UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ROBERT WHITE, *Plaintiff*	§	
v.	§	**No. A-20-CV-01219-RP**
PATRIOT ERECTORS LLC, *Defendant*	§	

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

Before the Court is Defendant Patriot Erectors LLC's Motion for Summary Judgment, Dkt. 12, Motion to Strike, Dkt. 18, and all associated responses, replies and motions. The District Court referred the above motion to the undersigned Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. § 636(b) and Rule 1(c) of Appendix C of the Local Court Rules.

I. FACTUAL BACKGROUND

This is a Title VII and 42 U.S.C. § 1981 case asserting claims of racial discrimination and retaliation. Plaintiff Robert White, who is Black, worked at Patriot Erectors LLC, which is a large commercial metal fabrication shop with three locations and over 500 employees, for nine years. White, who worked at the Dripping Springs location, started in July 2010 as a Welder, and was promoted to Line Leader, Shop Foreman, and finally Shop Supervisor or Production Manager, the last position he held with Patriot.

Patriot acquired Trinity Steel Fabricators in March 2019, doubling the size of its fabrication space. In September 2019, White complained to Patriot's Human Resources Department about a racial slur that was allegedly made about him to a coworker. He did not personally hear the slur. Patriot alleges it investigated the slur, which was reported to White by another employee, Maryann Ezell, who heard it from another employee, Renee Deselle, who overheard the remark allegedly made by Allen Bailey.[1] Patriot alleges it investigated White's complaint and found that the person who allegedly overheard the comment, Deselle, denied the remark about Bailey and Patriot closed the investigation. White alleges that he received no feedback or follow-up about his complaint, and that neither he nor Ezell were ever interviewed.

In July 2019, Trinity management was integrated into Patriot's management, including its Vice President in charge of fabrication operations, Mickey Swor, and President, Richard Neal. Patriot asserts that beginning in July 2019, with the addition of Trinity's processes, for various reasons White's supervisor, Swor, found White's abilities lacking in the larger shop environment. Ultimately, Swor felt a management change was needed, and communicated this to the CEO, Parley Dixon.

[1] Patriot asserts that White changed the identity of the individual who allegedly made the slur from his EEOC Charge, where he stated the person was Allen Bailey, to his deposition, where he asserted the individual was Gordon Satterwhite. Patriot alleges neither Bailey nor Satterwhite had supervisory status over White. The identity of the individual who allegedly made the racial slur is immaterial to this Court's analysis, as that issue goes to White's credibility, which is a consideration for a jury, and not to whether he actually complained, which is relevant to the consideration of the motion for summary judgment now before the Court.

Dixon met with White on October 23, 2019. The parties dispute what occurred at that meeting. Patriot claims that Dixon expressed his concerns about White, who was undergoing a messy divorce and was occasionally spending the night at the work site, and informed him he could no longer act as the manager of the fabrication shop. Patriot asserts Dixon gave White three options: (1) another job within Patriot such as sales or estimating; (2) a job with a sister company; or (3) open his own business as a subcontractor fabricator to Patriot. Patriot claims that it gave White several weeks of paid leave to close out his divorce and decide his future course of action. Patriot maintains that White chose the third option and opened his own fabrication shop, Phynix, which he founded on October 31, 2019, within a week of his discussion with Dixon. White alleges that Dixon discussed possible jobs with him at their meeting but did not present him with a concrete offer of employment at Patriot. White asserts he was removed from his job and told he needed a "vacation," that was his last day of work at Patriot, and his email access was discontinued on October 24, 2019.

White maintains that he did nothing else to pursue Phynix until he returned to Patriot in mid-November to meet again with Dixon. At that time, he alleges that Dixon informed him that no positions existed at Patriot or sister shops that would be close to his former salary range, and he was probably better off starting his own business. White maintains he was not offered another job at Patriot, and instead was offered the subcontractor business.

Patriot asserts it sent White's new company, Phynix, several overflow fabrication jobs after White left. Patriot asserts these overflow jobs dried up due to Covid-19. White filed an unemployment claim in March 2020, in response to which Pariot acknowledged he was "permanently laid off". White filed an EEOC Charge on August 10, 2020, alleging racial discrimination and retaliation.

II. MOTION TO STRIKE

First, Defendant Patriot objects to and moves to strike various exhibits to White's Response to its Motion for Summary Judgment.

Patriot objects to the Declarations of Robert White, Maryann Ezell, and Katelyn Reveal asserting that their declarations are conclusory, contain hearsay, speculatory, irrelevant, and are not based on personal knowledge in violation of Federal Rule of Civil Procedure 56(c)(4). The undersigned finds that to the extent the Declarations do not meet the requirements of Rule 56(c)(4), they will not be considered in evaluating Patriot's motion. Patriot also objects to Dkt. 15-7, which is an email from Robert White to various individuals. The undersigned finds that it is unnecessary to rely on this evidence, and therefore any motion to strike it is moot. Lastly, Patriot objects to the statement of Mickey Swor, Dkt. 15-8, as unauthenticated. White has not responded to the authentication issue. Accordingly, the undersigned will strike Dkt. 15-8. Accordingly, Patriot's Motion to Strike, Dkt. 18, is **GRANTED IN PART** and **DENIED IN PART**.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A fact is material if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir. 2009) (quotations and footnote omitted). When reviewing a summary judgment motion, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. Further, a court may not make credibility determinations or weigh the evidence in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). Further, the nonmovant is required to identify specific evidence

in the record and to articulate the precise manner that evidence supports its claim. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.* After the nonmovant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the nonmovant, summary judgment will be granted. *Miss. River Basin All. v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000).

IV. ANALYSIS

A. Race Discrimination Claim

White contends that Patriot violated Title VII and Section 1981. The undersigned analyzes these claims together, as "[t]he analysis of discrimination claims under § 1981 is identical to the analysis of Title VII claims." *Body by Cook, Inc. v. State Farm Mut. Auto. Ins.*, 869 F.3d 381, 386 (5th Cir. 2017) (citing *Jones v. Robinson Prop. Grp. L.P.*, 427 F.3d 987, 992 (5th Cir. 2005)).

Title VII of the Civil Rights Act makes it "an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). When the plaintiff lacks direct evidence of discrimination, such as in this case, the court applies the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Harville v. City of Houston*, 945 F.3d 870, 874-75 & n. 10 (5th Cir. 2019)).

1. Prima Facie Case Discrimination

Under the *McDonnell Douglas* framework, the plaintiff bears "the initial burden to establish a prima facie case of discrimination[.]" *Harville*, 945 F.3d at 875. "The prima facie case, once established, creates a presumption of discrimination and the burden then shifts to the [defendant] to articulate a legitimate, non-discriminatory reason for the adverse employment action." *Id.* (citing *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 404 (5th Cir. 1999)). If the employer does so, the plaintiff "must ... produce substantial evidence indicating that the proffered legitimate nondiscriminatory reason is a pretext for discrimination.'" *Outley v. Luke & Assocs., Inc.,* 840 F.3d 212, 216 (5th Cir. 2016)). The Fifth Circuit has articulated the plaintiff's prima facie burden as follows:

> To establish a prima facie case of racial discrimination in employment, an employee must demonstrate that she (1) is a member of a protected group; (2) was qualified for the position at issue; (3) was discharged or suffered some adverse employment action by the employer; and (4) was replaced by someone outside his protected group or was treated less favorably than other similarly situated employees outside the protected group. With respect to the "similarly situated employees" requirement, a plaintiff must show that [she] was treated less favorably than others under nearly identical circumstances.

Morris v. Town of Independence, 827 F.3d 396, 401-02 (5th Cir. 2016).

There is no dispute that White is Black and that he was replaced as the Shop Supervisor by Justin Snyder, who is White, so the parties' arguments focus on the third factor. Patriot asserts White cannot make out a prima facie case of race discrimination because the evidence shows he voluntarily resigned to start his own business and was not involuntarily terminated. Dkt. 12, at 11. However, the uncontroverted summary judgment evidence supports that when Dixon met with

White, he removed him from his supervisory job as Shop Supervisor and stated he could possibly find him another position in sales or estimating. Dkts. 12-1 and 12-3, at 16 (Parley Dixon deposition testimony stating that "the offer made was that we would find employment for him at Patriot at a similar salary level, position to be determined … it was clear there was employment available to him at Patriot, just not in the capacity of running the shop."). White was placed on a six-week sabbatical, with no plan in place for a position on his return. Dkts. 12-7 and 12-12.

White asserts he was terminated. He submits summary judgment evidence that after his conversation with Dixon, his email was turned off. Dkt. 15-1. White testified in his deposition that at their meeting after the six-week period, Dixon told him "there were no positions at Patriot …." Dkt. 12-2, at 229:1-4, and "that he had looked and there really didn't seem to be any other options … the best option was probably to go into business for myself." *Id.*, at 232:4-17. However, even if White was not terminated, a demotion in duties, even if not accompanied by a change in title or pay reduction, may constitute an adverse employment action. *See Pegram v. Honeywell, Inc.*, 361 F.3d 272, 283 (5th Cir. 2004). Actionable adverse employment actions are employment actions that constitute a "significant change in employment status, such as hiring, firing, failing to promote, *reassignment with significantly different responsibilities*, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (emphasis added). White's removal from the Shop Supervisor position is sufficient to establish the third prong of the inquiry, and White has established a prima facie case of race discrimination.

2. Legitimate Nondiscriminatory Reason

Since White has established a prima facie case of racial discrimination, the burden then shifts to Patriot to proffer a legitimate, nondiscriminatory reason for its actions. *Watkins v. Tregre*, 997 F.3d 275, 281 (5th Cir. 2021). If Patriot offers a legitimate nondiscriminatory reason, the presumption of discrimination disappears, and White must produce "substantial" evidence indicating that the proffered legitimate, nondiscriminatory reason is a pretext for discrimination. *Id.* at 282. A plaintiff can establish pretext by showing "the employer's proffered explanation is false or 'unworthy of credence.'" *Thomas v. Johnson*, 788 F.3d 177, 179 (5th Cir. 2015).

In support of its burden to establish that it had a legitimate nondiscriminatory reason for its actions, Patriot argues that White's lack of ability was the reason behind its decision to remove him from his Shop Supervisor position. Patriot states, "in 2019 with all the ongoing changes at Patriot, the company found that, while Mr. White was a decent leader, in a sense, for the shop when it had been smaller, he did not have the capabilities of process leadership that Patriot needed for much larger scaled work planned for the future." Dkt. 12, at 6. In order to meet its burden, Patriot must provide both "clear and reasonably specific reasons" for its actions. *Perry v. Pediatric Inpatient Critical Care Services*, No. SA-18-CV-404-XR, 2022 WL 4456273, at *11 (W.D. Tex. Sept. 26, 2022) (citing *Tex. Dep't Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981)). "[A] defendant employer must articulate in some detail a more specific reason than its own vague and conclusional feeling about the employee." *Patrick v. Ridge*, 394 F.3d 311, 317 (5th Cir. 2004) ("We hold as a matter of law that

justifying an adverse employment decision by offering a content-less and nonspecific statement ... is not specific enough to meet a defendant employer's burden of production under *McDonnell Douglas*. It is, at bottom, a nonreason."). Thus the notion that White did not have the leadership ability to run a "process driven" shop is in itself an insufficient to establish a legitimate nondiscriminatory reason for White's removal from the Shop Supervisor position.

But Patriot cites the following, more specific, evidence of White's lack of skills that Swor identified beginning in 2019: (1) some projects under White's supervision were found to have been cut improperly and had to be re-fabricated, Dkt. 12-3, 69:17-21, Dkt, 12-6; (2) various production targets for the fabrication shop were not being met, Dkt. 12-6; (3) product shipped to an erection site at times lacked the proper portions of the order, resulting in the fab shop scrambling to fill the missing pieces, *id.*; (4) inventory was not tracked properly, and White would indiscriminately use parts or products from one job for another, as he deemed necessary to get a job done, thus, impacting other jobs down the line, *id.*, Dkt. 12-1; (5) once they arrived, the Trinity executives concluded that the planned roll out of new production software had to stop, as they observed that White did not understand many features of the program and his team was not prepared to handle the tasks the program required, *id.*; (6) personnel in the shop complained to Swor about White's aggressive demeanor, Dkt. 12-2 at 141:16-142:6; and (7) Swor was alarmed when he discovered that Mr. White had ordered a fab job in the shop and by an outside fabricator, in duplicate fashion—doubling Patriot's costs, which was the triggering event for removing White

from his position, *id.* The undersigned finds Patriot has met its burden and offered a legitimate nondiscriminatory reason for its actions.

3. Pretext

Once a defendant establishes a legitimate, nondiscriminatory reason for the adverse employment action, the "presumption of discrimination created by the prima facie case disappears, and the plaintiff is left with the ultimate burden of proving discrimination." *Sandstad v. CB Richards Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511-12 (1993)). A plaintiff must provide substantial evidence to raise a genuine issue of fact regarding pretext. *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 219-20 (5th Cir. 2001). A plaintiff must do so by either showing that the defendant's nondiscriminatory explanations are "false or 'unworthy of credence,'" or by presenting evidence of disparate treatment. *Hernandez v. Clearwater Transp., Ltd.*, 550 F. Supp. 3d 405, 417 (W.D. Tex. 2021) (quoting *Wallace*, 271 F.3d at 220); *Owens v. Circassia Pharm., Inc.*, 33 F.4th 814, 826 (5th Cir. 2022).

However, "employment laws do not transform federal courts into human resources managers, so the inquiry is not whether [the employer] made a wise or even correct decision to terminate [the plaintiff]." *Owens*, 33 F.4th at 826 (citing *Bryant v. Compass Grp. USA Inc.*, 413 F.3d 471, 478 (5th Cir. 2005)). "The ultimate determination, in every case, is whether, viewing all of the evidence in a light most favorable to the plaintiff, a reasonable factfinder could infer discrimination." *Id.* (quoting *Crawford v. Formosa Plastics Corp., La.*, 234 F.3d 899, 902 (5th Cir. 2000)).

To evaluate a claim of pretext, "a court should consider 'the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case.'" *Crawford,* 234 F.3d at 902. Ultimately, "evidence must be of sufficient 'nature, extent, and quality' to permit a jury to reasonably infer discrimination." *Owens*, 33 F.4th at 826. Even when such a showing is made, however, it is not always enough to prevent summary judgment if "'no rational factfinder could conclude that the action was discriminatory.'" *Lockhart v. Republic Servs., Inc.*, No. 20-50474, 2021 WL 4955241, at *3 (5th Cir. Oct. 25, 2021). If the employer offers more than one nondiscriminatory reason, the plaintiff "must put forward evidence rebutting each of the nondiscriminatory reasons the employer articulates." *Wallace*, 271 F.3d at 220.

White responds with evidence that Patriot's proffered reasons are pretextual. Patriot argues that the event that "triggered" his removal from the Shop Supervisor position was when Swor discovered that "White had ordered a fab job in the shop and by an outside fabricator in duplicate fashion—doubling Patriot's costs." Dkt. 12-6, at 3. White argues that the event of duplication of work with the outside fabricator was not caused by White.

In support, White offers his own declaration testimony, Dkt. 15-1, and that of former Patriot employee, Katelyn Reveal, Dkt. 15-3. In his declaration, White states that he did not order the job from the subfabricator, did not have the contact information for the subfabricator, and did not have the authority to order a job of that cost, because he was limited to making decisions about subcontracting jobs in the

$5000 to $20,000 range and the job was for over $200,000. White further testified that Swor knew White did not have the authority to order a job at that price level. Dkt. 15-1. Reveal testified that in September 2019, Swor asked her to send drawings to a subfabricator she had never heard of before. Dkt. 15-3, at 3.

Patriot complains that White could not have known whether or not Swor ordered the job, and this portion of his statement is not based on personal knowledge. This is true, and the undersigned does not consider this portion of White's declaration in determining that the evidence offered by White is sufficient to carry his burden on pretext. However, Swor testified that he conducted no investigation as to the cause of the duplication as to this issue, but "that he found the email where I instructed the shop to make sure they knew it was going to Kennedy," and that he had sent an email instructing Katelynn Avila, who "was managing all subfabrication for the shop" to "make sure they knew it was going to Kennedy, and the steel needed to be taken care of." Dkt. 17-1, at 15, 53-54. Swor testified that White was not copied on these emails, but that he held him responsible because Katelyn Avia was White's direct report. Swor testified "Somehow or another, we got crossways and we ended up fabricating the same steel in our shop. Katelynn reported directly to Robert White." *Id.* Thus Swor's own testimony support's White's contention that Swor ordered the subfabrication job and not White, and that he did not let White know he had done so. The undersigned finds that White has carried his evidentiary burden on this issue.[2]

[2] In its Reply, Patriot states that "Mr. Swor did not fault Plaintiff for any ordering *snafus per se*, but rather for his failure to oversee the Shop adequately, to understand the work on site, and consequently, to know about the duplicate work." Dkt. 17, at 5. However, in its Motion for Summary Judgment, Patriot states that, "Finally, Mr. Swor was alarmed when he

Similarly, with regard to the other claims of White's cumulative poor performance of his job, White offers his testimony, that of Katelyn Reveal, and that of Maryann Ezell in support of his assertions that these reasons are pretextual. Reveal and Ezell both worked at Patriot with and for White before and after White was terminated from the Shop Supervisor position. Thus, to the extent they observed facts in their positions as Patriot employees, their declarations are admissible.[3]

All three testified that improper cuts and refabrication are common at Patriot, not a cause for concern, and cannot be controlled. *See* Dkt. 15-1, at 4 ("There were always mistakes in the shop."); Dkt. 15-2, at 1 ("That happened almost every day under the new Shop Supervisor Justin Snyder" who remains employed at Patriot); Dkt. 15-3, at 1 ("bad cuts happen all the time").

White testified that production targets were constantly being shifter by upper management, so missing a target was common. Dkt. 15-1, at 4 ("I did not have any control over meeting their targets.") Ezell testified that "production targets are flexible, and are missed all the time." Dkt. 15-2, at 2. Ezell testified that this occurred as late as 2021, when she left Patriot. *Id.*

With regard to mistakes in shipping, "resulting in the fab shop scrambling to fill the missing pieces," White testified this was the shipping department's error,

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discovered Mr. White had ordered a fab job in the shop *and* by an outside fabricator in duplicate fashion—doubling Patriot's costs." Dkt. 12, at 7 (italics in original). These statements are inconsistent and suggests Patriot's proffered reasons for removing White from the Shop Supervisor position are pretextual.

[3] Patriot objects to the testimony in part because Ezell is White's current girlfriend and Reveal now works for him, but once again these arguments go to credibility of the evidence, not its admissibility.

which was not under his supervision. Dkt. 15-1, at 5. Ezell concurred that White was not responsible for shipping errors. Dkt. 15-2, at 2.

As for the claim that inventory was not tracked properly, and White "would indiscriminately use parts or products from one job for another, as he deemed necessary to get a job done, thus, impacting other jobs down the line," White disputes this as false, stating that Patriot passed third party AISC audits every year, and that audit tested whether the inventory system was properly kept. White also testified that no other jobs down the line were impacted. Dkt. 15-1, at 5. Ezell testified that "I observed while working at Patriot that borrowing parts or products from one job or another was a standard practice there." Dkt. 15-2, at 3. Reveal testified that "Mr. White kept a very tight control over inventory. I know that sometimes material from one job would be used for another job, but it did not ever delay the completion of the other job, and did not create any problem with inventory." Dkt. 15-3, at 2.

With regard to the slowed rollout of the new production software Tekla, because of White and his teams' lack of understanding of the software, White submits evidence that he was not the cause of the slowed adoption. He asserts the rollout "was too big for the company to handle as a whole in such a short time as originally planned …. This was a company-wide issue because the training throughout the company had not been completed." Dkt. 15-1, at 6. Ezell testified that, "Renee, was put in charge of implementation … [she] was slow to roll out that training … Once Tekla was implemented, Renee would often take away Tekla permission from Robert's crew.

That tied their hands, because it made it so that they could not follow procedures to get things done in Tekla." Dkt. 15-2, at 3.

And, regarding personnel complaints about White's demeanor, the evidence shows a history of complaints about White's demeanor, but no recent complaint was identified by Swor as the reason for his removal as Shop Supervisor. Dkt. 12-2, at 141:16-142:6 (citing *White's* testimony that he was counseled in February 2018 about complaints regarding his lack of professionalism as evidence of complaints against him).

The undersigned finds that White has provided substantial evidence of pretext. In every instance where Patriot has identified a lack of ability on his part, White has provided competent summary judgment evidence that Patriot's reasoning and explanation is not worthy of credence. Especially noteworthy is Patriot's shifting reasoning regarding whether it found White's performance wanting because he ordered a subfabricator to do a job that he had also fabricated in the shop, when Swor testified that he had ordered the subfabrication himself. Dkt. 17-1, at 15, 53-54. "Evidence is substantial if it is of such quality and weight that reasonable and fair-minded [triers of fact] in the exercise of impartial judgment might reach different conclusions." *Owens*, 33 F.4th at 826. In this case, White has produced evidence such that impartial judges of the facts could reach different conclusions as to the reason for White's removal from the Shop Supervisor position.

"[The Fifth Circuit] has held that a plaintiff's summary judgment proof must consist of more than 'a mere refutation of the employer's legitimate

nondiscriminatory reason.'" *Jones v. Gulf Coast Rest. Grp., Inc.*, 8 F.4th 363, 369 (5th Cir. 2021) (quoting *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815 (5th Cir. 1993)). "Thus, the plaintiff is not relieved of her burden to present evidence that will permit a rational factfinder to infer intentional discrimination." *Douglas*, 2022 WL 898746, at *12 (citing *Harville v. City of Hous.*, 945 F.3d 870, 877 (5th Cir. 2019)). "Even in the face of sufficient evidence for a reasonable factfinder to find pretext and reject the nondiscriminatory reason, if no rational factfinder could conclude that the action was discriminatory, such as when the record conclusively reveals some other, nondiscriminatory reason for the decision, or if the plaintiff creates only a weak issue of fact as to whether the employer's reason was untrue and there is abundant and uncontroverted independent evidence that no discrimination occurred, summary judgment will be proper." *Id.* (citing *Harville*, 945 F.3d at 876-77).

In analyzing White's refutation of his alleged cumulative performance issues and inability to run the shop, the undersigned is aware that "[m]ere disputes over an employer's assessment of an employee's performance do not create issues of fact." *Owens*, 33 F.4th at 831 (citing *Salazar v. Lubbock Cnty. Hosp. Dist.*, 982 F.3d 386, 389 (5th Cir. 2020)). However, the undersigned views the present facts as more than a disagreement as to an employer's assessment. White contends that his allegedly poor performance was never discussed with him and is now being used to justify discrimination against him. And while Patriot takes the opposite view, with Swor stating that feedback on performance with his employees was always ongoing, Dkt. 12-6, at 20, and that his typical practice with performance or behavior issues is to

give three writeups prior to termination and that this is Patriot's policy, *id.*, at 21, Patriot has offered no documentation from the period in which Swor became White's supervisor[4] supporting any kind of ongoing performance review or any warning of any kind given to White about his performance, behavior, or ability to manage the shop. *See Cherry v. Premier Prints, Inc.*, No. 1:21-CV-59-SA-DAS, 2022 WL 3636606, at *9 (N.D. Miss. Aug. 23, 2022).

Instead, Patriot claims—contrary to Swor's deposition testimony and its own prior written disciplinary actions against White with forms showing a check the box as to whether a write up was a "first written warning" or a "second written warning"—that it has no formal written progressive disciplinary policy. Dkt. 17, at 9. Additionally, despite the claims of cumulative performance issues, White received three quarterly bonuses from Patriot in 2019 totaling $50,000. Dkt. 15-1, at 7. An employer's failure to follow its own disciplinary policies is evidence of pretext. *Burton v. Freescale Semiconductor*, 798 F.3d 222, 239-40 (5th Cir. 2015).

White's evidence that Patriot removed him from the position of Shop Supervisor without warning in contravention of its own avowed progressive disciplinary policies, whether formal or informal, written or unwritten, coupled with White's evidence showing that Patriot's nondiscriminatory explanations are "false or

[4] In fact, the summary judgment evidence submitted by Patriot shows that White was given written warnings twice, once in February 2018 and once in April 2017. Dkt. 12-10. While Patriot makes much of White's affair with a coworker and wrecking a company truck, there is no support he was ever counseled or punished for these actions. And White remained employed and received bonuses while admittedly carrying on with a coworker. Patriot's response to the truck accident was noted in a "Payroll Status Change" which stated "Robert's truck has been taken back by management" and provided White with a $75 per week fuel allowance in its stead. Dkt. 12-14.

'unworthy of credence," constitutes substantial evidence sufficient to raise a genuine issue of fact regarding pretext. *Wallace*, 271 F.3d at 219-20. Viewing all of the evidence in a light most favorable to White, a reasonable factfinder could infer discrimination against White. Summary judgment on White's race discrimination claim, therefore, should be denied.

B. Retaliation Claim

White also brings a retaliation claim. To establish a prima facie case of retaliation, a plaintiff must show that: (1) he participated in an activity protected under Title VII; (2) his employer took an adverse employment action against him; and (3) a causal link exists between the protected activity and the adverse action. *Feist v. Louisiana*, 730 F.3d 450, 454 (5th Cir. 2013). The causal connection must be "but for," meaning that the adverse action would not have occurred without the protected activity. *Univ. of Tex. SW Med. Ctr. v. Nassar*, 570 U.S. 338, 360-61 (2013). Once White makes this showing, the burden shifts as above to the employer to articulate a legitimate, non-discriminatory reason for its decision and then to the plaintiff to show that this reason is actually a pretext retaliation. *Septimus v. Univ. of Houston*, 399 F.3d 601, 610-11 (5th Cir. 2005).

The undersigned found above that White's removal from the Shop Supervisor position qualifies as an adverse employment action. "Protected activity" is defined as "opposition to any practice made unlawful by Title VII, including making a charge, testifying, assisting, or participating in any investigation, proceeding, or hearing under Title VII." *Green v. Admins. of Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir.

2002), *as amended on denial of reh'g and reh'g en banc* (Apr. 26, 2002). An employee that files an internal complaint of discrimination engages in a protected activity." *Flowers v. Tex. Mil. Dep't*, 391 F. Supp. 3d 655, 668 (S.D. Tex. 2018) (citing *Rodriquez v. Wal-Mart Stores, Inc.*, 540 F. App'x 322, 328 (5th Cir. 2013) (concluding that, while opposition to discrimination need not be in formal written form, the plaintiff's internal complaints to management did not constitute a protected activity because "they did not allege discrimination or any other unlawful employment activity"). In this case, it is undisputed that White complained about a comment about another employee using the "n-word." Whether he was incorrect about that, or whether his complaint was based on unsubstantiated gossip, or even made cynically, the summary judgment evidence establishes that White made the complaint to Human Resources, and that is sufficient to show he engaged in a protected activity.

In order to establish the causal link, "the evidence must show that the employer's decision to terminate was based in part on knowledge of the employee's protected activity." *Sherrod v. Am. Airlines*, 132 F.3d 1112, 1122 (5th Cir. 1998). Close timing between an employee's protected activity and an adverse action against him is frequently used to establish the "causal connection" required to make out a prima facie case of retaliation. *Swanson v. Gen. Serv. Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997) (citing *Armstrong v. City of Dallas*, 997 F.2d 62, 67 (5th Cir. 1993)). There is no bright-line rule in the Fifth Circuit for determining whether the time between the protected activity and the allegedly retaliatory conduct is too remote. *See Shirley v. Chrysler First, Inc.*, 970 F.2d 39 (5th Cir. 1992) (declining to hold that the passage of

fourteen months between the filing of the plaintiff's EEOC complaint and the date of termination was "legally conclusive proof against retaliation"). "Consideration of such dates is part of our analysis, but not in itself conclusive of our determinations of retaliation," especially where there is other evidence of retaliatory intent. *Shirley*, 970 F.2d at 40.

In this case, it is clear that Swor, who was the decisionmaker, was aware of White's claim to Human Resources. Dkt. 12-6, at 3 (Swor's Declaration stating "in September 2019, I became aware of a complaint about an alleged racial comment … I immediately talked to Rene and determined that the allegation was false.") Additionally, White's complaint was in September 2019, and his removal from the Shop Supervisor position, which the undersigned has already found qualifies as an adverse action, occurred in October 2019. This extremely close timing supports White's prima facie case of retaliation.

However, the Fifth Circuit has held that temporal proximity alone is insufficient to establish "but for" causation. *Strong v. Univ. Healthcare Sys. LLC*, 482 F.3d 802, 808 (5th Cir. 2007). Still, courts have recognized numerous ways in which plaintiffs can circumstantially show causation at the prima facie stage or at the pretext stage. *Perry*, 2022 WL 4456273, at *14 (citing *Robinson v. Jackson State Univ.*, 714 F. App'x 354, 361 (5th Cir. 2017)). Aside from timing, relevant evidence may include "specific conversations with knowledgeable colleagues, changed decisionmaker behavior following complaints, pretext, and parallel outcomes for similarly-situated employees." *Id.* (also recognizing shifting employer rationales and

an employer's departure from typical policies and procedures). The undersigned refers to its pretext analysis above as equally applicable to the White's retaliation claim and finds that the but-for prong of the inquiry is met by Patriot's shifting reasoning for its decision to remove White from the Shop Supervisor position, and lack of consistency in following progressive or any disciplinary policies. The undersigned finds that White has carried his burden as to his prima facie case.

The undersigned's analysis of Patriot's legitimate nondiscriminatory reason for White's adverse employment action, and White's burden to establish pretext for his retaliation claim, are identical to that of his race discrimination claim, and the undersigned adopts the reasoning laid out in that section. The undersigned has addressed the "but for" component of White's case with regard to his prima facie case of retaliation, and this analysis applies equally in the context of establishing a fact issue with regard to pretext. The undersigned finds that the evidence before the Court is sufficient to create a genuine issue of material fact as to whether White would have been removed from the Shop Supervisor position but for his protected activity. Accordingly, summary judgment on his retaliation claim should also be denied.

V. RECOMMENDATION

In accordance with the foregoing discussion, the undersigned **RECOMMENDS** that the District Court **DENY** Defendant Patriot Erectors LLC's Motion for Summary Judgment, Dkt. 12. **IT IS FURTHER ORDERED** the referral in this case is **CANCELED**.

VI. WARNINGS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen days after the party is served with a copy of the Report shall bar that party from *de novo* review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

SIGNED October 3, 2022.

DUSTIN M. HOWELL
UNITED STATES MAGISTRATGE JUDGE