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

ELISABETH SHELTON,

Plaintiff,

v.

VERTICAL EARTH, INC.,

Defendant.

Civil Action No.
1:19-cv-04185-SDG

OPINION AND ORDER

This matter is before the Court on the Order and Final Report and Recommendation (R&R) entered by United States Magistrate Judge John K. Larkins, III [ECF 94]. The R&R recommends that Defendant Vertical Earth, Inc.'s motion for summary judgment [ECF 65] be denied. Vertical Earth filed its objections to the R&R on June 1, 2021 [ECF 96]. For the following reasons, Vertical Earth's objections are **OVERRULED** and the R&R is **ADOPTED** in its entirety.

I. BACKGROUND

The Court incorporates by reference the thorough recitation of the facts, procedural history, and legal standard for resolving a motion for summary judgment as set forth in the R&R. For purposes of this Order, the Court provides a brief summary of the pertinent facts as follows.

Plaintiff Elisabeth Shelton worked for Vertical Earth as a Project Coordinator. Throughout Shelton's employment, Steve Vickery—Vertical Earth's President—acted as her immediate supervisor. On August 17, 2019, Shelton injured her foot and visited the emergency room for treatment. That same day, and again on August 19, Shelton informed Vickery of her injury. On August 20, Shelton visited her physician, Kathern Neely. Six days later, Shelton returned to Dr. Neely for the removal of stitches associated with her injury. Dr. Neely indicated that Shelton's wound was healing, but restricted her from walking for the remainder of the week. After that appointment, Shelton notified Vickery and sent him a letter from Dr. Neely excusing her from work until September 2. However, on August 27, Vertical Earth terminated Shelton's employment.

Shelton initiated this action on September 17, 2019. Shelton initially asserted one substantive claim against Vertical Earth for violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq*. Approximately three months later, Shelton filed a separate lawsuit against Vertical Earth, alleging it also violated the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601, *et seq*. On March 13, 2020, the Court consolidated both actions. Vertical Earth filed its motion for summary judgment on Shelton's FLSA and FMLA claims on October 19. Judge Larkins issued the instant R&R on May 17, 2021. It recommends that Vertical Earth's

motion be denied. Vertical Earth filed its objections to the R&R on June 1. Shelton filed a response to those objections on June 15.

II. LEGAL STANDARD

A district judge has a duty to conduct a "careful and complete" review of a R&R. *Williams v. Wainwright*, 681 F.2d 732, 732 (11th Cir. 1982). The Court reviews any portion of a R&R that is the subject of a proper objection on a *de novo* basis. 28 U.S.C. § 636(b)(1). *See also Jeffrey S. v. State Bd. of Educ.*, 896 F.2d 507, 512 (11th Cir. 1990) (holding district court must "give fresh consideration to those issues to which specific objection has been made by a party"). The party challenging a R&R must file written objections that specifically identify the portions of the proposed findings and recommendations to which an objection is made and must assert a specific basis for the objection. *United States v. Schultz*, 565 F.3d 1353, 1361 (11th Cir. 2009). The Court maintains the discretion—but is not obligated—to consider novel evidence and substantive legal and factual arguments raised for the first time in an objection to a R&R. *Williams v. McNeil*, 557 F.3d 1287, 1292 (11th Cir. 2009). In contrast, the Court need only review those portions of a R&R to which no objection is made for clear error. *Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006). After conducting this review, the Court retains broad discretion to

accept, reject, or modify a magistrate judge's findings and recommendations. 28 U.S.C. § 636(b)(1); *Williams*, 557 F.3d at 1290–92.

III. DISCUSSION

Shelton alleges Vertical Earth violated her rights under the FLSA and FMLA. Vertical Earth seeks summary judgment on both claims. The R&R recommends that Vertical Earth's motion be denied in full. The Court addresses each claim in turn.

A. Shelton's FLSA Claim

Shelton alleges Vertical Earth violated her rights under the FLSA by failing to pay her overtime wages. Vertical Earth contends it is entitled to summary judgment because Shelton's job duties qualified her as a bona fide administrative employee exempt from overtime pay under the FLSA. The R&R found genuine issues of material fact concerning the nature of Shelton's job duties that precluded summary judgment. Vertical Earth did not lodge an objection to the R&R's findings or conclusions on this claim. Accordingly, the Court need only review this portion of the R&R for clear error.

The FLSA requires an employer to pay overtime wages (one and one-half times the regular rate) to employees who work in excess of forty hours in a week. 29 U.S.C. § 207(a)(1). However, the FLSA categorically excludes certain types of

employees from the overtime requirement. 29 U.S.C. § 213. Relevant here, an individual "employed in a bona fide executive, administrative, or professional capacity" is exempt. 29 U.S.C. § 213(a)(1). The employer shoulders the burden of proving the exemption. *Pioch v. IBEX Eng'g Servs., Inc.*, 825 F.3d 1264, 1268 (11th Cir. 2016).

After consideration of the record, the Court finds no clear error. Viewing the evidence in a light most favorable to Shelton, Vertical Earth has not satisfied its burden of showing she qualified as an exempt bona fide administrative employee as a matter of law. Therefore, with regard to Shelton's FLSA claim the R&R is adopted and Vertical Earth's motion for summary judgment is denied.

B. Shelton's FMLA Claims

Shelton alleges Vertical Earth violated the FMLA by failing to notify her of the right to take leave for her foot injury and ultimately terminating her employment in retaliation for her injury-related absences. Vertical Earth argues it is entitled to summary judgment because: (1) Shelton did not adequately request leave for her injury; (2) its decision to terminate Shelton's employment predated—and did not otherwise relate to—her injury; and (3) it possessed legitimate, nondiscriminatory reasons to terminate Shelton's employment based on her performance. The R&R found material fact issues permeating each argument and

recommended that Vertical Earth's motion for summary judgment be denied. In its objections, Vertical Earth largely reiterates these arguments. The Court addresses each argument *de novo* in turn.

1. Shelton's Request for FMLA Leave

The FMLA provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D).[1] Covered employers are prohibited from interfering with—or retaliating against for exercising—an employee's rights secured under the FMLA. *See* 29 U.S.C. § 2615(a)(1); 29 C.F.R. § 825.220(c). *See also Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1206 (11th Cir. 2001) ("[T]he FMLA creates two types of claims: interference claims . . . and retaliation claims.").

"To establish an FMLA interference claim, an employee must show she was entitled to a benefit under the FMLA and her employer denied her that benefit." *Ramji v. Hosp. Housekeeping Sys., LLC*, 992 F.3d 1233, 1241 (11th Cir. 2021)

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[1] The R&R assumed Shelton's foot injury constituted a serious health condition because Vertical Earth did not present any argument or evidence to the contrary [ECF 94, at 32]. Vertical Earth likewise does not do so in its objections. Thus, the Court will make the same assumption for purposes of this Order.

(citing *Munoz v. Selig Enters., Inc.*, 981 F.3d 1265, 1274 (11th Cir. 2020)). A key issue is notice; *i.e.*, "whether the employee adequately conveyed to the employer sufficient information to put the employer on notice that her absence was potentially FMLA-qualifying." *Ramji*, 992 F.3d at 1242 (quoting *Gay v. Gilman Paper Co.*, 125 F.3d 1432, 1436 (11th Cir. 1997)). The notice requirement contains two criteria: timing and content. *White v. Beltram Edge Tool Supply, Inc.*, 789 F.3d 1188, 1195 (11th Cir. 2015).

When an employee's need for leave is unforeseeable—as in this case—she "must give notice as soon as practicable under the facts and circumstances of the particular case." *Ramji*, 992 F.3d at 1243 (quoting 29 C.F.R § 825.303(a)). As for content, "an employee need not explicitly mention the FMLA." *White*, 789 F.3d at 1196 (citing *Cruz v. Publix Super Mkts., Inc.*, 428 F.3d 1379, 1383 (11th Cir. 2005)). The provided information "must simply allow the employer to understand that the employee potentially qualifies for FMLA rights." *Ramji*, 992 F.3d at 1243. *See also id.* ("FMLA regulations offer examples of sufficient notice, such as providing information about the 'condition that renders the employee unable to perform the functions of the job' or 'the anticipated duration of the absence, if known.'") (quoting 29 C.F.R. § 825.303(b)).

Viewing the record, the Court agrees with the R&R and finds genuine issues of material fact as to whether Shelton timely placed Vertical Earth on notice of her need for leave. On August 17, 2019, Shelton injured her foot and visited the emergency room. That same day, she notified Vickery and sent him a picture of her stitched-up foot. Two days later, Shelton again notified Vickery of her injury via text message. Vickery responded that the cut looked bad and questioned when Shelton would return to work. On August 26, Shelton relayed the results of her visit with Dr. Neely to Vickery and attached a note excusing her from work until September 2. Viewing these facts in a light most favorable to Shelton, a reasonable jury could find that Vertical Earth had knowledge of Shelton's injury (and potential need for FMLA leave) by August 26, at the latest. This is sufficient to warrant the denial of summary judgment.

2. The Timing of Shelton's Termination

Vertical Earth next contends the R&R erred by not granting summary judgment on Shelton's FMLA retaliation claim. When analyzing a FMLA retaliation claim in the absence of direct evidence of discrimination, courts apply the burden-shifting framework from the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 798 (11th Cir. 2000). To establish a threshold *prima facie* case of FMLA

retaliation, the plaintiff must establish that "(1) she engaged in statutorily protected conduct; (2) she suffered an adverse employment action; and (3) there is a causal connection between the protected conduct and the adverse employment action." *Id*. (collecting cases).

Vertical Earth challenges the third element. "To establish a causal connection, a plaintiff must show that the relevant decisionmaker was aware of the protected conduct, and that the protected activity and the adverse actions were not wholly unrelated." *Kidd v. Mando Am. Corp.*, 731 F.3d 1196, 1211 (11th Cir. 2013). But where "an employer makes a tentative decision before protected activity occurs, the fact that an employer proceeds with such a decision is not evidence of causation." *Saffold v. Special Couns., Inc.*, 147 F. App'x 949, 951 (11th Cir. 2005) (citing *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001) ("Employers need not suspend previously planned [adverse actions] upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality.")). *See also Drago v. Jenne*, 453 F.3d 1301, 1308 (11th Cir. 2006) ("We hold that, in a retaliation case, when an employer contemplates an adverse employment action before an employee engages in protected activity, temporal proximity between the

protected activity and the subsequent adverse employment action does not suffice to show causation.").

Vertical Earth avers it set in motion plans to terminate Shelton's employment prior to her injury. It presents evidence that, beginning in early August 2019, it decided to begin searching for Shelton's replacement.[2] On August 15, it placed an advertisement on Craigslist seeking candidates.[3] As such, Vertical Earth contends it was ready to follow through and replace Shelton on August 26.[4] However, the Court agrees with the R&R that this evidence does not establish as a matter of law that Vertical Earth made tentative plans to terminate Shelton prior to learning of her injury. Viewing the record in a light most favorable to Shelton, a jury could glean multiple reasonable inferences from Vertical Earth's search for a potential successor and online job posting. Because fact issues remain, the Court agrees that summary judgment is not appropriate. *See Sconiers v. Lockhart*, 946 F.3d 1256, 1263 (11th Cir. 2020) ("[I]f a reasonable jury could make more than one inference from the facts, and one of those permissible inferences creates a genuine

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2 ECF 68-2, ¶¶ 10–11.

3 *Id*. ¶ 12. *See also id*. at 55–58.

4 *Id*. ¶¶ 13–14.

issue of material fact, a court cannot grant summary judgment. Rather, the court must hold a trial to get to the bottom of the matter.").

3. Vertical Earth's Purported Reasons for Terminating Shelton's Employment

Vertical Earth's final objection is that the R&R erred by not granting it summary judgment on Shelton's FMLA claims because it possessed legitimate, nondiscriminatory reasons for terminating her employment. Under *McDonell Douglas*, if a plaintiff successfully articulates a *prima facie* case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *See Jones v. Gulf Coast Health Care of Delaware, LLC*, 854 F.3d 1261, 1271 (11th Cir. 2017). Only then does the burden shift back to the plaintiff to show the proffered reason is "merely a pretext for discrimination." *Schaaf v. Smithkline Beecham Corp.*, 602 F.3d 1236, 1244 (11th Cir. 2010).

In its summary judgment motion, Vertical Earth makes only a passing reference to this standard. It simply concludes that it "had legitimate reasons for [Shelton's] discharge as an employee" without pointing to specific facts to support this contention.[5] As found by the R&R, this barebones argument does not warrant summary judgment. *See McMullin v. Mississippi Dep't of Pub. Safety*, 782 F.3d 251,

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5 ECF 66, at 20.

260 (5th Cir. 2015) (finding defendant failed to carry its burden of "produc[ing] or point[ing] to evidence of a non-race-based reason for its employment decision" because it "perfunctorily state[d] that it has provided a legitimate, non-discriminatory reason for its decision" without providing a "discussion, explanation, or elaboration of its purported legitimate reason(s)").

In its objections, Vertical Earth clarifies that its argument is premised on Shelton's deficient job performance. Vertical Earth points to affidavits from two employees that articulate several perceived issues with Shelton's work-related conduct.[6] It is true that, to shift the burden back to Shelton to show pretext as to avoid summary judgment, Vertical Earth "need not persuade the court that [its challenged employment action] was actually motivated by the proffered reasons"; it must only "raise[ ] a genuine issue of fact as to whether it discriminated against the plaintiff." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir. 1997). *See also Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 257 (1981). "This intermediate burden is exceedingly light." *Turnes v. AmSouth Bank, NA*, 36 F.3d 1057, 1061 (11th Cir. 1994). Given the more thorough discussion in Vertical Earth's

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6 *See* ECF 68-1, ¶ 11; ECF 68-2, ¶¶ 10–11.

objections, the Court finds the affidavits sufficient to satisfy its intermediate burden under *McDonnell Douglas*.

But that is not the end of the inquiry. Although the "presumption of discrimination is eliminated," a plaintiff may still defeat summary judgment by "com[ing] forward with evidence . . . sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." *Chapman v. AI Transp.*, 229 F.3d 1012, 1024 (11th Cir. 2000). To show pretext, the plaintiff "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Alvarez v. Royal Atl. Devs., Inc.*, 610 F.3d 1253, 1265 (11th Cir. 2010). The plaintiff "must meet that reason head on and rebut it"; she cannot triumph "simply quarreling with the wisdom of that reason." *Chapman*, 229 F.3d at 1030. And if the employer articulates more than one legitimate, non-discriminatory reason, "the plaintiff must rebut each of the reasons to survive a motion for summary judgment." *Crawford v. City of Fairburn, Ga.*, 482 F.3d 1305, 1308 (11th Cir. 2007).

Viewing the record in a light most favorable to Shelton, there is sufficient direct and circumstantial evidence to rebut Vertical Earth's proffered reasons as

mere pretext. For example, although Vertical Earth now points to a list of performance issues, Shelton presents evidence that she never received any warnings or reprimands during her employment. *See Wascura v. City of S. Miami*, 257 F.3d 1238, 1245 (11th Cir. 2001) ("[T]he lack of complaints or disciplinary reports in an employee's personnel file may support a finding of pretext.") (citing *Stanfield v. Answering Serv., Inc.*, 867 F.2d 1290, 1294 (11th Cir. 1989)). Shelton further counters Vertical Earth's reliance on a pattern of "absenteeism" by showing those events were covered by various forms of vacation and paid time off. Because the conflicting evidence would allow a jury to reach more than one reasonable conclusion, summary judgment is inappropriate.

IV. CONCLUSION

The R&R [ECF 94] is **ADOPTED** in its entirety and Vertical Earth's objections are **OVERRULED**. Vertical Earth's motion for summary judgment [ECF 65] is **DENIED**. Within 30 days after entry of this Order, the parties are **DIRECTED** to file a proposed pretrial order.

SO ORDERED this the 29th day of July 2021.

Steven D. Grimberg
United States District Court Judge