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

KEIAN BUTTS, SR., Plaintiff, v. CENTIMARK CORPORATION, Defendant.	CIVIL ACTION NO. 1:20-cv-1578-MHC-CMS

FINAL REPORT AND RECOMMENDATION

In this case, Plaintiff Keian Butts, Sr., proceeding pro se, alleges that his former employer, Defendant CentiMark Corporation, illegally demoted him and then terminated his employment in violation of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e et seq. [Doc. 1]. Butts raises alternative claims—either that he was retaliated against for filing a charge with the United States Equal Employment Opportunity Commission ("EEOC") or that he was discriminated against based on his race and/or color. [*Id.*]. Discovery is now closed, and CentiMark has filed a motion for summary judgment [Doc. 39] and a motion to strike [Doc. 50]. For the following reasons, I will grant the motion to strike, and I will recommend that the motion for summary judgment be granted on all claims.

I. SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A party seeking summary judgment has the burden of informing the court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions," and cannot be made by the district court in considering whether to grant summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

If a movant meets its burden, the party opposing summary judgment must present evidence demonstrating a genuine issue of material fact or that the movant is not entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 324. In determining whether a genuine issue of material fact exists, the evidence is viewed in the light most favorable to the party opposing summary judgment, and "all justifiable inferences are to be drawn" in favor of that opposing party. *Anderson*, 477 U.S. at 255. A fact is "material" only if it can affect the outcome of the lawsuit under the governing legal principles. *Id.* at 248. A factual dispute is "genuine" if the evidence would permit a reasonable jury to return a verdict for the nonmoving

party. *Id.* "If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial. But, where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, summary judgment for the moving party is proper." *Pledger v. Reliance Trust Company*, No. 1:15-cv-4444-MHC, 2019 WL 10886802, at *10 (N.D.Ga. March 28, 2019) (citations and quotation marks omitted).

Pro se litigants are not excused from the burden of establishing that a genuine issue of material fact exists when they are faced with a motion for summary judgment. *Brown v. Crawford*, 906 F.2d 667, 670 (11th Cir. 1990). The Federal Rules mandate the entry of summary judgment against any party—represented or not—who fails to make a showing sufficient to establish the existence of every element essential to that party's case on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. "Speculation or conjecture cannot create a genuine issue of material fact, and a mere scintilla of evidence in support of the nonmoving party cannot overcome a motion for summary judgment." *S.E.C. v. Monterosso*, 756 F.3d 1326, 1333 (11th Cir. 2014) (internal quotation marks omitted).

II. PRELIMINARY ISSUES

CentiMark filed its motion for summary judgment on December 21, 2020, along with its statement of undisputed material facts ("SMF"). [Doc. 39]. On January 13, 2021, Butts timely filed a response brief. [Docs. 42, 43]. Butts also responded to most of the facts contained in CentiMark's SMF, but he did not provide citations to evidence, as required by Local Rule 56.1(B)(1). [Doc. 42-2]. Also, Butts did not submit his own statement of additional material facts, as required by Local Rule 56.1(B)(2)(b). Thus, Butts never rebutted CentiMark's facts, nor did he provide an acceptable alternative statement of material facts to support his version of events.

On January 21, 2021—after the deadline to respond to the motion for summary judgment, but before CentiMark filed its reply brief—Butts filed a document titled "Amended and Supplemental Proceedinds [sic]" that addressed a number of CentiMark's material facts to which Butts had not previously responded. [Doc. 44]. On January 25, 2021, CentiMark timely filed its reply brief in which, among other things, it pointed out that Butts's response to its SMF did not comply with this Court's Local Rules. [Doc. 45 at 3–5]. On February 2, 2021, the motion for summary judgment was submitted to me.

Two days later, Plaintiff filed the two documents that are the subject of CentiMark's pending motion to strike. The first document is titled "Amended and Supplemental Proceedings," which contains a few paragraphs of citations to legal sources, followed by additional responses to CentiMark's SMF. [Doc. 48]. The second document is titled "Memorandum in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment." [Doc. 49]. Butts neither sought nor received permission to make these out-of-time filings. CentiMark now seeks to strike the two documents that Plaintiff filed after CentiMark filed its reply brief—Documents 48 and 49—to which I will refer as the "Disputed Filings."[1]

There is no dispute that Plaintiff filed the Disputed Filings after the deadline set by the rules of this Court. *See* LR 7.1(B), NDGa. (providing that a response to a motion for summary judgment must be served not later than twenty-one days after the service of the motion). The rules authorize the Court to decline to consider a late-filed brief. *See* LR 7.1(F), NDGa. Moreover, Local Rule 56.1 provides that the parties shall not be permitted to file supplemental summary judgment briefs and materials, unless they first obtain permission from the Court. *See* LR 56.1(A),

[1] To its credit, CentiMark has not moved to strike the document located at docket number 44, which was filed late but before CentiMark filed its reply brief.

NDGa. As noted above, Butts did not ask for permission to file the materials after the summary judgment briefing was closed.

In response to CentiMark's motion to strike, Plaintiff cites to Federal Rule of Civil Procedure 60 and to a Georgia ethics rule, neither of which applies in this situation. [Doc. 51 at 1–2, 4]. Plaintiff states that he noticed that he had made a mistake and that he had discovered new evidence, but he does not explain exactly what the mistake was, when he realized the mistake, what the newly discovered evidence is, or the date that he discovered the evidence. [*Id.* at 3].

Even though Plaintiff is proceeding pro se, he is not exempt from the deadlines and procedural requirements for motion practice. *See Mosley v. MeriStar Mgmt. Co., LLC*, 137 F. App'x 248, 250 (11th Cir. 2005) (affirming the district court's decision to disregard a pro se plaintiff's opposition to defendant's motion for summary judgment, filed four days late, where plaintiff "neither asked for an extension of time to file a response, nor explained why her opposition was tardy."). I agree with CentiMark that the Disputed Filings should be stricken from the record, and I will grant the motion to strike.

CentiMark has also lodged objections to other evidence that Butts has presented, including the documents attached at pages 13–16 of the original response, which apparently were not produced during discovery. [Doc. 46 at 2–3]. Those

documents include: an unauthenticated document purporting to be an invoice for repairing Plaintiff's wrecked car [Doc. 42-2 at 13–14] and an unauthenticated document purporting to be a blank CentiMark "Service Tech Sheet" [Doc. 42-2 at 15–16].

Federal Rule of Civil Procedure 26(a)(1)(A)(ii) requires that parties disclose all documents in their possession that they may use to support their claims. Because Plaintiff apparently withheld these documents in discovery, I will disregard them. *See* FED. R. CIV. P. 37(c)(1); *see also Galvin v. Suddath Van Lines, Inc.*, No. 1:05-cv-2376-HTW, 2008 WL 11404231, at *4 (N.D. Ga. Oct. 9, 2008).

Because Butts failed to properly respond to CentiMark's SMF, the facts laid out in the SMF are deemed admitted for purposes of summary judgment. *See* LR 56.1(B)(2)(a)(2), NDGa. Although Butts failed to provide his own statement of facts in compliance with Local Rule LR 56.1(B)(2)(b), I have nevertheless reviewed and considered his declaration [Doc. 42-3 at 1–2 & Doc. 42-1 at 24] and the remainder of Butt's evidence, i.e., a document that appears to be two pages excerpted from CentiMark's "Sales Force" program showing that Butts successfully closed a number of sales during the sales portion of his training [Doc. 42-2 at 17–18] and an unauthenticated document purporting to be the transcript of a portion of a conversation between Butts and his coworker James Streetman in November 2019

[Doc. 43]. To the extent that CentiMark has raised objections to these pieces of evidence, I will exercise my discretion and consider them. These objections are overruled.

III. FACTS

The summary judgment evidence shows that Butts was hired in April or May 2018 as a crew member to build and repair roofs. [Doc. 39-2 ¶¶ 1, 3, 4]. In July 2019, Butts was selected for a training program as a Service Salesman based on his outgoing personality. [*Id.* ¶¶ 8, 9]. James Streetman, a CentiMark employee with considerably more experience (approximately 14 years) was also selected for the training program. [*Id.* ¶ 10].

To pass the training program, each trainee had to learn both to "sell" and to "tech." [Doc. 39-2 ¶ 11]. "Tech'ing" involves going up on a prospective customer's roof to identify the repairs required and to draw a detailed picture that permits CentiMark to "build an accurate quote for the customer." [*Id.*]. Streetman, a Caucasian, passed both portions of the training program; Butts, who identifies as Black, passed the sales portion but struggled with the "tech'ing" portion of the training. [*Id.* ¶¶ 18–20].

In his declaration, Butts states that "tech'ing" is not a legitimate job requirement for a Service Salesman, but rather is something that should be done by

other employees. [Butts Decl., Doc. 42-3 at 2 (noting that as a sales serviceman he would walk around the roof taking pictures and that after the customer agreed to a new roof, a different person was responsible for taking measurements and preparing a quote)]. In Butts's opinion, all he needed to do his job was the visual from Google Earth and the pictures he took while on the roof. [*Id.* at Doc. 42-1 at 24].

CentiMark provided Butts an opportunity to redo the "tech'ing" portion of training in November 2019. [Doc. 39-2 ¶¶ 28–29]. When Butts subsequently failed to complete his training assignments, CentiMark issued a disciplinary action. [Doc. 39-2 ¶¶ 28–29]. After Butts refused to sign the disciplinary action, CentiMark demoted Butts back to a work crew. [*Id.* ¶ 31].

On December 13, 2019, Butts filed a charge with the EEOC in which he claimed that he had been subjected to retaliation and discrimination. [Doc. 39-2 ¶¶ 38, 39, 42, 47–51; Doc. 40-1 at 440–441].

Butts worked on December 16, 2019, but he failed to report after that date because he wrecked his car and lacked transportation. [Doc. 39-2 ¶ 10; Doc. 40-1 ¶ 120-21]. In his brief, Butts states that he maintained contact with one of his supervisors during this period and let the supervisor know about the car situation. [Doc. 42-1 at 16]. Shortly thereafter, on January 6, 2020, he was terminated for job abandonment. [Doc. 40-1 at 122:1-7]. Butts disagrees with the characterization of

"abandonment", but he does not dispute that he stopped reporting for work after December 16, 2019.

On January 20, 2020, two weeks after his termination, Butts emailed the general human resources email address complaining about discrimination. [Doc. 39-2 ¶ 47].

IV. DISCUSSION

A. Race and/or color Discrimination

Butts brings his case pursuant to Title VII of the Civil Rights Act of 1964, which makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Lewis v. City of Union City*, 918 F.3d 1213, 1220 (11th Cir. 2019) (en banc) (quoting 42 U.S.C. § 2000e-2(a)(1)). "The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate . . . discriminatory practices and devices" used to disadvantage racial, gender, and religious minorities in the employment context. *Id.* at 1220 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)).

When, as here, a plaintiff is confronted with a defendant's motion for summary judgment on claims for race/color discrimination under Title VII, he must make a sufficient factual showing to permit a reasonable jury to rule in his favor. *See Lewis*, 918 F.3d at 1220. The most familiar way to make this showing is via the three-part burden shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 at 800–02 (1973).[2]

The *McDonnell Douglas* framework places the initial burden on a plaintiff to establish a prima facie case of race/color discrimination by proving that he was treated differently from some other "similarly situated" individual or "comparator." *See Lewis*, 918 F.3d at 1217 (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258–59 (1981)). This initial burden can be met "by showing (1) that he belongs to a protected class, (2) that he was subjected to an adverse employment action, (3) that he was qualified to perform the job in question, and (4) that his employer treated 'similarly situated' employees outside her class more favorably." *Id.* at 1220–21 (citation omitted). If a plaintiff succeeds in making a prima facie

[2] There are two other ways of making a sufficient factual showing to survive summary judgment: (1) by presenting direct evidence of discriminatory intent; or (2) by establishing a "convincing mosaic" of circumstantial evidence that warrants an inference of intentional discrimination. *See Lewis*, 918 F.3d at 1220 n.6. Here, Butts presented only circumstantial evidence and has not made a "convincing mosaic" argument.

case, "the burden [then] shifts to [a] defendant to articulate a legitimate, nondiscriminatory reason for its actions." *Lewis*, 918 F.3d at 1221 (citing *Burdine*, 450 U.S. at 253). If a defendant can articulate such a reason, the burden shifts back to the plaintiff who must come forward with evidence to demonstrate that the proffered, nondiscriminatory reason was "merely a pretext for unlawful discrimination." *Id.* at 1221.

In its motion for summary judgment, CentiMark does not dispute that Butts satisfies the first three prongs of the prima facie case, i.e., that he belongs to a protected class, was subjected to an adverse employment action (demotion and termination), and was qualified to perform the job in question. CentiMark argues, however, that Butts has failed to present evidence that his employer treated similarly situated employees outside his class more favorably than it treated him. [Doc. 39-1 at 13-15]. CentiMark also argues that even if Butts made out a prima facie case, his claim still fails because he has no evidence of pretext. I agree with CentiMark in both respects.

i. Prima Facie Case

"[D]iscrimination," first and foremost, "consists of treating like cases differently[,]" and if this true, the converse must also be true: "Treating different cases differently is not discriminatory, let alone intentionally so." *Lewis*, 918 F.3d

at 1222–23 (citations omitted). Thus, the first burden of *McDonnell Douglas* essentially calls upon a plaintiff to show that she "was treated differently from another 'similarly situated' individual"—or, a comparator. *Lewis*, 918 F.3d at 1217 (citing *Burdine*, 450 U.S. at 258–59). In *Lewis*, the en banc Eleventh Circuit recently definitively answered "[t]he obvious question: Just how 'similarly situated' must a plaintiff and her comparator(s) be?" 918 F.3d at 1217. In cases like this one, "a plaintiff must show that she and her comparators are 'similarly situated in all material respects." *Id.* at 1224. The Eleventh Circuit held that "a meaningful comparator analysis must be conducted at the prima facie stage of *McDonnell Douglas*'s burden-shifting framework and should not be moved to the pretext stage." *Id.* at 1218 (cleaned up). The Eleventh Circuit further held that "proffered comparators [must be] 'similarly situated in all material respects.'" *Id.* To direct this analysis, it provided "guideposts," observing that ultimately "a plaintiff and her comparators must be sufficiently similar, in an objective sense, that they 'cannot reasonably be distinguished.'" *Id.* at 1227 (quoting *Young v. UPS, Inc.*, 135 S. Ct. 1338, 1355 (2015)).

In its motion for summary judgment, CentiMark argues that the only comparator that Butts has identified is Streetman and that they are not similar in all material respects. *See* [Doc. 39-1 at 13–15]. CentiMark points out that Butts is

reasonably distinguishable from Streetman because Butts had far fewer years of work experience with the company (Butts had less than two years, whereas Streetman had fourteen years), Butts had not previously served as a Service Foreman, Butts struggled in training, and Butts was disciplined for failing to complete assignments. *See* [Doc. 39-1 at 4–5, 14]. Butts offered no meaningful response to (let alone, evidence contradicting) CentiMark's argument in any of his filings, save for his claim that he was a better salesman than Streetman. [Doc. 42-1 at 29–30]. CentiMark also argues that Butts has not even identified anyone who could potentially be a comparator for his termination claim; Butts has pointed to no other employee who stopped reporting for work and was not terminated. *See* [*id.* at 15].

CentiMark's arguments have merit, and Butts did not meaningfully respond to these distinctions in his response. Thus, I find and conclude that Butts did not proffer a comparator similarly situated in all material respects and therefore failed to carry his burden of establishing a prima facie case of discrimination under *McDonnell Douglas* and *Lewis* with respect to both his demotion claim and his termination claim.

ii. Pretext

Moreover, even if Butts had made out a prima facie case, his discrimination claims would still be subject to summary judgment because he has come forward with no evidence of pretext. CentiMark has met its burden of articulating a race/color-neutral reason for its decisions—i.e., that Butts was demoted because he declined an opportunity to redo the "tech'ing" portion of training, that he failed to complete assigned tasks, and that Butts was terminated for failing to come to work. [Doc. 39-1 at 15–16]. As such, the burden shifts back to Butts who must present some evidence that the proffered reasons were merely a pretext for unlawful discrimination.

While it appears that Butts disagrees with CentiMark's policy of requiring its sales people to be proficient in "tech'ing," Butts has not created a fact dispute as to the existence of the policy or as to his inability to successfully complete this part of his training. He has not disputed (with evidence) that he declined an opportunity to redo the "tech'ing" portion of training or that he failed to complete assigned tasks. Nor has he disputed that he failed to report to work for several days in a row.

I find and conclude that Butts has not created a genuine issue of material fact with respect to whether CentiMark treated Plaintiff differently because of his race or his color, nor has he produced any evidence to support his claim that CentiMark's

proffered legitimate, non-discriminatory reasons for demoting and terminating him were pretextual. *See Brooks*, 446 F.3d at 1163. As such, summary judgment should be granted on his discrimination claims.

B. Retaliation

To establish a prima face case of retaliation, a plaintiff must show: (1) that he participated in conduct that the retaliation statute protects; (2) that he suffered an adverse employment action; and (3) that the protected conduct and the adverse employment action are causally related. *See Todd v. Fayette County School District*, No. 3:17-cv-00137-TCB, 2021 WL 2149351, at *9 (11th Cir. 2021). As with discrimination claims, once the employee sets forth a prima facie case of retaliation, the burden shifts to the employer to offer a legitimate, nondiscriminatory reason for the employment decision. *Id.* "If the employer carries that burden, then the plaintiff bears the ultimate burden to present some evidence that the proffered nondiscriminatory reasons "are a pretextual ruse designed to mask retaliation." *Id.* (citation and quotation marks omitted).

Butts engaged in protected activity by filing an EEOC charge on December 13, 2019, and he suffered an adverse action when he was terminated shortly

thereafter.[3] CentiMark argues, among other things, that Butts has failed to come forward with evidence that its non-retaliatory reason for terminating Butts (i.e. that Butts was fired for failing to report to work) was pretextual. [Doc. 39-1 at 25]. In his brief, Butts provides no meaningful response to this argument. I have reviewed the evidence that both sides have presented and conclude that Butts has failed to show a genuine dispute as to any issue of material fact and that CentiMark is entitled to judgment as a matter of law on the retaliation claim. FED. R. CIV. P. 56(a); *See also Celotex*, 477 U.S. at 324.

[3] Butts's demotion occurred before he engaged in any protected conduct. And his complaint to the human resources department on January 20, 2020 occurred after both of his adverse actions. Thus, neither the demotion nor the HR complaint can form the basis for a retaliation claim. *See Tucker v. Florida Dep't of Transp.*, 678 F. App'x 893, 896 (11th Cir. 2017) ("Logic dictates that the protected conduct must precede the act of retaliation.").

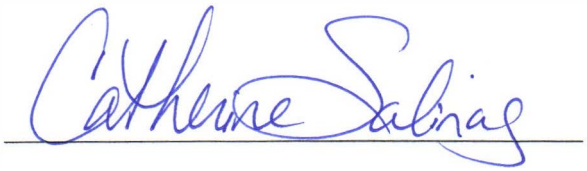
V. CONCLUSION

For the reasons stated above, CentiMark's motion to strike [Doc. 50] is **GRANTED**. Document Numbers 48 and 49 are hereby **STRICKEN FROM THE RECORD**.

Further, I **RECOMMEND** that CentiMark's motion for summary judgment [Doc. 39] be **GRANTED**.[4]

I **DIRECT** the Clerk to terminate the referral of this civil action to me.

SO REPORTED, RECOMMENDED, AND DIRECTED, this 11th day of June, 2021.



Catherine M. Salinas
United States Magistrate Judge

[4] CentiMark has also argued that certain portions of Butts's discrimination and retaliation claims were not properly exhausted before the EEOC. [Doc. 39-1 at 10–11]. These arguments have force, and Butts did not respond to them in any meaningful way. I have not addressed them here, but if the district judge would like those issues analyzed, the case can be resubmitted to me and I will promptly supplement this report and recommendation.