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

BLANCA ROSALES, Plaintiff, V. CARDIOTHORACIC & VASCULAR SURGEONS, Defendant.	§ § § § § § § § § §	A-12-CV-1013 LY

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE

Before the Court are Defendant's Motion for Summary Judgment, filed April 26, 2013 (Clerk's Dkt. #11); Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, filed May 10, 2013 (Clerk's Dkt. #13); and Defendant's Reply in Support of its Motion for Summary Judgment, filed May 17, 2013 (Clerk's Dkt. #14). The matters were referred by United States District Judge Lee Yeakel for a Report and Recommendation as to the merits of the matters pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. After reviewing the parties' pleadings, relevant case law, as well as the entire case file, the undersigned issues the following Report and Recommendation to the District Court.

I. BACKGROUND

Plaintiff Blanca Rosales ("Rosales") is a former employee of Cardiothoracic & Vascular Surgeons ("CTVS"). She brings this action against sole defendant CTVS. Plaintiff alleges she was subject to discrimination based on race and/or national origin, which resulted in the termination of her employment with CTVS. Rosales also alleges she was subject to retaliation for making

discrimination complaints and opposing discrimination. Plaintiff further alleges, after her termination, a survey response containing untrue statements concerning her job performance was sent to the school at which she received her training. She alleges these employment practices were in violation of the Texas Labor Code and 42 U.S.C. § 1981, and further constitute a cause of action for defamation.

Defendant has now filed a motion for summary judgment. Defendant contends: (1) Plaintiff cannot establish she was subject to national origin discrimination because she was hired and fired by the same manager; (2) any claim of racial harassment fails because the alleged conduct was not pervasive and CTVS took prompt remedial actions; (3) Plaintiff cannot establish a prima facie claim of retaliation and CTVS had a legitimate, non-discriminatory reason to terminate her employment; and (4) Plaintiff cannot establish a claim of defamation.

II. STANDARD OF REVIEW

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure only "if the movant shows there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254,106 S. Ct. 2505, 2513 (1986).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87,106 S. Ct. 1348, 1355-56 (1986); *Wise v. E.I. Dupont de Nemours & Co.,* 58 F.3d 193, 195 (5th Cir. 1995). The parties may satisfy their respective burdens by tendering

depositions, affidavits, and other competent evidence. *Topalian v. Ehrman,* 954 F.2d 1125, 1131 (5th Cir. 1992).

The Court will view the summary judgment evidence in the light most favorable to the non-movant. *Rosado v. Deters*, 5 F.3d 110, 122 (1993). The non-movant must respond to the motion by setting forth particular facts indicating that there is a genuine issue for trial. *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000). "After the non-movant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the non-movant, summary judgment will be granted." *Id*.

III. ANALYSIS

In responding to the motion for summary judgment, Plaintiff concedes she is no longer pursuing her claims for harassment and discrimination based on national origin. Summary judgment should thus be granted as to these claims. The undersigned will therefore only address Plaintiff's claims of retaliation and defamation.

A. Retaliation

1. Applicable Law[1]

To establish a prima facie case of retaliation, a plaintiff must demonstrate: (1) she engaged in a protected activity; (2) her employer took an adverse employment action against her; and (3) a causal connection exists between the protected activity and the adverse employment action. *Hernandez v. Yellow Transp., Inc.*, 641 F.3d 118, 129 (5th Cir. 2011), *cert. denied*, 133 S. Ct. 136 (2012); *Fabela v. Socorro Indep. Sch. Dist.*, 329 F.3d 409, 414 (5th Cir. 2003). If the employee can demonstrate this prima facie case of retaliation, the *McDonnell Douglas* burden-shifting framework

[1] Plaintiff asserts her claims under the provisions of the Texas Labor Code known as the Texas Commission on Human Rights Act ("TCHRA"). The TCHRA was patterned after federal anti-discrimination statutes in order to carry out the policies elucidated in Title VII of the Civil Rights Act of 1964. *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 474 (Tex. 2001). Thus, in analyzing a TCHRA claim, courts seek guidance not only from Texas cases, but from analogous federal statutes and cases as well. *Ysleta Indep. Sch. Dist. v. Monarrez*, 177 S.W.3d 915, 917 (Tex. 2005). *See also Amie v. El Paso Indep. Sch. Dist.*, 253 F. App'x 447, 450 n.1 (5th Cir. 2007) (because purpose of TCHRA is to provide for execution of policies of Title VII, same analysis is applied for each)

applies and the employer has the burden to state a legitimate non-retaliatory reason for the employment action. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007). Once the employer does so, the burden falls to the employee to show the explanation is a pretext for unlawful retaliation. *Aryain v. Wal-Mart Stores Texas LP*, 534 F.3d 473, 484 (5th Cir. 2008); *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 427 (5th Cir. 2000).[2]

2. Relevant Evidence

Plaintiff began her employment with CTVS on June 27, 2011 as a medical assistant. (Def. Mot. for Summ. Jt. Ex. 2 ("Wier Aff.") ¶ 7). Rosales was hired by Gail Wier ("Wier"), Clinical Supervisor of CTVS. On June 22, 2011 Wier received Plaintiff's resume from the Everest Institute, a vocational school that trains medical assistants. Wier interviewed Rosales on June 23, 2011 and hired her the same day. As Wier was aware at the time, Plaintiff's national origin is Mexico. (Wier Aff. ¶ 5; Plf. Resp. Ex. 8). Wier is responsible for supervising all of the nurses and medical assistants who work in CTVS, and has hiring and firing authority over those employees. (Wier Aff. ¶¶ 2-3, 5).

According to Wier, among the critical skills CTVS expects a medical assistant to have upon hiring are the ability to take accurate blood pressure and medication histories, as well as to chart accurately and thoroughly. Based on the resume provided by the Everest Institute, Wier thought Rosales had the skill set necessary to perform the duties of a CTVS medical assistant. (Wier Aff. ¶¶ 5-6, 11 & Ex. B).

It is undisputed that Plaintiff contacted Wier via e-mail on July 15, 2011 and raised some

[2] The undersigned notes this *McDonnell Douglas* burden-shifting framework is applicable to retaliation claims in which the Plaintiff argues the reasons offered by the employer for the adverse employment action are merely pretextual. *See Strong v. Univ. Healthcare Sys., L.L.C.*, 482 F.3d 802, at 805 (5th Cir. 2007) (applying *McDonnell Douglas* framework because plaintiff's retaliation claims are based on a pretext theory); *Fabela*, 329 F.3d at 415 (noting *McDonnell Douglas* framework does not apply where plaintiff is able to support element of retaliation claim with direct evidence of discrimination). Plaintiff does not proffer any direct evidence of retaliation, but rather relies on a pretext theory in this action.

concerns about her work environment. In pertinent part she stated "I don't think it is good to talk about another race at work because we are not all one race to say how you feel about an apposite [sic] race like some co-workers do here." (Wier Aff. Ex. F; Plf. Resp. Ex. 6 ("Rosales Depo.") at 55 & Ex. 19).

Wier met with Rosales that same day concerning her email. Rosales explained her comment was a reference to a telephone conversation of her co-worker, nurse Johanna Cockerham ("Cockerham"), which Rosales overhead. During the call, Cockerham discussed giving her cat away, but expressed concern that the cat would wind up "in a house full of Mexicans." (Wier Aff. ¶ 14; Rosales Depo. at 62-63). Rosales testified she also mentioned to Wier two other derogatory comments Cockerham had made concerning Mexicans, but Wier recalls only the first comment. (Wier Aff. ¶ 14; Rosales Depo. at 63-64).

According to Rosales, Wier was very nice during the meeting and told Rosales not to worry, she would deal with Cockerham. (Rosales Depo. at 72-73). Wier met with Cockerham and explained Rosales was offended by Cockerham's comment. Cockerham agreed to, and did apologize to Rosales via e-mail. (Wier Aff. ¶ 15; Rosales Depo. at 74 & Ex. 20).

According to Wier, she became aware within three weeks that Rosales was not mastering the skills required by CTVS rapidly enough. In her affidavit, Wier states:

> After receiving feedback from clinical staff that Blanca Rosales was struggling with taking accurate blood pressures, obtaining accurate medication lists from patients on intake, scheduling patient appointments, communicating with co-workers, and pulling charts efficiently, I decided to approach Sharon Koch, the Chief Operation Officer of CTVS and my supervisor, about separating Blanca Rosales's employment. Sharon Koch and I met on July 20, 2011, and decided to terminate Blanca Rosales's employment on Friday, July 22, 2011, so that she could finish her workweek. Sharon Koch and I met with Blanca Rosales on July 22, 2011, and communicated the employment decision to her.

(Wier Aff. ¶ 11). According to Wier, Rosales' complaint to her regarding racially derogatory comments in the workplace "played no role in my decision whatsoever to end her employment." (Wier Aff. ¶ 17).

Plaintiff testified, however, that Wier never expressed dissatisfaction with her performance during her employment with CTVS. (Rosales Depo. at 104). Further, according to Plaintiff, she asked Wier "every single day that I worked there, how was I doing every day, when I went home. And she would say that I was doing great." (Rosales Depo. at 104).

Wier and Plaintiff agree accurate blood pressure readings are a crucial part of providing care to patients of CTVS. (Wier Aff. ¶ 3; Rosales Depo. at 114). At some point in July 2011, Joe Wells ("Wells"), a doctor at CTVS, noticed several blood pressures in a row taken by the same medical assistant were identical and suspiciously low. Wells asked Cockerham to address it and also requested the medical assistant, who he later learned was Rosales, not be assigned to his patients again. (Def. Mot. for Sumn. Jt. Ex. 3 ¶ 4). Cockerham testified she told Wier about Wells' issue with Rosales. Cockerham did not know if any one ever spoke with Rosales about the matter. (Plf. Resp. Ex. 1 at 14-16).

Wier testified she was also aware of Rosales' problems with accurate blood pressure readings because of notes on the physician's office schedule. According to Wier, notes are made on the schedule during the training process to determine if mistakes are being made. Wier testified Cockerham had brought Rosales' mistakes to her attention using this method during the time Rosales was employed at CTVS. (Plf. Resp. Ex. 2 ("Wier Depo.") at 16-21). Wier specifically testified she had seen at least some of the office schedules before July 8, 2011 as Cockerham was keeping Wier informed of Rosales' progress. (Wier Depo. at 21).

Cockerham, however, testified Wier asked her to undertake the chart review. (Plf. Resp. Ex. 1 ("Cockerham Depo.") at 22-24). Cockerham did not recall exactly when Wier asked her to do so, but agreed it was at a minimum at some point after July 8, 2011, the latest date of the charts she reviewed. She also believes it was after Rosales made her complaint on July 15, 2011. (Cockerham Depo. at 27, 31).

Wier states in her affidavit that Rosales was also slow at pulling and organizing medical

charts. She states she asked another medical assistant, Sarah Romero ("Romero"), to assist in training Rosales. (Wier Aff. ¶10). Wier testified Romero told her verbally on July 6 and 13 that Rosales was having difficulty pulling charts. (Wier Depo. at 45). According to Romero's affidavit, she reported Rosales' slow progress in learning to pull charts to Wier. (Def. Mot. for Summ. Jt. Ex. 6 ¶ 5). Wier also states in her affidavit that Rosales obtained incomplete medication lists from patients and misspelled common medication names. (Wier Aff. ¶ 9).

In her deposition, Romero testified she helped train Rosales in pulling charts. She testified Rosales made a few mistakes, but also admitted she had made mistakes when she began pulling charts. Romero rated Rosales as "average" in the number of mistakes she made pulling charts. (Plf. Resp. Ex. 4 ("Romero Depo,") at 26-27, 50). Romero also testified she initially trained Rosales in taking blood pressure readings, but stopped checking on Rosales' charting of the blood pressure when she was satisfied with Rosales' performance. (Romero Depo. at 18-19). Romero also testified she did not recall any particular spelling errors Rosales had made in patient charts. (Romero Depo, at 41).

Wier testified she also asked Rachel Dominguez ("Dominguez"), another medical assistant at CTVS, to help train Rosales. (Wier Depo. at 15). However, Dominguez testified she just answered some questions from Rosales. (Plf. Resp. Ex. 5 ("Dominguez Depo,") at 8). Dominguez testified she helped Rosales organize charts on one occasion, but did not remember observing any errors made by Rosales. (Dominguez Depo. at 16-17). Dominguez denied ever speaking to Wier regarding Rosales' performance. (Dominguez Depo. at 18).

Wier testified she spoke with Rosales several times about her inaccurate recording of blood pressures. (Wier Depo. at 22). According to Wier, she documented those conversations with Rosales, and others concerning Rosales' performance, on a handwritten log. Wier stated her practice is to transfer the notes to a computer form, then shred the notes. Although she did not recall if she had typed up notes from Rosales, Wier testified she had a training log which

documented her performance discussions with Rosales. (Wier Depo. at 24, 31-32). Wier testified the training log for Rosales documents reports that Wier received from nurses and other medical assistants at CTVS during Rosales' employment of problems Rosales had with blood pressure accuracy, scheduling patients, spelling and pulling charts. (Wier Depo. at 38-47).

Although Wier stated she did not remember exactly when she wrote the entries on the training log, she testified it would have been around the time reports of Rosales' progress were made, and definitely during Rosales' employment. (Wier Depo. at 40). Wier specifically testified she had printed the training log, and began keeping handwritten notes on it shortly after Rosales began her employment with CTVS. (Wier Depo. at 52-53). However, during her deposition, Wier was confronted with evidence that the training log had not been created until September 14, 2011. Although she agreed she had no reason to dispute the evidence, Wier testified she could not recall when she created the training log. (Wier Depo. at 64-67).

3. Analysis

CTVS first contends Plaintiff's retaliation claim fails because she cannot establish the requisite prima facie case. Specifically CTVS argues no causal link exists between Plaintiff's July 15, 2011 complaint of racial bias and the termination of her employment. CTVS correctly points out "the plaintiff must produce *some* evidence of a causal link between the protected activity and the adverse employment action to establish a prima facie case of retaliation." *Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 385-86 (5th Cir. 2003) (emphasis in original). Plaintiff, in turn, points out the termination of her employment occurred only one week after her complaint. "The combination of temporal proximity and knowledge of a protected activity may be sufficient to satisfy a plaintiff's prima facie burden for a retaliation claim." *Cothran v. Potter*, 398 F. App'x 71, 73–74 (5th Cir. 2010). As the Supreme Court has noted, the cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as

sufficient evidence of causality "uniformly hold" that the temporal proximity must be "very close." *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74, 121 S. Ct. 1508, 1511 (2001). The undersigned has little trouble concluding the one week between Plaintiff's complaint and the termination of her employment is sufficient to establish the requisite causal link, and thus her prima facie case. *See LeMaire v. La. Dep't of Transp. & Dev*., 480 F.3d 383, 390 (5th Cir. 2007) (timing of suspension, approximately two weeks after report of harassment, suggests causal connection); *Bregon v. Autonation USA Corp.*, 128 F. App'x 358, 362 (5th Cir. 2005) (evidence plaintiff fired one week after filing complaint and people at work were likely aware of complaint sufficient to satisfy prima facie burden for retaliation claim); *Evans v. Houston*, 246 F.3d 344, 354 (5th Cir. 2001) (prima facie case established when plaintiff fired five days after complaint filed).

CTVS also contends it has presented evidence establishing a legitimate non-retaliatory reason for the termination of Plaintiff's employment. Specifically, CTVS maintains the evidence establishes Plaintiff was fired because she did not possess, or rapidly acquire, the skills necessary to perform the job of medical assistant at CTVS.

Plaintiff does not disagree CTVS has presented some evidence which suggests her job performance was not satisfactory. However, Plaintiff maintains that evidence is nothing more than a pretext for unlawful retaliation. Specifically, Plaintiff argues there is substantial evidence that CTVS's proffered explanation is false or not credible. *See Laxton v. Gap*, 333 F.3d 572, 578 (5th Cir. 2003) ("evidence demonstrating that the employer's explanation is false or unworthy of credence, taken together with the plaintiff's prima facie case, is likely to support an inference of discrimination even without further evidence of defendant's true motive."). *See also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 2109 (2000) (plaintiff's prima facie case, combined with sufficient evidence to find employer's asserted justification is false, may permit trier of fact to conclude employer unlawfully discriminated).

As set forth above, the summary judgment evidence establishes the decision to terminate

Plaintiff's employment was made by Weir. CTVS relies on the affidavit testimony of Wier to establish her decision was made based on reports made to her by other employees of CTVS. However, Plaintiff has presented summary judgment evidence which contravenes much of Wier's testimony concerning the complaints made by other employees of CTVS. Moreover, the summary judgment evidence establishing Wier was untruthful concerning the creation of, and her reliance on, the training log casts serious doubt on her credibility. As CTVS's proffered explanation for terminating Plaintiff's employment is based on Wier, the "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in her proffered legitimate reasons for CTVS's decision to fire Plaintiff could permit a reasonable factfinder to rationally find those reasons unworthy of credence and thus pretextual. *See Wojciechowski v. National Oilwell Varco, L.P.*, 763 F. Supp. 2d 832, 859 (S.D. Tex. 2011) (quoting *Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1136 (10th Cir. 2005) (to establish employer's proffered reason is pretextual, employee is required to demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in proffered reasons such that "a reasonable factfinder could rationally find them unworthy of credence."); *see also Olson v. Gen. Elec. Astrospace*, 101 F.3d 947, 951–52 (3d Cir. 1996) (same).

The undersigned concludes the combination of suspicious timing, combined with factual disputes concerning whether Rosales' performance was reported by her co-workers as inadequate, and a significant concern about the credibility of Wier, are sufficient to raise a fact question as to the pretextual nature of Defendant's reason for the termination of Plaintiff's employment. *See Magiera v. City of Dallas*, 389 F. App'x 433, 440 (5th Cir. 2010) (close timing of protected activity and adverse employment action, combined with evidence casting doubt on validity of reason proffered by employer sufficient to defeat motion for summary judgment); *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 409 (5th Cir. 1999) (combination of suspicious timing with other significant evidence of pretext sufficient to support summary judgment); *Evans*, 246 F.3d at 356

(close proximity between protected activity and demotion, coupled with lack of evidence of disciplinary problems, plus evidence refuting employer's justification, combine to create conflict of substantial evidence as to retaliation claim); *Long v. Eastfield College*, 88 F.3d 300, 308 (5th Cir. 1996) (reversing grant of summary judgment on plaintiff's retaliation claim where employee's past evaluations had been positive up until time of protected activity, and no other employee had been terminated for same behavior). Accordingly, CTVS's motion for summary judgment as to Rosales' retaliation claim should be denied.

B. Defamation

CTVS has also moved for summary judgment as to Plaintiff's claim of defamation on several bases. The undersigned will address each in turn.

1. Limitations

CTVS first contends Plaintiff's claim for defamation is barred by the statute of limitations. Claims for defamation must be brought not later than one year after the day the cause of action accrues. TEX. CIV. PRAC. & REM. CODE ANN. § 16.002(a); *Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 586 (Tex. App.–Austin 2007, pet. filed).

Plaintiff's defamation claim is based on the negative response of CTVS to a survey from the Everest Institute. The summary judgment evidence establishes Wier received an employer survey from the Everest Institute at some point after Plaintiff's employment was terminated. Wier filled out and returned the survey on September 27, 2011. (Wier Aff. ¶ 18 & Ex. H). In the survey, Wier gave Plaintiff the lowest possible ratings for demonstrating acceptable training in the area for which she was employed and in having the skill level necessary for the job. Wier additionally commented Plaintiff was "unable to learn our practice effectively" and was terminated. (Wier Aff. ¶ 18 & Ex. H). Wier had no further communication with the Everest Institute about Plaintiff. (Wier Aff. ¶ 18).

CTVS correctly points out Plaintiff did not assert her claim of defamation until October 25, 2012 when she filed her amended petition.[3] CTVS maintains Plaintiff's defamation claim is thus untimely because it was not asserted until more than one year after the allegedly defamatory comments were made. A defamation cause of action generally accrues on the date the alleged defamatory matter is published. *Judy Chou Chiung-Yu Wang v. Prudential Ins. Co. of Am.*, 439 F. App'x 359, 366 (5th Cir. 2011) (citing *Newsom v. Brod*, 89 S.W.3d 732, 736 (Tex. App.–Houston [1st Dist.] 2002, no pet.)); *Pitts & Collard, L.L.P. v. Schechter*, 369 S.W.3d 301, 323 (Tex. App.–Houston [1st Dist.] 2011, pet. pending); *Johnson v. Baylor Univ.*, 188 S.W.3d 296, 301 (Tex. App.–Waco 2006, pet. denied).

Plaintiff, in turn, contends she is entitled to the benefit of the discovery rule. The discovery rule applies to an action for defamation when a defamatory statement is inherently undiscoverable or not a matter of public knowledge. *San Antonio Credit Union v. O'Connor*, 115 S.W.3d 82, 96 (Tex. App.-San Antonio 2003, pet. denied); *Wheeler v. Methodist Hosp.*, 95 S.W.3d 628, 636–37 (Tex. App.–Houston [1st Dist.] 2002, no pet.). *See also Kelley v. Rinkle*, 532 S.W.2d 947, 949 (Tex. 1976) (discovery rule applies to claim for libel of credit reputation by publication of defamatory credit report). When the discovery rule applies, it defers the accrual of a cause of action until a plaintiff discovers or, through the exercise of reasonable care and diligence, should discover the nature of the injury. *Childs v. Haussecker*, 974 S.W.2d 31, 37 (Tex. 1998).

Plaintiff maintains she did not discover the defamation until she requested her records from the Everest Institute in Spring 2012 for the purpose of establishing her claims in this suit. (Plf. Am. Pet. ¶ 9). She argues she had no reason to, and did not, know of the defamatory statements prior to that time. CTVS counters that Plaintiff did not exercise due diligence because "[w]hen she completed her training at Everest, she was explicitly told that Everest would be soliciting information

[3] Plaintiff originally filed this action in Texas state court. Defendant removed the action to this court on November 2, 2012.

from her employer," and, in light of her claims in this action, she should have believed CTVS would provide negative information. (Def. Mot. for Summ. Jt at 17).

In support, CTVS points to a form completed by Plaintiff in June 2011 in which she authorized the Everest Institute to "verify my employment status, hours and wages." (Rosales Depo. at 35-37 & Ex. 15). CTVS is correct that the discovery rule does not apply where a plaintiff has knowledge of a defamatory statement but does not thereafter act with diligence to discover the facts on which a defamation claim may be asserted. *See Wheeler*, 95 S.W.3d at 639 (discovery rule did not apply when plaintiff knew unfavorable report had been made, but did not take prompt action to ascertain contents). However, as Plaintiff points out, this case is distinguishable from *Wheeler* for at least two reason. First, Plaintiff authorized the Everest Institute to verify her employment status, hours and wages. Her authorization of verification by the Everest Institute is not tantamount to a reasonable belief that the Everest Institute routinely made such inquiries or that CTS responded to such inquiries. Moreover, the authorization form contains no mention that the Everest Institute would send a survey to her employer asking her employer to rate her employment and training, or to otherwise comment on the quality of her work. Accordingly, the undersigned concludes CTVS has not shown Plaintiff's defamation claim is untimely. *See Weaver v. Witt*, 561 S.W.2d 792, 794 (Tex. 1977) (defendant bears burden in summary judgment to conclusively prove date of accrual and negate discovery rule).

2. Privilege

CTVS also contends Plaintiff's defamation claim fails because Wier's communication regarding Plaintiff was subject to a qualified privilege. Under Texas law, a qualified privilege extends to all "[a]ccusations or comments about an employee by his employer, made to a person having an interest or duty in the matter to which the communication relates." *Frakes v. Crete Carrier Corp.*, 579 F.3d 426, 430 (5th Cir. 2009) (quoting *Burch v. Coca-Cola Co.*, 119 F.3d 305,

323 (5th Cir. 1997)).

Wier stated vocational schools, like the Everest Institute, routinely ask for information about their graduates, including whether they are still employed. (Wier Aff. ¶ 18). Plaintiff admitted in her deposition that the Everest Institute actively participates in placing its students after graduation. (Rosales Depo. at 34-36). Plaintiff also testified she had returned to the Everest Institute after her termination from CTVS seeking help obtaining another job. (Rosales Depo. at 142-45). Based on the summary judgment evidence, the undersigned has little trouble concluding Wier's completion of the survey falls within the bounds of the qualified privilege accorded to employers.

However, the presence of actual malice defeats an employer's qualified privilege. *Frakes*, 579 F.3d at 431; *Burch*, 119 F.3d at 323; *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995). "In the defamation context, a statement is made with actual malice when the statement is made with knowledge of its falsity or with reckless disregard as to its truth." *Randall's*, 891 S.W.2d at 646. At the summary judgment stage, the plaintiff has the burden to put forth sufficient evidence to create a genuine dispute as to the existence of actual malice. *Frakes*, 579 F.3d at 431; *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 313-14 (5th Cir.1995).

Plaintiff argues there is summary judgment evidence establishing Wier knew her statements in the survey were untrue. As set forth above, there is at least a factual dispute raised by the record as to the truthfulness of Wier's statements concerning Plaintiff's skill level and performance at CTVS. Based on that evidence, the undersigned concludes Plaintiff has carried her burden to put forth evidence created a genuine dispute as to the existence of actual malice.

3. Consent

CTVS finally argues Plaintiff's defamation claim fails because the evidence establishes consent as a matter of law. Under Texas law a defamation cause of action requires the plaintiff to prove: (1) the defendant published a false statement; (2) defamatory to the plaintiff, in that it

damaged the plaintiff's reputation, exposing him to financial injury; and (3) the defendant made the statement negligently as to its truth. *Green v. CBS Inc.*, 286 F.3d 281, 283 (5th Cir. 2002); *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998); *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989). A plaintiff may not recover on a defamation claim based on a publication to which he has consented, authorized, procured or invited. *Lyle v. Waddle*, 144 Tex. 90, 188 S.W.2d 770, 772 (1945)*; Oliphint v. Richards*, 167 S.W.3d 513, 516 (Tex. App.–Houston [14th Dist.] 2005, pet. denied); *Rouch v. Cont'l Airlines*, Inc., 70 S.W.3d 170, 172–73 (Tex. App.–San Antonio, 2001, pet. denied). The scope of a plaintiff's consent, however, "does not exceed what is reasonable in light of the language or circumstances that created it," thus, the plaintiff's "[c]onsent does not immunize defamations that the plaintiff had no reason to anticipate." *Smith v. Holley*, 827 S.W.2d 433, 439–40 (Tex. App.–San Antonio, 1992, writ denied).

CTVS's argument once again relies on the authorization form Plaintiff executed. Specifically, Plaintiff initialed next to the statement "I authorize CCi to verify my employment status, hours and wages. My employer is released to provide any information to CCi." (Rosales Depo. Ex. 15).[4] CTVS maintains by this authorization Plaintiff granted explicit permission for Plaintiff's employer to release any information concerning her employment.

Plaintiff does not dispute the authorization form constituted consent on her part to release information relating to her employment. However, according to Plaintiff, the consent was limited to solely verification of her employment status, hours and wages. She thus maintains the consent did not extend to Wier's opinions concerning the adequacy of Plaintiff's skills and training.

The undersigned disagrees for two reasons. First, under Plaintiff's interpretation, the "any information" phrase in the second sentence must be read as a reference to "employment status, hours and wages." But that is contrary to the actual language of the second sentence. Presumably

[4] In her deposition Plaintiff was asked about, but was unable to explain CCi's relationship to the Everest Institute. She did agree she was given the form by the Everest Institute. (Rosales Depo. at 36).

the use of the phrase "any information" rather than a more limited phrase was intentional. And, as Plaintiff herself points out, the extent of consent is measured by its terms. *Rouch*, 70 S.W.3d at 173 (terms of consent must be determined "by the language or acts by which it is manifested").

Second, Plaintiff's argument rests on a very narrow reading of the phrase "employment status." As set forth above, her claim of defamation rests on Wier's low rating of Plaintiff's training and skill level, plus Wier's comment that Plaintiff was unable to learn CTVS's practice and was terminated. In pertinent part, "status" is defined as "state or condition with respect to circumstances." MERRIAM-WEBSTER DICTIONARY (online ed.). The information provided by Wier falls within the bounds of information regarding the state or condition of Plaintiff's employment. The undersigned thus concludes Plaintiff's execution of the authorization form constituted her consent to the information released by CTVS.

Plaintiff also argues her consent to the release of information about her employment was not so broad as to authorize release of untrue statements about her. Plaintiff contends she could not have anticipated at the time she signed the authorization that CTVS would release defamatory information. As she points out, while "it may be true that" a former employee "could assume that [his former employers] would give their opinion when asked to do so," this does not constitute knowledge that a former employer "would defame him." *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612, 617 (Tex. App.–Houston [14th Dist.] 1984, writ ref'd n.r.e.) (consent did not extend to bar claim of defamation based on accusations which were false and derogatory statements of fact). *See also Free v. Am. Home Assurance Co.*, 902 S.W.2d 51 (Tex. App.–Houston [1st Dist.] 1995, no writ) (rejected employer's consent defense to defamation claim based on statements made to employment headhunter because employer could not establish plaintiff had reason to believe employer would defame him when he requested headhunter check his references).

CVTS suggests Plaintiff's situation is more akin to the situation in *Rouch*, in which the plaintiff was found to have consented to release of information by participating in an employment

grievance procedure. *Rouch*, 70 S.W.3d at 173 (employee who challenged termination through employer's appeal procedure consented to any defamatory statements made during subsequent hearings). The undersigned disagrees. In this case, Plaintiff agreed prior to her employment with CTVS to the release of information. She would have had no reason to anticipate a future employer would release allegedly untruthful information about her. Plaintiff's consent to the release of information was not so broad as to act as a bar to recovery on her defamation claim. Accordingly, the motion for summary judgment on Plaintiff's defamation claim should be denied.

IV. RECOMMENDATION

The Magistrate Court **RECOMMENDS** that the District Court **GRANT in PART** and **DENY in PART** Defendant's Motion for Summary Judgment (Clerk's Dkt. #11). Summary judgment should be granted as to Plaintiff's claims of employment discrimination and harassment and defamation, but not as to her claims of retaliation and defamation.

V. OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States 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 and, except upon grounds of plain error, shall 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 v. Arn*, 474 U.S. 140, 150-53, 106 S. Ct. 466, 472-74 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996)

(en banc).

To the extent that a party has not been served by the Clerk with this Report & Recommendation electronically, pursuant to the CM/ECF procedures of this District, the Clerk is ORDERED to mail such party a copy of this Report and Recommendation by certified mail, return receipt requested.

SIGNED on June 6, 2013.

MARK LANE
UNITED STATES MAGISTRATE JUDGE