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Hall v. Pitney Bowes, Inc.
N.D.Tex.,2004.
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United States District Court,N.D. Texas, Dallas Division.
Raymond HALL, Plaintiff,
v.
PITNEY BOWES, INC., Defendant.
No. Civ.A.3:02-CV-2756-B.

Feb. 27, 2004.

Gregg M. Rosenberg, Gregg M. Rosenberg & Associates, Houston, TX, for Plaintiff.
Bobby G. Pryor, Pryor & Bruce, Rockwall, TX, for Defendant.

MEMORANDUM OPINION AND ORDER

RAMIREZ, Magistrate J.
***1** Pursuant to the District Court's *Order of Transfer to United States Magistrate Judge,* filed March 7, 2003, this matter has been transferred to the undersigned United States Magistrate Judge for the conduct of all further proceedings and the entry of judgment in accordance with 28 U.S.C. § 636(c). The following pleadings are presently before the Court:

1. *Defendant's Motion for Summary Judgment,* filed September 26, 2003;

2. *Plaintiff's Response to Defendant's Motion for Summary Judgment,* filed October 21, 2003; and

3. *Defendant Pitney Bowes Inc.'s Reply Brief in Support of Motion for Summary Judgment,* filed November 5, 2003.

Having reviewed the pertinent pleadings and the evidence submitted therewith, the Court is of the opinion that *Defendant's Motion for Summary Judgment* should be GRANTED.

I. BACKGROUND

A. Factual Background

This is an employment discrimination and retaliation case. **Raymond Hall** ("Plaintiff") is an African-American male who has been employed by Pitney Bowes, Inc. ("Defendant") since 1974. (Resp. at 3.) From 1990 to approximately April 2000, Plaintiff was a District Manager for Defendant in the Houston, Texas area. *See id.*Plaintiff alleges that he was denied pay raises that were granted to his peers for five years while working in that area, even though his "Houston/San Antonio district was tied for number one in performance in the nation for 1998."(Resp. Ex.A at 1.) Thereafter, in April 2000, Defendant promoted Plaintiff to Regional Manager in St. Louis, Missouri, where Plaintiff worked until February 2001. *See id.*In February 2001, Defendant demoted Plaintiff to District Manager and transferred him to Dallas, Texas. *See id.*In March 2001, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission, alleging that Defendant demoted him because of his race. *See id.* at 4. In April 2001, Plaintiff made the same allegation to Defendant's human resources manager. *See id.*Sometime thereafter, the EEOC dismissed Plaintiff's complaint, but provided him with a "right to sue" letter. *See id.*Plaintiff did not pursue the matter any further. *See id.*

In May 2001, Plaintiff applied for the Regional Manager position in Phoenix, Arizona. *See id.*Richard Jozwiakowski, Vice President of Customer Service and Worldwide Technical Support, selected four candidates from dozens of applicants and created an advisory committee to interview them and make a hiring recommendation. *See id.*Mr. Jozwiakowski selected Plaintiff as one of the four candidates, and Plaintiff traveled to Danbury, Connecticut, for the interview. *See id.* at 9. Shortly before his interviews began, Plaintiff encountered

advisory committee member Leonard Jones in the restroom. (Resp. at 5.) Mr. Jones, who is also African-American, remarked to Plaintiff: "Oh, a black man, I should have known you were just a visitor."*Id.* Afterwards, Mr. Jones and advisory committee member Sandra Long separately interviewed Plaintiff. Each ranked Plaintiff as the weakest of the four candidates. (Def. Br. at 4-5.) At some point before Plaintiff left Danbury, he also met with another employee of Defendant, Brian Baxendale. (Resp. at 5.) Mr. Baxendale was not a member of the advisory committee and did not interview Plaintiff or the other candidates, but he met with each of them individually. (Resp. at 5, 10.) During Mr. Baxendale's meeting with Plaintiff, he asked Plaintiff if he thought that he had ever been discriminated against; Plaintiff stated that he had thought that Defendant's discrimination had played a part in his February 2001 demotion. *See id.*The advisory committee unanimously recommended that Plaintiff not be selected for the Regional Manager position. (Def. Br. at 5.)

***2** After receiving the advisory committee's recommendation, Mr. Jozwiakowski interviewed the four candidates individually and agreed with the advisory committee that Plaintiff was the weakest candidate. *See id.* at 6. Ultimately, Mr. Jozwiakowski selected another candidate, an American-Indian male, for the Regional Manager position. *See id.*

The following year, in January 2002, Plaintiff expressed an interest through his attorney in a position in the mailing division in Boston, Massachusetts. (Resp. at 6.) Defendant informed Plaintiff that the position was being moved to Danbury, Connecticut, and that Plaintiff had fourteen hours to accept or decline the position. *See id.*Plaintiff declined the position "because of the time restraint and the manner in which the job was presented" to him. (Resp. Ex.A at 3.) In May 2002, Plaintiff accepted a different position in Detroit, Michigan. *See id.*

B. Procedural Background

On March 6, 2002, Plaintiff filed a charge of discrimination with the EEOC, complaining that Defendant demoted him in February 2001, and denied him the Regional Manager position in May 2001, because of his race. (Def.Ex.B.) Plaintiff also alleged retaliation in his EEOC complaint. *See id.*The EEOC dismissed his charge, but provided him with a "right to sue" letter. (Def. Ex.A at 3.) On December 24, 2002, Plaintiff filed this action, complaining that Defendant denied him the Regional Manager position in 2001 because of his race and retaliated against him for his previous EEOC activity in violation of Title VII. *See id.*Plaintiff seeks declaratory, injunctive, and equitable relief in addition to monetary damages. *See id.* at 3-4. Defendant responds that it did not unlawfully discriminate against Plaintiff in awarding the Regional Manager position to another candidate, that Plaintiff's claims are limited to those in his EEOC charge, that Plaintiff fails to state a claim for intentional infliction of emotional distress, and that Plaintiff has suffered no damages.

By the instant motion, Defendant moves for summary judgment as to all of Plaintiff's claims and argues that the decision not to promote Plaintiff to the Regional Manager position was based on legitimate, nondiscriminatory reasons. (Def. Br. at 3-7.) Defendant contends that the company selected a more qualified and better-suited candidate for the position and that Plaintiff cannot establish that Defendant's reasons for such selection are pretextual. *See id.*Defendant further argues that Plaintiff's own deposition testimony disavows his retaliation claim. *See id.*Plaintiff responds that he can prove a prima facie case of discrimination, that Defendant lacked a legitimate, nondiscriminatory reason to deny Plaintiff the Regional Manager position, and that Plaintiff did not knowingly disavow his retaliation claim because "retaliation" is a legal term of art and Plaintiff is not a lawyer. (Resp. at 6-16.)

II. ANALYSIS

A. Summary Judgment Standard

***3** Summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material facts exists and that the movant is entitled to judgment as a matter of law. *See Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994).“[T]he substantive law will identify which facts are material[,]” and only genuine disputes about material facts will preclude summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). If the non-movant bears the burden of proof at trial, the movant may satisfy its burden by showing that there is an absence of evidence to support the non-movant's case. *Latimer v. Smithkline & French Lab.,* 919 F.2d 301, 303 (5th Cir.1990). Once the movant makes this showing, the burden shifts to the non-movant to show that summary judgment is inappropriate. *Little,* 37 F.3d at 1075. Further, the court must view all of the evidence in the light most favorable to the non-movant. *See Richter v. Merchants Fast Motor Lines, Inc.,* 83 F.3d 96, 98 (5th Cir.1996).“On a motion for summary judgment in a case such as this one, where the Court would act as the ultimate trier of fact, the Court is permitted to draw inferences from the evidence so long as the inferences do not involve issues of witness credibility or disputed material facts.”*United States v. Real Property Known as 1700 Duncanville Road,* 90 F.Supp.2d 737, 740 (N.D.Tex.2000).

B. Title VII Framework

Title VII's burden-shifting paradigm is well established. “First, the plaintiff must establish by a preponderance of the evidence a prima facie case of discrimination.”*Nichols v. Lewis Grocer,* 138 F.3d 563, 566 (5th Cir.1998). A plaintiff may establish a prima facie case of race discrimination through either direct evidence, statistical proof, or the test established by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).*See Urbano v. Continental Airlines, Inc.,* 138 F.3d 204, 206 (5th Cir.1998). If the plaintiff makes a prima facie case, “the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged employment action.”*Id.*“Once the defendant meets this burden of production, the plaintiff must demonstrate that the defendant's proffered explanation is not the actual reason for its decision, but is instead a pretext for discrimination.”*Id.*“An employer's reason cannot be shown to be a ‘pretext for discrimination’ unless the plaintiff introduces *some* evidence, whether circumstantial or direct, that permits the jury to believe that the reason was false and that illegal discrimination was the actual reason.”*Id.* This burden-shifting framework applies to claims for retaliation under Title VII, although the plaintiff must establish “but for” causation instead of pretext. *See Vadie v. Mississippi State University,* 218 F.3d 365, 374 (5th Cir.2000); *see also Valentine v. Bowsher,* 1998 WL 329364, at *1 (N.D.Tex. June 12, 1998) (applying the *McDonnell Douglas* framework in a Title VII retaliation case).

C. Race Discrimination

***4** As stated above, Plaintiff may establish a prima facie case of race discrimination through direct evidence, statistical proof, or the *McDonnell Douglas* framework. Neither Plaintiff's complaint nor his summary judgment evidence contains direct or statistical proof of race discrimination. The *McDonnell Douglas* framework, therefore, is the measure of whether there is a genuine issue of material fact regarding his discrimination claim.

1. Prima facie Case

Applying the *McDonnell Douglas* framework in a failure to promote case, Plaintiff must make a prima facie showing: (1) that he is a member of a protected class, (2) that he sought and was qualified for the position, (3) that he was rejected for the position, and (4) that the employer continued to seek applicants with his qualifications. *See Haynes v.*

Pennzoil Co., 207 F.3d 296, 300 (5th Cir.2000). Plaintiff's affidavit states that (1) he is African-American, thus a member of a protected racial class, (2) he sought and was qualified for the position of Regional Manager, (3) he was rejected for that position, and (4) Defendant sought and interviewed other applicants with his qualifications. (Resp. Ex.A at 1-3.) Plaintiff has established his prima facie case. Thus, a presumption of discrimination arises, and the burden shifts to Defendant to articulate some legitimate, nondiscriminatory reason for its actions. *See Urbano,* 138 F.3d at 206.

2. Legitimate Nondiscriminatory Reason

Defendant argues that Plaintiff was denied the Regional Manager position for legitimate nondiscriminatory reasons. (Def. Br. at 8.) Defendant has presented evidence that the advisory committee members individually and collectively ranked Plaintiff as the weakest of the four candidates. They did not recommend that Plaintiff be selected for the Regional Manager position. Defendant presents affidavit testimony of two members of the advisory committee that interviewed Plaintiff, Leonard Jones and Sandra Long, and the affidavit of Richard Jozwiakowski, the individual responsible for the ultimate hiring decision. Mr. Jones states in his affidavit that during Plaintiff's interview, Plaintiff failed

to provide examples of ongoing direct customer involvement or innovations in meeting customer needs that I believed were necessary for the position. The other candidates I interviewed effectively communicated their experience in meeting customer needs and the innovations they employed in dealing with customers.... Based on their resumes and the interviews that I conducted, I concluded that [Plaintiff] was the weakest of the three candidates I interviewed.

(Def. Ex.F at 1-2.) Based on his evaluation of Plaintiff, Mr. Jones did not recommend Plaintiff for the Regional Manager position. *See id.*The other advisory committee member to interview Plaintiff, Sandra Long, states that Plaintiff
failed to provide examples of innovations in meeting customer needs. On the other hand, [the two top interviewees] provided numerous examples of their customer involvement and innovations with customers. In addition, [they] displayed an enthusiasm for the position and for dealing with customers, in general, which [Plaintiff] did not demonstrate during the interview.

***5** (Def. Ex.G at 1-2.) Ms. Long also states that she did not recommend Plaintiff for the Regional Manager position, and that Plaintiff's race was not a factor in her decision. *See id.*Finally, the individual ultimately responsible for the hiring decision, Mr. Jozwiakowski, states in his affidavit that the advisory committee members that interviewed Plaintiff
rated him as the weakest of the four candidates and did not recommend that he be hired for this position. I also interviewed [Plaintiff] for this position, and agreed with the advisory committee members that he was the weakest candidate of the four. He failed to provide me[,] in response to questions [,] examples of where he had established relationships with key customer accounts.

(Def. Ex.E at 1-2.) Mr. Jozwiakowski asserts that the other three candidates provided examples of established relationships, and their high levels of "customer involvement and achievement" made them "more viable candidates" than Plaintiff. *See id.* at 2. Mr. Jozwiakowski states that he based his hiring decision on the strongest examples of superior customer involvement and sales achievement. *See id.*Although Mr. Jozwiakowski believed that he selected a minority for the position, he concludes that race was not a consideration in his decision. *See id.* at 3.

The Court finds that Defendant has articulated legitimate, nondiscriminatory reasons why it did not select Plaintiff for the Regional Manager position. These reasons meet Defendant's burden. *See Solorzano v. Shell Chemical Co.,* 2000 WL 1252555, at *7 (E.D.La. Aug.31, 2000) (finding that the defend-

ant articulated legitimate, nondiscriminatory reasons for its decision not to promote the plaintiff, who was rated the third weakest candidate). Defendant's legitimate nondiscriminatory reasons erase any inference of discrimination established by Plaintiff's prima facie case, and the burden shifts back to Plaintiff to demonstrate that Defendant's reasons are in fact pretextual. *See Frantisek Benes, P.E. v. City of Dallas,* 2002 WL 318334, at *15 (N.D.Tex. Feb.26, 2002). Plaintiff must therefore show that Defendant's reasons are pretextual and that discrimination was the actual reason that he was not selected for the Regional Manager position. *See Nichols,* 138 F.3d at 566.

3. Pretext or Intentional Discrimination

"An employer's reason cannot be shown to be a 'pretext for discrimination' unless the plaintiff introduces some evidence, whether circumstantial or direct, that permits the jury to believe that the reason was false and that illegal discrimination was the actual reason."*Id.; see also Blow v. City of San Antonio, Tex.,* 236 F.3d 293, 297 (5th Cir.2001) (citing *Sanderson v. Reeves,* 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (holding that such evidence may be circumstantial)). Whether direct or circumstantial, "the evidence offered to counter the employer's proffered reasons must be substantial."*Nichols,* 138 F.3d at 566.

***6** Plaintiff alleges a pattern of racial discrimination by Defendant. (Resp. at 8.) Plaintiff alleges that Defendant denied him pay raises for five years while he was the Regional Manager in Houston and thereafter demoted him to District Manager.[FN1] (Resp. at 8; Ex .A at 1.) Plaintiff asserts that the filed claims with Defendant's human resources manager in April 2001 and the EEOC in March 2001 contending that the demotion was racially discriminatory. *See id.*Plaintiff states that he then received a racially derogatory voice-mail at work from an unidentified source. Before the interview for the Regional Manager position, Plaintiff encountered a member of the advisory committee in the restroom, who stated: "Oh, a black man, I should have known you were just a visitor."(Resp. at 8.) Plaintiff argues that this statement was derogatory and is evidence of racial discrimination. In addition, Plaintiff claims that he told another member of the advisory committee, Mr. Baxendale, that he believed that Defendant's racial discrimination played a part in his February 2001 demotion. *See id.*Further, Plaintiff states that he was more qualified for the Regional Manager position than any of the other applicants because he "held the position of Regional Manager before and knew what the job entailed."*Id.* at 2. Plaintiff argues that this evidence establishes that Defendant's legitimate nondiscriminatory reasons are pretextual.

> FN1. Plaintiff does not seek a remedy for these past events, but offers these instances as background to prove discrimination and retaliation in the Defendant's decision to deny him the Regional Manager position. Therefore, the Court need not address Defendant's arguments that these events are time-barred or otherwise fail. *See Winter v. Bank of America,* 2003 WL 23200278, at *5 n. 8 (N.D.Tex. Dec.12, 2003) (accepting evidence tendered "as background evidence to prove discrimination and retaliation" and not addressing whether the evidence was time-barred or did not constitute adverse employment actions cognizable under Title VII).

Defendant responds that Plaintiff's own sworn testimony contradicts his claims of discrimination. Defendant cites Plaintiff's deposition testimony, wherein Plaintiff stated: "No, I do not have evidence that anyone did not select me based on race. [T]he other applicants that applied were equal to or had the same experience as me ..." (Def. Ex.C at 7, 10.) In the context of summary judgment, the Court can consider the variances in Plaintiff's sworn testimony and his summary judgment evidence. *See Winter,* 2003 WL 23200278, at *7 (considering variances between affidavit testimony and depos-

ition testimony in Title VII case). Plaintiff has failed to present any competent summary judgment evidence to contradict his sworn deposition testimony. Rather, Plaintiff presents speculation that he was more qualified for the Regional Manager position than any of the other applicants because he "held the position of Regional Manager before and knew what the job entailed."(Resp. at 2.) However, while Defendant may have based part of its decision on Plaintiff's prior experience as a Regional Manager, the argument that this experience alone made Plaintiff "more qualified" is speculative and insufficient to create a genuine issue of material fact. *See Nichols v. Loral Vought Sys. Corp.,* 81 F.3d 38, 42 (5th Cir.1996) (explaining that summary judgment evidence must be more than mere subjective beliefs or speculation). Indeed, in order to show that he was more qualified, Plaintiff's qualifications must "leap from the record and cry out to all who listen that he was vastly-or even clearly-more qualified for the subject job."*Price v. Federal Express Corp.,* 283 F.3d 715, 723 (5th Cir.2002). Defendant argues that the record possesses no such evidence that Plaintiff was "vastly-or even clearly-more qualified for the subject job."*Id.* Consequently, Plaintiff has failed to present evidence that he was more qualified for the position. Even if Plaintiff presented evidence of higher qualifications, the Court is not to "try ... the validity of an employer's good faith belief as to one employee's competence in comparison to another."*Deines v. Texas Dep't. of Protective and Regulatory Services,* 164 F.3d 277, 281 (5th Cir.1999).

***7** [D]iscrimination laws [are not] vehicles for judicial second-guessing of business decisions. It is not the function of the [factfinder] to scrutinize the employer's judgment as to who is best qualified to fill the position; nor is it the [factfinder's] task to weigh the respective qualifications of the applicants. Whether the employer's decision was the correct one, or the fair one, or the best one is not a question within the [factfinder's] province to decide. The single issue for the trier of fact is whether the employer's selection of a particular applicant over the plaintiff was motivated by discrimination.

Id. (citations omitted). Accordingly, "even if the jury concluded that [Plaintiff] was the best qualified candidate, he still would not have proved his case [of racial discrimination]."*Id.* at 282. Plaintiff's qualifications do not create a fact issue precluding summary judgment.

With respect to Plaintiff's arguments regarding his lack of pay raises and his demotion, Plaintiff presents no evidence to show a connection between these events and Defendant's decision to not promote him. Defendant argues that Plaintiff's deposition testimony refutes any connections between the previous demotion and this suit:

Q. And so you didn't understand the St. Louis issue to be a part of this lawsuit, correct?

A. I ...

Q. I think that's what you told me.

A. Right.

(Reply at 2.)

Plaintiff's only other evidence of possible discriminatory animus are the ethnically-based comments that he allegedly received on his work voice-mail and from Mr. Jones in the restroom. However, it is well-settled that "derogatory stray remarks unconnected to an employment decision cannot create a fact issue regarding discriminatory intent."*Solorzano,* 2000 WL 1252555, at *7;*see also Scales v. Slater,* 181 F.3d 703, 712 (5th Cir.1999) (citing *Price v. Marathon Cheese Corp.,* 119 F.3d 330, 337 (5th Cir.1997); *Equal Employment Opportunity Comm'n v. Texas Instruments, Inc.,* 100 F.3d 1173, 1181 (5th Cir.1996); and *Ray v. Tandem Computers, Inc.,* 63 F.3d 429, 434 (5th Cir.1995)). Moreover, Plaintiff's own affidavit shows that he received the alleged derogatory voice-mail from an unidentified source *before* he applied for the Regional Manager position. (Resp. Ex.A at 2.) Plaintiff's deposition testimony also indicates that

he did not believe that Mr. Jones' comment "Oh, a black man, I should have known you were just a visitor" was discriminatory, but that it indicated "that it was a rarity to have blacks in Danbury, Connecticut."(Reply at 3-4.) Defendant states that Danbury, Connecticut, has a five-percent African-American population. (Reply at 4.) Even assuming that Plaintiff now finds these comments racially discriminatory, Plaintiff has failed to show a connection between the comments and Defendant's decision not to promote him. Without such connection, these comments do not create a genuine issue of material fact. *See Solorzano,* 2000 WL 1252555, at *7;*see also Christiason v. Hitelite Industries, Inc.,* 2000 WL 963449, at *3 & n. 6 (N.D.Tex. July 10, 2000) (noting that "cases that have found spatially unrelated, amorphous age-based comments to be insufficient proof of pretext."); *Laughlin v. Liberty Mut. Ins. Co.,* 1997 WL 694113, at *6 (N.D.Tex. Oct.30, 1997) ("Generally speaking, to be probative of discrimination, the remark 'must be direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was an impermissible factor in the decision to terminate the employee." ') (quoting *EEOC v. Texas Instruments Inc.,* 100 F.3d 1173, 1081 (5th Cir.1996)).

***8** Where the plaintiff has offered no evidence to rebut the employer's facially benign explanations, no inference of discrimination can be drawn. *See EEOC v. Louisiana Office of Community Servs.,* 47 F.3d 1438, 1447-48 (5th Cir.1995) (explaining that a plaintiff must tender factual evidence from which a fact-finder could reasonably conclude that the defendant's reasons were pretext for discrimination). Consequently, Plaintiff has failed to show a genuine issue of material fact regarding pretext, and the Court grants Defendant summary judgment on Plaintiff's Title VII discrimination claim. *See Moore v. Eli Lilly & Co.,* 990 F.2d 812, 817 n. 24 (5th Cir.1993) (holding that plaintiff failed to prove pretext and listing other cases in which plaintiffs similarly failed to meet their burden; "the most prevalent flaw in the losing plaintiffs' evidence is the absence of proof of nexus between the firing (or failure to promote) and the allegedly discriminatory acts of the employer").

D. Retaliation

Plaintiff also complains that Defendant retaliated against him in violation of Title VII. (Def. Ex.A at 3.) Defendant argues that Plaintiff's retaliation claim is not before this Court because it was not pleaded in Plaintiff's EEOC charge. In the alternative, Defendant argues that there are no genuine issue of fact regarding Plaintiff's claim for retaliation. (Mot. at 9.)

1. Failure to Exhaust

Defendant's argument that Plaintiff's retaliation claim is not before this Court challenges Plaintiff's administrative exhaustion of this claim. Defendant contends that Plaintiff failed to present his retaliation claim to the EEOC because he did not check the box for "Retaliation" in his charge. (Mot. at 9.) Defendant posits that "the 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination."*Sanchez v. Standard Brands, Inc.,* 431 F.2d 455, 466 (5th Cir.1970). However, because Plaintiff specifically stated in his EEOC complaint that he was "discriminated and retaliated against due to [his] race," Plaintiff's retaliation claim was directly before the EEOC. *See id* .(emphasis added). Thus, the Court need not consider whether the scope of the investigation would include the charge of retaliation.[FN2]

FN2. It is worth noting that even if Plaintiff's retaliation claim had not been so specifically stated, it could still be considered in appropriate circumstances. The "Fifth Circuit has long held that it is unnecessary for a plaintiff to his exhaust his administrative remedies prior to asserting a retaliation claim that grows out of an earli-

> er charge of discrimination."*Rangel v. Ashcroft,* 2001 WL 1597858, at *3 (N.D.Tex. Dec.11, 2001) (citing *Gupta v. East Texas State University,* 654 F.2d 411, 414 (5th Cir.1981)). Courts "have 'ancillary' jurisdiction to hear post-charge retaliation claims when the retaliation claim grows out of an earlier charge that has been properly exhausted."*Id.*

Because Plaintiff's retaliation claim was clearly presented to the EEOC, the Court finds that Plaintiff's retaliation claim was administratively exhausted and is properly before the Court.

2. Prima facie Case

Plaintiff may establish a prima facie case of retaliation through either direct evidence, statistical proof, or the *McDonnell Douglas* burden-shifting paradigm. *See Valentine,* 1998 WL 329364, at *1. Plaintiff does not present direct or statistical evidence of retaliation. Thus, the *McDonnell Douglas* framework is the measure of whether there is a genuine issue of material fact regarding Plaintiff's claim of retaliation.

***9** Applying the *McDonnell Douglas* framework to Plaintiff's claim of retaliation, Plaintiff must show: (1) that he participated in statutorily protected activity as described in Title VII; (2) an adverse employment action occurred; and (3) a causal connection exists between the protected activity and the adverse action. *See Holtzclaw v. DSC Communications Corp.,* 255 F.3d 254, 259 (5th Cir.2001)."The burden of production then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action."*Winter,* 2003 WL 23200278, at *10. "Once the defendant does so, the inference of discrimination created by the prima facie case disappears, and the ultimate question becomes whether the protected conduct was the 'but for' cause of the adverse employment action."*Id.*

Plaintiff alleges that he was engaged in a statutorily protected activity as described in Title VII, i.e., the filing the charge of discrimination regarding the demotion in St. Louis and filing the same charge of discrimination with Defendant's human resources manager. (Resp. at 14.) "An employee has engaged in activity protected by Title VII if she has either (1) 'opposed any practice made an unlawful employment practice' by Title VII or (2) 'made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing' under Title VII."*Long v. Eastfield College,* 88 F.3d 300, 304 (5th Cir.1996). Plaintiff has satisfied the first element. With regard to the second element, the denial of the Regional Manager promotion clearly constitutes an adverse employment action. *See Patrick v. Ridge,* 2004 WL 42609, at *7 n. 6 (N.D.Tex. Jan.6, 2004) ("Plaintiff suffered an adverse employment action in being denied a promotion which would have resulted in an increase in pay.").

Finally, Plaintiff must show a minimal causal connection between his previous discrimination complaints and Defendant's decision not to promote him to the Regional Manager position. "Although the initial requirement that a plaintiff show a 'causal link' is less stringent than the 'but for' causation that a jury must find, and this court has characterized the burden as 'minimal," 'Plaintiff "must still demonstrate *some* causal connection between his complaints" to the EEOC and Defendant, and Defendant's decision not to promote him. *See Keeley v. Cisco Systems,* 2003 WL 21919771, at *7 (N.D.Tex. Aug.8, 2003) (citations omitted). Plaintiff attempts to show this minimal causal connection through the close temporal proximity of his prior complaints, his statement to one of the advisory committee members that he believed he had been discriminated against by Defendant, and the denial of his promotion. (Resp. at 15.) Plaintiff filed his charge with the EEOC in March 2001, and complained to Defendant's human resources manager about the demotion in April 2001. Defendant denied Plaintiff the Regional Manager position in May 2001. Courts have found that "mere close

proximity in time" between an employee's allegations of discrimination and an adverse action may satisfy the minimal causal connection. *See, e.g., Keeley,* 2003 WL 21919771, at *9 (finding a genuine issue of material fact regarding the causation element of a retaliation claim based partly on temporal proximity). The Court finds that the close temporal proximity presented in this case is sufficient to create a genuine issue of material fact regarding the third element of Plaintiff's prima facie case. *See id.*For the purposes of summary judgment, the burden now shifts to Defendant to articulate a legitimate, nondiscriminatory reason for its actions. *See id.* at *9 n. 15; *see also Patrick,* 2004 WL 42609, at *7.

3. Legitimate Nondiscriminatory Reason

***10** Defendant reasserts the same reasons that it argued in response to Plaintiff's discrimination claims, i.e., that Plaintiff was the weakest of the four candidates. (Def. Br. at 8.) The Court determined that these reasons are legitimate, nondiscriminatory reasons that carry Defendant's burden. *See Solorzano,* 2000 WL 1252555, at *7. Thus, Defendant has carried its burden to proffer legitimate, nondiscriminatory reasons for its decision not to promote Plaintiff to the Regional Manager position. The burden now shifts to Plaintiff to identify specific record facts showing that his engagement in the protected conduct was the "but for" cause of Defendant's refusal to promote him. *See id.* at *10.

4. But For Causation

Plaintiff has the ultimate burden of "showing that 'but for' the protected activity, the [adverse employment action] would not have occurred, notwithstanding the other reasons advanced by the defendant."*Vadie,* 218 F.3d at 374 (quoting *McMillan v. Rust College, Inc.,* 710 F.2d 1112, 1116 (5th Cir.1983)); *see also Long,* 88 F.3d at 305 n. 4 ("even if a plaintiff's protected conduct is a substantial element in a defendant's [adverse employment] decision ..., no liability for unlawful retaliation arises if the [same decision would have been made] even in the absence of the protected conduct"). The requirement of showing "but for" causation is more stringent than the minimal causation required to make Plaintiff's prima facie case.[FN3] *See Long,* 88 F.3d at 305 n. 4. To show a genuine issue regarding "but for" causation, Plaintiff has to show that a fact issue exists whether "but for" his protected activities, Defendant would have selected him for the Regional Manager position. *See Vadie,* 218 F.3d at 374.

> FN3."At first glance, the ultimate issue in an unlawful retaliation case-whether the defendant discriminated against the plaintiff because the plaintiff engaged in conduct protected by Title VII-seems identical to the third element of the plaintiff's prima facie case-whether a causal link exists between the adverse employment action and the protected activity. However, the standards of proof applicable to these questions differ significantly.... The standard for establishing the 'causal link' element of the plaintiff's prima facie case is much less stringent."*Long,* 88 F.3d at 305 n. 4.

Plaintiff argues that "Clearly all that could have motivated Defendant was a discriminatory or retaliatory reason[,]" and Defendant's proffered reasons are "bogus and unworthy of credence." (Resp. at 15.) Plaintiff's conclusory allegations and subjective beliefs of what motivated Defendant are not competent summary judgment evidence. *See Winter,* 2003 WL 23200278, at *7-8;*see also Thornton v. Neiman Marcus,* 850 F.Supp. 538, 544 (N.D.Tex.1994) (holding that evidence that consists of subjective beliefs is not competent summary judgment evidence). Indeed, Plaintiff's own testimony undermines his claim. During Plaintiff's deposition, Defendant asked:

Q: Has there been any retaliation against you?

A: [Plaintiff answered] None that I know of.

(Def. Ex.C at 10.) Defendant claims that this is evidence that there was no retaliation, and that Plaintiff fails to present any controverting evidence. Plaintiff responds that because he is not an attorney, he cannot conclusively deny a claim of retaliation because "retaliation" is a legal term of art and retaliatory animus is a question for the jury to decide. (Resp. at 14.) In the context of summary judgment, the Court can consider the variances in Plaintiff's sworn testimony and his summary judgment evidence. *See Winter,* 2003 WL 23200278, at *7. Plaintiff has failed to present any competent summary judgment evidence to contradict his sworn deposition testimony.

***11** The only evidence that Plaintiff presents is the evidence of the temporal proximity of his filing of the EEOC charge and complaint to Defendant's human resources manager and the denial of his promotion. A close temporal proximity may satisfy Plaintiff's initial prima facie case, where the causal burden is "minimal," but it does not satisfy the stringent requirement of showing "but for" causation. "[T]emporal proximity alone is generally insufficient to establish a causal connection for a retaliation claim."*Little v. BP Exploration,* 265 F.3d 357, 363-64 (6th Cir.2001). Because Plaintiff presents only evidence of a temporal proximity, he fails to identify a genuine issue of material fact regarding "but for" causation. Indeed, Plaintiff has failed to show that the exercise of his protected activities are *even related* to Defendant's reasons for not promoting him. *See Frantisek Benes, P.E.,* 2002 WL 318334, at *15 (holding that even if the court considered the plaintiff's "filing of grievances as well as his EEOC charges as the protected activity he was engaged in, Plaintiff still fails to establish the causal link that 'but for' this protected conduct the Defendant's decisions not to promote him to the above noted positions would have been different.").

III. CONCLUSION

In conclusion, Plaintiff's subjective belief that he has been the victim of racial discrimination and retaliation, unsupported by any specific factual evidence, is insufficient to rebut Defendant's evidence of legitimate, nondiscriminatory reasons for its actions. Accordingly, Defendant is entitled to summary judgment on Plaintiff's claims of unlawful discrimination and retaliation in violation of Title VII. Because these are the only claims presented in Plaintiff's complaint, Defendant is entitled to judgment as a matter of law. For the foregoing reasons, *Defendant's Motion for Summary Judgment* is hereby GRANTED and this action is DISMISSED with prejudice. The Court will enter judgment by separate document in accordance with FED. R. CIV. P. 58(a).

SO ORDERED.

N.D.Tex.,2004.
Hall v. Pitney Bowes, Inc.
Not Reported in F.Supp.2d, 2004 WL 389093 (N.D.Tex.)

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