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

BILLY PASLEY and MYRA GREEN,

Plaintiffs,

v.

RELOGIO, LLC; RECUPERO, LLC; AGORA NOTUS, LLC; COMPLETE PROPERTIES, LLC; CC LICENSING, LLC; COMPLETE AVIATION, LLC; TROVAMI, LLC; COMPLETE CASH HOLDINGS, LLC; SIC CERTIOR TRUST; and TRACI ZIRKELBACH,

Defendants.

CIVIL ACTION FILE NO.

4:20-CV-00124-HLM-WEJ

FINAL REPORT AND RECOMMENDATION

Plaintiff Billy Pasley alleges that his supervisor, defendant Traci Zirkelbach, made inappropriate comments to him and touched him in an inappropriate manner

while both were employed by one or more of the nine "Entity Defendants."[1] (See Am. Compl. [108] ¶¶ 20-24.) After he complained about these incidents, Mr. Pasley alleges that he was discharged from employment. (Id. ¶ 25.) Subsequently, Mr. Pasley contacted a co-worker, plaintiff Myra Green, concerning his right to file a charge with the Equal Employment Opportunity Commission ("EEOC") about what had occurred; she confirmed that he could file a charge. (Id. ¶¶ 27-28.) After he filed a charge, Mr. Pasley again contacted Ms. Green to confirm that his former employer(s) had been served; she confirmed that a letter from the EEOC had been received, but she had no access to it. (Id. ¶¶ 30-31.) Plaintiffs allege that two weeks later, the operator of the Entity Defendants, Kent Popham, accused Ms. Green of assisting Mr. Pasley with filing an EEOC charge and terminated her employment. (Id. ¶¶ 32-33.)

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[1] Defendants (1) Relogio, LLC, (2) Recupero, LLC, (3) Agora Notus, LLC, (4) Complete Properties, LLC, (5) CC Licensing, LLC, (6) Complete Aviation, LLC, (7) Trovami, LLC, (8) Complete Cash Holdings, LLC, and (9) the SIC Certior Trust, collectively refer to themselves by this moniker. (Defs.' Br. [166-2] 1.) Plaintiffs refer to them as "Corporate Defendants." However, because not all of them are corporations, i.e., the Trust, the Court employs "Entity Defendants." Ms. Zirkelbach's surname recently changed. (Pls.' Consolid. Resp. Br. [171-1] 2 n.1.) Like the parties, the Court will refer to her as Ms. Zirkelbach.

Based on the above allegations, plaintiffs assert the following claims against defendants under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII") and Georgia tort law:

Count I: Plaintiff Pasley verses the Entity Defendants for hostile work environment sexual harassment in violation of Title VII;

Count II: Plaintiff Pasley verses the Entity Defendants for retaliation in violation of Title VII;

Count III: Plaintiff Pasley verses defendant Zirkelbach for assault in violation of Georgia tort law;

Count IV: Plaintiff Pasley verses defendant Zirkelbach for battery in violation of Georgia tort law;

Count V: Plaintiff Pasley verses the Entity Defendants for negligent hiring, retention, and supervision of Ms. Zirkelbach in violation of Georgia tort law;

Count VI: Plaintiff Pasley verses the Entity Defendants for ratification of defendant Zirkelbach's sexual harassment in violation of Georgia tort law;[2] and

Count VIII: Plaintiff Green verses the Entity Defendants for retaliation in violation of Title VII.

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[2] In Count VII, Mr. Pasley seeks punitive damages against all defendants under O.C.G.A. § 51-12-5.1 on his state law tort claims. (Am. Compl. ¶ 63.)

After a period of discovery, both Ms. Zirkelbach and the Entity Defendants filed Motions for Summary Judgment with supporting briefs. (See Def. Zirkelbach's Mot. for Summ. J. and Alt. Mot. to Dismiss Pl. Myra Green[3] [161] & Br. [161-2]; Entity Defs.' Mot. for Summ. J. re Pl. Pasley [166] & Br. [166-2]; and Entity Defs.' Mot. for Summ. J. re Pl. Green [167] & Br. [167-2].) Plaintiffs filed a Consolidated Response Brief [171-1] and defendants filed Rely Briefs. (See Def. Zirkelbach's Reply Br. [175]; Entity Defs.' Consolid. Reply Br. [179].)

For the reasons explained below, the undersigned reports that because Mr. Pasley failed to complain about the alleged sexual harassment by Ms. Zirkelbach using his employer's policy, the undersigned recommends that summary judgment be entered against his Title VII hostile work environment claim (Count I). The undersigned further reports that Mr. Pasley can establish no causal connection between his protected activity and his discharge; therefore, the undersigned further

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[3] Although Ms. Green alleged no claims against Ms. Zirkelbach, out of an apparent abundance of caution, she seeks dismissal of Ms. Green pursuant to Federal Rule of Civil Procedure 12(b)(6). (Def. Zirkelbach's Br. [161-2] 20.) Because Ms. Green makes no claim against Ms. Zirkelbach, there is nothing for the Court to dismiss as against her. Thus, the undersigned **RECOMMENDS** that Ms. Zirkelbach's Alternative Motion to Dismiss as to Plaintiff Myra Green [161] be **DENIED AS MOOT**.

recommends that summary judgment be entered against his Title VII retaliation claim (Count II). The undersigned further reports that, with the entry of summary judgment against Mr. Pasley's Title VII claims, there is no reason to resolve his state law tort claims here; therefore, the undersigned further recommends that supplemental jurisdiction be declined on the tort claims and related punitive damages claim Mr. Pasley alleged against Ms. Zirkelbach (Counts III-IV, VII) and the Entity Defendants (Counts V-VII), and that those claims be dismissed without prejudice. The undersigned further reports that there is no evidence that defendant SIC Certior Trust had anything to do with Ms. Green's discharge; therefore, the undersigned recommends that summary judgment be entered for this defendant against her Title VII retaliation claim (Count VIII). Finally, the undersigned reports that there are disputed issues of material fact over whether the Entity Defendants (with the exception of the SIC Certior Trust) discharged Ms. Green for engaging in protected activity; therefore, the Entity Defendants' Motion for Summary Judgment should be denied on Ms. Green's Title VII retaliation claim (Count VIII).

I. STATEMENT OF FACTS

As required by Local Civil Rule 56.1(B)(1), the Entity Defendants as movants filed a Statement of Material Facts in support of their Motion for Summary Judgment regarding Mr. Pasley's claims [166-1] ("ED-SMF-Pasley"), and a Statement of Material Facts in support of their Motion for Summary Judgment regarding Ms. Green's claims [167-1] ("ED-SMF-Green"). Likewise, Ms. Zirkelbach filed a Statement of Material Facts [161-1] ("Z-SMF").[4]

As required by Local Civil Rule 56.1(B)(2)(a), plaintiffs submitted responses to those proposed facts. (See Pl. Pasley's Resp. to Corp. Defs.' SMF [171-7] ("PR-ED-SMF-Pasley"); Pl. Green's Resp. to Corp. Defs.' SMF [171-6] ("PR-ED-SMF-Green"); and Pls.' Resp. to Def. Zirkelbach's SMF [171-8] ("PR-Z-SMF").)

Further, as allowed by Local Civil Rule 56.1(B)(2)(b), plaintiffs submitted their own statement of additional material facts. (See Pls.' Stat. of Undisputed

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[4] The Local Civil Rules provide that this "Court will not consider any fact: . . . (d) set out only in the brief and not in the movant's statement of undisputed facts." N.D. Ga. Civ. R. 56.1(B)(1)(d). Therefore, the Court cannot consider the numerous arguably inappropriate "Spark messages" that Mr. Pasley reportedly sent to co-workers which are quoted in Ms. Zirkelbach's Brief. (See Def. Zirkelbach's Br. [161-2] 7-13.)

Material Facts [171] ("PSUMF").) As required by Local Civil Rule 56.1(B)(3), the Entity Defendants submitted a response. (See Entity Defs.' Consolid. Resp. to PSUMF [180] ("EDR-PSUMF").)[5]

The Court uses the parties' proposed facts and responses as the basis for this Statement of Facts using the following conventions. Where one side admits a proposed fact, the Court accepts it as undisputed for purposes of these Motions and cites only the proposed fact. The Court sometimes modifies a proposed fact per the evidence cited and excludes immaterial proposed facts. Given the inevitable duplication among the three statements of material fact submitted by defendants and the one submitted by plaintiffs, the Court sometimes cites one proposed fact and uses a "see also" signal to the other(s).

The Entity Defendants object to most of the facts proposed by plaintiffs on the grounds that the evidence cited fails to support them. Upon review of the evidence cited, if a proposed fact is unsupported the Court either excludes it or modifies it to reflect the record cited accurately. However, if a proposed fact is supported by the record cited, and evidence cited by defendants simply disputes it

[5] Defendant Zirkelbach did not submit a response to PSUMF. However, the response filed by the Entity Defendants is sufficient for all defendants.

(see, e.g., EDR-PSUMF ¶¶ 20-22), given the standards applicable to motions for summary judgment (see infra Part II), the Court includes it herein. Finally, the Court includes some facts drawn from its review of the record. See Fed. R. Civ. P. 56(c)(3).

A. The Parties

Plaintiff Pasley worked for one or more of the Entity Defendants as an IT technician from April 2013 through July 2018. (ED-SMF-Pasley ¶ 1; see also Z-SMF ¶ 4; PSUMF ¶ 1, modified per record cited.)[6] He performed computer work, safe work, surveillance work,[7] and firewall work. (ED-SMF-Pasley ¶ 32.) Mr. Pasley's top employment priority was keeping the stores online and operational. (Id. ¶ 36.) Mr. Pasley received his paycheck from defendant Relogio, LLC, which is a staffing and payroll company. (ED-SMF-Green ¶ 26; see also ED-SMF-Pasley ¶¶ 30-31.)

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[6] Mr. Pasley graduated from Georgia Northwestern Technical College with a degree in Web Development, Programming and Computer Information Systems; he was trained in what the Entity Defendants asked him to do. (Z-SMF ¶ 6, modified per record cited in PR-Z-SMF ¶ 6.)

[7] The Court is unsure what "safe work" encompasses, but interprets "surveillance work" to mean installation of surveillance cameras.

Plaintiff Green began working for some of the predecessors of the Entity Defendants in 2008. At the time of her hire, she worked as a Human Resource ("HR") Manager for an entity known as The Cash Store, Inc. (ED-SMF-Green ¶ 1; see also PSUMF ¶ 2, modified per record cited.) In approximately 2009, The Cash Store, Inc. became Complete Cash Holdings, LLC, and Ms. Green's job duties remained the same. (ED-SMF-Green ¶ 2.) In 2017, Ms. Green left Complete Cash Holdings and went to work for Relogio, LLC as its HR Manager. (Id. ¶ 3.) In 2017, Ms. Green left that HR Manager position and became an administrative assistant for Mr. Popham while also performing benefits administration work. When Ms. Green changed job positions, she remained employed by Relogio, LLC. (Id. ¶ 4.)

Defendant Zirkelbach began working for the predecessors of Agora Notus, LLC and Relogio, LLC in 2005, and became the General Manager of Relogio and Agora Notus in July 2017. (ED-SMF-Pasley ¶ 2; see also Z-SMF ¶ 5; PSUMF ¶ 8, modified per record cited.) When Ms. Zirkelbach became General Manager, she was Mr. Pasley's supervisor and had the power to discipline and fire him. (Z-SMF

¶ 7; see also PSUMF ¶ 19.)[8] Ms. Zirkelbach has no ownership interest in the Entity Defendants. (ED-SMF-Pasley ¶ 29.)

The Entity Defendants are (1) Recupero, LLC; (2) Relogio, LLC; (3) Agora Notus, LLC; (4) Complete Properties, LLC; (5) CC Licensing, LLC; (6) Complete Aviation, LLC; (7) Trovami, LLC; (8) Complete Cash Holdings, LLC[9]; and (9) SIC Certior Trust. (Z-SMF ¶ 1, sentence one.) Each of the Entity Defendants has its own taxpayer identification number and its own bank accounts. (ED-SMF-Pasley ¶ 38; see also ED-SMF-Green ¶ 27.) When one of the Entity Defendants utilizes the services or products of another, it is invoiced for that work. When a loan is made from one entity to another, each entity's accounting records reflect that a debt is owed as well as when that debt is repaid. (ED-SMF-Green ¶ 28; see also ED-SMF-Pasley ¶ 39.) These loans were sometimes called "intercompany transfers." (See record cited in PR-ED-SMF-Green ¶ 28 and PR-ED-SMF-Pasley

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[8] Ms. Green makes no claims against Ms. Zirkelbach. (Z-SMF ¶ 3.) As already noted, Mr. Pasley asserts multiple tort claims against Ms. Zirkelbach. (Id. ¶ 2.)

[9] Complete Cash Holdings, LLC dissolved in 2018 and no longer exists. (ED-SMF-Green ¶ 5; see also ED-SMF-Pasley ¶ 37.)

¶ 39.) Defendant SIC Certior Trust is, as the title implies, a trust; the trustee is Kendall Popham (Mr. Popham's son). (ED-SMF-Green ¶ 29.)

Mr. Popham asserts that he is the sole member of the above-listed LLCs. (Z-SMF ¶ 9.) Plaintiffs dispute that assertion, relying on testimony from Ms. Green that Mr. Popham was the sole member only of the now-dissolved Complete Cash Holdings, LLC, and that the sole member of the other LLCs is the SIC Certior Trust. (PR-Z-SMF ¶ 9; PSUMF ¶ 3, both modified per record cited.)

Ms. Green further contends that all of the Entity Defendants are managed from an office located at 309 West 10th Street, in Rome, Georgia, where Mr. Popham works nearly every day. (PSUMF ¶ 4, modified per record cited.)[10] Ms. Green declares that Mr. Popham created many of the LLCs to insulate himself from liability if sued by customers or employees. (Id. ¶ 5, modified per record cited.) She adds that Mr. Popham created the SIC Certior Trust to provide protection to personal and business assets that are owned by the LLCs named in the Complaint.

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[10] Mr. Popham testified that the LLCs occupy office space at either the West 10th Street address or at a North Broad Street address in Rome. (Popham Dep. [172-4] 21.)

(Id. ¶ 6.) Ms. Green states without dispute that Mr. Popham operates all the LLCs. (Id.)

Both Mr. Pasley and Ms. Green assert that they performed work for all of the Entity Defendants. (PSUMF ¶ 7.) However, Mr. Pasley does not know if defendant SIC Certior Trust has any computers, surveillance equipment, or televisions; moreover, he also cannot state any dates when he might have performed work for SIC Certior Trust. (ED-SMF-Pasley ¶ 33.) The only knowledge Mr. Pasley has concerning for whom he worked is based on the tradename "Complete Cash" and his belief that Mr. Popham owns the Entity Defendants. (Id. ¶ 34.) With regard to Ms. Green, defendants dispute her assertion that she performed work for all the Entity Defendants by repeating her job history, stated above. (EDR-PSUMF ¶ 7.)[11]

B. Popham's Long-Standing Dissatisfaction with Pasley's Work

When Ms. Zirkelbach became General Manager in July 2017, Mr. Popham told her that he wanted Mr. Pasley fired, and he repeated that statement multiple times thereafter. (Z-SMF ¶ 10; see also ED-SMF-Pasley ¶ 3.) However, Mr.

[11] The Court excludes PSUMF ¶¶ 9-10 and ED-SMF-Pasley ¶ 35 as immaterial.

Pasley's performance evaluations were satisfactory throughout his employment, and he was never disciplined for poor work performance. (PSUMF ¶¶ 39-40.)

C. The Work Environment

The Court addresses Mr. Pasley's specific allegations of harassment against Ms. Zirkelbach infra, but Ms. Green testified generally about the work environment while she served as HR Manager from 2008-2017. On almost a daily basis, she heard employees tell jokes with sexual overtones or make sexually-inappropriate comments; this would occur in the office's reception area up front or in the breakroom and would include men speaking to women and women speaking to women. (PSUMF ¶ 11, modified per record cited.) Ms. Zirkelbach concurred that such behavior occurred at the office, including joking by Mr. Pasley. (Id., modified per record cited.) Ms. Green testified that she directed employees to stop, but she never brought the matter to Mr. Popham's attention because he occasionally shared a joke she deemed inappropriate. (Id. ¶ 12, modified per record cited.)[12] Both Ms.

[12] The Court sustains defendants' objection to PSUMF ¶ 13. It conflates testimony about the alleged hostile work environment with why Ms. Green claims she did not tell Mr. Popham that Mr. Pasley told her that Ms. Zirkelbach had texted nude pictures to him. Moreover, Ms. Green's testimony about Mr. Popham's alleged relationship with a store manager is both gossip and immaterial.

Green and Mr. Pasley once heard Mr. Popham say that "men cannot be sexually harassed." (Id. ¶ 33.)

Mr. Pasley alleges that Ms. Zirkelbach first began sexually harassing him in October 2017. (ED-SMF-Pasley ¶ 13; see also PSUMF ¶ 18, modified per record cited.) The first time she allegedly touched him inappropriately in October 2017, Mr. Pasley did not tell her to stop, but just pulled away while he was sitting in his office. (ED-SMF-Pasley ¶ 14; see also Z-SMF ¶ 16.) Mr. Pasley asserts that his initial efforts to avoid or refuse Ms. Zirkelbach were subtle so as not to get in trouble as she was his supervisor and had the power to discipline him. (PSUMF ¶ 28.) When Ms. Zirkelbach would say something that Mr. Pasley thought was inappropriate, he would walk away or laugh it off. (ED-SMF-Pasley ¶ 15; see also Z-SMF ¶ 17; PSUMF ¶ 27.) Ms. Zirkelbach's comments ranged from whispering to Mr. Pasley that she was not wearing underwear to telling him that she wanted what some other woman had. (PSUMF ¶ 20.)

Mr. Pasley also alleges that Ms. Zirkelbach inappropriately touched him, rubbed his shoulder, and rubbed her breasts against him several times while they were in his office during work hours. (ED-SMF-Pasley ¶ 16; Z-SMF ¶ 15; see also PSUMF ¶ 22, asserting that Ms. Zirkelbach touched Mr. Pasley inappropriately in

that manner 2-3 times per week.) Mr. Pasley testified that there was never a week that went by that Ms. Zirkelbach did not say something inappropriate to him or touch him inappropriately. (PSUMF ¶ 21, modified per record cited; see also PR-ED-SMF-Pasley ¶ 16 and record cited.)[13]

Ms. Zirkelbach admits that she engaged in sexual banter with employees. (PSUMF ¶¶ 14-15.) Jake Pilgrim, a former employee of the Entity Defendants, testified that on one occasion Ms. Zirkelbach declared in front of him and Mr. Pasley that, if someone bought shoes for her that person could "pull her hair, do whatever you want with her." (Id. ¶ 16.) Elizabeth Pendergrass and Dawn Tidwell, both of whom held administrative roles for the Entity Defendants, declared that they heard Ms. Zirkelbach tell sexually-charged jokes and discuss employees' sex lives in the workplace. (Id. ¶ 17.)

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[13] Mr. Pasley kept no notes, logs, or journals documenting any of the instances when he contends that Ms. Zirkelbach inappropriately touched him. (Z-SMF ¶ 21; see also ED-SMF-Pasley ¶ 19.) Although Mr. Pasley's office was an open cubicle, without a door, in an open area with several other people working in open cubicles, Mr. Pasley was not aware if others witnessed Ms. Zirkelbach's alleged inappropriate touching. (Z-SMF ¶ 19; ED-SMF-Pasley ¶ 17, both modified per record cited in PR-Z-SMF ¶ 19 & PR-ED-SMF-Pasley ¶ 17.)

Mr. Pasley asserts that after 10:00 p.m. on February 9, 2018, Ms. Zirkelbach sent him text messages inviting him to come meet her and some friends[14]; he contends that she also texted him several nude photos of herself. (Z-SMF ¶ 26; see also PSUMF ¶¶ 23, 25.) Ms. Zirkelbach testified that she could not recall, but could not deny, sending Mr. Pasley texts with nude photos of herself. (Z-SMF ¶ 27.)[15]

Within this series of salacious text messages is the following question from Mr. Pasley: "Why is Kent [Popham] mad at me?" Ms. Zirkelbach responded as follows: "Something about the golf course cameras not working. Don't worry,

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[14] In the text messages Ms. Zirkelbach reportedly mentioned that she was drinking "panty dropper liquor" and was "staying in a hotel and could use company." (PSUMF ¶ 24.)

[15] The parties dispute whether the nude photos were sent from Ms. Zirkelbach's cell phone. Ms. Zirkelbach shows that the itemization in her AT&T bill for the billing cycle encompassing February 9, 2018 shows no texts from that phone to Mr. Pasley. (Z-SMF ¶¶ 27-29.) Plaintiffs concede that the cell phone records do not show any texting from Ms. Zirkelbach's cell phone to Mr. Pasley's cell phone on that date; however, they suggest that the absence of those text messages from the bill could be explained by Ms. Zirkelbach's use of a burner phone or a burner application that can be loaded on a cell phone. (PR-Z-SMF ¶¶ 27-28.) Mr. Pasley declares that his phone contained two numbers for Ms. Zirkelbach, and that she told him she had installed a burner application on her phone. (Pasley Decl. [171-4] ¶¶ 2-4.) Given Mr. Pasley's assertion that Ms. Zirkelbach sent him nude photos of herself, and given Ms. Zirkelbach's concession that she could not deny sending the photos, the Court must assume that she sent them for purposes of making a recommendation on the instant Motions.

you do a good job. And I'll take care of that when you take care of this." (PSUMF ¶ 26; see also Zirkelbach Dep. Ex. 25 [183], at 1.)

Mr. Pasley testified that in early July 2018, when Ms. Zirkelbach allegedly touched him, he pushed away and told her to stop; this was the first time that he verbally told her that he did not want her to do that. (Z-SMF ¶ 18; see also ED-SMF-Pasley ¶ 18; PSUMF ¶ 29.)

As a result of Ms. Zirkelbach's alleged inappropriate touching, Mr. Pasley incurred no injury, no violent injury, no apprehension, no bruise upon his body, no bleeding, and no broken bones. (ED-SMF-Pasley ¶ 20; see also Z-SMF ¶ 22.) Moreover, as a result of Ms. Zirkelbach's alleged inappropriate touching, Mr. Pasley incurred no medical expenses, never treated with a medical professional for any emotional injuries, and never saw a medical professional. (ED-SMF-Pasley ¶ 21; see also Z-SMF ¶ 23.) Finally, as a result of the alleged sexual harassment by Ms. Zirkelbach, Mr. Pasley never suffered a demotion or decrease in salary. (ED-SMF-Pasley ¶ 22; see also Z-SMF ¶ 24.)

Ms. Zirkelbach denies that she ever inappropriately touched Mr. Pasley, but admits to inappropriate comments and texts between the two of them which she claims were always initiated by him. She also testified about instances when Mr.

Pasley inappropriately touched her and about his inappropriate behavior toward female co-workers.[16] (Z-SMF ¶ 25; see also ED-SMF-Pasley ¶ 23.) Mr. Pasley asserts that he never touched Ms. Zirkelbach inappropriately. (PSUMF ¶ 31.) Mr. Pasley did not ask Ms. Zirkelbach for photos of herself and did not send photos of himself to her. (Id. ¶ 30.) As for whether Mr. Pasley made inappropriate comments in the office, Ms. Zirkelbach testified that she never received a complaint from another employee about him. (Id. ¶ 32.) However, Ms. Green testified that she had to speak to Mr. Pasley and direct him to stop making sexually-inappropriate comments (i.e., crude jokes or banter) in the workplace. (EDR-PSUMF ¶ 32.)

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[16] For instance, Ms. Zirkelbach wrote the following undated memo memorializing a conversation she claims she had with Mr. Pasley in July 2017:

> I informed Billy that this was the last discussion we would have regarding inappropriate behavior with female employees. I told him that what he did on his own time was his own business, but that his behavior had to remain professional at work. I told him that if he had any relationships of a personal nature that interaction "could not happen at work." He again denied that he did anything. My response to him was that if that was the case, then he needed to make sure that he behaved in a way that would never be called into question.

(ED-SMF-Pasley ¶ 8.)

D. Policy Against Harassment

The Entity Defendants had and maintained a policy prohibiting sexual harassment which provided multiple reporting avenues. (ED-SMF-Pasley ¶ 24.)[17] This policy was disseminated to all employees; Mr. Pasley received a copy when he was hired in 2013. While this policy may have been revised over the years, Mr. Pasley was fully aware of any and all changes because he was the one who

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[17] Relogio's policy states that the company is committed to providing a work environment free from sexual harassment and provides a definition of sexual harassment. (Zirkelbach Dep. Ex. 1 [172-14], at 1-3.) The policy then provides the following procedure for an employee to follow:

> 1. Tell the individual that his/her behavior is offensive and ask him/her to stop.
>
> 2. Make a record (date, time, location, witnesses, what happened, your response).
>
> 3. If, after asking the individual to stop his/her behavior, the harassment continues, report the problem at once to one of the following [with phone numbers listed but omitted here]
>
> a) H.R. Manager: Kristy Rankin
>
> b) General Manager: Traci Zirkelbach
>
> c) CEO: Kent Popham

(Id. at 4.)

maintained it on the company's website. (Id. ¶ 25.) Mr. Pasley admitted that in his role as IT technician, he would have seen and been aware of the sexual harassment policy and its changes. (Id. ¶ 26.)

Although Relogio, LLC's Sexual Harassment Policy contained a procedure for reporting sexual harassment, Mr. Pasley never reported his allegations against Ms. Zirkelbach to anyone until after his employment was terminated. (ED-SMF-Pasley ¶ 27; see also Z-SMF ¶ 20.) Before his termination, Mr. Pasley never reported that he was or had been sexually harassed by Ms. Zirkelbach. This included Mr. Pasley not telling any of his fellow employees or Mr. Popham about her alleged unlawful conduct. (ED-SMF-Pasley ¶ 9.)[18] Mr. Pasley also testified that Paragraph 46 of the Amended Complaint, which states: "Defendant retaliated against Mr. Pasley by terminating him for reporting sexual harassment in violation of Title VII," was "not exactly correct" because he did not report the harassment. (Z-SMF ¶ 31; see also ED-SMF-Pasley ¶ 11.)

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[18] Ms. Green testified that during her time as HR Manager, she received a sexual harassment complaint from an employee (i.e., one female employee in the marketing department complained about another female employee). Ms. Green stated that the complaint was investigated and she trained the employees on sexual harassment, which concluded the matter. (ED-SMF-Pasley ¶ 28.)

E. Mr. Pasley's Discharge

In July 2018, Mr. Popham made the decision to terminate Mr. Pasley's employment; he directed Ms. Zirkelbach to "fire him." (ED-SMF-Pasley ¶ 4, first sentence; see also Z-SMF ¶ 11.) Mr. Popham told Ms. Zirkelbach that if she would not fire him, then he would find a new General Manager that would. (ED-SMF-Pasley ¶ 4, second sentence.)[19] Mr. Pasley concedes that if Mr. Popham said to do something, an employee had to do it. (Id. ¶ 5.) When Mr. Popham directed Ms. Zirkelbach to fire Mr. Pasley, he was unaware of the salacious text messages that she had purportedly sent to Mr. Pasley; he learned about the text messages only after Mr. Pasley filed his EEOC charge (discussed infra). (Z-SMF ¶ 30; see also ED-SFM-Pasley ¶ 10.)

The Separation Notice issued to Mr. Pasley at his discharge on July 17, 2018, stated that the reason for termination was "unsatisfactory work performance." (Z-SMF ¶ 12; see also ED-SMF-Pasley ¶ 6.) When the Entity Defendants filed their

[19] As discussed in more detail infra, plaintiffs' position is that Mr. Pasley's termination came upon the heels of him telling Ms. Zirkelbach to stop touching him. Over the preceding year, Ms. Zirkelbach had always defended Mr. Pasley to Mr. Popham and had talked him out of firing Mr. Pasley; however, this time she did not. (PR-ED-SMF-Pasley ¶ 4; see also PSUMF ¶¶ 34-35.)

position statement with the EEOC regarding the reasons for discharging Mr. Pasley, it listed five examples of poor job performance which led to his termination. (PSUMF ¶ 36, sentence one; see also Popham Dep. Ex. 29 [172-13], at 18-19 (Position Statement to EEOC).) When plaintiffs deposed Mr. Popham, he only had knowledge of the second reason listed in that position statement, which dealt with Mr. Pasley's failure to install a security video monitor at a golf course Mr. Popham owned. (PSUMF ¶ 36, sentences two & three; see also id. ¶¶ 37, 50.)[20] Nevertheless, Mr. Popham testified that his reasons for firing Mr. Pasley included that he was not doing his job at a satisfactory level, he was a liability to the company, his character, unprofessionalism, the way he conducted himself, his attitude and demeanor, his substandard work product, and not completing assignments he was directed to do. (Z-SMF ¶ 13; see also ED-SMF-Pasley ¶ 7.)

F. Mr. Pasley's Contacts with Ms. Green

As noted above, Mr. Pasley was terminated on July 17, 2018. (ED-SMF-Green ¶ 8.) Ms. Green had three relevant contacts with Mr. Pasley after that event. The first was immediately after his discharge, when Mr. Pasley called Ms. Green

[20] The Court sustains defendants' objection to PSUMF ¶ 38. (See EDR-PSUMF ¶ 38.) The proposed fact is also argumentative and speculative.

to tell her that he had been terminated.[21] Ms. Green thought he was joking. Ms. Green said that she would call Mr. Pasley back later and that ended the conversation. (Id. ¶ 9.)

The second contact occurred about a week after Mr. Pasley's termination. Mr. Pasley told Ms. Green that he was considering filing an EEOC charge against Ms. Zirkelbach. Ms. Green responded, "Well, you know, that is your right." Ms. Green testified "that was pretty much the gist of the conversation." (ED-SMF-Green ¶ 10; see also PSUMF ¶ 43, stating that Ms. Green told Mr. Pasley that he had the right to file a charge.) Ms. Green further stated, "I had no involvement in his firing. I knew nothing about it. I was not going to, you know, make any statements other than, 'That's your right to contact the EEOC.'" (ED-SMF-Green ¶ 11.)

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[21] Mr. Pasley asserts that he made the call to Ms. Green in an attempt to understand why he had been terminated; he knew that she had a close relationship with Mr. Popham. (PSUMF ¶ 41; see also ED-SMF-Pasley ¶ 12.) He informed Ms. Green that he felt he had been wrongfully terminated because he would not engage in sexual encounters with Ms. Zirkelbach. (PSUMF ¶ 42.)

Mr. Pasley filed a charge with the EEOC on October 18, 2018. (ED-SMF-Green ¶ 8.) The charge alleged that Ms. Zirkelbach had sexually harassed Mr. Pasley. (Z-SMF ¶ 14; see also ED-SMF-Pasley ¶ 8.)

The third relevant contact occurred on November 7, 2018, when Ms. Green received a text message from Mr. Pasley about an EEOC letter arriving at the office. Mr. Pasley texted Ms. Green as follows: "I got a notification that it should have been delivered. Did you get it? Good evening by the way :)" Ms. Green responded at approximately 7:00 p.m. with, "Hmmm I didn't. But I'm guessing that's what came. I haven't been told." (ED-SMF-Green ¶ 12; see also PSUMF ¶ 44.)[22] Ms. Green testified that, other than her 7:00 p.m. text message, she did not provide Mr. Pasley with any other information regarding an EEOC letter being delivered to the office because she "had no other knowledge" about the matter. (ED-SMF-Green ¶ 15.)

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[22] The exhibit documenting that text message does not show that Ms. Green responded any further to Mr. Pasley's text messages of November 7; Ms. Green also did not recall that she responded to him either by text message or by phone. (ED-SMF-Green ¶ 13.) Ms. Green confirmed in her deposition that the text message conversation shown in Defendants' Exhibit 1 to her deposition was the conversation she had with Mr. Pasley. (Id. ¶ 14.)

G. Relogio's Policy on Communication with Former Associates

During the course of Ms. Green's employment with Relogio, LLC, the company had an employee policy titled, "Communication with former Associates." Under the terms of this policy, if a current employee received a telephone call or electronic communication from a former employee, then the current employee was required to immediately inform the corporate office (i.e., the HR Manager). (ED-SMF-Green ¶ 6.) Ms. Green was aware of this policy because she wrote it. (Id. ¶ 7.) However, Ms. Green did not contact the HR Manager about any of the above-mentioned communications that she had with Mr. Pasley after his termination. (Id. ¶ 18.)[23]

H. Mr. Popham's Discussions with Ms. Green

On either November 19 or 20, 2018, but before his first conversion with Ms. Green, Mr. Popham received a copy of the November 7 text message conversation between Mr. Pasley and Ms. Green concerning whether the EEOC letter had arrived.

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[23] Mr. Popham testified that he could not recall terminating an employee for violating this policy when the content of the communication was purely concerning their personal lives rather than company business. (PSUMF ¶ 49, modified per record cited.)

(Compare ED-SMF-Green ¶ 22, with PSUMF ¶ 45.)[24] In addition to having a copy of their text message, Mr. Popham had heard from one employee that Mr. Pasley was telling other employees that "he was going to get some of [Mr. Popham's] money and [Ms. Green] was going to help him." (Popham Dep. [172-4] 55.)

According to Ms. Green, on November 19, 2018, Mr. Popham came to her office and stated that he had heard some gossip that she was assisting Mr. Pasley with his EEOC complaint. (Green Dep. [172-2] 37, 41.) Ms. Green replied, "Why would I do that?" (Id. at 37.) According to Ms. Green, Mr. Popham then stated, "Well, I didn't think so, but, you know, I just had to ask." (Id.)

Mr. Popham testified that, in response to his question whether she had been in communication with Mr. Pasley, Ms. Green reported only one conversation that had occurred on the day of his termination in which Mr. Pasley relayed that he had been fired. (Popham Dep. [172-4] 54-55, 57; see also ED-SMF-Green ¶ 21.) Mr. Popham felt that Ms. Green had lied to him based on the November 7 text message

[24] The IT Department had retrieved the text message from the Company's system. (Popham Dep. [172-4] 53-54, 56; see also Popham Dep. Ex. 27 [172-13], at 13-14, copy of text message.)

that was in his possession and because he had been told that Ms. Green was helping Mr. Pasley to get some of his money. (Popham Dep. [172-4] 64-65.)

Ms. Green disputes Mr. Popham's testimony. Ms. Green asserts that she told Mr. Popham during their November 19 conversation that Mr. Pasley had contacted her about a week after his termination to say that he was considering filing an EEOC charge. (Green Dep. [172-2] 46; see also ED-SMF-Green ¶ 19, modified per record cited.) However, Ms. Green admitted that she did not tell Mr. Popham about the text message where Mr. Pasley was inquiring about whether the EEOC letter had arrived. (ED-SMF-Green ¶ 20.)

Before Mr. Popham met a second time with Ms. Green (discussed infra), he met with Ms. Zirkelbach. According to Ms. Zirkelbach, they discussed their mutual feeling that Ms. Green was helping Mr. Pasley with his EEOC complaint because she hated Ms. Zirkelbach so much. (PSUMF ¶ 46, modified per record cited.) According to Ms. Zirkelbach, Mr. Popham was upset because Ms. Green knew that Mr. Pasley was planning on filing an EEOC charge but she had kept that information from him. (Zirkelbach Dep. [172-5] 164.)

Ms. Green and Mr. Popham spoke again on December 5, 2018. (ED-SMF-Green ¶ 23.) Between the November 19 meeting and this meeting on December 5,

Mr. Popham had heard more of what he called "hearsay," which was that Ms. Green and Mr. Pasley were conspiring to pursue a frivolous lawsuit to get some money. (Popham Dep. [172-4] 67.)

At the meeting on December 5, Ms. Green testified that Mr. Popham first asked her if she held a position of trust; she replied, "Well, yes." (Green Dep. [172-2] 42.) Mr. Popham, who had a piece of paper folded in his hand, told Ms. Green that Mr. Pasley had sent him some personal text messages showing that she had been helping him. (Id. at 43.) Ms. Green testified that she replied the assertion was ludicrous. (Id.)[25] Mr. Popham stated, "I have this that you were helping [Mr. Pasley] with his EEOC complaint." (Id.; see also PSUMF ¶ 48.) After he was unsuccessful in obtaining her resignation, Ms. Green testified that Mr. Popham terminated her employment. (Green Dep. [172-2] 43; see also PSUMF ¶ 47.)

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[25] Ms. Green was adamant in her deposition that she did not assist Mr. Pasley with the filing or drafting of his EEOC charge. (ED-SMF-Green ¶ 16, modified per record cited.) Ms. Green also testified that she did not participate in the EEOC's investigation until after her termination. (Id. ¶ 17.) In other words, Ms. Green did not speak to anyone at the EEOC, fill out any paperwork, or send anything to the EEOC regarding Mr. Pasley or his claims until after her own discharge. (Green Dep. [172-2] 36.)

Mr. Popham asserts that in this December 5 meeting he again asked Ms. Green about her conversations with Mr. Pasley. She denied all communication with him except for the initial phone call on the day of his discharge and a text message having nothing to do with company business. She never mentioned the November 7 text regarding whether the Company had received Mr. Pasley's EEOC charge. It was at that point that Mr. Popham terminated Ms. Green's employment. (ED-SMF-Green ¶ 24, modified per record cited.) Mr. Popham believed that Ms. Green, who was in a position of trust, was lying to him, so he fired her. (Id. ¶ 25.) Mr. Popham admitted that he told Ms. Green that he had heard she was helping a former employee (i.e., Mr. Pasley) with an EEOC complaint. (Popham Dep. [172-4] 73.)

II. SUMMARY JUDGMENT STANDARD

A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." See Fed. R. Civ. P. 56(a). The party moving for summary judgment bears the initial burden of "informing the court of the basis for its motion and of identifying those materials that demonstrate the absence of a genuine issue of material fact." Rice-Lamar v. City of Fort Lauderdale, 232 F.3d 836, 840 (11th

Cir. 2000) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Those materials may include "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

The non-moving party is then required "to go beyond the pleadings" and present competent evidence "showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. Generally, "[t]he mere existence of a scintilla of evidence" supporting the non-movant's case is insufficient to defeat a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). If in response the non-moving party does not sufficiently support an essential element of his case as to which he bears the burden of proof, summary judgment is appropriate. Rice-Lamar, 232 F.3d at 840. "In determining whether genuine issues of material fact exist, [the Court] resolve[s] all ambiguities and draw[s] all

justifiable inferences in favor of the non-moving party." Id., citing Anderson, 477 U.S. at 255.

In deciding a summary judgment motion, the Court's function is not to resolve issues of material fact but rather to determine whether there are any such issues to be tried. Anderson, 477 U.S. at 251. The applicable substantive law will identify those facts that are material. Id. at 248. Facts that are disputed, but which do not affect the outcome of the case, are not material and thus will not preclude the entry of summary judgment. Id. Genuine disputes are those in which "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. For factual issues to be "genuine," they must have a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). When the record as a whole could not lead a rational trier of fact to find for the non-movant, there is no "genuine issue for trial." Id. at 587.

III. DISCUSSION

Defendants seeks entry of summary judgment on all claims asserted by plaintiffs. The Court first addresses the Title VII claims alleged by both plaintiffs against the Entity Defendants before turning to the state laws tort claims alleged against them and Ms. Zirkelbach.

A. Title VII Claims Against the Entity Defendants

Plaintiff Pasley alleges both a hostile work environment claim and a retaliation claim against the Entity Defendants. Plaintiff Green alleges a retaliation claim against them.

1. Pasley's Title VII Hostile Work Environment Claim

Under Title VII, a hostile work environment is one form of disparate treatment on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Although other disparate treatment claims scrutinize discrete actions such as hiring or firing, a hostile environment claim based on sex analyzes a workplace environment as a whole to determine if it is "abusive." Harris v. Forklift Sys. Inc., 510 U.S. 17, 22 (1993). In order to be abusive, an environment must be "permeated with discriminatory intimidation, ridicule, and insult" that is sufficiently severe or pervasive so as to alter the conditions of the plaintiff's employment. Id. (internal quotation marks and citation omitted); see also Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).

In Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999) (en banc), the Eleventh Circuit delineated the elements that an employee must establish to support a hostile work environment claim. Those elements are as follows:

(1) The plaintiff belongs to a protected group;

(2) The plaintiff has been subjected to unwelcome harassment;

(3) The harassment was based on the plaintiff's protected characteristic, such as his sex;

(4) The harassment was sufficiently severe or pervasive to alter the terms and conditions of the plaintiff's employment and create an abusive working environment; and

(5) Employer responsibility under either a theory of direct or vicarious liability.

Id. at 1245.

For purposes of this case, elements four and five merit further discussion. With regard to element four, the Eleventh Circuit holds that harassment is "severe or pervasive" for Title VII purposes only if it is both subjectively and objectively severe and pervasive. Mendoza, 195 F.3d at 1246. Harassment is subjectively severe and pervasive if the complaining employee perceives the harassment as severe and pervasive, and harassment is objectively severe and pervasive if a reasonable person in the plaintiff's position would adjudge the harassment severe and pervasive. Id. When determining whether harassment is objectively severe or pervasive, a court should consider the following elements:

(1) the frequency of the conduct;

(2) the severity of the conduct;

(3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and

(4) whether the conduct unreasonably interfered with the employee's job performance.

Id.; see also Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 583 (11th Cir. 2000) (objective requirement prevents the ordinary tribulations of the workplace, such as sporadic abusive language, gender-related jokes, and occasional teasing from falling under Title VII's prohibition and does not turn the statute into a general civility code).

With regard to element five–employer liability–one must categorize the type of harassment that occurred and the status of the individual accused of misconduct. Harassment falls into two categories: (1) harassment that does not result in tangible job detriment to the claimant and (2) harassment that does result in tangible job detriment to the claimant. Johnson v. Booker T. Washington Broad. Serv., Inc., 234 F.3d 501, 508 (11th Cir. 2000). Tangible job detriment 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.'" Johnson, 234 F.3d at 512 (quoting Burlington

Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)). All harassment by a co-worker necessarily falls into the first category, as a co-worker can neither dock another's pay nor demote another. Actions that constitute tangible job detriment fall within the special province of a supervisor. Id. (citing Ellerth, 524 U.S. at 762). In cases of co-worker harassment, "the employer will be held directly liable if it knew or should have known of the harassing conduct but failed to take prompt remedial action." Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1278 (11th Cir. 2002).

Harassment by a supervisor can fall into either category. If the supervisor caused the victim tangible job detriment, then the employer is strictly responsible under principles of vicarious liability. Miller, 277 F.3d at 1278. If, however, the supervisor caused no tangible job detriment to the claimant, then the employer may escape liability if it can successfully prove a two-pronged affirmative defense. Id.

Under this affirmative defense, the employer is not liable if it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). As for the first part of the first prong of the affirmative defense, "an employer does not always

have to show that it has a formal sexual harassment policy to meet its burden of proof on this element. At the same time, an employer's showing that it has a . . . policy does not automatically satisfy its burden." Frederick v. Sprint/United Mgmt. Co., 246 F.3d 1305, 1313-14 (11th Cir. 2001) (citations omitted). As for the second part of the first prong, "an employer need not act instantaneously, but must act in a reasonably prompt manner to respond to the employee's complaint." Id. at 1314. As for the second prong, "an employer's showing that the plaintiff-employee failed to follow its complaint procedures will often be sufficient [to] satisfy its burden." Id. "However, in some cases, the proof will show that the employee's non-compliance was reasonable under the circumstances and, in these cases, the defendant cannot satisfy the second element of the affirmative defense." Id.

With regard to Mr. Pasley's hostile work environment claim, the Entity Defendants assert that Ms. Zirkelbach's alleged misconduct was neither severe nor pervasive. But, even if her misconduct satisfied that standard, the defendants contend that Mr. Pasley's employer (Relogio, LLC) had a policy against harassment that Mr. Pasley unreasonably failed to use to complain about Ms. Zirkelbach's alleged misconduct. Thus, under the Ellerth/Faragher affirmative defense, they contend that they are not liable to him. Because the Court agrees that

the affirmative defense applies, it does not decide whether Ms. Zirkelbach's alleged harassment was severe or pervasive (but assumes that it was).

Although Mr. Pasley alleged a sexually-hostile work environment, and asserted that he was fired after he rejected Ms. Zirkelbach's sexual demands (see Am. Compl. [108] ¶¶ 40-41), the undisputed material facts show that Ms. Zirkelbach as plaintiff's supervisor did not cause him any tangible job detriment because he rejected her sexual advances. See Bryant v. Sch. Bd. of Miami Dade Cty., 142 F. App'x 382, 383-84 (11th Cir. 2005) (per curiam) (because plaintiff suffered no job detriment as a result of rejecting her supervisor's sexual advances, court affirmed entry of summary judgment for the employer). Instead, Mr. Popham directed Ms. Zirkelbach to fire Mr. Pasley for reasons of his own and threatened to fire her if she did not do so. Because the job detriment that Mr. Pasley suffered was not the result of any decision made by Ms. Zirkelbach, the Entity Defendants may assert the affirmative defense. See Leeth v. Tyson Foods, Inc., 449 F. App'x 849, 853 (11th Cir. 2011) (per curiam) (if the plaintiff has not suffered an adverse, tangible employment action as a result of the supervisor's alleged harassment, the employer may establish the Faragher/Ellerth affirmative defense); Felton v. Paulson, No. 1:07-CV-0552-BBM, 2008 WL 11322952, at *6 (N.D. Ga. Oct. 15,

2008) (if supervisor caused plaintiff no tangible job detriment, then employer may assert the affirmative defense), R&R adopted, 2008 WL 11333687 (N.D. Ga. Nov. 10, 2008).

With respect to the first prong of that affirmative defense, the record shows that the Entity Defendants had and maintained a policy prohibiting sexual harassment that provided for multiple reporting avenues. This policy was disseminated to all employees, including Mr. Pasley, who received a copy at his hiring in 2013. While this policy may have been revised over the years, Mr. Pasley was fully aware of any and all changes because he was the one who maintained it on the company's website. Moreover, Mr. Pasley admitted that he would have seen and been aware of the sexual harassment policy and its changes. Thus, the Entity Defendants meet the first prong of the Faragher/Ellerth affirmative defense. See Benson v. Solvay Specialty Polymers USA, LLC, No. 1:16-CV-04638-CAP-RGV, 2018 WL 5118615, at *18 (N.D. Ga. July 3, 2018), R&R adopted, 2018 WL 5118601 (N.D. Ga. Sept. 7, 2018).

As for the second prong of the defense, the evidence clearly establishes that Mr. Pasley did not report any allegations of sexual harassment while he was employed with one or more of the Entity Defendants. Indeed, Mr. Pasley admits

that he did not complain. He also failed to discuss the alleged harassment with any other employee while he was working there (including the Entity Defendants' in-house general counsel who sat down the hall from him). (Pasley Dep. [172-1] 138-39.) While Mr. Pasley argues that it would have been futile to complain past Ms. Zirkelbach (Pls.' Consolid. Resp. Br. [171-1] 22), the reasons he offers for not doing so fail to withstand scrutiny. He provides no reason why he could not complain through an alternate channel available under the complaint procedure to the HR manager or Mr. Popham. While Mr. Pasley claims to have heard Mr. Popham say that "men cannot be sexually harassed," it is speculative to assert that Mr. Popham would have taken no action had he been told, especially when the evidence shows that the Entity Defendants had received a complaint of sexual harassment in the past and had handled it to the complainant's satisfaction. See Criswell v. Allied Interstate, Inc., No. 1:05-CV-0718-HTW, 2010 WL 11505796, at *4 n.3 (N.D. Ga. Feb. 17, 2010) ("'An employee's subjective belief in the futility of reporting a harasser's behavior is not a reasonable basis for failing to take advantage of any preventive or corrective opportunities provided by the employer.'") (quoting Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 268

(4th Cir. 2001)). Mr. Pasley's non-compliance with the policy was not reasonable under the circumstances.

The undersigned thus **REPORTS** that, assuming Mr. Pasley established the existence of a sexually-hostile work environment, the Entity Defendants established the Farragher/Ellerth affirmative defense; therefore, the undersigned **RECOMMENDS** that summary judgment be **GRANTED** for the Entity Defendants on Mr. Pasley's Title VII hostile work environment claim (Count I).

2. Plaintiffs' Title VII Retaliation Claims

Title VII makes it unlawful for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). The first clause of the above-quoted anti-retaliation provision is known as the "opposition" clause, while the second clause is known as the "participation" clause. Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1350 (11th Cir. 1999) The participation clause "protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC," while the opposition clause "protects activity that occurs before the

filing of a formal charge with the EEOC, such as submitting an internal complaint of discrimination to an employer, or informally complaining of discrimination to a supervisor." Muhammad v. Audio Visual Servs. Grp., 380 F. App'x 864, 872 (11th Cir. 2010) (per curiam) (internal quotation marks and citations omitted).

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), established a three-part framework that courts use to analyze retaliation claims supported by circumstantial evidence. Quigg v. Thomas Cty. Sch. Dist., 814 F.3d 1227, 1237 (11th Cir. 2016). The plaintiff must first establish a prima facie case of retaliation. Gogel v. Kia Motors Mfg. of Ga., Inc., 967 F.3d 1121, 1134 (11th Cir. 2020) (en banc). Should the plaintiff do so, he creates a "presumption that the adverse action was the product of an intent to retaliate." Bryant v. Jones, 575 F.3d 1281, 1307-08 (11th Cir. 2009). The burden of production then shifts to the employer to rebut the presumption by articulating a legitimate non-retaliatory reason for the challenged employment decision. Sims v. MVM, Inc., 704 F.3d 1327, 1332 (11th Cir. 2013).

If the employer carries this burden, which has been described as "exceedingly light," see Perryman v. Johnson Prods. Co., 698 F.2d 1138, 1142 (11th Cir. 1983), the presumption is rebutted and the plaintiff must demonstrate that the proffered reason is pretext for the unlawful retaliation. Gogel, 967 F.3d at

1135. To establish pretext, a plaintiff "must demonstrate that the proffered reason was not the true reason for the employment decision." Jackson v. Ala. State Tenure Comm'n, 405 F.3d 1276, 1289 (11th Cir. 2005) (internal quotation marks and citation omitted). "Reasons are pretextual only if (1) the reasons were false and (2) retaliation was the real reason for the employment decision." Mealing v. Ga. Dep't of Juvenile Justice, 564 F. App'x 421, 427 (11th Cir. 2014) (per curiam) (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993)).

A plaintiff may establish a prima facie retaliation case by showing that he (1) engaged in statutorily protected activity; (2) the employer subjected him to an action that a reasonable employee would have found to be materially adverse; and (3) there is some causal relation between the two events. Brown v. Northside Hosp., 311 F. App'x 217, 224 (11th Cir. 2009) (per curiam) (citing Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-69 (2006)). To establish the necessary causal connection, the plaintiff must "proffer evidence sufficient to permit a reasonable fact finder to conclude that discriminatory animus was the 'but-for' cause of the adverse employment action." Sims, 704 F.3d at 1332. In other words, "a plaintiff must prove that had she not [engaged in the protected activity], she would not have been fired." Jefferson v. Sewon Am., Inc., 891 F.3d 911, 924 (11th Cir. 2018).

The causal relation element is construed broadly so that "a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." EEOC v. Reichhold Chems., Inc., 988 F.2d 1564, 1571-72 (11th Cir. 1993).

a) Plaintiff Pasley

The Entity Defendants argue that Mr. Pasley cannot establish a prima facie retaliation case because he never reported the alleged harassment; they also assert that he cannot establish the third element of his prima facie retaliation case (i.e., causal connection) because Mr. Popham directed his termination, and Mr. Popham had no knowledge of Mr. Pasley's alleged statutorily protected activity (i.e., Mr. Pasley telling Ms. Zirkelbach to stop touching him).

Mr. Pasley responds that any failure to report the alleged harassment is irrelevant, as it is clear that when he told Ms. Zirkelbach to stop touching him he had opposed a practice—sexual harassment—made unlawful by Title VII. Plaintiff also asserts that he has met causal connection element. Although Mr. Popham did not know of Mr. Pasley's protected activity (i.e., telling Ms. Zirkelbach to stop), he argues that "Ms. Zirkelbach caused the Corporate Defendants to keep Pasley employed until it became clear he would no longer tolerate her conduct, at which

point she delivered on her ultimatum and caused Popham to fire Pasley." (Pls.' Consolid. Br. [171-1] 24-25.)[26]

The Court agrees with Mr. Pasley that his failure to report the alleged sexual harassment as required by Relogio's policy does not preclude him from establishing a prima facie retaliation claim. Indeed, the prima face case formulation quoted above contains no requirement that a plaintiff comply with a reporting policy. Instead, the retaliation prima facie case has the following three elements.

The first element of plaintiff's prima facie retaliation case requires him to show that he engaged in protected activity. Mr. Pasley did that when he opposed Ms. Zirkelbach's alleged sexual harassment by telling her to stop. See Quarles v. McDuffie Cty., 949 F. Supp. 846, 853 (S.D. Ga. 1996) ("[Plaintiff] engaged in the most basic form of protected conduct; namely, telling a harasser, who also was serving as her supervisor, to cease all forms of physical and verbal harassment.");

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[26] The Court quotes Mr. Pasley's assertion to highlight its significant factual deficiencies. First, there is no evidence that Ms. Zirkelbach issued an ultimatum to anyone. Second, there is no evidence that she caused Mr. Popham to fire Mr. Pasley. The most that can reasonably be said is that, when Mr. Popham told Ms. Zirkelbach to fire Mr. Pasley and threatened to fire her if she did not do so, she chose not to try get Mr. Popham to change his mind as she had done in the past.

see also EEOC v. New Breed Logistics, 783 F.3d 1057, 1067 (6th Cir. 2015) ("[A] complaint to a harassing supervisor qualifies as protected activity.").

Mr. Pasley satisfies the second element of his prima facie retaliation case because his employer subjected him to an action that a reasonable employee would have found to be materially adverse—a discharge. See Batchelor v. Tampa Elec. Co., No. 8:08-CV-144-T-30TGW, 2009 WL 903275, at *1-2 (M.D. Fla. Apr. 1, 2009) (termination was materially adverse employment action in Title VII retaliation claim) (citing Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008)).

However, the Court agrees with the Entity Defendants that Mr. Pasley cannot establish element three of his prima facie retaliation case—causal connection. Mr. Popham was the decisionmaker here. It is undisputed that Mr. Popham did not know of Mr. Pasley's protected activity. Indeed, how could Mr. Popham have known? Mr. Pasley did not tell anyone about it. Although Mr. Pasley worked in an open cubicle, he was unaware whether anyone ever witnessed what Ms. Zirkelbach was allegedly doing or saying to him; one must assume that no one witnessed his protected activity. Because Mr. Popham did not know of Mr. Pasley's protected activity, it matters not that there was close temporary proximity (i.e., three weeks) between that activity and his discharge. See Martin v. Fin. Asset

Mgmt. Sys., Inc., 959 F.3d 1048, 1054 (11th Cir. 2020) (unrebutted evidence that the decisionmaker did not have knowledge of the employee's protected conduct means that temporal proximity alone is insufficient to create a genuine issue of fact as to causal connection).

Proof of the decisionmaker's awareness of the protected activity and close temporal proximity between that awareness and the adverse employment action are necessary to establish the third element of a retaliation prima facie case. See Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1337 (11th Cir. 1999). The requirement that the decisionmaker be aware of the protected activity "rests upon common sense. A decisionmaker cannot have been motivated to retaliate by something unknown to him." Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 799 (11th Cir. 2000). Because Mr. Popham did not know that Mr. Pasley had engaged in protected activity, he could not have retaliated against Mr. Pasley for opposing a practice made unlawful by Title VII when he directed Ms. Zirkelbach to discharge Mr. Pasley.

Mr. Pasley nevertheless argues that Ms. Zirkelbach, who did know of his protected activity, could have stopped the termination by trying to get Mr. Popham to change his mind as she had done before. Thus, her failure to intervene this time

with Mr. Popham constituted retaliation. Plaintiff cites no case to support this novel theory.[27] Moreover, it is speculative to assume that Ms. Zirkelbach could have saved Mr. Pasley's job after Mr. Popham threatened to fire her if she did not fire Mr. Pasley. See Vaughn v. Retirement Sys. of Ala., No. 20-11295, 2021 WL 1291136, at *4 (11th Cir. Apr. 7, 2021) (per curiam) ("'[U]nsupported speculation does not meet a party's burden of producing some defense to a summary judgment motion.'") (quoting Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1181 (11th Cir. 2005)).

The undersigned thus **REPORTS** that Mr. Pasley has not established the causal connection element of his retaliation prima facie case. Because "summary

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[27] The Entity Defendants state that Mr. Pasley is asserting the "cat's paw" theory of liability. (ED Consolid. Reply Br. [179] 6.) This theory provides that causation may be established if the plaintiff shows that the decisionmaker followed the recommendation of a biased subordinate without independently investigating the complaint against the plaintiff. In such a case, the recommender uses the decisionmaker as a mere conduit, or cat's paw, to give effect to the recommender's animus. Stimpson v. City of Tuscaloosa, 186 F.3d 1328, 1332 (11th Cir. 1999) (per curiam). This theory could apply if Ms. Zirkelbach had recommended Mr. Pasley's termination to Mr. Popham because of her retaliatory animus, and Mr. Popham had accepted that recommendation and acted upon it without conducting an independent investigation. But that is not what happened here. The undisputed evidence is that Ms. Zirkelbach made no recommendation to Mr. Popham. Instead, Mr. Popham wanted Mr. Pasley's employment terminated and directed Ms. Zirkelbach to do so or he would replace her with a General Manager who would.

judgment against the plaintiff is appropriate if he fails to satisfy any one of the elements of a *prima facie* case," Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1433 (11th Cir. 1998), the undersigned **RECOMMENDS** that the Entity Defendants' Motion for Summary Judgment be **GRANTED** as to Mr. Pasley's Title VII retaliation claim (Count II).[28]

b) Plaintiff Green

In seeking summary judgment on Ms. Green's Title VII retaliation claim, the Entity Defendants assert that she cannot establish element one of her prima facie case because she did not engage in statutorily protected activity. The Entity Defendants further contend that, even if Ms. Green could establish a prima face case, Mr. Popham had a legitimate, non-retaliatory reason for discharging her that plaintiff cannot show to be pretextual. Finally, the Entity Defendants argue that Ms. Green failed to exhaust administrative remedies against defendant SIC Certior Trust and that the Trust was not her employer.

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[28] Given Mr. Pasley's failure to establish a prima facie case, it is unnecessary to consider whether the Entity Defendants articulated a legitimate, non-retaliatory reason for discharging him and whether plaintiff could show that reason to be pretextual. It is also unnecessary to consider the Entity Defendants' argument that Mr. Pasley was employed only by defendants Agora Notus and Relogio. (See Entity Defs.' Br. Pasley [166-2] 16-19, 23-24.)

With regard to her retaliation prima facie case, the record shows that Ms. Green denied having provided any assistance to Mr. Pasley in filing an EEOC charge. For example, she told Mr. Popham just before her discharge in December 2018 that she had provided Mr. Pasley no assistance, and in her subsequent deposition she reiterated that assertion. Indeed, the undisputed facts show that she answered only two questions from Mr. Pasley: (1) that he had a right to file a charge; and (2) that she guessed something had arrived at the office from the EEOC but she had not been told.

Ms. Green is proceeding under the participation clause of Title VII's anti-retaliation provision. As noted above, the participation clause "protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC." Muhammad, 380 F. App'x at 872. If the facts were simply those stated above, the undersigned would recommend entry of summary judgment against Ms. Green's Title VII retaliation claim for failure to establish a prima facie case. In answering these two questions, Ms. Green provided no assistance to Mr. Pasley connected to his EEOC charge. However, there is one more fact to consider. It is undisputed that Mr. Popham believed that Ms. Green did much more than she did. He believed, albeit wrongly, that Ms. Green was

assisting Mr. Pasley in filing his EEOC charge. Should that mistaken belief change the undersigned's recommendation?

The parties have cited no caselaw regarding this question. However, the Court's research has located several cases addressing this "perception theory" of retaliation. See Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 571 (3d Cir. 2002) (holding that a plaintiff's retaliation claims under the ADA and the ADEA were cognizable even in the absence of protected activity, as long as his employer perceived him to be engaged in such activity)[29]; Grosso v. City Univ. of N.Y., No. 03 Civ. 2619NRB, 2005 WL 627644, at *2-3 (S.D.N.Y. Mar. 16, 2005) (applying perception theory in Title VII retaliation claim); see also Carter v. Columbia Cty., 597 F. App'x 574, 580 (11th Cir. 2014) (per curiam) (explaining that the Eleventh Circuit has "not adopted the perception theory of retaliation, and this case does not require us to decide whether the theory is valid in this Circuit" because, even

[29] Although Fogleman dealt with the anti-retaliation provisions of the ADA and the ADEA, the Third Circuit's holding is applicable to the anti-retaliation provision of Title VII. Fogleman, 283 F.3d at 567 (noting that the anti-retaliation provisions of all three statutes are nearly identical and that precedent interpreting any one of them is equally relevant to interpretation of the others); see also Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1311 (11th Cir. 2002) (all three statutes share the same elements of prima facie retaliation claim).

assuming protected activity, the plaintiff failed to rebut the defendant's legitimate non-retaliatory reasons for terminating her); McKinney v. Bolivar Med. Ctr., 341 F. App'x 80, 83 (5th Cir. 2009) (per curiam) (noting that Fifth Circuit has "not adopted this perception theory of retaliation" and finding that there was nothing in the record suggesting that the plaintiff's employer believed he was engaged in protected activity or terminated him for that reason); Robertson v. Nat'l Smart Healthcare Servs., Inc., Civil Action No. H-12-0673, 2013 WL 12140299, at *12-13 (S.D. Tex. Mar. 13, 2013) (same). Under the perception theory, "a defendant violates the anti-retaliation provision of Title VII if, believing that the plaintiff is engaged in a protected activity, it intentionally retaliates against the plaintiff because of its belief." Puidokas v. Rite-Aid of Pa., Inc., No. 3:09cv2147, 2010 WL 1903590, at *3 (M.D. Pa. May 10, 2010).

This Court also reads the plain language of Title VII's anti-retaliation provision to support a violation of that statute under the perception theory. Notably, Title VII's anti-retaliation provision provides that it "shall be an unlawful employment practice for an employer to *discriminate* against any of his employees . . . *because* he has . . . assisted . . . in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e–3(a). That

provision must be interpreted in light of Title VII's overall remedial purpose. See Robinson v. Shell Oil Co., 519 U.S. 337, 346 (2001). "Under the plain language of the provision, those who testify or otherwise participate in a Title VII proceeding are protected from retaliation for having done so, even if it turns out they were not of any assistance to the Title VII claimant." Merritt v. Dillard Paper Co., 120 F.3d 1181, 1186 (11th Cir. 1997). As the Third Circuit explained in Fogleman,

> "Discriminat[ion]" refers to the practice of making a decision based on a certain criterion, and therefore focuses on the decisionmaker's subjective intent. What follows, the word "because," specifies the criterion that the employer is prohibited from using as a basis for decisionmaking. The laws, therefore, focus on the employer's subjective reasons for taking adverse action against an employee, so it matters not whether the reasons behind the employer's discriminatory animus are actually correct as a factual matter.

Fogleman, 283 F.3d at 571.

Ms. Green provided no assistance to Mr. Pasley. However, because Mr. Popham believed that she had, he confronted her twice about it. His belief that Ms. Green had engaged in protected activity allows her to satisfy element one of her prima facie case. Actions of the type allegedly taken by Mr. Popham are precisely what the statute aims to prevent. Because the Entity Defendants do not challenge the second and third elements of Ms. Green's prima face case, the undersigned reports that she established a prima facie retaliation case.

Therefore, a presumption of retaliation arises and the Entity Defendants must articulate a legitimate, non-retaliatory reason for firing Ms. Green. They contend that Mr. Popham fired Ms. Green because she violated Company policy and then lied about it. (Entity Defs.' Br. Green [167-2] 12.) Specifically, they assert that the Company's "Communication with Former Associates" policy required Ms. Green to inform HR immediately of the contacts she had with Mr. Pasley. Ms. Green was aware of the policy because she drafted it. However, she had numerous contacts with Mr. Pasley after his discharge but did not report them to HR. According to the Entity Defendants, when Mr. Popham met with Ms. Green on November 19, she admitted to only one conversation with Mr. Pasley that occurred the day of his discharge; however, Mr. Popham knew better because he was in possession of a copy of the November 7 text message between Mr. Pasley and Ms. Green about whether the EEOC letter had arrived. The Entity Defendants further contend that when Mr. Popham talked again to Ms. Green on December 5, he again asked her about conversations with Mr. Pasley; this time she admitted to two, one of which was the initial call on the date of his termination and the other she claimed had nothing to do with Company business. At this point, Mr. Popham fired her; he

could not tolerate a policy violation and lies from a person who held a position of trust with his organization.

The burden now shifts back to Ms. Green to raise a triable issue over whether this reason is pretextual. There is probative evidence in the record from which a reasonable jury could conclude that this reason is false. Mr. Popham's deposition testimony shows that he first confronted Ms. Green because he believed that she was assisting Mr. Pasley with his EEOC charge. He discussed that belief with Ms. Zirkelbach before meeting with Ms. Green a second time. With regard to this second meeting, Mr. Popham admitted that he told Ms. Green that he had heard she was helping Mr. Pasley with an EEOC charge. While Mr. Popham may have been concerned that Ms. Green kept an important fact from him (i.e., that a former employee was likely going to file an EEOC charge), a reasonable jury could conclude that Mr. Popham's real motivation was to punish Ms. Green for his belief that she was assisting Mr. Pasley with a lawsuit that so they could get some of his money. A reasonable jury could also conclude that the Entity Defendants' reliance on the "Communication with former Associates" policy is pretextual because it is not uniformly enforced. Finally, the record is in dispute over whether Ms. Green actually lied to Mr. Popham about her contacts with Mr. Pasley. Given that

disputed issues of material fact exist regarding whether Mr. Popham fired Ms. Green because he believed that she was assisting Mr. Pasley with his EEOC charge, the Entity Defendants' Motion for Summary Judgment on Ms. Green's Title VII retaliation claim (Count VIII) should be **DENIED**.

This recommendation does not conclude the analysis on this claim, however, because the Entity Defendants argue that Ms. Green failed to exhaust administrative remedies against the SIC Certior Trust. (Entity Defs.' Br. Green [167-2] 16-19.) Before asserting a claim in a Title VII lawsuit, a plaintiff must exhaust her administrative remedies by presenting that claim in a charge to the EEOC. See Anderson v. Embarq/Sprint, 379 F. App'x 924, 926 (11th Cir. 2010) (per curiam); Gregory v. Ga. Dep't of Human Res., 355 F.3d 1277, 1279 (11th Cir. 2004) (per curiam). "The purpose of this exhaustion requirement 'is that the [EEOC] should have the first opportunity to investigate the alleged discriminatory practices to permit it to perform its role in obtaining voluntary compliance and promoting conciliation efforts.'" Id. at 1279 (quoting Evans v. U.S. Pipe & Foundry Co., 696 F.2d 925, 929 (11th Cir. 1983)).

The "failure to exhaust" argument asserted here is without merit. Ms. Green's EEOC charge named her employer as "Relogio, SIC Certior Trust, and all

related entities" and alleged that they retaliated against her. (See Defs.' Ex. E [30-6], at 1.) The Entity Defendants assert that there is no evidence that the Trust was ever notified of Ms. Green's EEOC charge or had adequate opportunity to participate in the conciliation process. (Entity Defs.' Br. Green [167-2] 18.) Even if those assertions are true, that is not Ms. Green' fault, as she identified the Trust as one of her employers in the charge. Thus, she exhausted administrative remedies against the Trust.

The Entity Defendants further argue that summary judgment should be granted to the Trust because there is no probative evidence that it ever employed Ms. Green. (Entity Defs.' Br. Green [167-2] 18.) Specifically, they show that the Trust is not an LLC and has a Trustee (Kendall Popham). They argue that there is no evidence that the Trustee ever employed Ms. Green, ever paid Ms. Green out of Trust assets, ever directed her working conditions, or had anything to do with her discharge. At best, according to the Entity Defendants, Ms. Green claims that, because Mr. Popham is a beneficiary of the Trust, and she was an employee of one of his companies, then she should be able to sue the Trust.

Title VII prohibits an employer from retaliating against an employee. 42 U.S.C. § 2000e-3(a). An employer, for purposes of Title VII, is statutorily defined

as "a person engaged in an industry affecting commerce who has fifteen or more employees."[30] Id. at § 2000e(b). Courts give a "liberal construction to the term 'employer' under Title VII." Lyes v. City of Riviera Beach, Fla., 166 F.3d 1332, 1341 (11th Cir. 1999). In accordance with that liberal construction, the Eleventh Circuit recognizes three doctrines that allow an employee, in certain circumstances, to assert a Title VII claim against an entity that is not formally her employer. Id. These related doctrines are referred to as the (1) agency, (2) single employer, and (3) joint employer theories of liability. Id.

Under the agency theory, one "employer delegates sufficient control of some traditional rights over employees to a third party." Lyes, 166 F.3d at 1341. The single employer theory has four non-dispositive factors: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 933 (11th Cir. 1987).

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[30] The Eleventh Circuit has emphasized the importance of determining who is an employer for Title VII purposes when it noted that, "[a]lthough Title VII does not on its face define who can sue under the statute, it does clearly define who can be sued. A plaintiff may bring a Title VII action against any 'employer.'" Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1245 (11th Cir. 1998).

Finally, the joint employer test "concentrate[s] on the degree of control an entity has over the adverse employment decision on which the Title VII suit is based." Llampallas, 163 F.3d at 1244-45. A company is considered a joint employer where it contracts in good faith with another independent company and retains "for itself sufficient control of the terms and conditions of employment of the employee[]" employed by the other company. Virgo v. Riviera Beach Assocs., 30 F.3d 1350, 1360 (11th Cir. 1997). "Thus the joint employer concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment." Id.

Ms. Green asserts that, given the corporate structure and relationships of the Entity Defendants, the Trust should be considered a joint employer *or* a single employer with the entity that paid her salary, which was Relogio, LLC. (Pls.' Consolid. Resp. Br. [171-4] 44.) Plaintiff casts her net broadly and seeks to have this Court find that a triable issue exists over whether the Trust is a single *or* joint employer with Relogio, LLC. Although there are distinctions between the two theories, "[b]oth theories concentrate on the degree of control an entity has over the

adverse employment decision on which the Title VII suit is based." Llampallas, 163 F.3d at 1244-45.

The adverse employment decision at issue here was Ms. Green's discharge from Relogio, LLC. Ms. Green declares that she was instrumental in forming several of the LLCs named as defendants; that she has knowledge of their common ownership and control and financial interdependence; that she performed work in some form for every one of the entities named as defendants; that the corporate office for all the entities is 309 West 10th Street, Rome, Georgia, 30165, where Mr. Popham worked nearly every day; that Recupero, LLC, Agora Notus, LLC, and Trovami, LLC share the same registered agent as Relogio, LLC; that the creation of the separate entities was an effort to limit liability for the Entity Defendants; and that Mr. Popham created the Trust to protect his personal and business assets that were actually owned by the various LLCs named as defendants.

Despite these assertions about the various Entity Defendants, most of which relate to the various LLCs, Ms. Green points the Court to no probative evidence suggesting that the Trust had anything to do with the decision to terminate her employment. See Walker v. Boys & Girls Club of Am., 38 F. Supp. 2d 1326, 1330 (M.D. Ala. 1999) (focal point of court's inquiry is degree of control an entity has

over the adverse employment decision on which the Title VII suit is based). Plaintiffs did not depose the Trustee, and they have presented no evidence concerning what the Trustee knew about, or what he did (if anything) in relation to, the termination of Ms. Green's employment. In other words, there is no evidence that the Trust had any control over the adverse employment decision on which this Title VII claim is based. "'[T]he critical question to be answered then is: What entity made the final decisions regarding employment matters related to the person claiming discrimination?'" Trevino v. Celanese Corp., 701 F.2d 397, 404 (5th Cir. 1983) (quoting Odriozola v. Superior Cosmetic Distribs., Inc., 531 F. Supp. 1070, 1076 (D.P.R. 1982)). In this case, there is no evidence that the Trust made any final decision regarding Ms. Green's employment.

Accordingly, the undersigned **RECOMMENDS** that the SIC Certior Trust's Motion for Summary Judgment against Ms. Green's Title VII retaliation claim be **GRANTED** because it was not a single or joint employer with Relogio, LLC. See Llampallas, 163 F.3d at 1245 (vacating judgment in part because the "adverse employment decision was Llampallas' termination from her position as Production Supervisor at Mini-Circuits, and Palmetto had absolutely nothing to do with that decision").

B. State Law Tort Claims

The Entity Defendants ask the Court to decline supplemental jurisdiction over Mr. Pasley's state law tort claims of (1) negligent hiring, retention, and supervision of Ms. Zirkelbach and (2) ratification of her alleged tortious acts. (See Am. Compl. [108] Counts V-VI.) If the Court is not inclined to do so, then they assert that there is no probative evidence supporting those tort claims.

Defendant Zirkelbach also asks the Court to decline supplemental jurisdiction over Mr. Pasley's state law tort claims of (1) assault and (2) battery. (See Am. Compl. [108] Counts III-IV.) If the Court is not inclined to do so, Ms. Zirkelbach seeks entry of summary judgment in her favor on the grounds that Mr. Pasley has not established the elements of each tort.

The undersigned has recommended that summary judgment be entered for the Entity Defendants on Mr. Pasley's Title VII claims for hostile work environment and retaliation. Although dismissal of this plaintiff's federal claims "does not deprive the Court of supplemental jurisdiction over the remaining state-law claims . . . under 28 U.S.C. § 1367(c), the Court has the discretion to decline to exercise supplemental jurisdiction over non-diverse state-law claims, where the Court has dismissed all claims over which it had original jurisdiction." Baggett v.

First Nat'l Bank of Gainesville, 117 F.3d 1342, 1352 (11th Cir. 1997) (citations omitted). In exercising that discretion, "the court also can consider other factors. Where § 1367(c) applies, considerations of judicial economy, convenience, fairness, and comity may influence the court's discretion to exercise supplemental jurisdiction." Id. at 1353; see also United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966).

In light of the foregoing recommendations concerning Mr. Pasley's federal claims, principles of judicial economy, convenience, fairness, and comity counsel the Court to **RECOMMEND** that supplemental jurisdiction over his two state law claims against the Entity Defendants be declined. See 28 U.S.C. § 1367(c)(3); see also Carr v. Tatangelo, 156 F. Supp. 2d 1369, 1380-81 (M.D. Ga. 2001) (dismissing state-law claims in conjunction with granting summary judgment on federal constitution claims); Gibbs, 383 U.S. at 726 ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.") Accordingly, Mr. Pasley's state law tort claims against the Entity Defendants of (1) negligent hiring, retention, and supervision of Ms. Zirkelbach and (2) ratification of her alleged tortious acts,

should be **DISMISSED WITHOUT PREJUDICE**.[31] (See Am. Comp. [108] Counts V-VI.)

Mr. Pasley makes no federal claims against Ms. Zirkelbach. He alleges only state law tort claims of (1) assault and (2) battery against her. (See Am. Comp. [108] Counts III-IV.) If the presiding District Judge accepts the undersigned's recommendation that summary judgment be entered against Mr. Pasley's Title VII claims against the Entity Defendants, and that supplemental jurisdiction be declined over the two state law tort claims he asserts against the Entity Defendants, then the only state law tort claims that will remain are the two Mr. Pasley has asserted against Ms. Zirkelbach (i.e., assault and battery). As before, principles of judicial economy, convenience, fairness, and comity counsel the Court to **RECOMMEND** that supplemental jurisdiction over the two state-law claims asserted by Mr. Pasley against Ms. Zirkelbach be declined and that these two claims be **DISMISSED WITHOUT PREJUDICE**. See 28 U.S.C. § 1367(c)(3).

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[31] Should the presiding District Judge accept the undersigned's recommendation to decline jurisdiction over the state law tort claims, Mr. Pasley's state law punitive damage claim (Am. Compl. [108] Count VII) here would be moot.

IV. CONCLUSION

For the reasons explained above, the undersigned

RECOMMENDS that Defendant Zirkelbach's Alternative Motion to Dismiss as to Plaintiff Myra Green [161] be **DENIED AS MOOT**;

RECOMMENDS that the presiding District Judge **DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION** over the state law tort claims of assault and battery that Mr. Pasley alleged against Ms. Zirkelbach (Am. Compl. [108] Counts III-IV), that those two tort claims be **DISMISSED WITHOUT PREJUDICE**, and that Defendant Zirkelbach's Motion for Summary Judgment [161] regarding those two state law tort claims be **DENIED AS MOOT**;

RECOMMENDS that the Entity Defendants' Motion for Summary Judgment [166] regarding Mr. Pasley's Title VII hostile work environment and retaliation claims (Am. Compl. [108] Counts I-II) be **GRANTED**;

RECOMMENDS that the presiding District Judge **DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION** over the state law tort claims of (1) negligent hiring, retention, and supervision and (2) ratification that Mr. Pasley alleged against the Entity Defendants (Am. Compl. [108] Counts V-VI), that those two tort claims be **DISMISSED WITHOUT PREJUDICE**, and that

the Entity Defendants' Motion for Summary Judgment [166] regarding those two state law tort claims be **DENIED AS MOOT**;

RECOMMENDS that the Entity Defendants' Motion for Summary Judgment [167] regarding Ms. Green's Title VII retaliation claim (Am. Compl. [108] Count VIII) be **GRANTED IN PART** and **DENIED IN PART**. Because there is no evidence that the SIC Certior Trust was Ms. Green's employer, summary judgment should be entered for that defendant on Ms. Green's Title VII retaliation claim; however, a jury should determine whether the remaining Entity Defendants retaliated against Ms. Green for her participation in plaintiff Pasley's Title VII claim.

If the above recommendations are adopted by the presiding District Judge, then the only claim that remains for trial is plaintiff Green's Title VII retaliation claim against all defendants **except** the SIC Certior Trust.

The Clerk is **DIRECTED** to terminate the reference to the undersigned Magistrate Judge.

SO RECOMMENDED, this 13th day of August, 2021.

Walter E. Johnson

WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE