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

VICTORIA WILLIAMS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 21-2306-SHL-tmp**
	)	
KELLOGG USA, LLC,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

On May 11, 2021, plaintiff Victoria Williams filed a *pro se* complaint against Kellogg USA, LLC ("Kellogg"), seeking equitable relief and damages for claims of sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964. (ECF No. 1.) Before the court is Kellogg's Motion for Summary Judgment, filed on May 12, 2022.[1] (ECF No. 32.) Williams responded on June 2, 2022. (ECF Nos. 34 & 35.) Kellogg replied on June 16, 2022. (ECF Nos. 36 & 37.) For the below reasons, the undersigned recommends that Kellogg's Motion for Summary Judgment be granted.

I. PROPOSED FINDINGS OF FACT

[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.

Victoria Williams was hired by Kellogg as an operations technician at their Memphis, Tennessee cereal production facility on January 2, 2018. (ECF No. 32-2 at PageID 233.) Williams previously worked at the same facility from July 6, 2015, until sometime in 2016, but was terminated for reasons not relevant to this case. Williams was hired back in 2018 after signing a "Settlement and Last Chance Agreement," in which she agreed to "withdraw pending grievances and waive any and all claims she had against Kellogg through the date of [the] Agreement[.]" (Id. at PageID 236.) The agreement further provided that "she would be immediately discharged if she violated any Plant Rule within 6 months of her reinstatement." (Id.) As an operations technician, Williams's job was to "oversee production line 107 which accepted accumulated cereal from a surge bin and fed into machinery which then bagged, sealed and boxed the cereal." (Id.) Williams was also a member of Bakery, Confectionary, Tobacco Workers and Grain Millers Local No. 252G ("the Union"), (ECF No. 35-1 at PageID 661; ECF No. 32-2 at PageID 234), which had a Collective Bargaining Agreement ("CBA") with Kellogg. (ECF No. 32-2 at PageID 234.)

Williams's employment seemingly proceeded without incident until February 8, 2020, when supervisor Darlene Walker recommended that she be disciplined for being out of her work area without permission. (Id. at PageID 236.) The Union, Williams, and Kellogg

representatives all met the next day, and the Union "disclosed that Plaintiff had gone to the Union office to talk about an ongoing dispute" with a co-worker. (Id.) During this meeting, Kellogg warned Williams that regardless of the reason, she "should not leave her line mid-shift (except on breaks) without permission, even if to talk to her Union representative." (Id. at PageID 237.) However, according to Williams, "it is not uncommon at Kellogg for an [employee] to leave the line to handle business as long as there is a relief operator on the line." (ECF No. 35 at PageID 532.)

The events underlying the present case began in earnest on February 24, 2020. (Id. at PageID 533.) On that day, Williams requested off the entire day of Friday, March 6, 2020, so that she could go to scheduled doctor's appointments for herself and her son. (Id.) Kellogg has two relevant, distinct procedures for requesting full days off. The first involves the "Weekend Excused List" ("List"), which is a provision of the CBA. (ECF No. 32-2 at PageID 234.) The List is posted from 8:00 a.m. every Monday to 8:00 a.m. every Wednesday and allows employees to request a Friday, Saturday, or Sunday shift off if production allows. (Id.; ECF No. 35-1 at PageID 660.) The List is not first-come-first-served; excusals are given on the basis of seniority, "with the highest seniority [employee] allowed to be off work during low production weekend days[.]" (ECF No. 32-2 at PageID 234.) For her request,

Williams did not sign the List, but instead utilized the other leave procedure detailed in Kellogg's "Attendance Program." (ECF No. 35 at PageID 528.) Under the Attendance Program, which is not part of the CBA, "a Memphis worker who wants to take a single unpaid absence or perfect attendance excusal, completes an Excusal Request Form with 16 hours advance notice." (Id.) Grants of these requests are entirely within Kellogg's discretion. (Id.)

The interaction of these two procedures is heavily disputed by the parties. Kellogg claims that "[b]ecause the CBA weekend excusal list is contractual and proceeds by seniority, an employee requesting a full weekend day off under the Attendance Program excusal process can only override or 'bump' the CBA priority for weekend days off if the employee produces a doctor's note, evidencing a medical basis for Kellogg to bypass the CBA process." (ECF No. 32-2 at PageID 235.) Williams disagrees. She claims that "a person could override a senior person notwithstanding the weekend list if the employee has something that takes place for absences that are approved, no matter what it is, if they turn in a formal excusal form." (ECF No. 35 at PageID 528.) According to her, seniority is only relevant where "an employee signs the weekend excusal list and wants to be off the same week." (Id. at PageID 528-29.) Nothing in the portions of the CBA that Kellogg attached to their motion explains the interaction of the List with

the Attendance Program. Regardless, it seems uncontested that the "number of production employees permitted excusal on a given day under either the CBA or the Attendance Program is limited to 5." (ECF No. 35 at PageID 529.)

Zambree Taylor, a Human Resources Generalist/Crew Scheduler, received Williams's request for leave. (ECF No. 32-5 at PageID 443, 446.) The two parties dispute what followed. Kellogg and Taylor claim that, upon Williams's submission of her excusal form, Taylor told Williams that "she would need to submit something from her doctor showing she had the appointment in order to bump a more senior employee off the weekend excusal list for that date." (Id. at PageID 446.) Williams agrees that Taylor told her this, but states that she later spoke to Rob Efin, the President of the Union, who told her a doctor's note would not be required. (ECF No. 35 at PageID 535.) Ultimately, regardless of intermediate steps, Taylor told Williams that she would require proper documentation in the form of a doctor's note in order to grant the request. (ECF No. 35 at PageID 535-36.) Williams submitted a doctor's note on Wednesday, March 4, to Taylor's colleague Chastity Price. (ECF No. 32-4 at PageID 292.) However, when Taylor came into work that day she observed that "the Supervisor's Calendar list for excused absences on Friday, March 6, 2020 was full." (ECF No. 32-5 at PageID 446.) Taylor then asked Human Resources Manager

Shay Johnson whether she could grant Williams's excusal request despite the excusal list being full. (Id. at PageID 447.) Johnson told her no, explaining "that Kellogg approves day off requests upon completion of the requirements and we do not reserve or 'hold' a date pending completion of those requirements." (Id.)

With answer in hand, Taylor approached Williams at her Line 107 work area. (ECF No. 35 at PageID 538.) Taylor explained that Johnson had refused Williams's excusal because "we don't hold any spots," and told Williams to speak with Human Resources if she had any questions. (Id.) According to Williams, she "informed her relief operator, Sean Dortch, that she would have to get her shop [Union] steward, Vincent Mickens, Jr., and go to HR to see Shay Johnson[.]" (Id. at PageID 539.) Dortch then took over the line and kept it running, as it was "not uncommon at Kellogg for an employee to leave the line to handle business as long as there is a relief operator on the line." (Id.) Williams and Mickens went to find Patrick Quartermaine, their supervisor, to inform him that they were going to HR, but they could not locate Quartermaine because he was in a supervisors' shift meeting. (Id. at PageID 541.) The two proceeded to HR regardless. Williams claims that she "did not need to ask her supervisor to release her from the line as long as the relief operator was on the line," while Kellogg argues that the CBA states that "Union officials or members . . .

shall avoid neglecting their regular jobs during work hours . . . [and] shall be excused from their job for a short period by contacting their supervisor[.]" (ECF No. 37 at PageID 754.) Once at HR, a meeting between Williams, Union representatives, Plant Director Tina Almond, and Manager Larry Finney took place. (ECF No. 32-2 at PageID 239; ECF No. 35 at PageID 542.) Kellogg still refused to give Williams the day off, and Williams "left the plant without returning to her line." (ECF No. 35 at PageID 542.)

Kellogg presents a contradictory version of events. According to Taylor's declaration, after Taylor told Williams that she had been denied the day off, Williams "became irate, stating that she was 'tired of the whole fucking HR department' and declared, 'I will shut this motherfucking line down.'" (ECF No. 32-5 at PageID 447.) Taylor attempted to calm Williams down and suggested that she talk to Shay Johnson after her shift ended, but Williams instead "hit the manual stop button shutting down Line 107 and walked away." (Id.) Williams then attempted to reach Quartermaine by phone but could not get in touch with him, and ultimately "walked away from her job on Line 107," without permission and in violation of the CBA, to find Mickens and go to HR. (ECF No. 32-2 at PageID 238.) At around 2:20 p.m., Quartermaine noticed that "Line 107 was shut down and attempted to find Plaintiff," but learned she was at the Union office and not on the line. (Id. at

PageID 239.) Quartermaine then informed Union officials that Williams "did not have permission to leave the production line, and that he had no other operator to run Line 107[.]" (Id.) Rather than return, Williams stayed at the Union office until the meeting ended and then left the plant without returning to her line. (Id.)

Regardless of the exact circumstances regarding Williams leaving Line 107, Kellogg immediately initiated an investigation based on their belief that Williams had walked away from her line and shut down production. (Id.) As part of this investigation, Manager Finney found "production data metrics of Line 107 showing that the line was shut down and production halted on March 4, 2020 between 2:15-3:00 p.m. [] until the next shift began operating the line at 3:00 p.m." (Id.) Williams argued that "Line 107 was having problems and had issues throughout the entire day," with mechanical problems and inaccurate data monitoring accounting for the claimed stop in production. (ECF No. 35 at PageID 544.) Kellogg did not agree, and suspended Williams on March 5, 2020, for "violation of Group I Work Rule #10 (Restricting Output, Delaying Operations) and Rule #11 (Walking off the Job or Unauthorized Departure)[.]" (Id.) As stated in Kellogg's Plant Rules, violations of Group 1 Rules "are so serious that the first violation will probably call for discharge," pending a suspension and hearing. (ECF No. 32-4 at PageID 347.)

The next day, Williams filed for leave under the Family Medical Leave Act ("FMLA"), which was approved. (ECF No. 35 at PageID 545.) On March 11, 2020, Kellogg and Union leadership met to discuss Williams's suspension. (Id. at PageID 546.) Negotiations resulted in a proposed Settlement and Reinstatement Agreement, which was sent to Williams by letter dated March 11, 2020. (Id.) The Agreement provided that Williams would serve a two-day unpaid suspension and then be allowed to return to work at the end of her FMLA leave, on April 17, 2020. (Id.) This Agreement, like the Settlement and Last Chance Agreement that Williams had signed back in 2018, required that she withdraw any pending grievances with the Union, as well as "claims asserted through the NLRB, EEOC, or other agencies with regard to the subject of the Agreement." (Id.) At this point, Williams had no pending EEOC charges and one pending NLRB charge, although she later filed an EEOC charge relating to the suspension on March 13, 2020. (Id.; ECF No. 32-7 at PageID 484.)

Williams returned to work on April 17. (ECF No. 35 at 546-47.) However, she had not and never signed the Settlement Agreement. When asked during her deposition, Williams stated that she had "no objection to signing the March 11" Agreement, but had not signed because Rob Efin, the Union president, told her that everything was "handled." (ECF No. 32-4 at PageID 333; ECF No. 35

at PageID 546-47.) From Kellogg's perspective, though, the matter remained open. Consequently, on May 5, 2020, Kellogg Human Resources Manager Clyde Dismuke sent a letter to Williams. (ECF No. 32-4 at PageID 419.) The letter stated that "[b]ased on the Company's understanding that you planned to execute the settlement agreement, and as a showing of good faith, the Company allowed you to return to work." (Id.) Dismuke then wrote that "[i]t is now the Company's understanding based on discussions with the Union that you have refused to execute the Settlement Agreement," and then placed her back on suspension. (Id.) Kellogg provided Williams and the Union until "5:00 p.m. on Friday, May 15, 2020, to execute the Settlement Agreement[.]" (Id.) If the agreement was not signed by that point, Kellogg planned to move forward with their internal disciplinary process. (Id.)

However, the settlement agreement that Kellogg offered in this letter was not identical to the Settlement Agreement that had been negotiated on March 11. (ECF No. 37 at PageID 759.) Instead, this new agreement "was consistent in wording with settlement of past discipline issued to Plaintiff," and essentially identical to the "Settlement and Last Chance Agreement" Williams had signed in 2018, with two notable differences from the original March 11 Agreement. (Id.) First, it added the "Last Chance" language to the

title of the agreement. Second, it added a new paragraph, labeled "2B," which stated the following:

> Employee will be terminated if, in the future she violates Group 1 #10, restricting output, delaying operations, or sabotage, or Group 1 #11, walking off the job or unauthorized departure from the plant, of the Company Rules. Employee and union agree not to challenge the issue of the just cause for termination under this Agreement or under the grievance and arbitration procedures in any collective bargaining agreement between the Company and the Union.

(ECF No. 32-4 at PageID 421.) Williams states that this second agreement "was altered without the Union and [her] knowledge," and thus she refused to sign. (ECF No. 35 at PageID 548-49.) After Williams refused to sign, Kellogg resumed her suspension on May 18, 2020. (ECF No. 37 at PageID 760-62.) Kellogg held a disciplinary hearing regarding the incident and ultimately terminated Williams on September 4, 2020, "for violation of the Group 1 Plant Rule 10 (restricting output, delaying operations or sabotage) and Rule 12 (insubordination – refusal to follow instructions of supervisor)." (Id.)

Williams responded by filing another EEOC Charge and another NLRB charge. (ECF No. 32-4 at PageID 431; ECF No. 37 at PageID 761-62.) Williams filed a total of three EEOC Charges. Charge 1 was filed on June 10, 2019, and its factual allegations are not relevant to the present case. (ECF No. 35 at PageID 549.) Charge 2 was filed on March 13, 2020, shortly after Williams was suspended

but before she was terminated, and claims that Williams's "suspension and denied day off were motivated by sex discrimination and retaliation for making Charge #1." (Id. at PageID 550.) A right to sue letter was issued for Charge 2 on February 25, 2021. (ECF No. 1-2 at PageID 16.) Charge 3 was filed on November 6, 2020, after Williams's termination, and alleges that her termination was motivated by sex discrimination and retaliation. (Id.) A right to sue letter for Charge 3 was issued on November 17, 2021. (ECF No. 32-4 at PageID 435.) The present case is supported by the right to sue letter for Charge 2 only. Her NLRB charge resulted in an arbitration hearing that resulted in a finding in Kellogg's favor. (ECF No. 37 at PageID 762.)

Williams filed suit on May 11, 2021, alleging sex discrimination in the application of the attendance and "walk-off" policies, as well as retaliation for filing her EEOC and NLRB charges. (ECF No. 1.) Kellogg filed the present Motion for Summary Judgment on May 12, 2022, arguing that Williams has failed to state a *prima facie* case of sex discrimination or retaliation under Title VII, and that if she has, Kellogg had a legitimate, non-discriminatory, non-pretextual reason for firing her. (ECF No. 32.)

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 they assert. 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. Nat'l 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 their position; a mere "scintilla of evidence" is insufficient. Bell v. Ohio State Univ., 351 F.3d 240, 247 (6th Cir. 2003) (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). These standards apply regardless of a party's *pro se* status; "the liberal pleading standard for *pro se* parties is 'inapplicable' 'once a case has progressed to the summary judgment stage.'" George v. Whitmer, No. 20-12579, 2021 WL 1976314, at *2 (E.D. Mich. May 18, 2021) (quoting Tucker v. Union of Needletrades, Indus., & Textile Employees, 407 F.3d 784, 788 (6th Cir. 2005)). A *pro se* party's opposition to a motion for summary judgment cannot rely on "mere allegations and unsworn filings" but must instead "set out specific facts showing a genuine issue for trial through affidavits or otherwise[.]" Id. (citing Viergutz v. Lucent Techs., Inc., 375 F. App'x 482, 485 (6th Cir. 2010)).

B. Williams's Attached Statements

As a preliminary matter, the undersigned must address the "evidence" that Williams cites to support many of her claims and rebuttals to Kellogg's Statement of Undisputed Material Facts. Throughout her response, Williams cites to five "Statements" of

various other Kellogg employees that she claims support her interpretation of the relevant policies and events. See, e.g., (ECF No. 35 at PageID 525) ("It is not uncommon at Kellogg for an [employee] to leave the line every single day to handle business as long as there is a relief operator on the line.") (citing "Statement of Tim C. Gordon" and "Statement of Kevin Bradshaw"). All of these statements are attached to her Response to Kellogg's Statement of Undisputed Material Facts as "Exhibit 2." (ECF No. 35-2.) Included are statements from Sean Dortch, Kevin Bradshaw, Vincent Mickens, Jr., Rob Efin,[2] and Tim C. Gordon. (Id.) Each of the statements except for Efin's consists of a single typed page of varying length, which appear to be signed and dated by the author of the statement. Efin's statement consists of an email from "reafen008@hotmail.com" to "vwilliams589@gmail.com," and is not signed. (Id. at PageID 726.) All of the statements except Efin's state that the author is willing to testify.

In their Reply, Kellogg argues that these statements are inadmissible and cannot be considered at the summary judgment stage for four reasons. First, they argue that "[n]one of the Exhibit 2 statements are affidavits made under oath or affirmed before an

[2]Efin's statement spells his name as "Rob Eafen," although the cover page of Exhibit 2, and Williams's brief, spell his name "Efin."

authorized officer, nor are they declarations[.]" (ECF No. 36 at PageID 728.) Second, they contend that the statements fail to provide a foundation for personal knowledge of the assertions made. (Id. at PageID 729.) Third, they argue that the statements offer improper opinion evidence regarding legal conclusions. (Id.) Finally, they assert that each "Exhibit 2 statement constitutes hearsay under Fed. R. Evid. 801, and each paraphrases statements by others – classic hearsay within hearsay[.]" (Id. at PageID 730.)

Federal Rule of Civil Procedure 56(c)(4) requires that "an affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." This is not merely a rule of form; it aims to force the nonmoving party to "show that she can make good on the promise of the pleadings by laying out enough evidence that will be admissible at trial to demonstrate that a genuine issue on a material fact exists, and that a trial is necessary." Alexander v. CareSource, 576 F.3d 551, 558 (6th Cir. 2009). Due to this requirement, an affidavit or declaration used to support or defend against summary judgment must be "a sworn document or declared to be true under penalty of perjury." Smith v. Prudential Ins. Co. of Am., 864 F. Supp. 2d 654, 659 (M.D. Tenn. 2012) (citing 11 James Wm. Moore *et al.*, Moore's Federal Practice

§ 56.94[4][a] (3d ed. 2011)); see also Zainalian v. Memphis Bd. of Educ., 3 F. App'x 429, 431 (6th Cir. 2001) ("As Zainalian neither verified his affidavit nor complaint, signed them under oath, nor signed them under penalty of perjury pursuant to 28 U.S.C. § 1746, the facts averred to therein lacked the force and effect of an affidavit for purposes of responding to a motion for summary judgment."); Finch v. Xavier Univ., 689 F. Supp. 2d 955, 962 (S.D. Ohio 2010) ("[N]one of these affidavits have been notarized and none of the affidavits have been sworn to under penalty of perjury . . . The Court, therefore, may not consider these affidavits in ruling on the motions for summary judgment.").

The statements in Exhibit 2 are not sworn to under penalty of perjury and cannot be considered when ruling on this motion. Unsworn statements may be considered if they are "signed, dated, and recite[] that [they were] signed 'under penalty of perjury that the foregoing is true and correct[,]'" but the Exhibit 2 statements meet only the first two of these requirements. Sfakianos v. Shelby Cty. Gov't, 481 F. App'x 244, 245 (6th Cir. 2012) (quoting 28 U.S.C. § 1746(2)). As submitted, the statements do not meet the requirements of a proper affidavit or declaration. Thus, under Rule 56(c)(4), the court cannot consider them as evidence. The court will disregard the statements, as well as any offered facts supported solely by them.

C. Title VII Sex Discrimination Claims

Kellogg contends that Williams has not provided enough evidence to create genuine issues of material fact regarding her sex discrimination claims. Plaintiffs may attempt to prove Title VII discrimination claims in one of two ways. First, they may advance direct evidence of discrimination, or evidence that "if believed, *requires* the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." Kostic v. United Parcel Serv., Inc., 532 F. Supp. 3d 513, 527 (M.D. Tenn. 2021) (emphasis added). In cases where the plaintiff produces direct evidence of discrimination, the burden shifts to the defendant to prove that they would have taken the same actions "even if [they] had not been motivated by impermissible discrimination." Nguyen v. City of Cleveland, 229 F.3d 559, 563 (6th Cir. 2000).

Williams does not present direct evidence but instead relies on circumstantial evidence of discrimination. "Circumstantial evidence . . . is proof that does not on its face establish discriminatory animus, but does allow a factfinder to draw a reasonable inference that discrimination occurred." White v. Baxter Healthcare Corp., 553 F.3d 381, 391 n.5 (6th Cir. 2008) (citing Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997)). Where only circumstantial evidence exists, courts use the

familiar burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to evaluate claims. To establish a *prima facie* case of sex discrimination under this framework, a plaintiff must show that "(1) she is a member of a protected class, (2) she suffered an adverse employment action, (3) she was qualified [for her job] and (4) she was treated differently than similarly situated male employees." Jividen v. Univ. of Tenn., 834 F. Supp. 2d 745, 752-53 (W.D. Tenn. 2011) (citing McClain v. NorthWest Cmty. Corr. Ctr. Judicial Corr. Bd., 440 F.3d 320, 332 (6th Cir. 2006)).

Making a *prima facie* case typically "is a burden easily met" by the plaintiff, after which the burden shifts to the defendant to articulate a "legitimate, nondiscriminatory reason for the adverse action." Wheat v. Fifth Third Bank, 785 F.3d 230, 237 (6th Cir. 2015). If the defendant can do so, the plaintiff then must present sufficient evidence from which a reasonable jury could find that the reasons provided were "mere pretexts for prohibited discrimination." Id. (citing Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981)). Here, Kellogg does not argue the first two elements of the *prima facie* case. Instead, they argue that the difficulties Williams faced with the attendance policy do not amount to an adverse action, and that she cannot identify similarly situated employees for any of the claimed adverse actions

she suffered. Because of these deficiencies, they argue, there are no genuine issues of material fact remaining regarding Williams's sex discrimination claims.

1. Application of the Attendance Policy

Kellogg argues that even taking all of Williams's well-supported material facts as true, the denial of a day of leave under the attendance policy was not an adverse action. (ECF No. 32-1 at PageID 218 n.3.) It is unclear from Williams's filings whether she is arguing that the denial of the day off was indeed an adverse action. In her complaint, she notes that she was "not treated fair as the males, one in particular (Vincent Mickens Jr.)," and later alleges that Mickens had a day off granted without needing to bring a doctor's note. (ECF No. 1 at PageID 4); (ECF No. 35 at PageID 527) ("Further, Vincent Mickens, Jr. and Adam Swaggert, both males, were excused by simply filing an excusal request form, and were not told to bring any documentation for their excusals."). However, in her Response to the Motion for Summary Judgment, Williams characterizes Kellogg's focus on the "denial of [Williams's] request to take an unpaid absence from her March 6, 2020 shift" as a "red herring." (ECF No. 34 at 11.) Instead, she focuses on the "materially adverse change in the terms and conditions of her employment through Defendant Kellogg continually treating her harsher than other similarly situated

males by suspending and ultimately firing her for conduct that the males were not terminated for." (Id.) In the interest of completeness, the undersigned will consider whether the denial of a single day of unpaid leave could form the basis for a claim of sex discrimination.

As part of the *prima facie* case, a plaintiff must allege that they suffered an adverse employment action. "The Supreme Court has limited 'adverse employment actions' to something more than 'petty slights, minor annoyances, and simple lack of good manners.'" Kyle-Eiland v. Neff, 408 F. App'x 933, 941 (6th Cir. 2011) (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)). Common forms of materially adverse actions include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." Bowman v. Shawnee State Univ., 220 F.3d 456, 461-62 (6th Cir. 2000) (quoting Hollins v. Atlantic Co., 188 F.3d 652, 662 (6th Cir. 1999)).

While the Sixth Circuit has not had occasion to consider whether the denial of a single day of unpaid leave can constitute an adverse employment action, the undersigned has previously held that it cannot. In Clayton v. Shelby Cty. Gov't, the undersigned found that an employer's refusal to grant a request for leave on

a day the employee was scheduled to work did not constitute a materially adverse action. No. 08-2612-TMP, 2013 WL 12340144, at *15 (W.D. Tenn. Aug. 22, 2013). In reaching this decision, the undersigned examined the holdings of other circuit and district courts, which were largely in agreement. See id. (citing Ogden v. Potter, 397 F. App'x 938, 939 (5th Cir. 2010); Mackenzie v. Potter, 219 F. App'x 500, 503 (7th Cir. 2007); Box v. Principi, 442 F.3d 692, 697 (8th Cir. 2006); Chin-McKenzie v. Continuum Health Partners, 876 F. Supp. 2d 270, 286 (S.D.N.Y. 2012); Beltran v. Univ. of Texas Health Science Ctr. at Houston, 837 F. Supp. 2d 635, 643 (S.D. Tex. 2011); Carlson v. Leprino Foods Co., 522 F. Supp. 2d 883, 888 (W.D. Mich. 2007)); see also Morales v. Gotbaum, 42 F. Supp. 3d 175, 206-207 (D.D.C. 2014) ("[T]hat adverse action does not rise to the level of being *material*: the denied request was only one day of sick leave and was therefore *de minimis*.") (emphasis in original). The facts here are not distinguishable from these prior decisions. Thus, the undersigned agrees with Kellogg that the denial of Williams's leave request for March 6 cannot serve as a materially adverse employment action and cannot support her *prima facie* case. There are no genuine issues of material fact regarding the dispute over Williams's leave.

2. Application of the "Walk-Off" Policy

In her brief opposing summary judgment, Williams largely focuses on her suspension and firing for claimed violations of the plant rules regarding leaving the line as the relevant adverse actions. As discussed above, Williams was suspended and ultimately fired after admittedly leaving her production line without notifying her supervisor, although she alleges that this did not violate Kellogg's policies because she engaged a relief operator to cover her duties. Clearly, firing and suspension constitute materially adverse actions under Title VII. Benitez v. Tyson Fresh Meats, Inc., No. 3:18-cv-00491, 2022 WL 1283087, at *52 (M.D. Tenn. Apr. 28, 2022) ("Suspension without pay constitutes an adverse employment action[.]") (citing White v. Burlington N. Santa Fe R. Co., 364 F.3d 789, 802 (6th Cir. 2004)); Rim v. Laboratory Management Consultants, Inc., No. 3:18-cv-00911, 2019 WL 5898633, at *8-9 (M.D. Tenn. Nov. 12, 2019) ("[T]here must be '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.'") (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)). Williams has thus satisfied three elements of her *prima facie* case for sex discrimination; however, Kellogg contends that Williams "fails to produce any competent, probative evidence [] showing that she was treated less favorably than a

similarly situated individual outside of her protected class." (ECF No. 36 at PageID 731.)

When considering whether two individuals are similarly situated in a "disciplinary context" such as this, the Sixth Circuit has held that relevant factors may include whether the individuals dealt with the same supervisor, whether they were subject to the same standards, and whether they engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for that conduct. Conti v. Universal Enters., Inc., 50 F. App'x 690, 699 (6th Cir. 2002) (citing Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 352 (6th Cir. 1998) and Smith v. Leggett Wire Co., 220 F.3d 752, 762 (6th Cir. 2000)); see also Jackson v. FedEx Corp. Servs., Inc., 518 F.3d 388, 394 (6th Cir. 2008) (explaining that courts should make an "independent determination as to the relevancy of a particular aspect of the plaintiff's employment status and that of the non-protected employee" rather than blindly applying the above factors). These factors are not "inflexible requirement[s]," but instead can help determine whether a proposed comparator is similarly situated to the plaintiff in light of the facts presented. Bobo v. United Parcel Serv., Inc., 665 F.3d 741, 751 (6th Cir. 2012).

Williams has not identified any valid comparators. Twice in her response, Williams states that "Darius Williams, Brandon Malone, Jack Dobb, Anthony Kindred, Jesse Madkins and Bobby Baker, who are all not Union Stewards, were allowed to leave their line 'unattended,' actually abandoned their lines, and were not disciplined nor terminated for leaving their lines unattended and were treated differently than Victoria Williams." (ECF No. 35 at PageID 526.) But creating an issue of material fact requires more; an assertion must be supported by evidence in the record. Banks, 330 F.3d at 892. To support her claims that these employees can serve as comparators, Williams cites to the Exhibit 2 statements (which this court cannot consider) and her own deposition testimony. However, the portions of her deposition to which she cites make no mention of any of the alleged comparators.[3] The first and only mention of these employees is in Williams's Response to the Motion for Summary Judgment. There is thus no record evidence

[3]Williams cites her deposition testimony transcript at pages 41, 179, and 184. (ECF No. 35 at PageID 526, 539-40.) Page 41 consists of Williams confirming the titles of other Kellogg employees, but makes no mention of Darius Williams, Malone, Dobb, Kindred, Madkins, or Baker. (ECF No. 35-1 at PageID 555.) Page 179 consists of Williams identifying people she believes will serve as witnesses for her at trial, but again does not mention Darius Williams, Malone, Dobb, Kindred, Madkins, or Baker. (Id. at PageID 621.) Page 184, while presented with less context, appears to also consist of Williams identifying potential witnesses, but does not mention any of the alleged comparators. (Id. at PageID 622.)

to support Williams's use of these employees as comparators. For example, Williams has not stated (let alone provided support for) who supervised these employees, whether they were Union members subject to the same standards of conduct, or whether there were mitigating or differentiating circumstances surrounding their conduct. This type of evidence is important for determining whether an employee is similarly situated to the plaintiff and can be used as an adequate comparator. See Conti, 50 F. App'x at 699. Simply put, Williams has not provided enough facts for the court to adequately determine whether these employees are indeed similarly situated to her.

Because Williams has failed to adequately point to any similarly situated individuals outside her protected class who engaged in the same conduct but were treated more favorably, she has failed to demonstrate a *prima facie* case for sex discrimination. The undersigned recommends granting Kellogg's Motion for Summary Judgment with regard to Williams's sex discrimination claims.

D. Title VII Retaliation Claims

Williams's complaint also alleges retaliation in violation of Title VII. Title VII "prohibits discriminating against an employee because that employee has engaged in conduct protected by Title VII," including "not only the filing of formal discrimination

charges with the EEOC, but also complaints to management and less formal protests of discriminatory employment practices." Laster v. City of Kalamazoo, 746 F.3d 714, 729-30 (6th Cir. 2014) (citing 42 U.S.C. § 2000e-3(a) and Trujillo v. Henniges Auto. Sealing Sys. N. Am., Inc., 495 F. App'x 651, 655 (6th Cir. 2012)). Establishing a *prima facie* case of retaliation requires that a plaintiff establish that "(1) [s]he engaged in activity protected by Title VII; (2) [her] 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." Jones v. Johanns, 264 F. App'x 463, 466 (6th Cir. 2007) (citing Abbott v. Crown Motor Co., Inc., 348 F.3d 537, 542 (6th Cir. 2003)). The third prong is slightly different than in the sex discrimination context, in that it "is not limited to an employer's actions that solely affect the terms, conditions or status of employment[,]" but instead seeks to "protect[] employees from conduct that would have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 345 (6th Cir. 2008) (quoting Burlington N., 548 U.S. at 68). The fourth prong requires showing "but-for" causation by offering "proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or

actions of the employer." Laster, 746 F.3d at 731 (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013)).

The "protected activity" that Williams is alleging varies depending on which of her filings is considered, but in her Response she states that "Plaintiff engaged in protected activity of filing grievances, filing complaints, filing multiple EEOC charges, reaching out to her Union, and engaging in protected FMLA activity twice due to her on-the-job injury while in the scope of her employment at Kellogg." (ECF No. 34 at 17-18.) Of the activities listed, only one is protected by Title VII under the facts of this case: filing her EEOC charges.[4] Niswander v. Cincinnati Ins. Co., 529 F.3d 714, 720 (6th Cir. 2008). Kellogg does not contest that Williams filed multiple EEOC charges while employed at the plant. (ECF No. 32-1 at PageID 224.)

As discussed above, Williams filed a total of three EEOC Charges. The present case is based on the right to sue letter received from the EEOC as a result of Charge 2, which was filed on March 13, 2020, shortly after Williams was suspended but *before*

[4]Filing grievances and complaints about unlawful discrimination in the workplace can be protected activity under Title VII, but Williams does not claim that any of her prior complaints, grievances, or labor disputes involved claims of discrimination. Batuyong v. Gates, 337 F. App'x 451, 456 (6th Cir. 2009) (noting that "work grievances [are] not protected activity unless related to discrimination") (citing Kodl v. Bd. of Educ., Sch. Dist. 45, Villa Park, 490 F.3d 558, 563 (7th Cir. 2007)).

she was terminated. (ECF No. 35 at PageID 550.) Charge 2 claims that Williams's "suspension and denied day off were motivated by sex discrimination and retaliation for making Charge #1." (Id.) A right to sue letter was issued for Charge 2 on February 25, 2021. (ECF No. 1-2 at PageID 16.) Due to the multiple charges, and the present suit being based solely on the right to sue letter from Charge 2, Kellogg argues that some of Williams's claims, specifically those relating to her termination, are procedurally barred.

1. Administrative Exhaustion

Kellogg argues that at the time Williams filed the present suit, she had not yet received a right to sue letter from the EEOC regarding the claims made in Charge 3, which related to her termination, and that she thus never administratively exhausted retaliation claims premised on her termination. Compare (ECF No. 1) (complaint filed on May 11, 2021) with (ECF No. 32-4 at PageID 435) (right to sue letter for Charge 3 issued November 17, 2021). Indeed, under Kellogg's theory, those claims would now be time-barred due to Williams's failure to bring a separate lawsuit premised on Charge 3.

Title VII claimants must exhaust their administrative remedies before bringing a lawsuit. Weigel v. Baptist Hosp. of E. Tenn., 302 F.3d 367, 379 (6th Cir. 2002) (citing Strouss v. Mich.

Dep't of Corr., 250 F.3d 336, 342 (6th Cir. 2001)). This is typically done by filing a charge of discrimination with the EEOC, which "gives notice [to] the alleged wrongdoer of its potential liability and enables the EEOC to initiate conciliation procedures in an attempt to avoid litigation." Dixon v. Aschroft, 392 F.3d 212, 217 (6th Cir. 2004). However, "a plaintiff may fully exhaust her administrative remedies on a claim even if the claim was not actually investigated by the EEOC, or specifically stated in the charge[,]" provided that the unstated or uncharged claims are "within the scope of the EEOC investigation [that is] reasonably expected to grow out of the charge of discrimination." Scott v. Eastman Chemical Co., 275 F. App'x 466, 471 (6th Cir. 2008) (citing Dixon, 392 F.3d at 217). Specifically, "an employee is not required to file a separate EEOC charge alleging retaliation when the retaliation occurs in response to the filing of the original EEOC charge." Gawley v. Indiana Univ., 276 F.3d 301, 314 n.8 (7th Cir. 2001).

The multiple EEOC charges in this case present a complex problem. Strictly speaking, Charge 2, which this suit is based on, only mentioned sex discrimination claims and retaliation through suspension (and denial of a day of unpaid leave) for filing Charge 1. Kellogg argues that any retaliation claims Williams could bring based on her termination would have to be contained in Charge 3,

and thus barred from being considered by the court due to Williams's failure to administratively exhaust them. However, the exhaustion requirement "is not meant to be overly rigid, nor should it result in the restriction of subsequent complaints based on procedural technicalities[.]" Randolph v. Ohio Dep't of Youth Servs., 453 F.3d 724, 732 (6th Cir. 2006) (quoting E.E.O.C. v. McCall Printing Co., 633 F.2d 1232, 1235 (6th Cir. 1980)). Williams's termination directly followed her suspension, which itself was premised on discipline that Williams consistently alleges is due to filing EEOC charges. In Charge 2, Williams states that she was "suspended pending *investigation and discharge*." (ECF No. 32-4 at PageID 411) (emphasis added). Her termination could be said to reasonably grow out of the charge of discrimination that underlies this complaint, as the EEOC was on notice of the possibility and because the termination was not premised on a different disciplinary incident than the one Williams listed in Charge 2. Accepting Kellogg's argument would have required Williams to "file multiple charges and/or multiple lawsuits with overlapping evidence and issues," which this "pragmatic rule" seeks to avoid. Spellman v. Seymour Tubing, Inc., No. 4:06-cv-0013-DFH-WGH, 2007 WL 1141961, at *1 (S.D. Ind. Apr. 12, 2007) (citing Malhotra v. Cotter & Co., 885 F.2d 1305, 1312 (7th Cir. 1989)). Kellogg was on notice that the EEOC was investigating them

for their discipline of Williams, and by the time Williams received her right to sue letter from Charge 2, the disciplinary process had run its course and resulted in her termination. Although a close case, the undersigned finds the retaliation claims regarding her termination were administratively exhausted.[5]

2. *Prima Facie* Case

Williams clearly meets the first three elements of a *prima facie* case of retaliation: she engaged in a protected activity, that activity was known to Kellogg, and Kellogg took a materially adverse action against her. The last element requires Williams to show that there is a genuine issue of material fact over whether her discipline, suspension, and termination would not have occurred but for her protected activity, namely, filing EEOC Charges 1 and 2. E.E.O.C. v. New Breed Logistics, 783 F.3d 1057, 1066 (6th Cir. 2015).

Williams does not point to any evidence to create a genuine issue of material fact regarding but-for causation. Williams's suspension for walking off the line and denial of one day of unpaid

[5]The administrative exhaustion and charge filing requirement has been found to be non-jurisdictional, and thus can be waived. Fort Bend Cty., Texas v. Davis, 139 S. Ct. 1843, 1850-51 (2019). By not raising the argument that Williams failed to exhaust her sex discrimination claims regarding her termination, Kellogg has waived that argument, and thus the court's consideration of those claims in § II.C.2 above is proper.

leave came nine months after she filed Charge 1 and *before* she filed Charge 2.[6] Regarding Charge 1, while temporal proximity can sometimes establish causation independently, a nine-month gap between protected activity and alleged retaliation is insufficient to establish causation, absent other supporting evidence. George v. Youngstown State Univ., 966 F.3d 446, 460 (6th Cir. 2020); see also Vereecke v. Huron Valley Sch. Dist., 609 F.3d 392, 400-01 (6th Cir. 2010) (holding that "[e]xtremely close temporal proximity could permit an inference of retaliatory motive," but noting that "often evidence in addition to temporal proximity is required to permit the inference.") (citing Randolph, 453 F.3d at 737 (finding a four-month gap between protected activity and alleged retaliation insufficient to establish causation on its own)); Leavy v. FedEx Corp., No. 19-cv-2705-JTF-tmp, 2021 WL 4171454, at *9 (W.D. Tenn. Feb. 18, 2021). To the extent Williams argues that her termination was retaliation for filing Charge 1, that termination did not occur until fifteen months after Charge 1 was filed, making the temporal proximity argument even more tenuous. (ECF No. 35 at PageID 549.) Williams does not provide any

[6]Solely for the purpose of examining the retaliation claim, the undersigned will assume without deciding that Williams's denial of one day of unpaid leave could have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Hawkins, 517 F.3d at 345.

other supporting evidence beyond stating that she believes the action was retaliatory. Filing Charge 2 also could not have caused Williams's suspension or denial of leave since it was filed afterwards. Thus, the only remaining retaliatory claim is that Williams was *fired* in retaliation for filing Charge 2.

Charge 2 was filed six months before Williams's ultimate termination, and temporal proximity alone cannot establish causation. However, a larger problem exists regarding this theory: Williams's termination was the result of a process that began before she filed Charge 2. Williams was initially suspended on March 5, 2020. (ECF No. 35 at PageID 544.) Kellogg then negotiated a Settlement Agreement with the Union regarding these issues on March 11, 2020, which Williams never executed. (Id. at PageID 546.) When Williams failed to execute the Agreement, Kellogg placed her "back on investigatory suspension." (ECF No. 32-4 at PageID 419.) Kellogg offered a new, modified settlement agreement at that time as well, but noted that they would "schedule a suspension hearing as provided for in the Plant's Work Rules" if Williams did not sign that agreement. (Id.) Thus, Kellogg had initiated the investigation and disciplinary process against Williams before Charge 2 was filed, and only interrupted that process during the brief period where it seemed that Williams might sign the Settlement Agreement. As the Supreme Court and Sixth Circuit have

stated, "'an employer proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality,' but where an employer deviates from those lines, temporal proximity can certainly be evidence of causality." Montell v. Diversified Clinical Servs., Inc., 757 F.3d 497, 507 (6th Cir. 2014) (quoting Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 272 (2001)). In other words, Williams would need to show that her filing of Charge 2 caused Kellogg to deviate from their "previously contemplated" course of action, in order to use temporal proximity as evidence of causation. But she has failed to make this showing. Kellogg let Williams return to work after she filed Charge 2, and only placed her back on suspension when she did not sign the settlement agreement that was negotiated before Charge 2 was filed. There is no evidence that Charge 2 affected that process at all. Beyond temporal proximity, Williams points to no evidence that her termination was retaliatory, again beyond merely stating that she believes it was.

While Williams makes the above arguments, they are not the focus of her brief. She instead focuses on the idea that she was retaliated against for failing to *waive* the EEOC charges, as required by both settlement agreements that Kellogg proposed regarding her discipline. However, Williams does not point to any authority to support the idea that rejecting a settlement agreement

is protected activity under Title VII. See Jackson v. Baxter Int'l, Inc., No. 1:06CV2802, 2007 WL 4510258, at *5 (N.D. Ohio Dec. 18, 2007) (making and withdrawing settlement demands are not protected activities under Title VII) (citing Lentz v. City of Cleveland, 410 F. Supp. 2d 673, 693 n.9 (N.D. Ohio 2006)). Kellogg sought to settle the outstanding claims Williams had against them, which would logically *require* withdrawing outstanding EEOC charges. Without such a provision, Williams's claims would still be active, not settled. Further, as Kellogg notes, "[w]hen Kellogg and the Union reached agreement on March 11, 2020, Plaintiff had no EEOC Charge pending; the EEOC had issued its Right to Sue Notice almost nine months earlier[.]" (ECF No. 32-1 at PageID 226.) The second settlement agreement came after Williams had filed Charge 2, but the fact that the same language regarding withdrawing charges was included in the original agreement demonstrates that "waiver provisions are a standard term of settlement of an employee's discipline, regardless of whether she has or has not filed an agency charge," rather than an attempt at retaliation. (Id.) The facts Williams cites do not give rise to a *prima facie* case of Title VII retaliation.

E. Pretext

Even if Williams could establish a *prima facie* case for her discrimination or retaliation claims, those claims would

nevertheless fail. Once such a case is established, "the burden shifts to the defendant to offer evidence of a legitimate, non-discriminatory reason for the adverse employment action." White, 533 F.3d at 391. If the defendant can do so, then a plaintiff must "show that the defendant's proffered reason was not its true reason, but merely a pretext for discrimination." Id. In the summary judgment context, this would require Williams to "produce sufficient evidence from which the jury may reasonably reject the employer's explanation." Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1083 (6th Cir. 1994); see also Mickey v. Zeidler Tool and Die Co., 516 F.3d 516, 526 (6th Cir. 2008). This can be done by demonstrating one of the following: "(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the employer's action, or (3) that they were insufficient to motivate the employer's action." Chen v. Dow Chemical Co., 580 F.3d 394, 400 (6th Cir. 2009) (citing Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 460 (6th Cir. 2004)). Kellogg has provided a non-discriminatory reason for their actions: that Williams walked off the line without getting permission from her supervisor.

Williams does not dispute that this is factually true, but instead disputes the definition of "walk off" and attempts to show that her behavior did not actually motivate Kellogg's decision and

was insufficient to lead to her suspension and termination.[7] However, she points to no evidence in the record that support her theories. Indeed, "apart from her own testimony, [Williams] fails to adduce any evidence that [s]he was fired for a reason other than" the reason Kellogg offered. Abdulnour v. Campbell Soup Supply Co., LLC, 502 F.3d 496, 504 (6th Cir. 2007) (noting that summary judgment is appropriate where the plaintiff only creates "a weak issue of fact as to whether the defendant's reason was untrue" and there is "ample evidence to support the employer's position"). Kellogg has provided readouts showing that production stalled when Williams admittedly walked away from the line, (ECF No. 32-6 at PageID 471-80), multiple sworn declarations from employees and management supporting their disciplinary rationale, (ECF Nos. 32-5, 32-6), and copies of the policy showing that walking away from the line without supervisor permission is a violation that may lead to termination. (ECF No. 32-4 at PageID 347-51.) Williams has failed to create a genuine issue of material fact regarding Kellogg's motivations.

III. RECOMMENDATION

[7]Williams *does* dispute the circumstances regarding how she left the area of her line, but not that she left the line area without getting permission from her supervisor.

Based on the above, the undersigned recommends that the Motion for Summary Judgment be granted.

Respectfully submitted,

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

July 20, 2022
Date

NOTICE

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