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

DANA TURNER, Plaintiff, v. VALENTINO USA, INC. and KATIE DOW, Defendants.	 CIVIL ACTION NO. 1:21-cv-1739-ELR-CMS

FINAL REPORT AND RECOMMENDATION

Plaintiff Dana Turner filed this lawsuit against two defendants: her former employer, Valentino USA, Inc. ("Valentino"), and her former manager, Katie Dow (collectively "Defendants"). In her four-count Complaint, Turner alleges that Defendants discriminated against her based on her race in violation of 42 U.S.C. § 1981 by not promoting her to a selling supervisor position (Count One) and retaliated against her by issuing her a "formal warning" following an incident at work (Count Two). [Doc. 1, Compl. ¶¶ 51–54]. In Counts Three and Four, Turner asserts claims for punitive damages and attorney's fees. [*Id.* ¶¶ 55, 56].

Pending before the Court is Defendants' Motion for Summary Judgment, in which Defendants seek judgment on each of the claims raised in the Complaint. [Doc. 54]. Turner filed a response opposing the Motion [Doc. 62], and Defendants

filed a reply in support of it [Doc. 68]. For the reasons stated below, I will recommend that the Motion for Summary Judgment be **GRANTED**.

I. NOTICES OF OBJECTION

Both sides have filed a Notice of Objection, complaining about each other's proposed undisputed material facts. [Doc. 66, Turner's Notice of Objection to Defs.' Statement of Material Facts ("SMF"); Doc. 70, Defs.' Notice of Objection to Turner's Statement of Additional Facts ("SAF")]. To the extent the parties complain about the proposed facts being immaterial, I have considered each of the proposed facts, along with any objections thereto, and have provided my analysis of their relative materiality. Put simply, if I included a fact in my fact section, I considered it to be relevant to the issues presented in the Motion for Summary Judgment and/or helpful to provide context or background.

Moreover, both sides complain in their Notice of Objection about whether the evidence cited by the opposing side actually supports the proposed fact, whether additional evidence is necessary to give full context to the fact, and whether a proposed fact is actually a legal conclusion. I have reviewed each proposed fact, along with the cited evidence, and have adjusted my facts and citations to account for any unsupported or incomplete factual evidence. I have also omitted any legal conclusions or incomplete proposed facts from the fact section. To the extent the

parties have raised evidentiary objections to proposed facts, I have addressed those objections later in this Report and Recommendation.

II. BACKGROUND[1]

In July 2018, Turner, who is an African American woman, began working as a Sales Associate for Valentino's retail store in Atlanta, Georgia. [SMF ¶¶ 1, 8; Doc. 65, Turner's Resp. SMF ("RSMF") ¶¶ 1, 8; Defs.' Ex. 6 (Doc. 54-10); Docs. 54-2, 54-3, 54-4, Dep. of Dana Turner "Turner Dep." at 182]. At the time Turner was hired, Defendant Dow was the store manager. [SMF ¶ 1; RSMF ¶ 1; SAF ¶ 5; Doc. 69, Defs.' Resp. SAF ("RSAF") ¶ 5 (admitting this portion of SAF ¶ 5); Turner Dep. at 78].

In June 2019, the selling supervisor for the Atlanta store, Eden Lee, left Valentino. [SMF ¶ 10; RSMF ¶ 10; Turner Dep. at 137–138; Doc. 54-8, Dep. of Judy Park "Park Dep." at 13–14; Defs.' Ex. 8 (Doc. 54-12)]. From June to August 2019, Valentino informally sought to fill Lee's position; Valentino did not advertise it on a website or the internet. [SAF ¶ 3; Doc. 59, Defs.' Resp. SAF ("RSAF") ¶ 3; Doc. 54-4, Dep. of Katie Dow "Dow Dep." at 67; Park Dep. at 7, 14]. The evidence

[1] For purposes of this Report and Recommendation, citations to the record are made to the CM/ECF heading at the top of the page cited, except for depositions, where the citations are to the page number of the hard copy deposition transcript.

shows that Valentino uses an informal process to fill its retail store positions, including the selling supervisor position at issue in this case, by relying on its employees to be aware of open positions and to recommend that their colleagues or friends apply for those positions. [Park Dep. at 14–15].

Defendants claim that Turner did not express interest in the selling supervisor position, but Turner disputes this, contending that she was told that Valentino would be eliminating the position. [RSMF ¶¶ 19–20]. Thus, although the evidence shows that Turner knew that Lee had left Valentino, it is disputed whether Turner knew that Valentino planned to fill Lee's position or that she could apply for the selling supervisor position. *See* [Turner Dep. at 135]. In any event, Turner did not apply for the selling supervisor position. [*Id.*].

It is undisputed that the selling supervisor position required at least three years of supervisor or senior sales experience. [Defs.' Ex. 9 (Doc. 54-13)]. Under the heading "Requirements" of the job description, it states "3+ years' experience as a Senior Sales Associate/Selling Supervisor at a luxury or contemporary brand." [*Id.* at 3]. It is also undisputed that Turner never worked as a retail supervisor or manager and that she had only about six months of previous experience as a senior sales associate. [Turner Dep. Ex. 2 (Doc. 54-4 at 23); Turner Dep. at 64]. In August 2019, Valentino selected Katerliya Hall, who is not African American, to fill the Atlanta

selling supervisor position. [SMF ¶ 25; RSMF ¶ 25; Dow Dep. at 77; Park Dep. at 17]. Hall previously managed other retail stores. [Defs.' Ex. 11 (Doc. 54-15)].

Turner subsequently obtained a declaration from Hall, which is attached to the Complaint. [Doc. 1-1 at 2–4 ("Hall Decl.")]. In the declaration, Hall states that upon being hired, she began supervising Turner. [*Id.* ¶ 4]. Hall goes on to declare:

> After a short period of time, I realized that Ms. Turner had extensive knowledge of and had been performing the job tasks of both a selling supervisor and store manager, and thus I quickly realized she herself was exceptionally qualified for the position I had obtained as selling supervisor.
>
> Although I know for a fact that I was qualified to be hired for the position of selling supervisor because I had previously been store manager for several different retailers, after getting to work with Ms. Turner, I will say that she was more qualified than me for this particular position – Ms. Turner possessed more of the job-task skill set than I did and I actually learned a lot about the job task required by my position from Ms. Turner.

[*Id.* ¶¶ 5, 6 (emphasis omitted)]. Turner did not complain to HR at any point in 2019 about Hall's selection for the selling supervisor position. [Turner Dep. at 199–200, 248–49].

On or about November 9, 2020, more than a year after Hall was selected, Turner called HR to complain that Dow was behaving unprofessionally toward her and discriminating against her. [Docs. 54-6, 54-7, Dep. of Sharouna Makhijani "Makhijani Dep." at 34]. On November 11, 2020, Turner emailed HR about

discrimination and complained to HR employee Sharouna Makhijani about race discrimination in the workplace.[2] [Turner Dep. at 241–44, 315; Makhijani Dep. at 33–37]. HR conducted an investigation and concluded that no evidence supported Turner's race discrimination allegations. [Makhijani Dep. at 37–38].

On November 27, 2020, Turner assisted a new customer identified as "Terrence Levinsin" in transactions that were later determined to be fraudulent. On that day, the store's credit card reader did not recognize Levinsin's phone as a valid form of payment. Turner then manually entered credit card numbers that Levinsin read to her for four separate transactions that totaled more than $30,000. [SMF ¶¶ 39, 40, 46; RSMF ¶¶ 39, 40, 46; Turner Dep. Ex. 19 (Doc. 54-4 at 70–72); Defs.' Ex. 24 (Doc. 54-28); Defs.' Ex. 23 (Doc. 54-27)]. Valentino's written policy prohibits entering credit card details manually without prior management approval. [SMF ¶ 44; RSMF ¶ 44; Turner Dep. Ex. 19]. It is undisputed that Dow had previously instructed staff not to enter credit cards manually absent managerial approval and that Turner did not have approval to enter Levinsin's credit card

[2] Defendants contend that Turner never mentioned race when she complained to HR. Indeed, the November 11th email discussed discrimination generally and did not mention race. [Turner Dep. Ex. 13 (Doc. 54-4 at 56)]. At her deposition, however, Makhijani testified that Turner had alleged race discrimination. [Makhijani Dep. at 33–37]. I have construed this fact in Turner's favor.

information manually. [SMF ¶¶ 41, 45; RSMF ¶¶ 41, 45; Turner Dep. Ex. 19; Defs.' Ex. 25 (Doc. 54-29)].

Following the incident (the "Levinsin Incident"), video surveillance footage indicated that Turner was not entirely honest about the circumstances. She claimed to have checked the name on Levinsin's credit card, but the store's video surveillance footage showed that Turner entered numbers that Levinsin read aloud, and that Turner never looked at Levinsin's ID or credit card. [SMF ¶¶ 47, 48; RSMF ¶¶ 47, 48; Turner Dep. Ex. 17 (Doc. 54-4 at 62–66); Defs.' Ex. 24]. Turner also claimed that Levinsin split a single large purchase into smaller transactions, but the video surveillance footage showed that Levinsin brought new items to the register four separate times. [SMF ¶ 49; RSMF ¶ 49; Turner Dep. Ex. 17; Defs.' Ex. 24].

Dow reported the Levinsin Incident to Valentino's director of retail operations during the same week that the incident happened. [Park Dep. at 25; Defs.' Ex. 23]. Approximately two months later, in January 2021, Valentino issued a written warning to Turner for violating Valentino's written policy when she manually entered Levinson's credit card number on four separate occasions. [SMF ¶ 50; Turner Dep. Ex. 19]. Defendants presented evidence showing that the two-month delay between the incident and the written warning was the result of Valentino's investigation (including reviewing the surveillance footage), the holidays, and

COVID. [Park Dep. at 26–29; Makhijani Dep. at 39–41, 45, 48–49; Dow Dep. at 59–60, 63–64]. Turner failed to dispute this evidence.

In March 2021, Valentino received a chargeback of $33,135.76 from the bank for the transactions involved in the Levinsin Incident, and HR met with Turner in April 2021 to inform her of the chargeback. [SMF ¶ 54; Makhijani Dep. at 60–62; Defs.' Ex. 29 (Doc. 54-33)]. Around this same time, Turner's lawyer sent a letter to Valentino threatening litigation. It is undisputed that Turner received no additional discipline following her April 2021 meeting with HR and that Turner received a raise after the incident, effective August 1, 2021. [SMF ¶¶ 55, 56; RSMF ¶ 56; Defs.' Ex. 29; Defs.' Ex. 37 (Doc. 54-41)].

III. SUMMARY JUDGMENT STANDARD

Summary judgment is authorized 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 party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Bingham, Ltd. v. United States*, 724 F.2d 921, 924 (11th Cir. 1984). The movant carries this burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The court must

view the evidence and all factual inferences in the light most favorable to the nonmoving party. *Adickes*, 398 U.S. at 158–59.

Once the moving party has adequately supported its motion, the nonmoving party must come forward with specific facts that demonstrate the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving party must "go beyond the pleadings" and present competent evidence designating "specific facts 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 nonmoving party's case is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

When considering motions for summary judgment, the court does not make decisions as to the merits of disputed facts. *See Anderson*, 477 U.S. at 249. Rather, the court only determines whether there are genuine issues of material fact to be tried. *Id.* Applicable substantive law identifies those facts that are material and those that are not. *Id.* at 248. Disputed facts that do not resolve or affect the outcome of a suit will not properly preclude the entry of summary judgment. *Id.*

IV. DISCUSSION

a. Count One: Discrimination

In her Complaint, Turner asserts race discrimination claims under 42 U.S.C. § 1981. [Compl. ¶¶ 51–52]. Section 1981(a) provides, in relevant part, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981(a). "[T]he term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). "It is well-settled law that § 1981 prohibits race discrimination in both the public and private employment context." *White v. Crystal Mover Servs., Inc.*, No. 1:14-cv-3202-ELR-JSA, 2016 WL 8787057, at *13 (N.D. Ga. Jan. 26, 2016), *adopted by* 2016 WL 9065878 (N.D. Ga. Mar. 14, 2016), *aff'd*, 675 F. App'x 913 (11th Cir. 2017).

Courts apply the same analytical framework when addressing claims of discrimination under Title VII and Section 1981. *Bryant v. Jones*, 575 F.3d 1281, 1296 n.20 (11th Cir. 2009). Where, as here, a plaintiff claims discrimination based on circumstantial evidence under either Title VII or Section 1981, courts ordinarily

apply the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under the *McDonnell Douglas* framework, the plaintiff must first establish a prima facie case of discrimination. *Id.* at 802–04. Once the plaintiff employee has established a prima facie case, the burden shifts to the defendant employer to proffer a legitimate, non-discriminatory reason behind the complained-of employment action. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254–56 (1981) ("*Burdine*"). This "burden is exceedingly light." *Turnes v. AmSouth Bank, NA*, 36 F.3d 1057, 1061 (11th Cir. 1994) (internal quotation marks omitted and citation omitted). If the employer articulates a legitimate, non-discriminatory reason, the presumption is eliminated, and the plaintiff is given an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the employer is a pretext for discrimination. *Springer v. Convergys Customer Mgmt. Grp., Inc.*, 509 F.3d 1344, 1347 (11th Cir. 2007). The plaintiff retains the ultimate burden of persuading the finder of fact that the defendant acted with discriminatory intent. *Burdine*, 450 U.S. at 253.

1. Selling Supervisor Claim

a. The Prima Facie Case

In her response to the Motion for Summary Judgment, Turner argues that she made out a prima facie case of discrimination in connection with Valentino's failure

to promote her to the selling supervisor position in 2019. To establish a prima facie case of race discrimination based on a failure to promote, Turner must show that she "(1) belonged to a protected class; (2) was qualified for and applied for a position that the employer was seeking to fill, (3) was rejected despite [her] qualifications, and (4) that 'the position was filled with an individual outside the protected class.'" *Anthony v. Georgia*, 69 F.4th 796, 807 (11th Cir. 2023) (quoting *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 768 (11th Cir. 2005)). The second prong of the test is modified where, as here, an employer does not formally announce a position and uses informal and subjective procedures to identify a candidate. In that situation, a plaintiff need not show that she applied for the position—only that the employer had some reason to consider her for the post. *Vessels*, 408 F.3d at 768.

In their Motion for Summary Judgment, Defendants argue, among other things, that Turner cannot satisfy her prima facie case because she was not qualified for the selling supervisor position. "For the purposes of the *prima facie* case . . ., 'qualified' refers to minimal qualifications rather than relative qualifications or optimal performance." *White*, 2016 WL 8787057, at *18. To determine whether a plaintiff was qualified for a particular position, "a court must focus on the plaintiff's skills and background." *Id.* "At the *prima facie* stage, [the plaintiff] is not required to prove that [s]he was qualified, but at the very least, [s]he must present evidence

that would be sufficient to establish a genuine issue of fact regarding whether [s]he was minimally qualified." *Id.*

Defendants cite to undisputed evidence that the position required at least three years of experience as a senior sales associate or selling supervisor at a luxury or contemporary brand; that Hall possessed that experience; and that Turner did not possess that experience. [Doc. 54-43 at 21]. In her response brief, Turner does not mention the three-year experience requirement. [Doc. 62]. Rather, she appears to argue that she was qualified for the position because she "did the job of both a selling supervisor and store manager all the time," noting that she had keys to the Atlanta store, could open and close the store each day, and could address customer complaints. [*Id.* at 11].

Turner has failed to create a material issue of fact as to whether she was qualified for the position. She has not presented evidence, for example, that other experience could be substituted for the required three years as a senior sales associate or selling supervisor at a luxury or contemporary brand. Nor has she shown that having store keys, opening and closing the store, and addressing customer complaints were activities that were performed exclusively by the selling supervisor or store manager. For their part, Defendants provided evidence showing that everyone on the team had a key to the store and that sales associates could open and

close the store and handle some client complaints. [Dow Dep. at 28–29, 31, 41–43, 47–48; Makhijani Dep. at 17].

In the absence of evidence showing that Turner was qualified for the selling supervisor position, she has failed to create a prima facie case of discrimination based on Valentino's failure to promote her to the selling supervisor position. *See Anthony*, 69 F.4th at 807 (finding that a plaintiff could not establish a prima facie case for his failure to promote claim where the plaintiff was not qualified for the position); *Smith v. Thomasville Ga.*, 753 F. App'x 675, 690 (11th Cir. 2018) (finding that plaintiffs failed to establish prima facie cases of discrimination where they did not point to evidence creating a genuine issue of material fact that they were qualified for the promotions at issue). Summary judgment, therefore, is warranted on Turner's discrimination claim. *Anthony*, 69 F. 4th at 807.

Summary judgment is also warranted on a second, independent basis, i.e., that even if Turner had created a prima facie case of discrimination, she has failed to come forward with evidence of pretext. In the interest of providing a thorough Report and Recommendation and assistance to the district judge, I will address the rest of the burden-shifting analysis and explain how I reached this conclusion.

b. Defendants' Stated Reason

Had Turner created a prima facia case of race discrimination, the burden would have shifted to Defendants to articulate a legitimate, non-discriminatory reason for not promoting Turner to the selling supervisor position. *Burdine*, 450 U.S. at 254–56. Here, Defendants state that they selected Hall for the selling supervisor position because:

> Hall's credentials were objectively superior to those of Turner, as Hall's résumé boasted nearly two decades of retail experience, including working as a manager and completing three management training programs, whereas Turner had only worked in luxury retail for four years and never in a supervisory capacity.

[Doc. 54-43 at 21]. In coming forth with this reason, Defendants have met their exceedingly light burden of articulating a legitimate, non-discriminatory reason. *See Conaway v. Gwinnett Cnty., Ga.*, No. 1:16-cv-1418, 2019 WL 2611071, at *4 (N.D. Ga. June 25, 2019) (noting that the defendants satisfied their burden to articulate a legitimate, non-discriminatory reason for their decision not to promote the plaintiff where the defendants stated that they selected a more qualified candidate). The burden would then shift to Turner to show pretext. *Springer*, 509 F.3d at 1347.

c. Pretext

A plaintiff may show pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing

that the employer's proferred [sic] explanation is unworthy of credence." *Brooks v. Cnty. Comm'n of Jefferson Cnty.*, 446 F.3d 1160, 1163 (11th Cir. 2006) (citation and quotation marks omitted). The plaintiff "must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc) (citations omitted). The plaintiff must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [the defendant's] proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Jackson v. State of Ala. Tenure Comm'n*, 405 F.3d 1276, 1289 (11th Cir. 2005) (quoting *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997)). Further, "[t]he pretext inquiry focuses on the employer's beliefs, not the employee's." *McPhie v. Yeager*, 819 F. App'x 696, 699 (11th Cir. 2020) (emphasis in original). A reason cannot be "pretext *for discrimination* unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) (emphasis in original) (quotation marks omitted); *see also Brooks*, 446 F.3d at 1163 (same).

Here, Turner fails to address Defendants' stated reason head on. As noted above, Turner fails to dispute Defendants' evidence that she lacked the required

experience for the position. However, she advances several complaints about how Valentino did business and how she was treated. While it is not entirely clear from Turner's brief if these arguments were presented in an attempt to show pretext for discrimination, I have analyzed each of them in turn.

First, Turner states that no African American employee held a supervisory or management position at the Atlanta store until Turner filed this lawsuit, at which point, all of the store managers Valentino hired for the Atlanta store were African American. [Doc. 62 at 2, 8–10]. The racial makeup of Valentino's supervisors has no bearing on whether Defendants' stated reason for hiring Hall is pretextual. And, the fact that Valentino may have hired African American store managers after Turner filed her Complaint is not probative of whether Turner suffered discrimination when Valentino selected someone else for the selling supervisor position. *See Chatman v. Wellstar Health Sys., Inc.*, No. 1:05-cv-3217-WSD-RGV, 2007 WL 2049716, at *13 (N.D. Ga. July 10, 2007) ("Nothing about [the plaintiff's supervisor's] subsequent actions is probative of whether plaintiff suffered discrimination when [her employer] selected [another employee] for the position."). This evidence, therefore, does not show pretext.[3]

[3] This type of evidence might be relevant for a disparate impact claim. Such claims arise where there is a significant statistical disparity between the proportion

Next, Turner points to the fact that Valentino filled the selling supervisor role without informing her of the position or giving her the opportunity to apply, even though her performance was consistently above average. [Doc. 62 at 8]. Again, this fact has nothing to do with Defendants' stated reason for hiring Hall, and it ignores the undisputed evidence that Turner did not meet the basic qualifications for the position. Moreover, there is no general rule that employers must post their open positions, nor has Turner cited to any evidence that Defendants violated a company policy by not posting this particular position. In fact, there is no evidence that there was anything irregular about the way Hall was selected. Defendants' failure to post or advertise the selling supervisor position is insufficient to establish pretext. *See Springer*, 509 F.3d at 1350.

Turner next attempts to show pretext by claiming that Dow accused her and another African American associate working in the store of being involved in a theft

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of the protected class in the available labor pool and the proportion of the protected class hired as well as a specific, facially neutral employment practice that causes the disparity. *See EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1274 (11th Cir. 2000). Here, Turner has not made such a claim in her Complaint. And, because Turner is proceeding only under Section 1981 (and not Title VII), she cannot make out such a claim. Disparate impact claims are unavailable under Section 1981 because Section 1981 requires a discriminatory intent. *See Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999) ("A showing of disparate impact through a neutral practice is insufficient to prove a § 1981 violation because proof of discriminatory intent is essential [to a § 1981 claim].").

ring. [Doc. 62 at 8, 12]. Turner, however, fails to provide evidentiary support for this contention, citing only to Hall's declaration. The declaration does not state that Dow accused Turner of being involved in a theft ring. [Hall Decl. ¶ 8]. Instead, Hall states that Dow accused an African American male of being a participant in a theft ring; it does not say that Turner was also accused. [*Id.*]. Because Turner failed to provide evidentiary support for this argument, she has not created a fact dispute regarding pretext. Additionally, even if there had been a false allegation against Turner, that fact taken alone would not show pretext for Valentino's failure to promote Turner to a position for which she was not qualified. *See White*, 2016 WL 8787057, at *23 (noting that an isolated comment unrelated to a promotion decision did not establish pretext).

Turner also complains that she was treated differently than her co-workers because she was required to return to work in November 2020 after having COVID, even though she was still testing positive for COVID. [Doc. 62 at 8–9]. In their reply, Defendants point out that Turner's assertions are not supported by the record evidence. But even if this fact were true, it has no bearing on either Turner's or Hall's qualifications—i.e., the issues central to Valentino's stated race-neutral reason for its decision to hire Hall for the selling supervisor position more than a year earlier.

Turner also complains that Valentino did not track the race of its job applicants and had no diversity outreach program. [Doc. 62 at 9]. Turner does not, however, point to any authority requiring Valentino to either track applicant demographics or have a diversity outreach program, and fails to show how this might call into doubt Defendants' stated reason for hiring Hall for the selling supervisor position.[4]

Turner argues that the two-month delay between the Levinsin Incident and the written warning shows pretext. [Doc. 62 at 12]. Turner points to evidence that Valentino took two months to issue a written warning to her after the Levinsin Incident. Again, she fails to show how the Levinsin Incident (and her later discipline for it) had anything to do with Valentino's selection for the selling supervisor promotion. Indeed, it would be impossible to do so because the Levinsin Incident occurred in November 2020, more than a year after Hall was selected for the selling supervisor position. *See Tomaszewski v. City of Philadelphia*, 460 F. Supp. 3d 577, 597 (E.D. Pa. 2020) (finding that a plaintiff could not establish pretext based on

[4] Defendants note that as a matter of public policy, the EEOC has instructed that "employers should not request information that discloses or tends to disclose an applicant's race unless it has a legitimate business need for such information." *See* https://www.eeoc.gov/pre-employment-inquiries-and-race (last visited Sept. 25, 2023).

comments made months after the decision not to promote the plaintiff, noting that the comments "are too temporally remote . . . to create a genuine dispute of material fact regarding pretext"). In any event, Turner fails to refute Valentino's evidence indicating that it required additional time to investigate the Levinsin Incident fully. [Dow Dep. at 59–60, 63–64; Park Dep. at 26–29; Makhijani Dep. at 39–41, 45, 48–49]. Under those circumstances, Turner has not shown pretext based on this argument.

Finally, Turner argues that because both she and Hall believed that Turner was the most qualified person for the job, Defendants' stated reason is pretextual. [Doc. 62 at 11–12]. Hall's opinion is irrelevant because she was not the decision-maker. *See Conaway*, 2019 WL 2611071, at *6 ("[T]he relevant question is not what other employees thought; it's what [the decision-maker] thought."). Nor can Turner show pretext based on her own opinion that she was more qualified than Hall for the selling supervisor position. "To show pretext, the employee must confront the employer's seemingly legitimate reason for not promoting her 'head on and rebut it.'" *Kidd v. Mando Am. Corp.*, 731 F.3d 1196, 1206 (11th Cir. 2013) (quoting *Chapman*, 229 F.3d at 1030). A plaintiff "cannot succeed by simply quarreling with the wisdom of that reason." *Chapman*, 229 F.3d at 1030. "Indeed, 'a plaintiff cannot prove pretext by simply arguing or even by showing that [s]he was better qualified

than the person who received the position [s]he coveted." *Kidd*, 731 F.3d at 1206 (quoting *Springer*, 509 F.3d at 1349) (alterations in original). "The plaintiff 'must show that the disparities between the successful applicant's and [her] own qualifications were of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff.'" *Id.* (quoting *Springer*, 509 F.3d at 1349) (alteration in original).

Turner has presented no evidence to show that the decision-maker thought Turner was more qualified than Hall for the position, and as discussed above, the undisputed evidence shows that Turner did not even meet the basic qualifications for the selling supervisor position. Turner has presented nothing to show that the difference between her qualifications and Hall's qualifications was "of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen" Hall over Turner. *Springer*, 509 F.3d at 1349. Turner's arguments concerning her relative qualifications for the selling supervisor position call into question Valentino's business judgment, rather than its honesty, and the Court cannot second-guess Valentino's business judgment. *See Kidd*, 731 F.3d at 1207 (noting that the Court's job is "to determine 'whether the employer gave an honest explanation' to justify its hiring decisions," and "[i]f the employer gives one, [the Court is] not in a position to 'second-guess [its] business judgment'") (third

alteration in original) (quoting *Chapman*, 229 F.3d at 1030). The Court does not sit as "'a super-personnel department that reexamines an entity's business decisions," and that is what Turner is asking the Court to do in this case. *Chapman*, 229 F.3d at 1030. Turner, therefore, has not created a fact issue as to pretext based on this argument.

For the reasons discussed above, Turner has failed to present evidence sufficient to create a fact dispute as to whether Valentino's stated reason was actually a pretext for discrimination. This is an additional, independent basis for granting summary judgment on Turner's discrimination claim relating to the failure to promote her to the selling supervisor position.

2. Other Potential Discrimination Claims

After Turner filed this lawsuit, Defendant Dow left Valentino's employment, leaving the store manager position open. In her response to the Motion for Summary Judgment, Turner claims that Valentino discriminated against her when it failed to promote her to store manager. [Doc. 62 at 12–13; Turner Dep. at 301; Dow Dep. at 9; Makhijani Dep. at 12, 26–30]. The evidence shows that in 2021, Turner applied for, and received an interview for, the store manager position, but Valentino chose

another candidate for that position. [Makhijani Dep. at 26-30].[5] Turner did not amend (or seek leave to amend) her Complaint to add a claim for failure to promote her to store manager in 2021, and she may not add this claim in her response to the Motion for Summary Judgment. *See Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) ("A plaintiff may not amend her complaint through argument in a brief opposing summary judgment."). To the extent Turner seeks to add a claim based on her failure to be promoted to store manager, summary judgment should be granted as to this claim as well.

In her Complaint, Turner also alleged that Defendants discriminated against her based on her race by disciplining her "in a manner that affects her ability to get a bonus and by excluding her from benefits allotted to other employees such as two consecutive days off, . . . along with interfering with her client transactions which affected her ability to make money, and never considering or offering a pay raise or other promotion even for the currently, open position." [Compl. ¶ 52]. Defendants

[5] In her Statement of Additional Fact 17, Turner states that she was not interviewed for the store manager position filled by Maurice Williams, citing to pages 27–29 of Makhijani's deposition. [Doc. 65 at 5]. The testimony in those pages, however, contradicts Turner's statement. When asked about the store manager position filled by Maurice Williams, Makhijani testified twice that Turner interviewed for that position. [Makhijani Dep. at 27]. Moreover, it appears that Turner could not establish a prima facie case of discrimination based on Valentino's selection of Maurice Williams, because he is African American.

moved for summary judgment on those claims, arguing that the complained-of acts did not amount to adverse actions. [Doc. 54-43 at 23–26]. In her response brief, Turner did not respond to those arguments or attempt to present evidence of a prima facie case of discrimination based on these incidents. [Doc. 62]. Turner, therefore, has abandoned those claims, and the Motion for Summary Judgment should be granted as to those claims. *See Clark v. City of Atlanta, Ga.*, 544 F. App'x 848, 855 (11th Cir. 2013) (per curiam) (concluding that plaintiffs abandoned their excessive force claim and their state law claims by failing to respond to the defendants' summary judgment arguments relating to those claims); *Adams v. Heinrichs*, No. 1:20-cv-4899-JPB, 2022 WL 4332059, at *5 n.4 (N.D. Ga. Sept. 19, 2022) (finding that a plaintiff abandoned certain claims by failing to respond to the defendants' summary judgment arguments relating to the claims).

B. Count Two: Retaliation

Turner also asserts a retaliation claim under Section 1981. [Compl. ¶¶ 53–54]. Section 1981 "prohibits an employer from retaliating against its employee in response to the employee's complaint of race-based discrimination." *Kennedy v. Norfolk S. Corp.*, No. 1:10-cv-3427-TCB-RGV, 2012 WL 12985418, at *9 (N.D. Ga. Apr. 13, 2012), *adopted by* 2012 WL 12985419 (N.D. Ga. May 15, 2012) (internal quotation marks and citation omitted). The legal standard applicable to

Title VII retaliation claims and Section 1981 retaliation claims is identical. *Godwin v. Corizon Health*, No. 16-41-B, 2017 WL 1362033, at *6 (S.D. Ala. Apr. 10, 2017), *aff'd*, 732 F. App'x 805 (11th Cir. 2018). Courts use the burden-shifting framework established in *McDonnell Douglas* to analyze retaliation claims based on circumstantial evidence. *Moore v. Cobb Cnty. Sch. Dist.*, No. 1:19-CV-4174-MLB, 2021 WL 3661223, at *12 (N.D. Ga. Aug. 18, 2021).[6]

1. The Written Warning Claim

a. The Prima Facie Case

To establish a prima facie case of retaliation, a plaintiff must show that: (1) she engaged in statutorily protected activity; (2) she suffered an adverse employment action; and (3) there was some causal relation between the two events. *Gogel v. Kia Motors Mfg. of Ga., Inc.*, 967 F.3d 1121, 1134 (11th Cir. 2020) (en banc). Once the plaintiff establishes a prima facie case of retaliation, the burden of production shifts to the employer to articulate "a legitimate, non-discriminatory reason for the employment action." *Id.* at 1135. If the employer meets its burden, the plaintiff "must demonstrate that 'her protected activity was a but-for cause of the alleged adverse action by the employer.'" *Id.* (quoting *Univ. of Tex. Sw. Med. Ctr.*

[6] Turner does not argue that she has direct evidence of retaliation, and the record would not support such an argument.

v. Nassar, 570 U.S. 338, 362 (2013) ("*Nassar*"). "In other words, 'a plaintiff must prove that had she not [engaged in the protected conduct], she would not have been fired.'" *Id.* (alteration in original) (quoting *Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 924 (11th Cir. 2018)).

Defendants argue, among other things, that Turner fails to establish the second element of her prima facie case—that she suffered a materially adverse employment action when she received the written warning for the Levinsin Incident. "Materially adverse actions are those that might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Smith v. City of Fort Pierce, Fla.*, 565 F. App'x 774, 777–78 (11th Cir. 2014) (internal quotation marks omitted). "Under Eleventh Circuit precedent, if an employer's conduct negatively affects an employee's salary, job status, title, position, job duties, or employment opportunities, such conduct qualifies as an adverse employment action." *Barthelemy v. City of Atlanta*, No. 1:18-cv-4043-TWT-CMS, 2019 WL 13268614, at *12 (N.D. Ga. Mar. 25, 2019), *adopted by* 2019 WL 13268607 (N.D. Ga. Aug. 6, 2019). "An employee's complaint does not immunize her from 'petty slights or minor annoyances that often take place at work and all employees experience.'" *Plair v. Interactive Commc'n Int'l P.C.*, No. 1:21-cv-2455-WMR-LTW, 2023 WL 2506423,

at *5 (N.D. Ga. Feb. 9, 2023) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)), *adopted by* 2023 WL 2506426 (N.D. Ga. Feb. 28, 2023).

Here, Turner argues that the written warning amounts to an adverse action. [Doc. 62 at 14]. Although Turner states in a conclusory fashion that this warning "led her to be ineligible for promotion," Turner fails to point to any evidence to support this contention. [*Id.*]. To avoid summary judgment, a "[p]laintiff is required to point to specific evidence 'showing that there is a genuine issue for trial.'" *Plair*, 2023 WL 2506423, at *5 (quoting *Celotex*, 477 U.S. at 324). The Court need not accept unsupported assertions or dig through the record to find evidence to support Turner's contentions. *See id.* ("The Court will not accept conclusory assertions unsupported by any evidence, nor 'dig through volumes of documents and transcripts to find evidence to support Plaintiff's assertions.'") (quoting *Chavez v. Sec'y Fla. Dep't of Corr.*, 647 F.3d 1057, 1061 (11th Cir. 2011)).

Defendants provided undisputed evidence that the written warning did not affect Turner's pay or job duties and that Turner later received a pay raise. [SMF ¶ 56; RSMF ¶ 56]. Absent some evidence that the written warning negatively affected Turner in some material way, the written warning does not qualify as an adverse employment action. *Perry v. Rogers*, 627 F. App'x 823, 832–33 (11th Cir. 2015) (per curiam); *Cisero v. ADT LLC of Del.*, No. 1:19-cv-4319-SDG-CMS, 2021

WL 1712206, at *13 (N.D. Ga. Apr. 27, 2021), *adopted by* 2021 WL 4472977 (N.D. Ga. Sept. 30, 2021). Turner, therefore, cannot establish the second element of her prima facie case, and Defendants' Motion for Summary Judgment on Turner's retaliation claim should be granted on this basis.

Defendants also argue, alternatively, that even if the January 2021 written warning qualified as a materially adverse action, Turner cannot satisfy the third element of her prima facie case because she has failed to present evidence of a causal connection between her protected activity and the written warning. Although Turner's initial complaint of discrimination (November 12, 2020) was close in time to issuance of the written warning (January 22, 2021), "post-*Nassar*, temporal proximity alone is no longer enough, and will not suffice to show a defendant intended to retaliate against a plaintiff." *Cisero*, 2021 WL 1712206, at *13 (internal quotation marks and citation omitted). "A plaintiff must now show the causal connection under a but-for standard, requiring a showing 'that she would not have suffered the adverse employment action if she had not engaged in the protected conduct.'" *Id.* (quoting *Duncan v. Alabama*, 734 F. App'x 637, 641 (11th Cir. 2018)). "It is well established that intervening events can negate the inference of causation that may arise from temporal proximity." *Id.* at *14 (internal quotation marks and citation omitted).

Here, Turner has failed to dispute that she violated company policy in connection with the Levinsin Incident or show that the written warning was not appropriate. Her behavior constitutes an intervening event that severed any possible inference of causation between Turner's alleged protected conduct and the issuance of the written warning. *Cisero*, 2021 WL 1712206, at *14. Turner, therefore, has failed to provide evidence to create a fact dispute as to causation, and this is an alternative, independent reason why Defendants' Motion for Summary Judgment on Turner's retaliation claim should be granted.[7]

2. Other Potential Retaliation Claims

In her Complaint, Turner also alleged that Defendants retaliated against her by disciplining her "in a manner that affects her ability to get a bonus . . . and also by excluding her from benefits allotted to other employees such as two consecutive

[7] The retaliation claim also fails as a matter of law because there is no evidence of pretext. Turner admits that she engaged in the conduct underlying the written warning, and she does not argue that the written warning was undeserved. [SMF ¶¶ 39–45, 47–49; RSMF ¶¶ 39–45, 47–49]. There is no evidence to suggest that the issuance of the written warning was retaliatory, as required by the pretext inquiry. *See Hawkins v. Potter*, 316 F. App'x 957, 962 (11th Cir. 2009) (per curiam) (noting that an employee failed to show that his employer's stated reasons for issuing a written warning—the employee's admitted misconduct—were pretext for retaliation); *Cabrera v. Town of Lady Lake, Fla.*, Case No. 5:10-cv-415-Oc-34PRL, 2013 WL 12092573, at *21 (M.D. Fla. Mar. 2013) (finding that a plaintiff failed to establish pretext where the plaintiff admitted to the behavior which the employer classified as misconduct prohibited by its policies).

days off, . . . along with interfering with her client transactions which affected her ability to make money, and never considering or offering a pay raise or other promotion even for the currently, open position. . . ." [Compl. ¶ 54]. As noted above in the discrimination discussion, Defendants moved for summary judgment on those claims, and Turner did not respond to those arguments or present evidence of a prima facie case of retaliation based on these incidents. [Doc. 62]. Turner, therefore, has abandoned those claims, and the Motion for Summary Judgment should be granted as to those claims. *See Clark*, 544 F. App'x at 855.

In her response brief, Turner complains that on April 9, 2021, "within hours of Ms. Turner's lawyer sending a letter with a copy of a lawsuit attached . . . Valentino [employee Makhijani] stated that it was going to take more formal action against Ms. Turner." [Doc. 62 at 15]. The evidence cited in support of this assertion does not support this fact, but even if it did, there is no evidence that Valentino, in fact, took any additional disciplinary action in connection with the Levinsin Incident. In the absence of some evidence to show that Turner suffered an adverse action following the lawyer's letter to Valentino, there is no actionable retaliation claim.

C. Counts Three and Four: Punitive Damages and Attorney's Fees

Turner also asserts claims for punitive damages and attorney's fees. [Compl. ¶¶ 55–56]. Both of those claims fail because Turner's underlying substantive claims fail. *See Coleman v. City of Stockbridge, Ga.*, No. 1:15-cv-1913-ELR, 2018 WL 11483056, at *7 (N.D. Ga. May 9, 2018) (dismissing a claim for punitive damages under Section 1981 where the underlying substantive Section 1981 claim was subject to dismissal); *see also Johnson v. County of Paulding, Ga.*, No. 4:18-cv-136-HLM, 2018 WL 10582211, at *6 n.5 (N.D. Ga. Oct. 31, 2018) (noting that a claim for attorney's fees under 42 U.S.C. § 1988 fails "in the absence of any viable underlying claim"), *aff'd*, 780 F. App'x 796 (11th Cir. 2019). Summary judgment, therefore, should be granted on Turner's claims for punitive damages and attorney's fees.

V. CONCLUSION

For the reasons stated, I **RECOMMEND** that the Motion for Summary Judgment [Doc. 54] be **GRANTED** and that summary judgment be entered in Defendants' favor.

Because this is a Final Report and Recommendation, and there is nothing further in this action pending before the undersigned Magistrate Judge, the Clerk is **DIRECTED** to terminate the reference.

SO REPORTED AND RECOMMENDED, this the 10th day of October, 2023.

Catherine Salinas

CATHERINE M. SALINAS
UNITED STATES MAGISTRATE JUDGE