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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF ARIZONA

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11 Mark A. Camper,) No. CV-07-2251-PHX-GMS

12 Plaintiff,) **ORDER**

13 vs.)

14 John E. Potter, Postmaster General,)

15 Defendant.)

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18 Pending before the Court is the Motion for Summary Judgment (Dkt. # 90) filed by
19 Defendant John Potter, the Postmaster General of the United States. For the following
20 reasons, the Court denies the Motion.¹

21 **BACKGROUND**

22 Throughout the time period relevant to the instant action, Plaintiff Mark A. Camper
23 (“Camper”) was employed as a Supervisor at the West Valley Postal Facility for the United
24 States Postal Service (“USPS”). Camper worked the Tour 2 shift (i.e., the day shift) with
25 Sundays and Mondays as his days off.

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27 ¹The parties’ requests for oral argument are denied as the Court has determined that
28 oral argument will not aid in its decision. *See Lake at Las Vegas Investors Group, Inc. v. Pac. Malibu Dev.*, 933 F.2d 724, 729 (9th Cir. 1991).

1 In late 2005 and early 2006, USPS began a nationwide reorganization of its facilities
2 across the United States. As part of this reorganization, the West Valley Facility created three
3 new Tour 2 supervisor positions at pay grade “17.” Camper applied for one of the newly
4 created Level-17 positions, but was denied consideration due to a mistake in his application.
5 (*See* Dkt. ## 91 at ¶ 12.) When Camper learned that he was not being considered for the
6 promotion, he filed an informal Equal Employment Opportunity (“EEO”) complaint against
7 USPS, claiming discrimination on the basis of age, race, and religion. (Dkt. # 97 at 1.)
8 Specifically, Camper alleged that USPS discriminated against him by incorrectly processing
9 his application. (*Id.*)

10 After Camper filed his EEO complaint, USPS permitted him to reapply for the Level-
11 17 position. Nevertheless, on June 12, 2006, USPS informed Camper that he was not among
12 one of the three individuals selected for promotion at that time. Shortly thereafter, Dave
13 Carey and Dave Dilettoso, two upper-level managers at the West Valley Facility, decided to
14 adjust employee work schedules to accommodate personnel changes that resulted from
15 USPS’s nationwide reorganization. Specifically, Carey and Dilettoso determined that the
16 reorganization would require at least three supervisors to be on duty during each Tour 2 shift,
17 with the exception of Mondays, which only required two supervisors because it was the
18 slowest day of the week. (Dkt. # 91 at ¶¶ 23–24.) New schedules were then implemented on
19 July 11, 2006. Based on the record, it appears that the West Valley Facility had six
20 supervisors at that time: Ed Baker, Tim Felton, Richard Teets, Gary Platsky, Kristi Becker,
21 and Camper. (*See* Dkt # 96, Ex. 1 at 2061.) Of these, Baker, Felton, and Platsky, who had
22 been promoted to Level-17 supervisors, were assigned their work schedules based on
23 seniority. The remaining supervisors were then allegedly assigned schedules so that each
24 work day had no less than three supervisors. (*See id.*) And while USPS asserts that Camper’s
25 days off were changed from Sunday/Monday to Monday/Tuesday to ensure that each work
26 day had three supervisors, Camper presents evidence that the change was unnecessary.
27 According to Camper, USPS required him to work Sundays, even though there were already
28 four other supervisors assigned to work that day. (*See* Dkt. # 96, Ex. 1 at 2061.) He also

1 presents evidence that there would have been at least three supervisors scheduled each work
2 day, including Mondays which only required two supervisors, even if Camper had been
3 permitted to retain his old schedule.

4 Camper was upset with his new work schedule because he operated an independent
5 real estate business on Sundays. He therefore filed the instant action, alleging that USPS
6 discriminated and retaliated against him for bringing his EEO complaint. Camper raised three
7 claims in his Complaint: (1) employment discrimination pursuant to Title VII of the Civil
8 Rights Act of 1961, 42 U.S.C. § 2000e-16 (“Title VII”); (2) retaliation under Title VII;² and
9 (3) breach of a settlement agreement. (Dkt. # 87.) On August 26, 2009, the Court dismissed
10 Camper’s discrimination and breach of settlement claims. (Dkt. # 84.). USPS now moves for
11 summary judgment on Camper’s retaliation claim. (Dkt. # 90.)

12 **LEGAL STANDARD**

13 Summary judgment is appropriate if the evidence, viewed in the light most favorable
14 to the nonmoving party, shows “that there is no genuine issue as to any material fact and that
15 the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). Substantive law
16 determines which facts are material, and “[o]nly disputes over facts that might affect the
17 outcome of the suit under the governing law will properly preclude the entry of summary
18 judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see Jesinger v. Nev.*
19 *Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir.1994). The dispute must also be genuine; that
20 is, the evidence must be “such that a reasonable jury could return a verdict for the nonmoving
21 party.” *Anderson*, 477 U.S. at 248.

22 **DISCUSSION**

23 To establish a prima facie case of retaliation under Title VII, a plaintiff must show (1)
24 that he or she engaged in protected activity, (2) a materially adverse action, and (3) a causal
25 connection between the two. *Surrell v. Cal. Water Serv.*, 518 F.3d 1097, 1108 (9th Cir.

26
27 ²Camper’s claim is limited to the allegation that he was retaliated against when USPS
28 changed his work schedule. He does not contend that he was retaliated against when he was
passed up for the Level-17 promotion. (*See generally* Dkt. ## 87; 97.)

1 2008). At the prima facie stage, the causal link is construed broadly; a plaintiff must merely
2 “prove that the protected activity and the negative employment action are not completely
3 unrelated.” *See Poland v. Chertoff*, 494 F.3d 1174, 1181 n. 2 (9th Cir. 2007). Once the prima
4 facie case is shown, the employer may articulate some legitimate, non-retaliatory reason for
5 the challenged action. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464–65 (citations
6 omitted). Should the employer carry this burden, the plaintiff must then show that the stated
7 reason was not the employer’s true reason, but was a mere pretext for retaliation. *Id.*
8 (citations omitted).

9 **I. Prima Facie Case**

10 Camper has set forth a prima facie case of retaliation. First, Camper engaged in a
11 protected activity when he filed his EEO complaint. It further appears that he suffered an
12 adverse employment action when USPS decided to change his days off from Sunday/Monday
13 to Monday/Tuesday. *See Ray v. Henderson*, 217 F.3d 1234, 1243, (9th Cir. 2000) (holding
14 that a “changes in work schedules” constitute adverse employment actions); *see also Moore*
15 *v. King County*, 2005 WL 289065, at *5 (W.D. Wash. Oct. 31, 2005) (noting “as a matter of
16 law” that assigning an employee to a “new shift” is an adverse employment action in the
17 context of a Title VII retaliation claim). Camper has also presented sufficient evidence of a
18 causal link between the EEO complaint and USPS’s decision to switch his days off. Camper
19 filed his EEO complaint on April 18, 2006. Less than three months later, USPS implemented
20 the schedule change. The proximity of these events is sufficient, given the circumstances of
21 this case, for a reasonable factfinder to determine that the EEO complaint caused the change
22 to Camper’s schedule. *See Coszalter v. City of Salem*, 320 F.3d 968, 977 (9th Cir. 2003)
23 (“Depending on the circumstances, three to eight months is easily within a time range that
24 can support an inference of retaliation.”); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054,
25 1065 (9th Cir. 2002) (holding that causation may be inferred from timing alone where an
26 adverse employment action follows on the heels of the protected activity); *Hernandez v.*
27 *Arizona*, ___ F. Supp.2d ___, 2010 WL 1193727, at *4 (D. Ariz. 2010) (inferring causation
28 under Title VII based on timing alone). And while USPS brings forth evidence that the

1 decision to change Camper’s scheduled was caused by USPS’s nationwide reorganization,
2 the parties’ dispute over causation is a factual question for the jury to answer.

3 **II. Legitimate Non-Retaliatory Reason**

4 Because Camper has set forth a prima facie case, the burden of production now shifts
5 to USPS to articulate a legitimate, non-retaliatory reason for adjusting Camper’s work
6 schedule. *See Steiner*, 25 F.3d at 1464–65. To meet this burden, “the employer need only
7 produce admissible evidence which would allow the trier of fact rationally to conclude that
8 the employment decision had not been motivated by [retaliatory] animus.” *See Texas Dep’t*
9 *of Cmty. Affairs v. Burdine*, 450 U.S. 248, 257 (1981); *see also Steiner*, 25 F.3d at 1464–65
10 (applying this standard in the context of a retaliation claim).

11 USPS has arguably offered evidence showing that the decision to switch Camper’s
12 days off was motivated by a legitimate non-retaliatory reason. The nationwide reorganization
13 for USPS required the creation of new management positions at the West Valley Facility. As
14 a result of the reorganization, the three newly-created Level-17 supervisors had preference
15 over Camper in setting their schedules. *See Ballard v. Portland General Electric Co.*, 293
16 F. App’x 448, 450 (9th Cir. 2008) (finding that an employer’s decision to grant priority in
17 scheduling based on seniority constitutes a legitimate non-retaliatory reason). According to
18 USPS, it selected Camper to work on Sunday because it needed at least three supervisors to
19 work on that day. (Dkt. # 91 at ¶¶ 23–24.) Relying on this evidence, a reasonable jury could
20 rationally conclude that USPS had a legitimate non-retaliatory reason for changing Camper’s
21 work schedule. *See Burdine*, 450 U.S. at 257. This shifts the burden of production back to
22 Camper to show pretext.

23 **III. Pretext**

24 Camper carries his burden of showing that USPS’s explanation for shifting Camper’s
25 days off may be pretext for retaliation. To demonstrate that the employer’s reason may be
26 pretextual, a plaintiff may show either that a retaliatory reason “more likely motivated the
27 employer” or that the employer’s proffered explanation is “unworthy of credence.” *Chuang*
28 *v. Univ. of Cal. Davis*, 225 F.3d 1115, 1123–24 (9th Cir. 2000) (citing *Burdine*, 450 U.S. at

1 256); *see also Gray v. Masterfoods USA*, 304 F. App'x. 611, 612 (9th Cir. 2008) (applying
2 the same test for pretext in a retaliation claim as that applied in discrimination claims). In this
3 Circuit, pretext can be proven with either direct evidence or circumstantial evidence, but
4 where the plaintiff relies on circumstantial evidence to prove pretext, that evidence must be
5 “specific” and “substantial” to survive summary judgment. *Stegall v. Citadel Broad. Co.*, 350
6 F.3d 1061, 1066 (2003) (citing *Manatt v. Bank of Am.*, 339 F.3d 792, 801 (9th Cir. 2003)).
7 Evidence of pretext is both specific and substantial when it is “sufficient to raise a genuine
8 issue of material fact under Rule 56(c).” *Cornwell v. Electra Cent. Credit Union*, 439 F.3d
9 1018, 1029 (9th Cir. 2006).

10 Though Camper does not present direct evidence of a retaliatory motive, he does bring
11 forth sufficient evidence to allow a reasonable jury to find that USPS’s reason for changing
12 Camper’s days off is “unworthy of credence.” *See Chuang*, 225 F.3d at 1123–24. USPS
13 explains that it required Camper to work Sundays because the West Valley Facility needed
14 at least three supervisors to work Sundays. Nevertheless, Camper presents evidence that four
15 other supervisors regularly worked that day. (*See* Dkt # 96, Ex. 1 at 2061.) Before USPS
16 made the schedule change in July 2006, it appears that the following four supervisors worked
17 on Sundays: Baker, Teets, Platsky, and Becker. (*Id.* at 2060.) After the schedule change, five
18 supervisors were required to work on Sundays: Teets, Platsky, Becker, Felton, and Camper.
19 (*Id.* at 2061.) If Camper had been permitted to continue having Sundays and Mondays off,
20 USPS still would have had at least three supervisors on duty every day of the week, including
21 Sunday and Mondays. (*See id.*) Given this evidence, it seems illogical that USPS needed
22 Camper to work Sundays in order to have at least three supervisors on duty.

23 It is further unclear why the nationwide reorganization required any schedule change
24 at all since it appears that USPS had at least three supervisors working every day of the week,
25 even prior to the reorganization. (*Id.* at 2060.) To the extent it was necessary to adjust
26 Baker’s, Platsky’s, and Teets’s schedules to ensure that the newly promoted Level-17
27 Supervisors worked specific shifts, there still would have been at least three supervisors
28 available on each day of the week, even if the non-promoted supervisors, such as Camper,

1 had been permitted to retain their old work schedules. (*See id.*) And, while USPS contends
2 that it had a legitimate business reason for setting schedules the way it did, that reason
3 appears to be contradicted by the record. Where USPS scheduled five supervisors on
4 Sundays and four on Mondays, the lightest days of the week, it scheduled only three
5 supervisors on Tuesdays, the busiest of the week. (Dkt. # 96 at 172.)

6 In its reply, USPS appears to assert that Camper’s pretext argument fails because the
7 requisite number of supervisors was only available on Sundays when 204(b)s, or temporary
8 supervisors, are included in the pool of available supervisors. (Dkt. # 99 at 8–9.) According
9 to USPS, these 204(b)s cannot be considered part of the pool because they can only fill-in
10 for actual supervisors on a short-term basis. (*Id.*) USPS, however, does not present any
11 evidence, let alone a citation to the record, to refute Camper’s argument that the supervisory
12 pool included at least six actual supervisors. *See Indep. Towers of Wash. v. Washington*, 350
13 F.3d 925, 929 (9th Cir. 2003) (“[J]udges are not like pigs, hunting for truffles buried in
14 briefs.”) (citation omitted). USPS further fails to identify which of the group, in any, are
15 204(b)s. *See id.* Accordingly, there are issues of fact with respect to whether the utilization
16 of 204(b) supervisors is necessary to Camper’s argument that a sufficient number of
17 supervisors worked Sundays to allow him to have that day off. Further, even if the 204(b)s
18 are essential to Camper’s arguments, USPS has not presented any legal or factual authority
19 to support its assertion that 204(b) supervisors cannot be considered as available supervisors.
20 (*See* Dkt. # 96 Ex. 4 at 62.) USPS also raises this unsupported argument for the first time in
21 its Reply, depriving Camper of the opportunity to respond to it.

22 The Court also rejects USPS’s argument that Camper fails to bring forth more than
23 a “mere refutation” of USPS’s allegedly non-retaliatory reason for switching Camper’s
24 schedule. *See Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 969 (9th Cir. 2002)
25 (noting that pretext “must consist of more than a mere refutation of the employer’s legitimate
26 reason and a mere assertion that the [retaliatory] reason” was the cause of the adverse
27 employment action) (internal quotation and brackets omitted). Here, Camper presents
28 evidence suggesting that the schedule change was entirely unnecessary to achieve USPS’s

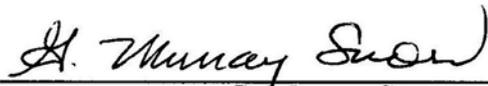
1 proffered purpose—to have three supervisors working every day of the week. This is
2 sufficient for a reasonable factfinder to determine that USPS’s reason for changing Camper’s
3 schedule is implausible, weak, or otherwise unworthy of credence. *See Henandez*, 2010 WL
4 1193727, at *9 (noting that a plaintiff may satisfy the unworthy of credence prong by
5 pointing to “specific inconsistencies, contradictions, implausibilities, or weaknesses in the
6 employer’s explanation”) (citing *Dominguez-Curry v. Nev. Transp. Dep’t*, 424 F.3d 1027,
7 1037 (9th Cir. 2005) and *Burch v. Regents of the Univ. of Cal.*, 433 F. Supp.2d 1110, 1130
8 (E.D. Cal. 2006)). This evidence also is sufficient for the fact-finder to conclude that USPS
9 did not “honestly believe[] its reason for its actions.” *See Villiarimo*, 281 F.3d at 1063
10 (noting that an employer’s reason for making an adverse employment decision is not pretext
11 if the employer had an honest belief that the decision was justified). And while Camper
12 “must show *both* that [USPS’s] reason was false, and that [retaliation] was the real reason”
13 for the schedule change, “[t]he factfinder’s disbelief of the reasons put forward by [USPS]
14 . . . may, together with the elements of the prima facie case, suffice to show intentional
15 [retaliation].” *See St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 512 n.4 (1993).

16 CONCLUSION

17 Having concluded that there are genuine issues of material fact with respect to
18 Camper’s Title VII claim,

19 **IT IS THEREFORE ORDERED** that USPS’s Motion for Summary Judgment (Dkt.
20 # 90) is **DENIED**.

21 DATED this 29th day of April, 2010.

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23 _____
24 G. Murray Snow
25 United States District Judge
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