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

ANNETTA LEE SMITH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 19-cv-2741-SHL-tmp**
	)	
XPO LOGISTICS,	)	
	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

On October 29, 2019, plaintiff Annetta Lee Smith filed a *pro se* Title VII complaint against XPO Logistics ("XPO").[1] (ECF No. 1.) Smith also filed a motion for leave to proceed *in forma pauperis*, which the undersigned granted on November 7, 2019. (ECF Nos. 2 & 7.) Before the court is XPO's motion for summary judgment filed on November 9, 2020. (ECF No. 29.) Because Smith did not timely respond to the motion, the undersigned entered an order to show cause on December 15, 2020. (ECF No. 30.) As of February 25, 2021, no response has been filed. For the reasons set out below, it is recommended that the motion for summary judgment be granted.

[1]Pursuant to Administrative Order No. 2013-05, this case has been referred to the United States magistrate judge for management and for all pretrial matters for determination or report and recommendation, as appropriate.

I. PROPOSED FINDINGS OF FACT

As an initial matter, because Smith did not file a response, she has not challenged any of the factual assertions made by XPO. Local Rule 56 requires that a party opposing a 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." LR 56.1(b). Furthermore, "[e]ach disputed fact must be supported by specific citation to the record." Id. Similarly, Rule 56 of the Federal Rules of Civil Procedure requires that a party support or challenge factual assertions by:

> (A) citing 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; or
>
> (B) 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). When a party fails to properly challenge an opposing party's assertion of fact, Rule 56(e) permits the court to "consider the fact undisputed for purposes of the motion" or "grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant

is entitled to it." Fed. R. Civ. P. 56(e)(2)-(3). Accordingly, the following facts are deemed undisputed for the purpose of resolving this motion.

Plaintiff Annetta Lee Smith worked for a temporary staffing company called Kelly Services, Inc., from June 5, 2017 to October 7, 2017, during which time Kelly Services controlled Smith's employment.[2] (ECF No. 29-3, at 2-3; ECF No. 29-4, at 2, 7-19; ECF No. 29-10, at 1.) Kelly Services assigned Smith to XPO's facility in Memphis, Tennessee, as a temporary employee in the position of

[2]XPO and Kelly Services are parties to a Master Temporary Services Agreement ("MTSA"), which provides, in relevant part, as follows:

> [Kelly Services] shall be the sole employer/manager of each Field Associate. Direction and control of the Field Associate is the right and responsibility of [Kelly Services]. [Kelly Services] shall have the sole right and responsibility to hire, discipline, fire, assign, and reassign the Field Associates. [Kelly Services] shall communicate to each and every Field Associate that it assigns to [XPO] that (i) [Kelly Services] is the employer, (ii) [XPO] is the customer and not the employer, and (iii) such Field Associate is only on temporary assignment to [XPO].
> . . .
> [Kelly Services] agrees that it is solely responsible, as the employer/manager of Field Associates assigned under this Agreement, for (i) maintaining all personnel and payroll records for such Field Associates; (ii) issuing paychecks . . . (iii) making all employer contributions for . . . unemployment insurance; (iv) maintaining workers' compensation insurance coverage; and (v) . . . providing short-term disability insurance coverage.

(ECF No. 29-4, at 10-11.)

verifier. (ECF No. 29-3, at 3.) Verifiers inspect products such as incoming materials and parts, items being processed, finished products, and assemblies for customers' supply chains. (ECF No. 29-4, at 3.)

On June 18, 2017, while employed by Kelly Services, Smith sent an email to supplychain@xpo.com asking for work instructions for her temporary position as a verifier. (ECF No. 29-5, at 1.) On October 4, 2017, while still employed by Kelly Services, Smith sent an email to contact@xpo.com stating that Reginald Thompson, the facility manager for XPO, "picks at [her] because [she] asked for the work instructions for verifiers back in June 2017. . . ." (ECF No. 29-6, at 1.) On September 20, 2017, Smith applied for a permanent position with XPO as a verifier. (ECF No. 29-4, at 24.) Smith was hired by XPO as a verifier and began employment on October 8, 2017. (Id. at 3, 26.)

XPO has in place an anti-discrimination, harassment, and retaliation policy, which specifically provides that "[i]f any person is subjected to or witnesses . . . harassment, that person should immediately notify their supervisor or Human Resources representative." (Id. at 22-23.) Alternatively, "[i]f the employee feels uncomfortable bringing their concerns to these individuals, then the employee may file their complaint anonymously, 24 hours a day, via the Ethics Hotline, 1-800-638-1486,

www.xpo.ethicspoint.com." (Id. at 23.) XPO policy also prohibits retaliation against any employee. (Id.) XPO's policy on retaliation specifically provides that "[i]t is [the employee's] responsibility to report any retaliation to [her] own or any other Company supervisor or manager, any member of Human Resources or the Ethics Hotline." (Id.) XPO posted this policy in the breakroom at the facility where Smith worked during the time she was employed by Kelly Services. (Id. at 3.) Smith acknowledged receipt of the above policy in the process of becoming an employee of XPO. (Id. at 2, 27.)

On November 26, 2017, Smith sent an email to complianceoffice@xpo.com stating that, in September 2017, Thompson pushed her because she was standing behind him; that when she went to "high five" an Executive Director, Thompson elbowed her arm; and that Thompson "put his hand on her shoulder" during a group meeting. (ECF No. 29-7, at 1.) Smith also alleged that Thompson mocked her for asking questions in meetings because "he did not like that [she] had a problem with the training." (Id.) XPO does not routinely monitor the complianceoffice@xpo.com email address, and it is not the submission email for employees seeking to raise issues concerning harassment or discrimination. (ECF No. 29-4, at 4.) No one from XPO received Smith's November 26 email, and XPO did not actually become aware of the issues described therein until

April 11, 2018. (Id.)

On April 11, 2018, one of Smith's co-workers, "Ms. Hearn," informed the Human Resources ("HR") department that Smith was telling her and other co-workers that Thompson had a warrant out for his arrest for assaulting her and that he could be picked up by Memphis police at any time. (Id. at 29.) Hearn reported this incident to Adriana Amsden, an HR generalist at XPO's Memphis facility, who immediately began to investigate the allegations. (Id.) Amsden interviewed Smith on April 11, 2018, during which Smith referenced her email from October of 2017 and said she had also submitted a complaint about Thompson to Kelly Services. (Id.) Amsden told Smith the complaint was never received by HR and asked for a copy of the statement. (Id.) Smith refused to provide a copy of her written statement but verbally informed Amsden that Thompson grabbed her arm in a September 2017 meeting. (Id.) Smith also identified two witnesses of the alleged incident, "Ms. Rayburn" and "Mr. Hammer." (Id.)

On April 12, 2018, Amsden interviewed Rayburn, Hammer, and Thompson, all three of whom denied any inappropriate behavior by Thompson or that Smith was physically assaulted or touched inappropriately by Thompson. (Id. at 29-30.) On April 16, 2018, Amsden again asked Smith to provide her written statement so that XPO could fully investigate her claims. (Id. at 29.) Smith again

refused to provide a written statement or any further details about her allegations. (Id.) Without any corroboration or Smith providing any further details, Amsden could not substantiate Smith's claims and the investigation closed. (Id. at 30.) However, Amsden informed Smith that she would reopen the investigation should Smith decide to provide a written statement and further details at a later date. (Id. at 30-31.) Travis McClain, another HR generalist for XPO in its Memphis facility, also made several attempts to get Smith to provide a written statement on May 14, 2018, May 16, 2018, and again on May 23, 2018. (Id. at 36.)

Smith continued working for XPO until she resigned in September 2018. (Id. at 4.) Smith did not receive any discipline from XPO or any XPO management employee during her employment. (Id. at 5.) Smith was never denied a raise by XPO during her employment. (Id.) Smith was not demoted by XPO, nor denied any promotion or advancement by XPO during her employment. (Id.)

Smith filed a Pre-Charge Inquiry with the EEOC on January 8, 2018. (ECF No. 29-8, at 1.) On January 9, 2018, Smith went to the EEOC office in Memphis, Tennessee, and was interviewed by EEOC Investigator Candice Macon. (ECF No. 29-9, at 1.) Smith declined to file an EEOC charge at that time. (Id.) Smith filed an EEOC charge on or about June 26, 2018. (ECF No. 29-10, at 1.) Smith checked only the box corresponding to sex-based discrimination in

her EEOC charge and did not assert any claim for retaliation. (Id.)

On July 11, 2018, EEOC Investigator Kevin Stovall interviewed Smith about her claim. (ECF No. 29-11, at 1.) The EEOC issued a Notice of Right to Sue letter at Smith's request on July 31, 2019. (ECF No. 29-12, at 1.) Smith filed her Title VII complaint against XPO on October 29, 2019. (ECF No. 1.)

II. PROPOSED CONCLUSIONS OF LAW

A. Standard of Review

Federal Rule of Civil Procedure 56(a) provides that "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." A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the initial burden to "demonstrate the absence of a genuine [dispute] of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "Once the moving party has presented evidence sufficient to support a motion for summary judgment, the nonmoving party is not entitled to trial merely on the basis of allegations; significant probative evidence must be presented to support the complaint." Goins v. Clorox Co., 926 F.2d 559, 561 (6th Cir. 1991).

The party opposing the motion for summary judgment may not rely solely on the pleadings but must present evidence supporting the claims asserted by the party. Banks v. Wolfe Cty. Bd. of Educ., 330 F.3d 888, 892 (6th Cir. 2003). Conclusory allegations, speculation, and unsubstantiated assertions are not evidence and are not sufficient to defeat a well-supported motion for summary judgment. See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990). Similarly, a court may not consider inadmissible unsworn hearsay in deciding a motion for summary judgment. Tranter v. Orick, 460 F. App'x 513, 514 (6th Cir. 2012). In order to defeat summary judgment, the party opposing the motion must present affirmative evidence to support its position; a mere "scintilla of evidence" is insufficient. Bell, 351 F.3d at 247 (quoting Anderson, 477 U.S. at 252). "In making this assessment, [the court] must view all evidence in the light most favorable to the nonmoving party." McKay v. Federspiel, 823 F.3d 862, 866 (6th Cir. 2016).

B. Employment with XPO

Title VII prohibits discrimination by employers "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(1). "To establish her claim under Title VII, [the plaintiff] must show that [the defendant] was her 'employer' within the

meaning of the statute." Nethery v. Quality Care Inv'rs, L.P., 814 F. App'x 97, 102 (6th Cir. 2020) (citing Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990, 992 (6th Cir. 1997)). XPO argues that it cannot be liable under Title VII for any conduct occurring prior to Smith's employment with XPO, which began on October 8, 2017. Smith worked for Kelly Services from June 5, 2017 to October 7, 2017, and XPO asserts that it did not qualify as Smith's joint employer during that time.

"Under the 'joint-employer' theory, 'an entity that is not the plaintiff's formal employer may be treated under these doctrines as if it were the employer for purposes of employment laws such as Title VII." Nethery, 814 F. App'x at 102-03 (quoting Sanford v. Main St. Baptist Church Manor, Inc., 449 F. App'x 488, 491 (6th Cir. 2011)). "Entities are joint employers if they 'share or co-determine those matters governing essential terms and conditions of employment.'" Id. (quoting E.E.O.C. v. Skanska USA Bldg., Inc., 550 F. App'x 253, 256 (6th Cir. 2013)). "In determining whether an entity is the plaintiff's joint employer, the major factors include the 'entity's ability to hire, fire or discipline employees, affect their compensation and benefits, and direct and supervise their performance.'" Id. (quoting Skanska, 550 F. App'x at 256).

It is undisputed that Smith worked for Kelly Services from

June 5, 2017 to October 7, 2017, and that Kelly Services controlled Smith's employment during that time. In addition, the services agreement between XPO and Kelly Services demonstrates that from June 5, 2017 to October 7, 2017, Kelly Services had the sole responsibility to pay and provide benefits to Smith and the sole ability to hire, discipline, fire, assign, or reassign Smith from June 5, 2017 to October 7, 2017. See Int'l. Longshoremen's Ass'n., Local Union No. 1937 v. Norfolk Southern Corp., 927 F.2d 900, 903 (6th Cir. 1991) ("While this contract language is not controlling, it is persuasive evidence of the parties' intentions and of their understanding of their contractual arrangement."). Based on the above, XPO did not qualify as a joint employer of Smith while she was employed at Kelly Services. Accordingly, Smith cannot maintain a Title VII action against XPO based on any conduct occurring prior to October 8, 2017, including her allegations that Thompson pushed her, elbowed her arm, and placed a hand on her shoulder. For completeness, the undersigned will address the merits of Smith's Title VII claims below.

C. Title VII Retaliation Claim

XPO argues that it is entitled to summary judgment on Smith's retaliation claim because Smith failed to exhaust administrative remedies and because Smith's retaliation claim fails on the merits. "To exhaust, an employee must file a charge of discrimination with

the EEOC that includes all claims the employee intends to bring in district court." Russ v. Memphis Light Gas & Water, 720 F. App'x 229, 236 (6th Cir. 2017) (citing Younis v. Pinnacle Airlines, Inc., 610 F.3d 359, 361 (6th Cir. 2010)). "Only claims that are included in the charge or are 'reasonably related to or grow out of the factual allegations in the EEOC charge' may be heard in federal court." Id. (quoting Younis, 610 F.3d at 361-62). "Retaliation claims are typically excepted from the filing requirement because they usually arise after the EEOC charge is filed." Spengler v. Worthington Cylinders, 615 F.3d 481, 489 n.3 (6th Cir. 2010) (citing Abeita v. TransAmerica Mailings, Inc., 159 F.3d 246, 254 (6th Cir. 1998)). "However, this exception 'does not apply to retaliation claims based on conduct that occurred before the EEOC charge was filed.'" Id. (quoting Abeita, 159 F.3d at 254). In other words, "retaliation claims based on conduct that occurred before the charge is filed must be included in that charge." Kurtz v. McHugh, 423 F. App'x 572, 576 (6th Cir. 2011) (citing Abeita, 159 F.3d at 254).

Smith filed her EEOC charge on June 26, 2018. The EEOC charge does not contain any allegations of retaliation, and none of the allegations reasonably relate or give rise to a claim of retaliation. Thus, to the extent that Smith's retaliation claim is based on conduct that occurred prior to June 26, 2018, she failed

to exhaust the administrative remedies available to her. Smith's complaint does not provide allegations regarding any conduct occurring after June 26, 2018. Accordingly, Smith failed to exhaust administrative remedies regarding her retaliation claim.

Even if Smith had exhausted the administrative remedies available to her, XPO is entitled to summary judgment on the merits of the retaliation claim. "Title VII makes it unlawful to retaliate against an employee either because she 'opposed any practice made unlawful [by Title VII],' or because she has 'made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing [under Title VII.]'" Kurtz, 423 F. App'x at 577 (quoting 42 U.S.C. § 2000e-3(a)). In order to establish a prima facie case of retaliation under Title VII, an employee must demonstrate that: "(1) [the plaintiff] engaged in activity protected by Title VII; (2) [the plaintiff's] exercise of such protected activity was known by the defendant; (3) thereafter, the defendant took an action that was 'materially adverse' to the plaintiff; and (4) a causal connection existed between the protected activity and the materially adverse action." Redlin v. Grosse Pointe Pub. Sch. Sys., 921 F.3d 599, 613 (6th Cir. 2019) (quoting Laster v. City of Kalamazoo, 746 F.3d 714, 730 (6th Cir. 2014)). "If [the plaintiff] succeeds in making out the elements of a prima facie case of retaliation, the burden of production shifts

[to the employer] to articulate a legitimate, non-retaliatory reason for the termination[].” Id. (quoting Mansfield v. City of Murfreesboro, 706 F. App'x 231, 236 (6th Cir. 2017)). “If the [employer] satisfies its burden of production, the burden shifts back to [the plaintiff] to show that the reason was a pretext for retaliation.” Id. at 614 (quoting Mansfield, 706 F. App'x at 236).

The evidence in the record falls far short of establishing a *prima facie* case of retaliation because Smith does not identify, and the evidence in the record does not demonstrate, any materially adverse action by XPO. “[T]o meet the requirement of demonstrating a materially adverse action, ‘a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’” Id. (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)). Smith has not identified any specific conduct by XPO as being retaliatory or materially adverse - Smith did not respond to XPO’s motion for summary judgment, and the allegations in the complaint do not challenge any specific conduct by XPO. None of the evidence in the record demonstrates any materially adverse action by XPO. Smith was not fired by XPO, and she was never demoted or denied a raise or promotion. Smith also never received any discipline from XPO or any XPO management

employee during her employment.

Because Smith has not demonstrated a materially adverse action, she necessarily fails to demonstrate a causal connection between her protected activity and the materially adverse action, a showing which requires a plaintiff to establish "that the harm would not have occurred in the absence of – that is, but for – the defendant's conduct." Id. at 614-15; see also Funk v. City of Lansing, 821 F. App'x 574, 584 (6th Cir. 2020) ("To establish a causal connection . . . a plaintiff must produce sufficient evidence from which an inference could be drawn that the adverse action would not have been taken had the plaintiff not filed a discrimination action.") (quoting Nguyen v. City of Cleveland, 229 F.3d 559, 563 (6th Cir. 2000)). Based on the above, Smith cannot establish a prima facie case of retaliation under Title VII. Accordingly, XPO is entitled to summary judgment on this claim.

D. Title VII Hostile Work Environment Claim

Smith also asserts a Title VII sexual harassment claim against XPO. "To establish a prima facie case of sexual harassment based on hostile work environment, [the plaintiff] must adduce evidence demonstrating that '(1) she is a member of a protected class (female); (2) she was subjected to harassment, either through words or actions, based on sex; (3) the harassment had the effect of unreasonably interfering with her work performance and creating an

objectively intimidating, hostile, or offensive work environment; and (4) there exists some basis for liability on the part of the employer.'" Gallagher v. C.H. Robinson Worldwide, Inc., 567 F.3d 263, 270 (6th Cir. 2009) (quoting Grace v. USCAR, 521 F.3d 655, 678 (6th Cir. 2008)). The evidence in the record falls short of satisfying the second and third prongs.

There is no evidence in the record demonstrating that Smith was subjected to sex-based harassment. In her email dated November 26, 2017, Smith asserted that Thompson pushed her because she was standing behind him, elbowed her arm when she tried to high-five an Executive Director, put his hand on her shoulder during a group meeting, and mocked her for asking questions in meetings. Smith does not connect any of these alleged actions to her sex. See Gordon v. England, 612 F. App'x 330, 336 (6th Cir. 2015) ("While we have held nonsexual conduct can constitute evidence of sexual harassment, an employee must show the acts would not have occurred but for her sex.") (citing Williams v. Gen. Motors Corp., 187 F.3d 553, 565 (6th Cir. 1999)). Smith asserts that Thompson mocked her for asking questions, not because she was female, but because "he did not like that [she] had a problem with the training." The evidence before the court does not demonstrate that any of the conduct Smith attributes to Thompson was "motivated by discriminatory animus against women." See Williams, 187 F.3d at

565; see also Graves v. Dayton Gastroenterology, Inc., 657 F. App'x 485, 489 (6th Cir. 2016).

In addition, Thompson's conduct was objectively neither severe nor pervasive enough to constitute a hostile work environment. "The Supreme Court has provided a non-exhaustive list of factors to consider when deciding whether a hostile work environment exists 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.'" Grace, 521 F.3d at 678 (quoting Harris, 510 U.S. at 23). "Further, courts must determine 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 and create an abusive working environment.'" Id. at 678-79 (quoting Harris, 510 U.S. at 21). The conduct Smith attributes to Thompson, even if it occurred, does not rise to the level of severity or pervasiveness required to sustain a hostile work environment claim. Rather, Thompson's physical interactions with Smith were "isolated incidents" that do not "amount to discriminatory changes in the 'terms and conditions of employment.'" Graves, 657 F. App'x at 489 (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)); see also Hensman v.

City of Riverview, 316 F. App'x. 412, 417 (6th Cir. 2009). Accordingly, XPO is entitled to summary judgment on Smith's hostile work environment claim.

III. RECOMMENDATION

For the above reasons, it is recommended that the motion for summary judgment be granted.

Respectfully submitted,

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

February 25, 2021
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.