IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA Carla DeBarr,

Plaintiff, vs. Maximus Inc., also known as Maximus Health Care,

Defendant.

C/A No.: 3:20-1795-SAL-SVH

REPORT AND RECOMMENDATION

In this employment discrimination case, Carla DeBarr ("Plaintiff") sues her former employer, Maximus Inc., also known as Maximus Health Care ("Defendant"). Plaintiff brings claims against Defendant for interference and retaliation in violation of the Family and Medical Leave Act, 29 U.S.C. §2601, et seq. (" FMLA"), and pursuant to state law for breach of contract.

This matter comes before the court on Defendant's motion for summary judgment. [ECF No. 17]. The motion having been fully briefed [ECF Nos. 19, 22], it is ripe for disposition. All pretrial proceedings in this case were referred to the undersigned pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civ. Rule 73.02(B)(2)(g) (D.S.C.). Because the motion for summary judgment is dispositive, this report and recommendation is entered for the district judge's consideration. For the reasons that follow, the



undersigned recommends the district judge grant Defendant's motion for summary judgment. I. Factual Background Plaintiff has been a nurse for 29 years. [ECF No. 19-1 ¶ 2]. In November 2010, Plaintiff began working as a review nurse auditor for Defendant, a Medicare contractor, on the administrative qualified independent contractor ("AdQIC") account. Id. She left the position and then returned in early 2012. [ECF No. 19-1 ¶ 2]. In October 2018, Plaintiff's mother beca me ill, and Plaintiff requested and received approval to take intermittent FMLA leave, starting October 9, 2018 through April 8, 2019, to care for her mother. [ECF No. 19-5 at 2, ECF No. 19-1 ¶ 6]. 1

Plaintiff took three weeks of FMLA-covered leave in total for the year 2018. [ECF No. 19-1 ¶ 6].

Plaintiff's review during this time period indicates she took 222 hours of leave and states that "[d]ue to health and personal issues, Carla had numerous unscheduled leave events throughout the year which the AdQIC is sympathetic towards however, unscheduled leave impacts the team and contract standards [as] a whole and should be kept to a minimum." [ECF No. 19 -3 at 4, 11, see also ECF No. 19-1 ¶ 9].

1 Plaintiff requested additional FMLA leave, unrelated to the care for her mother, not at issue in this case. [See, e.g., ECF No. 19-1 ¶ 5, ECF No. 19-6 at 75:10– 12, 83:13– 16].



In April 2019, Plaintiff applied for an extension of her intermittent FMLA leave to care for her mother. [ECF No. 19-6 at 109:17– 110:1]. Defendant approved Plaintiff for intermittent leave up to seven episodes per week, with each episode lasting one full day, from October 9, 2018, through October 8, 2019. [ECF No. 19-5 at 3]. Plaintiff testified that she reported all FMLA leave through Defendant's timeke eping system by entering her time and leave onto her timesheets so that her manager could approve them. [ECF No. 19-6 at 104:22–105:16]. Plaintiff repeatedly testified she accurately reported all of her FMLA leave, id. at 104:22– 105:16, 130:24– 131:3, 191:5–8 , and confirmed that each individual timesheet for the time periods in question accurately reflected the FMLA leave she had taken, id. at 118:21–130:13.

Notwithstanding, Plaintiff also attests she was informed that she would need to log missed hours to FMLA or paid time off ("PTO") if she did not complete her hours on a given day. If she compensated for the hours, she would not place FMLA or PTO leave on the log. [ECF No. 19-1 ¶ 8C, ECF No. 19-6 at 150:9–13 ( "If I didn't log any FMLA time on my sheet that mean t that it was not an extended period of time and I did not log it in"), 170:10– 171:3, 173:11–16 ]. Plaintiff states that if she needed to take leave, she was to make



sure the team knew either before or shortly afterwards regardless of the time. [ECF No. 190-1 ¶ 8C, ECF No. 19-6 at 173:17– 174:3].

While on approved FMLA leave, Defendant contacted Plaintiff about joining a new project to provide audit validation services (the "RVC Project" ) for a government contractor, Capitol Bridge LLC ("client"). [ECF No. 17-10 ¶ 5]. Defendant offered Plaintiff a promotion to manager-appeals to begin January 2019; Plaintiff accepted, resulting in a $20,000 raise in pay, and began the remote position, working from home, on January 27, 2019. [ECF No. 19-6 at 27:17– 21, 67:4– 10, 145:25–146:12; ECF No. 19-7].

On April 17, 2019, Plaintiff recorded one day (or eight hours) of FMLA leave and testified she did not

know if she missed any conference calls or meetings that day, but also noted that "if you consider we had conference calls every day, three times a day, sometimes, I'm sure there were some calls that day that I did not attend." [ECF No. 19-6 at 147:18–148:20; see also ECF No. 19-8 (text messages dated April 17, 2019, informing others that an emergency with Plaintiff's mother occurred)]. She also testified that she may have missed two team meetings or calls otherwise that month, even though she would not have recorded those times as FMLA leave, because she "just . . . had to run out quickly, maybe to the drugstore or maybe for an emergency at my mother' s house." See id.

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Over the course of the project, Patrick McLoughlin ("McLoughlin") and thereafter Frank Wolf ("Wolf"), both with Defendant, remotely supervised Plaintiff. [ECF No. 19-6 at 138:21– 25]. In late May 2019, both Defendant and the client appointed new managers for the RVC Project, Wolf and Monica Dantzler-Thomas, respectively. [ECF No. 19-1 ¶ 12A].

On May 21, 2019, Holly Havens ("Havens"), a project director with the client, sent an email to Wolf and McLoughlin stating:

Patrick/Frank, sending a quick note to voice some ongoing concerns about Carla. We had another team meeting this afternoon where she did not call in. This seems to be a weekly occurrence since the start. Carla often has questions, many of which are answered on these missed team calls, so a couple members of the team have expressed some frustration in that regard. Her missing the calls also requires Eileen to take the extra time to call her afterwards and recap the entire discussion. I know she has a lot going on in her personal life and we continue to be as flexible as possible but we do need some improvement on these issues. Frank circled up with her again but wanted to send this email so we are on the same page, in accordance with our previous discussions. Let me know if you have any questions. [ECF No. 19-19 at 6]. On June 4, 2019, the client again contacted Wolf to report that Plaintiff was not meeting its expectations for the RVC Project. [ECF No. 17-10 at 7]. Plaintiff' s shortcomings "directly impacted the financial well-being of the program by failing to leverage program resources in a manner expected of the

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RVC manager." Id. The client identified the following problems with Plaintiff' s performance:

Being unprepared for team meetings with Capitol Bridge

and asking duplicative questions of their Medical Director. Being late to/not attending team deliverable meetings

without prior notice which are essential for the delivery of our task orders. Failing to assign/manage

the assignment of complex

reviews in a manner that meets the required client delivery date. Providing inaccurate guidance to direct reports appropriate

coordination with the Capitol Bridge program/medical director. Id. The next day, Havens again emailed McLoughlin and Wolf, noting as follows:

Following up as related concerns were voiced again this week. Carla is falling behind on her complex sample reviews but did not raise this issue until the deliverables call yesterday afternoon. They had to reassign a bunch of her cases to Sandip and Maria so this is now having an impact on the WCRC too. . . . . Carla also mentioned intermittent FMLA to Monica, which I was not aware of. If Carla's availability will continue to be limited, we need another nurse that can assist on the RVC . . . . [ECF No. 19-19 at 6].

Plaintiff attests she was unaware of these complaints about her, does not "recall having missed any time or calls" in May 2019, and states:

I did miss a short time and a call (less than an hour) for an emergency with my mother on June 17, 2019 and then again (less than an hour to my recall) on June 24, 2019. These emergencies 3:20-cv-01795-SAL Date Filed 07/06/21 Entry Number 27 Page 6 of 32

would not be noted on the weekly time sheet because I got the 8 hours in on those days. I gave as much advance notice as I could—I believe each morning. I missed– during those emergencies– conference calls or parts of a call. I texted the managers. After this, on a call, Monica (Capital Bridge) was clearly not happy about me taking any "more" leave at that time in a phone conversation. This was the first time there was any outward negativity toward me. [ECF No. 19-1 ¶¶ 12B, 13; see also ECF No. 19-9 (text messages informing others on June 17 and 24, 2019, that Plaintiff's mother had an emergency)]. Plaintiff attests that she "never missed a deadline and no one ever stated to me that there were any problems with my work until June 25 th

." [ECF NO. 19-1 ¶ 12B]. On June 25, 2019, the client "requested that [Plaintiff] be removed from the project" because she was not "meeting [their] expectation for the RVC Manager." [ECF No. 17-12 at 2]. 2

However, after further discussion with Defendant, the client "agreed to allow her to step down to a reviewer position." Id.

That day, Wolf issued Plaintiff a verbal warning due to her poor performance and informed her that the client no longer wanted her in a management position. [ECF No. 17-10 ¶ 8, see also ECF No. 17-2 at 2]. Plaintiff testified that Wolf informed her that the client was dissatisfied and

2 Plaintiff states she "has never seen Exhibit (ECF 17 -12)(App. 6 DeBarr Dep. P. 159-160)," but does not indicate any reason why the court should not consider this exhibit. [See ECF No. 19 at 17].

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had expressed concerns about Plaintiff' s work and that Plaintiff had missed meetings and conferences. [ECF No. 19-6 at 158:19–161: 8]. 3

Wolf presented Plaintiff with the choice of remaining in the manager position with specific performance expectations necessary to meet the project's needs or to accept a demotion to a senior consultant-medical position. [ECF No. 19-6 at 162:2– 19, ECF No. 17-10 ¶ 8]. The next day, Plaintiff informed Wolf that she chose to be demoted. [ECF No. 19-6 at 163:10– 14]. 4

On July 30, 2019, Plaintiff notified Wolf, Havens, and other RVC project team members that she had appointments on July 30, 2019 "beginning at 9:30 am" and July 31, 2019 " beginning at 2:15," although no FMLA leave was recorded on these days because, according to Plaintiff, she made up the hours. [ECF No. 19-1 ¶ 16B, ECF No. 19-19 at 7–8 ]. In response, on August 5, 2019, Havens emailed Wolf, asking if Plaintiff had made up this time or used PTO and stating "let' s discuss how we can gain more visibility on Carla's day to ensure her time keeping is accurately reflective of her work schedule." See id.

3 Plaintiff testified she agreed that she had missed meetings and conferences and that she had only recorded one day of FMLA leave on her timesheets up to this point. [ECF No. 19-6 at 158:19– 161:8]. 4 Unknown to Wolf, Plaintiff recorded both the June 25, 2019 and June 26, 2019 phone calls, as well as a later September 26, 2019 phone call and other calls. [See ECF No. 19-18 (audio recordings)].

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On August 22, 2019, Dr. Cathy Cook (" Cook"), medical director for the client, addressed the following concerns about Plaintiff in an email to Wolf:

1. Carla has not learned the spreadsheet population for RVC despite multiple training sessions.

a. Risk—In a recent accuracy review of multiple claims, she manually changed the answer which was programmed to be auto populated. This created incorrect decisions. Quality Assurance was able to identify. 2. Carla was conducting training for Nola and still did not have a grasp of what the medical review questions were asking for

a. Risk—lack of understanding can lead to incorrect determination and error code 3. Carla resists taking initiative

a. During training she did not want to follow Monica's instruction—I finally had to tell her to do what Monica was asking 4. I have continued to find clinical/medical related edits that should be picked up at the step before

a. Example medical necessity of preventive services [ECF No. 17-10 at 6]. Cook noted that these were " this week's concerns as we have tried to mentor [Plaintiff] in the past months." Id..

Plaintiff attests that around this time, and prior to September 24, 2019, she informed her managers that her mother's condition was worsening, and Plaintiff was in the process of recertifying her FMLA leave to care for her mother. [ECF No. 19-1 ¶ 17, ECF No. 19-6 at 127:19–12 8:20].

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On September 24, 2019, a meeting occurred and, following that meeting, an email was distributed at 10:49 a.m. to multiple people on the RVC Project team, including Plaintiff, regarding a time-sensitive assignment. [ECF No. 19-1 ¶ 19B, ECF No. 17-12 at 2, ECF No. 19-6 at 176:6–1 77:20]. Plaintiff did not respond to that email. See id. Plaintiff received a second email at 1:30 p.m. from a team member and again did not respond. [ECF No. 19-6 at 184:5– 185:17]. 5

Plaintiff attests that she did not see the earlier email until after midday, briefly left work to go to the pharmacy "[a]round late lunch time," and, upon returning, "saw [an email] had co me that was not clear as to what [she] should do," prompting her to ask for instructions. [ECF No. 19-1 ¶ 19C]. Plaintiff attests that she was not informed that there was a deadline and completed the work that was assigned to her by the end of the business day. Id. Plaintiff testified that she did not inform anyone that she was unavailable, nor did she take any intermittent FMLA leave on the day in question. [ECF No. 19-6 at 190:6–191:4 ].

The following day, emails were circulated among Wolf, McLoughlin, and Bundy, discussing what had occurred, which was summarized as follows:

Carla received correspondence from the RVC leadership team at 10:49 AM. Within this email, assignment[s] were divided into

5 Neither party has submitted the September 24, 2019 emails at issue.

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thirds to allow ample time to complete tasks in an expedited manner. This effort was required to address concerns which were addressed by CMS. Carla did not respond to the outreach by the team and did not complete any of the assigned cases ahead of outreach at 2:30pm. She had not communicated any unavailability with the team. The end result of this failure of communication lead

to a late deliverable. [ECF No. 19-16 at 3].

On September 26, 2019, Plaintiff was asked to join a conference call with human resources in which Wolf asked Plaintiff about what occurred on September 24, 2019, and why there was a delay in Plaintiff's responsive ness to emails. [ECF No. 19-1 ¶ 20 (" If I was late in seeing the e-mail—I took responsibility for that"), ECF No. 19 -6 at 175:4–1 90:4, ECF No. 19-18].

On September 30, 2019, Plaintiff received a document summarizing the September 26, 2019 call with Wolf, reminding Plaintiff that she received a verbal warning on June 25, 2019, and providing a written warning concerning the September 24, 2019 incident, including the following information:

Continued performance in this manner or unsatisfactory levels of performance in any area and/or failure to adhere to MAXIMUS policies and procedures may lead to further disciplinary action, up to and including termination. During this time you will not be eligible for bonus or transfer. [ECF No. 17-14 at 2]. Plaintiff was advised she was required to be available every day from 8:00 a.m. to 4:30 p.m. and any deviation would require 24-

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hour notice. Id. She was to provide written confirmation of work assignments going forward. Id.

During this time, Defendant also approved Plaintiff for continuous leave starting October 1, 2019. [ECF No. 19-6 at 127:19– 128:20, ECF No. 19- 15 (letter dated September 26, 2019, approving Plaintiff's continuous leave)]. 6 Prior to Plaintiff's returning from leave on November 1, 2019, Wolf informed Havens that Plaintiff would be returning to work on the RVC Project. [ECF No. 19-6 at 129:19-130:4, ECF No. 17-10 ¶ 10]. On October 30, 2019, Havens emailed Wolf the following:

Following up on our discussion with Patrick yesterday. It is my understanding that MAXIMUS is expecting Carla to return from leave soon. Carla's efforts have had long term negative i mpacts on the success of our RVC program. For that reason, Capitol Bridge no longer has a position for Carla on the RVC team. [ECF No. 17-10 at 12].

When Plaintiff returned from leave on November 1, 2019, Wolf informed her that she was no longer assigned to the RVC Project at the client's instruction. [ECF No. 19-6 at 201:18– 202:22]. Wolf told Plaintiff that Defendant would try to find her another position. Id. at 202:4– 22. Wolf

6 Plaintiff additionally took recorded intermittent FMLA leave for two hours on August 21, 2019, September 10, 2019, and September 11, 2019, and for eight hours on September 25, 2019. [ECF No. 19-1 ¶ 16C, see also ECF No. 19-12, ECF No. 17-9].

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contacted Mary Bundy ("Bundy"), a m anager in human resources, to ask her to find an open position for Plaintiff. [ECF No. 17-10 ¶ 11; ECF No. 17-2 ¶ 6].

Bundy began searching on November 1, 2019. [ECF No. 17-2 ¶ 6]. She searched for any available positions in the Columbia, South Carolina area or remote positions for which Plaintiff was qualified. Id. No such positions were available. Id. Defendant continued to pay Plaintiff while it searched for suitable positions. Id. Bundy attests that Defendant terminated Plaintiff's employment on November 7, 2019, because no positions were available, although Plaintiff was and is free to reapply to work for Defendant at any time. Id. ¶ 7. II. Discussion A. Standard on Summary Judgment

The court shall grant summary judgment "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). The movant bears the initial burden of demonstrating that summary judgment is appropriate; if the movant carries its burden, then the burden shifts to the non-movant to set forth specific facts showing that there is a genuine issue for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322– 23 (1986). If a movant asserts that a fact cannot be disputed, it must support that assertion either by "citing to



particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials;" or "showing . . . that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

In considering a motion for summary judgment, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in favor of the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248. B. Analysis 1. FMLA Interference The Fourth Circuit has stated that "in order to make out an 'interference' claim under the FMLA, an employee must . . . demonstrate that (1) he is entitled to an FMLA benefit; (2) his employer interfered with the provision of that benefit; and (3) that interference caused harm." Adams v. Anne Arundel Cty. Pub. Sch., 789 F.3d 422, 427 (4th Cir. 2015).



Here, the parties agree Plaintiff was never denied any request for FMLA leave and that Defendant approved Plaintiff's requests for certification and recertification for intermittent leave under the FMLA. As Plaintiff testified:

Q: [P]art of your claims that you were ever denied FMLA leave

that you should have been approved of? A: I was never denied any FMLA leave. Q: Ok. And so you're not claiming that at any point you were

wrongfully denied FMLA leave? A: I was never denied FMLA leave. [ECF No. 19-6 at 106:1– 6]. Notwithstanding, Plaintiff argues Defendant interfered with her FMLA rights because upon her return from leave, she was entitled to reinstatement to her position or an equivalent one—a reinstatement that did not occur here. The FMLA entitles an employee to be restored "to the position of employment held by the employee when the leave commenced" or a position that is equivalent not just in terms of pay and full-time status, but also one that is equivalent in terms of " benefits . . . and other terms and conditions of employment." See 29 U.S.C. §2614(a)(1); Laing v. Fed. Exp. Corp., 703 F.3d 713, 723 (4th Cir. 2013). However, "the FMLA does not require an employee to be restored to his prior job after FMLA leave if he would have been

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discharged had he not taken leave." Laing, 703 F.3d at 723 (citing Yashenko v. Harrah's NC Casino Co., LLC , 446 F.3d 541, 547 (4th Cir. 2006)). Here, Defendant argues Plaintiff would have been discharged from the RVC Project even if she had not taken FMLA leave. Plaintiff disagrees, arguing that the record reveals no concerns about her performance from Defendant's employees and any evidence provided by Defendant from the client concerning her poor performance is inadmissible hearsay. [See ECF No. 19 at 14–1 8]. Inadmissible hearsay "is neither admissible at trial nor supportive of an opposition to a motion for summary judgment." Greensboro Pro. Fire Fighters Ass'n, Loc. 3157 v. City of Greensboro, 64 F.3d 962, 967 (4th Cir. 1995). However, evidence showing that the client conveyed concerns about Plaintiff' s performance to Defendant and twice demanded her removal from the RVC Project is not inadmissible hearsay. This evidence is not offered to prove the truth of the matter asserted— that Plaintiff actually missed meetings or caused late deliverables—to the

extent it is offered to show that Defendant's actions were motivated by client complaints and demands. See Fed. R. Evid. 801(c)(2), 803(3); Arthur v. Pet Dairy, 593 F. App'x 211, 215 n.3 (4th Cir. 2015) (holding that customer complaints about an employee's performance were not inadmissible hearsay

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because they were offered to show the employer' s state of mind, noting "[t]he issue in this case is whether Appellee fired Appellant because complaints were made, not whether the School Division was justified in complaining"); Arrington v. E.R. Williams, Inc., 490 F. App'x 540, 543 (4th Cir. 2012) ("Where, as here, 'third-party statements concerning the plaintiff's performance are offered not for

the truth of the matters asserted therein, but as an explanation of why [the employer] believed that terminating the plaintiff' s employment . . . was necessary and appropriate,' evidentiary rules governing the consideration of hearsay are not implicated.") (citations omitted). 7

Here, Defendant offers customer complaints to show why Plaintiff' s supervisors demoted her and removed her from the RVC Project. Plaintiff next argues "[t]here are sub stantial material facts in the record that there was in fact an equivalent position within Maximus in November of 2019," [ECF No. 19 at 17], contradicting Defendant's evidence

7 Defendant additionally has put forth that Wolf can testify that the emails, summaries, and disciplinary records were authentic, made contemporaneously, kept in the regular course of Defendant's business, as a regular practice, [see ECF No. 22 at 5, ECF No. 17-10 ¶¶ 4, 9–10 ], and, therefore, this evidence is also admissible under the business records exception. See Fed. R. Evid. 803(6); see also Kobe v. Haley, C/A No. 3:11- 1146-TMC, 2013 WL 4067921, at *6 (D.S.C. Aug. 12, 2013) (stating that all documents need not be authenticated or proven admissible at summary judgment as long as the proponent can " propose a method to doing so at trial" such as by identifying a witness who can testify that the documents are business records) (citations omitted).

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that, between November 1, 2019 and November 7, 2019, there were no available positions with Defendant for which Plaintiff was qualified and could work either in the Columbia, South Carolina area or remotely. [ECF No. 17-2 ¶¶ 6– 7, ECF No. 17-10 ¶ 11]. Plaintiff testified she believed she saw sometime after she was terminated that her "old position" as nurse auditor was open, but that she was not aware of any position open specifically between November 1, 2019 and November 7, 2019. [ECF No. 19-6 at 203:5– 204:25, 230:23– 231:2 (Plaintiff's testifying she did not apply for the position she saw available), see also ECF No. 19-1 ¶ 22]. Plaintiff has additionally submitted an online employment posting dated March 2020, although it is not clear if this posting concerns a position on the RVC Project, [ECF No 19-22], 8

as well as a declaration from Scott Garrison (" Garrison") who attests as follows:

After Carla left our department, to my recollection in early 2019 for another project, there were/was at least one position open for a nurse reviewer. A position was open, to my recall, during the end of that year, 2019, for a nurse. It may have been Carla's old position or another nurse position, I am unsure. [ECF No. 19-25 ¶¶ 3–4 ].

8 Plaintiff states that a subpoena issued to the South Carolina Department of Employment and Workforce "for postings during the December 201 9– March 2020 period rendered" the above posting, dated March 2020. [ECF No. 19 at 12]. Plaintiff further states that "[t]he results only gave the last upda ted posting for a specific job and the length of time it had been posted was not available."

Id. at 12 n.14.

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Plaintiff's evidence is insufficient to show that another position, not with the client, was available during the relevant period, November 1, 2019 to November 7, 2019. As stated, Plaintiff testified that she was not aware of any position available during the week following her removal from the RVC Project, and neither the job posting from March 2020 or Garrison's declaration confirm such an opening existed at that time. 9 Plaintiff also may base her interference claim on her demotion. [See ECF No. 19 at 14, 17]. However, Plaintiff's demotion and termination appear more properly analyzed under her FMLA retaliation claim, as discussed below, and not under her interference claim. See, e.g., Chacon v. Brigham & Women's Hosp. , 99 F. Supp. 3d 207, 214 (D. Mass. 2015) (" an employer who simply blocks an employee from taking leave to which she is entitled has committed non-retaliatory interference with the substantive rights afforded by the FMLA. But an employer who terminates an employee for exercising or attempting to exercise her FMLA rights has committed a retaliatory act of interference that must be evaluated under the retaliation framework"). Notwithstanding, Plaintiff has failed to put forth evidence that Defendant interfered with her FMLA rights where the record shows that the

9 Given the recommendation above, the court need not address Defendant's argument that Garrison's declaration is inadmissible. [See ECF No. 22 at 6 n.1 (arguing Garrison's declaration should not be considered because Plaintiff failed to disclose him as a witness)].

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client had been dissatisfied with Plaintiff's performance beginning late May 2019, a month prior to her demotion, and where there is no evidence that her demotion discouraged her from talking FMLA leave. See, e.g., Chauncey v. Life Cycle Eng'g, Inc. , C/A No. 2:12-CV-968-DCN, 2013 WL 5468237, at *15 (D.S.C. Sept. 30, 2013) ("Chauncey has presented no evidence to show that receiving the negative review interfered with her right to take FMLA leave. As discussed at length above, Walls had been dissatisfied with Chauncey's job performance for quite some time before issuing the performance review. Moreover, there is no evidence that the performance review discouraged Chauncey from taking leave."); see also Ranade v. BT Americas, Inc., 581 F. App'x 182, 184 (4th Cir. 2014) (dismissing the plaintiff's FMLA interference claim where the client complained about the plaintiff's reduced work schedule and, therefore, the employer gave the plaintiff the option of working full-time or taking continuous leave under the FMLA, holding "B T Americas was not required to provide a work schedule to Ranade that would disrupt its operations"). Here, as in Laing, Defendant "has introduced ample evidence" that Plaintiff would have been demoted and terminated based on client complaints, regardless of whether she had taken FMLA leave, see 703 F.3d at 724, evidence including that the client twice asked for Plaintiff to be removed

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from the RVC Project, as well as Plaintiff's own testimony and statements made on the calls that she recorded stating that she missed meetings and was aware that the client had raised concerns about her. For these reasons, the undersigned recommends Defendant' s motion for summary judgment be granted as to Plaintiff's interference claim. 2. FMLA Retaliation Retaliation claims brought under the FMLA are analogous to those brought under Title VII. Laing, 703 F.3d at 717; Yashenko, 446 F.3d at 550– 51. Thus, a plaintiff may succeed either by providing direct evidence of

discrimination or by satisfying the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Plaintiff argues "there are several pieces of direct evidence that the employer articulated that the taking of FMLA leave was a negative," including her 2018 evaluation that states she took leave for over 200 hours and "[d]ue to health and personal issues, Carla had numerous unscheduled leave events throughout the year which the AdQIC is sympathetic towards however, unscheduled leave impacts the team and contract standards [as] a

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whole and should be kept to a minimum." [ECF No. 19 at 19, ECF No. 19-3 at 4, 11]. 10 A reasonable jury would not construe these comments as evidence of a discriminatory attitude. First, it appears that only a little over half of the leave Plaintiff took during the relevant period was attributable to FMLA leave. Although Plaintiff glosses over the word "unscheduled" [see ECF No. 19 at 19], the direction provided in her evaluation does not focus on FMLA leave but only on unscheduled leave, and states only that unscheduled leave, for health and personal issues, not necessarily leave covered by the FMLA, should be kept to a minimum. More importantly, this comment was made by Leanne Sholley ("Sholley") in 2018. This took place before Plaintiff's demotion and termination, and there is no indication in the record that Sholley was involved in any decision concerning Plaintiff's demotion and termination. Plaintiff additionally argues she was "demoted just as her mother came home from ICU and intermittent leave was needed," and just after she missed calls due to needing to attend to her mother. [ECF No. 19 at 19]. Plaintiff argues these missed calls were also invoked as a reason for placing

10 In response, Plaintiff noted on her review as follow: "In reference to Dependability/Reliability all of my [absences] were either covered by approved paid leave or 2 approved FMLAs . . . . None of the absences were due to dereliction of responsibilities for company operations." [ECF No. 19-3 at 3].

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Plaintiff " on 'warning' days after she began her FMLA re-certification process in September," and "[t]he evidence reflects directly to animus related to her FMLA leave and bear on both contested decisions," her demotion and termination. Id. Defendant disputes this evidence, arguing the record

shows that Plaintiff did not take FMLA leave on June 17 and June 24, 2019, as she argue, prior to her demotion on June 25, 2019. [See ECF No. 22 at 10]. Although she missed work-related phone calls those days and sent texts indicating her mother was having difficulties, according to Plaintiff's own affidavit, she worked a full eight hours on both days. [See ECF No. 19-1 ¶¶ 13–14]. Defendant also notes that the client had already complained about Plaintiff's performance on multiple occasions prior to the alleged leave, including on May 21, June 4, and June 5, 2019; and the discipline was not solely related to missed calls on June 17 and June 24, but was related to a variety of ongoing performance problems. It is unnecessary for the court to resolve this issue. As discussed more below, even assuming Plaintiff was demoted and terminated shortly after she took FMLA leave, temporal proximity alone is insufficient to carry her burden to defeat Defendant's motion for summary judgment. Additionally, evidence of temporal proximity is not direct evidence of discrimination, but



evidence that bears on the burden-shifting framework set forth in McDonnell, the framework the court turns to now. Under McDonnell, a plaintiff must prove three elements to establish a prima facie case of retaliation: (1) she engaged in a protected activity; (2) her employer took an adverse employment action against him; and (3) there was a causal link between the two events. Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 271 (4th Cir. 2015). If the defendant advances a lawful explanation for the alleged retaliatory action, the plaintiff must demonstrate the defendant's reason for taking the adverse employment action was pretextual. See Laing, 703 F.3d at 717, 719 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973)). Here, the court assumes without deciding that Plaintiff has established a prima facie case of retaliation. See, e.g., Yashenko, 446 F.3d at 551 ("While evidence as to the closeness in time 'far from conclusively establishes the requisite causal connection, it certainly satisfies the less onerous burden of making a prima facie case of causality.'") (quoting Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989)). However, Defendant has proffered a legitimate non-retaliatory reason for Plaintiff' s termination: that Plaintiff was demoted and terminated at the behest of the client. In response, Plaintiff turns to (1) the temporal proximity



between her taking FMLA leave and her being demoted and terminated and (2) that she "was considered a good and valuable employee for almost nine years," including the period at issue, as evidenced by her performance evaluations and her own assessment. [See ECF No. 19 at 20–22 , see also id. at 15 (Plaintiff arguing the same as to her interference claim)]. 11

Plaintiff's perception of herself, her past performance reviews, and temporal proximity are insufficient to defeat Defendant's motion. As stated by the Fourth Circuit, addressing a situation like that found here regarding a claim for FMLA interference:

Thus, the fact that Mercer had previously received satisfactory performance reviews does not negate The Arc's ability to terminate her employment upon the discovery of previously unknown poor performance. This is so even if The Arc discovered the basis for terminating Mercer's employment while she was on FMLA leave . . . . Mercer's primary basis for connecting the termination of her employment to her FMLA leave is its timing. While timing is a relevant factor, it will rarely be independently sufficient to create a triable issue of fact. Mercer also speculates that The Arc's proffered reason is not the real reason it

11 Defendant disputes Plaintiff's assertions that she was a " good and valued employee" and " always received good or excellent reviews" and "all positive evaluations." [See ECF No. 19 at 11, 19]. Plaintiff attests that "I do not have copies of the evaluations from 2010 through 2018 but they were all good to excellent" and "[f]rom 20 10 through 2018, my annual reviews were above expectations." [ECF No. 19-1 ¶ 4]. However, the record shows that her 2018 evaluation, that Plaintiff has submitted, shows an overall evaluation of "meets expectations," many individual categories where she only met expectations, some categories where she was "below expectations," and a narrative showing she caused "the highest amount of errors for a single person in our department." [ ECF No. 19-3 at 3, 6–14 ].

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terminated her employment, offering her own view that her performance was adequate and explaining that she was not responsible for any lapses in clients' benefits that occurred. However, Mercer's subjective view of her job performance is not sufficient to survive summary judgment. Mercer v. Arc of Prince Georges Cty., Inc., 532 F. App'x 392, 397 (4th Cir. 2013) (citations omitted); see also id. at 399 (rejecting the plaintiff's claim for FMLA retaliation for similar reasons). 12 Plaintiff additionally argues "[t]he project manager expressed her difficulty" with the June 17 and June 24, 2019 leave. [ECF No. 19 at 21 (citing ECF No. 19-1 ¶¶ 13– 14)]. As discussed above, Defendant disputes that FMLA leave was taken on these days, where Plaintiff has put forth evidence that she worked full days both days and the record does not show that Plaintiff requested or recorded FMLA leave. Notwithstanding, this evidence is insufficient where the record shows that the client requested Plaintiff be taken off the RVC Project for multiple reasons beyond her missing calls on June 17 and June 24, 2019, and began complaining about Plaintiff's behavior, including that she had previously missed calls, in late May 2019. Although Plaintiff may not have been aware that the client's complaints about her had been ongoing, and seeks to frame the dispute as one where she had to miss

12 Likewise, Plaintiff' s evidence from a coworker who worked with her during 2011– 2016 and her husband's opinion about her work ethic [ECF Nos. 19-11, 19-24] are immaterial.

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two phone calls while on FMLA leave and then was immediately demoted, the record does not

support this framing. Under these circumstances, Plaintiff has failed to establish pretext. See, e.g., Brent v. Werner Enterprises, Inc., C/A No. 3:18-2440-MGL-SVH, 2019 WL 8403037, at *4 (D.S.C. Dec. 4, 2019), report and recommendation adopted, C/A No. 3:18-02440-MGL, 2020 WL 830798 (D.S.C. Feb. 20, 2020) (finding no inference of discrimination because employer " merely responded to [its client]'s request—thus attempting to meet client demands— and worked with [the plaintiff] to attempt to find a mutually agreeable different route for him to work"). For these reasons, the undersigned recommends the district judge grant Defendant's motion as to Plaintiff's retaliation claim. 3. Breach of Contract South Carolina generally recognizes and upholds at-will employment, but an employer and employee may contractually alter those terms, including through an employee handbook. See Weaver v. John Lucas Tree Expert Co., C/A No. 2:13-1698-PMD, 2013 WL 5587854, at *6 (D.S.C. Oct. 10, 2013); see also Small v. Springs Indus., 357 S.E.2d 452 (S.C. 1987). To prevail on a breach of contract claim under South Carolina law, a plaintiff bears the burden of establishing the existence and terms of the contract, defendant's

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breach of one or more of the contractual terms, and damages resulting from the breach. Taylor v. Cummins Atlantic, Inc., 852 F. Supp. 1279, 1286 (D.S.C. 1994) (citing Fuller v. Eastern Fire & Cas. Ins. Co., 124 S.E.2d 602 (S.C. 1962) ). In an action asserting breach of contract based on a company policy, once an employer voluntarily publishes the policy to its employees, the employer may be held liable for breach of contract if the employee can establish that the policy applies to the employee, sets out procedures binding on the employer, and does not contain a conspicuous and appropriate disclaimer. Grant v. Mount Vernon Mills, Inc., 634 S.E.2d 15, 20 (S.C. Ct. App. 2006). A handbook or policy cannot alter the at-will employment relationship if it is "couched in permissive language" such as "normally" and "should." Id. at 21– 22. To be considered mandatory language, the purported contract must be "definitive in nature, promising specific treatment in specific situations." Anthony v. Atl. Grp., Inc., 909 F. Supp. 2d 455, 467 (D.S.C. 2012) (quoting Hessenthaler v. Tri-Cnty. Sister Help, Inc., 616 S.E.2d 694, 698 (S.C. 2005)). Plaintiff argues Defendant's employee handbook, "in mandatory terms, provides that employees will be disciplined in a process," and that whether such a handbook "contains promises which are enforceable is a question for the jury to determine." [ECF No. 19 at 22–24].

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However, Plaintiff fails to specifically identify a provision that she alleges was breached. Williams v. Johnson & Johnson, Inc., C/A No. 2:13-304- RMG, 2014 WL 5106890, at *14 (D.S.C. Oct. 10, 2014) (granting summary judgment on breach of contract claim where Plaintiff "states that J & J's employee handbook created a contract with her, but she cannot identify any specific part of J & J's handbook to support her claim" and "none exists"); Weaver v. John Lucas Tree Expert Co., C/A No. 2:13-01698-PMD, 2013 WL 5587854, at *7 (D.S.C. Oct. 10, 2013) (granting motion to dismiss on claim for breach of contract where the plaintiff failed " to reference any handbook or cite any specific

policies or procedures"). The handbook in question, as submitted by Plaintiff, provides that (1) "[a] verbal counseling session is usually the first step of the formal disciplinary process," (2) "the next step is to execute a verbal warning," and (3) [i]f the problem is not corrected, the supervisor provides a written warning," further noting that "MAXIMUS reserves the right to implement or pass over any or all levels of discipline depending upon the severity and/or nature of the offense." [ECF No. 19-23 at 5]. The handbook also provides as follows:

Corrective and/or disciplinary action of employees may take one or more of the following forms (this list does not include all possible actions): 3:20-cv-01795-SAL Date Filed 07/06/21 Entry Number 27 Page 29 of 32

Imposition of a corrective action plan, which may include

training, education, and other remedial measures; Verbal warning; Written warning; Probation; Suspension with pay; Suspension without pay; and Termination. Id. Finally, the handbook also provides that "[e] mployment with MAXIMUS is terminable at will; there is no requirement that an employee receive a warning or documentation prior to termination." Id. at 6. Plaintiff also signed an offer letter and acknowledged Defendant "is an at- will employer" and "may terminate the employment relationship at any time, with or without cause or notice." [EC F No. 19-7]. Here, Plaintiff has failed to show evidence to support the elements of a breach of contract claim and does not address how the process she received is inconsistent with any alleged mandatory terms as found in the handbook. Accordingly, the undersigned recommends the district judge grant Defendant's motion as to Plaintiff' s claim for breach of contract.

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III. Conclusion and Recommendation For the foregoing reasons, the undersigned recommends Defendant's motion for summary judgment be granted. [ECF No. 17].

IT IS SO RECOMMENDED.

July 6, 2021 Shiva V. Hodges Columbia, South Carolina United States Magistrate Judge

The parties are directed to note the important information in the attached

" Notice of Right to File Objections to Report and Recommendation. 3:20-cv-01795-SAL Date Filed 07/06/21 Entry Number 27 Page 31 of 32

Notice of Right to File Objections to Report and Recommendation The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which

objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note). Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk United States District Court

901 Richland Street Columbia, South Carolina 29201 Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

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