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

NACION COLLY, Plaintiff, v. GEORGIA-PACIFIC, LLC, Defendant.	Civil Action No. 1:20-cv-02687-SDG

ORDER

This matter is before the Court on United States Magistrate Judge Linda T. Walker's Report and Recommendation (R&R) [ECF 39] recommending that Defendant's motion for summary judgment [ECF 31] be granted. Plaintiff has filed objections to the R&R [ECF 41]. For the reasons stated below, Plaintiff's objections are **OVERRULED**. Judge Walker's R&R is **ADOPTED** in its entirety, and Defendant's motion for summary judgment is **GRANTED**.

I. BACKGROUND

Plaintiff Nacion Colly filed suit against Defendant Georgia-Pacific, LLC alleging the company discriminated and retaliated against her in violation of the Americans with Disabilities Act (ADA), and retaliated against her in violation of and interfered with her rights under the Family and Medical Leave Act (FMLA).[1]

[1] ECF 1, at ¶¶ 21–41.

The facts are recited in detail in Judge Walker's R&R,[2] but in essence, Colly was terminated in August 2018 from her employment with Georgia-Pacific.[3] Prior to her termination, Colly took FMLA leave from March 2018 to June 2018, and remained on leave once her FMLA leave was exhausted by using Georgia-Pacific's non-FMLA extended leave policy.[4] That policy grants eligible employees additional leave, but the extended leave may be terminated if the employee's position is filled.[5] Once Colly was on the extended leave, Georgia-Pacific notified her in June 2018 that it was posting her position for hiring; the position was ultimately filled in August 2018.[6]

Additionally, soon after starting her FMLA leave, Colly submitted a complaint, through a 1-800 number used by employees to report concerns, that a former supervisor was "loud, condescending, rude, and . . . bullying," creating a hostile work environment.[7] Colly also contends that, while she was on leave,

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2 ECF 39, at 1–12.

3 *Id.* at 2, 10–11.

4 *Id.* at 4–6, 9.

5 *Id.* at 9.

6 *Id.* at 9–10.

7 *Id.* at 11.

Georgia-Pacific terminated her access to the workplace, as well as her work-related accounts and communications.[8]

Georgia-Pacific moved for summary judgment as to all of Colly's claims.[9] Judge Walker entered an R&R on May 28, 2021, recommending that the Court grant Georgia-Pacific's motion.[10] Specifically, Judge Walker found that Colly's FMLA claims fail because Colly conceded Georgia-Pacific did not interfere with her FMLA leave, and Colly cannot make out a *prima facie* case of retaliation under the FMLA because Georgia-Pacific's termination of her work-related access, while she was on leave, is not an adverse employment action.[11] Even if the termination of access was an adverse employment action, Judge Walker found that Colly cannot rebut Georgia-Pacific's legitimate, nondiscriminatory reasons for terminating her access during leave.[12]

Judge Walker then found that Colly's ADA discrimination claim fails because Colly cannot show she was a qualified individual or that she identified any reasonable accommodation Georgia-Pacific could make based on her alleged

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8 *Id.* at 14.

9 ECF 31.

10 ECF 39.

11 *Id.* at 14–21.

12 *Id.* at 18–21.

disability, and further, Georgia-Pacific made a showing of undue hardship.[13] Judge Walker also concluded that Colly's ADA retaliation claim fails because Colly cannot show she engaged in a statutorily protected activity or that there is a causal connection between any statutorily protected activity and Colly's termination, meaning she cannot make out a *prima facie* case of retaliation under the ADA.[14] Even if Colly could make out a *prima facie* case of retaliation, Judge Walker found that Colly cannot rebut Georgia-Pacific's legitimate, nondiscriminatory reasons for her termination.[15] Colly objected to the R&R,[16] to which Georgia-Pacific responded.[17]

II. LEGAL STANDARD

A. Objections to a Report and Recommendation

A party challenging a report and recommendation issued by a United States magistrate judge 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,

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13 *Id.* at 21–31.

14 *Id.* at 31–33.

15 *Id.* at 33–40.

16 ECF 41.

17 ECF 42.

1361 (11th Cir. 2009). The district court must "make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); *Jeffrey S. ex rel. Ernest S. v. State Bd. of Educ. of Ga.*, 896 F.2d 507, 512 (11th Cir. 1990).

Absent objection, the district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge," 28 U.S.C. § 636(b)(1), and need only satisfy itself that there is no clear error on the face of the record. Fed. R. Civ. P. 72(b). The district court has broad discretion in reviewing a magistrate judge's report and recommendation. In addressing objections, it may consider an argument that was never presented to the magistrate judge, and it may also decline to consider a party's argument that was not first presented to the magistrate judge. *Williams v. McNeil*, 557 F.3d 1287, 1290–92 (11th Cir. 2009). Further, "[f]rivolous, conclusive, or general objections need not be considered by the district court." *Schultz*, 565 F.3d at 1361 (quoting *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988)).

B. Motion for Summary Judgment

Summary judgment is appropriate when "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." Fed. R. Civ. P. 56(a). The Court must "view the evidence and

all reasonable inferences drawn from it in the light most favorable to the nonmoving party." *Tesoriero v. Carnival Corp.*, 965 F.3d 1170, 1177 (11th Cir. 2020). If the non-movant relies on evidence that is "merely colorable or not significantly probative, then summary judgment is appropriate." *Deal v. Tugalo Gas Co., Inc.*, 991 F.3d 1313, 1325 (11th Cir. 2021) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986) (punctuation omitted)). However, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions." *Strickland v. Norfolk S. Ry. Co.*, 692 F.3d 1151, 1154 (11th Cir. 2012) (quoting *Anderson*, 477 U.S. at 255). Put another way, to defeat summary judgment, the nonmovant "need only present evidence from which a jury might return a verdict in [its] favor." *Samples ex rel. Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988) (quoting *Anderson*, 477 U.S. at 257).

III. DISCUSSION

Colly does not object to the legal standards used in the R&R, but instead objects that Judge Walker "improperly weighed evidence" when ruling on the motion for summary judgment.[18] Colly enumerates the six times she contends the R&R "impermissibly decided a disputed factual issue."[19]

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18 ECF 41.

19 *Id.* at 8–10.

First, Colly makes a conclusory objection that Judge Walker decided a disputed factual issue when determining the 1-800 number complaint made by Colly was not statutorily protected activity and had no causal connection to an adverse employment action. As previously stated, conclusive objections need not be considered by the district court. *Schultz*, 565 F.3d at 1361. Even considering this first objection, Colly fails to show how her internal complaint rose to the level of a statutorily protected activity, and how the five-month period between the complaint and Colly's termination are causally created. *See Wascura v. City of S. Miami*, 257 F.3d 1238, 1248 (11th Cir. 2001) (finding three and one-half month period between protected activity and termination was insufficient to create a jury issue on causation); *Coutu v. Martin Cnty. Bd. of Cnty. Comm'rs*, 47 F.3d 1068, 1074 (11th Cir. 1995) (finding grievance was not a statutorily protected activity when there were allegations only of unfair treatment and an absence of allegations of discrimination based on protected characteristics). Both a statutorily protected activity and causal connection are required to establish a *prima facie* case of retaliation under the *McDonnell Douglas* framework. *Brungart v. BellSouth Telecommunications, Inc.*, 231 F.3d 791, 798 (11th Cir. 2000).

Second, Colly objects that Judge Walker impermissibly decided that Georgia-Pacific's actions following Colly's internal complaint, and while she was

on leave, did not constitute discrimination in light of Colly's affidavit, which states her work-related access was shut off after her complaint and that it had not been shut off during prior approved medical leaves. Colly also argues that Georgia-Pacific was aware of her protected status because of her ongoing psychological condition, and that withholding access in light of her condition constituted retaliation. As Judge Walker correctly decided, a discontinuation of Colly's access while she was on leave does not constitute an adverse action, no matter if it was done previously or not—meaning Colly cannot show this was an act of retaliation as a matter of law. *See Frey v. Berkley Specialty Underwriting Managers, LLC*, No. 1:10-CV-4114-CAP, 2013 WL 12291870, at *3 (N.D. Ga. Feb. 13, 2013) (holding that disabling plaintiff's voicemail, email, and building and parking deck access while she was on medical leave were not materially adverse actions).

Third, Colly objects that Judge Walker determined a disputed factual issue by concluding that Georgia-Pacific's legitimate, nondiscriminatory reasons for removing Colly's access were those that "might motivate a reasonable employer." Colly contends that this is a matter for the jury. Even though Colly has failed to make a *prima facie* showing of retaliation, and Georgia-Pacific did not therefore need to provide legitimate, nondiscriminatory reasons for removing Colly's access, Judge Walker still went on to decide—correctly—that Georgia-Pacific

made a sufficient showing of legitimate, nondiscriminatory reasons for removing Colly's access that might motive a reasonable employer. *See Alvarez v. Royal Atl. Devs., Inc.*, 610 F.3d 1253, 1265–66 (11th Cir. 2010) (describing burden shifting framework after *prima facie* showing is made and the role of the court).

Because Georgia-Pacific provided legitimate, nondiscriminatory reasons for removing Colly's access, Colly was required to show how these reasons were pretextual. *Id.* Colly argues that she has shown pretext on the grounds that the standard policy related to removing access was not followed by Georgia-Pacific. As Judge Walker properly decided, however, the undisputed evidence shows there was no policy regarding the removal of access; Colly cannot show deviation from a non-existent policy and she has not made a showing of pretext. *See Bass v. Bd. of Cnty. Comm'rs, Orange, Cnty., Fla.*, 256 F.3d 1095, 1108 (11th Cir. 2001) ("An employer's violation of its own normal hiring procedure may be evidence of pretext."), *overruled in part on other grounds, Crawford v. Carroll*, 529 F.3d 961 (11th Cir. 2008).

In her fourth and fifth objections, Colly argues that Judge Walker assumed facts not in evidence when ruling there was a need for Colly to show documentation that she was cleared to return to work, and that Colly's lay statement that she was able to return was insufficient to create a material dispute

of fact. As properly determined by Judge Walker, Colly was required to show that she could perform the essential functions of her employment position to be a qualified individual under the ADA. *See* 42 U.S.C. § 12111(8). To make such a showing, Colly needed to produce evidence that showed she could return to work *and* perform the essential functions of her employment, as her physician had reported she was "not released for any type of duty." [ECF 31-5, at 169]. Colly failed to produce such evidence, and Judge Walker properly concluded Colly's affidavit contained inadmissible hearsay and did not demonstrate Colly could perform the essential functions of her job. Therefore, there was nothing incorrect about Judge Walker's assessment that Colly did not show she could perform the essential functions of her job.

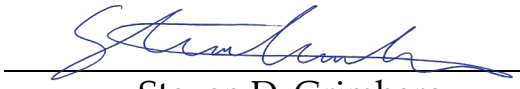
Finally, Colly objects that Judge Walker determined a disputed factual issue by ruling Georgia-Pacific would suffer undue hardship in holding Colly's job open while she was on leave and that such a determination is for the jury. Eleventh Circuit case law routinely holds that a court may determine whether undue hardship exists when deciding a motion for summary judgment. *See, e.g.*, *Davis v. Columbus Consol. Gov't*, 826 F. App'x 890, 893 (11th Cir. 2020). Further, in making her objection, Colly does not point to any dispute of material fact that would prevent the Court from determining on summary judgment that an undue

hardship existed. There was nothing erroneous about Judge Walker's conclusion that Georgia-Pacific made a showing of undue hardship, providing a complete defense to ADA liability.

IV. CONCLUSION

The Court **ADOPTS** the R&R [ECF 39] in its entirety as the Order of this Court. Accordingly, Defendant's motion for summary judgment [ECF 31] is **GRANTED**. The case is **DISMISSED WITH PREJUDICE**. The Clerk is **DIRECTED** to close this case.

SO ORDERED this the 27th day of August 2021.



Steven D. Grimberg
United States District Court Judge