UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 14-20372-CIV-WILLIAMS

UNITED STATES OF AMERICA *ex rel.*
BEATRIZ AQUINO,

Plaintiff,

vs.

UNIVERSITY OF MIAMI,

Defendant.
_____/

ORDER

THIS MATTER is before the Court on Defendant University of Miami's ("UM") motion for summary judgment (DE 81) to which Plaintiff, Relator Beatriz Aquino, filed a response (DE 88) and UM filed a reply (DE 93). For the reasons set forth below, the motion (DE 88) is **GRANTED**.

I. BACKGROUND

This case originated as a *qui tam* matter related to UM and Dr. Nestor De la Cruz-Munoz's ("De La Cruz") allegedly fraudulent surgical billing practices and the actions that they took when Aquino relayed her concerns about these practices to them. On April 26, 2017, the Court entered an Order dismissing with prejudice all of Aquino's False Claims Act ("FCA") claims, but allowing her retaliation claim against UM to survive. (DE 61).

A. Facts

Aquino worked at the UM Miller School of Medicine from December 1998 to April 2001 and again from January 2002 until her termination on February 9, 2012. (DE 82 ¶¶ 1, 2, 27). Before 2010, Aquino was a Patient Access Coordinator and a Patient Financial

Representative with the UM Miller School of Medicine Department of Surgery. (DE 82 ¶¶ 2, 10). Starting in January 2010 until her termination on February 9, 2012, Aquino worked as Patient Access Supervisor at a satellite office in Doral, Florida affiliated with the UM Miller School of Medicine Division of Laparoendoscopic and Bariatric Surgery. (DE 82 ¶¶ 11-12).[1] De La Cruz, who was the recently-hired Chief of the Division, was Aquino's supervisor. (DE 82 ¶ 12; DE 100-1 ¶ 12). Aquino's responsibilities included "supervision of three patient access representatives, maintaining inventory, ordering office/medical supplies, making daily bank deposits, surgical scheduling, obtaining surgery authorizations, assisting with patient phone calls, and attending/assisting with bariatric weight loss surgery seminars." (DE 82 ¶ 14). Aquino was not involved in making entries in patient's record or in submitting claims and bills to insurers or Medicare. (DE 82 ¶ 14; DE 100-1 ¶ 14). Additionally, from 2010 to November 2011, Aquino also performed janitorial services for the office, separate from her administrative duties. (DE 82 ¶ 14).

During the time that Aquino worked in De La Cruz's office, De La Cruz "performed *Vertical Sleeve Gastrectomy* procedures on Medicare patients." (DE 100 ¶ 42). As part of the preparation for surgery, De La Cruz's office would sell pre-operative shakes to patients for consumption prior to the surgery. (DE 100 ¶ 38). Aquino suggested to De La Cruz that he should "also sell post-operative products since the closest store was in Broward County." *Id.* According to Aquino, De La Cruz was not interested in pursuing that line of business and instead suggested that Aquino do it on her own. (DE 100 ¶ 38; DE 90-1 at 15). After this exchange with De La Cruz, Aquino proceeded to open up a

[1] Aquino signed a letter accepting the position in December 2009. (DE 82 ¶ 11). By signing the letter, Aquino accepted the terms of the offer and committed to abide by all University of Miami policies and procedures. *Id.*

company by the name of Miami Bariatrics with her daughter to sell post-operative shakes, including to De La Cruz's patients. (DE 82 ¶¶ 16-19; DE 100 ¶¶ 38-40). Aquino operated the business of Miami Bariatrics while employed by UM and used her UM email address to conduct such business. (DE 82 ¶ 17; DE 100 ¶ 17). Additionally, Aquino sent an email from her UM email address to her personal email address with an attachment named "Patient E-mail List for Vitamins," that included a message to an individual by the name of Erick Santana stating that "[t]his is the list from our old patients" and that "Alexandria – as promised has started obtaining email addresses so we can send out an email to all." (DE 82-1 at 62-63). Aquino also sold Miami Bariatrics products to De La Cruz's patients while they were at his office. (DE 82 ¶ 19).

According to Aquino, starting in November 2011, De La Cruz and UM billed Medicare patients $2,500 in surgical fees for these bariatric surgeries. (DE 100 ¶ 42). In late 2011, Aquino raised concerns about this practice with De La Cruz, Lilliam Dana (Administrator for UM's Division of Laparoscopic and Bariatric Surgery), Edith Hernandez (a nurse coordinator), an unnamed Advanced Registered Nurse Practitioner (ANRP) and unnamed nurse coordinators. (DE 82 ¶ 31; DE 82-1 at 96-99).[2] She also complained

[2] The Court notes that there are inconsistencies between Aquino's deposition testimony and the affidavit submitted in support of her response to the motion for summary judgment (the "Affidavit"). In her deposition, Aquino stated that she did not think De La Cruz was billing Medicare for these procedures and that he was collecting the $2,500 for himself. (DE 94 ¶¶ 8-9; DE 82-1 at 101). She also testified that she had no knowledge about De La Cruz's billing practices, and no knowledge of any claims submitted to Medicare. (DE 94 ¶¶ 8-9; DE 82-1 at 93-94). However, in the Affidavit, Aquino now claims that she believed the $2,500 fee was part of a scheme in which De la Cruz and UM would bill Medicare "for the hospital components" as if for an approved procedure. (DE 90-2 at 9-10). Similarly, although Aquino testified during deposition that she was not responsible for making entries in patient records (DE 94 ¶ 14; DE 82-1 at 37), in the Affidavit she concludes that some patient records were manipulated "to seek approval for Medicare and insurance payment for a covered surgery" (DE 90-2 ¶ 13).

that the office space was too open and people could see the information on the employees' computer screens which, in her view, was in violation of HIPPA. (DE 82 ¶ 31).

On February 6, 2012, De La Cruz informed Rafic Warwar (UM's Vice Chairman for Administration, Department of Surgery at the time) that some funds were missing from his office. (DE 82-2 at 9). The next day, UM began an investigation related to those funds. (DE 82 ¶ 20; 82-1 at 90). Lee Michaud (UM's Manager of the Department of Security at the time) met with Aquino in connection with the investigation. (DE 82 ¶ 21; DE 82-1 at 91). After their meeting, Aquino filled out and signed a voluntary statement where she stated that a patient had purchased shakes for $400, but the money was not in the drawer and she "owed" that money to the drawer. (DE 82-2 at 32-33). Michaud then prepared a report of his investigation, which stated, in part, that:

> Ms. Aquino admitted that she also returned $120 in cash to the petit cash envelope that she had "borrowed" on Friday. She also admitted to taking $400 cash from another patient, [portion redacted] in November, and intended to return that too, but did not have the cash available at the time. Ms. Aquino admitted to "borrowing" cash from time to time and returning it to the petit cash or to be deposited. She admitted that she never returned the $400.
>
> Ms. Aquino admitted to sending spreadsheets to her personal email address. The documents contained patients' names and email addresses. Her intent was to solicit them to purchase products including protein shakes, from her daughter's store. She had also solicited patients while at the clinic to purchase protein shakes and other items from her daughter's store.

(DE 82-2 at 9-11).[3] The report also revealed that in 1983, Ms. Aquino was convicted of crimes including forgery, grand theft and petit theft and that in 1994 she pleaded no

[3] Aquino disputes the findings of the report and moves to strike it as inadmissible hearsay (DE 100-1 ¶ 20; DE 82-1 at 72; DE 90-2 ¶¶ 26-29; DE 89 at 4). She contends that in her

contest to three counts of petit theft. *Id.* Ms. Aquino had failed to disclose these incidents in her job application, even though the application expressly required her to do so. (DE 82 ¶ 7). Lee Michaud forwarded the report to Karen Stimmell (Human Resources Director), Roberta LeFevre (Internal Audit Assistant Director) and Sharon Budman, Director, HIPAA and Security. (DE 82-2 at 11). Stimmell then emailed Dr. Keitz (UM's Associate Vice President for Human Resources, at the time) recommending that Aquino be terminated. (DE 82-2 at 27). The email stated, in relevant part:

> We have received a request from Rafic Warwar to terminate employment as follows ... It was discovered that the employee has been selling nutritional shakes to patients without depositing the cash received. An investigation ensued this morning. Through email search and a Security interview, it was discovered that: the employee has been stealing cash from the facility (admitted and did return some of the money today); the employee has been stealing product from the facility (caught on video entering the facility on the weekend with her husband and removing a case); the employee has set up a separate corporation and opened a store front to sell bariatric shakes and supplements and did so on University time; the employee has solicited UM patients to purchase products at her other company; the employee has taken patient data (names and emails addresses as far as we know) and provided them to an outside company for her own benefit.

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voluntary statement, she merely wrote what Lee Michaud instructed her to write. (DE 82-1 at 68). As a preliminary matter, the report is admissible as part of UM's business records. *See In re Int'l Mgmt. Assocs., LLC*, 781 F.3d 1262, 1267 (11th Cir. 2015) (finding that "[a]n authenticated document is admissible as a business record if it was made at or near the time by—or from information transmitted by—someone with knowledge; if it was kept in the course of a regularly conducted activity; and if making the record was a regular practice of that activity."). Also, for purposes of this motion, the accuracy of the report is not dispositive, as it is not being offered for the truth of the matter asserted. (DE 96 at 7) The import of the report lies in the fact that it is offered to show that the decision to terminate Aquino was not premised on retaliation, but upon the belief that she had engaged in misconduct. That belief, even if mistaken, forecloses Aquino's claim of retaliation. *See Fernandez v. Winn-Dixie Stores, Inc.*, No. 17-CV-60322, 2018 WL 538699, at *8 (S.D. Fla. Jan. 24, 2018).

Id. Two hours after she received the email, Dr. Keitz responded approving "immediate termination." *Id.* On February 9, 2012, Aquino received a letter from the University, signed by Lilliam Dana, terminating her employment. (DE 82 ¶ 27).

B. Procedural History

Aquino filed her original *qui tam* Complaint on January 30, 2014 under seal as required by 31 U.S.C. § 3730(b)(2). (DE 1). On August 13, 2015, the government filed a notice stating that it declined to intervene in this action. (DE 23). Accordingly, the Court unsealed the relevant portions of this action (DE 24) and set a status conference for November 23, 2015 (DE 31). Before the status conference, Defendants filed a motion to dismiss the Complaint arguing that Aquino's Complaint did not satisfy the pleading requirements of the Federal Rules of Civil Procedure as they pertain to alleged FCA violations. (DE 36). At the status conference, the Court granted the motion to dismiss and ordered Aquino to file a "final amended complaint" that met the pleading standards applicable to FCA claims. (DE 39).

Aquino filed the FAC on January 25, 2016. (DE 48). Defendants then timely filed a motion to dismiss the FAC. (DE 49). When Aquino failed to respond to the motion to dismiss within the time required by the Local Rules of the Southern District of Florida, the Court entered an order to show cause. (DE 50). Aquino then obtained leave of the Court and on April 14, 2016, submitted an untimely response to the motion to dismiss. (DE 52). Defendants filed a reply in support of their motion to dismiss (DE 58). On April 26, 2017, the Court entered an Order dismissing with prejudice all of Aquino's FCA claims, but allowing her retaliation claim to survive. (DE 61). On March 6, 2018, UM filed the motion for summary judgment presently before the Court. (DE 81).

II. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Under this standard, "[o]nly disputes over facts that might affect the outcome of the suit under the governing [substantive] law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And any such dispute is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

In evaluating a motion for summary judgment, the Court considers the evidence in the record, "including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials . . . ." Fed. R. Civ. P. 56(c)(1)(A). The Court "must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party, and must resolve all reasonable doubts about the facts in favor of the non-movant." *Rioux v. City of Atlanta*, 520 F.3d 1269, 1274 (11th Cir. 2008) (quotation marks and citations omitted). At the summary judgment stage, the Court's task is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

For issues for which the movant would bear the burden of proof at trial, the party seeking summary judgment "must show *affirmatively* the absence of a genuine issue of material fact: it must support its motion with credible evidence…that would entitle it to a directed verdict if not controverted at trial. In other words, the moving party must show that, on all the essential elements of its case on which it bears the burden of proof at trial,

no reasonable jury could find for the non-moving party. If the moving party makes such an affirmative showing, it is entitled to summary judgment unless the non-moving party, in response, come[s] forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-16 (11th Cir. 1993)(emphasis in original).

II. DISCUSSION

A. Threshold Summary Judgment Issues

i. Aquino's Motion For Leave to File Excess Pages

In her response to UM's motion for summary judgment, Aquino provided a response to the statement of material facts that failed to comply with Local Rule 56.1. Local Rule 56.1 requires a party opposing summary judgment to submit a statement of material facts that

> shall correspond with the order and with the paragraph numbering scheme used by the movant, but need not repeat the text of the movant's paragraphs. Additional facts which the party opposing summary judgment contends are material shall be numbered and placed at the end of the opposing party's statement of material facts; the movant shall use that numbering scheme if those additional facts are addressed in the reply.

S.D. Fla. L. R. 56.1(a). Local Rule 56.1 protects judicial resources by "mak[ing] the parties organize the evidence rather than leaving the burden upon the district judge." *Alsina-Ortiz v. Laboy*, 400 F.3d 77, 80 (1st Cir. 2005) (referring to analogous local rule); *see also Libel v. Adventure Lands of America, Inc.*, 482 F.3d 1028, 1032 (8th Cir. 2007) ("Courts have neither the duty nor the time to investigate the record in search of an unidentified genuine issue of material fact to support a claim or defense."). The Rule also streamlines the resolution of summary judgment motions by "focus[ing] the district court's attention on

what is, and what is not, genuinely controverted." *Mariani–Colon v. Dep't of Homeland Sec.*, 511 F.3d 216, 219 (1st Cir. 2007).

Plaintiff failed to submit a statement of materials facts in accordance with the Local Rules, because it exceeded the ten-page limitation set forth by the rule and it failed to "correspond with the order and with the paragraph numbering scheme used by the movant." To correct her error, Aquino filed a "*Nunc Pro Tunc* Motion for Enlargement of Page Limit for Aquino's Response to Defendant's Statement of Undisputed Material Facts & Additional Material Facts in Support of the Denial of Defendant's Motion for Final Summary Judgment, Alternatively to Accept Condensed Version." (DE 100).

The Court has reviewed the motion and for good cause shown, the motion (DE 100) is **GRANTED IN PART AND DENIED IN PART**. The Court **DENIES** Aquino's Motion to enlarge the page limit, but **GRANTS** Aquino's motion to substitute her response for the newly condensed version contained in docket entry 100-1.

ii. Aquino's Submission of a Late Affidavit and Motion to Strike Evidence

In support of her statement of material facts, Aquino submits a later-created affidavit that partially contradicts her deposition testimony. (DE 90-2). For example, Aquino testified during deposition that she was not responsible for making entries in patient records (DE 94 ¶ 14; DE 82-1 at 37), but opines in the Affidavit that some patient records were manipulated "to seek approval for Medicare and insurance payment for a covered surgery" (DE 90-2 ¶ 13). Additionally, the Affidavit contains numerous statements that are either inadmissible hearsay or not based on personal knowledge. For instance, she states that "[i]t was well known that everyone at Dr. De La Cruz's office

sometimes used the university email address and computer for personal use." (DE 90-2 ¶ 13).

To the extent that Aquino now changes unambiguous statements made during her deposition or otherwise during the discovery period, the Court declines to consider them. *Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657 (11th Cir. 1984) ("When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously clear testimony."); *Rinker v. Carnival Corp.*, 782 F.2d 1526, 1531 (11th Cir. 1986). Additionally, while the Court will not strike the Affidavit in its entirety, the Court will disregard Aquino's speculation and conclusory allegations contradicting her prior testimony, as well as any inadmissible hearsay statements and any unauthenticated documents offered in Aquino's response to the motion for summary judgment.[4] *See Macuba v. Deboer*, 193 F.3d 1316, 1322 (11th Cir. 1999) ("[A] district court may consider a hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial or reduced to admissible form."); *Saunders v. Emory Healthcare, Inc.*, 360 Fed. Appx. 110, 113 (11th Cir. 2010) ("To be admissible in support of or in opposition to a motion for summary judgment, a document must be authenticated.").

[4] On April 4, 2018, Aquino filed a motion to strike evidence offered by UM in support for summary judgment. (DE 89). As with Aquino's Affidavit, the Court will disregard any inadmissible hearsay statements and any unauthenticated documents offered in support of UM's motion for summary judgment.

B. Retaliation

Aquino alleges that UM terminated her employment as retaliation for Aquino's questions and concerns with respect to De La Cruz's practice of billing $2,500 in surgical fees directly to patients. According to Aquino, UM's alleged retaliatory action violated the "whistle-blower" provision in Section 3730(h) of the False Claims Act. See 31 U.S.C. § 3729 et seq. Section 3730(h) outlines the scope of this whistle-blower protection as follows:

> Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

31 U.S.C. § 3730(h)(1).

Thus, to prevail on a claim of FCA retaliation, the plaintiff must prove three elements: (1) she engaged in protected conduct, (2) the defendant took adverse action against her employment, and (3) the defendant took the adverse action because of her protected conduct. *Kalch v. Raytheon Tech. Servs. Co., LLC*, No. 616CV1529ORL40KRS, 2017 WL 3394240, at *3 (M.D. Fla. Aug. 8, 2017). If a defendant provides a legitimate, nondiscriminatory reason for termination in response to the plaintiff's prima facie showing, the plaintiff bears the burden of persuasion that the proffered reasons are pre-textual. *Humphrey v. Sears, Roebuck, and Co.*, 192 F. Supp. 2d 1371, 1374 (S.D. Fla. 2002) (plaintiff's claim of retaliation did not withstand summary judgment where she did not introduce evidence to show the reason for her termination was not actually the violation of a particular policy); *McDonnell Douglas Corp. v. Green*,

411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). UM contends that Aquino did not engage in protected conduct and that, in any event, UM had legitimate, non-discriminatory reasons to terminate her employment.

The Court finds that Aquino engaged in protected conduct. In 2009, "Congress expanded the FCA's anti-retaliation provision to protect not just whistleblowing conduct taken in furtherance of potential litigation, but also whistleblowing conduct taken to stop a possible violation of the FCA where no litigation is contemplated." *Kalch,* 2017 WL 3394240, at *3. Consequently, "conduct such as internal reporting to a supervisor or company compliance department and refusals to participate in the misconduct are protected under § 3730(h)(1)." *Arthurs v. Glob. TPA LLC*, 208 F. Supp. 3d 1260, 1265-66 (M.D. Fla. 2015) (finding that the FCA protects conduct "such as reporting suspected misconduct to internal supervisors."). As a result, Aquino engaged in protected conduct when she confronted Dana and De La Cruz about what she believed was fraudulent billing practices against Medicare. (DE 82-1 at 93-96).

However, the Court finds that Aquino cannot prove that UM took adverse action against her because of her protected conduct. To establish causation under § 3730(h)(1), "the plaintiff must show that the employer was at least aware of the protected activity." *Reynolds v. Winn-Dixie Raleigh Inc.*, 620 Fed. Appx. 785, 792 (11th Cir. 2015). "It is not enough for other employees, supervisors, or members of the employer's management to know about the plaintiff's protected conduct where these individuals have no decision-making authority." *Kalch*, 2017 WL 3394240 at *3. Thus, Aquino needs to show that the people who made the decision to terminate her employment were aware of her protected conduct.

The record evidence shows that UM investigated Aquino for alleged workplace misconduct at Warwar's request. (DE 82 ¶ 20; 82-1 at 90). Michaud, the investigator, concluded that Aquino had engaged in several instances of misconduct, including taking money from the cash register, setting up a competing business, disclosing patient information to third parties and making false statements in her job application. (DE 82-2 at 9-11). Based on the results of the investigation, Warwar concluded that Aquino should be terminated, Stimmell agreed that she should be fired and Dr. Keitz approved her termination. (DE 82-2 at 27). Thus, the evidence shows that Warwar, Stimmell and Dr. Keitz made the decision to terminate Aquino's employment (DE 82 ¶¶ 26, 33; DE 82-2 ¶12) and there is nothing in the record to suggest that they were aware of Aquino's protected conduct. In fact, Aquino admitted that she only talked to De La Cruz, Dana and other unnamed individuals about her concerns. (DE 82-1 at 96-97).

Further, Aquino's reliance on a "cat's paw" theory of liability is misplaced because the Eleventh Circuit has concluded that a cat's paw theory is not appropriate in cases involving statutory provisions requiring "but-for" causation. *Sims v. MVM, Inc.*, 704 F.3d 1327, 1335-36 (11th Cir. 2013) (finding that "cat's paw theory did not apply to age discrimination in Employment Act retaliation claims "[b]ecause the ADEA requires a but-for link between the discriminatory animus and the adverse employment action as opposed to showing that the animus was a motivating factor"); *Reynolds*, 620 Fed. Appx. at 792 (acknowledging that the "cat's paw" theory of liability may not be proper for FCA claims); *Kalch*, 2017 WL 3394240 at *4 (rejecting Plaintiff's "cat's paw" theory on a FCA claim).

Finally, Aquino's claim that De La Cruz and Dana were decision makers is unpersuasive. Stimmell's sworn statement, as the Human Resources Director, establishes that the only persons involved in the decision to terminate Aquino were Stimmell, Warwar and Dr. Keitz (DE 82-2 ¶ 12); the documentary evidence shows that Warwar recommended Aquino's termination of employment, Stimmell agreed and forwarded the recommendation to Dr. Keitz, who ultimately approved it. (DE 82-2 at 27). Although Dana signed the termination letter, Stimmell explained that this is UM's standard practice. (DE 94-4 ¶ 5) ("[I]n accordance with the University's standard Human Resources practice ... the termination letter was drafted by the Human Resources Department and provided to Aquino's supervisor, Lilliam Dana ... for signature and delivery to Aquino"). Stimmell also confirmed in her sworn declaration that Dana had no input into the decision to terminate Aquino. (DE 94-4 ¶ 7).

Aquino's reliance on three cases where the courts considered whether the authors of termination letters were decision makers is misplaced because the facts of those cases are readily distinguishable. *See Weeks v. Lower Pioneer Valley Educ. Collaborative*, 14-30097-MGM, 2016 WL 696096, at *10 (D. Mass. Feb. 19, 2016); *Andrews v. GEO Group, Inc.*, 10-CV-02605-MSK-MJW, 2012 WL 4478803, at *7 (D. Colo. Sept. 28, 2012); *Schandelmeier-Bartels v. Chicago Park Dist.*, 634 F.3d 372, 383 (7th Cir. 2011). In *Weeks*, the plaintiff asserted that the Director of Human Resources for the defendant was a decision maker, in part because she had drafted the termination letter. *Weeks*, 2016 WL 696096, at *10. Defendant responded that although she had drafted the letter, the ultimate decision was made by plaintiff's supervisor. *Id.* The court found that an issue of fact existed, because the Human Resources Director not only drafted the letter, but also

conducted the investigation of the alleged misconduct and authored the findings that were the basis for plaintiff's termination. *Id.*

In *Andrews*, plaintiff alleged that she was terminated because of her race. *Andrews*, 2012 WL 4478803, at *7. In support of her claims, she pointed to certain discriminatory comments made to her by two human resources representatives. *Id.* However, the court found that plaintiff failed to offer any evidence that the human resources representatives were involved in the decision to terminate her. *Id.* The evidence in the record showed that a different officer prepared the termination memos, signed them and ultimately made the decision to fire her. *Id.* Finally, in *Schandelmeier,* the Seventh Circuit did not focus on the termination letter to determine who the actual decision maker was. *Schandelmeier*, 634 F.3d at 383-84. Instead, the court focused on the investigation and the input that the drafter of the termination letter received from other officers when she drafted the letter. *Id.* Indeed, the parties did not dispute whether the drafter of the termination letter was a decision maker, but rather whether someone else influenced her decision. *Id.* In short, none of the cases cited by Aquino supports her contention that a person who signs a termination letter is a decision maker solely because she signed that letter.

There is also no evidence that De La Cruz was a decision maker. Besides Aquino's personal view of how De La Cruz managed his office, there is no evidence that De La Cruz was involved, in any way, in the decision to terminate Aquino. Accordingly, Aquino cannot survive summary judgment because she has not offered any evidence that the decision makers were aware of her protected conduct and made their decision on that basis.

Having found that Aquino failed to show that the decision makers were aware of her protected conduct, the Court need not reach UM's second argument that the University had legitimate, non-pretextual reasons to terminate Aquino. Nonetheless, the Court finds that, even if Aquino demonstrated the existence of causation, she is unable to prove that Defendant's proffered reason for her termination was mere pretext. Aquino does not dispute that UM's asserted non-retaliatory reasons for her termination – stealing and violation of University policies – is a sufficient basis for termination. Although Aquino admits that she violated numerous University policies, (DE 100-1 ¶¶ 17, 19) she argues that UM's allegation that she stole money is unworthy of credence, saying that there is "no admissible evidence of actual theft." (DE 88 at 11). However, "the inquiry into pretext centers on the employer's beliefs, not the employee's beliefs and, to be blunt about it, not on reality as it exists outside of the decision maker's head." *Feise v. N. Broward Hosp. Dist.*, 683 Fed. Appx. 746, 752 (11th Cir. 2017). Here, the evidence shows that (i) UM conducted an investigation on Aquino's alleged theft of University funds (DE 82 ¶ 20; 82-1 at 90), (ii) Aquino admitted that she "owed" $400 "to the drawer" (DE 82-2 at 32-33) and (iii) the investigator concluded that Aquino had taken money from the cash register (DE 82-2 at 9-11). On this record, a reasonable jury would be unable to find that UM's reason for terminating Aquino was motivated by retaliation. *See Feise*, 683 Fed. Appx. at 753. ("an employer can hardly be said to have discriminated or retaliated against an employee if it terminated the employee based on a good faith belief that she violated a rule, even if the purported violation never actually occurred."). Thus, regardless of whether Aquino

actually stole the money, no issue of fact exists as to whether UM's reason for terminating her employment was pretextual.[5]

IV. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that:

1. UM's motion for summary judgment (DE 81) is **GRANTED.**
2. All pending motions are **DENIED AS MOOT**.
3. All deadlines and hearings are **CANCELED**.
4. The Clerk is directed to **CLOSE** this case.
5. The Court will enter final summary judgment separately pursuant to Rule 58 of the Federal Rules of Civil Procedure.

DONE AND ORDERED in chambers in Miami, Florida, this 9th day of August 2018.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

[5] Aquino's remaining arguments that UM's reasons for terminating her were pretextual are equally unavailing. UM's investigative report concluded that Aquino sent patients' confidential information to her personal address and she admitted using her work computer and email address for personal use. She also admitted that she had failed to disclose her criminal history in her job application. These admissions also foreclose Aquino's claim. *See Rose v. Wal-Mart Stores E., Inc.*, 631 Fed. Appx. 796, 799 (11th Cir. 2010) (finding employee could not prove pretext, where he admitted to wrongdoing).