IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

RUDY JACKSON,

Plaintiff,

vs.

TIMOTHY GEITHNER, Secretary of the Treasury,

Defendant.

/

CASE NO. CV F 11-0055 LJO SKO

SUMMARY JUDGMENT DECISION
(Doc. 139.)

INTRODUCTION

Defendant Treasury Secretary Timothy Geithner ("Secretary") seeks summary judgment in the absence of evidence to support plaintiff Rudy Jackson's ("Mr. Jackson's") discrimination and retaliation claims based on reassignment of his duties to a coworker and purported demotion. Mr. Jackson responds that the less experienced coworker's promotion was a racially discriminatory demotion for Mr. Jackson. This Court considered the Secretary's summary judgment motion on the record[1] without a hearing, pursuant to Local Rule 230(g). For the reasons discussed above, this Court GRANTS the Secretary summary judgment.

[1] This Court carefully reviewed and considered the record, including all evidence, arguments, points and authorities, declarations, testimony, statements of undisputed facts and responses thereto, objections and other papers filed by the parties. Omission of reference to evidence, an argument, document, objection or paper is not to be construed to the effect that this Court did not consider the evidence, argument, document, objection or paper. This Court thoroughly reviewed, considered and applied the evidence it deemed admissible, material and appropriate for summary judgment. This Court does not rule on objections in a summary judgment context, unless otherwise noted.

BACKGROUND

Summary

Mr. Jackson is black, worked at the Fresno IRS Service Center ("Fresno center") for more than 30 years in various departments, and voluntarily retired in 2005. During 1992-2005, Mr. Jackson worked as a safety Management Assistant, which was colloquially referred to as a "safety officer." In this action, Mr. Jackson pursues discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, et seq., in that some of his duties were reassigned to a coworker to treat the coworker more favorably than Mr. Jackson and to retaliate against Mr. Jackson's pursuit of an administrative class action in April 2001.[2] The Secretary challenges the absence of adverse action and damages resulting from reassignment of duties or the coworker's promotion.

Mr. Jackson's Safety Officer Position And The New HazMat Program Analyst Position

As a Management Assistant or safety officer, Mr. Jackson's duties included:

1. Oversight of safety issues at the Fresno center;
2. Safety inspections and employee safety training; and
3. Serving as a liaison with the IRS national office, local fire departments, and the Occupational Safety and Health Administration ("OSHA").

Mr. Jackson also helped "roll out" the Safety and Health Information Management Systems ("SHIMS") program and describes himself as "the first full time safety officer for the IRS in Fresno."

In the late 1990s or early 2000, a support services specialist/HazMat program analyst position ("HazMat analyst") was created for the Fresno center. In her declaration, Margaret Frech ("Ms. Frech"), the former security and safety section chief and current facilities branch manager for the Fresno center, states the HazMat analyst position was needed "because the workload related to information about the handling and disposal of biological/chemical hazardous materials at the IRS facility was increasing."

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[2] Although Mr. Jackson's operative Second Amended Complaint for Damages ("SAC") alleges retaliation, Mr. Jackson's opposition papers state that he sues "for race discrimination" and fail to address retaliation. The Secretary construes Mr. Jackson's opposition papers to abandon a retaliation claim and to assert for the first time a discrimination claim. Given Mr. Jackson's absence of clarity as to his claims, this Court and the Secretary are compelled to address purported discrimination and retaliation.

During 1999-2002, Rosanna Rodriguez ("Ms. Rodriguez") served as the HazMat analyst.[3] Both Ms. Frech and Ms. Rodriguez declare: "A full-time, dedicated position was necessary to accommodate the expanded duties." The HazMat analyst position was assigned a General Schedule ("GS") 11 level.

In early 2002, Ms. Rodriguez left the HazMat analyst position, and Barbara Mecca ("Ms. Mecca") was assigned a temporary detail to the HazMat analyst position and assumed Ms. Rodriguez' duties. In his declaration, Mr. Jackson states: "I was instructed to allow her to shadow me, which she did for six months." Mr. Jackson criticizes Ms. Mecca's "little experience in the area."

Two or three weeks after Ms. Mecca began her HazMat analyst detail, Ms. Frech, as supervisor, assigned Ms. Mecca Safety Program responsibilities. Ms. Frech and Ms. Mecca declare that the "Safety Program's workload was increasing as the program was being expanded" and that to "accommodate the increased workload," Ms. Frech assigned Ms. Mecca "some responsibilities in the Safety Program" and Ms. Mecca "assumed the position of Safety Officer/HazMat Program Analyst."

In May or June 2002, Ms. Frech assigned Ms. Mecca management of the Ergonomics Team, which up to that time had been managed by a different office. Ms. Mecca had prior ergonomics experience. Mr. Jackson had no prior responsibility to manage the Ergonomics Team.

Mr. Jackson claims that during Ms. Mecca's first two years, he "trained her on safety and hazardous materials matters." Mr. Jackson declares that he trained Ms. Mecca "in late 2004 or early 2005 on SHIMS."

The Secretary notes that as of September 2002, Ms. Mecca and Mr. Jackson's respective duties had been divided. Ms. Frech declares: "I did not assign duties to Ms. Mecca from Mr. Jackson after 2002, including from October 2002 through December 2002." Ms. Mecca declares: "I have no recollection of assuming responsibilities from Mr. Jackson after September 2002, including from October 2002 through December 2002." The Secretary explains that although there was overlap in their duties, Ms. Mecca and Mr. Jackson "performed different duties."

Ms. Mecca's safety officer/HazMat analyst duties included providing information for responses or reports to the IRS National Safety Office. The Secretary attributes to Mr. Jackson to identify only a

[3] Mr. Jackson criticizes Mr. Rodriguez' selection as HazMat analyst given her lack of experience "in the subject matter of the HazMat position."

portion of national reviews and some HazMat duties that were reassigned to Ms. Rodriguez or Ms. Mecca from Mr. Jackson. In his deposition, Mr. Jackson testified that he could not remember specifically how national review responsibility was split. Mr. Jackson claimed that HazMat duties were "officially" transferred to Ms. Rodriguez and Ms. Mecca but he maintained responsibility for such duties. In his declaration, Mr. Jackson identified his duties as of his October 3, 2005 retirement to include: "indoor air quality, Safety and Health Information Management Systems (SHIMS) program, investigating all accidents, meeting with the site counsel, all three directors, and dealing with OSHA and GSA,[4] national reviews and root cause analysis."

Snubbing And "Demotion" Of Mr. Jackson

Ms. Mecca notes that in 2003 or 2004, she assisted Jeff Cole and Mr. Jackson "on an analysis of workers compensation cases." Mr. Jackson declares: "It was ordered that Barbara Mecca sit in on the project." Mr. Jackson claims that "[w]hen the project was completed and recognition given, credit was given to Cole and Mecca, my name was not mentioned."

In 2004, the HazMat analyst position was re-graded throughout the IRS as a GS 12 level position. Ms. Mecca applied for and was selected to the position. Mr. Jackson did not apply for the position. Mr. Jackson declares that at an "employees town hall meeting" on an unidentified date, manager Linda Holbrook ("Ms. Holbrook") announced that "the IRS was going to announce 'Rosanna's old GS-11 position' at the GS-12 level. As a GS-8 I could apply for the GS-11 but not the GS-12."

Mr. Jackson claims that Ms. Mecca's GS 12 level promotion was his demotion. He declares:

> I had worked as "Safety Officer" since 1991, but with the hiring of Mecca to the GS 12 position, I was demoted to the "Safety Assistant" position. At the time Mecca came into the safety unit, she had little experience in the area and as a result of the training I gave her, she was promoted and I was, in effect demoted.

Mr. Jackson also points to the deposition testimony of his supervisor Melinda Winston ("Ms. Winston"):

> Q. Isn't it true that up until that time Mr. Jackson had been the lead in safety issues and that he was referred to as a safety officer?

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[4] GSA is the federal General Services Administration.

A. That's true.

Q. In fact, he was at least verbally demoted from a safety officer to a safety assistant, correct?

. . .

THE WITNESS: Yes.

MR. ROBINSON: So he went from being the lead on safety to being an assistant, correct?

A. Correct.

Mr. Jackson declares that he was embarrassed during a meeting with executives and safety officers from around the nation when "Ms. Mecca introduced herself as Safety/HazMat Officer and introduced me as safety assistant."

Mr. Jackson never sought to have his safety Management Assistant position re-graded. The only promotion he applied for relative to that position was in 1999 when Mr. Rodriguez obtained the HazMat analyst position. Mr. Jackson received no official demotion or decrease in pay or benefits from 2000 to his 2005 retirement. After Mr. Jackson retired, his safety Management Assistant position was downgraded to a GS 7 level.

Mr. Jackson's Administrative Claim

On December 5, 2002, Mr. Jackson sought informal counseling to address his complaint that other employees were prepared and passed over Mr. Jackson for promotions. Mr. Jackson submitted a March 11, 2003 formal administrative complaint to claim age, race and sex discrimination and retaliation for April 2001 pursuit of an administrative class complaint in that management develops and promotes others to prevent his advancement and has minimized his duties.

Mr. Jackson's Claims And Damages

This Court dismissed several of Mr. Jackson's SAC discrimination and retaliation claims. After appeal to the Ninth Circuit Court of Appeals and its affirming and reversing in part dismissal of claims, Mr. Jackson is limited to the SAC's following Title VII claim: "In or around 2002, Jackson's duties were reduced and given to non-African-American employees in higher graded positions as retaliation against Jackson's complaints of race discrimination."

Mr. Jackson seeks lost wages of $52,998, the difference between his actual and GS 12 level

wages during 2001-2005. Mr. Jackson claims $300,000 compensatory damages for emotional distress.

DISCUSSION

Summary Judgment Standards

The Secretary seeks summary judgment in the absence of Mr. Jackson suffering adverse action with reassignment of job duties and a causal link between his administrative class complaint and transfer of duties.

F.R.Civ.P. 56(a) permits a party to seek summary judgment "identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought." "A district court may dispose of a particular claim or defense by summary judgment when one of the parties is entitled to judgment as a matter of law on that claim or defense." *Beal Bank, SSB v. Pittorino*, 177 F.3d 65, 68 (1st Cir. 1999).

Summary judgment is appropriate when the movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." F.R.Civ.P. 56(a); *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The purpose of summary judgment is to "pierce the pleadings and assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec.,* 475 U.S. at 586, n. 11, 106 S.Ct. 1348; *International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1405 (9th Cir. 1985).

On summary judgment, a court must decide whether there is a "genuine issue as to any material fact," not weigh the evidence or determine the truth of contested matters. F.R.Civ.P. 56(a), (c); *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9th Cir. 1997); *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598 (1970); *Poller v. Columbia Broadcast System*, 368 U.S. 464, 467, 82 S.Ct. 486 (1962); *Loehr v. Ventura County Community College Dist.*, 743 F.2d 1310, 1313 (9th Cir. 1984). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505 (1986)

The evidence of the party opposing summary judgment is to be believed and all reasonable

inferences that may be drawn from the facts before the court must be drawn in favor of the opposing party. *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505; *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-252, 106 S.Ct. 2505.

To carry its burden of production on summary judgment, a moving party "must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000); *see Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (2007) (moving party is able to prevail "by pointing out that there is an absence of evidence to support the nonmoving party's case"); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990). A "complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial" to entitle the moving party to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986).

"[T]o carry its ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact." *Nissan Fire*, 210 F.3d at 1102; *see High Tech Gays*, 895 F.2d at 574. "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

"If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial." *Nissan Fire*, 210 F.3d at 1102-1103; *see Adickes*, 398 U.S. at 160, 90 S.Ct. 1598. "If, however, a moving party carries its burden of production, the nonmoving party must produce evidence to support its claim or defense." *Nissan Fire*, 210 F.3d at 1103; *see High Tech Gays*, 895 F.2d at 574. "If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party wins the motion for summary judgment." *Nissan Fire*, 210 F.3d at 1103; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986) (F.R.Civ.P. 56 "mandates the entry

of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make the showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.")

"But if the nonmoving party produces enough evidence to create a genuine issue of material fact, the nonmoving party defeats the motion." *Nissan Fire*, 210 F.3d at 1103; *see Celotex*, 477 U.S. at 322, 106 S.Ct. 2548. "The amount of evidence necessary to raise a genuine issue of material fact is enough 'to require a jury or judge to resolve the parties' differing versions of the truth at trial.'" *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (quoting *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 288-289, 88 S.Ct. 1575, 1592 (1968)). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505.

As discussed below, Mr. Jackson lacks facts to support prima facie discrimination or retaliation to warrant summary judgment for the Secretary.

Burden Shifting Framework

The Secretary argues that Mr. Jackson is unable to establish prima facie discrimination or retaliation or that IRS' legitimate, non-discriminatory division of duties decisions were a pretext to discriminate or retaliate against Mr. Jackson.

For Title VII discrimination and retaliation claims at issue here, the *McDonnell Douglas*[5] burden-shifting framework applies in the absence of direct evidence of discrimination or retaliation.[6] *Metoyer v. Chassman*, 504 F.3d 919, 931 (9th Cir. 2007); *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 730-731 (9th Cir. 1986) (order and allocation of proof for retaliation claims follow familiar scheme announced in *McDonnell Douglas*). "At the first step of *McDonnell Douglas*, the plaintiff must establish a prima facie case of discrimination or retaliation." *Metoyer*, 504 F.3d at 931, n. 6. "If the plaintiff makes out her prima facie case of either discrimination or retaliation, the burden then 'shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its allegedly discriminatory [or retaliatory] conduct.'" *Metoyer*, 504 F.3d at 931, n. 6 (quoting *Vasquez v. County of Los Angeles*, 349

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[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973).

[6] Mr. Jackson concedes that this is "a circumstantial evidence case."

F.3d 634, 640 (9th Cir. 2003)).

"Finally, at the third step of *McDonnell Douglas*, if the employer articulates a legitimate reason for its action, 'the presumption of discrimination drops out of the picture, and the plaintiff may defeat summary judgment by satisfying the ususal standard of proof required'" under F.R.Civ.P. 56(c)(1). *Metoyer*, 504 F.3d at 931 (quoting *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9th Cir. 2006) (citations and internal quotation marks omitted)). If the employer carries its burden, plaintiff must have an opportunity to prove by a preponderance of evidence that the legitimate reasons offered by the employer were not its true reasons but were a pretext for discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089 (1981); *McDonnell Douglas*, 411 U.S. at 804; 93 S.Ct. 1817*; see Brundage v. Hahn*, 57 Cal.App. 4th 228, 66 Cal.Rptr.2d 830, 835 (1997). "If a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be believed." *Washington v. Garrett*, 10 F.3d 1421, 1432-1433 (9th Cir. 1993). The plaintiff is required to produce "specific, substantial evidence of pretext" to avoid summary judgment. *Collings v. Longview Fibre Co.*, 63 F.3d 828, 834 (9th Cir. 1995).

Despite the burden shifting, the ultimate burden of proof remains always with the plaintiff to show that the employer intentionally discriminated because of the plaintiff's race. *See Burdine*, 450 U.S. at 253, 101 S.Ct. 1089; *Coleman v. Quaker Oats Co.,* 232 F.3d 1271, 1281 (9th Cir. 2000); *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1420-1421 (9th Cir. 1990), *cert. denied,* 533 U.S. 950, 121 S.Ct. 2592 (2001).

As an alternative to the *McDonnell Douglas* framework, a plaintiff responding to a summary judgment motion "may simply produce direct or circumstantial evidence demonstrating that a discriminatory [or retaliatory] reason more likely than not motivated [the employer]." *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004) (citation omitted). The "*McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121, 105 S.Ct. 613 (1985).

"When the plaintiff offers direct evidence of discriminatory [or retaliatory] motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial. . . . it need

be 'very little.'" *Goodwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998) (quoting *Lindahl v. Air France*, 930 F.2d 1434, 1438 (9th Cir 1991)). "Direct evidence is evidence which, if believed, proves the fact [of discrimination or retaliation] without inference or presumption." *Goodwin*, 150 F.3d at 1221 (citation omitted). "Direct evidence typically consists of clearly sexist, racist, or similarly discriminatory statements or actions by the employer." *Coghlan v. American Seafoods Co. LLC.,* 413 F.3d 1090, 1095 (9th Cir. 2005).

With these evidentiary standards in mind, this Court turns to the worthiness of Mr. Jackson's discrimination and retaliation claims.

Discrimination

Title VII prohibits an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color . . ." 42 U.S.C. § 2000e-2(a)(1). The Secretary challenges Mr. Jackson's ability to pursue a discrimination claim and to establish a prima facie case of discrimination in absence of evidence that he was subjected to adverse action.

Discrimination Raised For The First Time

The Secretary contends that Mr. Jackson is not entitled to assert discrimination for the first time in opposition to summary judgment.

When "the complaint does not include the necessary factual allegations to state a claim, raising such claim in a summary judgment motion is insufficient to present the claim to the district court." *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1080 (9th Cir. 2008); *see, e.g., Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir.2006) ("'Simply put, summary judgment is not a procedural second chance to flesh out inadequate pleadings.'"); *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968-69 (9th Cir.2006) (complaint failed to satisfy F.R.Civ.P. 8(a) because it "gave the [defendants] no notice of the specific factual allegations presented for the first time in [the plaintiff's] opposition to summary judgment").

The SAC alleges retaliation, not discrimination. Mr. Jackson's abandonment of retaliation does not allow him to assert discrimination for the first time. Raising discrimination for the first time in a summary judgment opposition is too late. Discrimination is not properly before this Court. Nonetheless,

out of an abundance of caution, this Court turns to whether Mr. Jackson establishes factual issues as to an actionable discrimination claim.

Absence Of Discrimination During Relevant Period

The Secretary contends that "the time period covered by Jackson's claim" requires defining given the SAC's vague reference to transfer of duties "in or around 2002." The Secretary argues that Mr. Jackson is limited to address alleged discrimination during October 21, 2002 to December 5, 2002 ("relevant period"), the 45-day period preceding his December 5, 2002 informal counseling.

Title VII regulations require "[a]ggrieved persons" claiming discrimination based on race or color to "consult a Counselor prior to filing a complaint in order to try to informally resolve the matter." 29 C.F.R. § 1614.105(a). "An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1). Failure to comply with this regulation is "fatal to a federal employee's discrimination [or retaliation] claim." *Lyons v. England*, 307 F.3d 1092, 1105 (9th Cir. 2002); *see, e.g., Johnson v. United States Treasury Dept.*, 27 F.3d 415, 416 (9th Cir.1994) (per curiam) (affirming summary judgment based on plaintiff's failure to seek counseling before one year after the alleged incident of discrimination); *Boyd v. U.S. Postal Service*, 752 F.2d 410, 414-415 (plaintiff "precluded from pursuing his claim in federal courts" because he did not bring timely his grievance to the attention of the EEO counselor).

The Secretary faults Mr. Jackson's inability to identify a "discrete act of discrimination that occurred between October 21, 2002 to December 5, 2002." "[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122, 122 S.Ct. 2061(2002). "Each discrete discriminatory act starts a new clock for filing charges alleging that act." *Morgan*, 536 U.S. at 122, 122 S.Ct. 2061. "*Morgan* makes clear that claims based on discrete acts are only timely where such acts occurred within the limitations period." *Cherosky v. Hendreson*, 330 F.3d 1243, 1246 (9th Cir. 2003). The Secretary points to the absence of alleged transfer of duties or other adverse employment action during the relevant period to support alleged discrimination. The Secretary notes that in March 2002, Ms. Mecca assumed HazMat duties as the HazMat analyst, the position which Ms. Rodriguez previously

held. The Secretary points out that in April 2002, Ms. Mecca "assumed some safety duties alongside Jackson" and in May or June 2002, assumed ergonomics duties for which Mr. Jackson was not responsible. The Secretary explains that by September 2002, Ms. Mecca and Mr. Jackson's duties "were clearly delineated," including Ms. Mecca's duties to prepare national office reports, and that Ms. Mecca did not assume additional safety duties after September 2002. The Secretary concludes that Mr. Jackson fails to demonstrate that the national office reports and HazMat duties were transferred during the relevant period in that Ms. Mecca assumed them previously. In addition, the Secretary notes that Ms. Mecca's GS 12 level promotion was in 2004, well beyond the relevant period.

The Secretary is correct that Mr. Jackson is unable raise factual issues as to alleged discrete discriminatory acts during the relevant period. As such, a purported discrimination claim fails. Nonetheless, out of an abundance of caution, this Court will address prima facie case elements.

Prima Facie Case

A plaintiff "bears the initial burden of establishing a prima facie case of discrimination by introducing evidence that gives rise to an inference of unlawful discrimination." *Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 270 (9th Cir. 1996).

For a prima facie case, a plaintiff "must generally show" that:

1. He/she was a member of a protected class;
2. He/she was qualified for the position he sought;
3. He/she suffered an adverse employment action; and
4. There were circumstances suggesting that the employer acted with a discriminatory motive, such as, similarly situated employees not in the protected class received more favorable treatment.

See Burdine, 450 U.S. at 254, 101 S.Ct. 1089; *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817; *Moran v. Selig*, 447 F.3d 748, 753 (9th Cir. 2006); *see also Jones v. Department of Corrections and Rehabilitation*, 152 Cal.App.4th 1367, 1379, 62 Cal.Rptr.3d 200 (2007) (citing *Guz v. Bechtel Nat. Inc.*, 24 Cal.4th 317, 354-355, 100 Cal.Rptr.2d 352 (2000) (adopting the test applicable to federal discrimination claims in accordance with *McDonnell Douglas*)).

Mr. Jackson argues that he establishes prima facie discrimination in that he is black, was

qualified for an unidentified position, was demoted from safety officer to safety assistant, and Ms. Mecca was treated more favorably than he was.

Adverse Action

The Secretary argues that transfer of duties from Mr. Jackson is not adverse action to support a discrimination claim.

Inquiry whether employment action is adverse requires a case-by-case determination based upon objective evidence. *Blackie v. State of Maine*, 75 F.3d 716, 725 (1st Cir. 1996). Adverse employment action requires "a materially adverse change" in employment terms. *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885 (6th Cir. 1996). A "tangible employment action in most cases inflicts direct economic harm." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 762, 118 S.Ct. 2257 (1998). "A tangible employment action constitutes 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." *Ellerth*, 524 U.S. at 765, 118 S.Ct. 2257; *Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1179 (9th Cir. 2001). To qualify as adverse, the action must be "more disruptive than a mere inconvenience or alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Crady v. Liberty Nat. Bank and Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993). Adverse actions also include "dissemination of a negative employment reference, issuance of an undeserved negative performance review and refusal to consider for promotion." *Brooks*, 229 F.3d at 928.

Moreover, "reassignment of job duties is not automatically actionable. Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53,71, 126 S.Ct. 2405 (2006) (citation and internal quotations omitted). Failure to show harm by reassignment does support adverse action. *See Goodman v. National Sec. Agency, Inc.*, 621 F.3d 651, 655 (7th Cir. 2010).

The Secretary faults Mr. Jackson's failure to articulate "harm due to the alleged transfer of

duties," especially given that Mr. Jackson received neither a demotion in GS level nor reduction in pay or benefits. The Secretary notes that Mr. Jackson did not seek to re-grade his position.

Mr. Jackson's entire case rests on his purported demotion "in effect" from safety officer to safety assistant. Mr. Jackson claims a triable factual issue exists whether he "was demoted or not." The record lacks evidence that Mr. Jackson was actually demoted. The record merely shows that a HazMat analyst position was created, the position was re-graded in 2004 to a GS 12 level position, Ms. Mecca applied for and obtained the position, and Mr. Jackson did not apply for the position. There is no evidence of a material adverse change in Mr. Jackson's employment terms to inflict direct economic harm to him. He experienced no decrease in pay or benefits. At all relevant times, Mr. Jackson served as a Management Assistant, based on his own evidence. Mr. Jackson offers nothing more than that he was no longer referred to as safety officer, a title he never officially held. Mr. Jackson's evidence reveals that "safety officer" and "safety assistant" were "working titles." In the absence of adverse action, Mr. Jackson's discrimination claim fails despite his characterization of Ms. Mecca's promotion as his demotion.

Retaliation

Title VII prohibits an employer "to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

Absence Of Retaliation During Relevant Period

The Secretary faults Mr. Jackson's inability to identify a "discrete act of retaliation that occurred within the relevant period of October 21, 2002 to December 5, 2002." "Under federal law, a retaliatory act is considered a discrete act that occurs at a particular time . . ." *Eng v. County of Los Angeles*, 737 F.Supp.2d 1078, 1098 (C.D. Cal. 2010).

Similar to discrimination, the Secretary is correct that Mr. Jackson is unable to pursue alleged retaliation arising prior to October 21, 2002. The Secretary is further correct in pointing to the absence of retaliation during the relevant period to support a Title VII claim. As such, a purported retaliation claim fails. Nonetheless, out of an abundance of caution, this Court will address prima facie case

elements.

Prima Facie Case

To make out a retaliation prima facie case, a plaintiff must demonstrate that:

1. He/she engaged in protected activity;

2. He/she suffered an adverse employment action; and

3. There was a causal link between his/her activity and the employment action.

Stegall v. Citadel Broadcasting Co., 350 F.3d 1061, 1065-1066 (9th Cir. 2003); *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000).

Adverse Action

The Secretary argues that transfer of duties from Mr. Jackson is not adverse action to support a retaliation claim.

"The antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *White*, 548 U.S. at 67, 126 S.Ct. 2405. A plaintiff's displeasure "by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action." *Blackie*, 75 F.3d at 725. "An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *White*, 548 U.S. at 68, 126 S.Ct. 2405. "[O]nly non-trivial employment actions that would deter reasonable employees from complaining about Title VII violations will constitute actionable retaliation." *Brooks*, 229 F.3d at 928. A retaliation plaintiff "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *White*, 548 U.S. at 68, 126 S.Ct. 2405 (citations and internal quotations omitted). "[A]n action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity." *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir.2000).

The Secretary faults Mr. Jackson's failure to articulate "harm due to the alleged transfer of duties," especially given that Mr. Jackson received neither an official demotion in GS level nor reduction in pay or benefits. The Secretary notes that Mr. Jackson did not seek to re-grade his position.

As addressed above, Mr. Jackson experienced no actionable adverse action. Mr. Jackson demonstrates no more than his displeasure with Ms. Mecca's ascendance and his purported embarrassment. Mr. Jackson offers nothing remotely close to adverse action to support a Title VII claim.

Proximity

The Secretary further faults Mr. Jackson's failure "to show there was any causal link between his claimed adverse employment action and a protected activity." The Secretary points to the 18-month gap between Mr. Jackson's April 2001 pursuit of an administrative class action and transfer of duties in late 2002.

To support an inference of retaliatory motive, the adverse action must have occurred "fairly soon after the employee's protected expression." *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1009-10 (7th Cir.2000). "A nearly 18-month lapse between protected activity and an adverse employment action is simply too long, by itself, to give rise to an inference of causation." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002); *see Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1035 (9th Cir. 2006) (gap between plaintiff's complaint in November 2001 plaintiff's termination in July 2002 "was too great to support an inference that [plaintiff's] complaints caused his termination").

Neither the record nor Mr. Jackson suggest a retaliatory motive arising from adverse action occurring soon after Mr. Jackson's protected activity. No evidence supports prima facie retaliation.

Legitimate Reasons

The Secretary argues that the IRS had a legitimate, non-discriminatory reasons regarding the HazMat analyst position which "was created because the duties demanded the work of a full-time dedicated individual." The Secretary notes that Ms. Mecca's assuming "parallel safety duties" in April 2002 "was due to the increasing size of the safety program overall, which was becoming too great a burden for one position."

If plaintiff establishes a prima facie case, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for adverse employment action. *McDonnell Douglas Corp.,* 411 U.S. at 802, 93 S.Ct. 1817; *Burdine*, 450 U.S. at 252-253, 101 S.Ct. 1089; *Coleman*, 232 F.3d at 1281; *Guz*, 24 Cal.4th at 355-356, 100 Cal.Rptr. at 379; *Brundage v. Hahn*, 57 Cal.App.4th 228, 236, 66 Cal.Rptr.2d 830, 835 (1997).

"The defendant's burden at this stage is one of production, not persuasion. The court may not make a credibility assessment." *Njenga v. San Mateo County Superintendent of Schools*, 2010 WL 1261493, at *14 (N.D. Cal. 2010) (citing *see Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142, 120 S.Ct. 2097 (2000)). "The defendant need not persuade the court that it was actually motivated by the proffered reasons." *Burdine*, 450 U.S. 254, 101 S.Ct. 1089.

Neither the record nor Mr. Jackson suggest that IRS reasons for creating and regrading the HazMat analyst position are illegitimate or unreasonable. Nothing suggests that Mr. Jackson's safety Manager Assistant status was unreasonable.

Pretext

The Secretary holds Mr. Jackson "to show that the proffered reasons are false and that the real reason was in retaliation for past EEO activity." The Secretary faults Mr. Jackson's inability to "show the Secretary's legitimate, non-discriminatory reasons for assigning Mecca parallel duties in 2002 was a pretext."

"If the defendant offers admissible evidence of a legitimate, nondiscriminatory reason for the claimed adverse action, the *McDonnell Douglas* framework and its presumption of discrimination disappears, and the plaintiff is left to prove by a preponderance of the evidence that the reasons offered by the defendant are merely a pretext for discrimination [or retaliation]." *Njenga*, 2010 WL 1261493, at *14 (citing *see Reeves*, 530 U.S. 133, 143, 120 S.Ct. 2097 (2000)). The "critical" issue at the pretext stage is whether the plaintiff produces "sufficient evidence to raise a triable issue of fact as to whether the reason proffered by [employer] for denying her the promotion was a pretext for unlawful retaliation or discrimination. *Bergene v. Salt River Project Agr. Imp. and Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001); *see Manatt v. Bank of America,* N.A., 339 F.3d 792, 801 (9th Cir. 2003) ("Because [plaintiff] failed to introduce any direct or specific and substantial circumstantial evidence of pretext, summary judgment for the [defendant] must be affirmed."); *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983) (failure to "produce any specific, substantial evidence of pretext" support summary judgment for employer); *Brundage*, 57 Cal.App.4th at 236, 66 Cal.Rptr.2d at 835.

"In response to the defendant's offer of nondiscriminatory reasons, the plaintiff must produce 'specific, substantial evidence of pretext.'" *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994)

(quoting *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir.1983)). In other words, the plaintiff "must tender a genuine issue of material fact as to pretext in order to avoid summary judgment." *Steckl*, 703 F.2d at 393. A "plaintiff cannot create a genuine issue of pretext to survive a motion for summary judgment by relying solely on unsupported speculations and allegations of discriminatory intent." *Crawford v. MCI Worldcom Communications, Inc.*, 167 F.Supp.2d 1128, 1135 (S.D. Cal. 2001).

The Secretary argues that Mr. Jackson offers "only speculation about retaliation based on unsupported allegations." The Secretary points to the lack of evidence that transfer of his duties was due to "his participation in the class action." The Secretary notes Mr. Jackson's inability to identify "who the alleged decision-maker was who transferred his duties" and to present evidence "that any actual decision-makers, in fact, took into account Jackson's participation in the class action."

Neither the record nor Mr. Jackson suggests a pretext for discrimination or retaliation. Mr. Jackson offers mere speculation as to purported discrimination or retaliation, and as such, his Title VII claims fail.

Lost Wages

Mr. Jackson claims lost wages of $52,998, the difference in wages between Mr. Jackson's GS 8 level, Step 10 and a GS 12 level, Step 1 during 2001-2005.

The Secretary faults the absence of "conduct in the relevant time period to support a claim for economic loss" and characterizes Mr. Jackson's lost wages claim as "a speculative windfall."

For Title VII claims, "back pay remains an equitable remedy to be awarded by the district court in its discretion." *Lutz v. Glendale High School*, 403 F.3d 1061, 1069 (9th Cir. 2005).

The Secretary notes that Mr. Jackson seeks lost wages "based on his conjecture that he would have been promoted to a GS-12" but that "lack of a promotion is not the basis of his claim," which "is solely related to the transfer of duties in late 2002." The Secretary points out that two ostensible promotions (Ms. Rodriguez' GS 11 level promotion in late 1990s or early 2000 and Ms. Mecca's GS 12 level promotion, for which Mr. Jackson did not apply) occurred well outside the October 21, 2002 to December 5, 2002 relevant period. The Secretary explains that Mr. Jackson never sought a higher re-grading of his safety Management Assistant position and "has adduced no evidence that the IRS would have re-graded his position as a GS-12." The Secretary notes that Mr. Jackson's position was

downgraded to a GS 7 level on his retirement.

The Secretary has more than demonstrated that Mr. Jackson is not entitled to recover lost wages. His lost wages claim fails in the absence of a viable Title VII claim.

Compensatory Damages

The Secretary argues that Mr. Jackson is entitled to no more that "garden variety" emotional distress damages.

Under Title VII, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(1), "a Title VII plaintiff who wins a back pay award may also seek compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." *Landgraf v. USI Film Products*, 511 U.S. 244, 253, 114 S.Ct. 1483 (1994) (internal quotation marks and citation omitted). In *Carey v. Piphus*, 435 U.S. 247, 255-56, 98 S.Ct. 1042 (1978), the U.S. Supreme Court held that compensatory damages, such as for emotional harm caused by the deprivation of constitutional rights, may be awarded only when the claimant submits proof of actual injury. Although *Carey* refers to damage awards under 42 U.S.C. § 1983, its reasoning and standards apply to Title VII emotional distress claims. *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1053 (5th Cir. 1998); *see Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1121 (3rd Cir. 1988) (plaintiff in a corresponding 42 U.S.C. § 1981 action "must present evidence of actual injury, however, before recovering compensatory damages for mental distress"); *Ramsey v. American Air Filter Co.*, 772 F.2d 1303, 1313 (7th Cir.1985) ("competent evidence" must support award for compensatory damages in § 1981 action). "[S]peculative damages will not be awarded" in Title VII cases. *Gunby*, 840 F.2d at 1121.

The Secretary faults the absence of expert opinion to support an emotional distress claim for Mr. Jackson. The Secretary attributes Mr. Jackson to claim that he saw a stress counselor once in 2000-2001 and that sometime in the 2000s saw a psychiatrist for a few months as to sexual issues affecting his marriage. The Secretary notes that emotional distress which the stress counselor addressed arose "well prior to any actionable conduct." The Secretary points to the lack of evidence to tie his treatment with the psychiatrist to transferred duties. The Secretary concludes that Mr. Jackson is limited to "garden variety" minimal damages based solely on his testimony.

In evaluating the reasonableness of a non-economic damages award in discrimination suits,

courts often examine the duration, extent and consequences of mental anguish suffered by the plaintiff to determine whether the case is a "garden variety" mental-anguish claim, in which awards "hover in the range of $5,000 to $30,000." *Kinneary v. City of New York*, 536 F.Supp.2d 326, 331 (S.D. N.Y. 2008); *see Rainone v. Potter*, 388 F.Supp.2d 120, 122 (E.D. N.Y. 2005) (low end "garden variety" distress claims range from $5,000 to $35,000). "'In such cases, the evidence usually is limited to the testimony of the plaintiff, who describes the emotional distress in vague or conclusory terms, presents minimal or no evidence of medical treatment, and offers little detail of the duration, severity, or consequences of the condition.'" *Kinneary*, 536 F.Supp.2d at 331 (quoting *Reiter v. Metropolitan Transp. Auth. of New York,* 2003 WL 22271223, at *9 (S.D. N.Y. 2003)). "[C]ourts scrupulously analyze an award of compensatory damages for a claim of emotional distress predicated exclusively on the plaintiff's testimony." *Price v. City of Charlotte, N.C.*, 93 F.3d 1241, 1251 (4th Cir. 1996).

The Secretary concludes that "[a]nything more than minimal damages, absent other evidence would be speculative and improperly excessive."

Neither the record nor Mr. Jackson offer anything to support compensatory damages, especially given the futility of his Title VII claims.

CONCLUSION AND ORDER

For the reasons discussed above, this Court:

1. GRANTS the Secretary summary judgment;
2. DIRECTS the clerk to enter judgment in favor of Treasury Secretary Timothy Geithner and against plaintiff Rudy Jackson and to close this action; and
3. VACATES the July 12, 2001 pretrial conference and September 12, trial in this action.

IT IS SO ORDERED.

Dated: June 2, 2011

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE