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

MARTHA LYNNE BUTLER, Plaintiff, v. THE COCA-COLA COMPANY and YU SHI, Defendants.	: : : : : : : : : :	CIVIL ACTION NO: 1:19-cv-3847-AT

ORDER

In this employment action, Plaintiff Martha Lynne Butler brings a host of claims against her former employer, Coca-Cola, and former supervisor, Yu Shi, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. ("Title VII"); 42 U.S.C. § 1981; the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq*.; and state law. On November 13, 2020, Defendants filed their Motion for Summary Judgment [Doc. 64]. After full briefing by the Parties, the Magistrate Judge recommends granting summary judgment to Defendants on all but three claims. [Report & Recommendation, Doc. 78.] Defendants have filed specific objections to the R&R as to these three claims [Doc. 80]. Accordingly, the Magistrate Judge's R&R and Defendants' objections are now before the Court.

I. Report and Recommendation of the Magistrate Judge

After reviewing the relevant facts and the Parties' arguments, the Magistrate Judge recommends that Defendant's Motion for Summary Judgment (Doc. 64) be

granted in part and denied in part. (R&R, Doc. 78 at 79-80.) The Magistrate Judge recommends granting summary judgment to Defendants on the majority of Plaintiff's claims including her: § 1981 claim; Americans with Disabilities Act claim; Title VII disparate treatment claims as to her bereavement leave, denial of volunteer activities, denial of work from home, denial of lateral transfer, and assignment of exit checklist duties; Title VII retaliation claim; Title VII hostile work environment claim; Title VII constructive discharge claim; Title VII claim against Yu Shi individually; and intentional infliction of emotional distress claim under state law. (R&R at 79.) Plaintiff does not object to these findings. In accordance with the standard of review outlined below, the Court reviews this finding for plain error. Finding no error, the Court **ADOPTS** these specific findings and the Magistrate Judge's recommendation. Summary judgment is **GRANTED** in favor of Defendants as to the above-listed claims.

Conversely, the Magistrate Judge recommends the denial of summary judgment on Plaintiff's: (1) Title VII disparate treatment claim against Coca-Cola for denial of overtime pay; (2) Title VII punitive damages claim against Coca-Cola related to the denial of overtime pay; and (3) FLSA claim against both Defendants. (*Id.* at 79-80.)

In their objections, Defendants argue that the Magistrate Judge erred in (1) denying Defendants' Notice of Objections to Plaintiff's Response to Defendant's Statement of Material Facts; (2) denying summary judgment on Plaintiff's FLSA claim, as to some weeks; (3) denying summary judgment on Plaintiff's Title VII

claim for denial of overtime based on direct evidence; and (4) denying summary judgment as to Plaintiff's claim for punitive damages. (Obj., Doc. 80 at 3.)

II. Standard of Review

After conducting a careful and complete review of a magistrate judge's findings and recommendations, a district judge may accept, reject, or modify a magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1)(C); *Williams v. Wainwright,* 681 F.2d 732, 732 (11th Cir. 1982). Pursuant to 28 U.S.C. § 636(b)(1), the Court reviews any portion of the R&R that is the subject of a proper objection on a *de novo* basis and any non-objected portion for plain error. 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 154 (1985). The district judge must "give fresh consideration to those issues to which specific objection has been made by a party." *Jeffrey S. v. State Bd. Of Educ. Of Ga.*, 896 F.2d 507, 512 (11th Cir. 1990).

In review, the Court applies the standards for grant of summary judgment under Rule 56 of the Federal Rules of Civil Procedure set forth in *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 248 (1986) and its progeny. The district court should resolve all reasonable doubts about the facts in favor of the non-movant and draw all justifiable inferences in [her] favor." *United States v. Four Parcels of Real Prop. in Greene & Tuscaloosa Cntys. in State of Ala.*, 941 F.2d 1428, 1437 (11th Cir. 1991) (*en banc*) (citations and punctuation omitted). The Court may not weigh conflicting evidence or make credibility determinations. *Hairston v.*

Gainesville Sun Publ'g Co., 9 F.3d 913, 919 (11th Cir. 1993), *reh'g denied*, 16 F.3d 1233 (11th Cir. 1994) (*en banc*).

III. Discussion of Objections to the R&R

A. Objection to the denial of Defendants' Notice of Objection

On November 13, 2020, Defendants filed their Motion for Summary Judgment. (Doc. 64.) Plaintiff's response brief was filed on January 6, 2021. (Doc. 71.) Defendants filed their reply brief on January 20, 2021 and, with it, a Notice of Objection to Plaintiff's Response in Opposition. (Doc. 74.) In their Notice, Defendants object that a number of paragraphs in Plaintiff's response to Defendant's statement of material facts do not comply with the Local Rules. (*Id.* at 1-2.) While Plaintiff's response does include record citations, Defendants argue that a number of paragraphs contained "rambling, argumentative narratives" with a string of citations afterward. (*Id.*) Defendants also objected to other paragraphs because the Plaintiff's response was not supported by the record citation provided. (*Id.* at 3-4.)

In efforts to resolve the issues in this case on the merits, the Magistrate Judge chose to consider each of Plaintiff's statement of material fact responses in turn and declined to wholesale exclude them, as Defendants requested. (R&R at n.3.) Indeed, in the R&R, the Magistrate Judge painstakingly and thoroughly assessed the Parties' statements of facts and citations and made a specific determination as to each fact. (*Id.* at 6-15.) In so doing, the Magistrate Judge overruled many but not all of Plaintiff's responses to Defendants' material facts.

As the Magistrate Judge explained, "a district court has discretion to waive or excuse noncompliance with its local rules." *Fluor Intercontinental, Inc. v. IAP Worldwide Services, Inc.*, 533 F. App'x 912 n.35 (11th Cir. 2013) (citing *Quick v. Peoples Bank of Cullman Cnty.*, 993 F.2d 793, 798-99 (11th Cir. 1993)). The Eleventh Circuit has emphasized a "strong preference that cases be heard on the merits" and that litigants be "afford[ed] [their] day in court, if possible." *See Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1342 (11th Cir. 2014). In addition to these important goals, a court is of course permitted to consider materials in the record not directly cited. Fed. R. Civ. P. 56(c)(3).

Here, the Court finds that the Magistrate Judge's determination to consider each statement of fact response on an individual basis was the fair and appropriate way to handle this issue in a manner that strives to effectuate the important principles cited above. Defendants' objection is **OVERRULED**.

B. Objection to the denial of summary judgment on Plaintiff's FLSA claim as to certain weeks

Defendants moved for summary judgment on Plaintiff's FLSA claim, arguing that the evidence showed that Coca-Cola paid Plaintiff for all hours recorded, and Plaintiff "otherwise has no evidence that Coca-Cola knew she was working off the clock." (MSJ, Doc. 64-1 at 22.) Defendants also asserted that (1) Plaintiff has no claim for unpaid "regular time;" (2) Plaintiff's time spent checking her phone was not compensable; (3) Plaintiff's *de minimis* time is not compensable; and (4) Defendants are entitled to at least partial summary

judgment as to certain weeks for which Plaintiff failed to present any evidence of unpaid overtime. (MSJ at 22-24.)

The Magistrate Judge first correctly determined that Plaintiff made out a *prima facie* case in support of her FLSA claim, based on her own deposition testimony and declaration as well as the deposition testimony of Indaue Mello, Plaintiff's direct supervisor. Plaintiff stated in her declaration she was

> forced to work many hours of overtime for which I was not paid. Yu Shi would call me several times per week requesting that I make travel arrangements which required that I contact American Express Travel, Coke's vendor for travel, set up early morning meetings, request purchase orders, and perform other administrative tasks. On many occasions, these tasks required that I work well into the evening to complete these tasks such as making her travel plans, re-arranging her schedule and doing a variety of other tasks. I was told by both Yu Shi and Berginia Lee-Sun that I must be available to answer my phone at all times and respond immediately to her, or else she would fire me.

(Declaration of Martha Butler, ("Butler Decl."), Doc. 69-4 ¶ 4.) Plaintiff also averred that Yu Shi instructed her to complete tasks for four outside consultants and an outside vendor whenever they requested her help, and further stated that if Plaintiff failed to assist them "whenever they called," Plaintiff would be fired. (*Id.*) Accordingly, this left Plaintiff working "early in the am, through my lunch hour, and well into the evenings," and also on Sundays. (*Id.*) In total, Plaintiff estimates that she worked 20 hours of uncompensated overtime for the vast majority of weeks in 2017. (*Id.*) As discussed below under Objection C., Plaintiff testified that Yu Shi told her that she was not going to approve her (Plaintiff's) overtime hours because Yu Shi "did not trust that I had actually worked the hours reported since

she did not trust me. And she [did] not trust Black people at all." (Deposition of Martha Butler, Doc. 63 at pp. 140, 219, 254.)

Plaintiff's supervisor, Mello, deposed that she advised Plaintiff to go to the Department of Labor about her overtime issues because Plaintiff's predecessor, also a Black woman, had issues regarding overtime with Yu Shi as well. (Deposition of Indaue Mello, Doc. 72-1 p. 58:4-10.) Further, Mello testified that Plaintiff told her "that she was repeatedly having to work during her lunchtime and also Yu Shi would send her several requests after hours and at night; that she was expected to have everything ready first thing in the morning and the only way she could accomplish that was if she worked overtime." (*Id.* p. 58:9-16.) Mello also explained that she "saw multiple times" Ms. Butler working through lunch or working after regular hours, and that Yu Shi told her that her administrative assistants could not have overtime approved, and so Mello thought something "didn't add up." (*Id.* p. 59:2-16.)

In response to Coca-Cola's position that it was not on notice that Plaintiff was working overtime, the Magistrate Judge explained that here — where, viewing the facts in Plaintiff's favor, Yu Shi assigned Plaintiff after-hours, excess work but refused to approve overtime — actual knowledge can be presumed. (R&R at 72) (citing *Allen v. Bd. Of Pub. Educ. For Bibb Cty.*, 495 F.3d 1306, 1319 (11th Cir. 2007) (finding that jury could reasonably conclude that defendant knew that plaintiff was working without pay where supervisor asked plaintiff to stay late and observed plaintiff working beyond scheduled hours but declined to approve

overtime); *Reich v. Dep't of Conservation & Natural Res.*, 28 F.3d 1076, 1082 (11th Cir. 1994) (holding that defendant could have acquired actual knowledge that employees were working overtime hours through the exercise of reasonable diligence and explaining that it is a rare case where prohibited overtime work is done and the employer does not have constructive knowledge)). *See also, Bailey v. TitleMax of Georgia, Inc.*, 776 F.3d 797, 801 (11th Cir. 2015) (holding that plaintiff showed that employer knew of overtime work where supervisor explicitly instructed plaintiff to work off the clock).

In connection with Defendants' arguments that Plaintiff is not entitled to overtime for checking her email or for *de minimis* time, the Magistrate Judge generally agreed that Plaintiff's time spent checking her phone was not compensable but found that "the evidence also shows that Plaintiff worked on other emails for longer periods," including, for example, an email received after hours on April 19, 2017. (R&R at 75) (noting that one factor in *de minimis* analysis is aggregate compensable time worked and also detailing that the "question of whether a quantum of work is *de minimis* is generally left to the jury") (quoting *Anderson v. Perdue Farms, Inc.*, 604 F.Supp.2d 1339, 1360 (M.D. Ala. 2009)).

Next, Defendants argued in the Motion for Summary Judgment and again in their Objections that Plaintiff failed to present evidence of unpaid overtime for a number of particular listed workweeks. (Obj. at 7-11.) The Magistrate Judge correctly determined, however, that this contention implicates disputed facts. (R&R at 76-77.) To start, the Magistrate Judge explained that Plaintiff disputes the

accuracy and adequacy of the records Defendants propound in support of their position that Plaintiff did not work overtime for the listed workweeks. (*Id*. at 77.) Specifically, while Defendants rely on time records for when Plaintiff was in the building, Plaintiff's testimony (which, contrary to Defendants' position, is evidence) is that the badges used to swipe in and out of the building "a lot of times don't work" and security would just let her through. (Butler Dep. p. 251:8-10.) Plaintiff also declared that much of her overtime work was done at home, after hours and on the weekends, (see Butler Decl. ¶ 4), which would not be reflected in records depicting entry into the building. Where the employer's records are inaccurate or inadequate, the employee need only show that she "has in fact performed work for which [she] was improperly compensated" and "produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Brock v. Norman's County Market, Inc*., 835 F.2d 823, 828 (11th Cir. 1988).

Here, Plaintiff has presented evidence in the form of her own testimony that she performed approximately 20 hours of overtime a week for a vast majority of weeks, including work done at home in the evenings and on Sundays. (Butler Decl. ¶ 4.) Defendants' objection that Plaintiff's calculation is too speculative first, is not an argument they specifically raised in their initial summary judgment motion[1], and second, ignores disputed facts in the record. Plaintiff's estimate of her

[1] *See Williams v. McNeil*, 557 F.3d 1287, 1291-92 (11th Cir. 2009) (noting that "a district court has discretion to decline to consider a party's argument when that argument was not first presented to the magistrate judge").

overtime worked is based on her memory of specific listed tasks related to the particulars of her job — such as contacting American Express Travel for Yu Shi or assisting the four outside consultants as Yu Shi instructed (see Butler Decl. ¶ 4) — and therefore her estimates are not sufficiently speculative to bar her claim, as Defendants argue. *See Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013) (explaining that unreported overtime can be "reconstructed from memory, inferred from the particulars of the jobs the technicians did, or estimated in other ways")[2]. *See also*, *Hanson v. Trop, Inc.*, 167 F.Supp.3d 1324, 1336-37 (N.D. Ga. 2016) (denying summary judgment to defendant where plaintiff testified that she worked more than 40 hours during workweek on occasion but was unable to demonstrate the exact amount of hours for which she was not compensated as overtime).[3]

The Court notes that Defendants implicitly acknowledge in their motion for summary judgment the fact disputes surrounding Plaintiff's FLSA claim. (*See* MSJ at 21-22) (arguing that "Plaintiff testified that Yu Shi instructed her to remove overtime from her timesheets and refused to pay her for hours over 40. [SOMF ¶ 75]. Yu Shi denies this [SOMF ¶ 76] …"). Throughout their objections, Defendants

[2] Defendants suggest that a Plaintiff must provide documentary evidence of her overtime work to support an FLSA claim. (Obj. at 5.) But as *Hanson*, *Espenscheid,* and *Olivas* demonstrate, this is not supported by relevant authority.

[3] However, as this Court noted in *Hanson*, at trial, Plaintiff's claim for damages, if insufficiently specific, may be subject to a motion for directed verdict. 167 F.Supp. at n.7. *But see, Olivas v. A Little Havana Check Cash, Inc.*, 324 F. App'x 839, 844 (11th Cir. 2009) (holding that where employee explained how and why her time records were inaccurate and provided an average number of weekly hours worked, such evidence established the amount and extent of the employees work as a matter of just and reasonable inference).

err in improperly discounting Plaintiff's testimony, which constitutes admissible evidence. *See Strickland v. Norfolk Southern Ry. Co.*, 692 F.3d 1151, 1160 (11th Cir. 2012) ("Our case law recognizes that, even in the absence of collaborative evidence, a plaintiff's own testimony may be sufficient to withstand summary judgment."); *United States v. Stein*, 881 F.3d 853, 854 (11th Cir. 2018) (holding that "an affidavit which satisfies Rule 56 of the Federal Rules of Civil Procedure may create an issue of material fact and preclude summary judgment even if it is self-serving and uncorroborated."). Accordingly, the Court concludes that the Magistrate Judge correctly analyzed the FLSA claim to find that material disputes of facts preclude granting summary judgment to Defendants. (R&R at 77) (citing *Cason v. The Coca Cola Company and Yu Shi*, No: 1:17-cv-3891-JPB-JSA, Doc. 83 at 64-65 (N.D. Ga. Mar. 23, 2020) (denying summary judgment on FLSA claim based on plaintiff's (Butler's predecessor) sworn testimony that she was instructed by Yu Shi to work overtime but was also instructed to delete those hours from her timesheet)). This objection is **OVERRULED**.[4]

C. Objection to the denial of summary judgment based on direct evidence

Defendants argue that the Magistrate Judge's finding of direct evidence in support of her two Title VII pay claims contravenes well-established Eleventh Circuit precedent. (Obj. at 11-12.) Plaintiff testified that Defendant Yu Shi told

[4] Additionally, in arguing that the Court should, at this stage, dismiss part of Plaintiff's FLSA claim as to certain specific weeks (Obj. at 11), Defendants cite to no legal authority in which a court in an FLSA case has granted summary judgment as to specific weeks or hours but not others in the manner Defendants request.

Plaintiff that she was not going to approve her overtime hours because Yu Shi "did not trust that I had actually worked the hours reported since she did not trust me. And she [did] not trust Black people at all." (R&R at 31) (citing Deposition of Martha Butler, Doc. 63 at pp. 140, 219, 254)).[5]

The Court finds that the Magistrate Judge correctly assessed the statement in finding that it constitutes direct evidence of discrimination. As the Magistrate Judge noted, this statement can be interpreted only one way—to mean that Yu Shi denied Plaintiff's overtime request *because* she did not trust her as a Black person. (R&R at 31-35) (citing more than three pages worth of holdings in which courts in this Circuit have found direct evidence). Defendants' argument that the alleged remark is unrelated to any decisionmaking process is plainly incorrect; the comment was directly related to the reason behind Shi's decision not to approve Plaintiff's overtime, and was therefore directly related to a decision implicating the terms and conditions of Plaintiff's employment. In light of this understanding, Defendants' cited legal authority is distinguishable because, in those cases, the statements at issue were not directly related to the particular claimed adverse action. *See Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 642 (11th Cir. 1998) (finding that statement of supervisor, where supervisor "identified a bias

[5] The Court notes that Plaintiff's direct supervisor, Indaue Mello, testified that Yu Shi told her in connection with Plaintiff's predecessor, also a Black woman, that she (Yu Shi) "did not like Black people." (Deposition of Indaue Mello, Doc. 72-1 p. 28:14-15.) Mello also testified that she believed that Yu Shi treated Plaintiff the same way she treated Plaintiff's predecessor, (*id.* p. 33:18-21) and that Yu Shi harbored the same prejudices against Plaintiff as she had for her predecessor (*id.* p. 34:20-25).

against Blacks," was not related to decision not to promote plaintiff and was not direct evidence); *Fernandez v. Trees, Inc.*, 961 F.3d 1148, 1156 (11th Cir. 2020) (finding that statement that statement that there was a "new policy in the company: no more Cuban people" would constitute direct evidence for failure-to-hire claim but not necessarily for the termination claim at issue). Further, as the Magistrate Judge noted, Defendants have provided no interpretation of this statement that is not discriminatory. Defendants' objection is **OVERRULED**.[6]

D. Objection to denial of summary judgment to as punitive damages

Defendants contend that the Magistrate Judge should have granted summary judgment on the punitive damages claim because Plaintiff failed to present evidence that Coca-Cola acted with malice or reckless indifference towards Plaintiff. (Obj. at 13.)

As to this objection, the Court similarly concludes that the Magistrate Judge correctly applied the facts and law in denying summary judgment because Coca-Cola has discrimination policies that Yu Shi may have been aware of and because Yu Shi is undisputedly an individual "high up in the corporate hierarchy." (R&R at 70) (citing *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1323 (11th Cir. 1999)). Plaintiff provided sufficient evidence for a reasonable jury to determine that Yu Shi maintained a sustained management policy or practice of refusing to approve

[6] Defendants make a footnote argument that Plaintiff's direct evidence claim should be limited to only the single denial of overtime when Yu Shi allegedly made the discriminatory comment at issue. (Obj. at n.3.) Defendants cite no authority in support of this restrictive understanding and the Court declines to adopt it. Moreover, such an interpretation ignores that it was Yu Shi's stated blanket policy never to approve Plaintiff's overtime hours.

Plaintiff overtime pay based on racial considerations with malice and recklessness and that, given the record presented (including in connection with the treatment of Plaintiff's predecessor), this could be properly imputed to Coca Cola. Plaintiff's punitive damages claim may proceed alongside and in conjunction with her sole remaining Title VII claim based on direct evidence, as discussed above. This objection is **OVERRULED**.

IV. Conclusion

To sum up, the Court **ADOPTS** the Magistrate Judge's R&R [Doc. 78], and **GRANTS IN PART AND DENIES IN PART** Defendant's Motion for Summary Judgment [Doc. 64]. The Court **ORDERS** the Parties to engage in mediation to be conducted by a magistrate judge of this Court.

The Clerk is **DIRECTED** to refer this action to the next available magistrate judge (other than Judge Baverman) for the purpose of conducting the mediation. The mediation shall be concluded within forty-five days of the date of this order unless otherwise extended by the Magistrate Judge. If the case is not settled at the mediation, the parties are **DIRECTED** to file a status report with the Court within ten days of the conclusion of the mediation and file a proposed consolidated pretrial order within twenty days of the conclusion of the mediation.

IT IS SO ORDERED this 25th day of August 2021.

Honorable Amy Totenberg
United States District Judge