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

LINDSEY WALDERA,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION FILE
v.	)	
	)	NUMBER 1:19-cv-3495-TCB
MARKETSOURCE, INC.,	)	
	)	
Defendant.	)	

O R D E R

This matter is before the Court on Magistrate Judge John K. Larkins, III's final report and recommendation (the "R&R") [69], which recommends granting Defendant MarketSource, Inc.'s motion [49] for summary judgment. Plaintiff Lindsey Waldera has filed objections [73].

I. Background[1]

This is a case about equal pay for employees.

[1] The Court summarizes portions of the background to the extent they are relevant to Waldera's objections but incorporates by reference the facts as laid out in the R&R.

MarketSource is a staffing agency. In March 2013, it established a program known as Target Tech through which it would staff sales associates at Target stores.

When the Target Tech program was established, Matthew Burns (who had previously worked on a similar program at RadioShack) was hired as its sole operations director and handled all responsibilities associated with that title. Around the same time, Justin Gorman (who had also worked at RadioShack) was hired as an operations manager. In 2014, Gorman was promoted to operations director, the same title as Burns.

After Gorman was promoted, Burns handled internal-facing responsibilities such as the Target support team (which fielded requests for assistance from sales representatives), the Target reporting team (which provided analytical reports), and the loss prevention team (which handled issues related to theft in Target stores). In 2016, after between three and four years with the program, Burns earned approximately $109,241 per year with the potential for a $30,000 bonus.

Gorman, on the other hand, had primarily external-facing responsibilities as an operations director. He managed the field operations team, the communications team, the Target Wide program (which facilitated in-store demonstrations in Target stores), and the Target Open House program (which tested new products). In April 2017, he was paid approximately $107,515 with the potential for a $35,000 bonus.

In 2015, MarketSource hired Waldera as a financial manager to supervise Target Tech's financial activities. Prior to her job at MarketSource, Waldera had worked for four years with its corporate affiliates.

One year after Waldera was hired, Burns transitioned out of his role as an operations director. Gorman temporarily became the sole operations director for the program and assumed Burns's duties of supervising the Target support team and loss prevention team. However, he did not assume Burns's responsibility of supervising the reporting team. Instead, Tim Brannon, the executive director of Target Tech, temporarily took on this responsibility.

A few months later, Brannon encouraged Waldera to apply for the operations director position vacated by Burns. He told her to prepare a job description for a position with an external title of director of program governance. He also told her that she would take on most of Burns's responsibilities as well as some responsibilities that Burns had not handled. Given Burns's and Gorman's compensation as operations directors, she expected not less than $110,000 in annual salary.

Waldera got the promotion to operations director, but the terms were not as she expected. While her internal title became operations director, her external title was director of program control-retail delivery. Her salary increased from $79,976 with a potential $15,000 bonus to $86,500 with a potential $20,000 bonus.

As operations director, Waldera was primarily responsible for communicating with the finance department, performing reporting and analytical functions, and negotiating and drafting amendments to agreements between MarketSource and Target. A large part of her role was performing analytical functions that were used and implemented by other operations directors, including Gorman, as they directed their

teams. And although she acquired the title of operations director like Burns, she did not supervise the support team or the loss prevention team as he had done; instead, Gorman continued to perform these responsibilities while she handled other responsibilities that Gorman did not perform (such as negotiating amendments to agreements between MasterSource and Target).

In the spring of 2017, Waldera repeatedly complained to Brannon and others that her level of compensation was less than that of either Gorman or Burns. Brannon told her that he anticipated a promotion for himself that would enable him to promote her out of the Target Tech program to a new role as director of reporting and analytics for all MarketSource's retail programs. She told him she was looking for a salary of at least $110,000 per year. He recommended to his superiors that she receive an increase in salary to $100,000.

In March of 2018, MarketSource reorganized its retail division and changed the title and position for several employees. The company issued a press release announcing that Waldera would "lead Reporting and Analytics for Retail Delivery." [63-4] ¶ 44. In her new role, she

would supervise additional employees and would no longer have any responsibilities other than reporting and analytics; any of her additional duties would be shifted to Gorman. Yet she told a colleague that the change in position "felt more like a slap in the face than a promotion" because her salary would increase to only $91,005. [58-2] at 11.

Rather than accept the position, Waldera resigned on April 16, 2018. She reiterated in her notice of resignation to Brannon that she thought she was being undercompensated.

On August 2, 2019, Waldera filed this suit. She brings four claims: (1) pay discrimination in violation of the Equal Pay Act ("EPA"); (2) sex-based pay discrimination in violation of Title VII; (3) retaliation in violation of the EPA; and (4) retaliation in violation of Title VII.

On December 18, 2020, Defendants moved for summary judgment on all counts. On May 17, 2021, the magistrate judge recommended granting the motion.

II. Legal Standard

A. Review of a Magistrate Judge's R&R

A district judge has a duty to conduct a "careful and complete" review of a magistrate judge's R&R. *Williams v. Wainwright*, 681 F.2d 732, 732 (11th Cir. 1982) (quoting *Nettles v. Wainwright*, 677 F.2d 404, 408 (5th Cir. 1982)). This review may take different forms, however, depending on whether there are objections to the R&R. The district judge must "make a de novo determination of those portions of the [R&R] to which objection is made." 28 U.S.C. § 636(b)(1)(C). In contrast, those portions of the R&R to which no objection is made need only be reviewed for clear error. *Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006).[2]

[2] *Macort* dealt only with the standard of review to be applied to a magistrate's factual findings, but the Supreme Court has held that there is no reason for the district court to apply a different standard to a magistrate's legal conclusions. *Thomas v. Arn*, 474 U.S. 140, 150 (1985). Thus, district courts in this circuit have routinely applied a clear-error standard to both. *See Tauber v. Barnhart*, 438 F. Supp. 2d 1366, 1373-74 (N.D. Ga. 2006) (collecting cases). This is to be contrasted with the standard of review on appeal, which distinguishes between the two. *See Monroe v. Thigpen*, 932 F.2d 1437, 1440 (11th Cir. 1991) (when a magistrate's findings of fact are adopted by the district court without objection, they are reviewed on appeal under a plain-error standard, but questions of law remain subject to de novo review).

"Parties filing objections must specifically identify those findings objected to. Frivolous, conclusive or general objections need not be considered by the district court." *Nettles*, 677 F.2d at 410 n.8. "This rule facilitates the opportunity for district judges to spend more time on matters actually contested and produces a result compatible with the purposes of the Magistrates Act." *Id.* at 410.

The district judge also has discretion to decline to consider arguments that were not raised before the magistrate judge. *Williams v. McNeil*, 557 F.3d 1287, 1292 (11th Cir. 2009). Indeed, a contrary rule "would effectively nullify the magistrate judge's consideration of the matter and would not help to relieve the workload of the district court." *Id.* (quoting *United States v. Howell*, 231 F.3d 615, 622 (9th Cir. 2000)).

After conducting a complete and careful review of the R&R, the district judge may accept, reject or modify the magistrate judge's findings and recommendations. 28 U.S.C. § 636(b)(1)(C); *Williams*, 681 F.2d at 732. The district judge may also receive further evidence or recommit the matter to the magistrate judge with instructions. 28 U.S.C. § 636(b)(1)(C).

B. Motion for Summary Judgment

Summary judgment is appropriate when "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). There is a "genuine" dispute as to a material fact if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In making this determination, however, "a court may not weigh conflicting evidence or make credibility determinations of its own." *Id.* Instead, the court must "view all of the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Id.*

"The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the nonmoving party would have the burden of proof at trial, there are two ways for the moving party to satisfy this initial burden. *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437–38 (11th Cir. 1991). The first is to produce

"affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial." *Id.* at 1438 (citing *Celotex Corp.*, 477 U.S. at 331). The second is to show that "there is an absence of evidence to support the nonmoving party's case." *Id.* (quoting *Celotex Corp.*, 477 U.S. at 324).

If the moving party satisfies its burden by either method, the burden shifts to the nonmoving party to show that a genuine issue remains for trial. *Id.* At this point, the nonmoving party must "'go beyond the pleadings,' and by its own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593–94 (11th Cir. 1995) (quoting *Celotex Corp.*, 477 U.S. at 324).

III. Discussion

A. Pay Discrimination in Violation of the EPA

The EPA prohibits employers from paying employees differently on the basis of their sex. 29 U.S.C.A. § 206(d)(1); *see also Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1526 (11th Cir. 1992). To

recover under the EPA, a plaintiff must first establish a prima facie case showing that the "employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'" *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (internal citation omitted).

To demonstrate equal work, a plaintiff need not show that the job was identical to one held by an employee of the opposite sex. *Miranda*, 975 F.2d at 1533. However, "the standard for determining whether jobs are equal in terms of skill, effort, and responsibility is high." *Lima v. Fla. Dep't of Child. & Fams.*, 627 F. App'x 782, 786 (11th Cir. 2015) (quoting *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 592 (11th Cir. 1994)). Thus, a comparator does not perform equal work if he assumed additional job responsibilities that she did not bear. *See Waters v. Turner, Wood & Smith Ins. Agency, Inc.*, 874 F.2d 797, 799–800 (11th Cir. 1989) (per curiam).

If the plaintiff can make out a prima facie case, then the burden shifts to the defendant employer to show that the difference in pay is

justified by one of the EPA's four exceptions: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other fact other than sex." Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1); *see also Corning Glass*, 417 U.S. at 196. Employers "must demonstrate that the factor of sex provided *no basis* for the wage differential." *Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1078 (11th Cir. 2003) (quoting *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995)). If the employer establishes by a preponderance of the evidence a non-discriminatory reason for the pay differential, the burden shifts back to the employee to show pretext. *See Irby*, 44 F.3d at 954.

Here, the magistrate judge found that Waldera fails to make a prima facie case. He concluded that she does not meet her high burden of showing that her job was substantially similar in terms of skill, effort, and responsibility to Burns and Gorman. For the following reasons, the Court agrees.

1. Burns as a Comparator

The magistrate judge acknowledged that both Burns and Waldera had the same internal job title of operations director. They also reported to the same supervisor, Brannon, and worked with the same client program. Yet the magistrate judge concluded that Burns was not a proper comparator for Waldera because their responsibilities in their respective roles were different. When Burns was an operations director, he was responsible for the support team, reporting and analytics, and the loss prevention team. Waldera assumed only Burns's reporting and analytics duties, as well as certain other responsibilities that he did not bear (such as amending the agreements between Target and MarketSource).

Waldera acknowledges that she did not have the same job responsibilities as Burns. *See* [58-9] at 1 ("While I did not take all [of Burns's] responsibilities, I took the reporting team and overall program SOP and documenting responsibilities."). Yet she argues that her job was substantially similar to his because she was given his job title as operations director and assumed "most" of his job responsibilities. [73]

at 14. She also points out that she assumed additional responsibilities that he did not perform, presumably to argue that their overall workload was similar.

The Court disagrees with Waldera that her job was substantially similar to Burns's. As a preliminary matter, the fact that Waldera and Burns held the same job title is not dispositive. *See Mulhall*, 19 F.3d at 592 (finding that identical job titles do not necessarily indicate that two jobs are substantially similar). And here, Waldera admits that "[t]here are multiple individuals employed across MarketSource who possess the title of 'Operations Director,' but perform job duties and functions which are unrelated and not substantially similar to those performed by [her]." [50-5] ¶ 4.

Moreover, Burns began his career at Target Tech as its sole operations director. He handled all responsibilities associated with the position. Even after his responsibilities lessened in 2014 with Gorman's promotion to operations director, he still bore significant responsibilities that Waldera did not, including supervision of the loss prevention and support teams.

Waldera appears to argue that these additional responsibilities are equal to her own. But the Court agrees with the R&R that she has not met her "heavy burden of proving 'substantial identity of job functions.'" *Waters*, 874 F.2d at 799 (quoting *Hodgson v. Golden Isles Convalescent Homes, Inc.*, 468 F.2d 1256, 1258 (5th Cir. 1972)). To do so, she would have to show that the relative effort required for her narrower sector of responsibilities is equivalent to the duties and skills required of Burns. *See Calicchio v. Oasis Outsourcing Grp. Holdings, LP*, No. 19-cv-81292-RAR, 2021 WL 3123767, at *8 (S.D. Fla. July 22, 2021) (finding that the plaintiff did not met her prima facie burden where she "d[id] not explain how [her alleged comparator's job duties] [are] substantially equal to her tasks, nor d[id] she demonstrate that [the duties] require[] equal skill"). Waldera has not made such a showing, and the record reflects that her responsibilities—which included overseeing financial aspects of the company—differed materially from Burns's role supervising a whole host of programs. Therefore, Burns is not a proper comparator.

2. Gorman as a Comparator

Gorman is a closer call. Like Waldera, he was an operations director who reported to Brannon, and the two had both a similar number of employees who reported to them and the same job title.

Nevertheless, the magistrate judge found that Gorman was not a proper comparator. He pointed to the differences between their job responsibilities: Gorman managed the field operations team, the communications team, the Target Wide business, and Target Open House. He was the "primary day-to-day contact person . . . for Target executives regarding Target Tech," [63-4] ¶ 62, and he had "more field-facing communications than [Waldera]." *Id.* ¶ 65. He also "facilitated in-store 'demo day,' new store opening, inventory management, and played a critical role in managing MarketSource's relationship with Target." *Id.* ¶ 66. He had had "significant [profit and loss] responsibility in addition to [his other responsibilities]" because he was "in charge of Target Wide." [61] at 121:7–9. And he assumed Burns's responsibilities for the Target support and loss prevention teams once Burns transitioned to another role in 2016.

Waldera, on the other hand, handled internal-facing responsibilities such as communicating with the finance department and preparing and delivering analytical reports to other operations directors within Target Tech. Unlike Gorman, she did not have any loss prevention or inventory management responsibilities. And she did not bear the responsibilities assumed by Gorman after Burns left; instead, Gorman continued to be responsible for the support and loss prevention teams.

In her objections, Waldera acknowledges that her job responsibilities were different than Gorman's. Yet she argues that she was capable of performing Gorman's duties, many of which she contends were overstated by the magistrate judge. She also contends that her job responsibilities were both intertwined with and complemented Gorman's—he handled external operations while she handled internal operations, and together they participated in vendor calls, monthly travel, and weekly director meetings.

As a preliminary matter, the fact that Waldera might have been capable of performing Gorman's responsibilities does not make him a

proper comparator for her. The court is required to "compare the jobs, not the individual employees holding those jobs." *Mulhall*, 19 F.3d at 592 (quoting *Miranda*, 975 F.2d at 1533).

Moreover, the Court disagrees with Waldera that her job responsibilities required equal skill, effort, and responsibility to Gorman's. For instance, although Waldera negotiated with Target on financial and contractual issues as part of the Target Wide program, Gorman was "in charge of" the program, [61] at 121:7–9, which in 2018 was equivalent to MarketSource's fourth or fifth largest retail program. *See id.* at 73:14–22. As a result, he possessed "significant" profit and loss responsibilities. *Id.* at 121:7–9. Waldera admits that she did not possess direct profit and loss responsibilities for Target Wide. *See* [63-4] ¶ 78.

Gorman also supervised Target Tech's loss prevention team, which was a "high risk area" for MarketSource and "probably [one of] the biggest risks that we have on the program from a financial point of view" because it involved "the fiduciary responsibility of protecting [the company]" and its assets. [61] at 153:13–24. He assumed this

responsibility upon Burns's departure from Target Tech, and Waldera did not take on this responsibility upon becoming an operations director.

Waldera argues that she performed reporting and analytics for the loss prevention team and contends that she and Gorman "acted as the left hand and the right hand for operations of the Target Tech program [and] it took both to complete the tasks." [73] at 10. However, the fact that both of their responsibilities were necessary to complete a task does not mean that their responsibilities required equal skill and effort. Instead, "substantial identity of job functions" is required. *Prewett v. Ala. Dep't of Veteran Affs.*, 533 F. Supp. 2d 1160, 1166 n.11 (M.D. Ala. 2007) (quoting *Waters*, 874 F.2d at 799).

Ultimately, Waldera appears to have been a valued member of the Target Tech program. She handled the financial aspect of Target Tech, produced periodic reports, and performed analytical functions for other directors, who used this information to ensure that the program was profitable. And it is not unreasonable to argue that she should have been paid more for her work. But that is not the question here.

Instead, to demonstrate that her under-compensation violates the EPA, Waldera must meet the heavy burden of showing that her position was substantially equal to that of Burns and Gorman, who were paid more. She has not done so. Accordingly, the Court agrees with the magistrate judge that she has not made out a prima facie case under the EPA. Count I will be dismissed.

B. Pay Discrimination Under Title VII

Waldera also brings a claim for sex-based pay discrimination under Title VII, which makes it illegal for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

The standard for job similarity under Title VII is less stringent than the standard under the EPA. *See Meeks v. Comput. Assocs. Int'l*, 15 F.3d 1013, 1019 (11th Cir. 1994). As the Eleventh Circuit recently clarified, Title VII requires a plaintiff to show that she was treated differently from another individual who is "similarly situated in all

material respects." *Lewis v. City of Union City*, 918 F.3d 1213, 1224 (11th Cir. 2019) (en banc). That said, a plaintiff seeking to recover under Title VII must satisfy the additional element of discriminatory intent. *See Meeks*, 15 F.3d at 1018.

Here, the magistrate judge concluded that Waldera had not shown that the jobs performed by Gorman and Burns were substantially similar to hers in all material respects. He pointed to the significant differences between Waldera's role and those of Burns and Gorman, as outlined in detail as part of her EPA claim.

In her objections, Waldera does not argue that her Title VII claim should proceed even if her EPA claim fails. Instead, she hangs her hat on the fact that her EPA claim should proceed, arguing that she has met her burden under Title VII because she meets her burden under the EPA. *See* [73] at 16 ("Clearly, if the plaintiff makes a case under the EPA, she simultaneously establishes facts necessary to go forward on a Title VII claim." (quoting *Mulhall*, 19 F.3d at 598)).

But Waldera has not made her case for pay discrimination under the EPA. And even under the lower standard for substantial similarity pursuant to Title VII, she has not met her prima facie burden.

Under Title VII, "'[d]ifferences in experience and disciplinary history' can disqualify a plaintiff's proffered comparators." *Lewis*, 918 F.3d at 1228 (quoting *Tennial v. United Parcel Serv., Inc.*, 840 F.3d 292, 304 (6th Cir. 2016)); *see also Campbell v. Hamilton Cnty.*, 23 F. App'x 318, 325 (6th Cir. 2001) (holding that alleged comparators were not similarly situated based on differences in job title and responsibilities, experience, and disciplinary history).

Here, both Gorman and Burns had worked with the Target Tech program since its founding in 2013. They also arrived with program experience after time spent working on a different iteration of the Target Tech program through RadioShack. Waldera, by contrast, admits that at the time she began working for MarketSource in 2016, she "had no professional experience with, or involvement in, Target Tech." [63-4] ¶ 22. Because she was significantly less experienced than

either Burns or Gorman, they are not proper comparators under Title VII. Therefore, Waldera has not met her prima facie burden.

Even assuming arguendo that Waldera had established a prima facie case of sex discrimination under Title VII, her claim would still fail because she does not show that MarketSource's explanation for the disparity in her pay was pretextual.

Once a plaintiff establishes a prima facie case of discrimination, the burden is on the defendant to show that there is a "legitimate, nondiscriminatory reason for its actions." *Lewis*, 918 F.3d at 1221 (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). This is a "low bar to hurdle," as "[t]he burden placed on the employer is only an evidentiary one: a burden of production that 'can involve no credibility assessment.'" *Flowers v. Troup Cnty. Sch. Dist.*, 803 F.3d 1327, 1336 (11th Cir. 2015) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993)); *see also Meeks*, 15 F.3d at 1019 (noting the employer's "exceedingly light" burden, which requires only that it "proffer non-gender based reasons, not prove them" (quoting *Miranda*, 975 F.2d at 1529)).

Here, MarketSource presents evidence showing that Waldera's compensation was lower than either Burns or Gorman because she had fewer job responsibilities and less job experience. *See, e.g.*, [58-5] at 1–2 (noting that MarketSource's qualifications for employment include experience); [50-24] at 1 (outlining Gorman's work history); [50-15] at 1 (outlining Waldera's work history); [59] at 109:20–110:11 (explaining the value-add of Gorman's prior experience). Accordingly, it has met its exceedingly light burden, and Waldera must demonstrate that its reasons were "merely a pretext for unlawful discrimination." *Lewis*, 918 F.3d at 1221.

Waldera does not reach the pretext stage of her argument. Instead, she merely contends that she has met her prima facie burden and that MarketSource does not articulate any reasons that her compensation was lower. The Court disagrees, and because she has not made any showing with respect to pretext, the Court agrees with the magistrate judge that summary judgment is appropriate as to her Title VII discrimination claim.

C. Retaliation Under the EPA and Title VII

Both Title VII and the EPA prohibit an employer from "discriminat[ing] against an employee because she has brought charges relating to these statutes." *EEOC v. Reichhold Chems., Inc.*, 988 F.2d 1564, 1569 (11th Cir. 1993) (citing 42 U.S.C. § 2000e-3(a) and 29 U.S.C. § 215(a)(3)).

Retaliation claims under both Title VII and the EPA are analyzed under the *McDonnell Douglas* burden-shifting framework. *See Johnson v. Booker T. Wash. Broad. Serv., Inc.*, 234 F.3d 501, 511 n.10 (11th Cir. 2000) (citing *EEOC v. Total Sys. Serv., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000)). Where, as here, there is no direct evidence of retaliation, the plaintiff must make out a prima facie case of retaliation by showing that "(1) [she] engaged in a statutorily protected activity; (2) the employer took an adverse employment action against [her]; and (3) there is a causal connection between the protected activity and the adverse action." *Berman v. Orkin Exterminating Co.*, 160 F.3d 697, 701 (11th Cir. 1998) (citing *Bigge v. Albertsons, Inc.*, 894 F.2d 1497, 1501 (11th Cir. 1990)). If the plaintiff establishes a prima facie case, the

burden shifts to the defendant to show a legitimate, non-retaliatory basis for the action. *See Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001). If the defendant can do so, the plaintiff must point to evidence showing that the defendant's explanations were mere pretext. *See id.*

With respect to her prima facie case, Waldera argues that she engaged in protected activity in 2017 when she was promoted to operations director and told Brannon that the accompanying salary increase was "bullshit." [58] at 67:20. She told Brannon that his offer—an increase from $79,976 with a $15,000 bonus to $87,500 with a $20,000 bonus—was significantly less than the approximately $110,000 that she was expecting, based upon Gorman and Burns's level of compensation as operations directors. She asked whether it was because she was a woman.

Waldera also argues that she engaged in protected activity in 2018. That spring, Brannon told her of another planned change to her job title—this time to the position of director of reporting and analytics. The title change would be accompanied by a small salary increase to

approximately $91,005. She asked again if she was being paid less than either Gorman or Burns because she was a woman or because she had just had a child. She resigned rather than accept the change in job title, which she later learned would have been senior manager of reporting and analytics, rather than director of the same.

Waldera contends that she suffered two adverse employment actions as a result. First, she alleges that she was denied a pay raise commensurate with the operations director position because she received $10,000 less than what Brannon recommended while Gorman, who did not complain about his salary, received $10,000 more than what he recommended. Second, she avers that she was demoted from director to senior manager.

The magistrate judge found that Waldera had not met her prima facie burden of showing that her pay raise, even if unsatisfying, constituted an adverse employment action. He concluded that no reasonable factfinder could find that she was entitled to rely on Brannon's initial recommendation for her salary and that the change in Gorman's salary had no bearing on whether she suffered an adverse

employment action because Gorman's job responsibilities shifted in conjunction with the increase in his pay.

The Court agrees with the magistrate judge. Under certain circumstances, an increase in pay may give rise to an adverse employment action, such as where a similarly situated employee is given a greater increase in pay. *See Davis v. NYC Dep't of Educ.*, No. 10-cv-3812 (KAM) (LB), 2014 WL 917142, at *7 (E.D.N.Y. Mar. 7, 2014) (internal citations and alterations omitted), *aff'd*, 804 F.3d 231 (2d Cir. 2015). However, to show that a pay increase is an adverse employment action, the plaintiff must demonstrate that "discretionary pay was awarded as a matter of course or that she was otherwise entitled to expect or rely on it." *Id.* (citation omitted); *see also Boyar v. City of N.Y.*, No. 10-cv-65 (HB), 2010 WL 4345737, at *3 (S.D.N.Y. Oct. 28, 2010) (explaining that "failure to provide [discretionary pay] does not pass the test for an 'adverse employment action'") (citing *Kessler v. Westchester Cnty. Dep't of Social Servs.*, 461 F.3d 199, 207 (2d Cir. 2006)).

Waldera has not demonstrated that she was entitled to discretionary pay as a matter of course or that she was otherwise

entitled to expect or rely on it. Brannon's recommendation for her salary was just that—a recommendation. And the record reflects that it was not accepted because MarketSource was going through an internal reorganization to standardize its employee salaries. *See* [61] at 127:20–23 (explaining that the company rejected Brannon's recommendation because of the "organizational opinion that . . . the [pay] increases . . . needed to be more in line with whatever the . . . pay banding and the protocols were . . . moving to"). The record also reflects that Gorman's salary changed because he was to take on additional responsibilities. *See id.* at 117:9–10 (noting that Gorman absorbed additional operations director responsibilities when he received a pay increase in 2018). Under the circumstances, no reasonable factfinder could conclude that Waldera was entitled to either rely upon or expect a greater increase in salary. Therefore, she has not adequately alleged that her pay raise, even if not to her liking, constituted an adverse employment action.

As a final matter, Waldera argues that she suffered an adverse employment action when her job title changed from operations director to senior manager. The magistrate judge found that she had not met

her prima facie burden because no reasonable employee would be dissuaded from complaining about discrimination by a change in job title that resulted in an increase in pay and more prestigious job responsibilities.

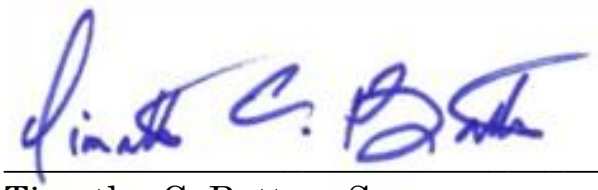
The Court agrees. It is undisputed that the change in Waldera's title resulted in a $3,500 pay increase and that MarketSource celebrated it in an internal press release. Although she argues that the change in title might negatively impact her future compensation, she cites to no evidence in the record that supports such an assertion. Under the circumstances, the Court finds that a reasonable worker would not have been dissuaded by making or supporting a charge of discrimination based on her title change. Accordingly, summary judgment is warranted as to Waldera's retaliation claims under Title VII and the EPA.

V. Conclusion

Having conducted a careful, de novo review of the R&R and Waldera's objections thereto, the Court agrees with the magistrate judge that Waldera has not demonstrated a genuine dispute of material

fact with respect to her claims. Accordingly, the Court adopts as its order the R&R [69] and grants MarketSource's motion [49] for summary judgment. The Clerk is directed to close this case.

IT IS SO ORDERED this 5th day of August, 2021.



Timothy C. Batten, Sr.
Chief United States District Judge