IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

VÉRONIQUE M. LAFONT,

Plaintiff,

v.

FEDERAL EXPRESS CORPORATION, dba FedEx, a Delaware corporation,

Defendant.

Case No. 3:16-cv-02072-SB

FINDINGS AND RECOMMENDATION

BECKERMAN, U.S. Magistrate Judge.

Plaintiff Véronique LaFont ("LaFont") sues her former employer, defendant Federal Express Corporation ("FedEx"), alleging claims for breach of express and implied-in-fact contract. FedEx moves for summary judgment on LaFont's claims and LaFont moves to strike portions of FedEx's reply brief. The Court has jurisdiction over this matter under 28 U.S.C. § 1332(a). For the reasons explained below, the Court recommends that the district judge grant FedEx's motion for summary judgment and deny LaFont's motion to strike.[1]

[1] The parties raise several evidentiary objections. The Court bases its opinion herein only on evidence that is relevant and that the parties could present in an admissible form at trial, and therefore declines to address separately each evidentiary objection. *See Criminal Prods., Inc. v. Behaki*, No. 17-00157-SI, 2018 WL 2875892, at *2 (D. Or. June 11, 2018) ("'When evidence is

BACKGROUND[2]

In October 2013, LaFont responded to one of FedEx's job postings on a private recruitment site. (Decl. Véronique LaFont Supp. Pl.'s Opp'n Def.'s Mot. Summ. J. ("LaFont Decl.") ¶ 2, ECF No. 60.) LaFont answered some of the job posting's questions but was called away from her computer before she could complete the application process. (LaFont Decl. ¶ 2.) LaFont never completed the application process, provided any electronic signatures, or knowingly populated any fields in the job posting's candidate profile. (LaFont Decl. ¶¶ 2, 4, 8; *see also* LaFont Dep. 40:20-23, 63:2-8, 74:3-6, Sept. 5, 2018, reflecting that LaFont testified that she did not recall viewing the posting's candidate profile or "digitally signing" the candidate profile).

Around the same time, FedEx's online recruitment system, known as My Staffing Pro, received pre-employment paperwork about LaFont, including a digitally signed candidate profile.[3] (*See* Smith Decl. ¶¶ 3-5; LaFont Dep. Ex. 6, at 10; LaFont Decl. ¶ 5.) The candidate profile stated, among other things, that the applicant's employment would be "at will" and

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not presented in an admissible form in the context of a motion for summary judgment, *but it may be presented in an admissible form at trial*, a court may still consider that evidence.'") (citation omitted); *Ambrose v. J.B. Hunt Transp., Inc.*, No. 12-01740-HU, 2014 WL 585376, at *5 (D. Or. Feb. 13, 2014) (explaining that relevancy objections are duplicative of the summary judgment standard); *Pegatron Tech. Serv., Inc. v. Zurich Am. Ins. Co.*, 377 F. Supp. 3d 1197, 1198 (D. Or. 2019) (declining to "separately address each evidentiary objection" on summary judgment).

[2] Unless otherwise noted, these facts are undisputed or drawn from LaFont's testimony and, in the event of a dispute, are construed in the light most favorable to LaFont, the party opposing summary judgment. *See Anemone v. Metro. Transp. Auth.*, 629 F.3d 97, 99 n.1 (2d Cir. 2011) (same).

[3] FedEx received the paperwork from the Internet Protocol ("IP") address 24.22.123.69, but LaFont's IP address "was and is 10.0.0.189." (Decl. Sidney Smith Supp. Def.'s Mot. Summ. J. ("Smith Decl.") ¶ 5, ECF No. 52; LaFont Decl. ¶ 6.)

terminable "with or without cause." (LaFont Dep. Ex. 6, at 7) (all caps omitted). The candidate profile also included a six-month deadline to file claims against the company:

> To the extent the law allows an employee to bring legal action against the company or any manager employed by the company and acting in his or her managerial capacity, I agree to bring any claim within the time provided by law or no later than six (6) months from the date of the event forming the basis of my claim, whichever expires first. I realize and acknowledge that I am agreeing to bring any claim I may have within a shorter time than may otherwise be provided by law.

(LaFont Dep. Ex. 6, at 9) (all caps omitted).

Soon thereafter, Tim Palmer ("Palmer"), a FedEx operations manager, contacted LaFont about a job. (LaFont Dep. 39:8-14; LaFont Decl. ¶ 7; Decl. Tim Palmer Supp. Def.'s Mot. Summ. J. ("Palmer Decl.") ¶ 2, ECF No. 51.) LaFont met with Palmer two times. (LaFont Decl. ¶ 7.) Palmer offered LaFont a job but never showed LaFont the candidate profile FedEx received, asked LaFont to sign a candidate profile, or mentioned an employment agreement. (LaFont Decl. ¶ 7.) LaFont accepted Palmer's offer of employment and signed a hiring letter. (LaFont Decl. ¶ 7; Palmer Decl. Ex. A.) The hiring letter did not include, or refer to, a six-month limitations period.

LaFont started working at FedEx in early January 2014. (LaFont Dep. Ex. 5; LaFont Dep. 47:7-10.) The following month, in mid-February 2014, LaFont used FedEx's computer-based training system to participate in FedEx's workplace violence training and to acknowledge her receipt of, among other things, FedEx's employee handbook. (Decl. Roberta Garner Supp. Def.'s Mot. Summ. J. ("Garner Decl.") ¶¶ 9-10, ECF No. 54.)

LaFont's employee handbook acknowledgment included a bold-typed, all-caps "**DISCLAIMER**," stating that FedEx's employee handbook was "not a contract of employment, nor should its provisions be read or implied to provide for one." (Garner Decl. Ex. F, at 1) (bold

type, all caps, and underline omitted). The Disclaimer explained that LaFont's employment was "at-will which means that either [LaFont] or [FedEx could] terminate the relationship at any time." (Garner Decl. Ex. F, at 1.) The Disclaimer also stated that (1) FedEx's "people manual" addresses personnel policies that FedEx references throughout the employee handbook, (2) FedEx's people manual is "not a contract of employment and no such contract may be implied from its provisions," (3) FedEx's people manual "does not create legal rights or obligations regarding any aspect of your employment relationship," (4) FedEx's employees can access the people manual on FedEx's intranet site or by asking a manager for a copy of the manual, and (5) FedEx's employees cannot "alter the nature of his or her at-will employment by taking any unilateral action." (Garner Decl. Ex. F, at 1.)

Also in mid-February 2014, LaFont used FedEx's computer-based training system to acknowledge her receipt of FedEx's acceptable conduct policy. (Garner Decl. ¶ 12.) FedEx's acceptable conduct policy is part of FedEx's people manual, and it included a provision stating that the relationship between FedEx and "any employee may be terminated at the will of either party" and "the policies and procedures set forth in this [people] manual provide guidelines for . . . employees during employment but do not create contractual rights regarding termination or otherwise." (Garner Decl. Ex. G, at 9.) The acceptable conduct policy also included a provision governing workplace violence. (*See* Garner Decl. Ex. G, at 1.) The workplace violence provision provided:

> Violent or threatening behavior is not tolerated in the workplace. 'Workplace Violence' is aggressive and/or other unwelcome and offensive physical contact. It can also include, but is not limited to, bullying, threats, threatening gestures, stalking, or any verbal or physical act of hostility or aggression that is perceived to put anyone's safety at risk. All employees are responsible for advising management, the FedEx Express Security Department, HR, or People Help of any actual or potentially serious or violent

> situations *as stated in the Workplace Violence guideline of 8-80 Security*.

(Garner Decl. Ex. G, at 1) (emphasis added).

Like the acceptable conduct policy, FedEx's security policy is part of FedEx's people manual. (*See* Garner Decl. Ex. J, at 1.) The security policy defined workplace violence in the same way it is defined in the acceptable conduct policy. (Garner Decl. Ex. J, at 1.) The security policy also provided employees with instructions on how to report any actual or potentially serious or violent situations:

> When Violence Occurs. Dial 911 immediately when workplace violence is occurring or is about to occur. In cities and areas that do not have the 911 system, call the local police or state agency that can respond immediately. After contacting 911 (or the appropriate law agency), contact the FedEx Express Security Department.
>
> Note: Managers should use discretion in accessing 911 for situations that are routinely resolved through the application of Corporate policies—such as 2-5 Acceptable Conduct.
>
> How to Report Threats or Potential Situations. When unusual actions, threats, or situations indicate a potential for violence exists but does not pose immediate danger, employees should report the situations to one or more of the following resources:
>
> - Your management
> - The FedEx Express Security Department
> - Your HR Advisor/Representative or office
> - The IMS/TAO Bulletin Board 'WORKPLACE-VIOLENCE'
>
> If you are unable to contact any of the above parties, People Help is available 24 hours a day, 7 days a week, at 1-800-274-HELP.

(Garner Decl. Ex. J, at 1.)

Several months into LaFont's employment, FedEx also provided LaFont with a three-page brochure about workplace violence. (LaFont Decl. ¶ 9.) Like the people manual's security

policy, the brochure explained that employees "should immediately report violence, threats of violence, or suspicious behavior" by: (1) calling 911 if an emergency occurs; or (2) "going to [FedEx's] Web-based reporting system for your operating company, contacting a member of [FedEx's] Management, Security, or Human Resources, or calling [FedEx's] Alert Line at . . . 1.866.423.339." (LaFont Decl. Ex. 16, at 1.) The brochure also stated that FedEx had a "response team" that would "monitor the situation" and "thoroughly" investigate reports of "potential workplace violence," such as threats, threatening gestures, or "any verbal or physical act of hostility or aggression that is perceived to put anyone's safety at risk." (LaFont Decl. Ex. 16, at 2.)

About five months into her employment, LaFont complained to an operations manager, Tereka Robinson ("Robinson"), about an argument she had with a co-worker, Myesha Johnson ("Johnson"). (Robinson Dep. 63:2-20, Sept. 26, 2018; Robinson Dep. Ex. 28, at 2-3.) LaFont provided Robinson with a written statement about her argument with Johnson and referenced being treated "with aggression." (Robinson Dep. Ex. 28, at 2-3.) In an email dated May 30, 2014, Robinson forwarded LaFont's written statement to LaFont's manager, Palmer, and the employee covering for Palmer while he was out on vacation, Matt Friesen ("Friesen"). (Robinson Dep. 63:2-8; Robinson Dep. Ex. 28, at 1; Palmer Decl. ¶ 3; Palmer Decl. Ex. B; Decl. Steve Hills Supp. Def.'s Mot. Summ. J. ("Hills Decl.") ¶ 2, ECF No. 50.)

The next day, May 31, 2014, LaFont emailed Palmer and provided a detailed history of Johnson's behavior, including behavior LaFont had previously reported to Palmer. (LaFont Decl. Ex. 5.) LaFont stated that Palmer knew "prior to [his] vacation" that LaFont "had many valid concerns" about Johnson, LaFont's concerns were not being addressed, and Johnson's behavior continued to "escalate[]." (LaFont Decl. Ex. 5, at 1.) LaFont added that she had informed

Robinson about Johnson's "continual racial slurs towards French people" and "prior unwarranted physical encounters" with LaFont (pushing LaFont, knocking LaFont into walls, and slamming doors as LaFont was passing through), and she explained that she was "scared for [her] personal safety." (LaFont Decl. Ex. 5, at 1.) LaFont also reported that Johnson called her the "stupid French girl" and told her to "[g]o back to [her] own country." (LaFont Decl. Ex. 5, at 1.) LaFont concluded by requesting a meeting with FedEx management to address her concerns. (LaFont Decl. Ex. 5, at 2.) Palmer did not follow up on LaFont's complaints about Johnson's behavior because Palmer incorrectly assumed that Friesen had done so, even though LaFont did not copy Friesen on her May 31, 2014 email to Palmer.[4] (Palmer Decl. ¶ 6; Hills Decl. ¶ 8; LaFont Decl. Ex. 5, at 1.)

Two and a half months later, Johnson threatened to "choke [LaFont] down." (LaFont Decl. ¶ 11.) LaFont immediately reported the threat to a senior manager, Adam Paulson ("Paulson"), and explained that she did not feel safe and was facing a hostile work environment. (LaFont Decl. ¶ 11.) Paulson acknowledged that Johnson's threat implicated workplace violence and instructed LaFont to take a lunch break. (LaFont Decl. ¶ 11.) LaFont started to do so, but then felt "afraid" in the parking lot and elected to leave Paulson a voicemail explaining that she "would not be back that day because [she] felt at personal risk in the workplace." (LaFont Decl. ¶ 11.)

Later that day, LaFont called Roberta Garner ("Garner"), a human resources ("HR") advisor, and provided a "detailed account about Johnson's verbal and physical acts of hostility and aggression, [including her] latest threat to 'choke [LaFont] down.'" (LaFont Decl. ¶ 14;

[4] FedEx later issued Palmer a warning for failing to "correctly follow up" on LaFont's complaints and for violating FedEx's acceptable conduct policy. (Palmer Decl. Ex. C, at 1.) FedEx also advised Palmer that "recurrent patterns of [such] behavior will not be tolerated." (Palmer Decl. Ex. C, at 1.)

Garner Decl. ¶ 2.) LaFont added that she feared for her safety. (LaFont Decl. ¶ 14.) Garner told LaFont that she would speak to Paulson and get back to her, but failed to do so. (LaFont Decl. ¶ 14.)

The next day, August 12, 2014, LaFont called Paulson and informed him that she was "willing to meet with him outside the station to attempt to achieve a resolution to the workplace violence problem." (LaFont Decl. ¶ 12; LaFont Dep. 133:8-135:23.) Paulson, however, would not meet with LaFont unless she returned to her normal workstation. (LaFont Dep. 138:15-18.) Fearing for her safety, LaFont declined to return to her normal workstation. (LaFont Decl. ¶ 15.) LaFont left Paulson voicemails before each of her shifts the next three days explaining that she was "not going to return to work in a hostile environment . . . where [she] felt [she] was going to be physically harmed [by a co-worker]." (LaFont Dep. 136:18-137:13; LaFont Decl. ¶ 15.)

After LaFont missed three work shifts, Paulson sent LaFont a letter. (LaFont Dep. 139:7-15, Ex. 15.) Paulson's letter explained that under FedEx's attendance policy, "employees who are unavailable for work for two consecutive days even though they advise their manager/management of their unavailability are . . . considered to have [voluntarily resigned] if the reason for their absence is unacceptable." (LaFont Dep. Ex. 15.) Paulson's letter also explained that, although LaFont called management, she failed to "follow proper notification (call-in) procedures" and failed to "provide a valid reason" for not showing up to work. (LaFont Dep. Ex. 15.) Paulson's letter concluded by advising LaFont that if she did not show up for her next shift, Paulson would "consider [LaFont] to have voluntarily resigned." (LaFont Dep. Ex. 15.)

LaFont did not show up for her next scheduled shift and instead continued to leave Paulson voicemails explaining that she did not feel safe returning to her normal workstation.

(LaFont Decl. ¶¶ 31-32.) Paulson did not respond to any of LaFont's voicemails. (LaFont Decl. ¶ 32.)

Instead, Paulson instructed Robinson, a manager who had just returned from vacation and who was aware of Johnson's prior "unwarranted physical encounters" with LaFont, to send an inter-office memorandum. (LaFont Decl. Ex. 5; Robinson Dep. 16:4-18:6.) The inter-office memorandum addressed to LaFont, which LaFont never received, was based on information Paulson provided to Robinson and it stated that LaFont failed to perform her "job functions within a timely manner without a valid reason."[5] (LaFont Decl. ¶ 33; Robinson Dep. 16:4-18:6; Garner Decl. Ex. O, at 1-2.)[6] The inter-office memorandum reiterated Paulson's warning that "employees who are unavailable for work for two consecutive days even though they advise their manager management of their unavailability are . . . considered to have [voluntarily resigned] if the reason for their absence is unacceptable." (Garner Decl. Ex. O, at 2.) The memorandum concluded by advising LaFont that FedEx terminated her employment and recorded it as a voluntary resignation. (Garner Decl. Ex. O, at 2.) The memorandum also advised LaFont that she had the "right" to invoke FedEx's internal grievance procedure known as the Guaranteed Fair Treatment Procedure and Equal Employment Opportunity complaint procedure, but LaFont

[5] Later that evening, Robinson forwarded the memorandum to her personal email under the subject line "CYA." (Robinson Dep. 7:17-8:25, 28:3-6; Decl. Linda Marshall Supp. Pl.'s Opp'n Def.'s Mot. Summ. J. ("Marshall Decl.") Ex. 7 at 16, ECF No. 61-7.) "Presumably 'CYA' is shorthand for 'cover your ass.'" *Adams v. Univ. of Indianapolis*, No. 1:17-cv-2101, 2019 WL 1317610, at *31 n.26 (S.D. Ind. Mar. 22, 2019); *see also* Robinson Dep. 8:14-15 (reflecting that Robinson testified that "CYA" was shorthand for "[c]over yourself").

[6] LaFont objects to and moves to exclude Exhibit O (the inter-office memorandum) to Garner's declaration, arguing that Garner does not have personal knowledge about Exhibit O. (Pl.'s Opp'n at 16-17.) The Court overrules this objection. In her declaration, Garner declares under penalty of perjury that she reviewed Exhibit O during LaFont's employment and in her capacity as an HR advisor. (Garner Decl. ¶ 23.) Thus, Garner has personal knowledge of the matter.

needed to do so within five days of receiving the memorandum. (Garner Decl. ¶¶ 6-7, Ex. O, at 2.)

Three weeks later, FedEx received a letter from LaFont's attorney, alleging that Johnson committed acts of workplace violence. (Garner Decl. ¶ 25, Ex. Q.) Garner responded by opening an investigation into Johnson's behavior. (Garner Decl. ¶ 25; Garner Dep. 36:3-9, Sept. 26, 2018.) Garner interviewed Johnson, Palmer, and Paulson as part of her investigation. (Garner Dep. 36:15-17.) Garner did not interview LaFont, Robinson, or anyone from LaFont's work unit. (Garner Dep. 36:15-25; *but see* Garner Decl. ¶ 27, reflecting that Garner stated under penalty of perjury that she interviewed LaFont as part of her investigation). Garner did not ask Palmer any "specific" questions about workplace violence or ask for any documentation about LaFont, and Palmer did not "offer up" LaFont's May 31, 2014 email detailing her complaints and past reports. (Palmer Dep. 15:22-25, 18:11-13, Oct. 16, 2018.) Garner's investigation "was unable to corroborate that [LaFont] was subjected to harassment or workplace violence[.]" (Garner Decl. ¶ 27.)

In November 2014, a second HR representative, Steve Hills ("Hills"), reviewed Garner's investigation into LaFont's complaints to determine "if the allegations could be substantiated or not." (Hills Decl. ¶¶ 2, 6.) Hills did not interview LaFont as part of his investigation. (LaFont Decl. ¶ 17; Hills Dep. 40:11-13, Nov. 18, 2018.) Hills instead interviewed Garner, Johnson, Paulson, Palmer, "all of LaFont's co-workers," and a manager named Russell Bronson. (Hills Decl. ¶ 7.) Although Hills asked Palmer for any emails that LaFont sent to him, Palmer did not provide Hills with a copy of LaFont's May 31, 2014 email. (Hills Dep. 49:12-17; *but see* Palmer Dep. 17:9-18, reflecting that Palmer testified that Hills did not ask him for any documents during the interview). Hills did not ask Palmer any question "specific to workplace violence." (Palmer

Dep. 16:4-8.) Hills did, however, ask Johnson about whether she engaged in intentional physical intimidation, such as bumping into LaFont, knocking paperwork out of LaFont's hands, and ramming into LaFont, and Johnson denied that she engaged in this behavior. (Hills Decl. Ex A, at 2.)

In December 2014, Hills completed his investigation and determined that "LaFont's workplace violence allegations were unsubstantiated, as none of the potential witnesses . . . could corroborate any of LaFont's allegations." (Hills Decl. ¶ 9.) Hills recommended that FedEx issue Palmer a warning letter for failing to follow up with LaFont and issue Johnson a warning letter for "use of profanity while joking with another co-worker in a non-related matter." (Hills Decl. ¶ 10.)

In late October 2016, LaFont filed this action against FedEx.

LEGAL STANDARDS

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). On a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party, and draw all reasonable inferences in favor of that party. *Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 891 (9th Cir. 2005). The court does not assess the credibility of witnesses, weigh evidence, or determine the truth of matters in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation and internal quotation marks omitted).

DISCUSSION

I. BREACH OF CONTRACT CLAIMS

FedEx moves for summary judgment on all of LaFont's claims. Specifically, LaFont has alleged that the workplace violence brochure FedEx provided to her was either an express employment agreement, an implied-in-fact employment agreement, or a modification of her common law employment agreement. (First Am. Compl. ¶¶ 21-32.) Based on the summary judgment record before the Court, summary judgment should enter for FedEx on LaFont's claims.

To begin, all of LaFont's breach of contract claims rely on her theory that FedEx communicated promises to her in the workplace violence brochure and her continued employment provided consideration for those promises, resulting in a contract between FedEx and LaFont.[7] *See Yartzoff v. The Democrat-Herald Pub. Co., Inc.*, 281 Or. 651, 656 (Or. 1978) ("[S]tatements in the [employee] handbook were intended and considered by both parties to be a part of plaintiff's original contract of employment" and "[i]t follows that her continued employment after receiving the handbook provided sufficient consideration for any such modification of the original contract of employment"); *see also McHorse v. Portland Gen. Elec.*, 268 Or. 323, 331 (Or. 1974) (holding that an employer's disability benefits plan is an "offer to the employee which can be accepted by the employee's continued employment, and such employment constitutes the underlying consideration for the promise"). Specifically, LaFont's theory is that the workplace violence brochure created an enforceable promise (either as a stand-alone contract or a modification of an existing employment contract) that a response team would

[7] Although LaFont refers to the brochure as an "employment agreement" and compares this case to cases in which an employer modifies an "at-will" employment relationship, LaFont has not alleged that the brochure changed her at-will relationship with FedEx, to the extent that the brochure did not change whether FedEx could terminate her with or without cause.

thoroughly investigate any allegations of workplace violence, and that FedEx breached that promise when she complained of workplace violence and FedEx failed properly to investigate her allegations. (First Am. Compl. ¶¶ 21-32.)

"Oregon subscribes to the objective theory of contract interpretation, which requires a court to look not at the parties' subjective understandings, but at their communications and overt acts." *Koepping v. Tri-Cty. Metro. Transp. Dist. of Or.*, 120 F.3d 998, 1002 (9th Cir. 1997) (citations omitted); *Real Estate Loan Fund Or. Ltd. v. Hevner*, 76 Or. App. 349, 354 (Or. Ct. App. 1985) ("In determining whether a contract exists and what its terms are, we examine the objective manifestations of intent, as evidenced by the parties' communications and acts."). Even when viewing the facts in a light most favorable to LaFont, no reasonable jury could conclude that the workplace violence brochure created a contract between the parties.

LaFont does not dispute that she received FedEx's employee handbook, including its "disclaimer." (Garner Decl. Ex. F, at 1.) The disclaimer, which appears in bold, capital, underlined typeface, made it clear that FedEx's employee handbook and people manual, and the personnel policies referenced therein, are not contracts and that no contract may be implied from their provisions. (Garner Decl. Ex. F, at 1.)

LaFont argues that the workplace violence brochure was a separate policy or program that was not included in the employee handbook or people manual, that the handbook disclaimer therefore does not apply, and that the brochure did not include a similar disclaimer. However, the summary judgment record reflects that the information included in the brochure was based on FedEx's existing policies, which FedEx had expressly disclaimed as not contractual. *See Araujo v. Gen. Elec. Info. Servs.*, 82 F. Supp. 2d 1161, 1167-68 (D. Or. 2000), *aff'd in relevant part and remanded on other grounds*, 25 F. App'x 615 (9th Cir. 2002) (granting summary judgment to the

employer and noting that the employee manual and handbook "clearly stated that they did not create any employment contract"). Of note, the brochure does not reflect that it was communicating a new policy or program, and FedEx's workplace violence program was in place before FedEx hired LaFont. (*See* Chris Connors Decl. Supp. Def.'s Mot. Summ. J. ¶ 6, ECF No. 49, stating that FedEx's employees have viewed its workplace violence prevention DVD since September 2012;[8] *see also* LaFont Decl. ¶ 9, stating that LaFont received the workplace violence brochure several months into her employment, in early 2014).

LaFont argues that the brochure refers to a workplace violence "response team" that is not referenced in FedEx's employee handbook or people manual, and therefore the disclaimer does not apply. However, it is undisputed that the policies described in FedEx's employee handbook and people manual: (1) define workplace violence in the same way as the brochure, (2) provide similar information about who to contact if workplace violence occurs, and (3) make clear that allegations of misconduct will be "thoroughly investigated and documented." (*Compare* Garner Decl. Ex. G, at 1, *and* Garner Decl. Ex. J, at 1, *with* LaFont Decl. Ex. 16, at 1-3.) That the policy does not state how many individuals will be involved in the investigation or refer to the investigators as a "response team" does not suggest that the workplace violence brochure was offering a new or different policy or program to employees.

Given FedEx's express disclaimer that its policies are not contractual, and given that the workplace violence brochure was merely a summary of FedEx's existing policies, no reasonable jury could conclude that the brochure created an enforceable contract or modified any existing

[8] LaFont objects to paragraph six of Chris Connors' declaration, because he implied that LaFont viewed this DVD. (*See* Pl.'s Opp'n at 13.) The Court overrules as moot LaFont's objection to paragraph six of Chris Connors' declaration because the Court relies only on Connors' assertion that FedEx established the workplace violence program on or before September 2012.

contract between FedEx and LaFont. *See Bird v. W. Valley City*, 832 F.3d 1188, 1209-11 (10th Cir. 2016) (holding that under Utah law, a contractual disclaimer in the defendant's employee handbook precluded the existence of an implied-in-fact contract based on a workplace violence policy in the employee handbook or an unwritten anti-retaliation policy); *Olson v. Ballantine*, No. 03-1121, 2004 WL 2578958, at *2 (Iowa Ct. App. Nov. 15, 2004) (affirming summary judgment for employer and holding that "[t]he district court correctly determined, as a matter of law, that no contract was created" by the employer's workplace violence policy); *see also Araujo*, 82 F. Supp. 2d at 1167-68 (granting summary judgment for employer where "[i]n the face of the disclaimers in the application, Handbook, and Manual . . . the plaintiff could not have reasonably believed that [the employer's] management policies constituted enforceable terms of an employment agreement"). The Court therefore recommends that the district judge grant FedEx's motion for summary judgment on all of LaFont's claims.

II. CONTRACTUAL LIMITATIONS PERIOD

FedEx also moves for summary judgment on the ground that LaFont's contract claims are barred by the candidate profile's six-month contractual limitations period. (Def.'s Mot. Summ. J. at 18-25.) The parties dispute whether LaFont received or signed the candidate profile. (*See, e.g.*, LaFont Decl. ¶¶ 7-8.) The Court need not reach this issue in light of its recommendation that FedEx is entitled to summary judgment on all claims.

III. LAFONT'S MOTION TO STRIKE

LaFont moves to strikes Sidney Smith, Jean Threat, and Chris Connors' supplemental declarations, which FedEx attached as exhibits three, four, and five, respectively, to its reply; exhibit two to FedEx's reply (excerpts from LaFont's deposition); and exhibit eight to FedEx's reply (a printout of FedEx's workplace violence PowerPoint presentation). (Pl.'s Mot. Strike at 2.) The Court did not rely on any of these materials herein, and therefore denies as moot

LaFont's motion to strike these materials. *See, e.g.*, *Day v. AT&T Disability Income Plan*, 733 F. Supp. 2d 1109, 1113 n.3 (N.D. Cal. 2010) (noting that the court did not rely on the plaintiff's declaration in ruling on the parties' cross-motions for summary judgment, and therefore denying the defendant's motion to strike the declaration).

LaFont also moves to strike FedEx's arguments that the workplace violence brochure was not contractual because "no FedEx party authorized to contract on behalf of the company entered into any agreement with [LaFont]" and LaFont "failed to contract with the CEO or [an authorized] Vice President[.]" (Pl.'s Mot. Strike at 3.) LaFont asserts that these arguments should be stricken because FedEx raised them for the first time in its reply. (Pl.'s Mot. Strike at 3.) The Court denies LaFont's motion to strike because the Court allowed LaFont to file a sur-reply, granted the parties' request for oral argument, held a hearing several months after the summary judgment briefing was completed, and provided LaFont an opportunity to respond on the record to any argument that FedEx made in its papers. In any event, the Court's findings herein are not based on any argument that FedEx presented for the first time in its reply.

CONCLUSION

For the reasons stated, the Court recommends that the district judge GRANT FedEx's motion for summary judgment (ECF No. 48), DENY LaFont's motion to strike (ECF No. 74), and enter judgment for FedEx on all of LaFont's claims.

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SCHEDULING ORDER

The Court will refer its Findings and Recommendation to a district judge. Objections, if any, are due within fourteen (14) days. If no objections are filed, the Findings and Recommendation will go under advisement on that date. If objections are filed, a response is due within fourteen (14) days. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 23rd day of September, 2019.

Stacie F. Beckerman

STACIE F. BECKERMAN
United States Magistrate Judge