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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DARRYL A. EDGE,

Plaintiff,

vs.

PATRICK R. DONAHOE, Postmaster
General, United States Postal Service,
a government agency,

Defendant.

Civil No. 15-cv-0353-WQH-KSC

ORDER

HAYES, Judge:

The matter before the Court is the Motion for Summary Judgment (ECF No. 51) filed by Defendant Patrick R. Donahoe.

I. Procedural History

On February 19, 2015, Plaintiff Darryl A. Edge filed the Complaint against Defendant Patrick R. Donahoe, Postmaster General of the United States Postal Service (the "Postal Service"). ECF No. 1 [hereinafter the "Complaint"]. The Complaint alleges that Defendant violated Title VII of the Civil Rights of Act of 1964 by discriminating against Plaintiff because of his race, retaliating against Plaintiff for engaging in protected activities, and creating a hostile work environment. *Id.* On July 28, 2017, Defendant filed the Motion for Summary Judgment. (ECF No. 51). On

1 September 14, 2017, Plaintiff filed an Opposition to the Motion for Summary
2 Judgment. (ECF No. 57). On September 25, 2017, Defendant filed a Reply to
3 Plaintiff’s Opposition. (ECF No. 59).

4 **II. Statement of the Facts**

5 **A. Background**

6 Plaintiff is an African American. EEOC Decision, ECF No. 51-8 at 15. Plaintiff
7 began working for the Postal Service in 1981. Declaration of Michael Miller, ECF No.
8 51-6 at ¶ 2. By 2011, Plaintiff was a Vehicle Maintenance Program Analyst (Level¹
9 23). *Id.* at ¶ 4. In May 2011, the Postal Service initiated “a nationwide Reduction in
10 Force (RIF)” and eliminated a number of positions, including Plaintiff’s position as a
11 Vehicle Maintenance Program Analyst. Declaration of Jennifer Wiggins, ECF No. 51-4
12 at ¶¶ 3, 6 [hereinafter “Wiggins Declaration”].

13 The Postal Service implemented a number of policies designed to reduce the
14 impact of the RIF. First, the Postal Service allowed managers to “[r]eassign”
15 employees into vacant positions as long as those positions were not “lower grade.”
16 Postal Service Employee and Labor Relations Manual, ECF No. 57 at 24. Plaintiff was
17 not reassigned into a vacant position. *See* Wiggins Declaration.

18 **B. Phase 1**

19 Next, the Postal Service accepted applications for “various positions in a
20 competitive ‘Phase 1’ process [f]rom June 14, 2011 through June 20, 2011. . . .” *Id.* at
21 ¶ 11. Plaintiff applied to two positions during Phase 1: Manager, Maintenance
22 Specialist (“MMS”) (Level 23) and Manager, Maintenance Operations (“MMO”)
23 (Level 26). *Id.* at ¶ 13. Larry Munoz was responsible for selecting the employee that
24 would fill those positions. *Id.* at ¶ 15.

25 Munoz is Filipino. *See* U.S. Equal Employment Opportunity Commission
26 Decision, ECF No. 51-8 at 17 [hereinafter “EEOC Decision”]. Plaintiff stated in his
27 deposition that Munoz frequently went on breaks with a Caucasian Postal Service

28 ¹ “Level” refers to a positions rank within USPS’s hierarchy of positions. The higher the level,
the higher ranking the position.

1 employee named David Brown and another Filipino employee named Ron Progalidad.
2 Deposition of Darryl A. Edge, ECF No. 51-8 at 89 [hereinafter “Edge Deposition”].
3 Plaintiff also stated in his deposition that he heard Progalidad encourage someone to
4 apply for a position over the phone, and that he believes that the person Progalidad was
5 speaking to was Patricio and that the position being discussed was the MMS 23
6 position. *Id.* at 91.

7 **1. MMS Position**

8 An MMS “[d]evelops, coordinates, implements, and evaluates national
9 maintenance management policies, procedures and programs related to the maintenance,
10 repair and modification of fixed and nonfixed mechanization, automation, customer
11 service equipment, buildings and building systems.” Postal Service Internal Publication
12 of Job Posting 61021777, ECF No. 51-8 at 33. Plaintiff was one of six applicants for
13 the position. Wiggins Declaration at ¶ 14. A Review Committee was used to assist in
14 the selection process. *Id.* at ¶ 15. The Review Committee recommended three
15 candidates, ranking them in the following order: (1) Plaintiff, (2) Gil Patricio, and (3)
16 Tadashi Ervin. EEOC Decision, ECF No. 51-8 at 19. In July 2011, Munoz selected
17 Patricio for the MMS position. Declaration of Larry Munoz, ECF No. 51-5 at ¶¶ 3, 8.
18 Patricio, like Munoz, is Filipino. EEOC Decision, ECF No. 51-8 at 19.

19 Munoz states that “[t]he selection criteria [he] used was based upon the seven
20 knowledge, skills, and abilities (KSAs) that were listed as requirements in the Job
21 Posting for the position.” Munoz Declaration at ¶ 7. Munoz states that he selected
22 Patricio “because his application contained objective and verifiable accomplishments
23 . . . that were superior to those in Plaintiff’s application.” *Id.* at ¶ 8. Munoz states that
24 he focused on safety when choosing an MMS because “[m]aintenance department
25 employees frequently work on and around equipment that can cause serious injury if
26 safety procedures are not properly followed.” *Id.* at ¶ 11. Patricio’s application
27 discussed safety in response to three questions. *See* Postal Service Data Overview for
28 Application 61567068, ECF No. 51-8 at 36-38. Plaintiff’s application does not discuss

1 safety. *See* Postal Service Data Overview for Application 61536145, ECF No. 51-8 at
2 45-46.

3 Munoz states that “[a]nother reason that [he] selected Mr. Patricio is that his
4 written application contained specific examples of actions that he had personally taken
5 that demonstrated his competency in each KSA[while] Plaintiff’s application contained
6 no such example[s].” Munoz Declaration at ¶ 14. Munoz states that he

7 also chose Mr. Patricio because he was a MMO just prior to being
8 selected. . . . Therefore, he had recent, hands on experience with the type
9 of maintenance work required by the position. . . . By contrast, Plaintiff’s
10 application reflected that Plaintiff had not been in Maintenance Operations
11 since approximately March 2009. Prior to applying for the MMS position,
12 Plaintiff worked as a Vehicle Maintenance Program Analyst. His expertise
was more consistent with fleet managements, as opposed to building
maintenance, mechanization, and automation, all of which are the core
responsibilities of the MMS EAS-23 position.

13 *Id.* at ¶ 20-21.

14 **2. MMO Position**

15 An MMO “[m]anages area wide field maintenance support programs[;] processes
16 and provides functional guidance relating to the maintenance of equipment, buildings
17 and building systems[; p]lans and manages maintenance programs[;] and evaluates plant
18 and equipment maintenance throughout the area in terms of efficiency, effectiveness
19 and compliance with safety standards and national guidelines.” Postal Service Internal
20 Publication of Job Posting 60943419, ECF No. 51-8 at 54. Plaintiff was one of six
21 applicants for the position. Wiggins Declaration at ¶ 18. The Review Committee
22 recommended three candidates for the position: (1) Karen Padden, (2) Steve Mummy,
23 and (3) Plaintiff. *Id.* at ¶ 19. Munoz interviewed the candidates. Munoz Declaration
24 at ¶ 28. Munoz conducted his interview with Plaintiff over the telephone while driving,
25 and the call was dropped multiple times. Edge Deposition, ECF No. 51-8 at 88.

26 In July 2011, Munoz selected Padden for the MMO position. Munoz Declaration
27 at ¶¶ 3, 28. Munoz states that he selected Padden because (1) “she had a more well-
28 rounded management background, including Plant management experience, finance,

1 and transportation,” (2) “she had maintenance experience,” (3) her “application gave
2 more specific examples of accomplishments that she did herself, whereas Plaintiff’s
3 application gave only generic descriptions about the Maintenance Manager’s
4 responsibilities,” (4) she had “executive-level experience” and Plaintiff did not, (5) she
5 held a Level 25 position at the time of her application and Plaintiff held a Level 23
6 position, and (6) “she had a bachelor’s degree in business and management, while
7 Plaintiff had no degree.” *Id.* at ¶¶ 29-34.

8 Plaintiff also was not selected for a temporary detail into the MMO position. *Id.*
9 at ¶ 40. Plaintiff did not apply for the temporary detail into the MMO position. Edge
10 Deposition, ECF No. 51-8 at 116. Munoz “had no knowledge that Plaintiff was
11 interested in or had requested [the] temporary detail.” Munoz Deposition at ¶ 40.
12 Munoz selected Padden for the detail into the MMO position. *Id.* at ¶ 39.

13 **C. Phase 2**

14 “For employees not selected for positions during ‘Phase 1’ selections, the [Postal
15 Service] reviewed each candidate’s profile and compared it to current vacant positions”
16 with the intention of placing the remaining employees in the vacant positions. Wiggins
17 Declaration at ¶ 11. Human Resources Analyst Jenni Wiggins reviewed Plaintiff’s
18 profile and notified him of open positions into which he could request a placement,
19 including the Learning/Diversity Specialist position (Level 23) and the Manager,
20 Maintenance position (Level 19). EEOC Decision, ECF No. 51-8 at 21. Wiggins is
21 Filipina. *Id.* On July 22, 2011, Plaintiff emailed Wiggins stating that he wanted to be
22 considered for both of these positions and that he preferred the Learning/Diversity
23 Specialist position. *Id.* “The USPS Human Resources Department determined that
24 Plaintiff was not qualified for the [Learning/Diversity Specialist] position”
25 Wiggins Declaration at ¶¶ 22-23. “On July 29, 2011, Plaintiff requested a non-
26 competitive placement into the open Manager, Maintenance (MM) EAS-19 position,
27 which was granted.” *Id.* at ¶ 26.

28 **D. EEO Process**

1 “Plaintiff first contacted the USPS’s Equal Employment Opportunity Office
2 regarding [his] complaints of discrimination on or about August 8, 2011.” *Id.* at ¶ 30.
3 On November 8, 2011, Plaintiff submitted a formal Complaint of Discrimination to the
4 USPS Equal Employment Opportunity Office. Complaint of Discrimination in the
5 Postal Service, ECF No. 51-8 at 8-9. The form Plaintiff used to file his EEO Complaint
6 had a section titled “Type of Discrimination You Are Alleging” that included nine
7 boxes corresponding to different types of discrimination. *Id.* at 8. Plaintiff checked the
8 box for “Race” and did not check the box for “Retaliation.” *Id.* The allegations in
9 Plaintiff’s EEO Complaint were that:

10 The Pacific Area Office Leadership began discriminating against me after
11 returning from the care of my father. David Brown was assigned to
12 replace me and when I returned was not assigned my full duties. I was
13 told I would be working as the [MMS] as well. I was lead to believe I
14 would get this job for several months. But the selecting official picked
15 within his race a person less knowlegable [sic] and less qualified.

16 *Id.*

17 On November 9, 2011, Plaintiff amended his EEO Complaint to allege that he
18 was discriminated against because of his race in three other instances: (1) when he was
19 “not selected for detail into the [MMO] position,” (2) when he was “not selected for the
20 [MMO] position,” and (3) when he was “demoted to a [MM] position.”
21 Acknowledgment of Amendment to Complaint, ECF No. 51-8 at 11. The Postal
22 Service EEO’s Acknowledgement of Amendment to Complaint stated

23 The total issues now accepted for investigation include only the following:
24 You alleged discrimination based on Race (African American)
25 when;

- 26 2. on, or around, July 11, 2011, you were not selected for a [MMS]
27 position;
- 28 3. In, or around, May 2011, you were not selected for detail into
the [MMO] position;
4. On, or around, July 11, 2011, you were not selected for the
[MMO] position;
5. On an unspecified date, you were demoted to a [MM] position.

1 *Id.*

2 USPS filed a Motion for Decision Without a Hearing on October 9, 2012. EEOC
3 Decision, ECF No. 51-8 at 16. The EEOC Administrative Judge granted USPS's
4 motion, concluding that "[t]here is insufficient evidence to create an inference that [the
5 Postal Service] discriminated against [Plaintiff] on the basis of race or color as to any
6 of the issues in this complaint." *Id.* at 30.

7 **III. Administrative Exhaustion**

8 **A. Contentions of the Parties**

9 Plaintiff claims that Defendant violated Title VII of the Civil Rights of Act of
10 1964 by discriminating against him because of his race, retaliating against him for
11 engaging in protected activities, and creating a hostile work environment. Complaint
12 at 1. Plaintiff alleges that Defendant discriminated against him because of his race
13 when he was not "placed" into the MMS position prior to Phase 1;² when he was not
14 "select[ed]" for the MMS position or the MMO position during Phase 1; when he was
15 not selected for the MMO detail; and when he was "demoted" to an MM position.
16 Complaint at ¶¶ 19, 44.

17 Defendant contends that Plaintiff failed to exhaust his retaliation claim, his
18 hostile work environment claim, and his claim that he was discriminated against
19 because of his race when he was not reassigned into the MMS position prior to Phase
20 1. (ECF No. 51-1 at 22, 24; ECF No. 59 at 3).

21 Defendant does not contend that Plaintiff failed to exhaust his racial
22 discrimination claims based on his nonselection for the MMS position, his nonselection
23 for the MMO position, his nonselection for the MMO detail, and his demotion to the
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25 ² Plaintiff explicitly alleges that the Postal Service discriminated against him by not "selecting"
26 him for the MMS position and by "demoting" him to the MM position, but does not explicitly allege
27 that the Postal Service discriminated against him by not "placing" or "reassigning" into the MMS
28 position. (ECF No. 1 ¶ 44). However, Plaintiff does allege that he "should have been placed non-
competitively into the MMS (EAS-23) position." *Id.* at ¶ 19. Construed in the light most favorable
to Plaintiff, the Complaint alleges that the Postal Service discriminated against Plaintiff by not placing
him into the MMS position prior to the Phase 1 process.

1 MM position (collectively, the “Hiring Decisions”). Plaintiff administratively
2 exhausted these claims, and the Court has jurisdiction over them. *See* Acknowledgment
3 of Amendment to Complaint, ECF No. 51-8 at 11 (explicitly stating that the issues
4 being investigated include whether the Postal Service discriminated against Plaintiff
5 because of his race when it made the Hiring Decisions).

6 **B. Applicable Law**

7 “In order to bring a Title VII claim in district court, a plaintiff must first exhaust
8 her administrative remedies.” *Sommato v. United States*, 255 F.3d 704, 707 (9th Cir.
9 2001) (citing 42 U.S.C. § 2000e–16(c); *Greenlaw v. Garrett*, 59 F.3d 994, 997 (9th Cir.
10 1995)).

11 Although failure to file an EEOC complaint is not a complete bar to
12 district court jurisdiction, substantial compliance with the exhaustion
13 requirement is a jurisdictional pre-requisite. The jurisdictional scope of the
14 plaintiff’s court action depends on the scope of the EEOC charge and
15 investigation. The specific claims made in district court ordinarily must be
16 presented to the EEOC. However, the district court has jurisdiction over
17 any charges of discrimination that are “like or reasonably related to” the
18 allegations made before the EEOC, as well as charges that are within the
19 scope of an EEOC investigation that reasonably could be expected to grow
20 out of the allegations.

21 *Leong v. Potter*, 347 F.3d 1117, 1122 (9th Cir. 2003) (citations omitted) (quoting *Sosa*
22 *v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990)).

23 In determining whether a plaintiff has exhausted allegations that she did
24 not specify in her administrative charge, it is appropriate to consider such
25 factors as the alleged basis of the discrimination, dates of discriminatory
26 acts specified within the charge, perpetrators of discrimination named in
27 the charge, and any locations at which discrimination is alleged to have
28 occurred. In addition, the court should consider plaintiff’s civil claims to
be reasonably related to allegations in the charge to the extent that those
claims are consistent with the plaintiff’s original theory of the case.

B.K.B. v. Maui Police Dep’t, 276 F.3d 1091, 1100 (9th Cir. 2002), *as amended* (Feb.
20, 2002).

27 **C. Reassignment**

1 Plaintiff's Complaint before this court alleges that the Postal Service
2 discriminated against him by not reassigning him to the MMS position. Complaint at
3 ¶ 19. Plaintiff's EEO Complaint states that he "was told [he] would be working as the
4 [MMS] . . . [b]ut the selecting official picked within his race a person less knowlegable
5 [sic] and less qualified." (ECF No. 51-8 at 8). The USPS EEO's Acknowledgement
6 of Amendment to Complaint listed "[t]he total issues now accepted for investigation."
7 *Id.* at 11. That list did not include whether the Postal Service discriminated against
8 Plaintiff when it did not reassign him to the MMS position prior to the Phase 1 process,
9 but did include whether the Postal Service discriminated against Plaintiff when "on, or
10 around, July 11, 2011, [Plaintiff was] not selected for a [MMS] position." *Id.*

11 Plaintiff has not administratively exhausted his claim that he was discriminated
12 against because of his race when he was not reassigned into the MMS position.
13 Plaintiff came closest to raising that issue before the Postal Service EEOC when he
14 alleged in his EEO Complaint that he "was told [he] would be working as the [MMS]
15 . . . [b]ut the selecting official picked [a person] within his race." (ECF No. 51-8 at 8).
16 While this statement very clearly alleges that Plaintiff was discriminated against when
17 he was not selected for the MMS position, it does not clearly allege that Plaintiff was
18 discriminated against when he was not reassigned into that position. Plaintiff explicitly
19 referred to "the selecting official," not the reassigning official. *Id.* The
20 Acknowledgement of Amendment to Complaint clarified that the Postal Service EEO
21 would be investigating whether Plaintiff was discriminated against when "on, or
22 around, July 11, 2011, [he was] not selected for a[n MMS] position," and not whether
23 Plaintiff was discriminated against when he was not reassigned into that position at
24 some earlier date. *See* Acknowledgment of Amendment to Complaint, ECF No. 51-8
25 at 11 (stating that "the total issues now accepted for investigation include only" those
26 listed therein). It is reasonable to expect an investigation into whether Plaintiff was
27 discriminated against when "on, or around, July 11, 2011, [he was] not selected for a[n
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1 MMS] position,” to focus on the Phase 1 selection process and the decision that
2 occurred on that date. *Id.* Such an investigation could not “reasonably . . . be expected
3 to grow” into an investigation of why Plaintiff was not reassigned into the MMS
4 position prior to Phase 1. *Leong v. Potter*, 347 F.3d 1117, 1122 (9th Cir. 2003).

5 The Court does not have jurisdiction over Plaintiff’s claim that he was
6 discriminated against because of his race when he was not reassigned into the MMS
7 position.

8 **D. Retaliation**

9 Plaintiff’s retaliation claim is also based on the Hiring Decisions. (ECF No. 1 at
10 ¶ 51). In his Complaint before this Court, Plaintiff alleges that the Postal Service made
11 the Hiring Decisions “in reprisal for Edge’s opposition to practices made illegal by Title
12 VII and because Edge made complaints of discrimination.” *Id.* Specifically, Plaintiff
13 alleges that the Postal Service “illegally retaliated against [him] by taking adverse
14 actions against him because he reported the aforementioned racial discrimination.” *Id.*
15 at ¶ 53. In his EEO Complaint, Plaintiff did not allege that the Postal Service engaged
16 in retaliation, nor did he check the box corresponding to “retaliation.” *See* ECF No. 51-
17 8 at 8. However, Plaintiff’s EEO Complaint for racial discrimination is based on the
18 exact same incidents as Plaintiff’s retaliation claim before this court: the Hiring
19 Decisions. *Compare id.*; ECF No. 1 at ¶ 51.

20 When deciding whether a Plaintiff has adequately exhausted a retaliation claim,
21 a court asks whether the Plaintiff’s current retaliation claim is reasonably related to the
22 claim presented in the EEO Complaint. *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634,
23 644 (9th Cir. 2003), *as amended* (Jan. 2, 2004). That test is satisfied if the Plaintiff’s
24 retaliation claim “fall[s] within the scope of the EEOC’s actual investigation or an
25 EEOC investigation that could reasonably be expected to grow out of the charge.” *Id.*
26 When an EEO complaint “does not contain the relevant legal theory of retaliation” but
27 states another claim based on the allegedly retaliatory acts, an EEOC investigation into
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1 that complaint can reasonably be expected to uncover any reports that the Plaintiff has
2 filed concerning the persons identified in the complaint. *Id.* Such an investigation can
3 also be expected to include an investigation into whether the acts mentioned in the EEO
4 complaint were done in retaliation for the reports filed by the Plaintiff. *Id.*
5 Consequently, to the extent Plaintiff alleges that the Hiring Decisions were made in
6 retaliation for reports of racial discrimination that Plaintiff filed before the Hiring
7 Decisions were made, Plaintiff's retaliation claim has been administratively exhausted.
8 The Court has jurisdiction over Plaintiff's retaliation claim to the extent it is based on
9 reports filed by Plaintiff prior to the Hiring Decisions.

10 On the other hand, an EEOC investigation into a complaint alleging that certain
11 hiring decisions constituted racial discrimination cannot reasonably be expected to
12 include an investigation into whether those hiring decisions were made in retaliation for
13 complaints filed after they were made. Retaliation, by definition, involves a retaliatory
14 act that occurs after an individual engages in a protected activity. *See Brooks v. City*
15 *of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000). The EEOC, therefore, cannot
16 reasonably be expected to investigate whether a hiring decision was made in retaliation
17 for an action taken after the hiring decision. Consequently, the Court does not have
18 jurisdiction over Plaintiff's retaliation claim to the extent it is based on actions taken by
19 Plaintiff after the Hiring Decisions were made.

20 **E. Hostile Work Environment**

21 Plaintiff's Complaint before this Court alleges that "[t]he Postal Service's
22 conduct as alleged above constituted a racially hostile and abusive work environment
23 in violation of Title VII." (ECF No. 1 at ¶ 59). Construed in the light most favorable
24 to the Plaintiff, Plaintiff's Complaint alleges that the Postal Service created a hostile
25 work environment when (1) it made the Hiring Decisions and (2) "Mr. Munoz treated
26 Edge differently than the other employees in maintenance at the Area Office." *Id.* at ¶
27 27. Plaintiff's Complaint before this Court alleges that Mr. Munoz treated Edge
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1 differently from other employees when he (1) “ma[d]e negative comments about [him]
2 to others,” (2) met or went on breaks with Brown and Progalidad and “specifically
3 excluded Edge,” and (3) “exclude[d] Edge from meetings, instructions, and assignments
4 that he should have been involved with.” *Id.* Plaintiff’s EEO Complaint did not
5 explicitly allege that the Postal Service created a hostile work environment. (ECF No.
6 51-8 at 8). The USPS EEO’s Acknowledgement of Amendment to Complaint stated
7 that the only “issues now accepted for investigation” were whether Plaintiff was
8 discriminated against because of his race when the Postal Service made the Hiring
9 Decisions. *Id.* at 11.

10 Plaintiff’s hostile work environment claim has been administratively exhausted
11 if it “fall[s] within the scope of the EEOC’s actual investigation or an EEOC
12 investigation that could reasonably be expected to grow out of the charge.” *Vasquez*,
13 349 F.3d at 644. An EEOC investigation into a racial discrimination claim can be
14 expected to encompass an investigation into a Plaintiff’s hostile work environment
15 claim if (1) the hostile work environment claim is based on facts that would have come
16 to the EEOC’s attention during its investigation of the claim for racial discrimination
17 and (2) those facts “would . . . have put the EEO investigator on notice of a pattern of
18 conduct ‘sufficiently severe or pervasive’ so as to create an ‘abusive work
19 environment.’” *Swinnie v. Geren*, 379 F. App’x 665, 667 (9th Cir. 2010) (quoting
20 *Manatt v. Bank of Am.*, 339 F.3d 792, 798 (9th Cir. 2003)).

21 As is discussed in Section V, deciding Plaintiff’s claim for racial discrimination
22 based on the Hiring Decisions requires evaluating whether the Postal Service’s
23 justifications for the Hiring Decisions are pretext for discrimination. An investigation
24 into whether the Postal Service’s justifications for the Hiring Decisions are pretextual
25 could reasonably have been expected to uncover the incidents that made Plaintiff
26 believe that Munoz was biased against Plaintiff because of his race. In his Complaint
27 before this Court, Plaintiff has alleged the following facts in support of his contention
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1 that the Postal Service’s proffered justifications for the Hiring Discriminations are
2 pretext for racial discrimination: (1) Munoz “ma[d]e negative comments about
3 [Plaintiff] to others,” (2) Munoz went on breaks with Brown and Progalidad and
4 “specifically excluded [Plaintiff],” and (3) Munoz “exclude[d Plaintiff] from meetings,
5 instructions, and assignments that he should have been involved with.” (ECF No. 1 at
6 ¶ 27). The EEOC investigation into Plaintiff’s EEO Complaint could reasonably have
7 been expected to bring these alleged incidents to the attention of the EEO investigator.
8 However, these alleged incidents would not “have put the EEO investigator on notice
9 of a pattern of conduct sufficiently severe or pervasive so as to create an abusive work
10 environment.” *Swinnie*, 379 F. App’x 665 at 667 (9th Cir. 2010); *see Vasquez v. Cty.*
11 *of Los Angeles*, 349 F.3d 634, 643-44 (9th Cir. 2003), *as amended* (Jan. 2, 2004)
12 (discussing the facts of different cases to explain why the acts about which the plaintiff
13 had complained were not severe and pervasive enough to create a hostile work
14 environment). Consequently, Plaintiff has not exhausted his hostile work environment
15 claim. *See id.* The Court does not have jurisdiction over Plaintiff’s hostile work
16 environment claim.

17 **IV. Summary Judgment Standard**

18 A party may move for summary judgment, identifying each claim or defense or
19 the part of each claim or defense on which summary judgment is sought. Fed. R. Civ.
20 P. 56(a). A court shall grant summary judgment if the movant shows that there is no
21 genuine dispute as to any material fact and the movant is entitled to judgment as a
22 matter of law. *Id.* A material fact is one that is relevant to an element of a claim or
23 defense and whose existence might affect the outcome of the suit. *See Matsushita Elec.*
24 *Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The materiality
25 of a fact is determined by the substantive law governing the claim or defense. *See*
26 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*,
27 477 U.S. 317, 322-24 (1986).

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1 The moving party has the initial burden of demonstrating that summary judgment
2 is proper. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970). The burden then
3 shifts to the opposing party to provide admissible evidence showing that summary
4 judgment is not appropriate. *See Anderson*, 477 U.S. at 256; *Celotex*, 477 U.S. at 322,
5 324. The opposing party’s evidence is to be believed, and all justifiable inferences are
6 to be drawn in its favor. *See Anderson*, 477 U.S. at 255.

7 **V. Discrimination**

8 Title VII racial discrimination claims based on hiring decisions proceed in three
9 steps. First, the Plaintiff must establish a prima facie case of discrimination by
10 showing that: (1) he belongs to a protected class, (2) he was qualified for the position,
11 (3) he applied for the position and was not selected, and (4) the person selected for the
12 position does not belong to the protected class. *Coghlan v. Am. Seafoods Co. LLC.*,
13 413 F.3d 1090, 1094 (9th Cir. 2005). If the plaintiff establishes a prima facie case of
14 discrimination, the burden shifts to the defendant “to articulate some legitimate,
15 nondiscriminatory reason for the employee’s rejection.” *McDonnell Douglas Corp.*
16 *v. Green*, 411 U.S. 792, 802 (1973). “The employer’s articulation of a facially
17 nondiscriminatory reason shifts the burden back to the plaintiff to show that the
18 employer’s reason was a pretext for discrimination.” *Godwin v. Hunt Wesson, Inc.*,
19 150 F.3d 1217, 1220 (9th Cir. 1998). “The ultimate burden of persuading the trier of
20 fact that the defendant intentionally discriminated against the plaintiff remains at all
21 times with the plaintiff.” *Id.* (quoting *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502,
22 507 (1993)).

23 **1. MMS Position**

24 Defendant moves for summary judgment on Plaintiff’s claim that the Postal
25 Service discriminated against him because of his race by not selecting him for the MMS
26 position during Phase 1. (ECF No. 51-1 at 15). For the purposes of the Motion for
27 Summary Judgment, Defendant “concedes that Plaintiff can establish a prima facie case
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1 of discrimination in connection with his non-selection for the MMS . . . position[.]” *Id.*
2 Defendant contends that “Munoz had legitimate, non-discriminatory reasons for
3 selecting Mr. Patricio,” specifically (1) “Patricio’s focus on safety, which Plaintiff’s
4 application lacked,” (2) “the specific relevant accomplishments that Mr. Patricio
5 detailed in his application” as compared to Plaintiff’s “generic statements” and lack of
6 examples of personal accomplishments, and (3) “Patricio’s more recent maintenance
7 experience.” *Id.* at 15-16. In his declaration, Munoz states

8 I selected Mr. Patricio for the [MMS] position because his
9 application contained objective and verifiable accomplishments regarding
the seven KSAs that were superior to those in Plaintiff’s application. . . .

10 I gave special emphasis on . . . safety . . . because of the nature of
11 work performed by maintenance department employees. . . . Mr.
12 Patricio’s application discussed safety in four of the seven KSAs (2, 4, 6,
and 7). Plaintiff’s application contained virtually no reference to safety.

13 Another reason that I selected Mr. Patricio is that his written
14 application contained specific examples of actions that he had personally
15 taken that demonstrated his competency in each KSA. Plaintiff’s
16 application contained no such example. . . .

17 I also chose Mr. Patricio because he was a MMO just prior to being
18 selected. . . . Therefore, he had recent, hands on experience with the type
19 of maintenance work required by the [MMS] position. . . . By contrast,
20 Plaintiff’s application reflected that Plaintiff had not been in Maintenance
Operations since approximately March 2009. . . . His expertise was more
consistent with fleet management, as opposed to building maintenance,
mechanization, and automation, all of which are the core responsibilities
of the MMS EAS-23 position.

21 (ECF No. 51-5 at 2-5). Defendant has articulated legitimate, non-discriminatory
22 reasons for Munoz’s decision to select Patricio, not Plaintiff, for the MMS position.

23 The parties dispute whether the evidence submitted to the Court is “sufficient to
24 raise a triable issue of fact as to pretext.” *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1168
25 (9th Cir. 2007). A triable issue of fact “exists where ‘a reasonable jury could return a
26 verdict for the nonmoving party.’” *Id.* quoting *Anderson v. Liberty Lobby, Inc.*, 477
27 U.S. 242, 248 (1986). The Court of Appeals has stated that “very little[] evidence is
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1 necessary to raise a genuine issue of fact regarding an employer’s motive; any
2 indication of discriminatory motive . . . may suffice to raise a question that can only be
3 resolved by a fact-finder.” *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1124 (9th Cir.
4 2004) (alterations in original) (quoting *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d
5 1406, 1409 (9th Cir. 1996)). However, a plaintiff “must do more than establish a prima
6 facie case and deny the credibility of the [defendant’s] witnesses.” *Schuler v. Chronicle*
7 *Broadcasting Co.*, 793 F.2d 1010, 1011 (9th Cir. 1986). To defeat summary judgment,
8 a plaintiff must submit either direct evidence of discrimination or evidence from which
9 a reasonable jury could conclude “that the employer’s proffered explanation is
10 unworthy of credence because it is internally inconsistent or otherwise not believable.”
11 *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1112–13 (9th Cir. 2011) (citing
12 *Chuang v. Univ. of Cal. Davis, Bd. of Trustees*, 225 F.3d 1115, 1127 (9th Cir. 2000)).

13 In this case, Plaintiff has not presented “direct evidence of discrimination, such
14 as comments from supervisors betraying bias or animus against” African Americans.
15 *Id.* There is evidence in the record that, (1) Munoz selected Patricio, who also is
16 Filipino, for the MMS position, (2) the review committee recommended Plaintiff over
17 Patricio for the MMS position, (3) Munoz went on breaks with Brown and Progalidad,
18 and (4) Progalidad may have told Patricio to apply for the MMS position.

19 Plaintiff has failed to raise a triable issue of fact as to whether Munoz’s stated
20 reasons for selecting Patricio are pretext for racial discrimination. None of the evidence
21 in the record suggests that Munoz’s proffered explanation is unworthy of credence
22 because it is internally inconsistent or otherwise not believable.” *Earl v. Nielsen Media*
23 *Research, Inc.*, 658 F.3d 1108, 1112–13 (9th Cir. 2011). The facts that Munoz took
24 breaks with Progalidad and that Progalidad told Patricio to apply for the MMS position
25 do not justify the conclusion that Munoz discriminated against Plaintiff because of his
26 race. Defendant is entitled to summary judgment on Plaintiff’s claim that he was

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1 discriminated against because of his race when he was not selected for the MMS
2 position.

3 **2. MMO Position**

4 Defendant moves for a summary judgment in his favor on Plaintiff's claim that
5 the Postal Service discriminated against him because of his race by not selecting him
6 for the MMO position. (ECF No. 51-1 at 15). For the purposes of the Motion for
7 Summary Judgment, Defendant "concedes that Plaintiff can establish a prima facie case
8 of discrimination in connection with his non-selection for the . . . MMO (EAS-26)
9 position[]." *Id.*

10 Defendant contends that "Munoz had legitimate, non-discriminatory reasons for
11 selecting someone else," for that position. *Id.* at 17. Defendant contends that "Munoz
12 was impressed with Ms. Padden's executive experience, well-rounded management
13 background . . . and with her bachelor's degree in business and management" and was
14 not impressed with Plaintiff's application for the position, which "gave only generic
15 descriptions of the Maintenance Manager's responsibilities." *Id.* In his declaration,
16 Munoz states that he "chose Ms. Padden [for the MMO position] because she had a
17 more well-rounded management background, including Plant management experience,
18 finance, and transportation," and because her "application gave more specific examples
19 of accomplishments" than Plaintiff's. (ECF No. 51-8 at 5-6). Munoz stated that he
20 "also selected Ms. Padden because she had PCES (executive-level) experience, whereas
21 Plaintiff had no such experience"; "because she was a level EAS-25 at the time of her
22 application, whereas the Plaintiff was a level EAS-23"; and "because she had a
23 bachelor's degree in business and management, while Plaintiff had no degree." *Id.* at
24 6. Defendant has articulated legitimate, non-discriminatory reasons for Munoz's
25 decision to select Padden, not Plaintiff, for the MMS position.

26 Plaintiff alleges that Munoz's stated reasons for selecting Padden "were not the
27 true reasons, but instead were pretext to hide the Postal Service and [his] discriminatory
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1 animus.” (ECF No. 1 at ¶ 44). Plaintiff supports this allegation by alleging that he
2 “was better qualified than Ms. Padden for the MMO (EAS-26) position,” *id.* at ¶ 35, and
3 that the interview process for the MMO position was flawed, (ECF No. 57 at 7).
4 Plaintiff has presented no evidence that objectively shows that he was better qualified
5 than Padden for the MMO position. *Compare* ECF No. 51-8 at 57-62 (Padden’s
6 application for the MMO position) with ECF No. 51-8 at 64-70 (Plaintiff’s application
7 for the MMO position.). Plaintiff did state in his deposition that, when Munoz
8 interviewed him for the MMO position, “he was driving and the phone kept getting
9 disconnected so it really wasn’t much of an interview . . . every time he would ask a
10 question, it would drop out.” *Id.* at 88. However, the facts that Munoz conducted his
11 interview with Plaintiff while driving and that the call was dropped multiple times do
12 not justify the conclusion that Munoz discriminated against Plaintiff because of his race.
13 Defendant is entitled to summary judgment on Plaintiff’s claim that he was
14 discriminated against because of his race when he was not selected for the MMO
15 position.

16 **3. MMO Detail**

17 Defendant moves for summary judgment on Plaintiff’s claim that the Postal
18 Service discriminated against him because of his race by not selecting him for the
19 MMO detail. (ECF No. 51-1 at 18). Defendant contends that “Plaintiff cannot establish
20 a prima facie case of discrimination with respect to this claim because he did not apply
21 for the detail.” *Id.* In his deposition, Plaintiff admitted that he did not apply for the
22 detail. (ECF No. 51-8 at 116). Munoz stated in his Declaration that he “had no
23 knowledge that Plaintiff was interested in or had requested a temporary detail into the
24 MMO EAS-26 position.” (ECF No. 51-5 at ¶ 40).

25 A plaintiff claiming that an employer discriminated against him because of his
26 race by not selecting him for a position must establish that he or another member of his
27 protected class applied for the position. *Gay v. Waiters’ & Dairy Lunchmen’s Union*,

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1 *Local No. 30*, 694 F.2d 531, 548 (9th Cir. 1982). Plaintiff did not apply for the MMO
2 detail, and has not produced evidence showing that any other African American applied
3 for that detail. Consequently, Defendant is entitled to summary judgment on Plaintiff’s
4 racial discrimination claim based on the MMO detail.

5 **4. “Demotion” to MM**

6 Defendant moves for a summary judgment in his favor on Plaintiff’s claim for
7 racial discrimination based on his “demotion” to the MM position. Plaintiff’s
8 “demotion” occurred when he was placed into the MM position. However, construed
9 in the light most favorable to the Plaintiff, the Complaint alleges that Plaintiff was
10 discriminated against when he did not receive other, more preferable positions, not
11 when he was placed into the MM Position. Two more preferable positions, MMS and
12 MMO, are discussed above. The only other position that Plaintiff requested but did not
13 receive was the Learning/Diversity Specialist position. *See* EEOC Decision, ECF No.
14 51-8 at 21.

15 The Postal Service has articulated a legitimate, nondiscriminatory justification
16 for its decision not to place Plaintiff into the Learning/Diversity Specialist position: that
17 “[t]he USPS Human Resources Department determined that Plaintiff was not qualified
18 for the [Learning/Diversity Specialist] position.” Wiggins Declaration at ¶¶ 22-23.
19 Plaintiff has provided no evidence that suggests that the Postal Service’s proffered
20 justification is pretextual. Defendant is entitled to summary judgment on Plaintiff’s
21 claim that he was discriminated against because of his race when he was demoted to the
22 MM position.

23 **VI. Retaliation**

24 Defendant contends that he is entitled to summary judgment on Plaintiff’s
25 retaliation claim because “[t]he Postal Service took no adverse employment action
26 against Plaintiff after he first contacted the EEO office on August 8, 2011.” (ECF No.
27 51-1 at 23).

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1 Plaintiff alleges that the Postal Service made the Hiring Decisions “in reprisal for
2 Edge’s opposition to practices made illegal by Title VII and because Edge made
3 complaints of discrimination.” *Id.* Specifically, Plaintiff alleges that the USPS
4 “illegally retaliated against [him] by taking adverse actions against him because he
5 reported the aforementioned racial discrimination.” *Id.* at ¶ 53.

6 Under federal law, “No person shall be subject to retaliation for opposing any
7 practice made unlawful by title VII of the Civil Rights Act (title VII) (42 U.S.C. 2000e
8 et seq.) . . . or for participating in any stage of administrative or judicial proceedings
9 under those statutes.” 29 C.F.R. § 1614.101(b). This provision only protects
10 individuals who “oppos[e]” an unlawful practice or “participat[e]” in administrative or
11 judicial proceedings. *Id.* Plaintiff did not oppose an unlawful practice or participate in
12 administrative or judicial proceedings until he contacted the Postal Service’s EEO
13 office on August 8, 2011. ECF No. 51-4 at 4; ECF No. 51-8 at 130. This occurred after
14 the Hiring Decisions. Plaintiff, therefore, did not take any actions that triggered the
15 protection of 29 C.F.R. § 1614.101(b) until after the Hiring Decisions were made. As
16 discussed in Part III.D, the Court does not have jurisdiction over Plaintiff’s retaliation
17 claim to the extent that it is based on actions that Plaintiff took after the Hiring
18 Decisions were made. Defendant is entitled to summary judgment on Plaintiff’s claim
19 for retaliation.

20 **VII. Conclusion**

21 IT IS HEREBY ORDERED that the Motion for Summary Judgment (ECF No.
22 51) is GRANTED. The Clerk of the Court shall enter judgment in favor of Defendant
23 and against Plaintiff.

24 DATED: December 21, 2017

25 
26 **WILLIAM Q. HAYES**
27 United States District Judge
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