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

DEANNA FULTON,	:	
	:	
Plaintiff,	:	
	:	CIVIL CASE NO.
v.	:	1:20-cv-02148-ELR-RGV
	:	
KEITH LAWSON COMPANY, INC.,	:	
	:	
Defendant.	:	

MAGISTRATE JUDGE'S FINAL
REPORT, RECOMMENDATION, AND ORDER

Plaintiff Deanna Fulton ("Fulton") brings this employment discrimination action against Keith Lawson Company, Inc. ("KLC"), alleging she suffered sexual harassment resulting in a tangible employment action and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. ("Title VII"). [Doc. 21].[1] KLC has filed a motion for summary judgment, [Doc. 52], which Fulton opposes, [Doc. 72], and KLC has filed a reply in support of its motion, [Doc. 73]. KLC also has moved for sanctions for spoliation of evidence, [Doc. 61], which Fulton opposes, [Doc. 71], and KLC has filed a reply in support of its motion, [Doc.

[1] The listed document and page numbers in citations to the record refer to the document and page numbers shown on the Adobe file reader linked to the Court's electronic filing database, CM/ECF, except that citations to deposition transcripts will also be cited according to the transcript page numbers.

75]. For the reasons that follow, KLC's motion for sanctions, [Doc. 61], is **DENIED**, and it is **RECOMMENDED** that KLC's motion for summary judgment, [Doc. 52], be **GRANTED**.

I. FACTUAL BACKGROUND

A. Preliminary Matters

"In this District, the process for separating disputed from undisputed material facts is governed by Local Rule 56.1(B)." Brandon v. Lockheed Martin Aeronautical Sys., 393 F. Supp. 2d 1341, 1347 (N.D. Ga. 2005), adopted at 1346; see also Dobson v. Fulton Cty., CIVIL CASE NO. 1:19-cv-00902-ELR-RGV, 2020 WL 5549246, at *2 (N.D. Ga. July 9, 2020), adopted by 2020 WL 5548771, at *7 (N.D. Ga. Aug. 31, 2020) (citation omitted).[2] In compliance with Local Rule 56.1(B)(1), KLC,

[2] Specifically, Local Rule 56.1(B)(1) requires the movant to include with its motion and brief "a separate, concise, numbered statement of the material facts to which [] [it] contends there is no genuine issue to be tried," and provides that the Court will not consider any fact that is "not supported by a citation to evidence (including page or paragraph number); [] supported by a citation to a pleading rather than to evidence; [] stated as an issue or legal conclusion; or [] set out only in the brief[.]" LR 56.1(B)(1), NDGa. In addition, Local Rule 56.1(B)(2) requires the non-moving party to include with the responsive brief "[a] response to the movant's statement of undisputed facts[] . . . [that] contain[s] individually numbered, concise, nonargumentative responses corresponding to each of the movant's numbered undisputed material facts." LR 56.1(B)(2)(a)(1), NDGa.; see also Williams v. Slack, 438 F. App'x 848, 849 (11th Cir. 2011) (per curiam) (unpublished) (citations omitted). If the non-moving party fails to respond to a material fact contained in the movant's statement by directly refuting the fact with concise responses supported by specific citations to evidence, stating a valid objection to the admissibility of the fact, pointing out that the movant's citation does not support the movant's fact, or showing that the movant's fact is not

as movant, filed a statement of material facts as to which there are no genuine issues to be tried, [Doc. 52-1], to which Fulton has responded, [Doc. 72-1]. Fulton also submitted her own statement of additional material facts, [Doc. 72-2], to which KLC has responded, [Doc. 74].[3] The Court accepts as undisputed those facts which the parties admit or have failed to properly dispute or deny, see [Doc. 72-1, admitting or failing to properly deny or dispute ¶¶ 1-24, 27-30, 33-39, 41-46, 48-51, 53-54, 56-80, 82-105, 107-11, 113, 117-25, 127, 130-55, 157-61,[4] and parts of ¶¶ 25-26, 31-32, 40, 47, 52, 55, 81, 106, 112, 114-16, 126, 128-29, and 156 of KLC's statement, Doc. 52-1; Doc. 74, admitting or failing to properly deny or dispute ¶¶ 1-15, 17, 19, 21-22, 24, 28, 38, 40, 43-52, 54-56, 63, 66-71, and parts of ¶¶ 16, 18, 20, 23, 25-27, 29-37, 39, 41-42, 53, 57-62, 64-65, and 72-77 of Fulton's statement, Doc. 72-2].[5]

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material, the fact will be deemed admitted. See LR 56.1(B)(2)(a)(2), NDGa.; BMU, Inc. v. Cumulus Media, Inc., 366 F. App'x 47, 48-49 (11th Cir. 2010) (per curiam) (unpublished) (citation omitted). Moreover, "[t]he court will deem the movant's citations supportive of its facts unless the respondent specifically informs the court to the contrary in the response." LR 56.1(B)(2)(a)(3), NDGa.

[3] The Local Rules contemplate the nonmovant "fil[ing] a separate statement of additional facts which the nonmovant contends are material and present a genuine issue for trial." Circle Grp., L.L.C. v. Se. Carpenters Reg'l Council, 836 F. Supp. 2d 1327, 1349 (N.D. Ga. 2011) (citing LR 56.1(B)(2)(b), NDGa.).

[4] KLC numbered its last undisputed material fact as a duplicate "161" instead of "162." See [Doc. 52-1 at 39].

[5] KLC objects that certain statements of additional material facts set forth by Fulton are inadmissible hearsay. See [Doc. 74 ¶¶ 18, 20, 25-26, 29-31, 33-37, 53, 57, 64-65, 72, 74, 76]; see also [Doc. 73 at 4-9 (KLC's reply to Fulton's response opposing

However, the Court has disregarded those facts that are not material, were stated as a legal conclusion, were argumentative, or were not properly supported by a citation to evidence. See LR 56.1(B)(1)-(3), NDGa.[6]

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summary judgment, arguing that Fulton impermissibly relies on inadmissible hearsay and that her statement of additional material facts does not comply with Local Rule 56.1)]. "[W]hen considering a motion for summary judgment, [t]he general rule is that inadmissible hearsay cannot be considered," but "there is an exception to the general rule: a district court may consider a hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial or reduced to admissible form." Coffman v. Battle, 786 F. App'x 926, 934 (11th Cir. 2019) (per curiam) (unpublished) (second alteration in original) (internal marks omitted) (quoting Macuba v. Deboer, 193 F.3d 1316, 1322-23 (11th Cir. 1999)); see also Johnson v. Fulton Cty. Bd. of Tax Assessors, CIVIL ACTION FILE NO. 1:18-cv-5292-TWT-JKL, 2021 WL 2582304, at *13 n.31 (N.D. Ga. Jan. 28, 2021), adopted sub nom. Johnson v. Fulton Cty., CIVIL ACTION FILE NO. 1:18-CV-5292-TWT, 2021 WL 2581431, at *1 (N.D. Ga. Feb. 17, 2021) (citation omitted). The Court finds that to the extent Fulton offers testimony about her coworkers' alleged statements to her or about what other supervisors or managers said for the truth of the matter asserted, "such testimony is inadmissible hearsay," Harrison v. Hertz Corp., Civil Action No. 1:05-CV-2253-BBM, 2006 WL 8433071, at *15 (N.D. Ga. Nov. 21, 2006), adopted by 2006 WL 8432890, at *1 (N.D. Ga. Dec. 13, 2006) (citations omitted); see also Fields v. Atlanta Indep. Sch. Sys., 916 F. Supp. 2d 1348, 1353 (N.D. Ga. 2013), which Fulton has failed to demonstrate is admissible under some exception, and the Court therefore will not consider such statements. The Court will further address the admissibility of the challenged statements, to the extent they are material, in connection with discussing the merits of KLC's motion for summary judgment hereinafter.

[6] "In determining whether evidence creates a factual dispute, [the Court] draw[s] reasonable inferences in favor of the nonmoving party, but inferences based upon speculation are not reasonable." Byrd v. UPS, No. 19-13758, 2020 WL 2849941, at *1 (11th Cir. June 2, 2020) (per curiam) (unpublished) (citation omitted). Additionally, "[t]he substantive law will identify which facts are material, and material facts are those which are key to establishing a legal element of the substantive claim which might affect the outcome of the case." Campbell v. Shinseki, 546 F. App'x 874, 877 (11th Cir. 2013) (per curiam) (unpublished) (citation

B. Statement of Facts

KLC is a commercial and residential plumbing, air conditioning, and heating company. [Doc. 52-10 (Sink Decl.) ¶ 3; Doc. 72-5 (Pl.'s Decl.) ¶ 5]. At all times relevant to this case, Keith O. Lawson, II was the President of KLC; Janet Sink ("Sink") was KLC's Human Resources/Payroll Administrator; Brad Butler ("Butler") was the General Superintendent over all of KLC's projects and jobsites; and Gregory Nicholas Molinari ("Molinari") was KLC's Corporate Safety Director.

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and internal marks omitted); see also Tucker v. State Farm Mut. Auto. Ins. Co., 109 F. Supp. 3d 1350, 1352 (N.D. Ga. 2015) (citation omitted) ("A fact is not material if a dispute over that fact will not affect the outcome of the suit under the governing law."); First Benefits, Inc. v. Amalgamated Life Ins. Co., Civil Action No. 5:13-CV-37 (MTT), 2014 WL 6956693, at *3 (M.D. Ga. Dec. 8, 2014) ("[T]he Court will not rely on any fact that is not 'material' in order to determine whether summary judgment should be granted."). Thus, what follows is a summary of facts as presented by KLC in its statement of material facts as to which there are no genuine issues to be tried, see [Doc. 52-1], and the Court will note those occasions in which Fulton offers additional or conflicting factual statements that are supported by the evidence of record, see J.D.P. v. Cherokee Cty., Ga. Sch. Dist., 735 F. Supp. 2d 1348, 1350 (N.D. Ga. 2010); see also [Doc. 72-2]. The Court has also taken additional facts from the exhibits to the motion for summary judgment and responses in order to fully describe Fulton's allegations. See Tishcon Corp. v. Soundview Commc'ns, Inc., Civil Action No. 1:04-CV-524-JEC, 2005 WL 6038743, at *3 (N.D. Ga. Feb. 15, 2005) (citing Fed. R. Civ. P. 56(c)) ("When ruling on summary judgment, the Court may consider pleadings, depositions, answers to interrogatories, admissions on file, and affidavits submitted by the parties."); Fed. R. Civ. P. 56(c)(3) ("The court need consider only the cited materials, but it may consider other materials in the record."). And, as required on a motion for summary judgment, the Court construes the pertinent facts of this case in the light most favorable to Fulton as the non-moving party. Jacomb v. BBVA Compass Bank, 791 F. App'x 120, 121 (11th Cir. 2019) (per curiam) (unpublished) (citation omitted).

[Doc. 52-10 ¶ 2; Doc. 52-11 (Lawson Decl.) ¶¶ 1-2, 4; Doc. 54 (Pl.'s Dep.) at 70-71 pp. 69-70, 85 p. 84; Doc. 55 (Butler Dep.) at 3 p. 7; Doc. 56 (Molinari Dep.) at 3 p. 6].

At all times relevant in this matter, KLC maintained Anti-Discrimination and Anti-Harassment Guidelines in its Employee Handbook that prohibited "any form of discrimination and/or harassment . . . based on any protected class established under applicable federal, state or local statute or ordinance." [Doc. 52-10 ¶ 4, 7-8; Doc. 54 at 346-47; Doc. 58 (Rule 30(b)(6) Sink Dep.) at 4 p.13]. These Guidelines also addressed sexual harassment and explained that if an employee believed he or she had been "subjected to discrimination or harassment . . . or ha[d] questions about whether certain conduct [was] unlawful[, the employee] should immediately report the offensive conduct to his or her direct supervisor and the [Human Resources] Administrator," or "if the employee's direct supervisor [was] in any way involved in the alleged inappropriate behavior or [was] unavailable, the employee must immediately contact the President and/or CEO," and further provided that "[m]anagement [would] ensure that there [was] no coercion, retaliation, intimidation, discrimination or harassment directed against any individual who registere[d] a complaint or serve[d] as a witness on behalf of another individual." [Doc. 54 at 346-47 (emphasis omitted)]; see also [Doc. 52-10 ¶¶ 6-7 (citation omitted); Doc. 54 at 101-02 pp. 100-01; Doc. 58 at 4-5 pp. 13-14].

Fulton participated in a training program offered through Construction Ready at Westside Works, which helped her prepare a resume to submit to potential employers and assisted her with preparing interview questions, among other employment-related tasks. [Doc. 54 at 46-49 pp. 45-48, 67 p. 66, 69 p. 68, 324-25]. On October 24, 2019, KLC representatives attended a job fair held by Construction Ready and received a copy of Fulton's resume. [Doc. 54 at 46 p. 45, 65-67 pp. 64-66; Doc. 58 at 3 pp. 7-8; Doc. 72-5 ¶ 15].[7] At the job fair, Fulton interviewed with Molinari, KLC's Corporate Safety Director. [Doc. 54 at 70-72 pp. 69-71; Doc. 56 at 3 pp. 8-9; Doc. 72-5 ¶ 16].[8] During the interview, Fulton expressed an interest in working as a "Safety Coordinator." [Doc. 54 at 72-73 at 71-72, 75-76

[7] On her resume, Fulton provided the following "Objective":

> [T]o continue building a career in the construction industry by becoming a Safety Coordinator. Currently, I have 5+ years in the workforce where [I] have developed great Communication, Investigative and coordination skills. Most importantly the Electrical Trade knowledge I have acquired while working for E&D Electrical Co. LLC has made me want to advance my career in safety coordination.

[Doc. 54 at 324 (emphasis and all caps omitted)]. Fulton did not know in advance of the job fair the positions for which KLC would be interviewing. [Id. at 69-70 pp. 68-69].

[8] Although Butler, KLC's General Superintendent, also was present at the job fair, he did not interview Fulton. [Doc. 54 at 70-72 pp. 69-71; Doc. 55 at 3 p. 8; Doc. 56 at 3 pp. 8-9].

pp. 74-75; Doc. 56 at 3 p. 9]. Molinari testified that he advised Fulton that "there may be a position for an assistant safety director in the future," but that "[i]f she was interested in that type of role, she would have to first learn how [KLC] did all of the work, working her way starting as a [H]elper since she had no experience in [KLC's] trade . . . and then if such a role opened up in the future, that [he] would keep her in mind." [Doc. 56 at 3 p. 9]. Fulton, on the other hand, maintains that Molinari agreed to "get[] a [S]afety [C]oordinator position" and to "pay [her] between 16 and 17 an hour," but that "he would have to work on it" and "get back to [her]." [Doc. 54 at 72-75 at 71-74]; see also [Doc. 72-5 ¶ 18]. Fulton acknowledges that Molinari explained that she would "first need to work" under Michael Windham ("Windham"), the Superintendent for KLC's Spring Street project,[9] "for a few months to get some on-the-job training and experience," but she maintains that he stated that "[i]f everything went well," he may have "a different position in a different state" for her, such as a "[S]afety [C]oordinator for . . . either [Georgia] or Florida" since he "was in Tennessee, if [she was] not mistaken[.]" [Doc. 52-12 (Windham Decl.) ¶ 2; Doc. 54 at 75-76 pp. 74-75; Doc. 72-5 ¶ 19]. However, Fulton admitted that other than what her program teachers at Construction Ready told her, she had no information that Molinari was authorized to make job offers at the

[9] KLC had a subcontract to provide plumbing services on a redevelopment project located on Spring Street in Atlanta, Georgia. [Doc. 52-11 ¶ 12].

job fair and that she was not, in fact, guaranteed a job or any specific position with KLC at the job fair. [Doc. 54 at 76 p. 75, 86 p. 85].[10]

Following the job fair, Fulton emailed Sink on October 28, 2019, with Butler copied thereon, stating in relevant part:

> Hello my name is [] Fulton,[I] am following up on my interview.
>
> I am part of the [C]onstruction [R]eady program. Newton High School is the high school I attended while doing dual enrollment at De[K]alb Tech to further my education to help the youth. I have worked in the construction field growing up as a child like, electrical, painting, and landscaping. Just to name a few, but as my career advanced I became more interested in safety coordination so I guess you can say construction is in my blood. I am a hands on learner and a very moldable employee. The construction field is where I see myself 15 years from now. Working with my hands is one of the best feelings when it comes to getting dirty and working hard. This is the

[10] As KLC's Corporate Safety Director, Molinari held the only company position dedicated to safety, and he was responsible for safety compliance and training for all KLC projects and jobsites. [Doc. 52-11 ¶¶ 3-4; Doc. 55 at 5 p. 14; Doc. 56 at 3 p. 7, 6 p. 18; Doc. 58 at 3-4 pp. 9-10]. Other than the Corporate Safety Director position that was currently held by Molinari, KLC did not have any other safety positions within the company and never had a "Safety Coordinator" position at the company nor did it maintain a "Safety Coordinator" on any jobsite. [Doc. 52-10 ¶ 11; Doc. 52-11 ¶ 6; Doc. 58 at 3-4 pp. 9-10]. Instead, the superintendents and foremen at each jobsite were responsible for ensuring that the site operated in a safe manner on a day-to-day basis while Molinari was responsible for the overall safety of the jobsites. [Doc. 52-11 ¶ 5; Doc. 56 at 3 p. 7, 6 p. 18; Doc. 57 (Windham Dep.) at 4 p. 10; Doc. 58 at 4 p. 12]. Molinari was not authorized to create job positions on behalf of KLC as that process required review and approval by multiple members of management, budgeting, and other administrative procedures. [Doc. 52-11 ¶ 8; Doc. 56 at 3 pp. 7-8]. KLC has never undertaken such procedures for a "Safety Coordinator" position or any other safety-related job position other than the Corporate Safety Director position held by Molinari. [Doc. 52-11 ¶ 9].

> best career investment [I] could ever be apart [sic] of. Thank you for your time, I look forward to working for your company.
>
> Thank you for giving me the opportunity to share my resume with you. Friday 10/24/2019 [I] spoke with . . . Molinari about a potential position with your company. I was given . . . Butler's email and was told to reach out for employment opportunities, unfortunately [I] didn't have the chance to speak with [] Butler myself on hiring fair day but [I] do look forward to meeting you[.]

[Id. at 340-41 (emphasis omitted)]; see also [id. at 84 p. 83, 86 p. 85; Doc. 58 at 3 p. 8]. Butler forwarded this email to Molinari, who responded, "Yes she was my first pick[.]" [Doc. 54 at 340].

On October 31, 2019, Fulton completed an electronic application and listed the job position she was applying for as "[H]elper." [Id. at 83 p. 82, 93-94 pp. 92-93, 342-44].[11] She input all of the information into the application herself and

[11] Fulton testified that she originally listed "[S]afety [C]oordinator" as the job position she was applying for on the application, but that Molinari re-sent her the application and told her that she had to resubmit the application with "Helper" as the position she was applying for with a "[d]esired [s]alary" of $16.00 per hour and that it was temporary and she "needed to wait until they [could] get [the Safety Coordinator] position down" and that after she got her "hands-on experience, . . . they would go back and put [her] as a [S]afety [C]oordinator." [Doc. 54 at 94-96 pp. 93-95, 112-15 pp. 111-14, 342; Doc. 72-5 ¶ 21]. She also testified that Molinari said she would still learn certain safety aspects of the job and perform some Safety Coordinator duties in the meantime. [Doc. 72-5 ¶ 23]. However, Fulton also admits that she would have been the first Safety Coordinator hired by KLC to work under Molinari, see [Doc. 52-1 ¶¶ 42, 45 (citing [Doc. 54 at 82 p. 81, 97 p. 96]); Doc. 72-1 ¶¶ 42, 45 (citing [Doc. 54 at 82 p. 81])], and that she had no personal knowledge as to whether such a position had been created or budgeted for at the time she submitted her application and was hired by KLC, [Doc. 54 at 76 p. 75, 107 p. 106]. In fact, there was no "Safety Coordinator" position in existence at the time Fulton was hired or any time thereafter. [Doc. 52-11 ¶¶ 6,

certified that all of the information in the application was true and correct. [Id. at 94 p. 93, 342-44]. Thereafter, Fulton interviewed with Windham and Bernard Phelps ("Phelps"), the foreman on the Spring Street jobsite who reported to Windham. [Doc. 52-12 ¶¶ 2-3; Doc. 54 at 87 p. 86; Doc. 57 at 3 pp. 7-9; Doc. 72-5 ¶ 26]. Windham testified that because Fulton "had no experience in plumbing," she was under consideration for a "[H]elper position," but was first offered "a clerical role in the office helping with paperwork," which she turned down because she "wanted to be in the field," and since she had no experience, the position would be as a Helper. [Doc. 57 at 3 p. 9]. He also stated that while Fulton discussed a Safety Coordinator position, the "agreement was . . . that she was a candidate for the safety job in the future" since she "had no experience." [Id. at 4 p. 10]. Fulton, on the other hand, testified that Windham said he needed someone to follow him around the jobsite and "[l]et everybody know what they're doing and what they're doing wrong as far as safety hazards," as well as filing his paperwork, and that she agreed as long as she could "get hands-on experience" and "learn what everybody [was] doing, their steps, so [she would] know if [they were] doing their

9; Doc. 56 at 4-5 pp. 13-15; Doc. 58 at 3-4 pp. 9-10]. Moreover, Fulton did not reference on her application any prior experience as a Safety Coordinator, and prior to working for KLC, she had never worked as a Safety Coordinator or performed in a safety role for any company that she previously worked for, though she performed some general safety-related duties. [Doc. 54 at 79-80 pp. 78-79, 97 p. 96, 342-44].

job correctly" so that she was not "telling them they're doing their job wrong when indeed they're doing it correct" because she was "ignorant to what a plumber does and does not do in a commercial building" since she "was never a plumber or . . . a [S]afety [C]oordinator for a plumber," and that she was ultimately offered both a Helper position and Safety Coordinator position and that she said she wanted to be "a [S]afety [C]oordinator with hands-on experience so [she] [knew] what they're doing." [Doc. 54 at 88-91 pp. 87-90]. Following the interview, Windham and Phelps believed Fulton would be a good fit at KLC and recommended to Butler that she be hired as a Helper, [Doc. 57 at 3-4 pp. 9-10], and Molinari subsequently informed Fulton that she was hired and to report for a drug test and to speak with Windham, but that if "everything goes good," she could "end up working alongside him personally if [she received] enough recommendations from [Windham] and the people that [she] work[ed] with to get more training in the [S]afety [C]oordinator position," [Doc. 54 at 97-99 pp. 96-98].

Fulton was officially hired by KLC on November 4, 2019. [Id. at 19 p. 18, 65 p. 64, 125 p. 124, 348; Doc. 58 at 3 p. 7]. On that day, Fulton signed a form, acknowledging that she had received KLC's Employee Handbook and agreed to follow its Anti-Discrimination and Harassment Policy. [Doc. 54 at 100-01 pp. 99-

100, 103 p. 102, 345].[12] While the parties dispute whether Fulton's job title when she was hired was "Helper" or "Safety Coordinator," see [Doc. 52-1 ¶¶ 52, 55 (citations omitted); Doc. 72-1 ¶¶ 52, 55 (citation omitted)],[13] KLC completed a Hiring Supervisor's Form after hiring Fulton, which stated that Fulton's "Job Position/Title" was that of "Helper," with a start date of November 4, 2019, at a rate of pay of $15.00 per hour, [Doc. 54 at 348 (emphasis omitted)]; see also [id. at 104-05 pp. 103-04, 116-19 pp. 115-18, 349-58].[14]

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[12] Although Fulton admits that she signed the acknowledgement form, she testified that she was never given the Handbook itself. [Doc. 54 at 99-103 pp. 98-102]; see also [Doc. 72-1 ¶ 49 (citation omitted)]. However, Fulton also admits that she understood how to report harassment or alleged discrimination consistent with KLC's policy. [Doc. 54 at 102 p. 101]; see also [Doc. 72-1 ¶ 51 (citation omitted)].

[13] KLC objects to the evidence relied upon by Fulton to support her assertion that she was hired as a Safety Coordinator as inadmissible hearsay, see [Doc. 74 ¶¶ 18, 20, 25-26, 29-31, 33-35, 72, 74], and as stated previously, the Court will address these objections and the evidence in conjunction with the merits of Fulton's claims.

[14] Fulton admits that she is not aware of any KLC document indicating that she was hired under any job title other than "Helper" and that she never received anything in writing from anyone at KLC stating that she was being offered a position as a Safety Coordinator or hired in such a position or any other type of safety position. [Doc. 54 at 106-08 pp. 105-07, 232 p. 231]; see also [Doc. 72-1 ¶¶ 54, 56]. In fact, there are no personnel records or other documents that list Fulton's job title as Safety Coordinator, or as any other type of safety position, but rather, the only documents KLC has in its possession list her job title as "Helper." [Doc. 52-10 ¶¶ 9-10].

Fulton was initially assigned to work at the Spring Street project jobsite in Atlanta, during which she would report to Windham and Phelps. [Id. at 59 p. 58, 103 p. 102, 125 p. 124, 147 p. 146; Doc. 59 (Sink Dep.) at 3 p. 6; Doc. 72-5 ¶ 6]. Windham was present at the Spring Street jobsite on a daily basis, and both Windham and Phelps were responsible for assigning Fulton daily tasks. [Doc. 57 at 4-5 pp. 13-14; Doc. 59 at 3 pp. 8-9].[15] At the Spring Street jobsite, Fulton's job duties included catching concrete cores and bringing them back up to the floor above,[16] assisting plumbers, and cleaning up and sweeping. [Doc. 54 at 122-23 pp. 121-22, 130 p. 129; Doc. 55 at 4-5 pp. 10, 17; Doc. 57 at 4 p. 13; Doc. 58 at 3 p. 9; Doc. 59 at 4 p. 12].[17]

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[15] Phelps, however, did not have authority to change Fulton's job position or employment status, such as by terminating her employment. [Doc. 52-10 ¶ 17; Doc. 59 at 6 p. 21].

[16] Fulton testified that other companies at the Spring Street jobsite were responsible for catching cores and cleaning up, [Doc. 54 at 142-43 pp. 141-42], but KLC's contract required KLC to clean up, sweep, and remove any dirt, trash, or debris resulting from its work on a daily basis and that if it failed to do so, and the contractor brought in an outside company to clean, KLC would be charged a fee for the cleaning services, [Doc. 52-11 ¶¶ 12-14, 6-9; Doc. 52-12 ¶ 17]. KLC therefore required its employees on the Spring Street jobsite to clean up after themselves in an effort to comply with its contractual obligations to the contractor and avoid a financial penalty, but even then, the contractor still occasionally sent an outside cleaning company to clean up the jobsite at KLC's expense. [Doc. 52-11 ¶ 15; Doc. 52-12 ¶ 18].

[17] When Butler and Molinari observed Fulton at the Spring Street jobsite, she was performing job duties typically performed by a Helper, and neither Butler nor Windham recalls hearing Phelps assign Fulton any tasks that were inappropriate

Fulton alleges that beginning her first week of work, Phelps engaged in inappropriate sexual conduct towards her. [Doc. 54 at 130-32 pp. 129-31; Doc. 72-5 ¶ 33]. She testified that Phelps would keep looking and smiling at her, would wink at her and tip his head and look at her over his glasses in a manner that made her feel uncomfortable, would stare at her while she swept the floor, asked her how she got to and from work, asked her if she had a boyfriend, and asked her if she wanted a ride home.[18] [Doc. 54 at 130-35 pp. 129-34, 141-42 pp. 140-41, 232-33 pp. 231-32; Doc. 72-5 ¶¶ 34, 43, 45]. She also testified that Phelps would frequently "grab his pants and adjust his penis/crotch while looking directly at [her]" and that she "expressed [her] disgust, asking 'why do you do that all the time?'" [Doc.

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or that would not typically be performed by a Helper. [Doc. 55 at 3 p. 9, 6 p. 19; Doc. 56 at 4 pp. 10-11; Doc. 57 at 6-7 pp. 19, 22]. And, Fulton admits that during her first two weeks on the job, she never assisted Molinari in his safety duties nor accompanied him when he gave safety presentations or training, and she did not train anyone in safety herself, [Doc. 54 at 123-24 pp. 122-23], though she contends her job duties as "Safety Coordinator" were to include walking the jobsite, learning about other employee's jobs and how they were supposed to be performed, and citing and reporting safety hazards, [id. at 121-24 pp. 120-23, 152-53 pp. 151-52]. She also testified that during the first weeks of her employment, Phelps introduced her to the team as "the new safety person." [Id. at 109-11 pp. 108-10].

[18] Fulton did not have her own form of transportation to and from work so she either walked, took public transportation, or arranged rides with other people. [Doc. 54 at 133-34 pp. 132-33]. Fulton testified that she rejected Phelps' advances of asking her if she had a boyfriend and if she needed a ride home by responding, "Well, I'm not here for all of that," or by changing the subject and walking away and not answering him. [Id. at 131 p. 130, 133 p. 132, 137-38 pp. 136-37].

54 at 134-36 pp. 133-35, 232-33 pp. 231-32; Doc. 72-5 ¶¶ 36, 38]. She further stated that she felt sexually harassed because Phelps would stand so close to her when he spoke to her that she could smell his breath, he watched pornography on his phone while at work, and he once had someone tell Fulton to meet him on the third floor to do some work but that once she arrived, she found him masturbating against a wall.[19] [Doc. 54 at 232-37 pp. 231-36; Doc. 72-5 ¶¶ 39-42]. Fulton asserts that in response to rejecting Phelps' advances, he instructed her to stay away from his team members and "assigned [her] constant Helper duties — such as catching cores, janitorial work, sweeping, and retrieving materials," which he referred to as "'busy work,'" and that as a result, she was unable to learn how everyone performed their jobs at KLC or to learn the safety aspects of the job "in order to train to be a Safety Coordinator as [she] was supposed to do." [Doc. 72-5 ¶¶ 46-47]; see also [Doc. 54 at 141-42 at pp. 140-41].[20] She also asserts that he would not

[19] Fulton also testified that Phelps did not know Fulton saw him masturbating at first and that she does not know that he wanted her to see him doing that when he asked an employee to tell her to come meet him because he had some work for her to do. [Doc. 54 at 235-36 pp. 234-35]. She further asserts that she "complained multiple times" to Windham and Stephen Butterfield ("Butterfield"), who was another coworker and foreman at the Spring Street jobsite, about Phelps' actions, including the masturbation incident and his constant adjusting his crotch in front of her. [Doc. 72-5 ¶¶ 10, 60].

[20] Fulton admits that Phelps never directly told her that she had to sweep and clean up or that her job duties or employment status would change because she rejected his sexual advances, [Doc. 54 at 144 p. 143, 149 p. 148], but she asserts that he told her that she "wouldn't have so many problems if [she] didn't come into the

let her use the restroom several times, but that when she asked Windham for permission to use the restroom, he told her she did not need permission and could use it whenever she needed to go. [Doc. 54 at 144-47 pp. 143-46; Doc. 72-5 ¶ 61].

On the morning of November 13, 2019, Phelps instructed Fulton to catch cores, but Fulton told him that she did not believe the task fell with her job description.[21] [Doc. 52-12 ¶ 3, 7-8; Doc. 52-14 at 16-22; Doc. 54 at 162 p. 161]. Phelps also believed that Fulton was continually leaving her assigned work area that day

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company with . . . . standards and . . . high morals," [id. at 138-40 pp. 137-39, 238 p. 237]. She also admits that Phelps never physically touched her, asked her to sleep with him, or sent her any text messages or emails containing sexual content, and that she was not aware of any manager or supervisor at KLC having knowledge that Phelps had a reputation for harassing women who worked for other contracting companies, other than Windham telling Fulton that he knew of one prior altercation between Phelps and a female, which Fulton testified was "neither here nor there." [Id. at 136 p. 135, 149-50 pp. 148-49].

[21] At 9:02 a.m. that day, Fulton emailed Butler the following:

> Hello, This is [] Fulton and I wanted to know what my job title was? I'm not sure if I am training to be [S]afety [C]oordinator or not or if I am a [H]elper? Can you please help me find out? All I have done is ran plugs up and down stairs for 2 weeks. Then being told by [Phelps] that my only job is to catch cores and not be seen. I feel uncomfortable with how he speaks to me. But ultimately I would like to know my job title. Thank you[.]

[Doc. 54 at 360-61]; see also [Doc. 52-13 (Butler Decl.) ¶ 10, 5-6; Doc. 54 at 161-62 pp. 160-61].

and not performing her assigned task. [Doc. 52-12 ¶ 3, 7-8; Doc. 52-14 at 16-22].[22] Phelps therefore notified Windham that Fulton was not performing her assigned task and that she was continually leaving her work area so Windham directed him to send her home and to have her contact him, but she did not do so. [Doc. 52-12 ¶ 3, 7-8; Doc. 52-14 at 16-22]. Instead, Fulton, while still present at the jobsite, spoke with Sink via telephone and told her that she was uncomfortable with how Phelps spoke and approached her and complained that when she would ask Phelps questions, he told her not to ask those questions. [Doc. 54 at 150-53 pp. 149-52, 161 p. 160, 359; Doc. 59 at 4 pp. 10-11, 6 pp. 19-20].[23] Fulton maintains that while she was still on the phone with Sink, Phelps interrupted the call and verbally told her she was fired, stating "I'm not finna [sic] have no little young, black female coming up here telling me what to do. I assert my dominance over my team. They

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[22] Fulton maintains that she only left her assigned work area twice to go to the restroom and once when she went to lunch. [Doc. 72-5 ¶ 64].

[23] Fulton avers that during this call, she also complained to Sink "about how [Phelps] would grab his pants and openly adjust his penis/crotch while looking at [her] whenever he was around [her] and about how [he] would sit down and stare at [her] while [she] was sweeping the floor." [Doc. 72-5 ¶ 66]. Sink did not recall Fulton complaining that Phelps' comments were of a sexual nature or that she felt she was being sexually harassed and her notes from their conversation do not reflect any such allegations. [Doc. 54 at 359; Doc. 59 at 4 p. 11, 6 p. 19]. Fulton testified that Sink told her she would not be retaliated against because of her complaint "because that's what they wanted [her] to do was to report whatever goes on." [Doc. 54 at 169 p. 168].

do what I say. I'm top dog," but that Sink responded that KLC did not tolerate discrimination and "stuff of that nature" and that Fulton was "not fired" and that "[i]t was a misunderstanding" or "a miscommunication." [Doc. 54 at 153-56 pp. 152-55; Doc. 72-5 ¶ 65].[24] Fulton then spoke with Butler and told him that she felt Phelps treated her unfairly and that he had fired her. [Doc. 52-13 ¶ 4; Doc. 52-14 at 16-22; Doc. 72-5 ¶ 71].[25] Butler assured Fulton that she had not been fired,[26] but told her that she would need to go home that day as Windham had previously directed in light of her insubordination in not performing her assigned job task.[27]

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[24] Fulton also states that a coworker texted her while she was on the phone with Sink and told her that Phelps had said she was fired. [Doc. 54 at 153-54 pp. 152-53; Doc. 72-5 ¶ 63].

[25] At this time, Fulton also complained to Butler about how Phelps "would grab his pants and openly adjust his penis/crotch while looking at [her] whenever he was around [her] and about how [he] frequently offered [her] 'rides home[.]'" [Doc. 72-5 ¶ 72]. Butler, however, denies that Fulton voiced any complaints about Phelps engaging in any conduct of a sexual nature. [Doc. 52-13 ¶ 6].

[26] In fact, there were no communications among management about Fulton being terminated in connection with her complaint about Phelps. [Doc. 52-12 ¶ 8; Doc. 52-13 ¶ 7; Doc. 59 at 6 p. 21].

[27] Fulton admits that she was instructed to go home, but denies that she was sent home for being insubordinate. [Doc. 72-5 ¶¶ 73-74]. Rather, she testified that Butler said, "You're not fired, you're rehired. Take the rest of the day off, come back tomorrow, and you're going to come in as a [H]elper," and that she was therefore demoted from Safety Coordinator to Helper after she complained about Phelps. [Doc. 54 at 111-12 pp. 110-11, 120 p. 119]; see also [Doc. 72-5 ¶ 73]. However, Fulton admits that she never saw or received any personnel records or documents that indicated that she was terminated or demoted at any time. [Doc. 54 at 155 p. 154, 165 p. 164, 232 p. 231].

[Doc. 52-13 ¶ 5; Doc. 52-14 at 16-22; Doc. 54 at 154-56 pp. 153-55; Doc. 55 at 4 pp. 12-13; Doc. 59 at 7 p. 22]. Butler also spoke with Phelps that day about Fulton's allegations, at which time Phelps denied treating Fulton unfairly. [Doc. 52-13 ¶ 9; Doc. 52-14 at 16-22; Doc. 55 at 4 p. 11].[28]

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[28] Later that day, Butler received and opened the email Fulton had sent him that morning asking for clarification about her job title and expressing concern about how Phelps spoke to her. [Doc. 52-13 ¶¶ 10-12, 5-6; Doc. 52-14 at 16-22; Doc. 54 at 163-65 pp. 162-64, 360-61; Doc. 56 at 5 p. 15]. Butler forwarded the email to Molinari, who replied at 3:14 p.m. that day as follows:

> Right now she is a [H]elper. There is a possibility of her moving into an assistant type Safety role in the future based on her performance, attitude, and abili[t]y to take direction. If that doesn't work for her right now then she may need to seek other employment.

[Doc. 54 at 360]. Also that afternoon, Windham emailed Mickey Cantrell ("Cantrell"), KLC's Division Manager for the Columbus/Phenix City area, to make him aware of the events that had occurred that day, stating in relevant part:

> [Fulton] was sent home today for constantly being out of her assigned work area. [] Phelps brought it to my attention that she was continually leaving her work area on the 5th floor. She was told her task for the day of bringing the cut cores up to the floor above. When [Phelps] confronted her about why she wasn't doing what she was told and in her assigned area her response was that she was texting someone to know what her job was. I told [Phelps] to send her home and to come talk to me. She never texted, called or spoke to me personally. In her pre hire interview on site with myself and [Phelps] she was specifically told she was hired as a helper/laborer. She agreed and said she was here to work. I can[]not tolerate employees that continue to be out of their work areas if they don't agree with [the] specific task given to them. So [] Fulton will be written up and sent home for the day.

Subsequently, Cantrell, Windham, and Butler discussed the situation that had occurred between Fulton and Phelps on November 13, 2019, and in light of Fulton's complaints against Phelps, as well as performance issues by Phelps on the Spring Street project, the decision was made to transfer Phelps to a different jobsite. [Doc. 52-12 ¶ 6; Doc. 52-14 at 16-22; Doc. 59 at 5 p. 15]. Phelps was transferred to another jobsite within a week of Fulton's complaints to Sink and Butler on November 13. [Doc. 54 at 155 p. 154; Doc. 55 at 4 pp. 11-12; Doc. 59 at 5 pp. 15-16].[29]

Fulton remained employed with KLC until KLC received notice of her voluntary resignation on August 21, 2020, due to her risk of exposure to COVID-19, through correspondence from the Georgia Department of Labor. [Doc. 52-10 ¶

[Doc. 52-12 ¶ 4, 7-8]; see also [Doc. 52-10 ¶ 15, 10-11; Doc. 52-14 at 16-22]. Cantrell immediately forwarded this email to Sink, notifying her of Windham's statement of what had transpired that day. [Doc. 52-10 ¶ 15, 10-11; Doc. 52-12 at 7].

[29] In April 2020, Fulton filed a charge of discrimination against KLC with the Equal Employment Opportunity Commission ("EEOC"), alleging sex discrimination and retaliation in violation of Title VII. [Doc. 54 at 322-23]. In particular, Fulton alleges that she "was hired by [] [KLC] as the Safety Coordinator"; that Phelps prevented her from doing her job as a Safety Coordinator and that when she complained, she was told to do whatever Windham and Phelps instructed her to do; and that in late November, Phelps told her she needed his permission to go to the restroom and that when she called Sink to complain, he told her she was fired, but that Sink told her she was not fired, which Butler then confirmed, but that she was demoted to a Helper the next day. [Id.].

19; Doc. 54-1 at 58-62; Doc. 59 at 7 p. 25].[30] Fulton's pay rate of $15.00 remained the same throughout her employment with KLC, and at the time of her voluntary resignation, she was still classified as a "Helper." [Doc. 52-10 ¶¶ 16, 20; Doc. 54 at 120 p. 119, 156 p. 155, 348-58].[31]

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[30] Following the incident with Phelps, and while she was still employed with KLC, Windham had learned of an incident where a coworker at the Spring Street jobsite, Andre Millet ("Millet"), had thrown water bottles at Fulton and made inappropriate comments about her, and he immediately removed Millet from the jobsite and terminated his employment after directing Fulton to prepare a written statement about the incident. [Doc. 52-12 ¶¶ 9-12, 9-10; Doc. 54 at 169-72 pp. 168-71, 362; Doc. 57 at 5 p. 15]. Additionally, in January 2020, Fulton also complained to Windham about another coworker, Keonta Quailes ("Quailes"), who had touched her on her bottom, and after receiving Fulton's written statement regarding the incident, Windham spoke with Quailes and then immediately terminated his employment. [Doc. 52-12 ¶¶ 13, 15, 11; Doc. 54 at 174-76 pp. 173-75, 180-82 pp. 179-81, 363-65; Doc. 57 at 5 pp. 15-17; Doc. 59 at 7-8 pp. 25-26]. The same day Quailes was terminated, he went to Fulton's home with a gun and shot at the father of one of her children. [Doc. 54 at 177 p. 176]. After Fulton notified KLC of the incident, Windham and Sink spoke to her, and because Quailes continued to come to the Spring Street jobsite despite being told not to do so, KLC transferred Fulton to the Woodson Park jobsite in February 2020 out of concern for the safety of its employees. [Id. at 129 p. 128, 175-76 pp. 174-75, 178 p. 177, 183-85 pp. 182-84, 363-67; Doc. 57 at 7 pp. 24-25; Doc. 72-5 ¶ 80]. Upon her transfer, Fulton remained classified as a "Helper" and her duties included catching cores, but she did not perform any safety-related duties at this jobsite. [Doc. 54 at 129-30 pp. 128-29, 184-85 pp. 183-84, 366-67; Doc. 57 at 7 p. 25].

[31] Fulton admits that she performed Helper duties both before and after she complained about Phelps. [Doc. 54 at 169 p. 168]. Indeed, she testified that "[b]efore [she] complained[, she] was doing [H]elper duties and janitorial duties, but [she] was told to report back safety things that [she] saw" and "then after [she] complained, [she] continued to do [H]elper duties" and to "report back all the safety violations that [she] saw because [she] was told to continue to do that." [Id.]. Indeed, even John McCants ("McCants"), Fulton's off and on boyfriend and coworker, testified that although he believed Fulton was going to start her

On May 19, 2020, Fulton filed this action against KLC, [Doc. 1], and on July 24, 2020, she filed her first amended complaint, [Doc. 21], alleging that KLC retaliated against her by demoting her to a Helper position for engaging in protected activity and that she suffered a tangible employment action when she was demoted as a result of Phelps' alleged sexual harassment, [id.]. KLC moves for summary judgment on Fulton's claims, [Doc. 52], which Fulton opposes, [Doc. 72]. KLC also has filed a motion for sanctions due to spoliation of evidence, [Doc. 61], which Fulton opposes, [Doc. 71]. KLC has filed a reply in support of both of its motions, see [Docs. 73 & 75], and the pending motions, [Docs. 52 & 61], are now ripe for ruling.[32]

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employment with KLC in a safety position, KLC "never gave her the position" and that she "was a [H]elper when she first started" doing "helper stuff" and questioned how you could "get demoted from [H]elper." [Doc. 60 (McCants Dep.) at 5 p. 15, 10 p. 36; Doc. 72-5 ¶ 13]. Similarly, Jeffrey Jenkins ("Jenkins"), Fulton's coworker at KLC, testified that while he was first told by either Phelps or Windham that KLC had hired a new employee "as the [S]afety [C]oordinator, [or] something, like, to that effect," he was later told she was "not the safety person," but "a [H]elper," which made sense since when he "met her, she was doing helper work anyway[.]" [Doc. 72-5 ¶ 14; Doc. 72-7 (Jenkins Dep.) at 2-3 pp. 14-15].

[32] Additional facts will be set forth as they become necessary for discussion of Fulton's claims and the issues presented in the pending motions.

II. DISCUSSION

A. Motion for Sanctions for Spoliation of Evidence, [Doc. 61]

KLC moves for spoliation sanctions, [Doc. 61], arguing that Fulton "failed to preserve numerous text messages relevant to both her sexual harassment and retaliation claims as well as to [its] affirmative defenses to those claims," [id. at 1]. Specifically, KLC argues that Fulton "sent or received text messages relevant to this litigation with no less than twelve individuals, [most of whom were no longer employed by KLC by the time the text messages were discovered and two of whom were never employed by KLC,] and that all of these communications have been destroyed," [Doc. 75 at 1-2 (citation omitted)],[33] but that these text messages

[33] KLC explains that Fulton retained legal counsel in March 2020 and filed a charge of discrimination with the EEOC in April 2020 and then her counsel sent KLC a letter informing it of his representation of Fulton and requesting that it preserve all potential evidence, including any electronically stored information ("ESI"). [Doc. 61-1 at 7-8 (citations omitted)]; see also [Doc. 61-4 at 10-11]. On May 19, 2020, Fulton filed her original complaint in this case, [Doc. 1], and KLC maintains that "despite her duty to preserve all relevant evidence and the specific duty to preserve [ESI] under Rule 37(e)," she "took no steps to indefinitely preserve the content of her . . . text messages, such as by saving them to a cloud-based storage device, emailing them to herself, printing them, taking screen shots of the messages, or otherwise providing them to her attorneys" and "all of the text messages in question have now been destroyed" when her "cell phone 'blew up' in a car accident on June 23, 2020 — six months after she says she first formulated the belief she had been discriminated and retaliated against, and three months after she retained a lawyer," [Doc. 61-1 at 8-9 (emphasis and citations omitted)]. KLC explained that "following [Fulton's] deposition, [it] served a subpoena on MetroPCS, [the carrier of the cell phone plan associated with the lost text messages,] requesting copies of," among other things, the text messages at issue, but "the responsive documents did not include text messages because T-

were "salient to both" of Fulton's claims, [Doc. 61-1 at 6-7].[34] As a sanction, KLC seeks "an adverse presumption at summary judgment and an adverse inference instruction if a trial is necessary," or "[a]lternatively, . . . that it be permitted to introduce evidence of the lost data and that the jury be instructed that it may consider such evidence in making its decision." [Id. at 20]. KLC also seeks "attorney's fees and expenses related to the underlying subpoena and this motion, to be presented at an evidentiary hearing and/or through the submission of a fee request." [Id.].

Fulton opposes KLC's motion, [Doc. 71], arguing that she "took reasonable efforts to preserve evidence and even 'locked' the relevant text messages so they could not be deleted from her phone"; that "[e]ven though [KLC] has not taken

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Mobile/Metro by T-Mobile does not store or maintain text content" and even if it did, "it would have been legally prohibited from producing them to KLC under the Stored Communications Act[.]" [Id. at 9-10 (emphasis, citations, and internal marks omitted)]; see also [Docs. 61-5 & 61-6].

[34] In particular, KLC points out that Fulton testified in her deposition that a coworker texted her while she was on the phone with Sink on November 13, 2019, and stated in the text that Phelps "'told him she was [being] fired.'" [Doc. 61-1 at 6 (alteration in original) (citation omitted)]. KLC also points out that Fulton "testified that she had several text messages on her phone related to [] Phelps' alleged regulation of her use of the restroom," which it maintains is "relevant to her harassment claims." [Id. (citation omitted)]. Finally, KLC points to Fulton's testimony that "following her hire on November 4, 2019, she text-messaged with [eleven individuals] [], each of whom [were] identified in her interrogatory responses as persons with relevant knowledge[.]" [Id. at 6-7 (footnote and citation omitted)].

obvious steps to obtain the text messages from other sources, it now seeks to punish [her] for its own inaction on the grounds that her reasonable efforts to preserve the messages were thwarted by a freak occurrence"; that "there is no allegation that she deliberately destroyed, altered, or deleted them," but as KLC admits, she was in "a car accident on June 23, 2020, in which her telephone — and the text messages maintained thereon — were destroyed"; that KLC "could have obtained from its own employees the text messages in question, yet apparently did not" and "if [it] actually had an interest in obtaining the text messages in question, [it] would certainly have engaged in discovery actually calculated to obtain the messages themselves" and "at a minimum, asked its own employees if they had received such texts," "served subpoenas duces tecum on the individuals who received the messages," or "deposed or at least contacted these individuals and sought statements from them as to the content of the messages from [her]"; that KLC "has failed to show in any respect that the text messages are 'crucial' — or even important — to [her] claims or the defense thereto, other than to speculate that the text messages might have been helpful to its defense"; and that "[m]ere negligence in destroying evidence is not sufficient to justify sanctions," [id. at 1-4, 14 (emphasis and citation omitted)]. In reply, KLC asserts that it "did seek the text messages through discovery, both directly from [Fulton] and from her wireless provider"; that there was "no basis for asserting that KLC had the legal right to

obtain on demand — let alone possession, custody, or control over — text messages stored on a non-managerial employee's personal cell phone"; that "most of the individuals at issue were no longer employed by KLC by the time the lost text messages were discovered"; and that "the logic articulated by [Fulton] . . . would hold the prejudiced party to too strict a standard of proof, turn the law governing spoliation on its face, and allow spoliators to profit from the destruction of the evidence." [Doc. 75 at 2 (alteration, emphasis, citations, and internal marks omitted)].

"Spoliation refers to 'the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.'" Pinkney v. Winn-Dixie Stores, Inc., Civil Action No. CV214–075, 2015 WL 858093, at *3 (S.D. Ga. Feb. 27, 2015) (quoting Graff v. Baja Marine Corp., 310 F. App'x 298, 301 (11th Cir. 2009) (unpublished)); see also Brown v. SSA Atl., LLC, CV419-303, 2021 WL 1015891, at *2 (S.D. Ga. Mar. 16, 2021) (citation omitted). "A district court has broad discretion to impose sanctions for spoliation, in order to prevent unfair prejudice to litigants and to insure the integrity of the discovery process." Pinkney, 2015 WL 858093, at *3 (citation and internal marks omitted). "The party seeking spoliation sanctions must prove that the missing evidence existed at one time; that the alleged spoliator had a duty to preserve the evidence; and that the evidence was crucial to the

party's case." Little v. McClure, Civil Action No. 5:12–CV–147 (MTT), 2014 WL 3778963, at *1 (M.D. Ga. July 31, 2014) (citation omitted); see also Se. Mech. Servs., Inc. v. Brody, 657 F. Supp. 2d 1293, 1299 (M.D. Fla. 2009) (citation omitted).[35]

"If spoliation has occurred, the Court must decide whether sanctions are warranted and if so, what sanction to impose." Little, 2014 WL 3778963, at *1. To determine whether sanctions are warranted, the Court must consider the following five factors:

> (1) whether [KLC] was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether [Fulton] acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence provided by the spoliator were not excluded.

Griffin v. GMAC Com. Fin., L.L.C., Civil Action File No. 1:05-CV-199-WBH-GGB, 2007 WL 521907, at *3 (N.D. Ga. Feb. 15, 2007) (footnote omitted) (citing Flury, 427 F.3d at 945); see also McLeod v. Wal-Mart Stores, Inc., 515 F. App'x 806, 808 (11th

[35] "[F]ederal law . . . governs spoliation sanctions in a case premised on federal-question jurisdiction." F.T.C. v. First Universal Lending, LLC, 773 F. Supp. 2d 1332, 1351 (S.D. Fla. 2011) (footnote and citation omitted); see also Atta v. Cisco Sys., Inc., CIVIL ACTION FILE NO. 1:18-cv-1558-CC-JKL, 2020 WL 7384689, at *3 (N.D. Ga. Aug. 3, 2020), adopted by 2020 WL 7022450, at *3 (N.D. Ga. Nov. 30, 2020) (citation omitted) ("The imposition of spoliation sanctions is governed by federal law, as spoliation sanctions are considered an evidentiary matter."). Since "Georgia state law on spoliation is wholly consistent with federal spoliation principles," the Court's analysis is also informed by Georgia law. Flury v. Daimler Chrysler Corp., 427 F.3d 939, 944 (11th Cir. 2005) (citation omitted).

Cir. 2013) (per curiam) (unpublished) (citation omitted).[36] "Of particular import is 'weigh[ing] the degree of the spoliator's culpability against the prejudice to the opposing party.'" Atta, 2020 WL 7384689, at *4 (alteration in original) (citation omitted). "Appropriate sanctions may include an adverse judgment, the denial of a defendant's motion for summary judgment, issuing jury instructions that raise a presumption against the spoliator, or the exclusion of evidence." In re Delta/Air Tran Baggage Fee Antitrust Litig., 770 F. Supp. 2d 1299, 1305 (N.D. Ga. 2011) (citations omitted); see also Graff, 310 F. App'x at 301 (citation and internal marks omitted) ("Under Georgia law, spoliation of critical evidence may warrant the imposition of sanctions such as exclusion of certain evidence or outright dismissal of the case."). However, "mere negligence in losing or destroying records is not sufficient to draw an adverse inference," Mann v. Taser Int'l, Inc., 588 F.3d 1291, 1310 (11th Cir. 2009) (citation omitted),[37] and the "Eleventh Circuit has

[36] "The fifth *Flury* factor is irrelevant where, as here, the [allegedly] spoliated evidence is not the subject of expert testimony." Carter v. Butts Cty., CASE NO.: 5:12-CV-209 (LJA), 2016 WL 1274557, at *8 n.2 (M.D. Ga. Mar. 31, 2016) (citation and internal marks omitted).

[37] "[A]n adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith," and "[b]ad faith in the context of spoliation generally means destruction for the purpose of hiding adverse evidence." Kadribasic v. Wal-Mart, Inc., Civil Action No. 1:19-cv-03498-SDG, 2021 WL 1207468, at *4 (N.D. Ga. Mar. 30, 2021) (alteration, citations and internal marks omitted).

acknowledged the broad discretion afforded to trial courts in determining whether to impose spoliation sanctions," Atta, 2020 WL 7384689, at *4 (citation omitted).

Because the material at issue involves ESI, see Living Color Enters., Inc. v. New Era Aquaculture, Ltd., Case No. 14–cv–62216–MARRA/MATTHEWMAN, 2016 WL 1105297, at *4 (S.D. Fla. Mar. 22, 2016) (explaining that text messages constitute ESI), Rule 37 of the Federal Rules of Civil Procedure governs, and provides in relevant part:

> **(e) Failure to Preserve [ESI].** If [ESI] that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> **(1)** upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> **(2)** only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> > **(A)** presume that the lost information was unfavorable to the party;
> >
> > **(B)** instruct the jury that it may or must presume the information was unfavorable to the party; or
> >
> > **(C)** dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e).

"As the advisory committee notes and courts in this Circuit have repeatedly held, Rule 37(e) does not fundamentally alter the common law spoliation

framework, and does not purport to create a duty to preserve," as the "new rule takes the duty as it is established by case law, which uniformly holds that a duty to preserve information arises when litigation is reasonably anticipated." Atta, 2020 WL 7384689, at *4 (citations and internal marks omitted). That is, "the introductory section of Rule 37(e) requires that a party must first be shown to have failed in its duty to preserve existing evidence; further, subsection (e)(1) requires that prejudice also be shown before sanctions can be imposed, and that, in most cases, any sanction must be no greater than necessary to cure that prejudice." Id. (citations omitted).[38] "Further, the bad faith requirement for more severe sanctions, such as default and adverse inferences, is also largely encompassed in the subsection (e)(2), since such sanctions are still only permitted upon a finding that the party that lost the information acted with the intent to deprive[, thereby] rejecting cases . . . that authorize the giving of adverse-inference instructions on a finding of negligence or gross-negligence." Id. (alterations in original) (citations and internal marks omitted); see also Coward v. Forestar Realty, Inc., CIVIL ACTION FILE NO. 4:15-CV-0245-HLM, 2017 WL 8948347, at *8-9 (N.D. Ga. Nov.

[38] "Prejudice to opposing parties requires a showing [that] the spoliation materially affect[ed] the substantial rights of the adverse party and is prejudicial to the presentation of [its] case," and [t]his requires offering plausible, concrete suggestions of what the missing evidence would have shown." Bistrian v. Levi, 448 F. Supp. 3d 454, 477 (E.D. Pa. 2020) (first and second alterations in original) (footnotes and internal marks omitted).

30, 2017) (footnote, citations, and internal marks omitted) ("To impose sanctions under Rule 37(e)(1), the court must find that the opposing party was prejudiced by the loss of the [ESI]" and if the party was so prejudiced, the "court has broad discretion to impose sanctions, but may order measures no greater than necessary to cure the prejudice," whereas "to impose sanctions under Rule 37(e)(2), [] the [moving party must show] that [p]laintiff[] acted in bad faith or with intent to deprive the [] [d]efendant[] of the use of the information in [the] litigation").[39]

A party seeking sanctions for spoliation must first prove that the evidence in question existed in the first place. Tootla v. Wal-Mart Stores E., LP, CIVIL ACTION NO. CV 312-094, 2014 WL 12617452, at *3 (S.D. Ga. Jan. 23, 2014) (citation omitted) ("[T]he allegedly spoliated evidence must have existed in the first instance."); Sentry Select Ins. Co. v. Treadwell, 734 S.E.2d 818, 822 (Ga. Ct. App. 2012) (citations omitted) ("It is axiomatic that in order for there to be spoliation, the evidence in question must have existed and been in the control of a party."). "Second, that information (or evidence) must be of the sort that should have been preserved in the anticipation or conduct of litigation." Storey v. Effingham Cty.,

[39] Because KLC's motion involves ESI, see [Doc. 61], "the Court follows Rule 37(e)'s framework," but "given that the resolution of the inquiry depends on the materials' relevancy to the litigation, the extent of prejudice to [KLC], and whether or not [Fulton] acted with the intent to deprive (or otherwise in bad faith), the Court also draws direction from general spoliation case law, since the pertinent analyses are essentially the same," Atta, 2020 WL 7384689, at *5 (citations omitted); see also Marshall v. Dentfirst, P.C., 313 F.R.D. 691, 695 (N.D. Ga. 2016).

CV415-149, 2017 WL 2623775, at *3 (S.D. Ga. June 16, 2017) (citation and internal marks omitted). "Third, the evidence must have been lost because a party failed to take reasonable steps to preserve it," and "[f]ourth, the court must find that the evidence cannot be restored or replaced through additional discovery." Id. (citation and internal marks omitted).

It is uncontested that the text messages in question existed at one time and that Fulton had a duty to preserve them, but the parties dispute whether Fulton took reasonable steps to preserve the evidence and whether the evidence could be restored or replaced through additional discovery. See [Doc. 61-1 at 6-7, 13; Doc. 71 at 2, 6-12; Doc. 75 at 6-11]. However, the Court need not resolve these issues because even assuming that Fulton failed to take reasonable steps to preserve the messages and that they cannot be restored or replaced through additional discovery, KLC "is not entitled to spoliation sanctions, either under the broad spoliation standard in [existing case law] or the standard for [ESI] in Rule 37(e)(1), because [KLC] cannot show that [it] was prejudiced by the loss of the [text messages]," since, "[a]s [demonstrated] below regarding the motion for summary judgment, the [evidence] . . . is immaterial to [Fulton's] claims of . . . [sexual harassment] and retaliation," and "[u]nder the circumstances, the Court does not find that it is appropriate to apply the measures in Rule 37(e)(2)—which allow courts to impose spoliation sanctions where the party who failed to preserve or

deleted evidence acted in bad faith, even without a separate showing of prejudice—where . . . . [KLC] has not shown that [Fulton] acted with intent to deprive or bad faith when [she] failed to preserve the [text messages and her phone was destroyed in a car accident]."[40] Brooks v. Phoenix Metals Co., CIVIL ACTION FILE NO. 1:15-cv-3612-ODE-JKL, 2017 WL 11093573, at *9 (N.D. Ga. May 22, 2017), adopted by 2017 WL 11093677, at *10 (N.D. Ga. June 28, 2017); see also Fuhs v. McLachlan Drilling Co., Civil Action No. 16-376, 2018 WL 5312760, at *16 (W.D.

[40] In contrast to the circumstances present here, courts have found sanctions warranted where the objective evidence showed that the party failed to take any steps to preserve the relevant ESI despite a duty to do so, and the moving party was either prejudiced or the offending party acted with an intent to deprive the moving party of the evidence. See Brewer v. Leprino Foods Co., Inc., No. CV-1:16-1091-SMM, 2019 WL 356657, at *10 (E.D. Cal. Jan. 29, 2019) (citation omitted) (finding plaintiff acted with the intent to deprive defendant of relevant text messages based on the fact that she failed to take any measures to preserve the text messages despite her duty to do so; that she provided no independent record of her phone, including providing a telephone number; and that she refused to identify the individuals with whom she texted, depriving defendant "of any possibility of resurrecting the messages or coming to a meaningful understanding of the messages' content," despite her argument that "she innocently lost the text messages . . . when she placed her phone on the hood of her car and drove away."); Spencer v. Lunada Bay Boys, Case No. CV 16-02129-SJO (RAOx), 2017 WL 10518023, at *10-11 (C.D. Cal. Dec. 13, 2017), adopted by 2018 WL 839862, at *2 (C.D. Cal. Feb. 12, 2018), aff'd, 806 F. App'x 564 (9th Cir. 2020) (unpublished) (explaining that defendant could have taken any number of measures to fulfill his duty to preserve his text messages, including that he could have "taken a photograph of the text messages," "locked the text messages so that they would not be deleted or overwritten," or "written down what he recalled about the text messages," but he "did not take any steps to preserve the text messages," which was not reasonable, and that plaintiffs suffered prejudice from the loss of the text messages).

Pa. Oct. 26, 2018) (finding defendants had not "adduced sufficient evidence to establish that [plaintiff] acted in bad faith, with intent to deprive [them] of relevant ESI, or that they sustained prejudice as a result of the lost cell phone" and therefore, "the imposition of sanctions [was] not appropriate . . . under either Rule 37(e)(1) or 37(e)(2)"). Therefore, KLC's motion for sanctions due to spoliation of evidence, [Doc. 61], is **DENIED**. See Brooks, 2017 WL 11093573, at *9 (denying the motion for sanctions and attorney fees since the court found there was no prejudice to plaintiff and that defendant did not act with an intent to deprive plaintiff of the documents or otherwise act in bad faith).

B. Motion for Summary Judgment, [Doc. 52]

Fulton asserts Title VII claims for retaliation and tangible employment action sexual harassment against KLC in her first amended complaint. See [Doc. 21]. KLC moves for summary judgment on both claims. [Doc. 52]. KLC first seeks summary judgment as to Fulton's Title VII retaliation claim, arguing that Fulton has failed to establish a prima facie case of retaliation, but even if she could, that KLC's decisions were based on legitimate, non-retaliatory reasons, which she has failed to show were pretextual. [Doc. 52-2 at 6-20]. KLC also argues that summary judgment is warranted on Fulton's Title VII sexual harassment claim because she has failed to make out a prima facie case. [Id. at 20-26]. Fulton opposes KLC's motion for summary judgment, [Doc. 72], and KLC has filed a reply in support of

its motion, [Doc. 73]. The Court will address KLC's arguments and the merits of each of Fulton's claims.

1. ***Summary Judgment Standard***

"Summary judgment shall be granted if the movant shows that there is 'no genuine issue as to any material fact', such that the movant is entitled to judgment as a matter of law." Jerome v. Barcelo Crestline, Inc., 507 F. App'x 861, 863 (11th Cir. 2013) (per curiam) (unpublished) (quoting Fed. R. Civ. P. 56(a)); see also Mathews v. Wells Fargo, 758 F. App'x 842, 843 (11th Cir. 2019) (per curiam) (unpublished) (citation omitted); Holmes v. Ga. ex rel. Strickland, 503 F. App'x 870, 872 (11th Cir. 2013) (per curiam) (unpublished) (citations omitted); Young v. FedEx Express, 432 F. App'x 915, 916 (11th Cir. 2011) (per curiam) (unpublished) (citation omitted). The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material facts, upon which the non-moving party must then submit specific facts showing a genuine issue for trial. See Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Hornsby-Culpepper v. Ware, 906 F.3d 1302, 1311 (11th Cir. 2018) (citation omitted); Premier Assocs., Inc. v. EXL Polymers, Inc., No. 1:08-cv-3490-WSD, 2010 WL 2838497, at *8 (N.D. Ga. July 19, 2010), aff'd in part, 507 F. App'x 831 (11th Cir. 2013) (unpublished) (citations omitted).

"[A] party opposing a properly supported motion for summary judgment may not rest upon mere allegation[s] or denials of [her] pleading, but must set forth specific facts showing that there is a genuine issue for trial." Jackson v. B & L Disposal, Inc., 425 F. App'x 819, 820 (11th Cir. 2011) (per curiam) (unpublished) (first alteration in original) (citation and internal marks omitted); see also Shuler v. Ingram & Assocs., 441 F. App'x 712, 715 (11th Cir. 2011) (per curiam) (unpublished) (citation omitted); Bryant v. U.S. Steel Corp., 428 F. App'x 895, 897 (11th Cir. 2011) (per curiam) (unpublished) (citation omitted). "Although [the Court] view[s] all the evidence and draw[s] all inferences in the light most favorable to the nonmoving party, [i]f the non-moving party fail[s] to make a showing on an essential element of [her] case with respect to which [s]he ha[s] the burden of proof, then the entry of judgment as a matter of law is appropriate." Lowe v. Exel, Inc., 758 F. App'x 863, 865 (11th Cir. 2019) (per curiam) (unpublished) (fourth, fifth, and eighth alterations in original) (citations and internal marks omitted).

"Speculation or conjecture cannot create a genuine issue of material fact." Shuler, 441 F. App'x at 715 (citation omitted); see also Perry v. Pediatrix Med. Grp. of Ga., 841 F. App'x 174, 177 (11th Cir. 2021) (per curiam) (unpublished) (citation omitted); Howard v. Or. Television, Inc., 276 F. App'x 940, 941 (11th Cir. 2008) (per curiam) (unpublished) (citation omitted); Goodman v. Ga. Sw., 147 F. App'x 888,

891 (11th Cir. 2005) (per curiam) (unpublished) (citation and internal marks omitted) ("[A]ll reasonable inferences arising from the undisputed facts should be made in favor of the nonmovant, but an inference based on speculation and conjecture is not reasonable."). "Moreover, the non-moving party cannot create a genuine issue through evidence that is 'merely colorable' or 'not significantly probative.'" Morales v. Ga. Dep't of Human Res., 446 F. App'x 179, 181 (11th Cir. 2011) (per curiam) (unpublished) (citation omitted); see also Deneve v. DSLD Homes Gulf Coast, LLC, No. 20-13844, 2021 WL 2026616, at *2 (11th Cir. May 21, 2021) (per curiam) (unpublished) (citation omitted); Brown v. Wrigley Mfg. Co., Civil Action No. 2:18-CV-141-RWS, 2021 WL 1696384, at *2 (N.D. Ga. Mar. 29, 2021) (citation omitted) (explaining that "mere conclusions and unsupported statements by the party opposing summary judgment [were] insufficient to avoid summary judgment"); Hall v. Dekalb Cty. Gov't, 503 F. App'x 781, 786 (11th Cir. 2013) (per curiam) (unpublished) (citation omitted) ("[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."). Indeed, "[t]o overcome a motion for summary judgment, the nonmoving party must present more than a scintilla of evidence supporting [her] position–rather, there must be enough of a showing that the jury could reasonably find for that party." Siddiqui v. NetJets Aviation, Inc., 773 F. App'x 562, 563 (11th

Cir. 2019) (per curiam) (unpublished) (citation and internal marks omitted); see also Troupe v. DeJoy, No. 20-12019, 2021 WL 2530188, at *1 (11th Cir. June 21, 2021) (per curiam) (unpublished) (citation omitted); James v. City of Montgomery, 823 F. App'x 728, 731 (11th Cir. 2020) (per curiam) (unpublished) (citation omitted); Wesley v. Austal USA, LLC, 776 F. App'x 638, 643 (11th Cir. 2019) (per curiam) (unpublished) (citation omitted); Mazzola v. Davis, 776 F. App'x 607, 609 (11th Cir. 2019) (per curiam) (unpublished) (citation omitted).

In addition, "[t]here is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment," Anyanwu v. Brumos Motor Cars, Inc., 496 F. App'x 943, 945-46 (11th Cir. 2012) (per curiam) (unpublished) (citation and internal marks omitted), and "[w]here 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," Premier Assocs., Inc., 2010 WL 2838497, at *9 (alteration in original) (citation and internal marks omitted); see also Ellison v. St. Joseph's/Candler Health Sys., Inc., 775 F. App'x 634, 643 (11th Cir. 2019) (unpublished) (citation omitted). "Summary judgment is required where the non-moving party's response to a motion is merely a repetition of [her] conclusional allegations and is unsupported by evidence showing an issue for trial." Comer v. City of Palm Bay, 265 F.3d 1186, 1192 (11th Cir. 2001) (per curiam) (citation and internal marks

omitted). Finally, "'[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.'" Morton v. Kirkwood, 707 F.3d 1276, 1284 (11th Cir. 2013) (alteration in original) (quoting Scott v. Harris, 550 U.S. 372, 380 (2007)); see also Pullen v. Osceola Cty., No. 19-11448, 2021 WL 2461828, at *3 (11th Cir. June 17, 2021) (per curiam) (unpublished) (citations omitted); Chadwick v. Bank of Am., N.A., 616 F. App'x 944, 950 n.3 (11th Cir. 2015) (per curiam) (unpublished) (citation omitted); Stevenson v. Delta Air Lines, Inc., CIVIL ACTION FILE NO. 1:16-cv-002571-AT-LTW, 2021 WL 2677018, at *6 (N.D. Ga. Apr. 13, 2021) (citation omitted); Doxie v. Chipotle Mexican Grill, Inc., No. 1:13–cv–2611–WSD, 2015 WL 5737359, at *14 (N.D. Ga. Sept. 29, 2015) (citation omitted). That is, "when documentary evidence blatantly contradict[s] a plaintiff's account so that no reasonable jury could believe it, a court should not credit the plaintiff's version on summary judgment." Morton, 707 F.3d at 1284 (alteration in original) (citations and internal marks omitted).

2. *Analysis*

Fulton alleges that as a consequence of her rejecting Phelps' advances, she was retaliated against by having her job duties changed such that it constituted a "*de facto* demotion and an undesirable reassignment" and that KLC retaliated

against her by demoting her from Safety Coordinator to Helper for engaging in protected activity by complaining of sexual harassment by Phelps. [Doc. 21 ¶¶ 9, 21-22, 25-27; Doc. 72 at 6]; see also [Doc. 52-2 at 6 (citation omitted)]. Fulton also contends that she suffered a tangible employment action when she was demoted or given an undesirable reassignment as a result of Phelps' alleged sexual harassment. [Doc. 21 ¶ 33; Doc. 72 at 22-25]. KLC seeks summary judgment on Fulton's claims. [Doc. 52]. The Court will address the merits of KLC's motion with regard to both of these claims.

a. Retaliation

Fulton alleges that she was retaliated against for rejecting Phelps' sexual advances and complaining about harassment in the workplace. [Doc. 21 ¶¶ 9, 21-22, 25-27]. Title VII prohibits an employer from discriminating against an employee because the individual "opposed any practice" made unlawful by Title VII.[41] See 42 U.S.C. § 2000e-3(a). Where, as here, there is no direct evidence of retaliation, the Court evaluates a claim of retaliation in violation of Title VII by using the burden shifting framework articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1353 (2015); see also Slater v. Energy Servs. Grp. Int'l Inc., 441 F. App'x 637, 640

[41] Title VII also prohibits retaliation against an employee "because [she] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

(11th Cir. 2011) (per curiam) (unpublished) (citation omitted); Burke-Fowler v. Orange Cty., 447 F.3d 1319, 1323 (11th Cir. 2006) (per curiam) (citation omitted); Johnson, 2021 WL 2582304, at *22 (citation omitted).

Under this framework, Fulton must first present a prima facie case of retaliation, but the framework "is 'not intended to be an inflexible rule.'" Young, 135 S. Ct. at 1353-54 (citation omitted); see also Berman v. Orkin Exterminating Co., 160 F.3d 697, 701 (11th Cir. 1998). If Fulton establishes a prima facie case, an inference of retaliation arises, and the burden shifts to KLC to articulate a legitimate, non-retaliatory reason for its action. Berman, 160 F.3d at 702; see also Entrekin v. City of Panama City Fla., 376 F. App'x 987, 997 (11th Cir. 2010) (per curiam) (unpublished) (citation omitted). KLC's burden, one of production and not of persuasion, is "exceedingly light." Smith v. Horner, 839 F.2d 1530, 1537 (11th Cir. 1988) (citations and internal marks omitted); see also Bagwell v. Peachtree Doors & Windows, Inc., Civil Action File No. 2:08–CV–191–RWS–SSC, 2011 WL 1497831, at *21 (N.D. Ga. Feb. 8, 2011), adopted by 2011 WL 1497658, at *1 (N.D. Ga. Apr. 19, 2011) (citations omitted). "It is not necessary that the court believe the evidence; the court's analysis can involve no credibility assessment." Matthews v. City of Dothan, No. 1:04–CV–640–WKW, 2006 WL 3742237, at *5 (M.D. Ala. Dec. 18, 2006) (citation and internal marks omitted). "So long as [] [KLC] articulates 'a clear and reasonably specific' non-[retaliatory] basis for its

actions, it has discharged its burden of production." Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 770 (11th Cir. 2005) (per curiam) (citation omitted).

If KLC meets its burden of production with respect to each claim, the inference of retaliation is erased, and the burden shifts back to Fulton to show that KLC's articulated reasons are merely a pretext for retaliation. Entrekin, 376 F. App'x at 997 (citation omitted); Berman, 160 F.3d at 702; see also Wigfall v. St. Leo Univ., Inc., 517 F. App'x 910, 912 (11th Cir. 2013) (per curiam) (unpublished); Saunders v. Emory Healthcare, Inc., 360 F. App'x 110, 113, 115 (11th Cir. 2010) (per curiam) (unpublished) (citation omitted). That is, "[o]nce [] [KLC] proffers [] legitimate, non-[retaliatory] reason[s], in order to survive summary judgment, [] [Fulton] must proffer sufficient evidence to create a genuine issue of material fact regarding whether each of [KLC's] . . . articulated reasons [are] pretextual." Dockery v. Nicholson, 170 F. App'x 63, 66 (11th Cir. 2006) (per curiam) (unpublished) (last alteration in original) (citation and internal marks omitted); Bagwell, 2011 WL 1497831, at *25 (citation omitted). Despite this burden-shifting framework, the "ultimate burden of persuading the trier of fact that [] [KLC] intentionally [retaliated] against [] [Fulton] remains at all times with [] [Fulton]." Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (citations omitted); see also Walker v. St. Joseph's/Candler Health Sys., Inc., 506 F. App'x 886, 888 (11th Cir. 2013) (per curiam) (unpublished) (citations omitted).

KLC argues that Fulton has not presented a prima facie case of retaliation. [Doc. 52-2 at 7-18; Doc. 73 at 6-9]. KLC further argues that even if Fulton could establish a prima facie case, summary judgment is still warranted because it has articulated legitimate, non-retaliatory reasons for the challenged employment actions, which she has failed to refute or show were a pretext for retaliation. [Doc. 52-2 at 18-20; Doc. 73 at 9-14]. The Court will address the merits of each of these arguments.

i. Prima Facie Case of Retaliation

To establish a prima facie case of retaliation, Fulton must show that (1) she engaged in statutorily protected activity;[42] (2) she suffered a materially adverse employment action; and (3) the adverse employment action was caused by her engaging in protected activity.[43] Bailey v. City of Huntsville, 517 F. App'x 857, 861

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[42] Under Title VII, "[s]tatutorily protected expression includes internal complaints of discrimination to superiors, as well as complaints lodged with the EEOC and discrimination-based lawsuits." Gerard v. Bd. of Regents State of Ga., 324 F. App'x 818, 825 (11th Cir. 2009) (per curiam) (unpublished) (citing Pipkins v. City of Temple Terrace, 267 F.3d 1197, 1201 (11th Cir. 2001)).

[43] Additionally, the 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." Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013) (citation omitted). Thus, to survive summary judgment, Fulton must show that the "unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of [] [KLC]." Id. at 360; see also Reynolds v. Winn-Dixie Raleigh, Inc., 85 F. Supp. 3d 1365, 1373 (M.D. Ga. 2015), aff'd, 620 F. App'x 785 (11th Cir. 2015) (per curiam) (unpublished) (footnote and citation omitted) ("To prove causation, [plaintiff] must show that [her] protected activity

(11th Cir. 2013) (per curiam) (unpublished) (citation omitted); see also Hawk v. Atlanta Peach Movers, 469 F. App'x 783, 785 (11th Cir. 2012) (per curiam) (unpublished) (citation omitted); Hawthorne v. Baptist Hosp. Inc., 448 F. App'x 965, 968 (11th Cir. 2011) (per curiam) (unpublished) (citation omitted); Cleveland v. Sec'y of the Treasury, 407 F. App'x 386, 388 (11th Cir. 2011) (per curiam) (unpublished) (citation omitted).

Fulton "alleges two acts" to support her retaliation claim: that "KLC retaliated against [her for her] complaints of sexual harassment by demoting her from Safety Coordinator to Helper" and that Phelps "retaliated against her [for her] rejection of his sexual advances by preventing her from learning her job and forcing her to do 'busy work' instead (a *de facto* demotion and an undesirable reassignment)." [Doc. 72 at 6]. KLC argues Fulton cannot establish a prima facie case of retaliation under Title VII because she cannot establish any element of her prima facie case, [Doc. 52-2 at 7-18]; however, viewing the evidence in the light most favorable to Fulton, the Court will assume for purposes of KLC's motion for summary judgment, that Fulton engaged in statutorily protected activity by voicing her complaints of Phelps' alleged sexual harassment to Sink and Butler on

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was the 'but-for' cause of [defendant's employment] decision . . ., not just a motivating factor.").

November 13, 2019,[44] and will address whether Fulton has established that she suffered an actionable materially adverse employment action.

[44] Although Fulton also bases her retaliation claim on a *de facto* demotion and/or undesirable reassignment by Phelps, see [Doc. 72 at 6, 19-22], and alleges that she engaged in protected activity by rejecting Phelps' sexual advances, [id. at 19 (citation omitted)], "there is a circuit split about whether a person who rejects a supervisor's sexual advances has engaged in a protected activity," Tate v. Exec. Mgmt. Servs., Inc., 546 F.3d 528, 532 (7th Cir. 2008) (citing cases from the Fifth and Eighth circuits); see also Cloud v. Brennan, 436 F. Supp. 3d 1290, 1299 (N.D. Cal. 2020) (citations and internal marks omitted) (discussing the circuit split, but ultimately concluding that plaintiff could not "state a retaliation claim based on refusing her supervisor's sexual advances," since a "refusal directed to the alleged harasser, even where the harasser is a supervisor, cannot be equated with notice to the employer"), and neither the Supreme Court nor the Eleventh Circuit has addressed this issue. Moreover, there appears to be a split on this issue among the district courts within the Eleventh Circuit. See, e.g., Charest v. Sunny-Aakash, LLC, CASE NO: 8:16-CV-2048-T-30JSS, 2017 WL 4169701, at *6-7 (M.D. Fla. Sept. 20, 2017) (footnote, citations, and internal marks omitted) (recognizing "a circuit split . . . [on] the issue of whether a person who rejects a supervisor's sexual advances has engaged in protected activity," but finding that plaintiffs' repeated refusals of their supervisor's sexual demands and demands that the harassment stop constituted protected activity); Austin v. Mac-Lean Fogg Co., 999 F. Supp. 2d 1254, 1262 n.11 (N.D. Ala. 2014) (declining to "expand the scope of the opposition clause as [plaintiff] suggests" and rejecting her argument that her refusal of her supervisor's advances constituted protected activity for purposes of her retaliation claim); McCulley v. Allstates Tech. Servs., No. Civ.A. 04-0115-WS-B, 2005 WL 1475314, at *21 n.65 (S.D. Ala. June 21, 2005) (citation omitted) (explaining that while it recognized "that precedents on this point [were] not unanimous," the "better approach [was] to recognize that rejection of a supervisor's sexual advances constitute[d] protected activity for purposes of Title VII"). However, the Court need not resolve this issue as it finds that Fulton has failed to establish that she suffered a materially adverse action to support her retaliation claims in this case.

1. *Materially Adverse Employment Action*

The "Supreme Court has held that the anti-retaliation provision of Title VII covers a broader scope of conduct than does the anti-discrimination provision." Holmes v. City of Atlanta, Civil Action No. 1:08–CV–3560–JOF–CCH, 2010 WL 1328713, at *13 (N.D. Ga. Jan. 27, 2010), adopted as modified by 2010 WL 1328733, at *3 (N.D. Ga. Mar. 30, 2010) (citation omitted). Therefore, an employee claiming retaliation need not show an adverse action that actually affected the terms and conditions of her employment. Crosby v. Mobile Cty. Pers. Bd., No. 05-17039, 2007 WL 245126, at *4 (11th Cir. Jan. 30, 2007) (per curiam) (unpublished) (citation omitted); Arnold v. Tuskegee Univ., 212 F. App'x 803, 810 n.4 (11th Cir. 2006) (per curiam) (unpublished) (citation omitted). Instead, Fulton must show that she suffered an action which a reasonable employee would find "materially adverse," that is, an action harmful to the point that it "could well dissuade a reasonable worker from making or supporting a charge of discrimination." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006). That is, "[a] challenged action must do more than merely affront a 'plaintiff's unusual subjective feelings' and cannot be a trivial harm that offends 'a general civility code for the American workplace.'" Manns v. City of Atlanta, Civil Action File No. 1:06-CV-0609-TWT, 2008 WL 150699, at *8 (N.D. Ga. Jan. 11, 2008) (quoting Burlington N., 548 U.S. at 68). And, "[a]lthough Title VII's protection against retaliatory discrimination

extends to adverse actions which fall short of ultimate employment decisions, [] [Fulton] must still demonstrate some threshold level of substantiality." Wesolowski v. Napolitano, 2 F. Supp. 3d 1318, 1348 (S.D. Ga. 2014) (citation and internal marks omitted). "Thus, even under this more lenient standard, an allegedly retaliatory act must be more than 'trivial' and must still 'produce some injury or harm' to be considered materially adverse." Thomas v. Rockdale Cty., CIVIL ACTION NO. 1:19-CV-2430-MLB-JSA, 2020 WL 10227322, at *18 (N.D. Ga. Apr. 23, 2020), adopted by 2020 WL 10227471, at *5 (N.D. Ga. July 15, 2020) (citation omitted). To determine whether an action is materially adverse, the Court considers the particular circumstances of the case. Burlington N., 548 U.S. at 69. As the Supreme Court has instructed, context matters. Id.

Fulton alleges that KLC hired her as a Safety Coordinator and that her job duties were "supposed to be walking the jobsite, learning about people's jobs and how they were supposed to do those jobs, and citing [and] reporting safety hazards," but that "after she rejected [Phelps'] sexual advances," she "was unable to perform these duties . . . because Phelps kept her busy doing Helper duties" and that he basically made her "a *de facto* Helper," which amounted "to a *de facto* demotion[.]" [Doc. 72 at 20 (emphasis, footnote, and citations omitted)]. She also alleges that after she complained to Butler on November 13, 2019, and was told to go home, "she returned to work the next day" and "was told that she was now a

Helper, not a Safety Coordinator," and was therefore demoted, which "was sufficient to dissuade [] [her] from protected activity." [Id. at 8 (citations omitted)]. KLC contends, however, that Fulton "did not experience actionable adverse actions since KLC never terminated her, demoted her, significantly changed her duties, reduced her pay, or otherwise altered any term or condition of her employment." [Doc. 52-2 at 9-10]. In fact, KLC maintains that Fulton "simply was not demoted from a Safety Coordinator to a Helper"; emphasizes "that it does not even maintain the position [Fulton] claims she held (and/or desired)"; and points out that Fulton "completed an application for the Helper position" after being told to resubmit her application because she could not apply for a Safety Coordinator position, that its personnel records list her job as Helper, and that Fulton admits that she performed Helper duties and reported safety violations "both before and after her complaint about [] Phelps[.]" [Id. at 11-13 (emphasis, footnote, and citations omitted)]. KLC further maintains that "almost all of the evidence [Fulton] relies on [to support her claim that she was hired as a Safety Coordinator] is inadmissible and should not be considered because it has no possibility of being reduced to admissibility as trial[.]" [Doc. 73 at 9 (footnote omitted)]; see also [id. at 6-8].

In an effort to show that she was hired by KLC as a Safety Coordinator, Fulton states that Molinari agreed to hire her as a Safety Coordinator at the job fair

held on October 24, 2019, but that she would first have to work under Windham for a few months and receive on-the-job training and experience; that Windham subsequently interviewed her and offered her the Safety Coordinator job; that Molinari, Windham, and Phelps announced her to staff as a Safety Coordinator; and that "everybody at the jobsite referred to her as the 'safety lady' or the 'safety person,'" including her coworkers and employees of the third-party general contractor. [Doc. 72 at 9-11 (citations omitted)]. As KLC points out, [Doc. 73 at 6-7], these statements are hearsay. In particular, KLC asserts that paragraphs 18, 20, 25, 26, 29, 30, 31, 33, 34, 35, 72, and 74 of Fulton's statement of additional material facts are based on inadmissible hearsay. See [Doc. 74]; see also [Doc. 72-2].

"Hearsay is 'a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.'" Edwards v. Nat'l Vision Inc., 568 F. App'x 854, 858 (11th Cir. 2014) (per curiam) (unpublished) (quoting Fed. R. Evid. 801(c)); Carlson v. WellStar Health Sys., Inc., No. 1:12–cv–3439–WSD, 2014 WL 2711924, at *5 n.6 (N.D. Ga. June 16, 2014) (citation omitted). "Inadmissible hearsay may not properly be considered on summary judgment unless it can be reduced to admissible evidence at trial for some purpose." Sullivan v. United Parcel Serv., Inc., Civil Action No. 1:07-CV-0976-JEC-LTW, 2008 WL 11320143, at *3 (N.D. Ga. June 16, 2008), adopted by 2008 WL 11322931, at *6 (N.D. Ga. Sept. 30, 2008) (citations omitted); see also Saunders,

360 F. App'x at 112-13 (citation omitted). "For example, the statement might be admissible because it falls within an exception to the hearsay rule, or does not constitute hearsay at all (because it is not offered to prove the truth of the matter asserted), or is used solely for impeachment purposes (and not as substantive evidence)." Macuba, 193 F.3d at 1323-24 (footnotes omitted). Fulton "bears the burden of proving that a hearsay exception exists." Smallwood v. Davis, CIVIL ACTION NO.: 5:14-cv-87, 2017 WL 1455967, at *3 (S.D. Ga. Apr. 21, 2017) (citation omitted).

"[T]he 'most obvious way that hearsay testimony can be reduced to admissible form is to have the hearsay declarant testify directly to the matter at trial.'" Brannon v. Finkelstein, 754 F.3d 1269, 1277 n.2 (11th Cir. 2014) (citation omitted). "If, however, the declarant has given sworn testimony during the course of discovery that contradicts the hearsay statement, [the Court] may not consider the hearsay statement at the summary judgment phase." Jones v. UPS Ground Freight, 683 F.3d 1283, 1294 (11th Cir. 2012); see also Bartels v. S. Motors of Savannah, Inc., 681 F. App'x 834, 839 (11th Cir. 2017) (per curiam) (unpublished). Although Fulton states that Molinari agreed to hire her as a Safety Coordinator, to pay her between $16.00 and $17.00 per hour but that he would have to work on that, and that she would ultimately be responsible for safety in a different location from him at the job fair held on October 24, 2019, [Doc. 72-2 ¶¶ 18, 20 (citations

omitted)], and that following this interview, she completed a job application, and when Molinari instructed her to list "Helper" as the position she was applying for, he explained that it was just temporary so she could provide assistance at the Spring Street jobsite and that she would still be learning the safety aspects of the job and performing Safety Coordinator duties in the meantime, [id. ¶¶ 25-26 (citations omitted)], Molinari expressly denied making such statements and testified that he "told her that there may be a position for an assistant safety director in the future," but that "she would have to first learn how [KLC] did all of the work, working her way starting as a [H]elper since she had no experience in [KLC's] trade, and she would have to learn [the] trade, and then if such a role opened up in the future, that [he] would keep her in mind," [Doc. 56 at 3 p. 9, 5 pp. 14-15]. He also testified that "there was no discussion about actual training as a [S]afety [C]oordinator on site," that "[s]he was told she would have to be a [H]elper first," and that while there "was discussion about her interest [in a Safety Coordinator position]," they discussed his "interest in seeing how she did and if she was interested in pursuing that role in the future, but it did not go passed that." [Id. at 3-4 pp. 9-10].

Fulton also states that during her subsequent interview with Windham and Phelps, Windham told her that he needed someone at the Spring Street jobsite to follow him around and correct safety hazards; that he offered her the Safety

Coordinator position in the interview, but that she first asked to be able to observe the employees to learn how they are supposed to perform their jobs in order to be able to know if they are performing them correctly from a safety perspective, and Windham agreed so he ultimately offered her both a Safety Coordinator and Helper position and she accepted a Safety Coordinator role with hands-on training; that after she was hired, Windham told her to contact Molinari to figure out what she needed to do regarding safety because he needed someone at the jobsite for safety; and that before she started work, Windham, Phelps, and Molinari announced to the staff that she would be starting as a Safety Coordinator, [Doc. 72-2 ¶¶ 29-31, 33-35, 74 (citations omitted)]; however, Windham has likewise expressly contradicted such testimony and testified that Fulton "was a candidate for [a] safety job in the future," but since she "had no experience," she "was just a [H]elper" and was there to learn and was introduced to the team as such, [Doc. 57 at 3-4 pp. 9-13], and Molinari testified that he was not present when Fulton was introduced to the staff, [Doc. 56 at 4 p. 10]. "[T]he possibility that [Molinari or Windham] might change [their] sworn deposition testimony and admit the truth of the hearsay statement[s] amounts only to a suggestion that admissible evidence might be found in the future, which is not enough to defeat a motion for summary judgment." Williams v. Ingram, No. 1:12-CV-263-WKW, 2014 WL 1765615, at * 9

(M.D. Ala. May 2, 2014) (citation and internal marks omitted); see also McMillian v. Johnson, 88 F.3d 1573, 1584 (11th Cir. 1996).

The statements at issue "are hearsay because they consist of statements other than ones made by [Fulton] that have been offered to prove the truth of the matter asserted." Bevill v. Home Depot U.S.A., Inc., 753 F. Supp. 2d 816, 837 (S.D. Iowa 2009) (citing Fed. R. Evid. 801(c)). Although it appears that Fulton claims that some of these statements are party admissions, see [Doc. 72 at 10 n.6 (citation omitted)], and Federal Rule of Evidence 801(d)(2)(D) provides that "[a] statement . . . is not hearsay" if the "statement is offered against an opposing party and . . . was made by the party's agent or employee on a matter within the scope of that relationship and while it existed," Fed. R. Evid. 801(d)(2)(D),[45] and it is undisputed that Molinari, Windham, and Phelps were employees of KLC at the time the statements were allegedly made, [Doc. 52-12 ¶¶ 2-3; Doc. 56 at 3 pp. 6-9], "[t]here is no evidence in the record that [they had] the authority to bind [] [KLC], so [their] statements cannot be attributed to . . . [KLC], and do not fall under the party admission exception to hearsay," Williams v. Univ. of Chi. Med. Ctr., No. 11 C 9015, 2014 WL 4724378, at *4 (N.D. Ill. Sept. 23, 2014). In fact, KLC has proffered evidence to the contrary, showing that KLC had only one job position devoted to

[45] Fulton bears the burden "to demonstrate the scope of [the declarant's] authority." Maher v. City of Chicago, 406 F. Supp. 2d 1006, 1020 (N.D. Ill. 2006), aff'd, 547 F.3d 817 (7th Cir. 2008) (citation omitted).

safety, which was the Corporate Safety Director position held by Molinari; that KLC never had a "Safety Coordinator" position or any other safety-related job position other than the Corporate Safety Director position; that Molinari was not authorized to create new job positions on behalf of KLC; that creating a new job position within KLC required review and approval by multiple members of management, budgeting, and other administrative procedures, which have never been undertaken for a "Safety Coordinator" position or any other safety-related job position at KLC other than the Corporate Safety Director position; and that no manager or employee of KLC was authorized to offer Fulton employment as a "Safety Coordinator." [Doc. 52-11 ¶¶ 3-4, 6-9, 11 (internal marks omitted)]; see also [Doc. 56 at 3 pp. 7-8; Doc. 58 at 4 pp. 10, 12]. Since Molinari, Windham, and Phelps "did not have the authority to create the position [Fulton claims they] promised to [her], the statements [she] attributes to [them] were not made on a matter within the scope of [their] relationship with . . . [KLC]." Williams, 2014 WL 4724378, at *4 (citations omitted). That is, "an employee's statement does not come under Rule 801(d)(2)(D) solely by virtue of his status as an employee; the statement must concern a matter within the scope of his employment," Kelly ex rel. all Heirs at L. of Kelly v. Labouisse, Civil Action No. 3:07cv631TSL–JCS, 2009 WL 427103, at *4 (S.D. Miss. Feb. 19, 2009), aff'd sub nom. Kelly v. Labouisse, 364 F. App'x 895 (5th Cir. 2010) (per curiam) (unpublished), and since these employees lacked the

authority to create a position that did not exist within KLC, "any alleged statement[s were] not 'authorized' or 'within the scope' of [their] employment, and accordingly, [are] mere hearsay," Loiseau v. Thompson, O'Brien, Kemp & Nasuti, P.C., 499 F. Supp. 3d 1212, 1224 (N.D. Ga. 2020) (citations omitted); see also Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325, 1341 (M.D. Ga. 2007) (declining to consider certain statements by a University employee since it was unclear whether he "should be considered a party" and plaintiff had "offered no argument or evidence on this point"). Thus, Fulton "has not laid the proper foundation under Rule 801(d)(2)(D) to admit [these statements] as [] statement[s] made by [a] party's agent or employee on a matter within the scope of that relationship and while it existed," and the statements are therefore "inadmissible hearsay under Rule 802." Brown v. QuikTrip Corp., CIVIL ACTION NO. 1:18-cv-03126-JPB, 2021 WL 778655, at *4 (N.D. Ga. Mar. 1, 2021) (last alteration in original) (internal marks omitted). "Because hearsay testimony would be inadmissible at trial, it cannot be used at the summary judgment stage." Bevill, 753 F. Supp. 2d at 837 (citations omitted); see also Lawson v. KFH Indus., Inc., Civil Action No. 1:09cv609-WHA-WC, 2011 WL 231667, at *9 (M.D. Ala. Jan. 24, 2011); During v. City Univ. of N.Y., No. 01 Civ. 9584(BSJ), 2005 WL 2276875, at *7 (S.D.N.Y. Sept. 19, 2005). However, even if the Court considers the alleged hearsay evidence in ruling on KLC's motion, these statements do not alter the Court's conclusions regarding this case

for the reasons explained herein. See Alexander v. Baldwin Cty. Bd. of Educ., Civil Action No. 07-0333-CB-C, 2008 WL 3551194, at *7 (S.D. Ala. Aug. 12, 2008) (noting plaintiff's evidence was based almost entirely on hearsay and innuendo, but nevertheless considering it on ruling on defendant's summary judgment motion).

First, any statements made at the pre-hiring interview at the job fair held on October 24, 2019, are insufficient to create a genuine issue of fact as to whether Fulton was hired into the position of "Safety Coordinator," since Fulton admits that she was not guaranteed a job or any position with KLC at the job fair and that Molinari explicitly explained to her that she would need to first work under Windham for a few months to get on-the-job training and experience and that if everything went well, she may have a different position, such as Safety Coordinator, in another state. [Doc. 54 at 75-76 pp. 74-75; 86 p. 85; Doc. 72-5 ¶ 19]. To the extent Fulton was unclear about the position that was available to her based on her conversation with Molinari at the job fair, she further testified that after she followed up with an email to Sink and Butler "about a potential position with [] [KLC]," [Doc. 54 at 340-41], Fulton completed an electronic job application for KLC, but because *she* listed "[S]afety [C]oordinator" as the job position she was applying for, Molinari sent it back and asked her to resubmit it with "Helper" as the job position and explained that it was temporary and that she needed to wait until they could get the Safety Coordinator position "down" and that after she

received hands-on experience, they could then go back and list her as a Safety Coordinator, [id. at 83 p. 82, 93-99 pp. 92-98, 112-15 pp. 111-14, 342-44; Doc. 72-5 ¶ 21]. Fulton then interviewed with Windham and Phelps, and while she testified that Windham offered her both a Helper and a Safety Coordinator position and that she informed him she wanted to be "a [S]afety [C]oordinator with hands-on experience so [she] know[s] what they're doing," [Doc. 54 at 88-91 pp. 87-90], Windham testified that he recommended to Butler that she be hired as a Helper, [Doc. 57 at 3-4 pp. 9-10], and the contemporaneous documentation reflects Fulton's "Job Position/Title" as that of "Helper," with a start date of November 4, 2019, at a rate of pay of $15.00 per hour, [Doc. 54 at 348 (emphasis omitted)]. Thus, viewing the evidence in the light most favorable to Fulton, "[a]ll that is clear [is that] . . . . [Fulton] agreed to and did assume the job and title of . . . [Helper]—the position reflected in the employment records of [] [KLC]—and . . . . [i]ndeed, [her] contention that the [Helper's] job . . . was 'temporary' is a virtual admission that [s]he was hired into that job and not the job of [Safety Coordinator]." Maher, 406 F. Supp. 2d at 1021 (emphasis omitted).

Fulton's reliance on her coworkers' testimony that it was announced prior to the beginning of her first day of work that she would be starting as a Safety Coordinator, see [Doc. 72 at 10-11 (citations omitted)], is equally insufficient to raise a genuine issue of disputed fact as to whether she was hired into the position

of Safety Coordinator because even if the Court accepts that it was announced prior to Fulton beginning her job, McCants, Fulton's off and on boyfriend and coworker, specifically testified that Fulton was a "[H]elper when she first started" and that KLC "never gave her the [Safety Coordinator] position even after saying that was what she would be doing" as it "was announced that she was there to take that position in the future." [Doc. 60 at 5 p. 15, 10 pp. 34, 36]. Likewise, Jenkins, another coworker whose testimony Fulton relies on, specifically stated that he was informed that Fulton would be coming on board as a "[S]afety [C]oordinator, [or] something, like, to that effect," but that he was "later told that . . . she [was] not the safety person[and was] a [H]elper," and "when [he] met her, she was doing helper work anyway[.]" [Doc. 72-7 at 2-3 pp. 14-15]. Thus, "[a]t best, this testimony creates a 'metaphysical doubt,' which is insufficient to create a genuine issue of material fact." Maher, 406 F. Supp. 2d at 1021 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)).

KLC contends that it has never employed a Safety Coordinator or an individual in any safety role, other than the Corporate Safety Director position held by Molinari, since no other such safety position has existed, [Doc. 52-11 ¶¶ 3-4, 6, 8-9], and Fulton's only remaining evidence "that [s]he was employed as the [S]afety [C]oordinator is [her] own self-serving testimony that [s]he was [verbally offered the] position," Howard v. Sunniland Corp., 281 F. Supp. 3d 1253, 1257

(M.D. Fla. 2017) (citation omitted), but she also testified that her formal job title on the application was that of Helper after she was explicitly directed to resubmit her application because she could not yet apply for a Safety Coordinator position, but had to get training, and understood that the Helper position was temporary in the meantime, that her pay rate of $15.00 per hour and benefits remained the same throughout her employment regardless of what she believed her job title was, and that even though she contends she was prevented from learning safety aspects of her job by rejecting Phelps' sexual advances and demoted after she complained, she clearly testified that "[n]othing happened . . . until [she] complained" and that "[w]hen [she] just continued to let [Phelps] keep asking [her] stuff and do stuff, there was no issue," but the "moment [she] started complaining, that's when all the problems started," yet she further stated that she performed Helper duties both before and after she complained about Phelps, explaining that before she complained, she was performing Helper and janitorial duties, as well as reporting safety violations, and that after she complained, she continued to perform Helper duties and to still report safety violations because she was instructed to continue to do so, [Doc. 54 at 83 p. 82, 93-96 pp. 92-95, 112-15 pp. 111-14, 120 p. 119, 156 p. 155, 169 p. 168, 238 p. 237, 342-44]. And, after Fulton complained to Sink and Butler about Phelps' actions, KLC immediately transferred Phelps to another jobsite and Fulton admits that she still performed the same job duties as before at the same

pay rate, even though she alleges that her job title changed to Helper from Safety Coordinator. [Doc. 52-12 ¶ 6; Doc. 52-14 at 16-22; Doc. 54 at 120 p. 119, 155-56 pp. 154-55, 169 p. 168; Doc. 55 at 4 pp. 11-12; Doc. 59 at 5 pp. 15-16]. Thus, Fulton's "testimony is insufficient to withstand summary judgment on this issue," since a "party's uncorroborated self-serving testimony cannot prevent summary judgment, particularly if the overwhelming documentary evidence supports the opposite scenario." Howard, 281 F. Supp. 3d at 1257 (citation and internal marks omitted) (quoting In re Buescher, 783 F.3d 302, 308 (5th Cir. 2015)).

The documentary evidence shows that she applied for a Helper position with KLC and that the Hiring Supervisor's Form completed after her interview with Windham and Phelps indicated her job position as "Helper," with a start date of November 4, 2019, at a rate of pay of $15.00 per hour. [Doc. 54 at 342-44, 348]. Moreover, when Fulton emailed Butler on November 13, 2019, prior to the events leading up to her alleged altercation with Phelps and demotion that day, requesting clarification of her job title because she was not "sure if [she was] training to be [S]afety [C]oordinator or not or if [she was] a [H]elper" because "[a]ll [she had] done [was run] plugs up and down stairs for 2 weeks" so she "would like to know [her] job title," [id. at 360-61], Molinari, who was not yet aware of what had transpired on November 13, 2019, responded that for now, Fulton was a Helper and that there was "a possibility of her moving into an assistant type Safety

role in the future based on her performance, attitude, and abili[t]y to take direction," but if that did not "work for her right now then she may need to seek other employment," [id. at 360]. Windham also reiterated in an email on that day that he and Phelps specifically told Fulton in her interview that she was hired as a Helper and that she agreed and said she was there to work. [Doc. 52-12 ¶ 4, 7-8]. KLC has no personnel records or other documents listing Fulton's job title as anything other than Helper during her employment there, and she has not presented any contradictory documentary evidence. [Doc. 52-10 ¶¶ 9-10].[46]

[46] Fulton contends that "[w]hen the testimony may reasonably be harmonized with the documentary evidence," the "'blatantly contradicted by the record'" standard set forth in Morton, 707 F.3d at 1284, "does not apply," [Doc. 72 at 12 (citation omitted)], and she asserts that her "job application identif[ying] 'Helper' as the position applied for may reasonably be harmonized with KLC hiring her to be a Safety Coordinator," [id. at 12-13], but she ignores the fact that her own testimony confirms that she was hired into the position of "Helper," even if she believed it "was just temporary," [id. at 13 (citation omitted)], and "where, as here, the uncontroverted documentary record . . . so squarely contradicts a plaintiff's story as to render it implausible on its face, summary judgment is appropriate," Schultz v. Am. Airlines, Inc., 449 F. Supp. 3d 1301, 1311 (S.D. Fla. 2020) (citation omitted); see also Reed v. City of St. Charles, 561 F.3d 788, 791-92 (8th Cir. 2009) (alteration, citations, and internal marks omitted) (affirming summary judgment for defendants where "no reasonable jury could have credited [plaintiff's] version of events," since "the evidence [plaintiff] offer[ed] amount[ed] to mere allegations, unsupported by specific facts or evidence beyond [his] own conclusions, ... mere speculation, conjecture, or fantasy," but, "[b]y contrast, evidence submitted by the [defendants]," including medical records, deposition testimony, and contemporaneous reports, "provided overwhelming evidence to refute [plaintiff's] version of the events in question").

Despite Fulton's argument to the contrary, [Doc. 72 at 17], KLC correctly contends that the "facts of this case are on all-fours with those in [Peterson v. Avalon Care Center-VA Payson, LLC, Case No. 2:15cv671, 2017 WL 3251569 (D. Utah July 31, 2017)]," [Doc. 52-2 at 16]. In Peterson, the plaintiff alleged that "she was demoted from 'Director of Housekeeping' to 'housekeeper' in retaliation for complaining about [sexual harassment by her supervisor.]" 2017 WL 3251569, at *8. The district court explained that when plaintiff "filled out her new hire paperwork, [she] herself used the term 'housekeeping' to describe her position"; that when her employment began, her supervisors completed "an 'Employee Action Form' marking the beginning of [her] employment and stating that [her] job title was 'housekeeping'"; that "[a]lthough the on-line job description for which [plaintiff] applied listed 'Director of Housekeeping,'" the "job title was erroneous because . . . [it was] 'not a position that existed'"; that "[a]ny confusion regarding [plaintiff's] official title occurred *before* she engaged in any protected activity"; and that "[a]lthough [plaintiff] may have been 'confused' about her job title, . . . any confusion regarding her title did not affect her duties, pay, or any other material aspect of her job." Id. (citations omitted). The Peterson court therefore found that plaintiff's "claim that she was demoted as a result of her complaints to management [was] not factually supported." Id.

Similarly, in the present case, the undisputed evidence of record shows that Fulton's hiring paperwork listed her job position as "Helper"; that a "Safety Coordinator" position did not exist at KLC at the time Fulton was hired and has never existed or been approved through the proper channels; and that while Fulton may have been confused about her official job title or whether she was training to be a Safety Coordinator, she admitted that she performed Helper duties, as well as reporting safety violations, both before and after she rejected Phelps' alleged sexual advances and complained about his actions and that her rate of pay never changed.[47] [Doc. 52-11 ¶¶ 3-4, 6, 8-9; Doc. 54 at 120 p. 119, 156 p.

[47] Fulton avers that after she rejected Phelps' sexual advances, he assigned her "constant Helper duties," or "'busy work,'" which prevented her from learning "how all the jobs were done," [Doc. 72-5 ¶¶ 46-47], but she clearly testified at her deposition that "[n]othing happened" until she complained to others and that the "moment [she] started complaining, that's when all the problems started," whereas when she "continued to let [Phelps] keep asking [her] stuff and do stuff, there was no issue," [Doc. 54 at 238 p. 237]. Regardless, Fulton admits that she was performing Helper duties even before she rejected Phelps sexual advances, but asserts that the duties simply became "constant" afterwards, see [Doc. 72-5 ¶¶ 46-47], and "[w]hile changes of job duties may constitute adverse employment decisions, the evidence before the court on summary judgment in this case suggests no such changes occurred," and Fulton's allegations here "would not alone constitute materially adverse actions" but, at most, constitutes "minor workplace annoyances," Goins v. Cty. of Merced, 185 F. Supp. 3d 1224, 1240 (E.D. Cal. 2016) (citation omitted); see also Gooden v. Lew, CIVIL ACTION FILE NO. 1:13-cv-0298-MHC-CMS, 2015 WL 13333494, at *9 (N.D. Ga. Aug. 3, 2015), adopted by 2015 WL 13343182, at *6 (N.D. Ga. Aug. 27, 2015), aff'd sub nom. Gooden v. Internal Revenue Serv., 679 F. App'x 958 (11th Cir. 2017) (per curiam) (unpublished) (citation omitted) (finding plaintiff's allegations that her supervisor gave her "simple work and 'busy work'" failed "to establish she was subject to an adverse action" to support her retaliation claim); Wright v. Conopco, Inc., Civil

155, 169 p. 168, 342-44, 348]. Fulton has simply failed "to explain why a reasonable employee in her position would consider [the alleged adverse actions], while holding the same job with the same responsibilities and pay, to be materially adverse." Windham v. Barr, CIVIL ACTION NO. 5:16-cv-83, 2019 WL 1412119, at *13 (S.D. Ga. Mar. 28, 2019).[48] In sum, "[b]ecause [Fulton] has failed to proffer evidence sufficient to create a genuine issue of fact regarding the existence of the [Safety Coordinator] position, the Court concludes that [s]he cannot establish that . . . s[he] suffered a[materially] adverse employment action." Howard, 281 F. Supp. 3d at 1258. Regardless of what Fulton was told before she was hired or believed based upon representations made to her, the undisputed evidence of record demonstrates that she was hired as a Helper and worked as a Helper before

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Action File No.: 1:10-CV-1405-RLV-SSC, 2011 WL 13323738, at *19-20 (N.D. Ga. July 29, 2011), adopted by 2011 WL 13323923, at *1 (N.D. Ga. Aug. 30, 2011) (citations and internal marks omitted) (finding plaintiff's "conclusory allegations that her work load increased and that she was given [] additional assignments in retaliation for her complaints" were "insufficient to show that [she] was subjected to [a] materially adverse action" where she failed to show that these "duties were outside her work responsibilities[or] that they were unreasonably arduous" because "the assignment of job duties that are part of the normal duties for a position is not an adverse action").

[48] Furthermore, the record reflects that Fulton "was not deterred by [KLC's] action from pursing a remedy," and the "fact that an employee continues to be undeterred in . . . her pursuit of a remedy, . . . may shed light as to whether the actions [were] sufficiently material and adverse to be actionable." Muigai v. United Parcel Serv., CIVIL ACTION FILE NO. 1:17-cv-3184-TCB, 2020 WL 5639803, at *9 (N.D. Ga. Aug. 14, 2020) (third alteration in original) (citation and internal marks omitted); see also [Doc. 54 at 158-59 pp. 157-58].

and after the alleged sexual harassment, and although she aspired to be a Safety Coordinator and may have been led to believe she would hold that position in the future, it is undisputed that no such position existed at KLC while she was employed there so she could not have been demoted from it. Because Fulton has failed to establish she suffered a materially adverse employment action, which is a required element of her prima facie case, her retaliation claim fails, and KLC's motion for summary judgment, [Doc. 52], is due to be granted as to this claim, see Adams v. City of Montgomery, 569 F. App'x 769, 774 (11th Cir. 2014) (per curiam) (unpublished) (finding summary judgment appropriate as to plaintiff's retaliation claim where he was unable to establish a prima facie case).

2. *Causal Connection*

KLC also contends that Fulton cannot create a disputed issue of material fact with respect to whether her alleged protected activity caused her purported demotion or *de facto* demotion. [Doc. 52-2 at 16-18]. In particular, KLC contends that Fulton "cannot show that she was required to work as a Helper or perform Helper duties because she supposedly rejected romantic advances by [] Phelps or because she made a complaint about him," but rather, "she worked in that capacity and performed these duties because she was hired as Helper and those [were] the types of duties a KLC Helper performs (across jobsites)." [Id. at 17 (citations omitted)]. Fulton responds that "KLC demoted [] [her] one day after her protected

complaints," and that she has therefore established a causal relationship between her complaints and demotion, [Doc. 72 at 18 (emphasis and citations omitted)], and that temporal proximity between her rejection of Phelps' sexual advances and his assigning her Helper duties also supports causation, [id. at 21 (citation omitted)].

To establish a causal connection between participation in a protected activity and an adverse employment action, "a plaintiff need only show that the protected activity and the adverse action were not wholly unrelated." Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 799 (11th Cir. 2000) (citations and internal marks omitted). To make this showing, a plaintiff must generally establish "that the decision maker was aware of the protected conduct at the time of the adverse employment action." Id. (citation omitted). And, "[a]lthough the burden of causation can be met by showing close temporal proximity between the statutorily protected activity and the adverse employment action, mere temporal proximity, without more, must be very close." Bruno v. Greene Cty. Sch. Dist., CASE NO. 3:17-CV-86 (CDL), 2019 WL 10303650, at *5 (M.D. Ga. Jan. 22, 2019), aff'd sub nom. Bruno v. Greene Cty. Schs., 801 F. App'x 681 (11th Cir. 2020) (per curiam) (unpublished) (alterations, citation, and internal marks omitted).

With respect to the events that occurred on November 13, 2019, Fulton has failed to show a causal connection between an alleged demotion to Helper

following her complaints about Phelps since she admits that Molinari explained to her that she had to apply for the Helper position until she could get experience and they could get the Safety Coordinator position "down," [Doc. 54 at 94-96 pp.93-95, 112-15 pp. 111-14; Doc. 72-5 ¶ 21]; that both Windham and Phelps were responsible for assigning Fulton's daily tasks, which included tasks typically expected of Helpers, [Doc. 54 at 122-23 pp. 121-22, 130 p. 129; Doc. 55 at 3-6 pp. 9-10, 17, 19; Doc. 56 at 4 pp. 10-11; Doc. 57 at 4-7 pp. 13-14, 19, 22; Doc. 58 at 3 p. 9; Doc. 59 at 3-4 pp. 8-9, 12]; and that she performed Helper duties both before and after she complained about Phelps, and that while she contends her job title changed after she complained, the record shows that nothing in fact changed, with the exception of Phelps' transfer to another jobsite, since Fulton still worked under the same job title of "Helper" as reflected on her application and hiring form with the same pay rate of $15.00 per hour and with no indication of a change in her job title, duties, or status as evinced by any KLC personnel records or documents, [Doc. 54 at 120 p. 119, 155-56 pp. 154-55, 165 p. 164, 169 p. 168, 232 p. 231; Doc. 59 at 5 pp. 15-16].[49] Thus, even if the Court accepted that an adverse employment

[49] Fulton's argument that Butler sent her home on November 13, 2019, and "told her she would have a 'different title' the next day," [Doc. 72 at 18 (citations omitted)], which Butler denied stating, see [Doc. 52-13 ¶¶ 4-5, 7-8], is not supported by her own deposition testimony that he told her to "[t]ake the rest of the day off, come back tomorrow, and you're going to come in as a [H]elper," [Doc. 54 at 112 p. 111, 120 p. 119]. Indeed, Fulton ignores the fact that earlier that day, she had requested clarification from Butler as to what her job title was, see [id. at

action occurred, Fulton was already performing Helper duties *prior to* voicing her complaints about Phelps pursuant to a job title consistent with her job application and hiring form also submitted *prior to* her internal complaints, but "only employment actions occurring *after* the protected activity can be implicated by the retaliation provision of Title VII." Broussard v. Lafayette City-Par. Consol. Gov't, 45 F. Supp. 3d 553, 578 (W.D. La. 2014) (emphasis added).[50] Therefore, no causal link can be shown between Fulton's internal complaints to Sink and Butler and her alleged demotion to Helper. Id. (citation omitted).[51]

360-61], and he responded with a job title consistent with KLC's personnel records and with the job duties she admits she had been performing. Thus, Fulton's assertion in this respect is likewise insufficient to create a genuine issue for trial.

[50] "A causal connection [also] may be established [] through direct evidence of retaliatory animus," Taylor v. Cardiovascular Specialists, P.C., Civil Action File No. 1:11–CV–4521–TCB–RGV, 2013 WL 12310269, at *24 (N.D. Ga. Dec. 11, 2013), adopted by 4 F. Supp. 3d 1374, 1383 (N.D. Ga. 2014) (citations omitted), and in this respect, Fulton contends that "retaliatory animus is shown by a statement that Phelps and [] Butterfield made shortly after [she] complained to management about Phelps' sexual harassment," [Doc. 72 at 18 (citations omitted)], that she would be "'working at the bottom of the building away from everybody, just watching a dude dig dirt and move it from one pile to another,'" [Doc. 72-5 ¶ 77]. However, it is undisputed that Phelps was not authorized to change Fulton's job position or employment status at KLC, [Doc. 52-10 ¶ 17; Doc. 59 at 6 p. 21], and that Butterfield was simply another employee at KLC, [Doc. 72-5 ¶ 10], and "[r]emarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not direct evidence of [retaliation]," Terry v. AT&T, CIVIL ACTION NO. 1:12-CV-127-RWS-ECS, 2013 WL 11319424, at *19 (N.D. Ga. Aug. 9, 2013) (citations and internal marks omitted).

[51] Similarly, Fulton has failed to show a causal link between her rejection of Phelps' sexual advances and a purported *de facto* demotion since she testified that she

ii. Legitimate Non-Retaliatory Reasons & Pretext

Even if Fulton could establish a prima facie case of retaliation, KLC still is entitled to summary judgment because she has failed to show that the reasons proffered by KLC concerning the challenged employment actions were pretextual. In particular, KLC argues that Fulton's retaliation claim fails because it "interviewed and hired [her] for a Helper position[;] that no Safety Coordinator position existed[;] that [she] was not demoted[;] [] that her job duties and pay remained the same throughout her employment"; that "tasks like retrieving materials, sweeping, and catching concrete cores [were] legitimate tasks that [were] within the typical duties of a Helper" and "being assigned those duties was consistent with her job as a Helper"; that she "performed Helper duties both before and after her complaint"; and that while KLC "does not dispute that there were discussions about [Fulton] performing in a safety role at some point," the "reality

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performed the same duties both before and after she rejected Phelps' alleged sexual advances and voiced her complaints and that in fact, "[n]othing happened" until she complained and that there was no issue as long as she let Phelps continue to ask her "stuff and do stuff," even though she rejected him, but that the "moment [she] started complaining, that's when all the problems started." [Doc. 54 at 169 p. 168, 238 p. 237]. While she contends that Phelps assigned her "constant" Helper duties after she first rejected him, thereby preventing her from being able to learn the safety aspects of the job, [Doc. 72-5 ¶¶ 46-47], she does not dispute that she was performing Helper duties prior to her rejection of his sexual advances and she therefore "cannot demonstrate that her rejection of [his] sexual advances resulted in a marked change in his conduct or in tangible job detriments that did not exist before the rejection," Johnson v. Runyon, 928 F. Supp. 575, 588 (D. Md. 1996), aff'd, 151 F.3d 1029 (4th Cir. 1998) (per curiam) (unpublished).

[was] that . . . this had not yet come to fruition during the events in question." [Doc. 52-2 at 18-19 (citations omitted); Doc 73 at 11-13 (emphasis and citations omitted)]. Because KLC's reasons constitute "'clear and reasonably specific'" non-retaliatory explanations for its decisions, it has discharged its burden of production, see Vessels, 408 F.3d at 770 (citation omitted), and the burden shifts back to Fulton to prove by a preponderance of the evidence that the reasons provided by KLC are pretexts for prohibited, retaliatory motives, see Gogel v. Kia Motors Mfg. of Ga., Inc., 967 F.3d 1121, 1136 (11th Cir. 2020); Marable v. Marion Mil. Inst., 595 F. App'x 921, 924 (11th Cir. 2014) (per curiam) (unpublished) (citation omitted).

To demonstrate pretext, Fulton's evidence must reveal "'such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in [] [KLC's] proffered legitimate reasons for [its] actions that a reasonable factfinder could find them unworthy of credence.'" Maples v. UHS of Ga., Inc., 716 F. Supp. 2d 1266, 1274 (N.D. Ga. 2010) (quoting Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997)); see also Vaughn v. FedEx Freight, Inc., 824 F. App'x 797, 803 (11th Cir. 2020) (per curiam) (unpublished) (citation omitted). Fulton may prove pretext by "either proving that intentional [retaliation] motivated [] [KLC] or producing sufficient evidence to allow a rational trier of fact to disbelieve the legitimate reason[s] proffered by [] [KLC], which permits, but does not compel, the trier of

fact to find illegal [retaliation]." Kilgore v. Trussville Dev., LLC, 646 F. App'x 765, 773 (11th Cir. 2016) (per curiam) (unpublished) (citations and internal marks omitted); see also Hamer v. City of Atlanta, CIVIL ACTION NO. 1:15-cv-00636-ELR-RGV, 2016 WL 10591434, at *14 (N.D. Ga. Dec. 27, 2016), adopted by 2017 WL 5639953, at *1 (N.D. Ga. Jan. 18, 2017) (citations omitted). Fulton may thus create an issue of fact at the pretext stage by (1) presenting evidence that KLC's proffered reasons are not worthy of belief, or (2) presenting evidence that retaliation was, in fact, KLC's real reason. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146-47 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

"Pretext means more than a mistake on the part of the employer; pretext means a lie, specifically a phony reason for some action." Tolley v. United Parcel Serv., No. Civ.A.1:05CV606TWT, 2006 WL 486523, at *5 (N.D. Ga. Feb. 27, 2006) (citation and internal marks omitted). "Thus, the inquiry is limited to whether [KLC] offered an honest, non[-retaliatory] explanation for [the alleged adverse actions], regardless of whether the decision might have been mistaken." Id. (citations omitted). "Ultimately, [] [Fulton] must meet [] [KLC's] stated reason[s] 'head on and rebut [them], and [she] cannot succeed by simply quarreling with the wisdom of [the] reason[s].'" Young, 432 F. App'x at 917 (citation omitted). Fulton "cannot establish pretext by simply demonstrating facts that suggest retaliatory animus, but must specifically respond to each of [] [KLC's] explanations

and rebut them." Burgos-Stefanelli v. Sec'y, U.S. Dep't of Homeland Sec., 410 F. App'x 243, 247 (11th Cir. 2011) (per curiam) (unpublished) (citation omitted). "If [] [Fulton] fails to demonstrate that there is a genuine issue of material fact concerning whether [] [KLC's] articulated reasons for the adverse employment action[s] are pretextual, then [] [KLC] is entitled to summary judgment on the retaliation claim." Johnson v. Advertiser Co., 778 F. Supp. 2d 1270, 1277 (M.D. Ala. 2011) (citing Combs, 106 F.3d at 1528). Finally, despite this burden-shifting framework, the "ultimate burden of persuading the trier of fact that [] [KLC] intentionally [retaliated] against [] [Fulton] remains at all times with [] [Fulton]." Burdine, 450 U.S. at 253 (citations omitted).

Fulton responds to KLC's legitimate, non-retaliatory reasons by asserting that she "has addressed [its] arguments" and has "nothing further to add here." [Doc. 72 at 22]. In reply, KLC points out that the "undisputed supporting evidence" in this case includes that Molinari was not authorized to create any new positions, including a Safety Coordinator position; that creating a new position required review and approval by multiple members of management, budgeting, and other administrative procedures, and that no such procedure had been undertaken for a Safety Coordinator position at KLC; that Fulton's job application listed her job position as "Helper"; that following her interview with Windham and Phelps, a completed Hiring Supervisor's Form identified Fulton's job position

as "Helper"; that email correspondence between KLC representatives confirmed that Fulton was hired as a Helper; and that Fulton was not aware of any personnel records or other documentation reflecting a demotion or change in her job status. [Doc. 73 at 10-11 (footnote and citations omitted)]. KLC maintains that "[t]his evidence precludes any inference that the nature of [Fulton's] job changed from Safety Coordinator to Helper only after and because she complained," [id. at 12 (emphasis omitted)], and that her reliance on her own testimony and that of two non-management coworkers, one of whom was her boyfriend, that she was offered the Safety Coordinator position or referred to as "'safety lady'" are insufficient to "avoid summary judgment when there is no evidence that the employees who supposedly made the statements were authorized to hire [Fulton] for that job or to create job positions at KLC," and that Fulton's inference that a Safety Coordinator position must have existed and been authorized was based on nothing more than speculation and conjecture, which are likewise insufficient on summary judgment, [id. (citations omitted)]. Finally, KLC points out that Fulton's assertion that "she was told the Helper job was only 'temporary,' . . . further supports the legitimate, non-retaliatory explanation that she was, in fact, hired as a Helper[.]" [Id. at 13 (internal citation omitted)].

KLC has shown that it took immediate action to address Fulton's sexual harassment complaint on November 13, 2019, by transferring Phelps to another

jobsite, and it has explained that upon Fulton's return to work the following day, she resumed her duties as a Helper, working under the same job title as listed on her job application and at the same pay rate as prior to her voicing her complaint. [Doc. 52-10 ¶¶ 16, 20; Doc. 52-12 ¶ 6; Doc. 52-14 at 16-22; Doc. 54 at 120 p. 119, 155-56 pp. 154-55, 169 p. 168, 342-44, 348-58; Doc. 55 at 4 pp. 11-12; Doc. 59 at 5 pp. 15-16]. In fact, contrary to her arguments, Fulton testified that before she complained, she performed Helper duties along with reporting safety violations and that after she complained, she continued to perform Helper duties and to report safety violations because she was told to continue to do so. [Doc. 54 at 169 p. 168].

"Since [] [KLC has] proffered evidence supporting [] legitimate, non[-retaliatory] reason[s] for [the alleged employment actions] . . ., and [Fulton] has not come forward with any evidence to show that th[ese] reason[s] [are] pretextual, summary judgment is warranted." Holifield v. Reno, 115 F.3d 1555, 1565-66 (11th Cir. 1997) (per curiam), abrogated on other grounds by Lewis v. City of Union City, 918 F.3d 1213 (11th Cir. 2019) (citations omitted); see also Boone v. City of McDonough, No. 1:12–cv–1036–WSD, 2013 WL 4670480, at *25 (N.D. Ga. Aug. 29, 2013), adopted at *5, aff'd, 571 F. App'x 746 (11th Cir. 2014) (per curiam) (unpublished) (citation omitted) ("'If the plaintiff fails to demonstrate that there is a genuine issue of material fact concerning whether the employer's articulated reasons for the adverse employment action are pretextual, then the employer is

entitled to summary judgment on the . . . retaliation claim.'"). Fulton simply has failed to produce evidence to create a genuine issue of material fact that KLC's reasons for the challenged actions were pretext for retaliation, and she has failed to meet her ultimate burden of showing that KLC's "reasons for the adverse actions were pretext for retaliation and retaliation was the but-for cause of the [alleged] adverse action[s]." Pasqualetti v. Unified Gov't of Athens-Clarke Cty., CIVIL ACTION No. 3:13-CV-13 (CAR), 2015 WL 5722798, at *14 (M.D. Ga. Sept. 29, 2015) (footnote omitted). In sum, Fulton has failed to "produce[] any evidence, outside of [her] own conclusory say-so, that would support an inference of [retaliation] from the circumstances," Flowers v. Troup Cty., Ga., Sch. Dist., 803 F.3d 1327, 1337 (11th Cir. 2015), and "[b]ecause [Fulton] has the burden of persuasion . . ., it is [her] responsibility to advance sufficient evidence of [] [retaliation] to create a triable factual dispute," id. at 1338, but she has failed to do so. Accordingly, it is **RECOMMENDED** that KLC's motion for summary judgment, [Doc. 52], on Fulton's Title VII retaliation claim be **GRANTED**.[52]

[52] Fulton has not specifically argued that her Title VII claim of retaliation could survive summary judgment under the alternative analysis that there is "a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker," Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011) (footnote, citations, and internal marks omitted); see also James, 823 F. App'x at 735 (assuming without deciding that the convincing mosaic theory applied to retaliation claims and finding that plaintiff, whose only evidence was her own declaration, had failed to "create a convincing mosaic of circumstantial evidence that created a triable issue about the

b. Sexual Harassment

In Count II of her amended complaint, Fulton also asserts a sexual harassment claim against KLC, [Doc. 21 ¶¶ 31-38], alleging that it "took tangible employment actions against [her] because she refused to give in to [Phelps'] sexual advances" by changing her "job responsibilities and demot[ing] her" and that it is liable "under a theory of vicarious or direct liability," [id. ¶¶ 33-34]. KLC moves for summary judgment on this claim, arguing that Fulton cannot establish a prima facie case of quid pro quo sexual harassment. [Doc. 52-2 at 20-26]. For the reasons that follow, the Court agrees with KLC.

"Title VII prohibits sex-based discrimination that alters the terms and conditions of employment." Nurse "BE" v. Columbia Palms W. Hosp. Ltd. P'ship, 490 F.3d 1302, 1308 (11th Cir. 2007) (citation omitted). "Generally, sexual harassment comes in two forms: harassment that does not result in a tangible employment action (traditionally referred to as 'hostile work environment' harassment), and harassment that does result in a tangible employment action

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[defendant's] retaliatory intent"); Welker v. Orkin, LLC, Civil Action No. 5:13–CV–126 (MTT), 2014 WL 1572535, at *6 & n.7 (M.D. Ga. Apr. 17, 2014) (acknowledging the alternative analysis of presenting a convincing mosaic of circumstantial evidence under Smith, but noting plaintiff only relied on the McDonnell Douglas framework for circumstantial evidence), but to the extent her response could be construed as having raised this argument, for all the reasons discussed herein, the record simply does not support such an inference.

(traditionally referred to as '*quid pro quo*' harassment)." Johnson v. Booker T. Wash. Broad. Serv., Inc., 234 F.3d 501, 508 (11th Cir. 2000) (citation omitted); see also Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751-54 (1998) (noting that the terms "*quid pro quo*" and "hostile work environment" retain limited utility in "making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether"); Dunn v. Smith & Sons, Inc., Civil Action No. 5:19-cv-00502-TES, 2021 WL 744156, at *7 (M.D. Ga. Feb. 25, 2021) (citation omitted).[53] "An employer accused of quid pro quo harassment will be vicariously liable per se, and will not be permitted to assert an affirmative defense if the tangible employment action resulted from his sexual harassment." Donaldson v. CDB, Inc., Civil Action No. 2:07CV122-KS-MTP, 2008 WL 2704829, at *5 (S.D. Miss. July 8, 2008), rev'd on other grounds, 335 F. App'x 494 (5th Cir. 2009) (per curiam) (unpublished) (citation omitted); see also Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272, 1281 (11th Cir. 2003) (per curiam). "An

[53] "[T]he Supreme Court in [Ellerth], instructed that the term quid pro quo should no longer be used and the courts now use the term tangible employment action to refer to harassment that culminates in a discharge, demotion, or undesirable reassignment." Beasley v. Wal-Mart Stores E., L.P., Civil Action No. 05-0620-KD-B, 2006 WL 3449144, at *9 n.7 (S.D. Ala. Nov. 29, 2006) (internal marks omitted) (quoting Hulsey v. Pride Rests., LLC, 367 F.3d 1238, 1245 (11th Cir. 2004)). Although the Eleventh Circuit has interpreted Ellerth as "largely wip[ing] out the usefulness of the terms 'hostile environment' and '*quid pro quo*,'" Johnson, 234 F.3d at 508 n.7, the terms remain in use and retain some utility, see Pipkins, 267 F.3d at 1199.

employer accused of hostile work environment harassment will also be held vicariously liable unless he can prove both prongs of the *Ellerth/Faragher* defense[.]"[54] Donaldson, 2008 WL 2704829, at *5 (citations omitted). Fulton alleges sexual harassment based on a tangible employment action, [Doc. 21 ¶¶ 33-34; Doc. 72 at 22-25],[55] and KLC contends that she has failed to establish a prima facie case as to this form of sexual harassment, [Doc. 52-2 at 20-26; Doc. 73 at 15-17].

"The gravamen of a *quid pro quo* sexual harassment claim is that the employer conditions an employment benefit or job status upon the employee's submission to conduct of a sexual nature." Sadeghian v. Univ. of S. Ala., CIVIL

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[54] See Ellerth, 524 U.S. at 765; Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

[55] Fulton's amended complaint alleges sexual harassment based on a tangible employment action, see [Doc. 21 ¶¶ 33-34], and in her brief opposing KLC's motion for summary judgment, she alleges that she suffered only a *quid pro quo* form of sexual harassment, see [Doc. 72 at 22-25], and the Court will therefore restrict its analysis to this form of harassment. However, the Court notes that "quid pro quo and hostile work environment sexual harassment are grounded in the same legal theory under Title VII, and that the principal significance of these terms is to distinguish between situations where there was an explicit alteration of the terms and conditions of employment and those situations where there was only a constructive alteration of the terms and conditions of employment," Moberly v. Midcontinent Commc'n, CIV. 08-4120-KES, 2010 WL 11681663, at *4 (D.S.D. Aug. 2, 2010) (citation omitted), but since Fulton "never argues that the conduct which [Phelps] allegedly subjected her . . . was sufficiently severe or pervasive to constitute actionable sexual harassment, *i.e.*, to create a sexually hostile work environment, . . . the court concludes that [she] has limited her . . . claim to a harassment claim of the *quid pro quo* variety," Coe v. N. Pipe Prods., Inc., 589 F. Supp. 2d 1055, 1080 (N.D. Iowa 2008) (citation and internal marks omitted).

ACTION NO. 18-00009-JB-B, 2020 WL 869217, at *5 (S.D. Ala. Feb. 21, 2020) (citation and internal marks omitted). To establish quid pro quo sexual harassment, Fulton must show: "(1) that she belongs to a protected group; (2) that she has been subjected to unwelcome sexual harassment; (3) that the harassment was based on her sex; (4) that she suffered a tangible employment action; and (5) that there is a 'causal link between the tangible employment action and the sexual harassment.'" Franklin v. Delta Life Ins., CIVIL CASE NO. 1:14-CV-0766-SCJ-LTW, 2015 WL 12843880, at *6 (N.D. Ga. Aug. 7, 2015), adopted by 2015 WL 12856759, at *1 (N.D. Ga. Aug. 27, 2015) (citation omitted).

"A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," and "[i]n most cases, a tangible employment action inflicts direct economic harm." Baines v. City of Atlanta, CIVIL ACTION NO. 1:19-CV-0279-TWT-JSA, 2020 WL 10058116, at *5 (N.D. Ga. Mar. 10, 2020), adopted by 2020 WL 10070276, at *1 (N.D. Ga. Apr. 6, 2020) (citation and internal marks omitted); see also Arnold v. Tuskegee Univ., 212 F. App'x 803, 807 (11th Cir. 2006) (per curiam) (unpublished) (citation omitted); Halaoui v. Renaissance Hotel Operating Co., No. 6:13–cv–1839–Orl–40TBS, 2015 WL 2024417, at *5 (M.D. Fla. Apr. 30, 2015) (citations and internal marks omitted) (explaining that a "tangible employment

action is a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits" and that "[r]egardless of the tangible employment action taken, . . . it must come as a result of the employee's acceptance or rejection of a supervisor's sexual requests"). "Additionally, it is essential that the plaintiff show a nexus between the harassing conduct and a job-related reprisal," which "means there should be a reasonable verbal/temporal relationship between the offensive request or conduct and a discussion of the employee's job benefit or detriment." Sadeghian, 2020 WL 869217, at *5 (citations and internal marks omitted). Furthermore, "[w]hether implicit or explicit, there must be in fact some evidence of a threatened or promised impact on employment." Id. (alteration in original) (citation and internal marks omitted).

Fulton alleges that she suffered sexual harassment in the workplace that altered the terms and conditions of employment when she refused to submit to Phelps' sexual advances, which resulted in a tangible employment action — "whether one calls it a 'demotion' or an 'undesirable reassignment'" — by Phelps forcing her "to perform Helper duties and prevent[ing] her from learning her Safety Coordinator job." [Doc. 72 at 23-24 (citations omitted)]. For purposes of KLC's motion for summary judgment, the Court assumes that Fulton can establish that she belongs to a protected group, that she was subjected to unwelcome

harassment, and that the harassment was based upon her sex, and therefore, the survival of her claim depends on whether she can establish that she suffered a tangible employment action and a causal link between any tangible employment action and the sexual harassment.[56]

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[56] Although the parties have not addressed this argument, see generally [Docs. 52-2, 72, & 73], "[b]ased upon [the] evidence before it, the Court questions whether under *Vance v. Ball State Univ.*, 133 S.Ct. 2434 (2013), [Fulton] could establish that [Phelps] qualifies as a supervisor such that she could take advantage of the tangible employment action theory," Sanders v. Staffmark, No. 2:11–cv–03711–MHH, 2014 WL 3749565, at *1 n.4 (N.D. Ala. July 29, 2014); see also Dunn, 2021 WL 744156, at *7 (citations omitted) (explaining that since plaintiff's allegations concerned himself and another coworker, he did not set forth a quid pro quo sexual harassment claim). "In *Vance*, the Supreme Court held that a supervisor [for purposes of Title VII] is one whom the employer has empowered . . . to take tangible employment action against the victim, *i.e.*, to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Sanders, 2014 WL 3749565, at *1 n.4 (second alteration in original) (citation and internal marks omitted). Here, "[t]he record contains no evidence indicating that [KLC] empowered [Phelps] to hire, fire, promote, or reassign [KLC] employees," id.; see also Wilcox v. Corr. Corp. of Am., CIVIL ACTION NO. 1:11-cv-04365-ODE, 2017 WL 5247923, at *8 (N.D. Ga. Mar. 31, 2017), aff'd, 892 F.3d 1283 (11th Cir. 2018), and in fact, the undisputed evidence is to the contrary as KLC asserts that Phelps did not have any authority to terminate Fulton's employment or change her job position, see [Doc. 52-1 ¶ 66 (citing [Doc. 52-10 ¶ 17; Doc. 59 at 6 p. 21])], and though Fulton denied KLC's undisputed statement of fact in this regard, she cited no evidence in support of her denial, see [Doc. 72-1 ¶ 66]; see also Ponder v. Experian Info. Sols., Inc., CIVIL ACTION NO. 1:19-CV-5494-CAP-JSA, 2021 WL 2688648, at *1 (N.D. Ga. May 18, 2021) (citation omitted) (explaining that "for those facts submitted by [d]efendant that [p]laintiff has failed to dispute with citations to record evidence, the Court must accept the facts as true, so long as the facts are supported by citations to record evidence"); LR 56.1(B)(2)(a)(2)(i), NDGa. ("This Court will deem each of the movant's facts as admitted unless the respondent . . . directly refutes the movant's fact with concise responses supported by specific citations to evidence (including page or paragraph number)[.]"). "The

"It is undisputed that [Phelps'] actions never rose to the level of explicit conditionality," in that he "never expressly stated [Fulton] would suffer some detriment if [s]he did not accept [his] advances." Sadeghian, 2020 WL 869217, at *5 (citation omitted); see also [Doc. 54 at 144 p. 143, 149 p. 148 (Fulton's testimony that Phelps never said she would have to perform any duties because she rejected his sexual advances or that in order for her to become a Safety Coordinator, she would "have to put out"; never asked her to "sleep with him"; never sent her any text messages or emails with any sexual content; and never "said that unless [she]

Court recognizes that in some circumstances, an employer may call upon an employee with [certain authority, such as managing operations and providing day-to-day supervision, even though he had no power to take formal employment actions,] to provide substantial input into employment decisions, and the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies," but "those are not the facts here." Marshall v. Bravo Food Serv., LLC, No. 2:12-CV-03914-MHH, 2015 WL 1487021, at *7 (N.D. Ala. Mar. 31, 2015) (citation and internal marks omitted). For the reasons discussed herein, "assuming [] [Phelps] qualifies as a supervisor under *Vance*, as the Court does for purposes of this motion," Fulton has not presented evidence showing that he or "anyone else at [KLC] [demanded her acquiescence to his sexual advances in exchange for a tangible job benefit or] subjected her to an adverse employment action for her failure to comply with [] [his] sexual advances." Sanders, 2014 WL 3749565, at *1 n.4; see also Prescott-Crawford v. Fulton Cty., CIVIL ACTION FILE NO.: 1:09-CV-3373-WCO-SSC, 2011 WL 13323656, at *15 (N.D. Ga. Jan. 31, 2011), adopted by 2011 WL 13323672, at *4 (N.D. Ga. Mar. 14, 2011) (emphasis and internal marks omitted) (assuming, without deciding, that harasser was plaintiff's supervisor for purposes of analyzing plaintiff's tangible employment action harassment claim, but finding that plaintiff had "failed to present evidence from which a reasonable jury could find that she was subjected to a tangible employment action that resulted from a refusal to submit to a supervisor's sexual demands").

accepted his advances, let him take [her] home, or something like that, that [her] job duties would change or [she] would be fired")]. Thus, Fulton's "claim rests on inference, making this an implicit *quid pro quo* sexual harassment claim," Sadeghian, 2020 WL 869217, at *5 (citation omitted); however, "there is simply no evidence to support a finding that [Phelps] ever conditioned, explicitly or implicitly, an employment action on [Fulton's] acceptance or rejection of [his] advances," Williams v. Silver Spring Volunteer Fire Dep't, 86 F. Supp. 3d 398, 417 (D. Md. 2015); see also Farley v. Am. Cast Iron Pipe Co., 115 F.3d 1548, 1552 (11th Cir. 1997) (finding that the "record [did] not contain substantial evidence that [plaintiff's supervisor] demanded [plaintiff's] acquiescence to his sexual overtures in exchange for a tangible job benefit"); Cook v. Hubbell Power Sys., Inc., Civil Action No. 2:12–CV–02122–KOB, 2014 WL 868080, at *10 (N.D. Ala. Mar. 5, 2014) (citation and internal marks omitted) (explaining that while an explicit condition is not required, plaintiff "must present some evidence of a threatened or promised impact on employment, whether it be implicit or explicit"); Durham v. Philippou, 968 F. Supp. 648, 654-55 (M.D. Ala. 1997) (citation omitted).[57]

[57] In her brief in opposition, Fulton cites her own testimony and McCants' deposition testimony to argue that Phelps "made his intentions quite clear, admitting he was making [her] do 'busy work' and telling her she wouldn't have so many problems if she hadn't begun the job with 'standards' and 'high morals' and had just 'put out like the other girls.'" [Doc. 72 at 25 (citations omitted)]. However, "[t]he Court need not give [Fulton] the benefit of [her] arguments, just the benefit of facts and justifiable inferences drawn from them." Sadeghian, 2020

Furthermore, as previously explained, "[a] tangible employment action is a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," Daniel v. Spectrum Stores, Inc., 381 F. Supp. 2d 1368, 1373–74 (M.D. Ga. 2005) (citation and internal marks omitted), and "[a] tangible employment action in most cases inflicts direct economic harm," Prescott-

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WL 869217, at *5 (citation omitted). Fulton testified that Phelps' "exact words" were that she "wouldn't have so many problems if [she] didn't come into the company with . . . standards and . . . high morals." [Doc. 54 at 139-40 pp. 138-39]. Similarly, McCants testified that Phelps said to Fulton in his presence that if she knew what she was doing, she would get further, and that Phelps would make comments to him and other coworkers but not directly to Fulton that "he's the first to f**k her" or had "first dibs," but McCants admitted that Phelps "didn't say [to Fulton directly that she] need[ed] to sleep with [him]," [Doc. 60 at 5-7 pp. 17, 21-22, 11 p. 38], and these comments Phelps made to McCants and other unidentified coworkers likewise did not link his sexual desire to any adverse action. In short, while the vague comments made to Fulton "may set off 'alarm bells,' . . . [Fulton] would need to come forward with additional evidence to establish a causal connection between the rejection of sexual advances and [any] adverse employment action." Briggs v. Waters, 484 F. Supp. 2d 466, 479 (E.D. Va. 2007) (citation omitted); see also Alexander v. Westbury Union Free Sch. Dist., 829 F. Supp. 2d 89, 108-09 (E.D.N.Y. 2011) (citation and internal marks omitted) (rejecting plaintiff's argument that her supervisor "linked tangible job benefits to the acceptance or rejection of sexual advances" by making sexual advances to her and then stating "he could 'work out' the adverse employment action," since "it [was] entirely unclear what adverse employment action the plaintiff [was] referring to and the court [could not] infer any such action from the record"); Sullivan v. Mass. Bay Commuter R.R., Civil Action No. 07–cv–10875–DPW, 2009 WL 1067184, at *7 n.13 (D. Mass. Apr. 22, 2009) (finding supervisor's "alleged statement [to] [plaintiff] that they could 'work something out' regarding her past disciplinary problems. . . ., standing alone, [was] too vague to support a 'quid pro quo' harassment claim").

Crawford, 2011 WL 13323656, at *14 n.27 (citation and internal marks omitted). "As further examples of actions that satisfy the 'tangible employment action' requirement, the Supreme Court listed a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation," and the Supreme Court "contrasted such examples with a bruised ego; a demotion without change in pay, benefits, duties, or prestige; and a reassignment to a more inconvenient job, none of which constitute a tangible employment action." Loudermilk v. Stillwater Milling Co., 551 F. Supp. 2d 1281, 1288-89 (N.D. Okla. 2008) (emphasis and internal marks omitted) (quoting Ellerth, 524 U.S. at 761).

Fulton contends that Phelps forced her to perform constant Helper duties and prevented her from learning the safety aspects of her job as a result of her rejection of his sexual advances. [Doc. 72 at 24 (citations omitted)]. Despite Fulton's arguments, "the Court concludes that assignment to various undesirable tasks . . . does not qualify as a tangible employment action," especially under the circumstances presented in this case where "[m]ost tasks about which [Fulton] complained . . . [were] jobs that [Helpers, as was Fulton's job title,] must ordinarily perform." Loudermilk, 551 F. Supp. 2d at 1289; see also McCormick v. Kmart Distrib. Ctr., 163 F. Supp. 2d 807, 829–30 (N.D. Ohio 2001) (finding that a denial of

"preferred secondary job assignments" was "not sufficient to establish a "tangible job detriment").[58] "The record also reveals that [Fulton] did not suffer any loss of wages or benefits," Hawkins v. Avalon Hotel Grp., LLC, 986 F. Supp. 2d 711, 722 (M.D. La. 2013); see also Bryant v. Sch. Bd. of Miami Dade Cty., 142 F. App'x 382, 383-84 (11th Cir. 2005) (per curiam) (unpublished), as she remained classified as a "Helper" and paid at the same pay rate throughout her tenure at KLC, [Doc. 52-10 ¶¶ 16, 20; Doc. 54 at 120 p. 119, 156 p. 155, 348-58]. In short, Fulton has not shown that Phelps' alleged conduct "resulted in a *significant* change in her employment status." Newland v. Stevinson Toyota E., Inc., 505 F. Supp. 2d 689, 698 (D. Colo.

[58] Indeed, Fulton understood that she had to work under Windham to gain experience and knowledge of the industry as she had never worked in a safety-related role prior to working for KLC, nor did she have any plumbing-related experience, and that she listed and applied for the role of Helper after being advised that she could not yet apply for a Safety Coordinator position, [Doc. 54 at 79-80 pp. 78-79, 88-91 pp. 87-90, 94-97 pp. 93-96, 115 p. 114, 342-44, 348, Doc. 72-5 ¶¶ 19, 21], and it is undisputed that both Windham and Phelps were responsible for assigning Fulton's daily tasks and that Windham did not recall Phelps assigning Fulton any tasks that were inappropriate or that would not typically be performed by a Helper, [Doc. 55 at 3 p. 9, 6 p. 19; Doc. 56 at 4 pp. 10-11; Doc. 57 at 4-7 pp. 13-14, 19, 22; Doc. 59 at 3 pp. 8-9]. Although Fulton agrees that it was a normal task to clean an employee's own work area, she contends that Phelps assigned her to clean and sweep areas where she did not work, which was not a normal task for a Helper. See [Doc. 72-5 ¶¶ 50-52]. However, "[w]hile unpleasant and perhaps unfairly imposed upon [Fulton] by [Phelps], assignment to various undesirable work tasks is not a tangible employment action." Loudermilk, 551 F. Supp. 2d at 1289 (citations and internal marks omitted); see also Watts v. Kroger Co., 170 F.3d 505, 510 (5th Cir. 1999) (finding an expansion of plaintiff's duties to various forms of cleaning and requiring her to check with her supervisor prior to taking a break were not tangible employment actions).

2007) (emphasis added). Accordingly, it is **RECOMMENDED** that KLC's motion for summary judgment, [Doc. 52], be **GRANTED** on Fulton's tangible employment action sexual harassment claim.

III. CONCLUSION

For the foregoing reasons, KLC's motion for sanctions, [Doc. 61], is **DENIED**, and it is **RECOMMENDED** that KLC's motion for summary judgment, [Doc. 52], be **GRANTED**.

The Clerk is **DIRECTED** to terminate this reference.

IT IS SO ORDERED, **RECOMMENDED**, and **DIRECTED** this 26th day of July, 2021.

Russell G. Vineyard

RUSSELL G. VINEYARD
UNITED STATES MAGISTRATE JUDGE