

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

FILED
U.S. DIST COURT
MIDDLE DIST. OF LA

2023 OCT 23 P 4: 23

JESUS RICO-SANZ

CIVIL ACTION NO.

VERSUS

04-693-JJB-DED

STATE OF LOUISIANA &
PENNINGTON BIOMEDICAL CENTER

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is before the court on a motion for summary judgment by the defendant, The State of Louisiana, through The Pennington Biomedical Research Center (PBRC) (doc 53). The plaintiff, Jesus Rico-Sanz, has filed a motion in opposition (doc. 64). This court has jurisdiction of this matter pursuant to 28 U.S.C. § 1331.

BACKGROUND FACTS

On September 25, 2001, the plaintiff, Jesus Rico-Sanz, a resident of Spain, was offered a temporary full-time position as a Postdoctoral Fellow in the Human Genomics Laboratory with defendant, Pennington Biomedical Research Center. The plaintiff accepted the offer and began his appointment on November 1, 2001.

Under the initial employment contract, the plaintiff worked with Dr. Bouchard

and Dr. Tuomo Rankinen on positional cloning projects pertaining to the Heritage Family Study phenotypes.¹ On September 24, 2002, Dr. Bouchard recommended that the plaintiff's appointment be extended from November 1, 2002, through October 31, 2003.

In 2003, the plaintiff applied for a position in Dr. Eric Ravussin's laboratory. The plaintiff alleges that he was denied the position and that a less qualified person was hired instead.

On May 19, 2003, Dr. Bouchard sent the plaintiff a letter confirming that the plaintiff's appointment would expire in ninety days, thus ending the appointment on August 20, 2003. On May 20, 2003, the plaintiff filed a grievance with the defendant's human resource department in which he challenged his termination.

In response to this grievance letter, Dr. David York agreed to allow the plaintiff to work in Dr. Steve Clarke's laboratory within the 90 days stipulated by Dr. Bouchard's letter.

On August 20, 2003, the plaintiff filed a second grievance with human resources. In a letter dated August 20, 2003, the plaintiff received a formal offer of temporary employment in Dr. Clarke's laboratory. The appointment was to be for an additional month from August 21, 2003 until September 17, 2003. The plaintiff

¹The project's purpose was "to find candidate genes and mutations responsible for exercise capacity, energy metabolism, obesity, and adaptations to exercise training." (doc. 10, Plaintiff's Second Amended Complaint, p. 1-2).

accepted the offer on August 21, 2003. The plaintiff alleges that during this period he “was not afforded any assignments or projects to work on.” Ultimately, on September 17, 2003, the plaintiff’s employment with the defendant was terminated. The plaintiff filed a third grievance with human resources on September 17, 2003.²

The plaintiff filed two charges of discrimination with the Equal Employment Opportunity Commission (EEOC). The first EEOC charge was filed on December 3, 2003. The second EEOC charge was filed February 23, 2004. The plaintiff alleges that as result of the EEOC filings, the defendant has retaliated against him by holding several of his manuscripts “that contain novel results” and by forbidding positive letters of recommendation to be written about him.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, answers to interrogatories, admissions, and affidavits on file indicate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

When the burden at trial rests on the non-movant, as it does here, the movant need only demonstrate that the record lacks sufficient evidentiary support for the

²The grievance is dated September 17, 2003. Defendant argues that the grievance may have been filed September 16, 2003.

non-movant's case. *Id.* The movant may do this by showing that the evidence is insufficient to prove the existence of one or more elements essential to the non-movant's case. *Id.*

Although this court considers the evidence in the light most favorable to the non-movant, the non-movant may not merely rest on allegations set forth in the pleadings. Instead, the non-movant must show that there is a genuine issue for trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Conclusory allegations and unsubstantiated assertions will not satisfy the non-movant's burden. *Grimes v. Dep't of Mental Health*, 102 F.3d 137, 139-40 (5th Cir. 1996). If once the non-movant has been given the opportunity to raise a genuine factual issue, no reasonable juror could find for the non-movant, summary judgment will be granted. See *Celotex*, 477 U.S. at 322; see also Fed. Rule Civ. P. 56(c).

ANALYSIS

I. Discrimination Based on Race and National Origin

The plaintiff may establish a claim of discrimination by either direct or circumstantial evidence. As the plaintiff in this case is relying upon circumstantial evidence, the burden shifting framework of *McDonnell Douglas* applies.

Under the *McDonnell Douglas* framework, the plaintiff must establish a prima facie case of discrimination by a preponderance of the evidence to defeat the

defendant's motion for summary judgment. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Once a prima facie case is established by the plaintiff, the burden then shifts back to the employer to articulate a legitimate, nondiscriminatory reason for its conduct. *Id.* at 802-03. If the defendant meets its burden of production, the burden shifts back to the plaintiff who must be allowed the opportunity to show that the defendant's reasons were in fact a pretext for discrimination. *Id.* at 804.

In light of the Supreme Court's opinion in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), the Fifth Circuit has adopted a modified-*McDonnell Douglas* test. The modification applies to the third step of the *McDonnell Douglas* analysis if the plaintiff relies on circumstantial evidence to prove discrimination. Under the modification, after the plaintiff has put forth a prima facie case of discrimination and after the defendant has articulated a legitimate non-discriminatory reason, the plaintiff must then offer sufficient evidence to create a genuine issue of material fact either: 1) that the defendant's reason is not true, but rather is a pretext for discrimination; or 2) that the defendant's reason while true is only one of the reasons for its conduct, and another motivating factor is the plaintiff's protected characteristic (mixed-motive alternative). *Machinchick v. PB Power, Inc.*, 393 F.3d 345, 352 (5th Cir. 2005).³

³ The modified framework is often discussed in context of ADEA cases; however, it is also applicable to Title VII.

Whether the Plaintiff can establish a Prima Facie Case of Discrimination

The plaintiff appears to assert that two forms of employment discrimination based upon race and national origin occurred. First, the plaintiff alleges that he was passed over for promotion due to his protected characteristics. Second, the plaintiff alleges that his contract with the defendant was not renewed based upon his protected characteristics.⁴

In a failure to promote case, the plaintiff must demonstrate that: 1) he was a member of a protected class; 2) he applied to and was qualified for a position for which applicants were being sought; 3) he was rejected for the position; and 4) another applicant not belonging to the protected class was hired. *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 680-81 (5th Cir. 2001).

To establish that an adverse employment action took place based on race or national origin, a plaintiff must show that he was: 1) a member of a protected class; 2) qualified for the position held; 3) subject to an adverse employment action; and 4) treated differently from others similarly situated. *Abarca v. Metro. Transit Auth.*, 404 F.3d 938, 941 (5th Cir. 2005) (citing *Rios v. Rossotti*, 252 F.3d 375, 378

⁴Both parties attempt to merge these issues into one analysis. However, as failure to promote and wrongful termination /adverse employment action claims have different elements that must be met, this court will separate the analysis. First, this court will consider whether the plaintiff was discriminated against when he sought promotion to a faculty position or a position in Dr. Ravussin's laboratory. Second, this court will consider whether the plaintiff was subjected to discrimination when his contract was not renewed. The plaintiff has also raised a claim of retaliation which is addressed in section II of this opinion.

(5th Cir. 2001)).

The fact that the plaintiff is Hispanic and of Spanish origin has been established. Thus, the plaintiff's membership in a protected group is not in dispute and does not require any further analysis. The remaining elements, however, are in contention.

A) Failure to Promote Claim

The plaintiff has alleged that a position in Dr. Ravussin's office was given to less qualified applicants and that faculty appointments were given to less qualified Postdoctoral Fellows.

As previously stated, in a failure to promote case, the plaintiff must demonstrate that: 1) he was a member of a protected class; 2) he applied to and was qualified for a position for which applicants were being sought; 3) he was rejected; and 4) another applicant not belonging to the protected class was hired. *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 680-81 (5th Cir. 2001).

1) Faculty Position

It is undisputed that the plaintiff is within a protected class, that he sought a faculty position, and that individuals not within the protected class have filled those positions. Thus, the focus of the inquiry is whether the plaintiff was qualified for a

faculty position.

The defendant asserts that the plaintiff did not merit consideration for a faculty appointment because matriculation from a Postdoctoral Fellow to a Faculty appointment occurs in only the “most unique circumstances.” Defendant points out that only seven (7) out of one hundred fifty (150) Fellows have matriculated from a postdoctoral position to a faculty position.⁵ According to the defendant, the seven individuals were “engaged in research areas of strategic importance,” had an “outstanding performance” record and had “the financial support of their mentors to cover their faculty salary.”

In response, the plaintiff concedes that promotions from the ranks of a postdoctoral fellow to faculty member was an uncommon practice prior to the year 2000 and no such promotion took place before 2000. However, the plaintiff asserts that as of the year 2000, the promotions were not uncommon and from 2000 to 2006 seven promotions occurred in six years.

In his opposition to the defendant’s motion for summary judgment, the plaintiff maintains that he was as qualified or even more qualified than four out of the seven fellows who received appointments as faculty instructors. For instance, the plaintiff notes that he had been working for PBRC for one and a half years and

⁵The seven individuals are: Dr. Tuomo Rankinen (born in Finland); Dr. Betty Kennedy (African-American born in the United States); Dr. Huiyan Zheng (born in China); Dr. Robert Newton, Jr. (African American born in the United States); Dr. Karkal V. Hedge (born in India); Dr. Valerie Myers (born in the United States); and Dr. Anthony Civitarese (born in Australia). (Doc. 53; Defendant’s Exhibit H, paragraph 12).

had received his Ph.D. in 1996. In comparison, Dr. Rankinen was promoted within five months of working at PBRC and also obtained his Ph.D. in 1996. Therefore, the plaintiff concludes that he was more qualified than Dr. Rankinen. Likewise, the plaintiff asserts that he was more qualified than Dr. Valerie Myers who received her Ph.D. in 2003, and had less than two years of experience at PBRC before receiving a faculty position. The plaintiff argues that Dr. Myers was hired shortly after receiving her Ph.D. and that Dr. Myers' experience cannot be compared to the plaintiff's four years of postdoctoral experience prior to working at PBRC.⁶

In this case, the defendant has not offered any subjective hiring criteria for the faculty positions. It has only explained that promotions happen in "unique circumstances" if an employee had worked in an area of "strategic importance" or has "outstanding performance." The Fifth Circuit has explained that "an employer may not utilize wholly subjective standards by which to judge its employees' qualifications when its promotion process ... is challenged as discriminatory." *Medina*, 238 F.3d at 681.

In *Medina*, the court explained that it is "inappropriate to decide as a matter of law that an employee is unqualified because he has failed to meet entirely subjective hiring criteria." *Id.* At the prima facie case stage, an employee must only demonstrate that he met *objective* criteria and the issue of whether he met

⁶Doc. 64; Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 13-16. The plaintiff relies on various PBRC webpages for this information.

subjective criteria is dealt with at later stages in the analysis. *Id.*

In this case, what constitutes “strategic importance” or “outstanding performance” cannot be objectively quantified. As this criteria is subjective, the plaintiff’s claim that he was not promoted to a faculty position due to discrimination cannot be defeated on summary judgment at the prima facie case stage.

As the plaintiff has survived the prima facie case stage, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its decision. In the present matter, the defendant has asserted that the plaintiff was not promoted from postdoctoral fellow to faculty member because the plaintiff was unqualified for the position. Therefore, the burden is shifted back to the plaintiff to show that the defendant’s reason was pretextual.

The plaintiff has failed to show that the reason articulated by the defendant is only a pretext for what is in actuality discrimination against him. The defendant asserted that it rarely promotes postdoctoral fellows to faculty positions and that when it has made such promotions, the postdoctoral fellows at issue have had outstanding performance records and were engaged in research areas of strategic importance. The plaintiff’s evidence that he was in this category included the fact that he had received his Ph.D. before some of the faculty and that he had more postdoctoral experience prior to coming to PBRC than some of the faculty. Notably, neither of these facts touch on the plaintiff’s work while at PBRC.

Moreover, even if the plaintiff had performed outstanding-level work and was

not promoted, the plaintiff has still failed to link this decision to his race or national origin. The issue is not whether the defendant made an error in failing to promote the plaintiff. Instead, the issue is whether the employment decision was prompted by discrimination. See *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir. 1995) (stating that “the question is not whether an employer made an erroneous decision; it is whether the decision was made with a discriminatory motive”). See also *Nieto v. L&H Packing Co.*, 108 F.3d 621, 624 (5th Cir. 1997) (holding that “Title VII does not protect against unfair business decisions, only against decisions motivated by unlawful animus”).

Although the plaintiff may sincerely believe that the employment decision was discriminatory, the Fifth Circuit has explained that “a subjective belief of discrimination, however genuine [may not] be the basis of judicial relief.” *Lawrence v. Univ. of Texas Med. Branch at Galveston*, 163 F.3d 309, 313 (5th Cir. 1999). A plaintiff must raise fact issues that the reason for the employment decision was false and that discrimination was the real reason.” In this case, the plaintiff has failed to demonstrate how his failure to receive a faculty position was based on his race or national origin.

2)Position with Dr. Ravussin

It is undisputed that the plaintiff was a member of the protected class, that he applied for a position with Dr. Ravussin and that he was rejected for it. As the

defendant has not argued that the plaintiff was not unqualified for the position,⁷ this court will assume for the purpose of this summary judgment motion that the plaintiff was in fact qualified for the position that he sought. Thus, the only remaining element at issue is whether another applicant not in the protected class was hired.

The defendant concedes that the plaintiff applied for one of two postdoctoral research positions with Dr. Ravussin and was not hired for the position. However, the defendant points to two affidavits in support of its position that Dr. Ravussin did not receive the necessary grant funding for the two positions so no one was hired for either position.⁸

The plaintiff argues that he applied for one of two *faculty* positions with Dr. Ravussin and although the affidavits indicate that Dr. Ravussin did not receive funding for the *research* positions, the affidavits do not state that Dr. Ravussin failed to receive funding for two *faculty* positions. The plaintiff asserts that the two faculty positions do exist and were filled by two other applicants.⁹

⁷It should be noted that the defendant does not appear to question whether the plaintiff was qualified for the *research* position. The plaintiff argues that the position was in fact a faculty position, not a research position. As discussed above, the defendant *does* argue that the plaintiff was unqualified for a *faculty* position.

⁸ Doc. 53; Defendant's Exhibits H and I.

⁹Arguably, the plaintiff has not even produced sufficient summary judgment evidence to make this assertion. The plaintiff directs the court to the defendant's website and the employee profiles of Dr. Anthony Civitarese and Matthew Hulver (plaintiff refers to a Dr. Mark Hulver, however, the court assumes that he means Dr. Matthew Hulver). The plaintiff asserts that Drs. Hulver and Civitarese were hired for the faculty positions with Dr. Ravussin. Even if the two doctors do work under Dr. Ravussin, the plaintiff fails to offer evidence demonstrating that the positions the two doctors fill are the same positions that the plaintiff sought as opposed to

Whether the position was a faculty position or a research position does not appear to be outcome determinative in this case. If the position was a research position as defendant asserts, then the defendant has provided uncontested evidence that the requisite funding did not exist. See *Perez v. Region 20 Educ. Serv. Center*, 307 F.3d 318, 325 (5th Cir. 2002) (holding that the nonexistence of an available position is a legitimate reason not to promote).¹⁰

If the position was a faculty position as plaintiff maintains, then the analysis discussed above in Section I(A)(1) of this opinion would apply. The defendant asserts that the plaintiff did not meet its subjective hiring criteria for a faculty position which is a legitimate, non-discriminatory reason. The plaintiff has failed to establish how his failure to be promoted to a faculty position was a pretext for racial discrimination.

Accordingly, the defendant is entitled to summary judgment on the plaintiff's claims of racial discrimination based on the defendant's failure to promote the plaintiff while he was employed at PBRC.

positions that materialized later. For example, the plaintiff's petition alleges that the plaintiff applied for a position in Dr. Ravussin's lab in 2003. Affidavits produced by the defendant indicate that Dr. Anthony Civitarese was promoted to a faculty position in February 1, 2006. The plaintiff fails to establish a link between the position he applied for and a position that appears to have been offered years later.

¹⁰In *Perez*, the plaintiff brought a failure to promote claim against the defendant. 307 F.3d 318. The defendant responded that the plaintiff was not promoted or reclassified because funding was not received and the position did not exist. *Id.* at 324. The Fifth Circuit found that the non-existence of an available position is a legitimate reason not to promote. *Id.* at 325.

B) Wrongful Termination Claim

The plaintiff has alleged that he was wrongfully terminated by the defendant. To establish a prima facie case of wrongful termination based on race or national origin, the plaintiff must show that he was: 1) a member of a protected class; 2) qualified for the position held; 3) subject to adverse employment action; and 4) treated differently from others similarly situated.

In the present case, the fact that the plaintiff is a member of a protected class is not in dispute. Thus, the remaining issues are whether the plaintiff was qualified for the position he held; whether the plaintiff was subjected to an adverse employment action; and whether the plaintiff was treated differently from others similarly situated.

Whether the Plaintiff was Qualified for the Position Held

To be “qualified” for a position means that the individual was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative.” *Wilkins v. Eaton Corp.*, 790 F.2d 515, 521 (6th Cir.1986). In this case, the defendant has not addressed the merits of whether the plaintiff was qualified for the position he held prior to his termination. Accordingly, for the purpose of this summary judgment motion, this court will assume that the plaintiff will be able to show that he was qualified for the position that he held.

Whether the Plaintiff was Subjected to an Adverse Employment Action

In this case, the plaintiff was initially appointed to a one year term of employment with PBRC. This appointment was extended into a second year. During the second year, the plaintiff was informed that he would not be offered a third appointment.

The defendant maintains that the plaintiff's receipt of a ninety day notice of non-reappointment was not an adverse employment action. The defendant cites the Louisiana State University System Handbook which states that "non-reappointment carries no implication whatsoever as to the quality of the employee's work, conduct, or professional competence."¹¹ Thus, the defendant argues that the plaintiff's employment "was simply not renewed" and that there was "no negative implication or connotation associated with his departure."

In response, the plaintiff points to two cases, *Jatoi v. Hurst-Euleless-Bedford Hosp. Auth.*, 807 F.2d 1214 (5th Cir. 1987) and *Simmons v. McGuffey Nursing Home, Inc.*, 619 F.2d 369 (5th Cir. 1980). In *Jatoi*, the issue of whether the plaintiff had suffered an adverse employment action went unchallenged when the plaintiff physician was not reappointed. In *Simmons*, the plaintiff sued his employer for discrimination after his employer decided not to renew his contract. Although the plaintiff did not ultimately prevail on the matter, the court found that the plaintiff had

¹¹Doc. 53; Defendant's Exhibit B, p.22.

established a prima facie case of discrimination.¹²

The Fifth Circuit has adopted a narrow view of what constitutes an adverse employment action. *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000). The list of adverse employment actions includes discharges, demotions, refusals to hire, refusals to promote, and reprimands. *Id.* The Fifth Circuit explained that the list has not been expanded in order to ensure that federal courts were not involved in “relatively trivial” employment matters.¹³ Therefore, an employment action is actionable if it amounts to an ultimate employment decision and effects a “material change in the terms or conditions of employment.” *Eugene v. Rumsfeld*, 168 F. Supp. 2d 655, 671 (S.D. Tex. 2001).

The defendant has failed to direct this court to any case in the Fifth Circuit or any other circuit which has held that a failure to reappoint an employee is not an adverse employment action. The only source that the defendant has cited is the Louisiana State University System’s Regulations that provide that non-reappointment has no implication on an employee’s work, conduct, or competence. However, the defendant has not explained how or why the manner in which non-reappointment is to be viewed *within the LSU System* is applicable in this suit.

¹²See also *Girma v. Skidmore College*, 180 F. Supp. 2d 326, 339 (N.D.N.Y. 2001) (assuming that the failure to offer a plaintiff a three year extension contract was an adverse employment action).

¹³See *Breaux v. City of Garland*, 205 F.3d at 157-58 (holding that mere accusations or criticism; investigations; psychological testing; and false accusations were not adverse employment actions).

Moreover, even if this court were to agree that non-reappointment does not address the quality of the plaintiff's work product, that does not answer the question of whether non-reappointment was an "ultimate employment decision." On that point, the defendant has not explained how a failure to reappoint the plaintiff has not effected a material change in the terms and conditions of the plaintiff's employment. Accordingly, this court will assume that the plaintiff will be able to show that an adverse employment action has occurred.

Whether the Plaintiff was treated differently from others similarly situated

To establish that he was treated differently, the plaintiff must show that the defendant gave preferential treatment to another employee who was a "nearly identical, similarly situated individual" under "nearly identical circumstances." *Bryant v. Compass Group USA, Inc.*, 413 F.3d 471, 478 (5th Cir. 2005).

In this case, the plaintiff has not established or explained how any postdoctoral fellow that was either promoted to a faculty position or was reappointed to another postdoctoral position was in "nearly identical circumstances" to his own. Although the plaintiff argues that he was more qualified than some of the faculty members, he only relies on three factors to make this claim: the year the faculty member received his or her Ph.D.; the number of years of postdoctoral experience; and the number of years the postdoctoral fellow worked at PBRC before being hired as faculty. There would appear to be a myriad of other factors

that would influence a decision on whether to promote or retain a postdoctoral fellow including the quality and quantity of work completed while at PBRC, the type of work performed, and the ability to get along with other staff members. Such factors were not addressed and the plaintiff did not offer evidence as to how any employee retained or promoted was in a nearly identical circumstance to himself.¹⁴ As such, insufficient summary judgment evidence was presented on this element. Therefore, the plaintiff has not made out a prima facie case that would defeat the defendant's motion for summary judgment.

Nevertheless, even assuming that the plaintiff could make a prima facie case, he cannot survive summary judgment because the defendant has articulated a legitimate, non-discriminatory reason for the plaintiff's termination and the plaintiff has failed to show how the reason is pretextual.

The defendant asserts that the plaintiff was not offered a reappointment because "the Pennington staff and faculty became increasingly dissatisfied with his work and his inability to work and communicate with several key employees in the laboratory." Accordingly, the burden is shifted to the plaintiff to offer sufficient evidence to create a genuine issue of material fact that the defendant's reason is not true, but rather is a pretext for discrimination.

The record reflects the fact that the plaintiff had been criticized about his work

¹⁴Notably, the defendant asserts that at the time that the plaintiff was not reappointed, three other employees also received notice that they would not be reappointed.

prior to his receiving the notice of non-reappointment.¹⁵ The only evidence that the plaintiff offers to demonstrate that his work was satisfactory is the fact that he produced several manuscripts that were published by scientific journals. Moreover, the plaintiff does not rebut the defendant's assertion that the plaintiff was unable to "work and communicate" with several of his co-workers. The record reflects that there were numerous scientific disagreements between the plaintiff and other doctors on the type of scientific models to be used, the use of various scientific graphs, and the content of various papers.¹⁶ The plaintiff has failed to show that the reasons offered by the defendant for its employment decision were untrue and were a pretext to discriminate against him.

II. Retaliation Claim

The plaintiff has alleged that the defendant retaliated against him in violation of Title VII. To establish a prima facie case of retaliation, the plaintiff must show that: 1) he engaged in an activity protected by Title VII; 2) that an adverse employment action occurred; and 3) that a causal link existed between the protected activity and the adverse employment action. *Long v. Eastfield College*,

¹⁵See, e.g., doc. 53; Defendant's Exhibit N. In his May 2003 letter to human resources, the plaintiff states that Dr. George Argyropoulos commented on his dissatisfaction with the plaintiff's writing, the presentation of results, the text, and graphs.

¹⁶ *Id.* Defendant's Exhibit N.

88 F.3d 300, 304 (5th Cir. 1996). If the plaintiff establishes a prima facie case of retaliation, the burden shifts to the employer to “state a legitimate non-retaliatory reason for its action.” *Baker v. Am. Airlines, Inc.*, 430 F.3d 750, 754-55 (5th Cir. 2005). If the employer states a legitimate, non-retaliatory reason, “any presumption of retaliation drops from the case” and the burden shifts back to the employee to show that the stated reason is actually a pretext for retaliation.’” *Id.* at 755.

Whether the Plaintiff Engaged in Activity protected by Title VII

A plaintiff has engaged in a “protected activity” if he has “opposed any . . . unlawful employment practice” under Title VII or “has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.” involving Title VII. *Baker*, 430 F.3d at 755.

In this case, the plaintiff received notice that he would not be reappointed to a third term on May 19, 2003. Subsequently, the plaintiff filed three grievances through the defendant’s internal grievance process. The grievances were filed on May 20, 2003;¹⁷ August 20, 2003;¹⁸ and September 17, 2003.¹⁹ The plaintiff also

¹⁷Doc. 53; Defendant’s Exhibit N.

¹⁸*Id.* Defendant’s Exhibit Q.

¹⁹*Id.* Defendant’s Exhibit S. The grievance is dated 9/17/03. However, defendant contends that the grievance was filed on September 16, 2003, because defendant’s response to the defendant’s grievance (Defendant’s Exhibit T) is dated September 16, 2003.

filed two EEOC complaints (December 3, 2003²⁰ and February 23, 2004).²¹

The defendant argues that the plaintiff did not engage in any “protected activity” under Title VII as the grievances did not pertain to discrimination based on race or national origin. The defendant acknowledges that the plaintiff did file charges of discrimination with the EEOC. However, the defendant maintains that this was not a protected activity because the EEOC charges were filed after the plaintiff received his notice of non-reappointment. This court will consider each of the grievances and the EEOC complaints in turn.

The First Grievance (May 20, 2003)

The plaintiff’s first grievance on May 20, 2003, was written in response to Dr. Bouchard’s May 19, 2003 letter in which the plaintiff was informed that his contract with PBRC would not be renewed.²² The first grievance is a seven page letter in which the plaintiff objected to the termination letter and argued that he had conducted himself professionally and that he had been one of the most productive postdoctoral fellows at PBRC.

²⁰*Id.* Defendant’s Exhibit U.

²¹*Id.* Defendant’s Exhibit V.

²² Doc. 53; Defendant’s Exhibit F. The letter reads: “Jesus: This is to confirm what we discussed today in my office. Your contract will expire 90 days from today, i.e. on August 20, 2003. As I told you, you will continue to have access to the laboratory and to your computer unless I have reasons to change my mind.”

In the first grievance, the plaintiff chronicled a number of incidents that he felt indicated that Dr. Bouchard was biased against him. The plaintiff stated that he raised several issues with Dr. Bouchard, but instead of addressing the issues, Dr. Bouchard disrespected and humiliated him. The issues the plaintiff presented to Dr. Bouchard were: 1) the untimeliness of the review of the plaintiff's manuscript and the fact that Dr. Bouchard refused to revise the plaintiff's manuscript unless it was revised by Dr. Tuomo Rankinen first;²³ and 2) Dr. Tuomo Rankinen requiring the postdoctoral fellows to use a statistical model which the plaintiff believed was an incorrect method.²⁴

Additionally, the plaintiff accused Dr. Bouchard of making "disrespectful remarks" such as "This is Jesus' story, but it is not what we are going to do."²⁵ The plaintiff also cited problems with George Argyropoulos who "used bad manners and disrespectful comments" in regards to the plaintiff's writing and the plaintiff's

²³*Id.* Defendant's Exhibit N. The plaintiff's first grievance letter alleged that the plaintiff spoke to Dr. Bouchard about the fact that Dr. Tuomo Rankinen had not given him any comments about his manuscript for over two months. Dr. Bouchard responded that he would not revise the manuscript until Dr. Rankinen had included his comments. The plaintiff stated it took Dr. Rankinen four months to revise the manuscript and that this was far longer than the time accepted by editors of scientific journals. Therefore, the plaintiff concluded that the treatment of his manuscript was "unethical."

²⁴*Id.* In his grievance letter, the plaintiff stated that he spoke to Dr. Bouchard in 2002 and vocalized his disagreement with the statistical model (GLM) that Dr. Rankinen desired the postdoctoral fellows to use. Dr. Bouchard did not respond to the plaintiff's request to take care of this issue and then months later the postdoctoral fellows were given instructions to switch to the correct statistical method.

²⁵*Id.* In his grievance letter, the plaintiff stated that Dr. Bouchard made this comment after another Professor commented that he liked the plaintiff's idea.

presentations of results in his paper. The plaintiff concluded his first grievance with the observation that “Dr. Bouchard has threatened me, humiliated me, and filled me with fear for raising legitimate issues regarding in the end productivity, respect for people, and scientific values of PBRC.”

The Second Grievance (August 20, 2003)

In his second grievance, the plaintiff states that he was “expelled by Dr. Bouchard in retaliation for presenting serious scientific issues and asking for respect.” The plaintiff reiterated incidents mentioned in the first grievance letter and raised additional issues such as his inability to secure a faculty position and a conflict with Drs. Bouchard, Rankinen, and Argyropoulos over an analysis in a paper which the plaintiff concluded was “scientific misconduct.”²⁶ The plaintiff proposed a list of remedies involving the publication and submission of his work and requested appointment to an Instructor position at PBRC.

The Third Grievance (September 17, 2003)

The plaintiff’s third grievance was brief. In its entirety it states: “I was offered a position in writing as a postdoc in Steven Clarke’s lab, promised a contract,

²⁶*Id.* Defendant’s Exhibit Q, p. 3. The plaintiff stated that the dispute was over the change of a figure in a paper. The figure was removed from the paper and the statistics and results were not provided. The plaintiff concluded this was scientific misconduct.

waited 6 months for this but Dr. Clarke never sent me offer letter, and in the last month he did not communicate to me.”

The defendant claims that the plaintiff failed to assert an opposition to any unlawful employment practices under Title VII as the plaintiff never mentions discrimination based on race or national origin in any of his grievances. In response, the plaintiff concedes that the terms “racial discrimination” or “nationality discrimination” were not mentioned. However, the plaintiff maintains that the grievances had “a strong indicia of the disparate treatment condemned by Title VII.”

The court agrees with the defendant. The plaintiff did articulate what he perceived was unfair treatment and discrimination. However, this alleged mistreatment was never tied to race or national origin. In one of his grievances, the plaintiff himself stated that he was terminated for “presenting serious scientific issues and asking for respect.” As the grievances were never tied to any racial or national origin discrimination they did not constitute a protected activity for the purpose of the plaintiff’s retaliation claim.

The EEOC charges

The plaintiff filed two charges with the Equal Employment Opportunity Commission on December 3, 2003 and February 23, 2003. Citing *Frank v. Harris County*, 118 Fed. App’x 799, 804 (5th Cir. 2004), the defendant argues that these

were not protected activities as the charges were filed after the plaintiff received notice that he would not be reappointed. *See also Baker*, 430 F.3d at 755 (finding an EEOC claim irrelevant to a retaliation claim when the EEOC claim was filed after the plaintiff was terminated).

However, the plaintiff asserts that *Franks* is inapplicable where a plaintiff alleges that the retaliatory conduct occurred after the filing of an EEOC charge. *See Fields v. Phillips School of Bus. & Tech.*, 870 F. Supp. 149 (W.D. Tex. 1994) (recognizing a split amongst the circuits but concluding that the Fifth Circuit would permit a former employee to assert a cause of action against a former employer for acts of retaliation after the employment has ended). In this case, the plaintiff has alleged that he was retaliated against after his employment as a result of his filing the EEOC complaints. Therefore, this court finds for the purpose of this summary judgment motion that the plaintiff has established that he engaged in a protected activity under Title VII.

Whether an Adverse Employment Action Occurred and Whether a Causal Link to the Protected Activity Exists.

Finally, the plaintiff must prove that an adverse employment action took place and that the defendant's implementation of this adverse employment action is causally linked to the protected activity (filing of the EEOC charges).

In this case, the plaintiff points to two actions which it argues constitute

adverse employment action taken by the defendant. First, the plaintiff claims that Dr. Bouchard threatened that any letter of recommendation would reflect negatively against the plaintiff. Second, the plaintiff claims that Dr. Bouchard halted any work on the plaintiff's manuscripts.

Threatened Negative Reference

In *Fields*, a district court ruled that an adverse employment decision had occurred when the defendant gave a negative reference regarding the plaintiff to a prospective employer. 870 F. Supp. at 153.

In its motion in opposition to summary judgment, the plaintiff asserts that “Dr. Bouchard threatened that any letter of recommendation he would issue for Dr. Rico-Sanz would reflect negatively upon him.” The plaintiff relies upon an email from Dr. Bouchard dated January 1, 2004 in where Dr. Bouchard writes: “Finally he needs to realize that if he gets a letter of recommendation from any of us, he is unlikely to get the position he is applying for as those letters will have to reflect the reality of our relations with him.”²⁷

However, the plaintiff's reliance upon the email suffers from two major flaws. First, the plaintiff has not alleged that an actual negative reference was given, only that a negative reference *may* be given in the future. Therefore, the plaintiff has not

²⁷Doc. 64; Plaintiff's Exhibit 16-B.

asserted an adverse employment decision as this is an activity that may or may not happen at a later date.

Second, even if this court were to find that the threatened recommendation letter constituted an adverse employment decision, the plaintiff has not shown how the negative reference is linked to his filing of the EEOC charges. The email does not state that the reference would be based on any unlawful animus toward the plaintiff. Rather, Dr. Bouchard predicted that any recommendation letter would “reflect the reality of our relations with [Dr. Rico-Sanz].”

The *Fields* case is instructive on this issue. In *Fields*, the court found that an adverse employment decision occurred when the defendant gave a negative reference to a potential employer of the plaintiff. The court then evaluated the causal connection between the negative reference and the filing of EEOC charges. The defendant in *Fields* stated that the evaluation was based on her personal observations of the plaintiff during his employment and the defendant denied that the references were prompted by the plaintiff’s Title VII complaint. *Id.* at 153-54. In rebutting the defendant’s explanation, the only causal link that the plaintiff provided was his testimony reflecting his subjective belief that discrimination had occurred. *Id.* at 154. The *Fields* court found that this was insufficient and concluded that the plaintiff had not established a causal link.

Likewise, in this case, Dr. Bouchard’s email does not state that the references would be based on anything other than “reality.” An employer is entitled

to give references that reflect the nature of an employee's performance. The record is replete with evidence that Dr. Bouchard and the plaintiff had disagreements and had a less than cordial relationship. However, the plaintiff has failed to show how any negative recommendation would be linked to his race or national origin rather than Dr. Bouchard's actual perception of the plaintiff's work performance and his ability or inability to work with others.

Suspension of work on the manuscript

The plaintiff asserts that upon learning of the EEOC charge, the defendant retaliated against him by halting the review of his manuscripts. The plaintiff maintains that this was an adverse employment action in retaliation to the EEOC charges.

Historically, the Fifth Circuit has taken a restrictive view of what constitutes an adverse employment decision. To establish an adverse employment decision, in a retaliation claim, a plaintiff had to show that the action was an "ultimate employment decision," the same standard employed in a substantive discrimination claim.²⁸ The plaintiff argues, however, that this practice has been abrogated by a recent Supreme Court ruling.

In *Burlington N. & Sante Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006), the

²⁸See *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997).

Supreme Court found that the Fifth Circuit and Eighth Circuit approach of limiting retaliation claims to “ultimate employment decisions” did not achieve the anti-retaliation provision’s objective. The Court explained that “an employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside of the workplace.” *Id.* at 2412. The Court concluded that the substantive discrimination provisions and anti-retaliation provisions were not the same. Therefore, it rejected the application of the “ultimate employment decision” doctrine in the context of a retaliation claim. *Id.* at 2414.

This court agrees with the plaintiff that the prior Fifth Circuit precedent has been overruled. *See also Pryor v. Wolfe*, No. 05-21067, 2006 WL 2460778, *2 (5th Cir. Aug. 22, 2006) (recognizing that *Burlington* had rejected the “ultimate employment decisions” rule in retaliation claims). Following *Burlington*, the correct inquiry is whether “a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”

In the present matter, the plaintiff has alleged that six manuscripts are being withheld from publication. The plaintiff argues that “at this point in time, three years later, and considering the current pace of scientific advancements, the chances of publishing or patenting them as novel results may well have been compromised.” This court finds that the plaintiff has alleged a materially adverse action, which might have dissuaded a reasonable worker from making or supporting a charge of

discrimination. Thus, the plaintiff has created a genuine issue of material fact as to this element of his claim.

Next, the plaintiff must establish a causal connection between the defendant's failure to work on the manuscript and the EEOC charges. The plaintiff should be able to meet this burden. In an email dated January 12, 2004, Dr. Bouchard's states:

Our PBRC attorneys and the LSU counsel does not want me to answer any of his correspondence. I am sure that they are right. However, someone needs to tell him that because he filed complaints, all work on the manuscripts had to stop until the matters are resolved by the court or a referee. We are legally forced to do so. This is the result of his own making.²⁹

And in another email dated January 20, 2004, Dr. Bouchard writes:

It is likely that the litigation will consume time and resources here at PBRC and will demand a rather large involvement of Toumo and me plus a lot of other people. Under these circumstances, you will understand that it is out of the question that we spend one more minute on his paper until all is fully resolved. Then we will see.³⁰

Thus, the plaintiff has pointed to sufficient evidence in the record to show a causal link of the EEOC complaints to the work on the manuscripts being halted. Accordingly, the plaintiff will likely be able to make out a prima facie case of retaliation.

Once the plaintiff has established a prima facie case of retaliation, the burden

²⁹Doc. 64; Plaintiff's Exhibit 16-B.

³⁰*Id.* Plaintiff's Exhibit 16-C.

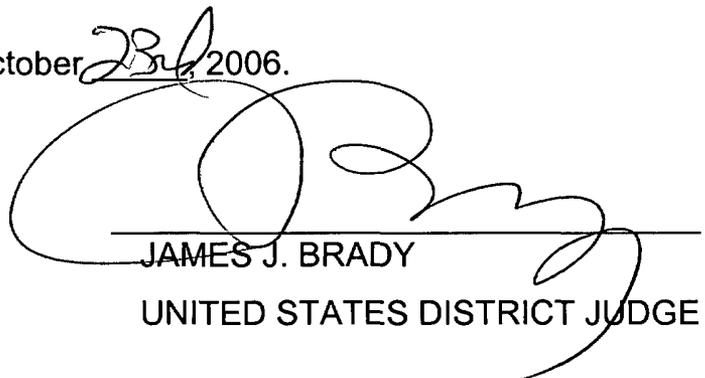
shifts to the defendant to offer a legitimate, non-retaliatory reason for the action. The evidence in the record reflects that halting of the manuscript was purportedly done at the behest of defendant's legal counsel.

Once a legitimate non-retaliatory reason has been stated, the presumption of retaliation drops from the case and the burden shifts back to the employee to show that the stated reason is actually a pretext for retaliation. Unfortunately for the plaintiff, he has not provided sufficient evidence that the halting of the manuscripts was a pretext for retaliation, nor does the evidence reflect that the halting of the work on the manuscript was done for any retaliatory reason. Accordingly, the plaintiff is unable to defeat the defendant's motion for summary judgment.

CONCLUSION

For the reasons stated herein, the defendant's motion for summary judgment on the plaintiff's claims of discrimination based on race and national origin is GRANTED. The defendant's motion for summary judgment on the plaintiff's claim of retaliation is GRANTED.

Baton Rouge, Louisiana, October 23, 2006.



JAMES J. BRADY
UNITED STATES DISTRICT JUDGE