IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Faybria Hendrix,

Plaintiff,

v. **Case No. 25-cv-2335-JWL**

Life Care Centers of America, Inc.,

Defendant.

MEMORANDUM & ORDER

Plaintiff Faybria Hendrix filed this lawsuit against her former employer alleging retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.; and the Kansas Act Against Discrimination, K.S.A. § 44-1001 et seq. ("KAAD"). Specifically, she alleges that defendant reduced overtime opportunities, increased scrutiny, directed plaintiff to submit to drug testing, and ultimately terminated her employment in retaliation for her complaints to management about race and age discrimination with respect to scheduling and shift assignments. Plaintiff also asserts a claim for breach of implied contract under Kansas state law. This matter is presently before the court on defendant's motion for summary judgment on all claims (doc. 46). As will be explained, the motion is granted in its entirety.[1]

[1] Yesterday, plaintiff filed a motion for leave to file a surreply and has attached her proposed surreply for consideration. The court has reviewed the proposed surreply and denies the motion as moot. The issues raised in plaintiff's surreply, without exception, go to the issue of pretext. Because the court concludes herein that plaintiff has not established a prima facie case of retaliation, it never reaches the question of pretext.

I. Facts

The following facts are uncontroverted, stipulated in the pretrial order, or related in the light most favorable to plaintiff as the non-moving party. Defendant Life Care Centers of America, Inc. owns and operates long-term care facilities throughout the United States, including one located in Kansas City, Kansas (hereinafter, the "Facility"). Plaintiff Faybria Hendrix began working at the Facility in September 2014 as a Certified Nursing Assistant (CNA). At all times pertinent to this lawsuit, Mary Jones was employed as the Executive Director of the Facility; Caroline Kabuti was employed as the Director of Nursing at the Facility; Jennifer Burns was employed as the Assistant Director of Nursing; and Melany Nieset was employed as the Divisional Director of Human Resources.

When plaintiff began her employment with defendant, she acknowledged receipt and understanding of various policies, including signing an acknowledgement that she understood that her employment was "at-will at all times." She also acknowledged that she received, read, and understood the Associate Handbook, which includes the following provision:

> IMPORTANT: THE CONTENTS OF THIS HANDBOOK DO NOT CONSTITUTE THE TERMS OF A CONTRACT OF EMPLOYMENT. NEITHER THE ASSOCIATE NOR LIFE CARE IS OBLIGATED TO CONTINUE THE EMPLOYMENT RELATIONSHIP, AND EITHER MAY CHOOSE TO END THE EMPLOYMENT RELATIONSHIP AT ANY TIME WITH OR WITHOUT CAUSE. ALL EMPLOYMENT RELATIONSHIPS WITH LIFE CARE ARE THEREFORE **"AT-WILL"** UNLESS A SPECIFIC EMPLOYMENT CONTRACT PROVIDING OTHERWISE EXISTS WITH A SPECIFIC ASSOCIATE AND SUCH CONTRACT IS SIGNED ON BEHALF OF THE COMPANY BY AN OFFICER OF THE COMPANY. NOTHING IN THIS HANDBOOK CHANGES AN ASSOCIATE'S STATUS AS AN EMPLOYEE AT-WILL.

In March 2018, plaintiff executed a Drug and Alcohol Policy Acknowledgement which stated that she was prohibited from having any prohibited substance in her system while at work or on duty.

As part of that acknowledgement, plaintiff also acknowledged that a refusal to submit to testing was a violation of the policy that may result in discipline, up to and including discharge.

Throughout her employment, plaintiff was primarily scheduled for the night shift (10:00pm through 6:00am). Defendant occasionally scheduled plaintiff to work the day shift as overtime. In March 2023, plaintiff made a request to Ms. Jones to move to the day shift. The record does not reveal how this request was resolved or whether plaintiff and Ms. Jones ever had any discussion about it. For whatever reason, plaintiff was not moved to the day shift after her request. On April 2, 2024, plaintiff submitted a written notice stating that she wanted to move to part-time work with no weekend shifts. In a text message to plaintiff, Ms. Burns explained that the only way to exclude weekends from plaintiff's schedule was for plaintiff to move to an "as-needed" schedule. Plaintiff, then, declined to move to part-time work or "as-needed" work.

On April 17, 2024, plaintiff submitted another request, in writing, to Ms. Burns. That request stated that she was "putting her 2 week [sic] in for day shift." It also appears that plaintiff inquired of Ms. Burns why she was no longer being scheduled day-shift overtime. Ms. Burns, in turn, emailed Ms. Jones and Ms. Nieset to advise them about plaintiff's request for a full-time day-shift position and to advise them that she had told plaintiff that she could no longer have scheduled overtime hours. In response, Ms. Nieset, among other things, wrote that she "wanted to reach out to everyone so we are all on the same page and to ensure there is no form of retaliation towards associate Faybria for reaching out to inquire about her schedule being changed." Plaintiff was not moved to the day shift after her request and she does not dispute that no full-time day-shift position was available between the time of her request and the termination of her employment in June 2024. Around the time of her written request, plaintiff spoke to Ms. Jones on two occasions

about wanting to be moved to the day shift. She testified in her deposition that she did not expressly reference race or age in these two conversations. She further testified that she did not recall telling Ms. Jones why she believed she was not being moved to the day shift.

When she was not moved to the day shift after her written request and her two conversations with Ms. Jones, plaintiff contacted Ms. Nieset. During this conversation, Ms. Nieset and plaintiff discussed only the concept of plaintiff's "seniority" over "new hires." Plaintiff testified that neither race nor age was discussed. In fact, in her deposition, plaintiff testified as follows:

> Q: Tell me specifically what you remember saying about your race. Did you say, I don't think I'm getting the day shift because I'm Black, or tell me what you remember saying?
> A: Oh, no, I never said nothing like that, because of my color or anything, no.
> Q: Okay.
> A: Never was nothing like that. I just didn't understand why. I don't know why. I was never understanding.
> Q: Because you had been there longer, right?
> A: Yes, ma'am, so I just couldn't understand. It wasn't for me to understand. I couldn't do nothing, but pray about it. I don't know. I don't know, Hun. I can't say.

In May 2024, plaintiff contacted defendant's Corporate Office regarding "concerns with her schedule and treatment by [Jennifer Burns]." Nothing in the record indicates the substance of plaintiff's concerns or even whom she contacted to discuss those concerns.[2]

The only "new hire" identified in the record who received a day-shift position during this time frame was Amber Askren. Ms. Askren was hired in January 2024 and received the day-shift at that time. Ms. Askren is a Caucasian woman who was thirty-six (36) years old at the time she

[2] Plaintiff indicates that her May 2024 communication with the corporate office was in the form of an email but no such email is found in the record. The exhibit referenced by plaintiff is an email exchange between Ms. Nieset and Ms. Jones regarding a phone call made by plaintiff to the corporate office.

was hired. Plaintiff remembers complaining to Ms. Askren that she thought Ms. Askren was receiving more desirable shifts than plaintiff, but she told Ms. Askren that it "wasn't nothing personal, and she understood me." Plaintiff does not remember mentioning Ms. Askren by name to any supervisor in connection with her scheduling request; she believes she complained about Ms. Askren to someone but has no recollection of whom she complained to or the substance of what was said.

On Thursday, June 6, 2024, defendant's Compliance Department received an anonymous complaint from a Facility employee alleging that plaintiff had been "under the influence of drugs while at work and smelling of it when entering the building" during the previous overnight shift.[3] The complaint also alleged that plaintiff's impairment was occurring "every night shift" and had "become routine." That complaint was forwarded to the Facility on Friday, June 7, 2024. Upon receipt of the complaint, Ms. Jones and Ms. Kabuti reviewed both the complaint and video surveillance from the shift in question. Ms. Jones and Ms. Kabuti testified that the video surveillance confirmed that plaintiff had been acting unusually and inappropriately during her shift.[4] The record reflects that Ms. Jones then contacted Katie Rush, defendant's Employment Screening Specialist, for guidance as to next steps. Ms. Rush advised Ms. Jones via email that because plaintiff was no longer on-the-clock, the Facility had "missed their window to drug screen

[3] Plaintiff does not contest the contents of the anonymous complaint but says that the complaint's contents may only be considered for non-hearsay purposes. Because the court is not considering the contents of the complaint for the truth of the matter asserted therein, the court overrules plaintiff's objection.

[4] Plaintiff objects to defendant's reliance on the video surveillance because the video is no longer available. But plaintiff does not dispute the contents of the video and, in any event, Ms. Jones and Ms. Kabuti may testify from their personal knowledge of what they viewed on the video.

for reasonable suspicion." Ms. Jones, however, testified that during a follow-up phone conversation she had with Ms. Rush, Ms. Rush advised her to follow the "actual directives" of Ms. Nieset; that Ms. Nieset had specifically instructed Ms. Jones to ask plaintiff to come into the Facility for the purpose of conducting a drug test; and that Ms. Nieset advised her that defendant's policy required a drug test under the circumstances presented. Ms. Jones further testified that she deferred to Ms. Nieset because Ms. Nieset is higher on the organizational chart than Ms. Rush.

On June 11, 2024, Ms. Jones contacted plaintiff, who was off-duty at the time, asking her to come into the Facility for a "conversation." When plaintiff arrived, Ms. Jones advised plaintiff that she would need to undergo drug and alcohol testing. Plaintiff told Ms. Jones that she was unable to complete testing that day and asked if she could test the following day. The record reflects that plaintiff had come to the Facility over a lunch break from her second job and asserted that she did not have time to go to the testing facility. The record contains a completed form that the Facility utilizes in connection with drug and alcohol screening. On the portion of the form that plaintiff completed, plaintiff was required to indicate by circling either AGREE or REFUSE whether she agreed to undergo testing. Plaintiff circled "REFUSE" but added additional information to the form, including her explanation that she was willing to test the following day. Plaintiff testified that she did not refuse the drug test, only that she refused to test on that day and that she was willing to return the next day to take the test. Later that day, plaintiff contacted Ms. Nieset, reported the demand that she submit to a drug test, and told Ms. Nieset that she believed the demand was in retaliation for her prior complaints to management and corporate. Ms. Nieset advised plaintiff not to return to work until contacted by the corporate office.

Defendant's evidence concerning the consequences of a refusal-to-test is somewhat contradictory. The written drug testing policy states that a refusal-to-test is treated the same as a positive drug test and, accordingly, a refusal to test "may" result in discharge. Defendant's corporate representative, however, testified that when an employee refuses to take a drug test when requested, termination is required and that a supervisor has no discretion whatsoever. The drug screening form states that plaintiff was advised that a refusal to submit to the test is considered a positive test result with the same disciplinary measures. Plaintiff testified that to her knowledge, no other employee during plaintiff's ten-year employment at the Facility had ever been asked to submit to a drug test under the policy. Plaintiff's employment was effectively terminated on June 11, 2024 but the record is unclear as to when this information was communicated to plaintiff.

Additional facts will be provided as they related to the specific arguments raised by the parties in their submissions.

II. Summary Judgment Standard

"Summary judgment is appropriate if the pleadings, depositions, other discovery materials, and affidavits demonstrate the absence of a genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Water Pik, Inc. v. Med–Systems, Inc*., 726 F.3d 1136, 1143 (10th Cir. 2013) (quotation omitted); *see* Fed. R. Civ. P. 56(a). A factual issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Water Pik, Inc*., 726 F.3d at 1143 (quotation omitted). "The nonmoving party is entitled to all reasonable inferences from the record; but if the nonmovant bears the burden of persuasion

on a claim at trial, summary judgment may be warranted if the movant points out a lack of evidence to support an essential element of that claim and the nonmovant cannot identify specific facts that would create a genuine issue." *Id*. at 1143-44.

III. Retaliation

Plaintiff asserts in the pretrial order that defendant reduced overtime opportunities, increased scrutiny, directed plaintiff to submit to drug testing, and ultimately terminated plaintiff's employment in retaliation for her complaints about race and age discrimination.[5] The court assesses plaintiff's retaliation claims under the *McDonnell Douglas* framework. *Dominguez v. Weiser Sec. Servs., Inc*., 172 F.4th 1138, 1145 (10th Cir. 2026) (citing *Montes v. Vail Clinic, Inc*., 497 F.3d 1160, 1176 (10th Cir. 2007)). To state a prima facie case for retaliation, plaintiff "must show (1) she engaged in protected opposition to discrimination, (2) a reasonable employee would have considered the challenged employment action materially adverse, and (3) a causal connection existed between the protected activity and the materially adverse action." *Id*. (citing *Montes*, 497 F.3d at 1176). If plaintiff presents a prima facie case of retaliation, then defendant must respond with a legitimate, nonretaliatory reason for the challenged action. *Byrnes v. St. Catherine Hosp*., 158 F.4th 1107, 1114 (10th Cir. 2025) (citing *Twigg v. Hawker Beechcraft Corp*., 659 F.3d 987, 998 (10th Cir. 2011)). Plaintiff, then, must show that defendant's stated reason is pretextual. *Id*. (citing *Twigg*, 659 F.3d at 998-99).

[5] In its motion, defendant addresses only the termination aspect of plaintiff's retaliation claim. Because the court concludes that plaintiff has not come forward with sufficient evidence from which a jury could reasonably determine that plaintiff engaged in protected activity, all of plaintiff's retaliation theories necessarily fail.

In its motion for summary judgment, defendant contends that summary judgment is appropriate on plaintiff's retaliation claims because plaintiff cannot show that she engaged in protected opposition to discrimination; because she cannot establish a causal connection between any complaints and any adverse action; and because she cannot establish that defendant's proffered reasons for those actions are pretextual. Because the court concludes that no reasonable jury could conclude that plaintiff engaged in opposition protected by Title VII or the ADEA in connection with any complaints or concerns she raised with management, the court grants summary judgment in favor of defendant on plaintiff's retaliation claims and declines to address the other issues raised in defendant's motion.

To establish the first prong of her prima facie case of retaliation, plaintiff must show that she conveyed to her employer a "concern that the employer has engaged in a practice made unlawful" by Title VII or the ADEA. *See Hinds v. Sprint/United Management Co*., 523 F.3d 1187, 1203 (10th Cir. 2008). ("Although no magic words are required, to qualify as protected opposition the employee must convey to the employer his or her concern that the employer has engaged in a practice made unlawful" by Title VII or the ADEA.).[6] The admissions made by plaintiff in her deposition are all but fatal to her retaliation claims. It is uncontroverted that plaintiff testified that she did not expressly reference race or age in her two conversations with Ms. Jones. It is further uncontroverted that plaintiff testified that she never mentioned race or age

[6] Although plaintiff's retaliation claim is asserted under the KAAD as well as Title VII and the ADEA, the court, for convenience, refers only to the federal claims in this memorandum and order. The court, however, applies the same standards and burden to plaintiff's KAAD claims such that the result is the same regardless of the statute under which the claim is asserted. *See Singh v. Cordle*, 936 F.3d 1022, 1037 (10th Cir. 2019)

during her conversation with Ms. Nieset; rather, she and Ms. Nieset discussed only the concept of plaintiff's "seniority" over "new hires." Certainly, there is no written document in the record in which plaintiff raises a concern to management about race or age factoring into employment decisions at the Facility.

Plaintiff candidly admits these facts in her submissions. Nonetheless, she contends that a jury could conclude that plaintiff conveyed a race- or age-based concern to management considering two pieces of evidence in the record. First, plaintiff highlights that she expressed concerns about "new hires" receiving day-shift positions despite the fact that plaintiff, a ten-year employee with more "seniority," had requested a day-shift position. According to plaintiff, because the only new hire during the pertinent time frame was a younger, Caucasian employee, a jury could infer that plaintiff was conveying a concern about preferential treatment for younger, Caucasian employees. Second, plaintiff asserts that Ms. Nieset's caution to Facility management that no "retaliation" was to occur in connection with plaintiff's scheduling change request and plaintiff's stated belief to Ms. Nieset in June 2024 that the demand for a drug test was in "retaliation" for her scheduling change request are sufficient for the jury to find that plaintiff engaged in protected activity. As will be explained, the court rejects these arguments.

The court begins with plaintiff's evidence that she complained about "new hires" receiving day-shift positions when she had seniority over new hires. Plaintiff concedes, as she must, that age and seniority are "analytically distinct." *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611-13 (1993) (holding that employer does not violate ADEA merely by interfering with employee's pension benefits that would have vested by virtue of employee's years of service because "an employee's age is analytically distinct from his years of service"); *Cross v. New York City Transit*

Auth., 417 F.3d 241, 250 (2d Cir. 2005) ("seniority is not a sufficiently accurate indicator of age that, by itself, can support an inference that adverse actions based on seniority necessarily evidence age discrimination"). Plaintiff, then, must point to evidence beyond a complaint about "new hires" to show that she complained about age (and certainly race) discrimination.

In an effort to bridge that significant gap, plaintiff contends that a jury could infer that plaintiff complained about race and age discrimination because the only new hire during the time of plaintiff's complaints about "new hires" was a younger, Caucasian employee. Plaintiff provides no case authority in her submissions to support her argument. But no reasonable jury could draw the inference plaintiff seeks. A case from our district is instructive on this point. In *Pearson v. Kansas Department of Corrections*, 2024 WL 4948884 (D. Kan. Dec. 3, 2024), the plaintiff contended that her employer retaliated against her for raising a complaint about sex discrimination. *Id*. at *14. In their summary judgment submissions, the parties disputed whether the plaintiff had engaged in protected activity for purposes of establishing a prima face case of retaliation. *Id*. at *14-15. In her written complaint to management, the plaintiff did not complain about discrimination on the basis of her sex, but she did allege that a co-worker was treated more favorably than her. *Id*. at *15.

In response to the defendant's motion for summary judgment, the plaintiff argued that she engaged in protected activity because the co-worker she mentioned in the written complaint was male. *Id*. The court rejected this argument and granted summary judgment in favor of the employer. *Id*. In so holding, the court reiterated that plaintiff's complaint did not refer to her gender or sex and, accordingly, did not put defendant on notice that plaintiff believed defendant had discriminated against her in violation of Title VII. *Id*. The court continued:

> Undeterred, plaintiff argues that her comparison to another male employee, Ali Shawki, sufficed to qualify her grievance as a form of protected activity. She's right about one thing. The grievance form questions why Captain Perez treated plaintiff differently than Mr. Shawki. But that question—at best—makes a generalized accusation that defendant treated plaintiff unfairly. And courts consistently have refused to treat such a complaint as protected Title VII activity. *E.g., Benzinger v. Lukoil Pan Ams., LLC*, 447 F. Supp. 3d 99, 124 (S.D.N.Y. 2020) ("Mere complaints of unfair treatment are not protected speech in the employment retaliation context, and the onus is on the speaker to clarify to the employer that he is complaining of unfair treatment due to his membership in a protected class and that he is not complaining merely of unfair treatment generally." (quotation cleaned up)); *Overfield v. Kansas*, 660 F. Supp. 3d 1101, 1113 (D. Kan. 2023) ("A complaint about unfair treatment in general is not 'protected opposition to discrimination unless the basis for the alleged unfair treatment is some form of unlawful discrimination in violation of Title VII.'" (quoting *Faragalla v. Douglas Cnty. Sch. Dist. RE 1*, 411 F. Appx. 140, 148 (10th Cir. 2011))); *Kendrick v. Penske Transp. Servs., Inc*., 220 F.3d 1220, 1232 (10th Cir. 2000) ("Title VII does not make unexplained differences in treatment per se illegal nor does it make inconsistent or irrational employment practices illegal. It prohibits only intentional discrimination based upon an employee's protected class characteristics." (emphasis in original)). Without a mention of sex—or any other protected Title VII class—plaintiff's grievance form didn't communicate her "concern that her employer had engaged in a practice made unlawful by Title VII." *Kincaid*, 645 F. Supp. 3d at 1155 (internal quotation marks and citation omitted). In short, plaintiff hasn't raised a triable issue that she engaged in any protected activity.

Id.

Plaintiff's argument in this case is even less compelling than in *Pearson*. Here, plaintiff does not identify any employee who allegedly received more favorable treatment. She made a generic complaint about "new hires" getting day-shift opportunities despite plaintiff's seniority on the job. She points to no evidence suggesting that management would have understood that plaintiff was complaining about age or race discrimination. And the mere fact that plaintiff herself was a member of a protected class is not sufficient to show that she was complaining about discrimination. *See Cole v. Bd. of Trs. of N. Illinois Univ*., 838 F.3d 888, 901 (7th Cir. 2016) (Plaintiff argued that he "was implicitly complaining of race discrimination because he was the only African–American foreman or sub-foreman in the department and the only subject of the conduct of which he complained. But his membership in a protected class, without anything more,

is not enough to transform his general complaint about improper workplace practices into a complaint opposing race discrimination.").

Turning to plaintiff's second argument, the court attaches no significance—and no reasonable jury could attach significance—to Ms. Nieset's warning to Facility management not to "retaliate" against plaintiff for her scheduling change request or plaintiff's description of the drug-test demand as "retaliation" for her earlier concerns. Plaintiff has directed the court to no case law that supports the inference she urges in this context and the court's research suggests no such inference may be drawn. Courts routinely hold that the mere use of the word "retaliation" untethered to an allegation that conduct occurred because of membership in a protected class is not enough to transform unprotected activity into protected activity. *See Abdelhamid v. Lane Constr. Corp.*, 744 F. Supp. 3d 10, 24 (D.D.C. 2024) (plaintiff's complaint about "retaliation" was not tied to his national origin and, in the absence of that critical connection, court could not conclude that plaintiff engaged in protected activity); *Jackson v. Atlanta Pub. Schs.*, No. 1:20-CV-01056-SDG-LTW, 2023 WL 10447512, at *3 (N.D. Ga. Mar. 31, 2023), *aff'd*, No. 24-11343, 2025 WL 2223492 (11th Cir. Aug. 5, 2025) (plaintiff's use of legal buzzwords such as "retaliation" and "hostile work environment" in her email did not render the email protected activity); *see also Fields v. Locke Lord Bissell & Liddell LLP*, No. CIVA 1:07-CV-2984TWT, 2009 WL 2341981, at *16 (N.D. Ga. July 28, 2009) ("[I]t is not enough for Plaintiff to allege merely that she used the word 'retaliation' and that, by using a particular Title VII 'buzzword,' her conversations with Lawson automatically became protected activities under Title VII.").

Here, Ms. Nieset's email to Facility management conveyed only that she wanted to ensure that there would be "no form of retaliation towards [plaintiff] for reaching out to inquire about her

schedule being changed." There is nothing in that email from which a reasonable jury could conclude that plaintiff's request for a schedule change included any concerns about race or age discrimination in connection with that request. Similarly, in the portion of plaintiff's deposition where she describes her phone conversation with Ms. Nieset and, more specifically, her suggestion to Ms. Nieset that Ms. Jones asked her to take a drug test, plaintiff testified only that she believed that Ms. Jones had asked her to take the drug test in retaliation for plaintiff's "issues" about "scheduling." Nothing in plaintiff's deposition or anywhere else in the record reflects that plaintiff's articulated concerns about scheduling included concerns about race or age discrimination. In sum, the fact that an employer or plaintiff subsequently uses the word "retaliation" in connection with the plaintiff's prior expressed concerns is not sufficient, without more, to transform those concerns into protected activity.

Having examined the evidence referenced by plaintiff in support of her retaliation claims, the court concludes that summary judgment is required on those claims. In essence, plaintiff is asking the court to permit a jury to speculate about whether plaintiff might have engaged in protected activity when, in fact, plaintiff herself testified that she did not. Because plaintiff has not come forward with evidence sufficient to show that she conveyed to defendant a concern that defendant had engaged in an unlawful employment practice or a concern that she had been treated differently based on her race or age, she cannot establish a prima facie case of retaliation. Summary judgment is granted in favor of defendant.

IV. Implied Contract Claim

In the pretrial order, plaintiff alleges that defendant's employee handbook, policies, disciplinary procedures, representations and employment practices created contractual obligations under Kansas law and that defendant failed to follow these obligations before terminating plaintiff's employment. Specifically, plaintiff alleges that defendant's drug testing policy and practices created an implied contract of employment pursuant to which defendant agreed that it would drug-test employees only under certain circumstances.[7] Plaintiff claims that defendant's demand that she take a drug test several days after receipt of the anonymous complaint when she was off-duty breached this contract. Plaintiff further claims that defendant's drug testing policy and practices created a binding contract whereby defendant could not deem plaintiff to have refused the test when she agreed to take it the following day and whereby defendant could not terminate her for refusing the test in any event. Plaintiff claims defendant's termination of her employment breached this term. Defendant moves for summary judgment on this claim on the grounds that plaintiff has set forth no evidence demonstrating that defendant's drug testing policy and practices created an implied contract of employment and, in any event, plaintiff has come forward with no evidence that defendant breached any contract. As will be explained, the court concludes that plaintiff has not carried her evidentiary burden to show that there are any issues of material fact to be resolved by a jury regarding whether an implied contract existed with the terms described by plaintiff.

[7] Plaintiff's implied contract claim is also based on the theory that defendant, by terminating plaintiff's employment in retaliation for reporting discrimination concerns, violated an implied contract of employment in which defendant promised not to terminate employees in retaliation for reporting discrimination concerns. Because the court has concluded that no reasonable jury could find that plaintiff reported discrimination concerns, this claim necessarily fails.

The question of whether an implied contract exists under Kansas law is typically a question of fact for the jury. *Anglemyer v. Hamilton County Hosp*., 58 F.3d 533, 537 (10th Cir.1995). Summary judgment is not precluded, however, where there is no showing of liability as a matter of law, where there are no essential facts in dispute, and where "the plaintiff presents only evidence of his own unilateral expectations of continued employment." *Kastner v. Blue Cross & Blue Shield of Kan., Inc*., 21 Kan.App.2d 16, 24, 894 P.2d 909 (1995) (quoting *Conyers v. Safelite Glass Corp.*, 825 F. Supp. 974, 977 (D.Kan.1993)). To determine whether an implied employment contract exists, the Kansas Supreme Court directs courts to look to the intent of the parties:

> Where it is alleged that an employment contract is one to be based upon the theory of 'implied in fact,' the understanding and intent of the parties is to be ascertained from several factors which include written or oral negotiations, the conduct of the parties from the commencement of the employment relationship, the usages of the business, the situation and objective of the parties giving rise to the relationship, the nature of the employment, and any other circumstances surrounding the employment relationship which would tend to explain or make clear the intention of the parties at the time said employment commenced.

Morriss v. Coleman Co., 241 Kan. 501, 513, 738 P.2d 841 (1987). For an implied employment contract to exist, both parties must intend to enter into a contract with terms other than employment at-will. *See Allegri v. Providence–St. Margaret Health Center*, 9 Kan. App. 2d 659, 663, 684 P.2d 1031 (1984) ("A contract implied in fact arises from facts and circumstances showing mutual intent to contract.").

As noted above, plaintiff challenges two aspects of defendant's application of its drug testing policy—the timing of the demand for the test and the characterization of plaintiff's offer to take the test the following day as a refusal-to-test. With respect to the timing of the demand, plaintiff highlights that Katie Rush, defendant's Employment Screening Specialist, advised Ms. Jones on June 7 that the Facility had "missed the window to drug screen for reasonable suspicion"

because plaintiff was not currently on-the-clock. But the record is devoid of any evidence that plaintiff relied on any statement, policy or practice that defendant would refrain from demanding a drug test under the circumstances in which it did. There is no evidence that Ms. Rush or anyone else communicated to plaintiff, at any time during her employment, any policy or promise not to demand a drug test under the circumstances that it did. The written drug and alcohol policy does not speak to the issue of timing in any respect. Moreover, plaintiff testified that to her knowledge the Facility had never drug tested or attempted to drug test anyone under the policy during her ten-year employment at the Facility. Thus, there is certainly nothing in defendant's course-of-conduct indicating that defendant had restricted its ability to drug test its employees in the circumstances here. At most, plaintiff has demonstrated that she had a unilateral expectation that she would not be called into work while she was off-duty to submit to a drug test over events that had occurred several days prior to the demand to test. This expectation does not seem unreasonable. But the fact remains that plaintiff's expectation is insufficient to create a binding contractual term with defendant. *See Frye v. IBP, Inc*., 15 F. Supp. 2d 1032, 1045 (D. Kan. 1998) (granting summary judgment in favor of defendant on plaintiff's implied contract claim arising out of drug and alcohol policy where record was devoid of evidence that regarding the parties' intention to modify the at-will-nature of plaintiff's employment; the fact that IBP unilaterally adopted a drug/alcohol policy and had a general practice of adhering to it does not transform the policy into a binding contract of employment) (citing *Berry v. General Motors Corp*., 838 F. Supp. 1479, 1492 (D.Kan.1993) (recognizing distinct difference between policy which given employer might adopt and sincerely intend to follow, and normally does follow, and binding contractual duty), *aff'd*, 56 F.3d 1233 (10th Cir.1995)).

Lastly, plaintiff claims that defendant's drug testing policy and practices created a binding contract whereby defendant could not deem plaintiff to have refused the test when she agreed to take it the following day and whereby defendant could not terminate her for refusing the test in any event. The second part of plaintiff's argument is easily resolved because she stipulated in the pretrial order that she acknowledged when she executed the drug and alcohol policy that a refusal to submit to testing "was a violation of the policy that may result in discipline, up to and including discharge." Clearly, then, defendant was well within its rights to terminate plaintiff based on a refusal to test even if, as plaintiff argues, termination was not necessarily required and a supervisor retained discretion to mete out a less severe punishment. There is simply no evidence in the record supporting the conclusion that defendant could not terminate an employee based on that employee's refusal to submit to drug testing.

That leaves only plaintiff's argument that defendant was somehow contractually bound to permit plaintiff to drug test the following day or was somehow precluded from characterizing her offer to return the following day as a refusal to test. Again, nothing in the policy covers the circumstances presented here. Plaintiff directs the court to no evidence that she relied on anything in defendant's policies or practices when she offered to return the following day to submit to a drug test. She points to no representations from defendant suggesting that she could return the following day to test without consequence. She simply describes a unilateral expectation that her offer to return the next day was a reasonable one that should have been honored. And while nothing in the policy expressly permits defendant to treat her offer as a refusal, certainly nothing prohibits defendant from doing just that. In fact, the policy expressly provides that if defendant requests a drug test that is refused, defendant can terminate that employee's employment. Simply

put, no evidence in the record suggests a mutual intent of the parties whereby defendant restricted its ability to characterize plaintiff's counteroffer as a refusal to test.

In sum, the record is devoid of evidence establishing or even suggesting that plaintiff enjoyed an implied contract of employment containing terms that restricted defendant's ability to drug test or discharge under the circumstances presented here. Because plaintiff has failed to meet her burden of coming forward with evidence of disputed material facts, summary judgment in favor of defendant on this claim is appropriate.

IT IS THEREFORE ORDERED BY THE COURT THAT defendant's motion for summary judgment on all claims (doc. 46) is granted and plaintiff's motion for leave to file a surreply (doc. 54) is denied as moot.

IT IS SO ORDERED.

Dated this 9th day of September, 2026, at Kansas City, Kansas.

s/John W. Lungstrum
HON. JOHN W. LUNGSTRUM
United States District Judge