IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NAKIRI CISERO, **Plaintiff,** **v.** **ADT LLC OF DELAWARE,** **Defendant.**	**CIVIL ACTION FILE NO.** **1:19-cv-04319-SDG-CMS**

FINAL REPORT AND RECOMMENDATION

This case is before the Court on the motion for summary judgment filed by the defendant, ADT LLC of Delaware ("Defendant" or "ADT"). [Doc. 54].

Plaintiff worked for Defendant ADT as a Commercial Security Consultant from July 17, 2017 until she was terminated nine months later on April 11, 2018. Plaintiff's complaint alleges that ADT unlawfully discriminated and retaliated against her on the basis of her race (African American) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII") (Counts I and III), and in violation of 42 U.S.C. § 1981 ("Section 1981") (Counts II and IV).[1]

[1] Plaintiff filed her original complaint in this case on September 25, 2019. [Doc. 1]. On December 9, 2019, Plaintiff filed an amended complaint [Doc. 19], with Defendant's permission, for the sole purpose of amending the style of the case to conform with the proper name of the defendant as identified in the parties' Joint Preliminary Report and Discovery Plan [Doc. 13]. The one-page amended complaint adopts and incorporates the allegations of Plaintiff's original complaint as if fully

Defendant's motion for summary judgment has been fully briefed and is before the undersigned U.S. Magistrate Judge for a Report and Recommendation.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there is no genuine dispute as to any material fact such that the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(a); *Ezell v. Wynn*, 802 F.3d 1217, 1222 (11th Cir. 2015). The moving party bears the initial burden of showing the court "the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact" and "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 325 (1986); *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437-38 (11th Cir. 1991) (en banc). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the moving party fails to discharge this initial burden, the motion must be denied. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 (11th Cir. 1993).

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restated therein. Accordingly, for purposes of this Report and Recommendation, to the extent reference is made to allegations in Plaintiff's complaint, the citation will be to Plaintiff's original complaint, as amended (hereinafter, collectively, Doc. 1, "Complaint").

If the burden is met, however, the non-moving party must then "go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp.*, 477 U.S. at 324 (citation omitted). "A 'mere scintilla' of evidence is insufficient; the non-moving party must produce substantial evidence in order to defeat a motion for summary judgment." *Garczynski v. Bradshaw*, 573 F.3d 1158, 1165 (11th Cir. 2009) (citation omitted). Mere conclusions and factual allegations unsupported by evidence are insufficient to survive a motion for summary judgment. *See Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005). "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment." *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992) (citation omitted).

It is not the Court's function to scour the record in search of evidence to defeat a motion for summary judgment. Instead, the Court relies on the nonmoving party to identify the evidence which creates an issue of triable fact. *See* FED. R. CIV. P. 56(c)(1)-(3); *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). Resolving all doubts in favor of the nonmoving party, the Court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

All reasonable inferences will be made in Plaintiff's favor. *Duke v. Cleland*, 5 F.3d 1399, 1402 (11th Cir. 1993).

II. FACTS

In light of the foregoing summary judgment standard, the Court finds the following facts for the purpose of resolving ADT's motion for summary judgment only.

ADT provides residential and commercial security, fire protection, and other related alarm-monitoring services throughout the United States. [Doc. 55-14, Declaration of Doug Ortlund ("Ortlund Decl."), ¶ 3]. Plaintiff began working for ADT in its Norcross, Georgia office as a Commercial Security Consultant ("CSC") on July 17, 2017. [Doc. 56, Def.'s Stmt. of Mat. Facts ("DSMF"), ¶ 1; Ortlund Decl. ¶ 6]. Plaintiff was initially interviewed and hired by Doug Ortlund (Caucasian), ADT's Commercial Sales Manager, and Ortlund's general manager, Mike Woodrow (Caucasian). [DSMF ¶ 2]. Once hired, Plaintiff spent the first several months in training. [Doc. 55-1, Deposition of Nakiri Cisero ("Pl.'s Dep."), Volume I, at 113].[2] At all relevant times, Ortlund was Plaintiff's direct supervisor. [DSMF ¶ 2]. During Plaintiff's tenure with ADT, Ortlund supervised a fluctuating group of six to ten CSCs

[2] Unless otherwise indicated, citations to record evidence are to the CM/ECF electronic header at the top of the referenced page, but citations to depositions are to the actual page of the hardcopy transcript.

in three different regions; two CSCs worked in Greenville, South Carolina, one worked in Asheville, North Carolina, and the remaining CSCs were based in Northeast Georgia, where Plaintiff worked. [Doc. 59, Pl.'s Stmt. of Add'l Mat. Facts ("PSAF"), at 4 ¶ 1]. Although Plaintiff was the only African-American CSC based in the Northeast Georgia area, she was not the only African-American CSC that Ortlund supervised during Plaintiff's tenure with ADT. [DSMF ¶ 29; PSAF ¶ 2].

As a CSC, Plaintiff was responsible for generating her own leads as well as working leads assigned to her by Ortlund, and she was paid both a salary and commissions. [DSMF ¶ 3; Pl.'s Dep. at 128]. After receiving and/or self-generating a lead, the first step in ADT's sales cycle is for the CSC to set up an appointment to visit the customer for a needs-assessment and to gather information needed for the design/proposal, which can include measuring the building, taking pictures, and obtaining floor plans. [Pl.'s Dep. at 122–23]. Next, the CSC creates the design, which must be approved by Ortlund and the operations manager before the proposal is sent to the customer. [*Id.* at 123; Doc. 55-9, Deposition of Doug Ortlund ("Ortlund Dep."), at 46–47, 49; Doc. 55-11, Deposition of Audrey Courseault ("Courseault Dep."), at 128]. Before the design is approved, the CSC generally performs a walk-through of the customer site with the operations manager. [Ortlund Dep. at 58, 60–61]. The CSCs used a program called SalesPilot to track the status of their leads,

and Ortlund monitored the status of his CSCs' leads by checking SalesPilot and meeting with the various CSCs that he supervised. [Pl.'s Dep. at 116–17, 126–27; Ortlund Dep. at 50–51].

Pursuant to ADT's customary policies and sales compensation plan for CSCs, including Plaintiff, sales commissions at times were split between CSCs if more than one CSC was assigned a lead and/or worked on a project. [DSMF ¶ 4; Doc. 55-5 at 16; Pl.'s Dep. at 139]. It is undisputed that all the CSCs in Plaintiff's office were at times required to split leads and/or commissions. [DSMF ¶ 28; Ortlund Decl. ¶¶ 16–18; Doc. 55-13, Deposition of Michael James Woodrow ("Woodrow Dep."), at 61–62; Courseault Dep. at 74, 92, 145–46].

From almost the outset of Plaintiff's employment, Plaintiff became concerned that Ortlund was trying to sabotage her income potential by bringing in other CSCs on her projects at the last minute, thus necessitating a split of the commissions that Plaintiff believed should have been hers alone. [Pl.'s Dep. at 140–42; Ortlund Dep. at 63]. Plaintiff spoke with Mike Grissam, a Caucasian male CSC who started with ADT around the same time as Plaintiff, to inquire about what was happening with him. Plaintiff learned that the jobs he worked on that involved a split commission had been assigned that way from the outset, thereby allowing the CSCs to share in the

work for the customer with knowledge from the beginning that they would likewise be sharing in the commission. [Pl.'s Dep. at 139–40, 211].

On December 6, 2017, Plaintiff submitted a complaint to ADT's ethics hotline and sent an email to Ortlund and Woodrow to report four situations over the prior sixty days where she believed her sales were either improperly taken away from her by Ortlund or unfairly split with another employee. [DSMF ¶ 5; Pl.'s Dep. at 147–49; Doc. 55-5 at 20–22 (Pl.'s Dep. Ex. 10)]. Woodrow responded to Plaintiff's email the same day and copied HR Manager Audrey Courseault. [Doc. 55-5 at 25].

All four jobs at issue—Kids R Kids, Lowers Risk Group, Sac Wireless, and Roof Depot—were leads that Ortlund had assigned to Plaintiff during the first few months of her employment. [Pl.'s Dep. at 149, 154–55, 161, 165].

Among the four jobs, there was only one instance where Ortlund was the person who required Plaintiff to split a lead (Kids R Kids), and that job ultimately never sold. [DSMF ¶ 7]. At his deposition, Ortlund testified that for the Kids R Kids lead, Ortlund paired Plaintiff with an experienced CSC because Plaintiff was new to the CSC role, and it was a large and complex job. [DSMF ¶ 8]. According to ADT, it is common for CSCs to split leads on large or complex jobs, particularly when the CSC is new. [DSMF ¶ 9; Woodrow Dep. at 62]. Ortlund was not responsible for making the decision to split the other three jobs. [DSMF ¶ 10].

The undisputed evidence shows that for the Lowers Risk project, Ortlund fought to secure a 100% commission for Plaintiff. According to Ortlund's declaration, Plaintiff ultimately shared commissions with a CSC in Virginia because Lowers Risk was an existing customer who had reached out to the Virginia CSC first. [DSMF ¶ 11; Pl's Dep. at 158–59; Ortlund Decl. ¶¶ 26–34; Doc. 55-14 at 14]. The decision to split commissions was not made by Ortlund.

With Sac Wireless, Ortlund initially assigned the lead to Plaintiff, but ADT's Small Business Sales Manager later brought one of her salespersons, Kathy Rush, in on the deal based on a customer request, without Ortlund's involvement. The job never sold, so no one earned any commissions on the job. [DSMF ¶ 12; Ortlund Dep. at 79; Ortlund Decl. ¶¶ 20–22; Pl.'s Dep. at 164].

As to Roof Depot, the undisputed evidence shows that the customer complained to ADT that Plaintiff was pushy and the customer did not want to deal with Plaintiff moving forward. Ortlund completed the sale for ADT, but gave Plaintiff 100% of the commission. [Pl.'s Dep. at 165–66; Doc. 55-14 at 59]. An ADT Small Business CSC received the commission for a second building project for Roof Depot. It is undisputed that Plaintiff did not get the commission because the building fell under "Small Business" rather than "Commercial," and because the initial lead originated with the other CSC. [Ortlund Dep. at 82].

In Plaintiff's December 2017 ethics hotline complaint and email to Ortlund and Woodrow, Plaintiff did not complain of race discrimination or accuse Ortlund or anyone at ADT of race discrimination. [DSMF ¶ 14]. Rather, Plaintiff's complaints were limited to the way Ortlund was allegedly taking sales away from Plaintiff and making her split sales commissions with other sales representatives without discussing it with Plaintiff first. [Doc. 55-5 at 20].

In response to Plaintiff's ethics complaint, HR representative Audrey Courseault met with Plaintiff in December 2017 and again in January 2018 in person and by telephone to discuss Plaintiff's concerns. The meetings were sometimes joined by Ortlund and/or Woodrow. [DSMF ¶ 15]. Courseault is African American. [*Id.*]. When Courseault completed her investigation in early January 2018, she concluded that Plaintiff's concerns were unfounded, but noted in her report that Plaintiff was "not accepting of the resolutions." [DSMF ¶ 16]. Courseault wrote that Plaintiff "doesn't understand that there are circumstances where a job split is reasonable if more than one representative worked on a particular job or if a customer requested follow up by another rep or the manager to complete the job. It is recommended that the commercial sales manager [Ortlund] open the lines of communication with [Plaintiff] so that she better understands the business." [Doc. 55-5 at 21]. It is undisputed that Courseault's report referenced multiple customer and internal

employee complaints about Plaintiff, including complaints about Plaintiff's "aggressiveness" and "inability to work well with her co-workers." [DSMF ¶ 17; Doc. 55-5 at 21; Doc. 55-12 at 1–3]. Courseault discussed the complaints with Plaintiff, but did not issue Plaintiff any written discipline at that time. [Doc. 55-7, Vol. II, Pl.'s Dep., at 342–43 (Doc. 55-7 at 80); Courseault Dep. at 144–45]. Instead, based "on the number of complaints from customers that [Plaintiff had] received and her inability to work well with her co-workers," Courseault recommended that Ortlund have a coaching session with Plaintiff. [Doc. 55-5 at 21].

On January 28, 2018, following Plaintiff's most recent meeting with Courseault, Plaintiff sent an email to Courseault complaining of more incidents that Plaintiff contended constituted interference with her sales efforts, in addition to the four she had complained about in December. [Doc. 55-5 at 34–35]. The additional incidents included calls to a customer from "Anne" with ADT who was reportedly trying to solicit negative feedback about Plaintiff, and a customer report to Plaintiff that Ortlund and operations manager Brooks Rhodes had visited one of Plaintiff's customers without notifying her or requesting an appointment from the customer. [*Id.* at 34]. Plaintiff's email stated that she had retained an attorney because she believed she was repeatedly receiving discriminatory treatment based on her ethnicity/race. And, among other things, Plaintiff accused her supervisor, Doug Ortlund, and

operations managers Anne Murphy and Brooks Rhodes of "singling her out" and treating her differently than the other members of her sales team. [*Id.* at 35].

Courseault testified that in her view, the concerns that Plaintiff reported on January 28, 2018 were largely the same as what she had complained about in her December 2017 ethics hotline complaint relating to the four jobs—i.e., interfering with Plaintiff's sales efforts, treating her unfairly, splitting leads and/or sharing commissions with other CSCs, and not understanding ADT's sales processes or how the split commissions worked. [Courseault Dep. at 65–66, 70–73, 90, 106–08, 148–49]. Courseault testified that she concluded that the email did not warrant a separate investigation. [*Id.* at 72–73]. Throughout the remainder of Plaintiff's tenure with ADT, Plaintiff continued to raise similar concerns of discriminatory treatment. [DSMF ¶ 20].

On February 6, 2018, Plaintiff filed the first of three charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"). [Doc. 1-1 at 2]. In her first charge, Plaintiff alleged that her manager, Doug Ortlund, who is white, was interfering with her sales by either taking over the sales process, or assigning her sales to a counterpart and sabotaging her work, without any explanation or discussion with her. [*Id.*]. She further alleged that she was the only black employee in her department, and she believed she was being discriminated against due to her race.

[*Id.*]. Plaintiff told Ortlund and Courseault that she either had filed or was planning to file an EEOC charge and would provide them with a copy; it is undisputed, however, that she never provided them with a copy, and that ADT did not receive a copy of that charge—or the two charges she filed later—until after Plaintiff was terminated. [DSMF ¶ 21; Courseault Dep. at 104; PSAF ¶ 4].

Despite not receiving a copy of Plaintiff's February 2018 EEOC charge, Courseault continued to communicate with Plaintiff to discuss her concerns, and Courseault also spoke with Ortlund and Woodrow regarding Plaintiff's ongoing issues. [DSMF ¶ 22; Courseault Dep. at 146–48].

On February 23, 2018, after consultation with Courseault and Woodrow, Doug Ortlund issued Plaintiff a Final Written Warning describing a continuing pattern of behavioral issues, including Plaintiff's argumentative and unprofessional demeanor with customers and managers, issues with customers and installers,[3] failure to submit

[3] One of the customer complaints came from a longtime ADT client, Turbo Air. [PSAF ¶ 9; Doc. 55-14 at 56–57]. Turbo Air raised numerous complaints about Plaintiff, including, among others, that: (1) Plaintiff was unprofessional when responding to customer questions; (2) she failed to apologize for missing calls and had an unprofessional attitude; (3) she was dishonest about the customer's request to use its own forklift to save money; and (4) it seemed like Plaintiff was "trying to take advantage" of Turbo Air. Turbo Air's representative told ADT that they were "strongly offended" and "agitated" by Plaintiff's unprofessional conduct. [Doc. 55-14 at 56; Ortlund Decl. ¶ 43]. The customer also complained that the installer failed to adequately explain what he was doing, and repeatedly failed to fix issues. Unlike Plaintiff, however, the installer (who was Caucasian) was never disciplined by ADT

jobs for final approval from Operations, inadequate communication with management, and disregard of her management's directives.[4] [Doc. 55-6 at 21–22; Courseault Dep. at 69, 102, 112, 152–53; Ortlund Decl. ¶¶ 40–45; Doc. 55-14 (Ex. F)]. Prior to February 23, Plaintiff had never received a written warning of any kind, and thus the "Final" warning was actually Plaintiff's first written warning. [PSAF ¶ 7]. The Final Written Warning described areas of improvement that were needed, and provided specific tasks that Plaintiff needed to complete in order to improve the process flow and communications with management for the jobs for which Plaintiff was preparing proposals. [Doc. 55-6 at 21]. In the Employee Comments section of the Final Written Warning, Plaintiff wrote, "I haven't not [sic] received leads in almost 30 days. I am [sic] consistently have been treated differently from the rest of my team. I know that

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for the complaint. [Doc. 55-14 at 56–57; PSAF ¶ 9].

[4] Although ADT has a progressive discipline policy and procedure, Courseault testified that ADT normally follows progressive discipline only for pure performance issues, and that behavioral issues, like Plaintiff's, generally fall outside of ADT's progressive discipline policy and often warrant a final warning or immediate termination. [Courseault Dep. at 52, 54, 100]. Ortlund explained that because the customer complaints that he had received "needed to be addressed quickly," that Plaintiff was issued a Final Written Warning instead of being placed on a performance improvement plan, or PIP. [Doc. 55-10, Vol. II, Ortlund Dep., at 112–13; PSAF ¶ 8; Ortlund Decl. ¶ 37; Doc. 55-14 at 16–17 (Ex. C)]. Ortlund testified that he prepared the Final Written Warning sometime during the week prior to meeting with Plaintiff on February 23, 2018. [Ortlund Dep. at 129; PSAF ¶ 10].

I am being discriminated against. I do not agree with the entirety of this writeup."[5] [*Id.*].

On March 7, 2018, Plaintiff filed a second charge of discrimination with the EEOC, and added a claim for retaliation in light of the February 23, 2018 Final Written Warning that had been issued. [Doc. 1-2 at 2].

Following the issuance of the Final Written Warning, Ortlund continued to monitor Plaintiff's performance via conversations, emails, team meetings, and telephone calls. [Doc. 55-10, Vol. II, Ortlund Dep., at 126–27; Doc. 55-7, Vol. II, Pl.'s Dep., at 347–48; Courseault Dep. at 51].

The evidence shows that after issuing the Final Written Warning, Ortlund documented continuing problems, such as Plaintiff submitting jobs without approval, not requesting site visits, failing to communicate on key items, continuing issues with customers, arguing with employees and managers over policies and processes, not

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[5] The evidence shows that Ortlund assigned Plaintiff leads on January 3 and 23; February 23 and 28; and March 6, 15, 23, and 26, 2018. [DSMF ¶ 30]. Ortlund acknowledged in his deposition that, as he has done with other CSCs who were not getting through the processes, not finishing jobs, not updating leads, and not completing the work that they already had in their funnel, he did slow down Plaintiff's leads because she was not processing her existing leads and not completing her existing work. [Ortlund Dep. at 135]. Ortlund testified that Plaintiff had also requested that she not receive any leads that would require her to split commissions or work with any other CSC, which Ortlund told Plaintiff really limited almost all leads, to which she responded, "That's fine." [*Id.*].

making timely updates in SalesPilot, and being late to and/or missing calls and meetings. [Doc. 55-14, Ortlund Decl., ¶¶ 30–34, 39, 45; Doc. 55-14 at 12–14 (Ex. B), 20–52 (Ex. E)]. Ortlund, Woodrow, and Courseault began to have discussions in late March or early April about terminating Plaintiff's employment due to her continuing failure to follow the required sales process, her failure to communicate properly, and her failure to show up on time to meetings and for phone calls with Ortlund. [Doc. 55-10, Vol. II, Ortlund Dep., at 151–54, 156; PSAF ¶ 14].

On April 11, 2018, ADT terminated Plaintiff's employment. [DSMF ¶ 26]. According to Ortlund, Plaintiff was terminated for, among other things, failing to follow sales processes, failing to improve her communications with management, missing meetings, skipping steps, and submitting jobs multiple times without approval. [Doc. 55-10, Vol. II, Ortlund Dep., at 159, 163]. Ortlund, Woodrow, and Courseault were all involved in the termination decision. [Ortlund Dep. at 151–52; Woodrow Dep. at 43–45].

Plaintiff, however, was not the only CSC that Ortlund ever terminated for performance and/or conduct issues. Ortlund terminated two white CSCs for performance and/or conduct issues, neither of whom ever engaged in protected activity or made complaints of discrimination or other unlawful activity. [Ortlund Decl. ¶¶ 35–36].

Following Plaintiff's termination, she filed a third EEOC charge of discrimination, alleging discrimination on the basis of race and retaliation for engaging in protected activity, in violation of Title VII. [Doc. 1-3 at 2].

On June 27, 2019, the EEOC issued a notice of dismissal and right-to-sue letter, stating that based upon its investigation, the EEOC was unable to conclude that the information obtained established violations of Title VII. [Doc. 1-4 at 2].

On September 25, 2019, Plaintiff filed her original complaint in this Court, alleging claims for race discrimination and retaliation, in violation of Title VII and Section 1981.[6] [Doc. 1, Compl.]. As noted earlier, Plaintiff amended her complaint in December 2019 to correct the name of the ADT entity that employed her. [Doc. 19, Am. Compl.].

III. PLAINTIFF'S RACE DISCRIMINATION CLAIMS

In Counts I and II of her Complaint, Plaintiff asserts claims pursuant to Title VII and Section 1981, alleging that she was discriminated against on the basis of her race when Ortlund interfered with her sales by: (1) reassigning her leads to non-African-American counterparts; (2) taking over or removing leads generated or

[6] This is the third employment discrimination lawsuit that Plaintiff has filed against an employer in the last eleven years in which she has alleged these same types of claims. [Pl.'s Dep. at 17–25].

managed by Plaintiff at the last minute; and/or (3) requiring her to split leads with other CSCs, resulting in shared commissions. [Compl. ¶¶ 18–20, 36].

Title VII prohibits employment discrimination with respect to an employee's compensation, terms, conditions, or privileges of employment, because of the individual's race. 42 U.S.C. § 2000e-2(a)(1). Section 1981 protects individuals from racial discrimination during the making of contracts and creates a federal right of action. *Webster v. Fulton County, Ga.*, 283 F.3d 1254, 1256 (11th Cir. 2002); 42 U.S.C. § 1981(a). Plaintiff's claims under Title VII and Section 1981 require proof of discriminatory intent. *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 767–68 (11th Cir. 2005). Race discrimination claims pursuant to Section 1981 utilize the same standard of proof and same analytical framework as claims under Title VII, and thus may be addressed together. *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008) (noting that the standards governing Title VII race discrimination claims apply equally to Section 1981 race discrimination claims); *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998); *Sledge v. Goodyear Dunlop Tires N. Am, Ltd.*, 275 F.3d 1014, 1015 n.1 (11th Cir. 2001) (noting the same *McDonnell Douglas* prima facie case and burden-shifting mechanisms apply to Title VII and Section 1981 discrimination claims).

To prevail on Plaintiff's Title VII and Section 1981 race discrimination claims, Plaintiff must prove that the defendant acted with discriminatory intent. *Hawkins v. Ceco Corp.*, 883 F.2d 977, 980-81 (11th Cir. 1989) (citing *Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525, 529 (11th Cir. 1983)). Such discriminatory intent may be established either by providing direct evidence of discrimination or by showing circumstantial evidence of discrimination. Where, as here, there is no direct evidence, a claim of discrimination is proven by circumstantial evidence and is generally evaluated under the burden-shifting *McDonnell Douglas* framework. *E.E.O.C. v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1272 (11th Cir. 2002); *see also Rainey v. Holder*, 412 F. App'x 235, 237 (11th Cir. 2011).

Under *McDonnell Douglas*, the plaintiff must first establish a prima facie case of discrimination. Once the plaintiff employee has established a prima facie case, the burden shifts to the defendant employer to proffer a legitimate, nondiscriminatory reason behind the complained-of employment action. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981). If the employer proffers a legitimate, nondiscriminatory reason for the employment action, the burden shifts again to the employee to show that the employer's proffered reason is a pretext for a discriminatory motive. *Id.* at 256.

A plaintiff establishes a prima facie case of discrimination by showing that: (1) she belongs to a protected class; (2) she was qualified to do the job; (3) she was subjected to an adverse employment action; and (4) her employer treated similarly situated employees outside her class more favorably. *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008) (citing *Knight v. Baptist Hosp. of Miami, Inc.*, 330 F.3d 1313, 1316 (11th Cir. 2003) (per curiam)).

For purposes of Defendant's motion for summary judgment only, Defendant concedes that Plaintiff has satisfied the first two elements of her prima facie case—namely, she is African American, and she was qualified to do her job. Defendant argues, however, that Plaintiff cannot show that reassigning her leads to non-African-American counterparts, taking over or removing leads generated or managed by Plaintiff at the last minute, and/or requiring her to split leads with other CSCs were adverse employment actions. Nor can Plaintiff show that she was treated less favorably than any similarly-situated employee outside her protected class. The Court agrees.

The Eleventh Circuit has held that "[t]he most important factors in the disciplinary context . . . are the nature of the offenses committed and the nature of the punishment imposed." *Moore v. Alabama Dep't of Corrs.*, 137 F. App'x 235, 238 (11th Cir. 2005) (quoting *Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253, 1259

(11th Cir. 2001)). To make a comparison of Plaintiff's treatment to that of another employee outside of Plaintiff's protected category, Plaintiff must show that she and the other employee were "similarly situated in all material respects." *See Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1218 (11th Cir. 2019). As noted above, for purposes of establishing a prima facie case, it is necessary to consider whether the two employees were involved in, or accused of, the same or similar conduct but were disciplined in different ways. If the plaintiff fails to show the existence of a similarly-situated employee, summary judgment is appropriate where no other evidence of discrimination is present. *Holifield v. Reno*, 115 F.3d 1555, 1565 (11th Cir. 1997).

In cases such as Plaintiff's involving alleged race discrimination in the application of work rules to discipline an employee, the Eleventh Circuit has stated that the plaintiff must show either (a) that she did not violate the work rule, or (b) that she engaged in misconduct similar to that of a person outside the protected class, and that the disciplinary measures enforced against her were more severe than those enforced against the other person who engaged in similar misconduct. *Moore*, 137 F. App'x at 238 (citing *Jones v. Gerwens*, 874 F.2d 1534, 1540 (11th Cir. 1998)).

In this case, Plaintiff has failed to show that reassigning leads to non-African-American counterparts, taking over or removing leads generated or managed by Plaintiff at the last minute, and/or requiring Plaintiff to split leads and commissions

with other CSCs were adverse employment actions. [DSMF ¶ 4; Doc. 55-5 at 16; Pl.'s Dep. at 139]. "[N]ot all conduct by an employer negatively affecting an employee constitutes adverse employment action." *White v. Hall*, 389 F. App'x 956, 960 (11th Cir. 2010). To establish an adverse job action for Plaintiff's race discrimination claim, Plaintiff "must show a *serious and material* change in the terms, conditions, or privileges of employment." *Id.* (italics in original) (holding that more difficult assignments and negative performance evaluations were not adverse actions). Plaintiff has not disputed ADT's evidence that all the CSCs in Plaintiff's office had leads reassigned, were required to split leads, and were required to split commissions. [DSMF ¶ 28; Ortlund Decl. ¶¶ 16–18; Woodrow Dep. at 61–62; Courseault Dep. at 74, 92, 145–46]. The only job where Ortlund brought in another CSC to assist Plaintiff (and thereby theoretically reduce her commission) was the Kids R Kids project. But that project never sold, and no one earned any commissions on that job. As for the other jobs, the Sac Wireless job never sold or generated commissions. Plaintiff received a 100% commission on the Roof Depot project, even though Ortlund completed the sale. And Plaintiff split the lead and shared commissions with a CSC in Virginia on the Lowers Risk project, but the record is clear that Ortlund was not responsible for the decision to split Plaintiff's commission on that project, and that he tried to secure a 100% commission for Plaintiff, albeit without success.

Plaintiff has pointed to no evidence in the record to support her claim that a split-commission scenario constituted a departure from ADT's normal sales procedures or that, to the extent her commission was split, it was done so unfairly or for a discriminatory reason, or was in any way motivated by Plaintiff's race. In sum, apart from her own subjective testimony, Plaintiff has presented no probative evidence that the way Plaintiff was assigned leads by Ortlund had a serious and material effect on the terms and conditions of Plaintiff's employment.

For the same or similar reasons, Plaintiff has also failed to show that any proffered comparator is similarly situated in all material respects. Plaintiff argues that with regard to her Final Written Warning, she was treated less favorably than a coworker. Plaintiff, however, has failed to show that the written warning issued to Plaintiff was more severe than actions enforced against other persons who engaged in similar conduct or misconduct. *See Moore v. Ala. Dep't of Corrs.*, 137 F. App'x 235, 238 (11th Cir. 2005) (citing *Jones v. Gerwens*, 874 F.2d 1534, 1540 (11th Cir. 1998)). Plaintiff points to an installer who, like she, was the subject of complaints from Turbo Air (one of ADT's longtime clients), but unlike Plaintiff, the installer received no discipline for his actions. The installer, however, is not a proper comparator because the customer's concerns about the installer were largely related to his unacceptable work product, whereas the complaints about Plaintiff related to her

alleged unprofessional attitude, dishonesty, missing calls, evasive responses, and offensive demeanor rather than the quality of any installations she had designed or sold. [Doc. 55-14 at 56–57]. Plaintiff has presented no probative evidence to dispute the fact that these complaints were lodged against her. Moreover, it is undisputed that ADT received multiple internal and external complaints about Plaintiff's interactions with customers and coworkers, whereas there are no details in the record about the installer's prior work history or record of previous complaints. *See Hester v. Univ. of Ala.*, 798 F. App'x 453, 457 (11th Cir. 2020) (comparator not similarly situated when there were no details in the record about the comparator's alleged prior misconduct). Because the underlying issues, nature of the complaints, misconduct, job functions, and supervisors were different, the installer is not a proper comparator.[7] *See Lewis*, 918 F.3d at 1218.

Plaintiff next argues that she was the only African-American CSC in her office who reported to Ortlund, and the other CSCs in that office were not required to split leads and commissions in the same manner as Plaintiff. [Doc. 58 at 10]. However, the only evidence Plaintiff submits on this point is her own self-serving and conclusory testimony. As noted above, she has failed to cite or to provide any

[7] Ortlund testified that installers worked under the operations manager, who was Anne Murphy initially, and then Brooks Rhodes. [Ortlund Dep. at 47].

probative evidence that a single comparator, outside of her protected class, was treated more favorably than she with regard to leads and/or split commissions. *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999). Notably, Plaintiff was unable to name a single white CSC who did not have to split leads or share commissions during his or her employment under similar circumstances. [*See* Pl.'s Dep. at 212–13]. Moreover, it is undisputed that commission-sharing is a common occurrence at ADT and that other CSCs in Plaintiff's office, including Mike Grissam, were required to split commissions. [DSMF ¶¶ 4, 9, 28].

Instead, Plaintiff makes the conclusory, unsupported assertion that all of her white colleagues were treated better than she, and that no other CSC, including Mike Grissam (who started at ADT around the same time as she did), was required to split leads and commissions *in the same manner* as she—i.e., having another CSC inserted into the deal at the last minute after having completed most of the work, resulting in a split commission, rather than having the lead assigned to two CSCs at the very beginning. [Doc. 58 at 10, citing Pl.'s Dep. at 139–40, 211–12].

The evidence simply does not support Plaintiff's assertion. ADT has presented evidence that in January 2018, Grissam was required to share commissions with a CSC in another office on a sold job for Cooling & Winter LLC, and Ortlund was involved in making that decision. [Ortlund Decl. ¶ 18]. ADT also presented evidence

that Ortlund removed and reassigned a lead to another CSC after initially assigning it to Grissam, due to the other CSC's relationship with the customer. [*Id.* ¶ 19]. While Plaintiff has shown that on one occasion, Ortlund inserted another CSC at the end of a project that was assigned to Plaintiff, she has failed to articulate or show how the timing of that action constitutes race discrimination. Without providing further detail on how Plaintiff's situation differed so materially from her colleagues' that it had a serious and material effect on the terms and conditions of Plaintiff's employment, Plaintiff cannot survive summary judgment on this basis.

Plaintiff's sweeping, unsupported statements do not suffice to defeat a motion for summary judgment. *See Soulinthong v. Excelerate Discovery, LLC*, No. 1:14-cv-02737-JCF, 20216 WL 9444362, at *7 (N.D. Ga. July 19, 2016) (granting summary judgment where "[p]laintiff's evidence of discrimination is almost entirely based on her own testimony regarding comments made by others . . . and other disparate treatment that is tenuous at best."). Plaintiff's bare allegation that she was treated much less favorably than her white coworkers is insufficient to show a valid comparator. *Daniel v. Bibb County Sch. Dist.*, No. 5:18-cv-417 (MTT), 2020 WL 2364596, at *7 (M.D. Ga. May 11, 2020) (no prima facie case because plaintiff's conclusory allegations failed to show a valid comparator). Plaintiff has provided no probative evidence about any similarly-situated CSC involving the splitting and/or

reassigning of leads. Any indication that racial discrimination informed Ortlund's or ADT's decisions to split commissions or reassign leads "is conspicuously absent from the evidence presented." *See Flowers v. Troup County, Ga. Sch. Dist.*, 803 F.3d 1327, 1330–31 (11th Cir. 2015).

Moreover, Plaintiff's allegation that she was the only African-American employee reporting to Ortlund is neither accurate nor determinative. [Pl.'s Dep. at 329]. First, Plaintiff was not the only African-American CSC who Ortlund supervised during Plaintiff's employment. [DSMF ¶ 29]. Second, even if Plaintiff was the only African-American *in her office* who reported to Ortlund, that "does not create an inference of discrimination." *See Spralling v. Avaya, Inc.*, No. 1:04-cv-3349-WBH, 2007 WL 9700604, at *12 (N.D. Ga. Feb. 9, 2007); *see also Litman v. Sec'y of the Navy*, 703 F. App'x 766, 769 (11th Cir. 2017) ("The fact that [the plaintiff] was the only African-American employee does not plausibly lead to an inference that other employees there were similarly situated to him but differently treated.").[8]

In Plaintiff's response brief, Plaintiff alleges for the first time that the assignment of leads is not the only area she was treated differently than her coworkers. Plaintiff asserts that: (1) Ortlund stopped assigning her leads for thirty days in

[8] ADT has submitted evidence showing that shortly after Plaintiff's termination, Ortlund hired several African-American CSCs at Plaintiff's location. [Ortlund Decl. ¶¶ 9, 13–15].

February; (2) Ortlund did not accompany Plaintiff to customer visits; and (3) Ortlund showed up unannounced to a customer site. [Doc. 58, Pl.'s Resp. Br., at 11]. These allegations, which were not made in either Plaintiff's EEOC charges or her Complaint, contradict Plaintiff's sworn testimony and undisputed record evidence.

For example, while Plaintiff now asserts that Ortlund discriminated against her by not assigning her leads "for approximately 30 days in February" [Pl.'s Resp. Br. at 11 (citing Pl.'s Dep. at 104–06, 332–33; Ortlund Dep. at 117–18)], it is undisputed that Ortlund assigned multiple leads to Plaintiff in January, February, and March 2018 (including on February 23 and 28). [Pl.'s Dep. at 227–30; Pl.'s Dep. Ex. 17]. Ortlund acknowledged that he slowed down his assignment of leads to Plaintiff, but he testified that he did this for all his CSCs who were not making sufficient progress on their current leads. Plaintiff has no evidence to dispute this. [DSMF ¶ 30; Pl.'s Dep. at 229–30; Doc. 55-10, Vol. II, Ortlund Dep., at 135–37; Ortlund Decl. ¶ 24; Doc. 55-14 at 10; Doc. 55-6 at 24–32]. Plaintiff has failed to point to any contradictory evidence showing that, with regard to leads, she was treated differently than any of the other CSCs who worked under Ortlund. It is also undisputed that Plaintiff asked Ortlund not to assign her any leads that would potentially involve split commissions or working with another CSC, and she acknowledged that this could result in fewer leads being assigned. [Ortlund Dep. at 135–37].

Plaintiff claims in her brief that Ortlund refused to accompany her on customer visits, but at her deposition, Plaintiff could not identify a single such appointment, nor could she point to any documentary evidence to support her contention. [Pl.'s Dep. at 358–59]. In fact, Plaintiff acknowledged that when she asked Ortlund to join her on appointments, he did. [*Id.* at 357]. Plaintiff's arguments in her brief are directly contradicted by these admissions. *See Rodriguez v. Jones Boat Yard, Inc.*, 435 F. App'x 885, 888 (11th Cir. 2011) ("We will not allow a party to create an issue of material fact by providing supplemental testimony that contradicts prior answers to unambiguous questions."). Plaintiff has also failed to point to any probative evidence in the record to support her contention that Ortlund discriminated against her by showing up unannounced at one of Plaintiff's customers without her being present, but allegedly he never did that with the other CSCs. [Pl.'s Resp. Br. at 11]. Apart from Plaintiff's own conclusory and non-specific testimony, there is no evidence to support that assertion.

In sum, Plaintiff has failed to show an adverse employment action with regard to the assignment of leads and/or split commissions, nor has Plaintiff identified any similarly-situated white employee who was treated better than she. Plaintiff has also failed to show how Ortlund's temporarily slowing down lead assignments to Plaintiff, not accompanying Plaintiff on customer visits when he wasn't asked to do so, and

visiting a job site without Plaintiff being present create an inference of discrimination on the basis of race. For all these reasons, Plaintiff has failed to establish a prima facie case of race discrimination.

Even if she had established a prima facie case, Plaintiff has failed to meet her burden to show pretext. Plaintiff has failed to point to any probative evidence from which the court could infer that Defendant's proffered reasons for reassigning and/or splitting leads and commissions were pretextual for intentional race discrimination. *See Brooks v. County Comm'n of Jefferson County, Ala.*, 446 F.3d 1160, 1163 (11th Cir. 2006) (proof of pretext requires proof that the reason is false and the real reason is intentional discrimination).

Plaintiff has also failed to address or overcome the "same actor" inference that there was no discriminatory animus where, like here, the same manager that hired Plaintiff terminated her less than a year later. *See Hawkins v. BBVA Compass Bancshares, Inc.*, 613 F. App'x 831, 837 (11th Cir. 2015) (affirming summary judgment and finding that supervisor's hiring of the plaintiff only a year before her termination "undermined the notion that any actions toward her were gender-motivated"); *Oliver v. VSoft Corp.*, No. 1:09-cv-0185-CAP-WEJ, 2010 WL 11505776, at *7 (N.D. Ga. Feb. 2, 2010) (noting that the supervisor's hiring of

plaintiff gave rise to an inference that he did not act with discriminatory animus in termination).

For the reasons stated, I RECOMMEND that Defendant's motion for summary judgment as to Plaintiff's Count I and II race discrimination claims be GRANTED.

IV. PLAINTIFF'S RETALIATION CLAIMS

In Counts III and IV of Plaintiff's Complaint, Plaintiff claims that ADT unlawfully retaliated against her (in violation of Title VII and Section 1981) for making internal complaints of race discrimination and for filing EEOC charges by (1) denying Plaintiff commission compensation; (2) issuing her a Final Written Warning; and (3) terminating her employment. [Compl. ¶¶ 63–64, 69; *see also* Doc. 58 at 13].

The prima facie elements that govern Section 1981 retaliation claims are essentially the same as those governing Title VII retaliation claims—i.e., the plaintiff must show that: (1) she engaged in protected activity; (2) she suffered a materially adverse action; and (3) there was a causal connection between the protected activity and the adverse action. *See Gilliam v. United States Dep't of Veterans Affs.*, 822 F. App'x 985, 989 (11th Cir. 2020) (citing *Dixon v. The Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2020)); *Edmond v. University of* Miami, 441 F. App'x 721, 724 (11th

Cir. 2011); *Anderson v. Dunbar Armored, Inc.*, 678 F. Supp. 2d 1280, 1321 (N.D. Ga. 2009*; Goldsmith v. Bagby Elevator Co.,* Inc., 513 F.3d 1261, 1277 (11th Cir. 2008).

If the plaintiff makes out a prima facie case of retaliation, the burden then shifts to the defendant to offer a legitimate reason for the adverse action. If the employer does so, the burden then shifts back to the plaintiff to prove pretext. *Goldsmith*, 513 F.3d at 1277 ("After the plaintiff has established the elements of a claim, the employer has an opportunity to articulate a legitimate, nonretaliatory reason for the challenged employment action," and then the plaintiff must show that the proffered reason is a pretext). "The plaintiff bears the ultimate burden of proving retaliation by a preponderance of the evidence and that the reason provided by the employer is a pretext for prohibited retaliatory conduct." *Id.*

To succeed on a retaliation claim at trial, a plaintiff "must show that a reasonable employee would have found the challenged action materially adverse," meaning that it "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 72-73 (2006).

Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), states, in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Based on this language, the United States Supreme Court has concluded that Title VII retaliation claims "require proof that the desire to retaliate was the but-for cause of the challenged employment action." *See Booth v. Pasco County, Fla.*, 757 F.3d 1198, 1207 (11th Cir. 2014) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013)). *Nassar* tightened the causation requirement in retaliation cases. Post-*Nassar*, Title VII retaliation claims must be proven according to traditional principles of but-for causation, meaning that a plaintiff "must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." *Smith v. City of Fort Pierce, Fla.*, 565 F. App'x 774, 778 (11th Cir. 2014). Thus, at the summary judgment stage, Plaintiff must produce some evidence tending to show that her protected activity was a but-for cause of her termination. Stated another way, a plaintiff must prove that had she not complained, she would not have been fired. *Jerberee Jefferson v. Sewon America, Inc.*, 891 F.3d 911, 924 (11th Cir. 2018). An employer, however, does not need to show good cause for its decisions. *Id.* (citing *Nix v. WLCY Radio/Rahall Commc'ns*, 738 F.2d 1181, 1187 (11th Cir. 1984)). To the

contrary, it "may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for [an unlawful] reason." *Id.*

With regard to commissions and/or compensation, Plaintiff has apparently abandoned her claim that ADT retaliated against her by denying her commissions because she neither discussed that in her response brief, nor pointed to any evidence in the record to support such a claim. Accordingly, I will confine my analysis to the remaining two events on which she appears to be basing her retaliation claim: the February 23, 2018 Final Written Warning and her termination on April 11, 2018.

A. Plaintiff Has Not Established a Prima Facie Case of Retaliation

1. February 23, 2018 Final Written Warning

With regard to the February 23, 2018 written warning, Plaintiff has failed to show that the issuance of that warning constituted an adverse employment action. The Supreme Court has defined an adverse employment action in the context of a retaliation claim as an action by an employer that is "harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 548 U.S. at 57. Plaintiff has not shown that anything about her employment materially changed as a result of that action, that she suffered any injury or harm (employment-related or otherwise), or that she was in any

way dissuaded from making or supporting a charge of discrimination. *Id.* The record shows that, in fact, Plaintiff filed three EEOC charges.

But even assuming the Final Written Warning constituted a retaliatory adverse action, Plaintiff has failed to show a causal connection between her first internal complaint of discrimination on January 28, 2018, and the issuance of that warning on February 23, 2018. Although the two events are approximately one month apart, post-*Nassar*, temporal proximity alone "is no longer enough, and will not suffice to show a defendant intended to retaliate against a plaintiff." *See Whitworth v. SunTrust Banks, Inc.*, No. 1:16-cv-325-ODE-CMS, 2018 WL 1634301, at *11 (N.D. Ga. Mar. 30, 2018), *as amended* (Apr. 3, 2018), *aff'd*, 800 F. App'x 879 (11th Cir. 2020). A plaintiff must now show the causal connection under a but-for standard, requiring a showing "that she would not have suffered the adverse employment action if she had not engaged in the protected conduct." *Duncan v. Alabama*, 734 F. App'x 637, 641 (11th Cir. 2018) (noting that *Nassar* created a "heightened" standard). This, Plaintiff has failed to do.

The record shows that Plaintiff was counseled about her performance and behavioral issues before she ever made her first internal complaint of discrimination on January 28, 2018. [Courseault Dep. at 62, 143–45; Pl.'s Dep. at 342]. Plaintiff admitted that Courseault addressed customer complaints with her in early January

2018, and Courseault's investigative summary (prepared before Plaintiff engaged in any protected activity) noted Plaintiff's "aggressiveness," inability to work well with her coworkers, and complaints from internal and external customers. [Pl.'s Dep. at 342; Pl.'s Dep. Ex. 10; Courseault Dep. at 143–44].

It is well established that "intervening events can negate the inference of causation that may arise from temporal proximity." *Hollan v. Web.com Grp., Inc.*, No. 1:14-cv-00426-LMM-WEJ, 2015 WL 11237023, at *21 (N.D. Ga. Apr. 7, 2015). Here, Plaintiff's ongoing performance and conduct issues—including issues with customers, employees, and managers, and her refusal to follow ADT's established sales processes—constitute intervening events that severed any possible inference of causation between Plaintiff's complaints and the issuance of her written discipline. *See Hankins v. AirTran Airways, Inc.*, 237 F. App'x 513, 521 (11th Cir. 2007) (despite 20-day temporal proximity, plaintiff's failure to meet performance standards "broke the causal connection (if any) between the protected activity and her eventual termination").

Although the record indicates the decisionmakers had actual knowledge that Plaintiff was complaining of race discrimination and had either filed or intended to file a discrimination complaint with the EEOC, Plaintiff cannot avoid the fact that she had documented ongoing behavior and performance issues that were present both before

and after Plaintiff started complaining of discrimination—which issues formed the basis for the Final Written Warning. *See Duncan*, 734 F. App'x at 641. Moreover, it is undisputed that Ortlund issued the same discipline for performance and conduct issues to white CSCs who never engaged in protected activity. [DSMF ¶ 31; Doc. 59, Pl.'s Resp. to DSMF ¶ 31; Ortlund Decl. ¶¶ 35–36].

Viewing the evidence in the light most favorable to Plaintiff, she has failed to establish a prima facie case of retaliation with respect to the Final Written Warning.

2. Plaintiff's Termination

With regard to Plaintiff's termination, Plaintiff again argues that she can establish causation based on temporal proximity. It is undisputed that Plaintiff complained internally of race discrimination to both Ortlund and Courseault on January 28, 2018. She also informed them on or about February 5, 2018 that she had filed or was filing a charge of discrimination with the EEOC and had retained an attorney. [Doc. 55-3 at 2; Pl.'s Dep. at 198; Doc. 55-6 at 2]. She was not terminated until April 11, 2018, more than two months after her initial complaint of race discrimination. In cases both predating and following *Nassar*, however, the Eleventh Circuit has rejected retaliation claims where causation is based on shorter time periods than what is alleged here. *See Johnson v. Miami-Dade Cty.*, 948 F.3d 1318, 1328 (11th Cir. 2020) ("However, even when the disparity is only two weeks . . . such

proximity is probably insufficient to establish causation itself") (internal quote marks and citation omitted); *Hankins,* 237 F. App'x at 521 (concluding that the 20-day temporal promixity between the plaintiff's claimed protected expression and her termination was insufficient to infer causation). As discussed above, post-*Nassar*, temporal proximity alone is no longer sufficient; a plaintiff must establish but-for causation.

Plaintiff's temporal proximity argument also fails because, as discussed above, Defendant began addressing Plaintiff's job performance and ongoing conduct issues prior to her first complaint of discrimination on January 28, 2018. It is undisputed that in early January 2018, upon completion of Courseault's investigation into Plaintiff's December 2017 complaints about assignment of leads and split commissions—before Plaintiff ever engaged any protected activity—Courseault addressed with Plaintiff the need for improved communications with management, Plaintiff's lack of understanding about why, when, and how ADT split leads/commissions, customer complaints about Plaintiff's "aggressiveness," and Plaintiff's inability to work well with her coworkers. [Doc. 55-5 at 20–22; DSMF ¶ 17; Doc. 55-12 at 1–3; Courseault Dep. at 144–45]. Thus, ADT placed Plaintiff on notice of what ADT perceived to be behavioral and performance deficiencies prior to any protected activity. "Importantly, when an employer contemplates an adverse

employment action before an employee engaged in protected activity, temporal proximity . . . does not suffice to show causation." *Jurriaans v. Alabama Coop. Extension Sys.*, 806 F. App'x 753, 757 (11th Cir. 2020) (temporal proximity failed to show causation where plaintiff was on notice of performance issues before protected activity). Moreover, ADT has provided uncontroverted evidence that Plaintiff had continuing performance and conduct issues following her initial complaint of race discrimination. Despite a two-plus month temporal proximity, Plaintiff's undisputed continuing failure to meet the required performance standards, as discussed by Plaintiff's management and as set forth in her Final Written Warning, broke the causal connection, if any, between her protected activity and her eventual termination and severed any causal connection that might have been present. *See Hankins*, 237 F. App'x at 521.

Plaintiff has failed to create a fact dispute as to whether her complaints about race discrimination (internally and/or with the EEOC) were a but-for cause of her termination. Plaintiff appears to argue that everything that happened to her after she complained was retaliatory. The apparent inference that Plaintiff wants the Court to draw is that because ADT's managers knew of her internal complaints, as well as her EEOC complaints, this proves retaliatory motive and/or establishes a causal

connection.[9] However, this is not the law. *See Knight v. Fla. Dep't of Transp.*, 291 F. App'x 955, 959-60 (11th Cir. 2008) (decisionmaker's knowledge that plaintiff engaged in protected activity is not enough to show actual retaliatory motivation). "Were the rule otherwise, then a disgruntled employee, no matter how poor [her] performance or how contemptuous [her] attitude toward [her] supervisors, could effectively inhibit a well-deserved discharge by merely filing, or threatening to file, a discrimination complaint." *Robinson v. AFA Serv. Corp.*, 870 F. Supp. 1077, 1085 (N.D. Ga. 1994); *see also Jackson v. St. Joseph State Hosp.*, 840 F.2d 1387, 1391 (8th Cir. 1988) ("Title VII protection from retaliation for filing a complaint does not clothe the complainant with immunity for past and present inadequacies, unsatisfactory performance, and uncivil conduct in dealing with subordinates and with his peers.").

Plaintiff asserts that Ortlund "admitted he was upset" about her race discrimination complaints, and, thus, Ortlund was presumably motivated to retaliate as a result. There is no evidence, however, to support this assertion. During Ortlund's deposition, Plaintiff's counsel asked him three times if he was "hurt" or "upset" by Plaintiff's complaints. [Ortlund Dep. at 116–18]. Ortlund responded that he "didn't

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[9] Notably, with regard to Plaintiff's EEOC charges, although Plaintiff mentioned filing an EEOC charge in an email to Ortlund and Courseault in early February 2018, it is undisputed that Plaintiff never provided a physical copy of her charges to anyone at ADT, and ADT did not receive a copy of any of the three charges until after Plaintiff was terminated. [DSMF ¶ 21].

like it because it was absolutely 100% not the case." [*Id.*]. He did not testify that he was hurt or upset. Plaintiff's argument on this point is insufficient to create a fact dispute as to whether Ortlund fired Plaintiff because of the complaints. Ortlund's testimony does not demonstrate "but for" causation.

For all the reasons discussed above, Plaintiff has failed to establish a prima facie case of Title VII (or Section 1981) retaliation. ADT is therefore entitled to summary judgment as a matter of law. *See Herron-Williams v. Alabama State Univ.*, 805 F. App'x 622, 633 (11th Cir. 2020) (affirming summary judgment where plaintiff relied on temporal proximity evidence and failed to show that filing her EEOC charge of discrimination was a "but-for" cause of the alleged pay reduction).

B. No Probative Evidence of Pretext

Even if Plaintiff had established a prima facie case of retaliation (which she has not), her retaliation claims still fail because she cannot show that ADT's race-neutral reasons for issuing the Final Written Warning and terminating her employment were false and a mere pretext for unlawful retaliation.

ADT has produced credible evidence showing that ADT issued Plaintiff a Final Written Warning and terminated her employment based on issues and complaints that occurred throughout her employment that she failed to address or improve, including her failure to follow management directives concerning the sales process, failure to

improve her communications with management, lack of professionalism, argumentative and defensive nature, and negative interactions with customers, managers, and coworkers. [Doc. 55-6 at 21–22 (Ex. 16), 34-35 (Ex. 18), 37 (Ex. 19); Ortlund Dep., Vol. II, at 113, 117, 122–27, 146, 151, 168–69, 173–74; Woodrow Dep. at 38, 41–42, 46, 58–59; Courseault Dep. at 48, 69, 102, 104–05, 112, 127, 135, 152–53]. The uncontroverted evidence shows that even after being issued a Final Written Warning, Plaintiff continued to submit jobs without approval, did not request site visits, failed to communicate with Ortlund and Operations on key items, had issues with customers, argued with employees and managers over policies and processes, did not make timely updates in SalesPilot, and was late to or missed calls and meetings. [Ortlund Decl. ¶¶ 30–34, 39, 45, Exs. B, E]. Thus, ADT has met its burden of articulating legitimate, nonretaliatory reasons for issuing Plaintiff a Final Written Warning and terminating her employment. *See Soulinthong*, 2016 WL 9444362, at *6 (proffering a legitimate nondiscriminatory reason for termination based on the employee's disrespectful conduct not improving after specific warnings); *Bahrami v. Maxie Price Chevrolet-Oldsmobile, Inc.*, No. 1:11-cv-4483-SCJ-AJB, 2014 WL 11517837, at *12 (N.D. Ga. Aug. 4, 2014) (defendant met burden of articulating a legitimate reason for termination based on the plaintiff's poor

performance, tardiness, and his supervisor's belief that the plaintiff did not respect him as a superior).

The burden then shifts back to Plaintiff to show that ADT's stated reasons are a pretext for retaliation. To establish pretext, an employee must specifically respond to the employer's explanation and produce sufficient evidence for a reasonable factfinder to conclude that the employer's stated reason is pretextual. *See Combs v. Plantation Patterns*, 106 F.3d 1519, 1529 (11th Cir. 1997) (explaining that the plaintiff must present "sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged action"). A reason is not pretextual unless the employee shows both that the given reason was false and that retaliation was the real reason. *See Brooks v. Cty. Comm'n of Jefferson Cty.*, 446 F.3d 1160, 1163 (11th Cir. 2006). To survive summary judgment, the plaintiff must "come forward with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." *Chapman v. AI Transport*, 229 F.3d 1012, 1024 (11th Cir. 2000) (quoting *Combs*, 106 F.3d at 1528). The plaintiff must meet the employer's reasons "head on" and rebut them. *Wilson v. B/E*

Aerospace, Inc., 376 F.3d 1079, 1088 (11th Cir. 2004); *see also Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990).

Here, Plaintiff has failed to meet head on and rebut ADT's reasons for issuing her a Final Written Warning and terminating her employment. ADT, on the other hand, has provided contemporaneous evidence of Plaintiff's ongoing performance and behavioral issues, and this evidence supports a conclusion that ADT had an "honest belief" those issues merited termination. *See Landry v. Lincare, Inc.*, 579 F. App'x 734, 738 (11th Cir. 2014) (affirming summary judgment and concluding that the plaintiff could not establish pretext where the employer had an honest belief that plaintiff violated work rules).

Plaintiff attempts to show pretext by arguing that: (1) ADT violated its progressive discipline system by issuing a Final Written Warning without first issuing any other discipline; (2) some of the issues identified in Plaintiff's Final Written Warning occurred in the fall of 2017, months before the Final Written Warning was issued; (3) although Turbo Air complained about Plaintiff (who was African American) and an installer (who was Caucasian), only Plaintiff was disciplined; and (4) ADT has provided shifting reasons for Plaintiff's termination. [Doc. 58, Pl.'s Resp. Br., at 16–18]. I will address these arguments in turn.

1. Progressive Discipline

Plaintiff first points to the fact that ADT issued Plaintiff a Final Written Warning in February 2018 without issuing any prior formal discipline. Courseault, ADT's HR representative, testified that ADT follows progressive discipline only for pure performance issues, and that behavioral issues like Plaintiff's fall outside of ADT's progressive discipline policy and often warrant a final warning or immediate termination. [Courseault Dep. at 52–54]. According to ADT, Plaintiff had both performance *and* behavioral issues, and the chief reason Ortlund decided to issue Plaintiff a Final Written Warning rather than a lower-level written warning was because ADT had received a series of internal and customer complaints in late December 2017, and continuing through January 2018, about not wanting to work with Plaintiff any further, and Ortlund felt those complaints "needed to be addressed quickly." [Ortlund Dep. at 112–15; Doc. 55-14 at 54–59]. Plaintiff has presented no evidence to contradict this testimony. ADT has also presented evidence that following Plaintiff's December 2017 internal complaints and Courseault's subsequent investigation, Courseault recommended that Ortlund address Plaintiff's behavioral and performance deficiencies, as well as her reported poor understanding of ADT's sales process and policies concerning split leads and commissions, by coaching Plaintiff in

lieu of issuing a written warning. In light of this undisputed testimony, the fact that Plaintiff received a Final Written Warning (that included references to prior behavioral issues) does not establish pretext. On the contrary, it shows that ADT was continuing to address what ADT viewed as Plaintiff's ongoing pattern of problematic behaviors.

2. Prior Events

Plaintiff next attempts to show pretext by arguing that certain issues mentioned in the Final Written Warning issued on February 23, 2018 occurred several months earlier, such as Plaintiff allegedly selling jobs without prior approval from Operations, including the Asahi and Marina Bay projects. [Pl.'s Resp. Br. at 17; Doc. 55-9 at 111]. Plaintiff argues that the complaints from Turbo Air and Roof Depot also were made several months before Plaintiff was ever disciplined. [Pl.'s Resp. Br. at 17]. Plaintiff's assertions, however, are contrary to the record. Plaintiff testified that Marina Bay became an issue in January 2018, and the record contains emails dated February 21, 2018 referencing approvals for Marina Bay. [Vol. II, Pl.'s Dep., at 345–46]. Plaintiff also testified that the Asahi project lasted from October 2017 all the way through February of 2018. [Doc. 55-14 at 19; Vol. II, Pl.'s Dep., at 345]. Thus, the issues with those jobs did not occur "months earlier" than February 2018 as Plaintiff contends. The evidence also shows that Turbo Air emailed its complaint

to ADT in mid January 2018, only a few weeks before Plaintiff was issued the Final Written Warning in February 2018, not months before she was issued the written warning, as Plaintiff argues.[10] [Doc. 55-14 at 56–58; Ortlund Decl. ¶ 43]. The evidence cited by Plaintiff does not support her arguments.

3. Turbo Air's Complaint about the Installer

I have already discussed why the installer about whom Turbo Air complained is not a proper comparator for purposes of establishing a prima facie case. The same applies to Plaintiff's pretext argument. Plaintiff argues, without evidentiary support, that the customer's complaint was not even about her, but was "majority about the installer," who did not receive a written warning or discipline for the customer complaint. [Pl.'s Dep. at 223]. However, a review of Turbo Air's email complaint dated January 10, 2018 shows that Turbo Air spent a page and a half listing its complaints about Plaintiff, but only a half page discussing its problems with the installer. [Doc. 55-14 at 56–58]. Moreover, as discussed earlier, the complaints about Plaintiff concerned her unprofessional attitude, dishonesty, missing calls, evasive responses, and offensive demeanor, whereas the concerns about the installer were largely related to his failure to communicate, inability to fix problems, and unacceptable work product. Because the underlying issues, nature of the complaints,

[10] The email from Roof Depot is undated. [Doc. 55-14 at 59; Ortlund Decl. ¶ 44].

objectionable conduct, job functions, and ADT supervisors were different, the installer is not a proper comparator, and the fact that the installer was not disciplined does not suggest pretext.

4. Shifting Explanations for Plaintiff's Termination

Finally, Plaintiff argues that she is able to demonstrate pretext with respect to her termination because ADT originally claimed it terminated Plaintiff for failure to follow sales processes, but ADT now claims that it continued to receive complaints about Plaintiff as well as ongoing problems with her customers. However, Plaintiff merely cites to ADT's brief, not to any probative evidence to support her argument.

The uncontroverted record evidence shows that both before and after issuing the Final Written Warning, Ortlund documented continuing problems with Plaintiff's conduct and job performance, including submitting jobs without approval, not requesting site visits, failing to communicate with management on key items, continuing issues with customers, arguing with employees and managers over commissions, not making timely updates in SalesPilot, and being late to or missing calls and meetings. [Ortlund Decl. ¶¶ 30–34, 39, 45; Doc. 55-14 at 11–14 (Ex. B), 17 (Ex. C), 18 (Ex. D), 21–52 (Ex. E), 54 (Ex. F)]. Plaintiff has failed to show that these reasons are pretextual and that retaliation was the but-for cause of her termination.

For the reasons discussed above, I RECOMMEND that Defendant ADT's motion for summary judgment as to Plaintiff's Title VII and Section 1981 retaliation claims be GRANTED.

V. CONCLUSION

In sum, Plaintiff's conclusory and subjective beliefs are insufficient to defeat ADT's well-supported motion for summary judgment. *See Hall v. DeKalb Cty. Gov't*, 503 F. App'x 781, 786 (11th Cir. 2013) ("[M]ere conclusions, unsupported factual allegations, and statements that are based on belief, as opposed to personal knowledge, are insufficient to overcome a summary judgment motion."). In the absence of probative evidence that ADT's reasons were false or that the real reason for terminating her employment was discrimination or retaliation, ADT is entitled to summary judgment. *See Hawkins*, 613 F. App'x at 838–39.

Accordingly, for the reasons discussed above, I **RECOMMEND** that Defendant ADT's Motion for Summary Judgment [Doc. 54] be **GRANTED** in its entirety.

IT IS SO RECOMMENDED, this 27th day of April, 2021.

Catherine Salinas

CATHERINE M. SALINAS
UNITED STATES MAGISTRATE JUDGE