IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

ANDRES ANCHONDO,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	No. 01-1155
	)	
TYSON FOODS, INC.,	)	
	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Andres Anchondo has filed suit against his former employer, Tyson Food, Inc., for allegedly failing to promote him on the basis of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), terminating him from his employment following his protests about age discrimination in violation of the ADEA, and terminating him in retaliation for assisting co-workers with rights protected by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) et seq. ("Title VII"). Defendant has filed a motion for partial summary judgment on Plaintiff's claims of failure to promote in violation of the ADEA and retaliatory discharge in violation of Title VII. Plaintiff has responded to Defendant's motion, and Defendant has filed a reply to the response. For the reasons set forth below, Defendant's motion for summary judgment is DENIED.

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. To prevail on a motion for summary judgment, the moving party has the burden of showing the "absence of a genuine issue of material fact as to an essential element of the nonmovant's case." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989). The moving party may support the motion with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

"If the defendant . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . . [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter, however. Anderson, 477 U.S. at 249. Rather, "[t]he inquiry on a summary judgment motion . . . is . . . 'whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" Street, 886 F.2d at 1479 (quoting Anderson, 477 U.S. at 251-52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970).

The facts of this case are as follows:[1] Plaintiff was employed by Defendant from October 6, 1999, until January 5, 2000, in a Class I position in the dark meat debone department. Defendant granted Plaintiff a leave of absence, but he did not return at the agreed upon time. Thereupon, Plaintiff's employment was terminated. Plaintiff was re-hired on February 14, 2000. On May 3, 2000, Plaintiff received a counseling statement for leaving the line without being excused.

Defendant posted a notice for a second shift debone lead position on May 18, 2000. Plaintiff submitted a bid for the position but did not receive the position. In its initial answers to Plaintiff's interrogatories, see Plaintiff's Exhibit H, Defendant contended that Plaintiff was rendered ineligible for the position because he had received a counseling statement within the six months prior to the posting of the position pursuant to Defendant's written "career opportunities procedures." In its amended and supplemental answers to Plaintiff's interrogatories, see Plaintiff's Exhibit L, Defendant contended that Gilberto Mendoza, the employee who received the promotion, was more qualified for the position than Plaintiff.

According to Plaintiff, he was terminated from his employment for assisting over employees to exercise their civil rights and for protesting age discrimination. Defendant contends that Plaintiff voluntarily resigned for personal reasons.

[1] The facts are stated for the purpose of deciding this motion only.

Age Discrimination Claim

The ADEA provides, inter alia, that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a). A plaintiff may present direct evidence of discrimination **or** circumstantial evidence that creates an inference of discrimination. Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1246 (6th Cir. 1995). McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973),[2] established a three-part test for allocating the burden of proof in employment discrimination cases in the absence of intentional discrimination. First, the plaintiff must prove a prima facie case of discrimination by establishing:

> (i) that he belongs to a protected class; (ii) that he was qualified for the job that he held; (iii) that, despite his qualifications, he suffered an adverse employment decision; and (iv) that, after his rejection or demotion, the position was filled by a person outside his class.

Id. at 802; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 n.6 (1981). Replacement by someone outside the protected class is not a proper element of a prima facie case in an ADEA claim. O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307, 1310 (1996). Instead, the prima facie case requires "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion ...." Id., quoting Teamsters v. United States, 431 U.S. 324, 358. If the plaintiff presents direct

[2] The McDonnell Douglas framework applies to claims brought under both the ADEA, Title VII, and the THRA. Mitchell v. Toledo Hospital, 964 F.2d 577, 582 (6th Cir. 1992). Accord Crawford v. Medina General Hospital, 96 F.3d 830, 834 (6th Cir. 1996) (Because the substantive, antidiscrimination provisions of the ADEA are modeled upon the prohibitions of Title VII, courts routinely employ Title VII and ADEA case law interchangeably.)

evidence of age discrimination, he need not make out a prima facie case under the McDonnell Douglas framework. LaPointe v. United Autoworkers Local 600, 103 F.3d 485, 487-88 (6th Cir.1996).

Defendant argues that it is entitled to summary judgment on Plaintiff's failure to promote claim because Plaintiff has not established a prima face case of age discrimination. Defendant contends that Plaintiff was not qualified for the promotion because he had received a counseling statement within the six months prior to the posting of the position and Defendant's written policy prohibited the promotion of such an employee.

Plaintiff has responded by pointing to direct evidence of age discrimination; therefore, as noted above, the McDonnell Douglas burden shifting standard is inapplicable. Specifically, Plaintiff testified during his deposition that J. B. Norment, the shift manager who reviewed the decision of the first line managers as to who received the promotion, see Plaintiff's Exhibit L, told Plaintiff that he was too old for the position and that the man who received the position was young and could do a better job. Plaintiff's Exhibit Defendant at p. 130. Thus, summary judgment on this issue is not appropriate.

Title VII Claim

Next, Defendant contends that it has refuted Plaintiff's claim of retaliatory discharge under Title VII. The framework established in McDonnell Douglas is applicable to claims of retaliation. Prince v. Commissioner, U.S.I.N.S., 713 F. Supp. 984, 996 (E.D. Mich. 1989), citing McKenna v. Weinberger, 729 F.2d 783, 791 (D.C. Cir. 1984). To establish a prima

facie case of retaliation, the plaintiff must show: (1) that he engaged in a statutorily protected activity; (2) that the employer knew that he had engaged in a statutorily protected activity; (3) that the employer took an adverse personnel action; and (3) that a causal connection existed between the two. Prince, 713 F. Supp. at 996. The burden of establishing a prima facie case in a retaliation action is not onerous. EEOC v. Avery Dennison Corp., 104 F.3d 858, 861 (6th Cir. 1997).

To establish a causal connection between the protected activity and the adverse employment action, a plaintiff must "proffer evidence 'sufficient to raise the inference that [his] protected activity was the likely reason for the adverse action.'" Zanders v. National R.R. Passenger Corp., 898 F.2d 1127, 1135 (6th Cir. 1990) (quoting Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th Cir. 1982)). A causal connection between the protected activity and the adverse employment action may be inferred by temporal proximity. Wrenn v. Gould, 808 F.2d 493, 501 (6th Cir. 1987). Although no one factor is dispositive in establishing a causal connection, evidence that the adverse action was taken shortly after the plaintiff's exercise of protected rights is relevant, although not dispositive, to causation. See Moon v. Transport Drivers, Inc., 836 F.2d 226, 230 (6th Cir. 1987) (stating, in a case where the plaintiff was fired less than two weeks after making a complaint, that "the proximity in time between protected activity and adverse employment action may give rise to an inference of a causal connection").

Defendant states that Plaintiff has failed to establish a prima facie case because he cannot show a causal connection between Plaintiff's alleged participation in a protected activity and his ultimate termination. Defendant describes the alleged protected activity as Plaintiff's communications with the human resources department on behalf of fellow Hispanic employees concerning allegations of problems with their pay. According to Defendant, Plaintiff has presented no evidence that any of its decision makers knew of these communications.

Plaintiff has responded with his own declaration which states that, shortly before his termination, he signed a letter that complained of the alleged sexual harassment of two of Defendant's female workers. Plaintiff's Declaration at ¶ 5. The letter was delivered to Defendant's human resources manager. Id. As a result of the complaint, J. B. Norment fired the person whose position Plaintiff subsequently applied for. Id. at ¶ 6.

Plaintiff's evidence that J. B. Norment fired an employee based on allegations of sexual harassment that were addressed in a complaint made by Plaintiff is sufficient to raise the inference that Norment knew that Plaintiff had made such a complaint. Additionally, the proximity in time between Plaintiff's complaint and his alleged termination by Norment "gives rise to an inference of a causal connection." Because there are disputed issues of fact as to whether one of Defendant's decision makers knew of Plaintiff's complaint, Defendant is not entitled to judgment as a matter of law on this issue.

Accordingly, Defendant's motion for partial summary judgment is DENIED.

IT IS SO ORDERED.

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JAMES D. TODD
UNITED STATES DISTRICT JUDGE

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DATE