IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

TWYLA SANDOLPH,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CASE NO. 6:19-CV-00516-ADA-JCM**
	§	
MARTIN MARIETTA MATERIALS, INC.,	§	
	§	
	§	
Defendant.	§	

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE ALAN D ALBRIGHT,
UNITED STATES DISTRICT JUDGE

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(C), Fed. R. Civ. P. 72(b), and Rules 1(f) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. Before the Court is Defendant Martin Marietta Materials, Inc.'s Motion for Summary Judgment (ECF No. 44), and the responses, replies, and supplemental briefing thereto. For the reasons described below, the Court **RECOMMENDS** that Defendant's Motion be **GRANTED IN PART AND DENIED IN PART**.

I. BACKGROUND

Martin Marietta Materials, Inc. hired Twyla Sandolph as a truck driver at its Woodway concrete plant in March 2017. Def.'s App. (ECF No. 45) at 9. In October or November 2017, Sandolph complained to Melinda Feola, Martin Marietta's Human Resources Manager, that Joe Hernandez was sexually harassing Sandolph. *Id.* at 74, 107, 126. Feola and Sandolph met in

December 2017 to discuss the harassment. *Id.* at 19. During this meeting, Sandolph asked to transfer from the Woodway plant to the Gholson plant. *Id.* Feola said she would look into the request and completed the transfer in February 2018. *Id.* at 9.

Sandolph and Hernandez did not interact between February 2018 and July 7, 2018. On July 7, 2018, Sandolph went to the Woodway plant to load her truck because the Gholson plant was closed. *Id.* at 13. While Sandolph was there, she and Hernandez got into an argument on the work radio. *Id.* at 13–14. On July 9, 2018, Sandolph complained to Feola about that argument. *Id.* at 29, 143–47. Feola interviewed Sandolph and Hernandez that day. *Id.* at 33. During their interviews, Sandolph and Hernandez both accused each other of sexual harassment. *Id.* at 31–33, 144–45.

Feola investigated the allegations, interviewed ten witnesses, and wrote her conclusions about each allegation. *Id.* at 137, 144–45. Feola concluded that the other employees confirmed that Sandolph and Hernandez engaged in "inappropriate behavior." *Id.* at 147. Feola suspended Sandolph and Hernandez for three days. *Id.* After the suspension, Hernandez did not harass Sandolph again. *Id.* at 29.

Sandolph filed this lawsuit in the 170th Judicial District Court of McLennan County, Texas, on July 10, 2019. Def.'s Notice of Removal (ECF No. 1). Sandolph alleged causes of action for sexual discrimination, retaliation, and harassment. Martin Marietta filed its Notice of Removal on September 3, 2019. *Id.* After an adequate time for discovery passed, Martin Marietta filed this Motion for Summary Judgment.

II. LEGAL STANDARD

Summary judgment is appropriate "if 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). A dispute is not genuine if the trier of fact could not, after an examination of the record, find for the nonmoving party. *Matsushita Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 578 (1986). The moving party bears the burden of showing that no genuine dispute of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). That said, the moving party can satisfy its burden either by producing evidence negating a material fact or pointing out the absence of evidence supporting a material element of the nonmovant's claim. *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 190 (5th Cir. 1991). Throughout this analysis, the Court must view the evidence and all factual inferences in a light most favorable to the party opposing summary judgment. *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014).

III. ANALYSIS

A. Sandolph waived her arguments on her sex discrimination and retaliation claims.

Martin Marietta moved for summary judgment on Sandolph's sex discrimination and retaliation claims. Def.'s Mot. Summ. J. at 6. To prove a prima facie claim of discrimination, Sandolph must show that she: (1) is a member of a protected group; (2) was qualified for the position at issue; (3) suffered some adverse employment action by the employer; and (4) was replaced by someone outside her protected group or was treated less favorably than other similarly situated employees outside the protected group. *McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007). To prove a prima facie claim of retaliation, Sandolph must show that: (1) she participated in a protected activity; (2) she suffered some adverse employment action by the employer; and (3) a causal connection between the protected activity and the adverse employment action. *Id.* at 556–57.

Sandolph asserts that Martin Marietta "does not dispute the existence of the three (3) elements" of a retaliation claim. Pl.'s Resp. (ECF No. 51) at 12. Sandolph does not address these

elements of a prima face claim of retaliation. In its Motion, Martin Marietta challenged the third element of a prima facie claim of retaliation in a section entitled "Sandolph cannot prove her prima facie case." Def.'s Mot. Summ. J. at 9. As Martin Marietta argues in its Reply, Sandolph has waived her argument on her prima facie claim, and, therefore, has waived her retaliation claim. *Muniz v. El Paso Marriott*, 773 F. Supp. 2d 674, 683 (W.D. Tex. 2011), *aff'd sub nom. Muniz v. Columbia Sussex Corp.*, 477 Fed. App'x 189 (5th Cir. 2012) (holding that a plaintiff waived her claims of sex discrimination by failing to address them in her response to a defendant's motion for summary judgment). Accordingly, the Court should grant Martin Marietta summary judgment on Sandolph's retaliation claim.

Sandolph's response completely ignores her sex discrimination claim. *See generally* Pl.'s Resp. Sex discrimination claims are distinct from retaliation and sexual harassment claims. *See Clark v. Kraft Foods, Inc.*, 18 F.3d 1278, 1279 n.2 (5th Cir. 1994) ("The summary judgment only address [plaintiff's] disparate treatment claim. If a retaliation claim in fact exists, it is not properly before us on appeal."). By failing to address her sex discrimination claim in her Response, Plaintiff waived it. *Muniz*, 773 F. Supp. 2d at 683. The Court should grant Martin Marietta summary judgment on Sandolph's sex discrimination claim.

B. A genuine issue of material fact exists precluding summary judgment on Sandolph's harassment claim.

Martin Marietta also moved for summary judgment on Sandolph's harassment claim. Def.'s Mot. Summ. J. at 10. To establish a claim for sexual harassment, Sandolph must prove that: (1) she is a member of a protected group; (2) she was the victim of uninvited sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of her employment; and (5) her employer knew or should have known of the harassment and failed to take prompt remedial action. *Harvill v. Westward Commc'ns, LLC*, 433

F.3d 428, 434 (5th Cir. 2005) citing *Woods v. Delta Beverage Grp., Inc.*, 274 F.3d 295, 298 (5th Cir. 2001). Here, Martin Marietta challenges the fifth element, arguing that it took prompt remedial action as a matter of law. Def.'s Mot. Summ. J. at 10–11.

An employer is not liable for sexual harassment when the employer took prompt remedial action. *Harvill*, 433 F.3d at 434. To be prompt remedial action, the employer's action must be reasonably calculated to end the harassment but need not end the harassment instantly. *Kreamer v. Henry's Towing*, 150 Fed. App'x 378, 382 (5th Cir. 2005); *Abbood v. Tex. Health & Hum. Servs. Comm'n*, 783 Fed. App'x 459, 462 (5th Cir. 2019).

Martin Marietta argues that it took prompt remedial action as a matter of law by approving Sandolph's request to transfer facilities and conducting an immediate investigation when Sandolph and Hernandez accused each other of misconduct in July 2018. Def.'s Mot. Summ. J. at 11. Sandolph argues that it is "undisputed that Sandolph complained and that the harassment continued" and that it is "also undisputed that attempts to cure the harassment and prevent future harassment were not made." Pl.'s Resp. at 8.

Sandolph's first argument misunderstands the law. The fact that harassment continues after a complaint does not mean that the employer failed to take prompt remedial action. *See Abbood*, 783 Fed. App'x at 462 (holding that an employer took prompt remedial action where it transferred the harasser to a different area of the building, but the harassment continued). Thus, whether the parties dispute that is irrelevant to determining whether Sandolph has satisfied her burden at the summary judgment stage.

Sandolph's second argument misunderstands Martin Marietta's Motion. Martin Marietta certainly disputes that it made no attempt to cure the harassment and prevent future harassment because it argues that it took prompt remedial harassment as a matter of law. Def.'s Mot. Summ.

J. at 10–11. Sandolph argues that she first complained about the harassment to Feola in October 2017. Pl.'s Resp. at 3, citing Ex. 2 at 23. Martin Marietta contends that Sandolph first complained about the harassment in November 2017. Def.'s Mot. Summ. J. at 3, citing Def.'s App. at 74, 107. The parties agree that Sandolph requested a transfer to the Gholson facility in December 2017 and that Sandolph was not transferred until February 2018. Def.'s App. at 9, 75.

The Court cannot conclude that a delay of three to four months is prompt as a matter of law. *Williams-Boldware v. Denton Cty., Tex.*, 741 F.3d 635, 641 (5th Cir. 2014) (holding that action less than twenty-four hours was prompt as a matter of law); *Harvill*, 433 F.3d at 437 (holding that immediately separating the employees after the plaintiff followed the employer's reporting policy was prompt as a matter of law); *Wyly v. W.F.K.R., Inc.*, 1 F.Supp.3d 510, 514 (W.D. Tex. 2014) (holding that firing the harasser within three days was a prompt remedial action as a matter of law); *Guadalajara v. Honeywell Int'l, Inc.*, 224 F.Supp.3d 488, 505 (W.D. Tex. 2016) (holding that six days was not per se prompt and denying the employer's motion summary judgment). Where the record is unclear as to when a plaintiff complained of the harassment and the extent of any investigation on them, there are genuine issues of material fact regarding prompt remedial action. *Jones v. Delta Towing LLC*, 512 F.Supp.2d 479 (E.D. La. 2007). Thus, the Court should deny Martin Marietta's motion on Sandolph's harassment claims.

IV. CONCLUSION

For the reasons outlined above, the undersigned **RECOMMENDS** that the Defendant's Motion for Summary Judgment (ECF No. 44) be **GRANTED IN PART AND DENIED IN PART.** If the Court adopts this Report & Recommendation, only Plaintiff's claims for harassment will remain.

V. OBJECTIONS

The parties may wish to file objections to this Report and Recommendation. Parties filing objections must specifically identify those findings or recommendations to which they object. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v Arn*, 474 U.S. 140, 150–53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc). Except upon grounds of plain error, failing to object shall further bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas*, 474 U.S. at 150–53; *Douglass*, 79 F.3d at 1415.

SIGNED this 1st day of June 2023.

JEFFREY C. MANSKE
UNITED STATES MAGISTRATE JUDGE