND FILE SPECIFIC WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS. ANY PARTY MAY RESPOND TO ANOTHER PARTY'S OBJECTIONS WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b)(2); L.R. 72.1(g)(2). FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.

[6]Based on the court's conclusion that Graham has failed to satisfy her *prima facie* case, the court need not address the IRS's remaining arguments.