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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	*	
Plaintiff,	*	
v.	*	1:21-CV-03870-ELR-JSA
AMERICAN SECURITY ASSOCIATES, INC.,	*	
Defendant.	*	

O R D E R

Presently before the Court are Magistrate Judge Justin S. Anand's Non-Final Report and Recommendation ("R&R") [Doc. 31] and the objections thereto submitted by Plaintiff Equal Employment Opportunity Commission. [Doc. 34]. The Court sets forth its reasoning and conclusions below.

I. Background

Plaintiff brings the instant action on behalf of Ambreia Chaney against her former employer, Defendant American Security Associates, Inc. See generally Am. Compl. [Doc. 16]. Ms. Chaney worked for Defendant as a security officer from June 2016 through July 3, 2017. Id. ¶¶ 10–11. At some point during April 2017, one of

Ms. Chaney's male coworkers "began to sexually harass [her]" by making "lewd sexual statements directed at [her]" and "frequent[ly]" touching her in an "unwelcome and inappropriate" manner. Id. ¶ 13. At the time this alleged harassment began, Ms. Chaney was earning $12.00 per hour. Id. ¶ 12.

Ms. Chaney first reported the alleged harassment to her supervisor and at least one of Defendant's owners on June 3, 2017. Id. ¶ 14. Over the course of the next month, she continued reporting the alleged harassment to her supervisor, Defendant's regional manager, and Defendant's owners. Id. ¶ 15. On June 14, 2017, Ms. Chaney received a paycheck that reflected a reduced pay rate of $10.00 per hour (as opposed to the $12.00 per hour she was earning before reporting the alleged harassment). Id. ¶¶ 12, 16.

On July 3, 2017, Ms. Chaney "met with Defendant's owners to complain about" the sexual harassment she had been experiencing and "her pay being reduced[,]" which she felt she was "retaliation[]" for her reports of the harassment. Id. ¶ 26. Plaintiff alleges that Defendant's owners told Ms. Chaney during that meeting that "she should expect to suffer harassment and sexually charged attacks from her co-workers again in the future" because of "her appearance[.]" Id. ¶ 27. Additionally, Defendant's owners purportedly conveyed during that meeting that they would not offer any "protection, assistance, or redress" to Ms. Chaney, going so far as to tell her "that sexual harassment did not exist between co-workers"

because "as long as they're not your supervisor, they can say and do pretty much whatever they want and it's not sexual harassment." Id. ¶¶ 27–28. Defendant's owners also allegedly refused to restore Ms. Chaney's hourly pay rate to the level it was prior to her reporting the sexual harassment. Id. ¶ 29. Thus, "believ[ing] that Defendant was requiring her to accept possible and likely future harassment from her co-workers as a condition of her employment[,]" in addition to lower pay, Ms. Chaney resigned from her position immediately after the July 3, 2017 meeting. Id. ¶¶ 29–30. Approximately three (3) weeks after her resignation, on July 24, 2017, Ms. Chaney received her final paycheck from Defendant, which reflected an hourly pay rate of only $8.00—a second decrease from her original pay rate of $12.00 per hour. Id. ¶¶ 12, 16, 19.

II. Procedural History

As a result of these alleged events, Ms. Chaney initiated administrative proceedings through Plaintiff, and Plaintiff found "reasonable cause to believe that Title VII had been violated and invit[ed] Defendant to join with [Plaintiff and Ms. Chaney] in informal methods of conciliation[.]" Id. ¶ 7. Because Plaintiff was unable to "secure . . . a conciliation agreement" from Defendant, Plaintiff filed this action on Ms. Chaney's behalf on September 20, 2021. See Compl. [Doc. 1]. Defendant waived service and thereafter timely submitted a "Motion to Dismiss Complaint." [Docs. 2, 3]. Plaintiff opposed the motion to dismiss. [Doc. 4]. On

April 27, 2022, the Magistrate Judge issued a non-final Report and Recommendation (the "April 27, 2022 R&R"), in which he recommended that the undersigned grant Defendant's motion to dismiss in part and deny it in part. [See Doc. 12]. In relevant part, the Magistrate Judge recommended that Plaintiff be directed to amend its Complaint to set forth the factual basis for its claim that Defendant "constructively discharged" Ms. Chaney. [Id. at 59]. Neither Party objected to the April 27, 2022 R&R, and the undersigned adopted it as the opinion of this Court on May 12, 2022. [Doc. 15]. Pursuant to the Magistrate Judge's recommendation, the Court directed Plaintiff to amend its Complaint no later than June 13, 2022. [See id.] (requiring Plaintiff to amend its Complaint with thirty (30) days); see also FED. R. CIV. P. 6(a)(1)(C) (extending certain deadlines that fall on weekends).

Plaintiff timely filed its Amended Complaint on June 1, 2022. See Am. Compl. Defendant failed to timely respond to the Amended Complaint and—after the Magistrate Judge issued a show cause order—Plaintiff moved for a Clerk's entry of default against Defendant. [See Docs. 17, 18]. The Clerk entered the default on July 1, 2022. The next day, on July 2, 2022, Defendant moved to set aside the default and submitted a "Motion to Dismiss the EEOC's Claims of Constructive Discharge in its Amended Complaint." [See Docs. 20, 21]. The Magistrate Judge granted Defendant's motion to set aside default, and Plaintiff timely responded in opposition

to Defendant's motion to dismiss the constructive discharge claim. [See Docs. 27, 28].

On October 26, 2022, the Magistrate Judge issued the instant R&R, in which he recommends that the undersigned grant Defendant's motion to dismiss Plaintiff's constructive discharge claim because "even assuming that all of [Plaintiff]'s allegations in the [Amended Complaint] are true, [Defendant] did not constructively discharge [Ms.] Chaney as a matter of law." See R&R at 17. As relevant to the analysis herein, the Magistrate Judge finds that Plaintiff cannot base a constructive discharge claim on the statements Defendant's owners allegedly made to Ms. Chaney during the July 3, 2017 meeting. As a reminder, the statements from that meeting that Plaintiff claims made Ms. Chaney's resignation a constructive discharge were that, "based on her appearance," Ms. Chaney "should expect to suffer harassment and sexually charged attacks from her co-workers again in the future[,]" that Defendant would do nothing to redress or stop this supposedly inevitable harassment, and that Ms. Chaney's co-workers "can say and do pretty much whatever they want" to her "and it's not sexual harassment." See Am. Compl. ¶¶ 27–28. The Magistrate Judge reasons:

> [w]hile the[se] statement[s] may have been upsetting to [Ms.] Chaney, *. . . it is undisputed that, after [Ms.] Chaney complained about the harassment, [Defendant] transferred [Ms.] Chaney away from her alleged harasser*, and [Ms.] Chaney was not subjected to an ongoing, active pattern of sexual harassment at the time of her resignation.

R&R at 16 (emphasis added). For this reason, the Magistrate Judge determines that Plaintiff fails to allege a necessary element of a constructive discharge claim. See id. at 17–18. In further elaborating on this point, the R&R explains that:

> a plaintiff cannot show a constructive discharge merely by alleging that she was subjected to severe or pervasive harassment that would violate Title VII; she must go beyond that to show an even greater "severity or pervasiveness of harassment" such that resignation would be the only reasonable response. Bryant v. Jones, 575 F.3d 1281, 1298 (11th Cir. 2009).

See id. at 17. In the Magistrate Judge's view,

> [i]n this case, . . . [Plaintiff] does not even allege that [Ms.] Chaney was being actively subjected to any harassment *at the time of her resignation*. Instead, [Plaintiff] alleges that [Ms.] Chaney was told by [Defendant]'s owners that she "should expect to suffer harassment and sexually charged attacks from her co-workers again in the future." [See Am. Compl.] ¶ 27.

See id. at 17–18 (emphasis added). The Magistrate Judge explained his basis for this view as follows:

> Assuming this allegation is true, the Court finds that it is, at most, merely speculation by [Defendant]'s owners that [Ms.] Chaney may suffer more harassment in the future. While entirely wrong and inappropriate, this kind of speculation about what may or may not happen in the future cannot form the basis of a constructive discharge claim, particularly when it is not accompanied by any "intolerable conditions" that [Ms.] Chaney was *actually facing* in the workplace *at the time of her resignation*. See, e.g., Fitz [v. Pugmire Lincoln-Mercury, Inc., 348 F.3d 974, 977 n.4 (11th Cir. 2003)] (statements from co-workers informing African-American plaintiff that his supervisor planned to terminate him at some point in the future because of his race did not rise to level of constructive discharge, because "[m]ere suspicion of an unsubstantiated plot is not an intolerable employment condition" and "[t]he employer might never carry out the plan");

> Medearis v. CVS Pharmacy[, Inc.], 92 F. Supp. 3d 1294, 1314 (N.D. Ga. 2015) (Thrash, J.) (plaintiff failed to show constructive discharge when he claimed that he was "treated with hostility" by his supervisor, and that his supervisor laughed at him and told him he would be fired within a year), aff'd sub nom. Medearis v. CVS Pharmacy, Inc., 646 F. App'x 891 (11th Cir. 2016).
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> Thus, the Court finds that [Plaintiff] has failed to allege sufficient facts in the [Amended Complaint] to state a plausible claim that [Defendant] subjected [Ms.] Chaney to such intolerable conditions that it resulted in a constructive discharge. For that reason, the Court finds that [Plaintiff]'s claims that [Defendant] discriminated and retaliated against [Ms.] Chaney by constructively discharging her must be dismissed.

Id. at 17–18 (emphasis added).

On November 9, 2022, Plaintiff timely filed its objections to the R&R. [See Doc. 34]. In those objections, Plaintiff requests that the Court reject the Magistrate Judge's recommendation to grant Defendant's motion to dismiss the constructive discharge claim. [See generally id.] Defendant timely responded in opposition to Plaintiff's objections to the R&R. [See Doc. 36]. Having been fully briefed, Plaintiff's objections are ripe for the Court's review.

III. Legal Standards

The undersigned begins by setting forth the legal standard for reviewing the instant R&R and assessing a Rule 12(b)(6) motion to dismiss.

A. Review of an R&R

The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." See 28 U.S.C. § 636(b)(1); see

also FED. R. CIV. P. 72(b)(3). Portions of the R&R to which no objections have been made are reviewed for clear error. See Thomas v. Arn, 474 U.S. 140, 154 (1985); see also Macort v. Prem, Inc., 208 F. App'x 781, 784 (11th Cir. 2006); Tauber v. Barnhart, 438 F. Supp. 2d 1366, 1373 (N.D. Ga. 2006). However, the Court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." See 28 U.S.C. § 636(b)(1); see also FED. R. CIV. P. 72(b)(3). A party objecting to an R&R "must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." See United States v. Schultz, 565 F.3d 1353, 1361 (11th Cir. 2009) (quoting Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988)).

B. Rule 12(b)(6) Motion to Dismiss

To survive a Rule 12(b)(6) motion to dismiss, a complaint must "contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Put differently, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." See id. This so-called "plausibility standard" is not akin to a probability requirement; rather, the plaintiff must allege

sufficient facts such that it is reasonable to expect that discovery will lead to evidence supporting the claim. See id.

When considering a 12(b)(6) motion to dismiss, the Court must accept as true the allegations set forth in the complaint, drawing all reasonable inferences in the light most favorable to the plaintiff. See Twombly, 550 U.S. at 555–56; United States v. Stricker, 524 F. App'x 500, 505 (11th Cir. 2013) (per curiam). Even so, a complaint offering mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" is insufficient. See Ashcroft, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 555); accord Fin. Sec. Assur., Inc. v. Stephens, 500 F.3d 1276, 1282–83 (11th Cir. 2007). Rather, "a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief" so as to satisfy "the pleading requirements of Rule 8." See Parker v. Brush Wellman, Inc., 377 F. Supp. 2d 1290, 1294 (N.D. Ga. 2005) (citing FED. R. CIV. P. 8(a)(2)).

IV. Discussion

Having set forth the relevant legal standards, the Court turns to Plaintiff's objections to the R&R. [Doc. 34]. As noted above, Plaintiff objects to the Magistrate Judge's recommendation that this Court should grant Defendant's motion to dismiss the constructive discharge claim alleged in the Amended Complaint. [See generally id.] Specifically, Plaintiff argues in its objections that the R&R "subjects the Amended Complaint to a heightened pleading standard," fails to consider the

allegations in the Amended Complaint in the light most favorable to Plaintiff, and improperly considers facts alleged in Plaintiff's original Complaint that were not alleged in the Amended Complaint. [See id. at 4–14]. In response, Defendant urges the Court to adopt the recommendation of the Magistrate Judge because "[d]espite multiple attempts, [Plaintiff] simply cannot state a viable claim for constructive discharge[.]" [See generally Doc. 36]. Defendant also praises the Magistrate Judge for considering "all allegations" Plaintiff has made in this case, including those made in the now-superseded original Complaint. [See id. at 7–10].

To state a claim for constructive discharge, a plaintiff must "allege facts to plausibly show that the conditions of employment were so unbearable that a reasonable person would be compelled to resign." Palmer v. McDonald, 624 F. App'x 699, 704 (11th Cir. 2015); accord Poague v. Huntsville Wholesale Furniture, 369 F. Supp. 3d 1180, 1199 (N.D. Ala. 2019) ("a plaintiff must plead facts that tend to show that an employer deliberately ma[de] an employee's working conditions intolerable[,]" meaning "so unbearable that a reasonable person in that person's position would be compelled to resign" (internal quotation marks omitted) (quoting Bryant, 575 F.3d at 1298)). Where a plaintiff alleges "facts plausibly suggesting that the alleged acts of harassment did in fact change the terms and conditions of their employment . . . such that working [for the employer] became intolerable[,]" it is "premature" to decide that such alleged facts "would not rise to the level of a

constructive discharge *as alleged*[.]" See id. (emphasis added); see also Twombly, 550 U.S. at 555–56 (explaining that when reviewing a Rule 12(b)(6) motion to dismiss, a court must accept as true the allegations set forth in the complaint, drawing all reasonable inferences in the light most favorable to the plaintiff).

Upon review and consideration, the Court agrees with Plaintiff that it was improper for the Magistrate Judge to consider facts not alleged in the Amended Complaint in recommending dismissal of the claim at issue. Compare R&R at 16 (concluding without citation to the Amended Complaint that Ms. "Chaney was not subjected to an ongoing, active pattern of sexual harassment at the time of her resignation" on the basis that "after [Ms.] Chaney complained about the harassment, [Defendant] transferred [Ms.] Chaney away from her alleged harasser"), with [Doc. 34 at 13] ("No where [sic] in the Amended Complaint is there an allegation stating that [Ms.] Chaney was transferred or separated from the harasser."); see generally Am. Compl. (lacking any allegation that Defendant transferred Ms. Chaney to a different job or work site). Based on the undersigned's review, it appears that the Magistrate Judge draws this alleged fact from the original Complaint. See, e.g., R&R at 4; Compl. ¶ 20. However, the original Complaint is no longer the operative pleading before the Court; the Amended Complaint is. See Dresdner Bank, A.G. v. M/V Olympia Voyager, 463 F.3d 1210, 1215 (11th Cir. 2006) (explaining that the filing of an amended complaint supersedes the previous complaint); Malowney v.

Fed. Collection Deposit Grp., 193 F.3d 1342, 1345 n.1 (11th Cir. 1999) (same). It is of no import that both Parties discussed Ms. Chaney being "separat[ed] [from] the alleged harasser" in their briefs associated with the instant motion to dismiss because "[a] court's review on a motion to dismiss is limited to the four corners of the [operative] complaint." Wilchombe v. TeeVee Toons, Inc., 555 F.3d 949, 959 (11th Cir. 2009) (internal quotation marks omitted) (quoting St. George v. Pinellas Cnty., 285 F.3d 1334, 1337 (11th Cir. 2002)). Thus, the Court sustains Plaintiff's objection to the R&R based on the Magistrate Judge's consideration of a purported fact not alleged in the Amended Complaint to support the conclusion that Plaintiff fails to state a claim for constructive discharge. [See Doc. 34 at 13]; see also R&R at 16.

Next, Plaintiff objects that the R&R "subjects the Amended Complaint to a heightened pleading standard" because it fails to consider its allegations the light most favorable to Plaintiff. [See Doc. 34 at 4–9]. The Court agrees with Plaintiff. The Magistrate Judge was correct to note that "the standard for proving constructive discharge is higher than the standard for proving a hostile work environment." See R&R at 13 (internal quotation marks omitted) (quoting Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1231 (11th Cir. 2001)). However, in explaining his view that Plaintiff fails to adequately allege that Ms. Chaney's working conditions were "intolerable" or that the alleged harassment she suffered was sufficiently "severe or pervasive" at the time of her resignation, the Magistrate Judge relies heavily on the

unsupported assumption that Ms. Chaney was not "being actively subjected to any harassment at the time of her resignation." See R&R at 17–18. This view appears to stem from an allegation Plaintiff made in the original Complaint that Ms. Chaney had been transferred away from her alleged harasser, but, as noted above, that fact was not properly before the Magistrate Judge when he was evaluating Defendant's motion to dismiss portions of the Amended Complaint. See supra pp. 11–12.

The Court also disagrees with the R&R's characterization of the purported statement made by Defendant's owner to Ms. Chaney that "based on her appearance, [Ms. Chaney] should expect to suffer harassment and sexually charged attacks from her co-workers again in the future without Defendant's protection, assistance, or redress" as mere "speculation about what may or may not happen in the future" such that it cannot support a plausible claim for constructive discharge.[1] See R&R at 18 (citing Am. Compl. ¶ 27). The Magistrate Judge reasons that "this kind of speculation" is "particularly" insufficient to state a constructive discharge claim because "it is not accompanied by any 'intolerable conditions' that [Ms.] Chaney was actually facing in the workplace at the time of her resignation." See id. Here again, the Magistrate Judge appears to rely on alleged facts not contained in the Amended Complaint. Nothing in the Amended Complaint suggests that the alleged

[1] Indeed, it is unclear to this Court why such statements made directly to an employee by her employer, even unaccompanied by physical contact or direct sexual advances, would not be sufficient to independently constitute sexual harassment and a severe and pervasive environment of intolerable working conditions. See Am. Compl. ¶¶ 27–28.

sexual harassment (which included "frequent unwelcome and inappropriate touching and lewd sexual statements directed at [Ms.] Chaney") had ceased as of the date of Ms. Chaney's resignation. See Am. Compl. ¶ 13; see also R&R at 18. And even if the so-called "fact" not included in the Amended Complaint that the Magistrate Judge improperly considered *had* been alleged in the operative pleading (that Ms. Chaney was transferred to a different job location to be "away from the harasser"), such allegations that an employee has to take physical action to avoid interacting with an alleged harasser are sufficient to "support a reasonable inference both that the conduct affected her psychological well being (and thereby the terms of her employment) and unreasonably interfered with her job." See EEOC v. Jomar Transp., Inc., Civil Action No. 1:13-CV-3143-ODE, 2014 WL 12069843, at *4 (N.D. Ga. Aug. 12, 2014). Thus, even if the allegation of Ms. Chaney's transfer had been properly within the scope of the Magistrate Judge's review, which it was not, it would tend to support the opposite conclusion reached in the R&R.

Further, this Court finds that the statements made to Ms. Chaney by Defendant's owner during the July 3, 2017 meeting go beyond "speculation about

what may or may not happen in the future."[2] R&R at 18. Defendant's owner told Ms. Chaney that "based on her appearance, she should *expect* to suffer harassment and sexually charged attacks from her co-workers *again in the future* without Defendant's protection, assistance, or redress." Am. Compl. ¶ 27 (emphasis added). This statement conveyed a seeming certainty to Ms. Chaney that she would be sexually harassed, and perhaps even physically attacked, in the future and that Defendant would allow the harassment to continue without intervention. Id. Ms. Chaney "complained repeatedly" to Defendant and various supervisors "of the offensive behavior to no effect." See Jomar Transp., 12014 WL 12069843, at *4; see also Am. Compl. ¶ 15. Taken as true, these alleged statements alone are sufficient to establish a severe and pervasive environment of intolerable working

[2] The cases cited in the R&R in support of the idea that the above statements constitute mere speculation about the future are not only factual distinguishable from the instant matter but were also decided on summary judgment with the full benefit of discovery and an evidentiary record. See R&R at 18 (citing Fitz, 348 F.3d at 977 n.4, and Medearis, 92 F. Supp. 3d at 1314). In Fitz, the Eleventh Circuit rejected a plaintiff's argument that his work conditions became so intolerable as to sustain a constructive discharge claim where the plaintiff had learned of a co-worker's statement (made in secret) that the co-worker "planned to fire [the plaintiff] at some point in the future due to [the plaintiff's] race." See 348 F.3d at 978. In Medearis, the Eleventh Circuit similarly upheld the district court's ruling granting summary judgment in favor of a defendant employer as to the plaintiff employee's constructive discharge claim. Medearis, 646 F. App'x at 899. Specifically, the Eleventh Circuit found that where the plaintiff's district manager "laugh[ed] at [the plaintiff's] complaints" about racial discrimination and told the plaintiff "that he would be fired within a year[,]" the district manager's actions "failed to rise to the level of severity or pervasiveness that a reasonable person would be compelled to resign." Id. Again, however, both of these cases were decided on summary judgment rather than under the more lenient standard applied to Rule 12(b)(6) motions to dismiss. Cf. Sherman v. Franklin, No. 5:18-CV-00589-MHH, 2019 WL 339176, at *3 (N.D. Ala. Jan. 28, 2019) (rejecting a defendant's motion to dismiss a plaintiff's constructive discharge claim where the defendant relied exclusively on cases that were "all were decided on evidentiary records, not motions to dismiss").

conditions that would place a reasonable employee in fear for her physical safety. And "the Eleventh Circuit has held that 'the state of [an employee's] psychological well being is a term, condition, or privilege of employment within the meaning of Title VII.'" Jomar Transp., 2014 WL 12069843, at *4 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). Therefore, the Court sustains Plaintiff's objections to the R&R on these bases.

In sum, the undersigned finds that any reasonable interpretation of Plaintiff's allegations make clear that the Amended Complaint states a plausible claim for constructive discharge. While Plaintiff will have to eventually prove this claim with evidence, at this juncture, its allegations are sufficient to survive dismissal. See Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 570.

V. Conclusion

For the reasons set forth above, the Court **SUSTAINS** Plaintiff's objections to the R&R. [Doc. 34]. The Court **REJECTS** the R&R [Doc. 31] and **DENIES** Defendant's "Motion to Dismiss the EEOC's Claims of Constructive Discharge in Its Amended Complaint." [Doc. 21]. The Court **DIRECTS** the Clerk to submit this matter to the Magistrate Judge for further proceedings.

SO ORDERED, this 23rd day of May, 2023.

Eleanor L. Ross
United States District Judge
Northern District of Georgia