Schirle v. Sokudo USA LLC et al Doc. 234

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MATTHEW J. SCHIRLE	§	
	§	
V.	§	ACTION NO. 4:08-CV-555-Y
	§	
SOKUDO USA, LLC, DNS ELECTRONICS, LLC, DAINIPPON SCREEN DEUTSCHLAND GMBH, and DAINIPPON SCREEN MFG CO LTD	§ § § §	

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT, AND DENYING AS MOOT MOTIONS TO EXCLUDE, MOTION TO STRIKE, AND OBJECTIONS

Pending before the Court are: (1) Defendants' Motions to Exclude Opinion Testimony (docs. 161, 164, 167), filed December 22, 2010; (2) defendant Dainippon Screen Mfg. Co., Ltd.'s Motion for Summary Judgment (doc. 170), filed December 22, 2010; (3) defendant DNS Electronics, LLC's Motion for Summary Judgment (doc. 173), filed December 23, 2010; (4) defendant SOKUDO USA, LLC's Motion for Summary Judgment (doc. 176), filed December 23, 2010; (5) defendant Dainippon Screen Deutschland gMBh's Motion for Summary Judgment (doc. 179), filed December 23, 2010; (6) Defendants' Motion to Strike (doc. 220), filed April 20, 2011; and (7) Defendants' Objections to Plaintiff's Summary-Judgment Evidence (docs. 223, 226), filed April 20, 2011. The Court GRANTS Defendants' motions for summary judgment and DENIES as moot the remaining motions.

Dockets.Justia.com

I. BACKGROUND[1]

A. EMPLOYMENT

Defendants are a family of Japanese companies in the semiconductor industry. Defendant Dainippon Screen Mfg. Co., Ltd. ("DSM"), has two subsidiaries: defendants DNS Electronics, LLC ("DNS"), and Dainippon Screen Deutschland gMBh ("DSD"). SOKUDO KK is a joint venture between DSM and Applied Materials. Defendant SOKUDO USA, LLC ("Sokudo USA"), is a subsidiary of SOKUDO KK and shares with DSM the same Japanese facilities and the same sales force, with the exception of the United States market. Masahiro Hashimoto was the president of DSM, and Takashige Suetake was chief executive officer for SOKUDO KK and DSM's vice-chairman. (Pl. Summ. J. App. 10-14.) A review of the parties' briefs and the submitted organizational charts indicates that DSM was at the top of the organizational pyramid.

In 1996, plaintiff Matthew J. Schirle ("Schirle") began working for DNS. (Pl. Summ. J. App. 349.) Schirle believed he had an oral employment contract with DNS. From 2003-2005, Schirle worked for DSM and returned to DNS in 2005. (Pl. Summ. J. App. 350.) In July 2006, Schirle was "seconded"[2] to Sokudo USA and became its president. Schirle remained an employee of DNS. (Pl. Summ. J. App. 352; Sokudo USA Summ. J. App. 84-85, 87.) Schirle did not have an employment contract with DSM or Sokudo USA. (Pl. Summ. J. App. 350-51.) When Schirle first became president of Sokudo USA, he reported to Suetake, who was, again, SOKUDO KK's chief executive. (Pl. Summ. J. App. 352.) Schirle also shared responsibility for worldwide sales for SOKUDO KK

[1]The Court viewed the summary-judgment facts set out in this section in the light most favorable to the plaintiff.

[2]A secondment agreement seems to be a loan of one company's employee to a subsidiary company within DSM's corporate structure. When an employee was seconded, he remained an employee of the loaning company. (Pl. Summ. J. App. 350, 357; Pl. Resp. to Sokudo USA Summ. J. 5; Sokudo USA Summ. J. App. 87.)

with Hiroyuki Okawa.

Schirle complains that, in December 2006, he began to experience harassment, which Schirle argues "was motivated by a cultural bias within DSM and its affiliates against 'gaijins,'[3] or non-Japanese foreigners." (Pl. Resp. to Sokudo USA Summ. J. 5.) Specifically, DSM "seconded" Steve Yada and Marty Yano, both Japanese nationals, to Sokudo USA to report on Schirle's daily actions. (Pl. Summ. J. App. 210.)

The year 2007, according to Schirle, was a tough one. In February, Schirle reported Yada's and Yano's harassment to Suetake. (Pl. Summ. J. App. 357-58.) The harassment continued and, in late March, Suetake removed Schirle's sales responsibilities for the European market as part of a "restructuring." (Pl. Summ. J. App. 33.) Suetake gave the European sales responsibilities to Minoru Okamoto. (Pl. Summ. J. App. 31-33.) Schirle first learned of the change from Okamoto and not from Suetake. Schirle believes this was a "tactic intended to humiliate and embarrass Schirle." (Pl. Resp. to Sokudo USA Summ. J. Mot. 6.) In May, Schirle reported the unfair treatment and harassment to Sokudo USA's human-resources director, Alan Bickett. (Pl. Summ. J. App. 221.) It is unclear what, if anything, occurred as a result of this report.

On July 1, Suetake withdrew Schirle's responsibility for field service in the United States. (Pl. Summ. J. App. 359.) Suetake gave the US service responsibility to Yasuhiko Kawanishi. (Pl. Summ. J. App. 64.) Suetake informed Schirle that Keisuke "Kevin" Takimoto, a DSM employee who was Asian and Japanese, would be seconded to Sokudo USA and would be Schirle's direct supervisor beginning July 1. (Pl. Summ. J. App. 70, 403.) Schirle asserts Takimoto "escalated the harassing and discriminatory treatment." (Pl. Resp. to Sokudo USA Summ. J. Mot. 9.)

---

[3]Gaijin is a Japanese word that means a foreigner or "not one of us." (Pl. Summ. J. App. 356.)

On July 12, Takimoto excluded Schirle from a meeting with a Sokudo USA customer, Micron. During the meeting, Takimoto showed an organizational chart with Schirle's name misspelled and indicated that Schirle was a secretary ("the one that brings the pencils and paper to the executive") and not a manager. **("Instance A")** (Pl. Summ. J. App. 77, 338-338.1.) A Micron employee who was present at the meeting understood that these representations meant Schirle was out of favor with the Japanese management and was being humiliated. (Pl. Summ. J. App. 75, 299-300.) Schirle learned of Instance A the next day. (DSM Summ. J. App. 29.) Schirle also had difficulty obtaining approval of his proposed deals. (Pl. Summ. J. App. 214-17, 221-22.) Claes Bjorkman, a manager for Applied Materials who worked as an administrator for Suetake within SOKUDO KK, told Schirle that his difficulty in getting deals approved was based on the gaijin prejudice. (Pl. Summ. J. App. 91.)

On August 13, Schirle notified Bickett of the continued harassment, which precluded him from traveling for four weeks because he was suffering from a "general anxiety disorder." (Pl. Summ. J. App. 81-82, 340.) Schirle specified that he believed he was being treated differently because he was a gaijin. (Pl. Summ. J. App. 82.) Schirle's anxiety worsened, and his doctor directed him to take a medical leave of absence beginning August 17. (Pl. Summ. J. App. 98, 339.) Schirle's doctor later continued the leave through October 17. (Pl. Summ. J. App. 94-95.)

On August 31, Takimoto announced to Sokudo USA employees that "Schirle will be absent from day-to-day work until further notice. Keisuke Takimoto will act in his position temporarily until his return." (Pl. Summ. J. App. 104.) In September, Bickett discovered that Schirle "considered his employment to have been terminated and that [he] had no intention of returning to his position at [DNS] and [Sokudo USA]. I understood this to constitute an effective resignation by

. . . Schirle." (Sokudo USA Summ. J. App. 85.) Schirle contends he did not resign, but was fired. (Pl. Summ. J. App. 345.) Schirle's last day as an employee was September 14, but no announcement was made at that time. (Pl. Summ. J. App. 99; 276.) Junya Ota became Sokudo USA's president, Yasuhiko Kawanishi became responsible for the United States field services, and Okamoto continued to handle Sokudo USA's European sales responsibilities. (Pl. Summ. J. App. 110-20.)

B. Post-Employment

Schirle's departure from DNS and Sokudo USA with no announcement apparently caused confusion for Sokudo USA's customers and employees. (Pl. Summ. J. App. 178, 276.) On October 16, Suetake notified Sokudo USA employees in a memo that "Schirle has decided to end his employment." (Pl. Summ. J. App. 120.) The information was disseminated to customers and employees of DSM subsidiaries.

On October 19, Junji Otsuka, president of DSD, forwarded the information in an e-mail to Willi Henrich, who worked for a DSD third-party agent in Germany. (DSD Summ. J. App. 63.) Henrich asked Otsuka if Schirle left voluntarily. Otsuka responded that he "heard [Shirle is] suffering from small mental disease, and not appearing to [the Sokudo USA] office at all in this one month time." **("Instance B")** (Pl. Summ. J. App. 124.) That same day, Henrich forwarded Otsuka's e-mail response to DNS's vice-president of business operations, Scott Galler. (Pl. Summ. J. App. 124.) Galler gave Schirle a copy of Otsuka's e-mail and told Schirle that there "was a bunch of defamation going on." (Pl. Summ. J. App. 338.1-39.)

Nevertheless, Galler himself thereafter discussed Schirle's "mental issues" with Reggie Hernandez, a Sokudo USA account manager, and told Hernandez that Schirle had inherited mental problems from his mother. **("Instance C")** (Pl. Summ. J. App. 196, 198, 289-90, 345.) Laszlo

Mikulas, a vice-president with DNS, also discussed Schirle's mental state with Hernandez and he too stated that Schirle's mother had suffered from mental problems.[4] (Pl. Summ. J. App. 198, 291, 346.) ("Instance D") Hernandez, in turn, discussed Instances C and D with Rod Hogan, a former DNS employee.[5] **("Instance E")** (Pl. Summ. J. App. 202, 292.) Galler discussed Instance B with Robert Paulk, a DNS network administrator, and informed Paulk that "Schirle had gone crazy and was completely nuts and was no longer able to function as an employee because of the stress from his family situation and the failure of a business . . . Schirle had started with DNS." [6] **("Instance F")** (Pl. Summ. J. App. 200.) Hernandez told Schirle about Galler's and Mikulas's statements in "the 2009 time frame." (Pl. Summ. J. App. 293.)

C. PROCEDURAL HISTORY

On July 11, **2008**, Schirle, DNS, and Sokudo USA entered into a tolling agreement under which they agreed to toll any limitations period from July 12 through August 12, pending a mediation attempt. (Pl. Summ. J. App. 144-47.) But on August 14, Schirle filed a petition in state court against Defendants. He asserted claims for libel, business disparagement, and civil conspiracy. On September 16, Sokudo USA and DNS removed the case to this Court based on diversity jurisdiction. Schirle twice amended his complaint in this Court and now raises the following claims against Defendants: (1) statutory libel, (2) libel and slander per se under common law, (3) business disparagement, and (4) civil conspiracy. Additionally, Schirle raises the following claims against

---

[4]Hernandez remembers that his conversation with Galler occurred in August 2007 before Schirle officially left the company and that his discussion with Mikulas occurred in late 2007. (Sokudo USA Summ. J. App. 32-35.)

[5]Hernandez believes this conversation occurred between August 2007 and December 2007. (Sokudo USA Summ. J. App. 36.)

[6]This statement occurred in late 2007.

Sokudo USA and DNS: (1) racial discrimination under Title VII, (2) retaliation under Title VII, (3) national-origin discrimination under Title VII, and (4) racial discrimination under § 1981. Defendants move for judgment as a matter of law and further seek to strike, exclude, or raise objection to portions of Schirle's summary-judgment evidence.

II. STANDARD OF REVIEW

Summary judgment is appropriate when the movant establishes "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is considered genuine if it is real and substantial as opposed to merely formal or a sham. *See Brazan v. Hidalgo Cnty.*, 246 F.3d 481, 489 (5th Cir. 2001). A material fact is one that could affect the outcome of the suit under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

To show that a particular fact is or cannot be genuinely in dispute, a party must support its assertion either by (1) citing to particular parts of materials in the record, such as depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials; or (2) showing that the materials cited do not establish the absence or presence of a genuine dispute; or (3) showing that the adverse party cannot produce admissible evidence to support the fact. *See* Fed. R. Civ. P. 56(c)(1). The Court is **required** to consider only the materials cited by the parties, but **may** consider other materials in the record. *See id.* 56(c)(3). The Court views the considered materials in the light most favorable to the nonmovant, drawing all reasonable inferences in the nonmovant's favor. *See Sanders-Burns v. City of Plano*, 594 F.3d 366, 380 (5th Cir. 2010). But if the nonmovant's evidence is merely colorable or is not

significantly probative, summary judgment may be granted. *See Anderson*, 477 U.S. at 249-50.

If a defendant moves for summary judgment on the basis of an affirmative defense, such as limitations, the defendant has the burden of establishing the affirmative defense. *See Crescent Towing & Salvage Co. v. M/V Anax*, 40 F.3d 741, 744 (5th Cir. 1994); *Bank One, Tex., N.A. v. Prudential Ins. Co. of Am.*, 878 F. Supp. 943, 962 (N.D. Tex. 1995) (Fitzwater, J.). Thus, it is the defendant's obligation on summary judgment to demonstrate the expiration of a limitations period. *See* Fed. R. Civ. P. 8(c)(1); *In re Hinsley*, 201 F.3d 638, 644-45 (5th Cir. 2000). If the defendant establishes all elements of a valid statute-of-limitations affirmative defense, the plaintiff then must go beyond the pleadings and set forth specific facts showing a genuine dispute for trial on the limitations issue. *See McGregor v. La. State Univ. Bd. of Supervisors*, 3 F.3d 850, 865 (5th Cir. 1993).

III. DISCUSSION

A. DEFAMATION (LIBEL AND SLANDER)

Defendants assert that Schirle's defamation claims are barred by the applicable statute of limitations.[7] Defamation claims in Texas are governed by a one-year limitations period, which accrues on the date the statements are spoken or published. *See* Tex. Civ. Prac. & Rem. Code § 16.002 (West 2002); *Martinez v. Hardy*, 864 S.W.2d 767, 774 (Tex. App.—Houston [14th Dist.] 1993, no writ). The discovery rule tolls the limitations period until such time as the plaintiff learns of, or by reasonable diligence should have learned of, the existence of the defamatory statement. *See Wheeler v. Methodist Hosp.*, 95 S.W.3d 628, 636 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

[7]The Court must evaluate statute-of-limitations issues in accordance with Texas law. *See Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1156 n.16 (5th Cir. 1992).

Defendants also assert that, even if the claims are not barred by limitations, Plaintiff has failed to proffer evidence that raises a material dispute regarding the elements of defamation or defamation per se. Under Texas law, defamation is comprised of the following elements: (1) a false statement about the plaintiff was made, (2) the statement was published to a third party without legal excuse, and (3) the plaintiff's reputation was damaged as a result. *See Fiber Sys. Int'l, Inc. v. Roehrs*, 470 F.3d 1150, 1161 (5th Cir. 2006); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 73.001 (West 2011). Statements that injure a person in his office, business, profession, or occupation may be defamatory per se. *See Estate of Martineau v. Arco Chem. Co.*, 203 F.3d 904, 914 (5th Cir. 2000). Additionally, a statement that imputes a present loathsome disease may be defamatory per se. *See Fiber Sys.*, 470 F.3d at 1161.

1. Instance A

The statements in Instance A were made by Takimoto, a DSM employee. To the extent Schirle raises this claim against Sokudo USA, DNS, or DSD, they are entitled to judgment as a matter of law because those companies were not involved in the alleged defamation and because Schirle has not pleaded alter ego, or otherwise attempted to pierce the corporate veil, with the requisite specificity. *See Lincoln Gen. Ins. Co. v. U.S. Auto Ins. Servs., Inc.*, 3:07-CV-1985-B, 2009 WL 1174641, at *5-6 (N.D. Tex. Apr. 29, 2009) (Boyle, J.); *VBFSB Holding Corp. v. Fid. & Deposit Co. of Md.*, 3:95-CV-693-BC, 1997 WL 527308, at *11 (N.D. Tex. Aug. 19, 1997) (Boyle, M.J.).[8] Worse for him, Schirle's defamation claim regarding Instance A is time-barred. A

---

[8]Schirle attempts to argue that, based on a corporate organizational chart and the secondment agreements, management and control of DSM, DNS, DSD, and Sokudo USA were shared, which renders all responsible for any action taken at the individual companies. (Pl. Resp. to DNS Summ. J. 23; Pl. Resp. to Sokudo USA Summ. J. 21; Pl. Resp. to DSM Summ. J. 21; Pl. Resp. to DSD Summ. J. 21-22.) Schirle's generalized statements in summary-judgment

defamation claim based on Instance A accrued, at the latest, on July 19, 2007. Thus, limitations expired on July 19, 2008, as to any defendant who did not sign the tolling agreement. Schirle filed his complaint in state court on August 14, 2008. Because DSM was not a party to the tolling agreement, it cannot operate against it to toll the limitations period regarding Instance A. The discovery rule is likewise unavailing because Schirle admits he was told about Takimoto's presentation and statements on July 19, 2007. (Pl. Summ. J. App. 213; Pl. Resp. to DSM Summ. J. Mot. 24.) DSM has established the limitations affirmative defense, and Schirle has failed to establish a genuine dispute for trial.

2. Instance B

Instance B involved Otsuka, a DSD employee. To the extent Schirle attempts to impose liability on Sokudo USA, DSM, or DNS, those companies are entitled to judgment as a matter of law because Schirle failed to specifically plead alter ego.

Schirle's claims based on Instance B accrued on October 19, 2007. DSD does not assert that Instance B is barred by limitations. DSD does argue, however, that Otsuka's statement is not referable to a duty Otsuka owed to DSD. Indeed, to impose liability on DSD based on its employee's allegedly defamatory statement under the theory of respondeat superior, Schirle must show that the statement was made or published while in the discharge of his duties on behalf of DSD. *See Rodriguez v. Sarabyn*, 129 F.3d 760, 767 (5th Cir. 1997). Otsuka was responding to an unsolicited inquiry about Schirle from an employee of DSD's third-party agent. Nevertheless, it certainly would have been part of his duties as president of DSD to respond to such inquiries.

---

briefing cannot be construed as adequate notice to Defendants of Schirle's alter-ego theory. *See VBFSB*, 1997 WL 527308, at *11. Further, Schirle's arguments do not raise any actual fraud on Defendants' part, which is required to pierce the corporate veil. *See Lincoln Gen.*, 2009 WL 1174641, at *5-6.

The problem for Schirle instead arises regarding the content of Otsuka's message to Henrich. A statement cannot be defamatory if the statement was substantially true. *See Grogan v. Sav. of Am., Inc.*, 118 F. Supp. 2d 741, 756 (S.D. Tex. 1999). Schirle's family doctor referred to Schirle's condition as a "psychiatric condition." (DSD Summ. J. App. 79.) Schirle's psychiatrist stated Schirle had a "mood disorder," which was identified and diagnosed based on the Diagnostic and Statistical Manual of Mental Disorders ("DSMMD"). (DSD Summ. J. App. 74-75.) Schirle attempts to demonstrate a factual dispute regarding whether his condition, which mandated his leave of absence, was a mental condition or disorder by relying on the absence of the words "small mental disease" or "mental illness" in the DSMMD. (Pl. Resp. to DSD Summ. J. 28.) This is merely a semantic argument that does not demonstrate a factual dispute regarding whether Schirle's illness was psychiatric in nature as stated by Otsuka. Otsuka's statement was **substantially** true and, thus, not actionable defamation. (DSD Summ. J. Br. 16.)

3. Instances C and D

In Instance C, Galler, an employee of DNS, discussed Instance B with Hernandez, a Sokudo USA employee, and stated that Schirle inherited mental issues from his mother. Likewise, Instance D involved Mikulas, a DNS employee, also repeating Instance B and the genetic allegation to Hernandez. To the extent Schirle attempts to raise Instance C or D against Sokudo USA, DSD, or DSM, he has not sufficiently pleaded alter ego; thus, Sokudo USA, DSD, and DSM are entitled to judgment as a matter of law.

Instance C occurred in August 2007; thus, the one-year limitation period expired, at the latest, on August 31, 2008. (DNS Summ. J. App. 32-33.) Instance D occurred in late 2007, which at best results in a limitations deadline of December 31, 2008. (DNS Summ. J. App. 33-34.) DNS

argues that any slander or libel claims based on Instance C are time-barred because Schirle failed to plead Instance C or D until he filed his second amended complaint on October 22, 2010. To raise a genuine dispute of material fact, Schirle first relies on the tolling agreement between him, DNS, and Sokudo USA to bring his claim based on Instance C within the limitations period. (Pl. Resp. to DNS Summ. J. Mot. 19-20.) However, the agreement tolled limitations for only thirty-one days, which is insufficient to render these claims timely if DNS is correct that the filing date of the second amended complaint is the operative date for limitations purposes.

Schirle's second argument is that he did not discover the conduct that gave rise to the defamation alleged in Instances C and D when he filed his original petition or when he filed his first amended complaint. Schirle merely states that he discovered the relevant conduct "during discovery" and then filed his second amended complaint on October 22, 2010. (Pl. Resp. to DNS Summ. J. 20.) The discovery rule is an exception to the general rule that a cause of action accrues when facts first occur that give rise to the right to a judicial remedy. *See Ellert v. Lutz*, 930 S.W.2d 152, 156 (Tex. App.—Dallas 1996, no writ). As mentioned above, under the discovery rule, a limitations period does not begin to run until the defamed person learns of, or in the exercise of reasonable diligence should have learned of, the allegedly defamatory statements. *See Langston v. Eagle Publ'g Co.*, 719 S.W.2d 612, 615 (Tex. App.—Waco 1886, writ ref'd n.r.e.). The discovery rule applies if (1) the injury is inherently undiscoverable despite the exercise of due diligence and (2) the evidence of the injury is objectively verifiable. *See Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 531 (Tex. 1997); *Ellert*, 930 S.W.2d at 156. Thus, the discovery rule is very limited in application and is a question of law for the Court. *See Ellert*, 930 S.W.2d at 156. Here, it is clear that the nature of Schirle's injury was not ordinarily undiscoverable. *See Procter & Gamble Co. v.*

Amway Corp., 80 F. Supp. 2d 639, 651-52 (S.D. Tex. 1999) (citing *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456-57 (Tex. 1996), *rev'd on other grounds*, 242 F.3d 539 (5th Cir. 2001). Indeed, defamatory statements generally are capable of detection within the time allotted for bringing suit. *See id.* Further, Schirle's statement that he did not discover Instances C and D until "during discovery" is insufficient to justify application of the limited discovery rule especially because Schirle does not allege he exercised due diligence to discover such statements. (DNS Reply 2-3.)

Schirle's final argument is that his claims based on Instances C and D relate back to the defamation claims he raised in his original petition filed August 14, 2008. In federal court, Rule 15(c)(1) governs the determination of whether an amendment relates back to the original pleading:

> ***When an Amendment Relates Back***. An amendment to a pleading relates back to the date of the original pleading when:
>
> > **(A)** the law that provides the applicable statute of limitations allows relation back;
> >
> > **(B)** the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or
> >
> > **(C)** the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied . . . .

Fed. R. Civ. P. 15(c)(1). The rule uses the disjunctive "or"; as a result, if a plaintiff can satisfy either A, B, or C, the amendment will be deemed to relate back to the date of the original pleading.[9]

---

[9]Thus, relation back is determined by whichever is more forgiving between state law (per Rule 15(c)(1)A)) or federal law (per Rule 15(c)(1)(B) and (C)):

> The purpose of Rule 15(c)(1)(A) is to make clear that, if state limitations law "affords a more forgiving principle of relation back than" Rule 15(c), such state law "should be available to save the claim." Fed. R. Civ. P. 15(c) Comm. N. to 1991 Amendment. Thus, state law becomes relevant to the Rule 15(c) analysis to the extent it is more lenient than federal law. *Coons v. Indus. Knife Co., Inc.*, 620 F.3d 38, 42 (1st Cir. 2010) ("In addition to the federal test, Rule 15(c)(1)(A) allows for relation

If there is a difference between Texas and federal relation-back law, the federal rule appears to be more lenient. The federal rule allows relation back if the proposed amendment arose out of the same "conduct, transaction, or occurrence" as the claim asserted in the original petition. Texas law provides that the amendment relates back unless it "is wholly based on a new, distinct, or different transaction or occurrence." Tex. Civ. Prac. & Rem. Code Ann. § 16.068 (West 2008). Thus, Texas law omits the word "conduct." And, Schirle has not urged or demonstrated that Texas law is more lenient than federal relation-back law.

Nevertheless, the Court concludes that under either provision, Schirle's claim is time-barred. Under Texas law, "a 'transaction' is a set of facts that gives rise to the cause of action premised thereon." *Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 587 (Tex. App.–Austin 2007, pet. denied) (op. on reh'g). Thus, "Texas law treats each alleged defamatory publication as a single transaction with an independent injury." *Id.* Relation back does not apply merely because "the newly asserted claims are otherwise part of the same general course or pattern of conduct as those originally pleaded. *See id.* Similarly, under federal law, relation back requires the existence of common operative facts that unite the original claims and the newly asserted claims. *See Mayle v. Felix*, 545 U.S. 644, 659 (2005).

Schirle's original petition mentioned facts regarding Instances A and B. (Notice of Removal Ex. 1 at 8, 10.) In alleging facts regarding Instance B, Schirle stated:

> back when the law that provides the applicable statute of limitations . . . allows relation back. We have described the choice between these . . . provisions as 'a one-way ratchet,' meaning that a party is entitled to invoke the more permissive relation back rule, whether that is the state rule or the federal rule set out in Rule 15(c)(1)[(B) and (C)].").

Wandschneider v. Tuesday Morning, Inc., No. 08-CV-522-TCK-FHM, 2011 WL 1990449, at *5 (N.D. Okla. May 23, 2011); *see also* Fed. R. Civ. P. advisory committee's note to 1991 amendment ("Whatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim.").

> Pursuant to [Defendants'] conspiracy, Defendants began to circulate statements and comments inferring that [Schirle] suffered from disease and incapacity. As evidence of a conspiracy to defame and blame [Schirle], Defendants, on or about October 19, 2007, circulated an email between [DNS] managers referring to [Schirle's] departure from Sokudo [USA]. It implied [Schirle] left due to some imputation of disease and incapacity.

(Notice of Removal Ex. 1 at 10.) In an amended complaint filed November 13, 2008, the facts alleged regarding Instances A and B were the same as those in Schirle's original petition. (1st Am. Compl. 8, 10.) In his October 22, 2010, second amended complaint, Schirle alleged the same facts as he did in his original petition and his first amended complaint; however, Schirle added allegations relating to Instances C, D, E, and F:

> More specifically, upon information and belief, [DNS's] Galler and another officer made and circulated statements to Defendants' employees, officers, and/or managers and perhaps others that [Schirle] suffered from mental issues, that [Schirle's] mental state was not healthy, that [Schirle's] mother had mental issues, that [Schirle] inherited his alleged mental issues from his mother, and/or that [Schirle] was "mental" or "crazy" and thus could not function at [DNS/Sokudo USA].

(2nd Am. Compl. 10.)

Schirle's second amended complaint raised separate and specific instances of defamation that were not raised in his original petition. Although Schirle's original petition and first amended complaint included generalized language regarding multiple "statements and comments," this language is insufficient to invoke relation back. Schirle's second amended complaint added new facts regarding separate transactions—distinct instances of defamation—perpetrated by different wrongdoers and addressed to different audiences. Relation back does not save Schirle's allegations regarding Instances C and D from the bar of the statute of limitations. *See Tex. Disposal*, 219 S.W.3d at 587; *cf. Cram Roofing Co. v. Parker*, 131 S.W.3d 84, 89 (Tex. App.—San Antonio 2003, no pet.) (op. on reh'g) (holding libel allegations in amended petition related back to original petition because same facts and circumstances regarding libel raised in amended petition); *Duran v. Furr's*

Supermarkets, Inc., 921 S.W.2d 778, 791-92 (Tex. App.—El Paso 1996, writ denied) (holding amended claim related back to claim alleging same wrongdoer and same facts).

Schirle has failed to raise a genuine issue for trial regarding DNS's affirmative defense; thus, DNS is entitled to judgment as a matter of law.

4. Instance E

In Instance E, Hernandez, an employee of Sokudo USA, discussed Instances C and D with a former DNS employee. To the extent Schirle attempts to raise Instance E against DNS, DSD, or DSM, he has not sufficiently pleaded alter ego; thus, DNS, DSD, and DSM are entitled to judgment as a matter of law. Further, for the reasons Instances C and D are not saved by the relation-back rule, the tolling agreement, or the discovery rule, neither is Instance E, and it is barred by the statute of limitations. The limitations period for Instance E expired, at the latest, on December 31, 2008. Schirle's allegations regarding the separate and distinct statements by Hernandez were not raised until his second amended complaint on October 22, 2010.

5. Instance F

In Instance F, Galler, a DNS employee, told Paulk that Schirle was crazy, was "nuts," and couldn't function as an employee. To the extent Schirle attempts to raise Instance F against Sokudo USA, DSD, or DSM, he has not sufficiently pleaded alter ego; thus, Sokudo USA, DSD, and DSM are entitled to judgment as a matter of law.

Schirle has never alleged facts regarding Instance F in his petition or amended complaints. The first time Schirle raised Galler's comments was in his April 6, 2011, response to DNS's motion for summary judgment. (Pl. Resp. to DSM Summ. J. Mot. 17, 21-22.) An argument solely raised in summary-judgment briefing cannot be considered a timely and properly-raised claim that a

defendant would know to defend against even if the statement was alluded to during discovery. *See Cutrera v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005). Thus this claim, if any it is, is not before the Court.

B. BUSINESS DISPARAGEMENT

Schirle asserts that Defendants' statements (presumably, Instances A-F) were malicious and disparaged his business and economic interests. (2nd Am. Compl. 12.) Generally, a two-year statute of limitations applies to a business-disparagement claim. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (West Supp. 2010). When the gravamen of a business-disparagement claim is defamatory injury to a plaintiff's reputation and there is no evidence of direct pucuniary loss to give rise to special damages, a one-year limitations period is applied. *See Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 146-47 (5th Cir. 2007). "If the damages alleged are primarily personal and general—e.g., injury to personal reputation, humiliation, or mental anguish—then the cause of action is one for libel or slander, even though incidental or consequential professional losses are also pleaded and proved." *Williamson v. New Times, Inc.*, 980 S.W.2d 706, 710-11 (Tex. App.—Fort Worth 1998, no pet.) (quoted with approval in *Nationwide Bi-Weekly*, 512 F.3d at 147.)

Here, the gravamen of Schirle's business-disparagement claim is defamatory injury to his reputation. Further, the damages Schirle alleges are primarily personal and there is no evidence of direct pecuniary loss.[10] Thus, Schirle's business-disparagement claim is characterized as a defamation claim and is governed by the one-year limtations period. For the same reasons that

---

[10] Although Schirle proffers evidence that **if** a future employer discovered the rumors regarding Schirle's "mental issues," it **could** hurt his business relationships, this is mere conjecture and cannot be considered evidence of a direct, pecuniary loss. *See Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 767 (Tex. 1987); *Astoria Indus. v. SNF, Inc.*, 223 S.W.3d 616, 629 (Tex. App.—Fort Worth 2007, pet .denied). (Pl. Summ. J. App. 295-96.) The same holds true for Schirle's subjective belief that his employment future was harmed by Defendants' actions. (Pl. Summ. J. App. 265, 330-36.)

Schirle's defamation claims fail, his business-disparagement claim likewise fails on summary judgment.

C. CIVIL CONSPIRACY

Schirle further argues that Defendants' statements show a conspiracy between them in order to "defame and blame" Schirle and "protect their business relationships with Texas Instruments, ST Micro Electronic, [Applied Materials], and Micron." (2nd Am. Compl. 10.) Conspiracy is a derivative tort. In other words, a defendant's liability for conspiracy depends on participation in some underlying tort, and if the underlying tort is dismissed, so too must be the conspiracy claim. *See Hanold v. Raytheon Co.*, 662 F. Supp. 2d 793, 808 (S.D. Tex. 2009); *Transcon. Realty Inv., Inc. v. John T. Lupton Trust*, 286 S.W.3d 635, 649 (Tex. App.—Dallas 2009, no pet.). Because Schirle's underlying tort allegation cannot survive Defendants' summary-judgment motions, his conspiracy claim likewise fails.

D. DISCRIMINATION: TITLE VII AND § 1981[11]

Schirle raises employment-discrimination claims under Title VII and § 1981 against DNS and Sokudo USA. But Schirle was solely employed by DNS. Although Schirle was "seconded" to Sokudo USA, the secondment agreement specifically stated that Schirle remained a DNS employee. (Pl. Summ. J. App. 352; Sokudo USA Summ. J. App. 84-85, 87.) Schirle argues that he never signed a secondment agreement and was, thus, also a Sokudo USA employee. (Pl. Resp. to Sokudo USA Summ. J. Mot. 38.) But Sokudo USA has proffered the secondment agreement that specifically applied to Schirle as a DNS employee. (Sokudo USA Summ. J. App. 84, 87-97.) Thus,

---

[11]Schirle argues that DNS fails to differentiate between his discrimination claims under Title VII and his discrimination claims under § 1981. (Pl. Resp. to DNS Summ. J. Mot. 38 n.179.) But such claims are identical; thus, DNS did not have to separately argue them in its summary-judgment motion. *See Pratt v. City of Houston, Tex.*, 247 F.3d 601, 606 (5th Cir. 2001).

Schirle cannot raise Title VII or § 1981 claims against Sokudo USA because Sokudo USA was not his employer.

Schirle asserts DNS violated Title VII and § 1981 when it fired him based on his race (white or non-Asian) and national origin (American or non-Japanese). Title VII and § 1981 prohibit an employer from "discharg[ing] any individual . . . because of such individual's race . . . or national origin." 42 U.S.C.A. § 2000e-2(a)(1) (West 2003); *see Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 651 (5th Cir. 2004) (stating because Title VII and § 1981 elements are the same, § 1981 analyzed under Title VII evidentiary framework). Discrimination claims based upon circumstantial evidence, such as this one, are evaluated under a burden-shifting framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); *Meinecke v. H & R Block of Houston*, 66 F.3d 77, 83 (5th Cir. 1995) (applying *McDonnell-Douglas* framework to discharge case). First, the plaintiff must establish a prima-facie case of discrimination. *See Haynes v. Pennzoil Co.*, 207 F.3d 296, 300 (5th Cir. 2002). If the plaintiff establishes a prima-facie case, then a presumption of discrimination arises and the burden shifts to the defendant to articulate—but not prove—a legitimate nondiscriminatory reason for the adverse employment action.[12] *See McDonnell Douglas Corp.*, 411 U.S. at 802; *Evans v. City of Houston*, 246 F.3d 344, 350 (5th Cir. 2001). If the defendant meets its burden of production, then the presumption of intentional discrimination is rebutted and the burden of production shifts back to the plaintiff to show that the reason proffered by the defendant is merely

[12]"It is important to note . . . that although the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993) (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

a pretext[13] for racial discrimination. *See McDonnell Douglas Corp.*, 411 U.S. at 802; *see also Evans*, 246 F.3d at 350.[14]

To establish a prima-facie case of disparate treatment based on race or national-origin discrimination, Schirle must show by a preponderance of the evidence that (1) he is a member of a protected class; (2) he was qualified for the position; (3) he was subject to an adverse employment action, and (4) others similarly situated, but not in the protected class, were treated more favorably than Schirle. *See Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 512-13 (5th Cir. 2001); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998). Proof of an employer's discriminatory intent is required, but this intent may be established by direct evidence or may be inferred from a prima-facie showing of discrimination. *See Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *Huguley v. Gen. Motors Corp.*, 52 F.3d 1364, 1370 (6th Cir. 1995).

In moving for summary judgment, DNS argues that Schirle was not subject to an adverse employment action. Specifically, DNS asserts that Schirle voluntarily resigned and was not constructively discharged. (DNS Summ. J. Mot. 23-26; DNS Summ. J. Reply 18-20, 21-23.) DNS additionally argues that there is no evidence DNS treated employees of Asian race and Japanese national origin more favorably than Schirle was treated. (DNS Summ. J. Mot. 26; DNS Summ. J.

---

[13]A plaintiff may show pretext "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256-57.

[14]As the Supreme Court acknowledged, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false" may be sufficient for the finder of fact to infer discrimination. *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 148 (2000). The Supreme Court has also made it clear, however, that "instances [exist] where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Id.*

Reply 21.)

Regarding whether Schirle was fired or voluntarily resigned, there are fact issues precluding summary judgment on this element of Schirle's prima-facie case. Schirle states he was fired or told not to return to work while on medical leave, while DNS asserts Schirle voluntarily resigned and that DNS fully expected Schirle to return to work once his medical leave expired. (DNS Summ. J. App. 84, 88-89; Pl. Summ. J. App. 95-96, 109, 120, 142, 180-81, 222, 284, 345.)

But Schirle has failed to present evidence suggesting that he was treated differently than similarly situated Asian and Japanese employees. To support this element of his prima-facie case, Schirle points to the following "abundant evidence" (Pl. Resp. to DNS Summ. J. Mot. 41):

1. Bjorkman's e-mail to Schirle stating that Suetake did not like one of Schirle's proposed deals, which "reflect[ed] the Gaijin prejudice." (Pl. Summ. J. App. 91.)

2. Bjorkman's statement to Schirle that "'Gaijins are at a disadvantage and we will never be considered equal' in this company." (Pl. Summ. J. App. 222.)

3. Hernandez's and Kevin McGinnis's[15] declarations that Yada and Yano excluded Schirle from discussions with Suetake and treated Schirle with disrespect to undermine Schirle's authority. (Pl. Summ. J. App. 197, 210-11.)

4. Both McGinnis's and Sandy Burgan's[16] belief that they had been subjected to discrimination while employed by Sokudo USA and DNS, respectively, because they were not Asian or Japanese. (Pl. Summ. J. App. 211, 219.)

5. Schirle was replaced by Takimoto, Kawanishi, and Ota who were all Asian and Japanese. (Pl. App. 118, 282, 403.)

There is insufficient evidence to demonstrate a factual dispute as to whether Takimoto, Kawanishi, or Ota were similarly situated to Schirle when they assumed Schirle's position in DNS. *See, e.g., Jackson v. Dallas Cnty. Juvenile Dep't*, 288 Fed. Appx. 909, 911-12 (5th Cir. 2008); *Nzeda v. Shell*

---

[15]McGinnis was an account manager for Sokudo USA.

[16]Burgan was a sales manager for DNS.

Oil Co., 228 Fed. Appx. 375, 376 (5th Cir. 2007); *Martin v. Kroger Co.*, 65 F. Supp. 2d 516, 552 (S.D. Tex. 1999), *aff'd*, 224 F.3d 765 (5th Cir. 2000). Further, other than Schirle's bald assertion in his **brief**, there is no **evidence** that Kawanishi or Ota were indeed Asian and Japanese. Although their names suggest that they are Asian and Japanese, the Court cannot assume they are outside Schirle's race and national origin merely based on Schirle's unsworn statement in his brief. (Pl. Resp. to DNS Summ. J. Mot. 42.) Further, McGinnis's, Burgan's, and Schirle's subjective beliefs that they were treated less favorably than their Japanese and Asian co-workers is insufficient to provide this element of Schirle's prima-facie case. *See, e.g., Lowery v. Univ. of Houston—Clear Lake*, 82 F. Supp. 2d 689, 701 (S.D. Tex. 2000). Because there is no probative evidence to support the fourth element of Schirle's prima-facie case, the Court must grant DNS judgment as a matter of law on Schirle's discrimination claim.

E. RETALIATION: TITLE VII

Under Title VII, a prima-facie case of retaliation requires evidence that (1) the employee engaged in a protected activity, (2) the employer took an adverse employment action, and (3) there was a causal connection between participation in the protected activity and the adverse employment action. *See* 42 U.S.C.A. § 2000e-3(a) (West 2003); *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 331 (5th Cir. 2009); *Ameen v. Merck & Co.*, 226 Fed. Appx. 363, 376 (5th Cir. 2007). If the plaintiff establishes a prima-facie case of retaliation, the burden then shifts to the employer to articulate a legitimate, non-retaliatory reason for its actions. *See McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007). If the employer meets its burden of production, the plaintiff must then offer sufficient evidence to create a genuine dispute of material fact either (1) that the employer's reason is not true, but is a pretext for retaliation, or (2) that the employer's reason, while true, is only one

of the reasons for its conduct and another motivating factor was the plaintiff's protected activity. *See Smith v. Xerox Corp.*, 602 F.3d 320, 326-27 (5th Cir. 2010); *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004).

To show retaliation, Schirle relies on the following complaints and resultant adverse employment actions (Pl. Resp. to DNS Summ. J. Mot. 43-44):

1. Schirle's February 17, 2007, verbal complaint to Suetake about Yano, Yada, and Okamoto's harassment, which resulted in Suetake's removing European sales responsibilities from Schirle in April 2007. (Pl. Summ. J. App. 357-58.)

2. Schirle's May 2007 report to Bickett that he was being harassed because of his race and national origin, which resulted in Suetake's removing Schirle's responsibility for U.S. service business in June 2007. (Pl. Summ. J. App. 221, 359.)

3. Schirle's July 12, 2007, verbal statement to a DNS human-resources employee that he was being called a gaijin, which resulted in Takimoto's asking Schirle to give up his title of president on July 27. (Pl. Summ. J. App. 214, 221, 286-87.)

4. Schirle's August 13, 2007, written complaint to Bickett that he was being treated differently and less favorably because he was a gaijin, which resulted in his ultimate termination in September 2007. (Pl. Summ. J. App. 23-24.)

Schirle has failed to demonstrate a material dispute as to the existence of a causal connection between Schirle's verbal and written complaints and the adverse employment actions. Schirle seems to rely solely on temporal proximity to supply the causative link. This is insufficient to demonstrate a factual dispute and thus avoid summary judgment. *See Ajao v. Bed Bath & Beyond, Inc.*, 265 Fed. Appx. 258, 265 (5th Cir. 2008); *Siddiqui v. AutoZone W., Inc.*, 731 F. Supp. 2d 639, 660 (N.D. Tex. 2010) (Fitzwater, C.J.). This is especially true when there is no evidence that Suetake or Takimoto knew of Schirle's complaints to DNS human-resources employees. *See Amir v. El Paso Indep. Sch. Dist.*, 253 Fed. Appx. 447, 455 (5th Cir. 2007); *Hanks v. Shinseki*, No. 3:08-CV-1594-G, 2010 WL 3000835, at *6 n.39 (N.D. Tex. July 28, 2010) (Fish, Sr. J.). Indeed, Schirle admits his complaints

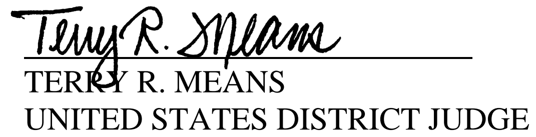
were not investigated. (Pl. Resp. to DNS Summ. J. Mot. 13; Pl. Summ. J. App. 274.) Schirle has brought forth no evidence to support a causative link between his complaints and DNS's adverse actions.

IV. CONCLUSION

Schirle has failed to raise a material fact dispute regarding his claims for defamation, business disparagement, conspiracy, employment discrimination, and retaliation. Thus, Defendants are entitled to judgment as a matter of law. Because Defendants are entitled to judgment as a matter

of law—even considering Schirle's evidence to which Defendants object or as to which they move to strike or exclude—there is no need to address Defendants' remaining motions and objections.[17]

SIGNED July 19, 2011.



TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

[17] Of course, the November 2011 trial setting is CANCELLED.