APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

OPINION OF THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT (OCTOBER 13, 2022)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-20044

NACHAIYA KAMA,

Plaintiff-Appellant,

versus

MEMORIAL HERMANN HEALTH SYSTEMS;
TIRR MEMORIAL HERMANN,

Defendant-Appellees,

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-4682

Before: JONES, SOUTHWICK, and HO,
Circuit Judges.

PER CURIAM; *

Nachaiya Kama was hired by Memorial Hermann Health System in October 2017 and received numerous disciplinary actions for poor performance and unprofessional behavior. After being fired, Kama alleged that her supervisor sexually assaulted her both before and immediately after she began employment. She sued her former employer, claiming assault and battery, sexual harassment, race discrimination, and retaliation. The district court, after an oral hearing, granted Memorial Hermann's motion for summary judgment. Kama appeals *pro se*, and this court affirms.[1]

Memorial Hermann Health System cannot be held liable under Kama's assault and battery claim. As the district court noted, "[i]n order for the plaintiff to prevail on her tort-based sexual assault/harassment claim, she must establish [that] the assault that McLeod allegedly committed occurred while he was acting within his authority, in furtherance of his employer's . . . business . . . ." Kama does not contend that the alleged assault was within the scope of McLeod's employment. Consequently, Memorial Hermann cannot be held liable for McLeod's intentional tort.

The District Court properly granted summary judgment on the sexual harassment claim. To prevail

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* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

under Title VII, the plaintiff must show that "(1) the victim belongs to a protected group; (2) the victim was subjected to unwelcome harassment; (3) the harassment was based on a protected characteristic; (4) the harassment affected a term, condition, or privilege of employment; and (5) the victim's employer knew or should have known of the harassment and failed to take prompt remedial action." *E.E.O.C. v. WC&M Enterprises, Inc.*, 496 F.3d 393, 399 (5th Cir. 2007). McLeod, though a "supervisor," had no power to hire or fire Kama and is therefore treated as a coworker for Title VII purposes, thus, his alleged assault cannot be imputed directly to the employer, though it is subject to the coworker harassment standards. Assuming *arguendo* that she has met her other burdens, Kama has not created a material fact issue as to whether Memorial Hermann knew or should have known of McLeod's alleged misconduct. Although Kama claimed that she informed a clinical nurse manager (not in her unit) and several co-workers, she admits that she never reported it through Hermann Memorial's official channels. She did not go to the Human Resources Department or to the police until March 2019, a month after she had been terminated.

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[1] Kama filed her Notice of Appeal 45 days after the district court entered its Final Judgment, which would ordinarily make the appeal untimely. FED. R. APP. P. 4(a)(1)(A). However, this court construes Kama's motions to retain the case on the docket as a Rule 59(e) motion to alter or amend the judgement, which moves back the deadline. FED. R. APP. P. 4(a)(4)(A).

Since the conduct was not "known to 'higher management' or to someone who ha[d] the power to take action to remedy the problem," Memorial Hermann is not liable. *Sharp v. City of Houston*, 164 F.3d 923, 929 (5th Cir. 1999).

Kama's race discrimination claim also fails. Individuals who pursue claims of discrimination under Title VII must first exhaust their administrative remedies. *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378- 79 (5th Cir. 2002). "Exhaustion occurs when the plaintiff files a timely charge with the EEOC and receives a statutory notice of right to sue." *Id.* At 379. But Kama did not assert race discrimination in her EEOC Charge, so she cannot bring this claim to federal court.

Neither can Kama prevail in her retaliation claim. To survive summary judgment, a plaintiff must create a genuine issue of material fact that she was subject to an adverse employment action for engaging in a protected activity. *Wooten v. McDonald Transit Assocs., Inc.*, 788 F.3d 490, 496–97 (5th Cir. 2015). She must also show that any non-retaliatory reason given for her dismissal was pretext. *Septimus v. Univ. of Houston*, 399 F.3d 601, 607–08 (5th Cir. 2005). Kama alleges that she was fired for opposing sexual harassment and sexual assault, but there is no evidence that she alerted Memorial Hermann that she had been sexually assaulted until after her termination. Further, Kama has failed to show that Memorial

Hermann's non-retaliatory rationale was pretextual. On the contrary, the record shows that she was fired after a long string of disciplinary actions involving a smorgasbord of misbehavior.

The district court correctly disposed of Kama's claims. The summary judgment is AFFIRMED.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (DECEMBER 14, 2021)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NACHAIYA KAMA,	§
	§
Plaintiff,	§
	§
VS.	§
	§
MEMORIAL HERMANN HEALTH SYSTEMS,	§
	§
	§
Defendant,	§

Civil Action No. 4:19-CV-4682

Before: Hon. Kenneth M. Hoyt
United States District (Senior) Judge.

MEMORANDUM AND ORDER

I. INTRODUCTION

Before the Court are the defendant's, Memorial Hermann Health Systems, motions to dismiss [DE

73], for summary judgment [DE 103], and to suspend trial pending resolution of its dispositive motions [DE 117]. Also before the Court are the plaintiff's, Nachaiya Kama, responses [DEs 74, 105, 107 and 118] to the defendant's various motions. After a careful and patient review of the pleadings and documents on file, and conducting an oral hearing on the motions and responses, the Court determines that the defendant's motion for summary judgment should be granted, the remaining motions are, therefore, rendered moot.[1]

II. FACTUAL BACKGROUND

The plaintiff was first employed by the defendant in October 2017, as a Patient Care Assistant ("PCA") at the Memorial Rehabilitation and Research Center.

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[1] The plaintiff's Original and Amended Complaints [DEs 1, 20, 21, 27 and 28] all assert causes of action that were not presented to the EEOC or the Texas Workforce Commission. The Charge of Discrimination seeks relief on the basis of "sex" and "retaliation". Because the additional claims asserted in her pleadings have not been exhausted and the time for presenting them to the Agencies has long since passed, the Court dismisses those claims. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 37 (1974); *Miller v. S. W. Bell Tele. Co.*, 51 F.2d Appx. 928 (2002); 2002 WL 31415083. The Court also denies the plaintiff's recently filed motion for reconsideration [DE 136], and any remaining motions.

In her capacity as a PCA, the plaintiff was to complete assignments delegated to her by the nursing staff and managers with regard to the care of patients under the care of the defendant. As a PCA, the plaintiff reported to John McLeod, who in turn, reported to the Nursing Director in Unit Four.

While employed in Unit Four and during the period of her employment, the plaintiff received "formal" discipline actions concerning poor performance and behavior such as raising her voice and being confrontational with a fellow employee. In February, June and September of 2018 and January 2019, complaints of unacceptable behavior were experienced and reported by fellow co-workers. On one or more occasions, the plaintiff did not deny that the events occurred for which she received formal disciplinary action notices. Other complaints charged that the plaintiff was "charting on a workstation" instead of caring for the patients. PCAs are also required to wear a location badge while on duty in order that they may be tracked and, if necessary located. For over a month, the plaintiff failed to insure that her location badge was properly functioning.

III. CONTENTIONS OF THE PLAINTIFF

The plaintiff asserts that her supervisor, McLeod, subjected her to sexual assaults, harassment and retaliation. The plaintiff first met McLeod in April 2017, at a job fair. When she received her

certified nursing assistance license, she called McLeod concerning a position in hopes of receiving a job. In August 2017, after the plaintiff received a call from McLeod concerning a job she accepted a ride with him. At some point, McLeod was permitted to enter her home where he raped her. This event occurred prior to the plaintiff's employment with the defendant. Nevertheless, the plaintiff accepted employment with the defendant under McLeod's supervision.

Allegedly, McLeod sexually assaulted her again in November, one month after she began her employment with the defendant. The record reflects that the plaintiff did not report either of these incidents to the defendant's Human Resource Department ["HR"], or the police until March 2019, a month after her employment was terminated.

IV. DISCUSSION AND ANALYSIS

The Court is of the opinion that the defendant's motion for summary judgment should be granted. On or about August 14, 2019, the plaintiff filed a Charge of Discrimination with the EEOC. She alleged discrimination based on sexual assault, harassment and retaliation. The focus of the plaintiff's Charge was an alleged sexual assault that the plaintiff contends was committed by Clinical Nurse Manager John McLeod. The first occasion occurred prior to and as a condition of her employment with the

defendant. In November 2017, McLeod allegedly sexually assaulted her again. According to the plaintiff, one Clinical Nurse Manager, not in her unit, and several co-workers were informed of McLeod's conduct. Nevertheless, she did not report the matter to HR in details, even after she was terminated. On these facts, the Court concludes that the plaintiff's sexual assault/harassment claim fails.

In order for the plaintiff to prevail on her sexual assault/harassment claim, she must establish on the assault that McLeod allegedly committed occurred while he was acting within his authority, in furtherance of his employer's [the defendant's] business, and that he was attempting to accomplish an objective expected by his employer. *Knight v. City Streets, LLC*, 167 SW.3d 580, 583 (Tex. App.—Houston [14th Dist.] 2005). Clearly, McLeod was not acting in the scope of his employment or at the behest of the defendant on either occasion of the alleged sexual assault. And, the plaintiff does not argue that he was.

In order for the plaintiff to establish a sexual harassment claim, she must establish that she belongs to a protected class, she received unwelcomed harassment, the harassment affected a term, condition, or privilege of her employment, she informed or made known to the defendant that the conduct was occurring, and that the defendant failed to correct the conduct or otherwise remediate the

conduct. *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 399 (5th Cir. 2007). This claim also fails because the matter was never presented to the defendant, as is conceded by the plaintiff. Sharing events of harassment with fellow workers is not a substitute for reporting unwanted sexual harassment conduct to HR.

Finally, the plaintiff contends that her termination was in retaliation for her opposition to "sexual harassment and continued sexual assault". This claim, too, is without merit because the plaintiff never reported the events that she claims give rise to her retaliation claim. In order to establish a claim for retaliation, she must establish that she engaged in protected activity, and as a result, suffered an adverse employment action, *i.e.*, termination. *Wooten v. McDonald Transit Assocs., Inc.*, 788 F.2d 490, 497 (5th Cir. 2015).

There is not evidence that the plaintiff engaged in protected activity and that it was the basis for her termination. On the contrary, the evidence establishes that the plaintiff's termination was the result of a combination of her lack of performances, poor performance and unacceptable behavior. The plaintiff, for example, does not deny that her locator badge was inoperative and that she was responsible for replacing the batteries. Instead, she blames McLeod for giving her the heavier assignments. Moreover, she does not, otherwise, dispute the claims

made by her fellow employees concerning her conduct toward them.

The Court concludes that the plaintiff's suit is without merit, and that the defendant's motion for summary judgment should be, and it is Hereby, Granted.

It is so Ordered.

SIGNED on this 14th day of December, 2021.

/s/ Kenneth M. Hoyt

Kenneth M. Hoyt
United States District Judge

FINAL JUDGEMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (DECEMBER 14, 2021)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NACHAIYA KAMA,	§
Plaintiff,	§
VS.	§
MEMORIAL HERMANN HEALTH SYSTEMS and TIRR MEMORIAL HERMANN,	§
Defendants,	§

CIVIL ACTION NO. 4:19-CV-4682

FINAL JUDGEMENT

Pursuant to the Memorandum and Order entered in this case, the plaintiff shall take nothing by her suit. The defendant, Memorial Hermann Health System's motion for summary judgment is Granted.

This is a Final Judgment.

SIGNED on this 14th day of December, 2021.

/s/ Kenneth M. Hoyt

Kenneth M. Hoyt
United States District Judge