Affirmed and Memorandum Opinion filed September 12, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00826-CV

DAVID A. LOPEZ, Appellant

V.

EXXON MOBIL DEVELOPMENT COMPANY AND EXXON MOBIL CORPORATION, Appellees

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On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 2015-28744

M E M O R A N D U M O P I N I O N

In this age discrimination and retaliation suit under the Texas Commission on Human Rights Act ("TCHRA"), appellant David Lopez claims his former employer terminated his employment because of his age and because he engaged in protected conduct by reporting discrimination. The trial court granted summary judgment in the employer's favor. Lopez argues on appeal that the summary judgment was

improper as to both claims. He also argues that some of the employer's evidence was not timely authenticated and should not be considered.

Assuming Lopez met his prima facie burden of proof as to his age discrimination claim, Lopez's evidence does not raise a genuine issue of material fact that the employer's stated nondiscriminatory reason for the termination was pretextual or that age discrimination was a motivating factor in the decision. As to the retaliation claim, and again assuming Lopez met his prima facie burden of proof, his evidence does not raise a genuine issue of material fact that but for his complaint about perceived discrimination, the employer would not have terminated him when it did. Accordingly, we affirm the trial court's summary judgment.

Background

Lopez was employed by Exxon Mobil Development Company from July 2002 to April 2014.[1] In July 2002, Lopez was over forty years of age. He was fifty-six years of age when Exxon terminated his employment on April 15, 2014. During his employment, Lopez worked at various projects and locations throughout the world primarily as a "business lead," which is a managerial position. Lopez also had experience as a senior business manager, business manager, and project controls manager.

Lopez's claims at issue have their genesis in certain job assignments and his supervisors' responses to his complaints about those assignments. Specifically, in July 2012, Exxon relocated Lopez to Canada to work as "Business Services Lead for Emerging Projects." Lopez complained to Exxon's human resources department about this assignment. Lopez contends that there were no emerging projects on

[1] Appellees are Exxon Mobil Development Company and Exxon Mobil Corporation. Lopez asserts that Exxon Mobil Development Company is a wholly owned subsidiary of Exxon Mobil Corporation. For purposes of this appeal, we refer to both appellees as "Exxon."

which to work. Additionally, Lopez complained that he did not receive a "housing waiver" in connection with the assignment, which required his family to move from Texas to Calgary. According to Exxon, an expatriate employee may elect to retain a principal residence in his home country and waive a housing spendable deduction, which is an amount deducted from the employee's paycheck. In order to qualify for a waiver, the employee's principal residence must be located within fifty miles of his previous home country work location. Exxon contends that Lopez falsely represented that his principal residence was within fifty miles of his previous home country work location, when in fact it was over 175 miles away. Therefore, Exxon rejected Lopez's request for the waiver. Lopez believed he was entitled to the waiver under Exxon policy.

In September 2012, Lopez spoke with one of his senior supervisors, Don Moe, about his Canadian job assignment and Lopez's previous complaints to Exxon's human resources department, which included complaints about the housing waiver issue. In this meeting, Lopez contends, Moe engaged in "provocative, intimidating, and discriminatory verbal communications," including "unlawful ageist remarks and complaints." According to Lopez, Moe stated that "the higher-ups" were "very upset that an older guy like [Lopez] was complaining about stuff; that [Lopez] should know better, that [Lopez is] a senior guy; that maybe younger guys can get away with complaining, but as far as [Moe] knew [Lopez] was on nobody's fast track." Lopez also alleges that Moe said that "older guys like [Lopez] should just shut up, and . . . did not fit the mold." Lopez did not report Moe's comments to human resources, or to any of his superiors, at that time.

Approximately six months later, in March 2013, Lopez approached his functional supervisor, Irfan Khan, and for the first time reported Moe's age-related comments. Lopez complained to Khan of "discrimination relating to mobilization,

'Moe's verbal discrimination,' and . . . other issues in connection with his transfer to" Canada. Lopez was upset that Exxon denied the housing waiver. Lopez believed his Canadian work assignment was discrimination and the company was trying to "get him to fail." According to Lopez, Khan promised to look into Lopez's complaints.[2]

Another year passed and a manager on a different project asked Lopez to work for him. That project was slated to start in March or April 2014. In early April 2014, before moving to the new project, Lopez asked Khan about the status of his investigation into Lopez's March 2013 discrimination complaints. As related by Lopez, Khan said that he had spoken with Oswald Machado and Dave Kudlak, two of Lopez's senior managers, and that Machado and Kudlak were "annoyed about [Lopez's] persistence about the complaints" and "specifically stated to Khan that [Lopez] was 'old and stubborn.'"

Exxon terminated Lopez's employment on April 15, 2014. Exxon stated that it terminated Lopez due to consistently low performance rankings. The undisputed evidence indicates that, from 2009 to 2014, Lopez was ranked below at least 87% of his peers. Lopez admitted in his deposition that, "[a]s far as [he] [knew], [he] was always at the bottom" of the annual employee ranking, "since as far as [he] can remember."

Additionally, in August 2013, Exxon stated in Lopez's annual evaluation that Lopez had failed to develop or establish an estimating organization, which is a personnel staffing task. Lopez disputes that he was ever assigned to this task. As a result of Lopez's unsatisfactory evaluation, and his overall "relative performance

[2] In his deposition, Khan denied that he told Lopez he would "act on [Lopez's] complaint." For purposes of this summary judgment appeal, we accept Lopez's version of events. *See Wohlstein v. Aliezer*, 321 S.W.3d 765, 768 n.1 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

deficiencies," Exxon put Lopez on a Personal Improvement Plan, or "PIP," which was to run from October 21, 2013, to April 15, 2014. In a letter sent to Lopez, Exxon set forth performance objectives for the PIP and identified minimum expectations required for each area for improvement. According to the record, the objective of a PIP is to provide an employee who is not meeting performance expectations an opportunity to improve both his absolute and relative performance. Successful completion of a PIP requires the employee to not only accomplish the objectives set forth in the PIP document, but to also improve performance such that his relative ranking is likely to improve in the next ranking cycle. Khan testified that, while Lopez met the written objectives set forth in the PIP, his performance had not improved enough to increase his relative ranking.

Khan, Machado, and Kudlak all participated in the termination decision. Kudlak recommended Lopez's termination to John Plugge, who made the ultimate decision. Moe left Exxon's employ in November 2012 and was not involved in the termination decision.

Lopez sued Exxon, claiming age discrimination and retaliation in violation of the TCHRA.[3] Lopez exhausted his administrative remedies as to Exxon's decision to terminate his employment, which is the only adverse employment action at issue in this appeal.[4]

Exxon filed a traditional motion for summary judgment on Lopez's age discrimination and retaliation claims. As to the age discrimination claim, Exxon conceded that Lopez could meet his prima facie burden, but argued that no genuine issue of material fact exists as to whether Exxon's stated reason for Lopez's

[3] Lopez also asserted several common law claims, none of which he pursues on appeal.

[4] *See* Tex. Lab. Code §§ 21.201-.202.

termination was pretext for discrimination or whether Exxon's reason, even if true, was only one reason and age discrimination was another motivating factor. As to the retaliation claim, Exxon argued that Lopez could not establish a prima facie case of retaliation, or assuming Lopez could meet his prima facie burden, his claim failed nonetheless because there is no evidence that Lopez's protected conduct was the "but-for" cause of Exxon's decision to terminate his employment. After Lopez filed his response with accompanying evidence, and Exxon filed its reply, the trial court granted Exxon's motion without specifying the grounds on which it ruled.

Lopez now appeals the summary judgment as to the TCHRA claims, contending that: (1) Exxon's documentary evidence should not be considered on appeal because of Exxon's failure to timely authenticate the evidence; (2) a genuine issue of material fact exists as to whether Exxon's stated reason for termination was a pretext for discrimination or that discrimination was a motivating factor in the decision; and (3) a genuine issue of material fact exists as to each of the essential elements of Lopez's retaliation claim.

Standard of Review

We review a trial court's grant of summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). We accept as true all evidence favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in the nonmovant's favor. *Dias v. Goodman Mfg. Co., L.P.*, 214 S.W.3d 672, 675-76 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *see also Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006) (in de novo review of summary judgment, court considers all the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not).

The party moving for traditional summary judgment has the burden to show that no genuine and material fact issue exists and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). To be entitled to traditional summary judgment, a defendant must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997); *Haven Chapel United Methodist Church v. Leebron*, 496 S.W.3d 893, 899 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Once the defendant produces sufficient evidence to establish the right to summary judgment, the burden shifts to the plaintiff to come forward with competent controverting evidence raising a genuine issue of material fact. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995); *Haven Chapel*, 496 S.W.3d at 899. The evidence raises a genuine issue of material fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755, 757 (Tex. 2007) (per curiam).

Finally, when, as here, the trial court grants a motion for summary judgment without specifying the grounds, we will affirm the trial court's judgment if any of the independent grounds supporting the motion are meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872-73 (Tex. 2000).

Statutory Framework

Lopez sued Exxon under the TCHRA. *See* Tex. Lab. Code §§ 21.001 *et seq.* The TCHRA was enacted to, *inter alia*, "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments." *Id.* § 21.001(1). Title VII is a federal law that prohibits employers from discriminating

against employees on the basis of sex, race, color, national origin, and religion.[5] *See* 42 U.S.C. §§ 2000e *et seq*. Although Texas courts enforce the plain meaning of the TCHRA and binding Texas precedent as to this statute's interpretation, when there is no binding precedent, Texas courts also look to federal law for guidance in situations like today's case, in which the language of the TCHRA and the analogous federal statute contain the same or substantially similar language. *See* Tex. Lab. Code § 21.001; *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 505 (Tex. 2012); *Okpere v. Nat'l Oilwell Varco, L.P.*, --- S.W.3d ---, 2017 WL 1086340, at *5 n.6 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

As discussed in more detail below, the TCHRA prohibits employers from, among other things, discharging an employee because of age. Tex. Lab. Code § 21.051. The TCHRA also prohibits employers from retaliating against an employee who engages in certain protected activities. *Id.* § 21.055.

There are two alternative methods by which a plaintiff can establish discrimination or retaliation under the TCHRA. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 634 (Tex. 2012); *Quantum Chem.*, 47 S.W.3d at 476-77. First, an employee can offer direct evidence of the employer's discriminatory actions or words. *Garcia*, 372 S.W.3d at 634. "'Direct evidence of discrimination is evidence that, if believed, proves the fact of discriminatory animus without inference or presumption.'" *Coll. of the Mainland v. Glover*, 436 S.W.3d

[5] The TCHRA's antidiscrimination provision is substantively identical to its federal counterpart in Title VII, with the exception that Title VII does not prohibit discrimination based on age or disability. *See Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 475 (Tex. 2001). Federal law prohibits age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634, and prohibits disability discrimination under the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213. Federal analysis of these types of employment discrimination claims is generally similar to the approach under Title VII (and thus the TCHRA). *See Quantum Chem.*, 47 S.W.3d at 475 n.2.

384, 392 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (quoting *Jespersen v. Sweetwater Ranch Apartments*, 390 S.W.3d 644, 653 (Tex. App.—Dallas 2012, no pet.)).

Alternatively, because direct evidence of discrimination or retaliation is a "rarity" in employment cases, courts allow such claims to proceed with indirect or circumstantial evidence of discrimination or retaliation. *Russo v. Smith Int'l, Inc.*, 93 S.W.3d 428, 434 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). Under this second method, Texas courts follow the burden-shifting mechanism set forth by the Supreme Court in *McDonnell Douglas*. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); *Glover*, 436 S.W.3d at 392. Under the *McDonnell Douglas* framework, as applied to the TCHRA, the plaintiff is entitled to a presumption of discrimination if he meets the "minimal" initial burden of establishing a prima facie case of discrimination or retaliation. *Garcia*, 372 S.W.3d at 634.[6] In the age discrimination context, for example, a plaintiff may create an inference of impermissible discrimination by presenting evidence that he was (1) a member of the protected class (i.e., at least forty years old), (2) qualified for the position, (3) terminated from employment, and (4) replaced by someone outside the protected class. *See Kaplan v. City of Sugar Land*, --- S.W.3d ---, 2017 WL 1287994, at *3 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (citing *Garcia*, 372 S.W.3d at 632). A plaintiff offering such evidence raises a presumption of discrimination because the employer's challenged acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. *See Garcia*, 372 S.W.3d at 634. Once a plaintiff has established a prima facie case of discrimination or retaliation, the burden shifts to the defendant to produce evidence

[6] There is no prima facie case requirement in the text of the TCHRA; rather, the elements of a prima facie case are products of case law. *See Garcia*, 372 S.W.3d at 638.

of a legitimate, nondiscriminatory or nonretaliatory reason for the adverse employment action. *See M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 24 (Tex. 2000) (per curiam); *Okpere*, 2017 WL 1086340, at *2. If an employer moving for summary judgment proves as a matter of law a legitimate, nondiscriminatory or nonretaliatory reason for the adverse employment action, the burden then shifts to the employee to raise a genuine issue of material fact as to whether the employer's reason was a pretext for discrimination or retaliation. *See Willrich*, 28 S.W.3d at 24; *Okpere*, 2017 WL 1086340, at *2. As explained in more detail below, the plaintiff's burden at the third stage varies depending on whether the claim under consideration is one for discrimination or retaliation.

Analysis

Though Lopez challenges the trial court's summary judgment in a single issue, we consider each of his two claims in turn, after first addressing a preliminary evidentiary issue.

A. Summary Judgment Evidence

In his first argument, Lopez contends that Exxon failed to timely authenticate the evidence it cited in its summary judgment motion. Because the court could not consider that evidence, Lopez argues the trial court should have denied Exxon's motion. We agree that Exxon failed to timely authenticate the evidence, but disagree that the failure compelled the trial court to deny Exxon's motion.

Exxon filed its motion and set the motion for hearing by submission twenty-one days later. Exxon attached to its motion a number of exhibits, consisting mainly of deposition excerpts and business records, but did not timely authenticate the business records. The day after filing its motion, Exxon filed a "Supplement to Defendants' Motion for Summary Judgment," acknowledging the failure to include

a business records affidavit and attaching the affidavit to the supplement. Lopez did not object to Exxon's supplement or to the business records affidavit, but argues on appeal that Exxon had the burden to file, and obtain a ruling on, a motion for leave to file its affidavit late.[7]

Under the rules of civil procedure, a motion for summary judgment and any supporting affidavits must be filed and served at least twenty-one days prior to the hearing date. *See* Tex. R. Civ. P. 166a(c). Thus, Exxon's business records affidavit, filed twenty days prior to the submission date, was untimely. Summary judgment evidence may be filed late, but only with leave of court. *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996). When, as here, nothing appears in the record to indicate that the trial court granted leave to file summary judgment evidence late, we presume the trial court did not consider the untimely business records affidavit. *See id.* (citing *INA v. Bryant*, 686 S.W.2d 614, 615 (Tex. 1985)); *see also Tex. Airfinance Corp. v. Lesikar*, 777 S.W.2d 559, 561 (Tex. App.—Houston [14th Dist.] 1989, no writ) (stating that appellate court must presume trial court did not consider summary judgment movant's supplemental affidavit filed twelve days before order granting summary judgment was signed because affidavit was not timely filed and nothing in record indicated trial court granted leave to file). Further, although the business records themselves were timely filed, Exxon did not authenticate them. Thus, we agree with Lopez that we may not consider the

[7] For support, Lopez cites cases where there parties made no attempt to authenticate evidence in the trial court, and the reviewing courts permitted the objection to be raised for the first time on appeal. *See, e.g.*, *Blanche v. First Nationwide Mortg. Corp.*, 74 S.W.3d 444, 451 (Tex. App.—Dallas 2002, no pet.); *see also Haase v. Abraham, Watkins, Nichols, Sorrels, Agosto & Friend, L.L.P.*, 499 S.W.3d 169, 176 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). In *In re Estate of Guerrero*, 465 S.W.3d 693, 706-08 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (en banc), this court held that a complete absence of authentication is a defect of substance that is not waived by a party failing to object and may be urged for the first time on appeal. As Lopez's appellate evidentiary complaint presents an issue of a complete absence of authentication, we consider the argument. *Id.*

unauthenticated business records as part of the appellate record even though Lopez did not expressly raise that objection in response to the summary judgment motion. *See Guerrero*, 465 S.W.3d at 706-08.

As Exxon points out, however, Lopez cited in and attached to his timely summary judgment response one of Exxon's exhibits challenged on appeal—a copy of the PIP document. Accordingly, there is no dispute that the PIP document is part of the summary judgment record, and we may consider it. *See Wilson v. Burford*, 904 S.W.2d 628, 629 (Tex. 1995) (per curiam) ("Rule 166a(c) plainly includes in the record evidence attached either to the motion or to a response."). Other than the PIP document, however, we presume the trial court did not consider Exxon's untimely authenticated evidence, and we exclude those exhibits from our review. *Benchmark Bank*, 919 S.W.2d at 663; *Tex. Airfinance*, 777 S.W.2d at 561. But we include within our scope of review other timely and admissible evidence properly before the trial court when it ruled. For instance, both parties rely on deposition excerpts, which need not be authenticated. *See McConathy v. McConathy*, 869 S.W.2d 341, 341 (Tex. 1994) (per curiam).

Moving to Lopez's substantive appellate issues, we next consider whether summary judgment was proper based on the evidence timely submitted by both parties.

B. Age Discrimination Claim

Lopez's first claim under the TCHRA is that Exxon fired him because of his age. *See* Tex. Lab. Code § 21.051(1). The TCHRA protects individuals who are forty years or older from adverse employment decisions based on the employee's age. *See id.* § 21.101. Lopez was fifty-six years old when Exxon terminated his employment.

1. *Summary judgment arguments*

In Exxon's motion for summary judgment, it conceded that Lopez could meet his prima facie burden of proof because Lopez was: (1) over the age of forty, (2) qualified for his position, (3) terminated, and (4) replaced by someone younger than forty. Exxon then argued and presented evidence of its legitimate nondiscriminatory reason for terminating Lopez's employment, i.e., that Lopez was placed at the bottom of the company's employee ranking system for years. Exxon argued that it was entitled to summary judgment because Lopez could not establish that Exxon's nondiscriminatory reason for terminating his employment was false or that Exxon's decision was motivated by discrimination.

In response, Lopez argued that Exxon's "proffered reason for [his] termination is so suspect that it can be given no credence." Lopez contended that his overall ranking was belied by his "glowing" evaluations, that Exxon's ranking process is "100% . . . subjective," and that the PIP "was a sham." Lopez also argued that, even if Lopez's low ranking was a true reason for firing him, discrimination was another motivating factor. In support, Lopez pointed to instances when his supervisors made allegedly discriminatory statements about Lopez's age.

2. *Appellate arguments*

On appeal, the parties focus, as they did below, on whether Lopez can meet his burden of rebutting Exxon's nondiscriminatory reason for termination. Lopez reiterates his criticism of Exxon's "subjective" ranking system in an attempt to undermine the legitimacy of Exxon's termination decision, and points to the comments made by Lopez's supervisors as evidence that age discrimination motivated Exxon's decision.

In response, Exxon argues that Lopez was terminated because of his poor performance and low peer ranking, and that Lopez did not present the trial court with more than a scintilla of evidence showing that Exxon's reason for firing him was a pretext for age discrimination or that age discrimination was a motivating factor in its decision.

3. *Analysis*

a. Lopez offers no direct evidence of discrimination

As mentioned above, an employee can prove discrimination in one of two ways, and the first method is by offering direct evidence of discrimination. *See Garcia*, 372 S.W.3d at 634. In his brief, Lopez contends that he provided direct evidence of discrimination, identifying only the "old and stubborn" comment made by Machado and Kudlak. This comment is not direct evidence of discrimination. Direct evidence is evidence that, if believed, "proves the fact of discriminatory animus *without inference or presumption*." *Jespersen*, 390 S.W.3d at 653 (emphasis added). Because we would have to infer or presume that Exxon terminated Lopez because of his age, the comment is circumstantial evidence, not direct evidence. *Id.* at 653-54.

b. The *McDonnell Douglas* analysis

i. Prima facie case

In the absence of direct evidence of discrimination, we apply the *McDonnell Douglas* framework. Exxon conceded, for purposes of summary judgment, that Lopez could prove a prima facie case of age discrimination. Under *McDonnell Douglas*, the burden then shifted to Exxon to articulate a legitimate, nondiscriminatory reason for Lopez's termination. *See Dias*, 214 S.W.3d at 676.

ii. Legitimate, nondiscriminatory explanation

In its motion for summary judgment, Exxon proved that Lopez was ranked below at least 87% of his peers for at least the three-year period before relocating to Canada. Exxon asserts that this trend did not change when Lopez began working in Canada. Exxon also points to the PIP and contends that, while Lopez "minimally met" the PIP objectives, his performance did not improve enough to increase his comparative ranking. Based on Lopez's low ranking compared to his peers, Kudlak recommended that Lopez's employment be terminated, which occurred on April 15, 2014.

This showing satisfies Exxon's burden of producing a nondiscriminatory reason for its decision. *See Winters v. Chubb & Son, Inc.*, 132 S.W.3d 568, 578 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (employer's belief that an employee's performance is inadequate constitutes a legitimate, nondiscriminatory reason for termination). Exxon's burden is merely one of production, not persuasion. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *Russo*, 93 S.W.3d at 437-38. Lopez does not argue on appeal that Exxon failed to meet its burden.

iii. Lopez's arguments are insufficient to show pretext or that his age was a motivating factor

The burden shifted to Lopez to present evidence raising a genuine issue of material fact that Exxon's stated reason for his termination was pretext for discrimination, or that Exxon's explanation, even if true, was only one reason and discrimination was another motivating factor. *See Navy v. Coll. of the Mainland*, 407 S.W.3d 893, 899 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *see also* Tex. Lab. Code § 21.125(a) ("[A]n unlawful employment practice is established when the

complainant demonstrates that . . . age . . . was a motivating factor for an employment practice, even if other factors also motivated the practice.").

To raise a fact issue on pretext, the employee must present evidence "indicating that the non-discriminatory reason given by the employer is false or not credible, and that the real reason for the employment action was unlawful discrimination." *Chandler v. CSC Applied Techs., LLC*, 376 S.W.3d 802, 814 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (internal quotation omitted); *see also Little v. Tex. Dep't of Crim. Justice*, 177 S.W.3d 624, 632 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("[T]he United States Supreme Court has made it clear that it is not sufficient merely to show that the employer's reasons are false or not credible; the plaintiff must prove that the employer discriminated intentionally."). "A plaintiff can avoid summary judgment if the evidence, taken as a whole, creates a fact issue as to whether each of the employer's stated reasons was not what actually motivated the employer *and* creates a reasonable inference" that the employer acted with the intent to discriminate. *Chandler*, 376 S.W.3d at 814 (internal quotation omitted).

Lopez did not meet his burden for several reasons.

The first reason relates to Lopez's performance ranking. Lopez did not show that Exxon's reason underlying his termination is false. As Exxon points out, Lopez admitted in his deposition that he was consistently placed in the bottom third of employee performance rankings "[s]ince as far as [he] can remember." Lopez's recollection was further buttressed by other testimony and evidence establishing that Lopez had low rankings "for the four or five years prior to his separation," a time period preceding the first alleged instance of age discrimination in September 2012.

While acknowledging his overall performance ranking, Lopez attacks the ranking process generally. However, his arguments are, in all material respects, subjective and conclusory on his part. Citing some favorable performance reviews

over the years, Lopez argues that "it is simply unbelievable and incredulous that [Lopez] could have performed so superlatively in his job, and yet supposedly have had poor rankings for years." Lopez's reliance on his own subjective beliefs and conclusory characterizations of his performance is insufficient to raise a fact question as to the falsity of Exxon's stated reason for termination. "An employee's subjective belief that his employer has given a false reason for the employment decision is not competent summary judgment evidence." *Id.*; *see also Winters*, 132 S.W.3d at 578 ("'Even an incorrect belief that an employee's performance is inadequate constitutes a legitimate, non-discriminatory reason.'") (quoting *Little v. Republic Refining Co.*, 924 F.2d 93, 97 (5th Cir. 1991)); *Coastal Transp. Co. v. Crown Cent. Petroleum Corp*., 136 S.W.3d 227, 232 (Tex. 2004) (stating that even unobjected-to conclusory testimony does not raise a fact issue).

Moreover, simply providing examples of favorable performance reviews, as Lopez does, is insufficient to raise a genuine issue of material fact as to whether Exxon's reliance on Lopez's poor overall ranking was false or pretextual. *See Navy*, 407 S.W.3d at 903 ("But providing good evaluations from other students does not demonstrate that the poor evaluations that caused Mainland's concerns were false."); *Donaldson v. Tex. Dep't of Aging & Disability Servs.*, 495 S.W.3d 421, 436 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (plaintiff's evidence refuting alleged performance issues amounted simply to a "subjective belief that [the employer] gave a false reason for its employment decision," which is not competent summary judgment evidence). Exxon does not dispute that Lopez received positive feedback at various times during his employment tenure. However, according to the record, an employee's ranking is a product of overall performance and incorporates any favorable reviews Lopez received during the relevant time period. Lopez does not dispute this but merely emphasizes those instances when he received positive

feedback. Lopez offered no evidence controverting Exxon's argument and proof that the effects of all Lopez's reviews are subsumed within his overall ranking. *See Grimes v. Reynolds*, 252 S.W.3d 554, 558 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (once defendant negates an element of a plaintiff's cause of action, the burden shifts to the plaintiff to come forward with competent controverting evidence raising a genuine issue of material fact); *Delcor USA, Inc. v. Tex. Indus. Specialties, Inc.*, No. 14-11-00048-CV, 2011 WL 6224466, at *4 (Tex. App.—Houston [14th Dist.] Dec. 13, 2011, no pet.) (mem. op.) ("Delcor did not respond with any controverting evidence and failed to raise a genuine issue of material fact.").

Lopez also assails Exxon's ranking process as "highly subjective" and contends that "Exxon's so-called ranking system is a disingenuously designed and utilized mechanism to enable Exxon . . . to claim justification for" impermissible employment actions. Again, these are subjective complaints and speak to no more than a "wholly innocuous" fact. *Gold v. Exxon Corp.*, 960 S.W.2d 378, 384 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

Next, Lopez cites age-related remarks by his supervisors as circumstantial evidence that his age was a motivating factor in the termination decision. On this record, however, Lopez's reliance on the cited statements or stray remarks is insufficient to raise a fact question as to whether age discrimination motivated Exxon in its termination decision. Here, Lopez points to two alleged instances as evidence of Exxon's discrimination: Moe's September 2012 comments, referring to Lopez as "an older guy" and a "senior guy"; and Machado's and Kudlak's remark that Lopez was "old and stubborn," as relayed to Lopez by Khan in April 2014.[8]

[8] Though Lopez acknowledges that Moe's comments are not themselves actionable, as they would be time-barred, he contends they are additional circumstantial evidence relevant to his discrimination claim.

The Supreme Court of Texas has held that statements and remarks may serve as evidence of discrimination only if they are "(1) related to the employee's protected class, (2) close in time to the employment decision, (3) made by an individual with authority over the employment decision, and (4) related to the employment decision at issue." *AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 593 (Tex. 2008) (per curiam).

Under the *AutoZone* test, Moe's statements do not defeat Exxon's entitlement to summary judgment. Moe was not involved in the decision to terminate Lopez's employment. Additionally, Moe's comments pre-dated Lopez's termination by eighteen months and did not relate to the employment decision at issue. *See id.* Thus, Moe's comments are nothing more than stray remarks and are insufficient to raise a fact question as to pretext. *See Willrich*, 28 S.W.3d at 25 ("Stray remarks, remote in time from [the plaintiff's] termination, and not made by anyone directly connected with the [employment] decisions, are not enough to raise a fact question about whether [the defendant's] reason for terminating [the plaintiff] was pretextual."); *see also Chandler*, 376 S.W.3d at 816 ("Stray remarks made in the workplace by non-decision makers, without more, are not evidence of the employer's intent to discriminate.") (internal quotation omitted).

Similarly, Machado's and Kudlak's "old and stubborn" comment is insufficient to defeat summary judgment on Lopez's age discrimination claim.[9] While the comment occurred close in time to Lopez's termination and Machado and Kudlak were involved in that decision, the remark does not suggest that Lopez's age was a factor in his ultimate discharge from the company. *See AutoZone*, 272 S.W.3d at 593; *compare McKenna v. Baylor Coll. of Med.*, No. 01-15-00090-CV, 2016 WL

[9] Exxon argued in its motion for summary judgment that Machado's and Kudlak's "old and stubborn" comment was inadmissible hearsay, but Exxon does not re-urge that argument here. Accordingly, we consider the comment for purposes of this appeal, assuming its admissibility.

1714870, at *7 (Tex. App.—Houston [1st Dist.] Apr. 28, 2016, no pet.) (mem. op.) (isolated remark that employee was "old school" is insufficient to raise a fact issue regarding whether employer's stated reason for termination was pretext for discrimination or whether age was motivating factor in decision), *with Jefferson County v. Davis*, No. 14-13-00663-CV, 2014 WL 4262184, at *6-7 (Tex. App.—Houston [14th Dist.] Aug. 28, 2014, pet. denied) (mem. op.) (noting that weekly references to employee's age supported an inference of age discrimination and concluding that those comments, in addition to other direct evidence, supported jury's finding that age was a motivating factor in employee's termination). Lopez does not direct us to summary judgment evidence that this particular comment was related to the employment decision at issue.

Rather, as Kudlak testified, he believed that Lopez "[d]idn't take direction well, didn't provide direction well, [and] didn't work well within his peer group." According to Kudlak, while Lopez was capable of performing his duties, "it always came with an attitude, one that was not supportive of the general interest." Khan also testified that Lopez did not know "when to stop chasing an issue even [when] there were clear policies provided to him," and "just did not understand . . . things and he would be wasting a lot of [Exxon's] time on an issue which was already settled." When considered in context, as it must be, the "old and stubborn" comment is not sufficient evidence giving rise to a reasonable inference that age was a motivating factor in Exxon's decision to terminate Lopez's employment, but rather was an expression of Lopez's supervisors' belief that Lopez was inflexible. *Accord, e.g.*, *AutoZone*, 272 S.W.3d at 592-93 (evidence cannot be considered in isolation but must be viewed in proper context with other evidence).

Finally, Lopez was already within the protected age class when he began working for Exxon in 2002, which undermines Lopez's contention that age was a

motivating factor in the company's termination decision. *See, e.g.*, *Wal-Mart Stores, Inc. v. Bertrand*, 37 S.W.3d 1, 12 (Tex. App.—Tyler 2000, pet. denied) ("[I]t is inferred that when the same company hires someone in a protected class, such as age, discrimination is not involved in that employee's termination."); *see also Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991) ("[C]laims that employer animus exists in termination but not in hiring seem irrational. From the standpoint of the putative discriminator, it hardly makes sense to hire workers from a group one dislikes . . . only to fire them once they are on the job.") (internal quotations omitted). The present record does not give rise to a reasonable inference that Lopez's age was a motivating reason for his termination when Exxon knew he was within a protected age group when he began his employment.

For the foregoing reasons, Lopez failed to raise a genuine issue of material fact as to whether Exxon's stated reason for termination was pretext for discrimination, either because the reason was false or because discrimination was nevertheless a motivating factor in Exxon's decision. Reasonable and fair-minded jurors could not differ in their conclusions in light of all of the summary judgment evidence. *See Goodyear Tire*, 236 S.W.3d at 755, 757. Accordingly, we hold that the trial court did not err in granting summary judgment on Lopez's age discrimination claim.

C. Retaliation claim

Lopez's second claim is that Exxon terminated his employment because he complained to Khan about age discrimination. *See* Tex. Lab. Code § 21.055. Under the TCHRA, an employer may not retaliate against an employee who engages in any of the following protected activities: opposing a discriminatory practice; making or filing a charge; filing a complaint; or testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing. *Id.* To establish a prima facie

case of retaliation, a plaintiff must show that: (1) he engaged in one or more protected activities, (2) an adverse employment action occurred, and (3) there exists a causal link between the protected activity and the adverse action. *See San Antonio Water Sys. v. Nicholas*, 461 S.W.3d 131, 137 (Tex. 2015). If the employee meets his prima facie burden, the employer may present evidence of a nonretaliatory reason for the employment action. *See Navy*, 407 S.W.3d at 900.

To reach a jury, the employee must then rebut the employer's explanation with evidence raising a genuine issue of material fact that the employer's proffered reason is false and that engaging in the protected activity was the but-for cause of the adverse employment action. *See Barnes v. Tex. A&M Univ. Sys.*, No. 14-13-00646-CV, 2014 WL 4915499, at *3 (Tex. App.—Houston [14th Dist.] Sept. 30, 2014, no pet.) (mem. op.) (once employer meets its burden, presumption raised by prima facie case is rebutted and employee has burden of proving that employer's proffered reason is pretext and that engaging in the protected activity was the but-for cause of the adverse employment action); *see also Navy*, 407 S.W.3d at 901; *Feng v. Sabic Americas, Inc.*, No. 14-07-00699-CV, 2009 WL 679669, at *2 (Tex. App.—Houston [14th Dist.] Mar. 17, 2009, pet. denied) (mem. op.); *Pineda v. United Parcel Serv., Inc.*, 360 F.3d 483, 487 (5th Cir. 2004) (op. on reh'g) (citing *Long v. Eastfield Coll.*, 88 F.3d 300, 305 n.4 (5th Cir. 1996)). Showing but-for causation requires evidence that the termination would not have occurred when it did but for the protected activity. *See Navy*, 407 S.W.3d at 901; *Long*, 88 F.3d at 305 n.4; *see also Tex. Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 636 (Tex. 1995) (setting forth but-for causation standard in whistleblower actions and similar cases: "the employee's protected conduct must be such that, without it, the employer's prohibited conduct would not have occurred when it did"); *Feng*, 2009 WL 679669, at *2, 11; *Pineda*, 360 F.3d at 487. "[N]o liability for unlawful

retaliation arises if the employee would have been terminated even in the absence of the protected conduct." *Long*, 88 F.3d at 305 n.4.

1. *Summary judgment arguments*

Exxon moved for summary judgment on Lopez's retaliation claim, arguing that: (1) Lopez cannot establish a prima facie case of retaliation because the requisite causal link is lacking; and (2) even assuming Lopez could meet his prima facie burden, his retaliation claim still fails because he cannot show that his protected activity was the "but-for" cause of Exxon's termination decision.

In response, Lopez argued generally that his "complaints of discrimination" made "at various times" constituted protected activity.[10] However, he did not argue substantively why the evidence he presented met his prima facie burden as to the causal link between his protected activity and his termination. Instead, Lopez argued that Moe's remarks reported in March 2013 show discriminatory animus and may be imputed to Exxon, even though Moe was not the decision-maker and was no longer employed by Exxon at the time Lopez was terminated. Lopez also raised several attacks on the PIP and performance ranking system, characterizing them as "fraudulent" and "wholly subjective." Lopez did not apply the but-for causation standards to any summary judgment evidence or explain why the evidence he presented was sufficient to meet his rebuttal burden and overcome summary judgment as to but-for causation.

2. *Appellate arguments*

On appeal, the parties dispute whether Lopez rebutted Exxon's nonretaliatory reason for firing him. Lopez argues that genuine issues of material fact exist as to

[10] Lopez did not argue that his April 2014 request for a status update as to his March 2013 complaint constituted protected activity.

"each of the essential elements of [his] retaliation claim," focusing almost exclusively on his prima facie case. Exxon, in turn, argues that Lopez's reliance on the temporal proximity between his protected activity and subsequent termination, and on stray remarks, is insufficient to raise a fact question as to but-for causation.

3. *Analysis*

As with Lopez's discrimination claim, we analyze Lopez's retaliation claim under the *McDonnell Douglas* framework because there is no direct evidence of retaliation.

a. Lopez's prima facie case and Exxon's burden of production

On appeal, Exxon concedes that Lopez can state a prima facie case of retaliation. To satisfy its burden of stating a nonretaliatory reason for its termination decision, Exxon again argues that Lopez was terminated due to "well-known performance issues and his chronic poor ranking relative to his peers." As we concluded above, this satisfies Exxon's burden of production.

b. Lopez failed to rebut Exxon's nonretaliatory explanation

No one disputes that Exxon terminated Lopez's employment on April 15, 2014. In response to Exxon's evidence that Lopez was terminated due to performance issues and his low peer ranking, Lopez was required to identify evidence raising a genuine issue of material fact that his protected activity was the but-for cause of Exxon's termination decision. *See Barnes*, 2014 WL 4915499, at *3 (once employer meets its burden, presumption raised by prima facie case is rebutted and employee has burden of proving that employer's proffered reason is pretext and that engaging in the protected activity was the but-for cause of the adverse employment action); *see also Navy*, 407 S.W.3d at 901; *Feng*, 2009 WL 679669, at *2; *Pineda*, 360 F.3d at 487; *Long*, 88 F.3d at 305 n.4.

Here, Lopez agrees that Exxon's reason is factually correct—his ranking was in bottom third. If that is in fact the reason for his termination, then he cannot establish but-for causation and his retaliation claim fails. *See Kingsaire, Inc. v. Melendez*, 477 S.W.3d 309, 313 (Tex. 2015) (if employee's termination was required by uniform enforcement of reasonable policy, it cannot be case that termination would have occurred when it did but for employee's assertion of compensation claim or other protected conduct); *Long*, 88 F.3d at 305 n.4.

However, Lopez contends that despite the factual accuracy of his rankings, his performance was not the real reason for his termination; the real reason was because he complained of age discrimination.[11] In the retaliation context, courts have identified circumstantial evidence a plaintiff may rely upon to prove but-for causation between the protected activity and the alleged retaliatory conduct, such as an employer's expression of a negative attitude toward the conduct at issue, an employer's discriminatory treatment of the employee compared with similarly situated employees, an employer's failure to adhere to established company policy, and evidence that the employer's stated reason for termination was false. *See Kingsaire*, 477 S.W.3d at 312; *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 451 (Tex. 1996). Courts also consider the temporal proximity between the protected activity and the alleged retaliatory action, but temporal proximity alone is insufficient to establish but-for causation. *See, e.g., Strong v. Univ. Healthcare Sys*., 482 F.3d 802, 807-08 (5th Cir. 2007) (holding that temporal proximity between protected activity and termination of employment is not enough to raise a fact issue as to but-for causation requirement in retaliation claim); *Pineda*, 360 F.3d at 489-90; *Feng*, 2009 WL 679669, at *11.

[11] It is not clear from Lopez's appellate brief that he is challenging but-for causation at the rebuttal stage of the analysis, as his argument focuses on the causal link necessary to support his prima facie case. Exxon challenged the evidence of causation at both stages in its motion for

We first examine the evidence of but-for causation as to Lopez's initial age discrimination complaint to Khan in March 2013 about Moe's statements made in September 2012. Both parties agree that Lopez's complaints about Moe's alleged ageist comments constituted protected activity under the TCHRA. Tex. Lab. Code § 21.055(1). However, this complaint is too far removed from Lopez's April 2014 termination to raise a fact issue on but-for causation. *See, e.g.*, *Gonzales v. Dupont Powder Coatings USA, Inc.*, 546 F. App'x 378, 379 (5th Cir. 2013) (per curiam) ("We agree that the passage of six months here is too great a delay to support a causal connection."); *Perry v. Univ. of Houston*, No. 01-08-00807-CV, 2009 WL 3152166, at *5 (Tex. App.—Houston [1st Dist.] Oct. 1, 2009, no pet.) (mem. op.) (temporal proximity between a protected act and an adverse employment action may be evidence of a causal connection "when they are separated by weeks, as opposed to months or years").[12]

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summary judgment: (1) Lopez could not establish a prima facie case; and (2) even if he could, his claim still failed for lack of but-for causation and thus did not rebut Exxon's nonretaliatory reason for the termination decision. When a summary judgment appellant does not challenge all independent grounds asserted below on which the judgment could be based, the appellate court may affirm the trial court's summary judgment ruling for that reason alone. *See Davis v. Galagaza*, No. 14-16-00362-CV, 2017 WL 1450582, at *2 (Tex. App.—Houston [14th Dist.] Apr. 18, 2017, no pet.) (mem. op.) (in summary judgment context, appellant must challenge and negate all independent grounds on appeal); *Heritage Gulf Coast Props., Ltd. v. Sandalwood Apartments, Inc.*, 416 S.W.3d 642, 653 (Tex. App.—Houston [14th Dist.] 2013, no pet.). Moreover, whether Lopez met his prima facie case is not relevant because Exxon has conceded that point for purposes of the appeal. Nonetheless, we will construe Lopez's brief liberally and address whether he has met the more substantial burden of demonstrating but-for causation between the protected activity and his termination. *See Long*, 88 F.3d at 305 n.4.

[12] *Gonzales* and *Perry* analyzed temporal proximity as part of the plaintiff's prima facie case, which requires a "causal link" between the protected activity and adverse employment action. As the Fifth Circuit has noted,

> the ultimate issue in an unlawful retaliation case—whether the defendant discriminated against the plaintiff *because* the plaintiff engaged in conduct protected by Title VII—seems identical to the third element of the plaintiff's prima facie case—whether a *causal* link exists between the adverse employment action and the protected activity.

Lopez additionally contends that he engaged in protected activity in April 2014 when he "persisted in complaining to Khan . . . about complaints of [age] discrimination." The record does not show that Lopez raised any new allegations or complaints of age discrimination during that meeting, but he requested a status update on Khan's investigation into Lopez's March 2013 complaint. Whether Lopez's request for a status update from Khan constitutes protected activity on the present record is unclear, but the parties have not briefed the question. Assuming without deciding that Lopez's April 2014 status update request constitutes a protected activity, Lopez did not raise a genuine issue of material fact that Exxon would not have terminated him but for his request. We reach this conclusion for several reasons.

First, to the extent Lopez attempts to show but-for causation by relying on the temporal proximity between his April 2014 conversation with Khan and his termination, Lopez did not raise this argument in his summary judgment response. He cannot seek to reverse summary judgment on a ground not raised below. *See Pinnacle Anesthesia Consultants, P.A. v. St. Paul Mercury Ins. Co.*, 359 S.W.3d 389, 398 (Tex. App.—Dallas 2012, pet. denied) (citing Tex. R. App. P. 33.1(a); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979)). In any event, the fact that Lopez's termination occurred shortly after his April 2014 conversation with Khan is insufficient to raise a fact issue on but-for causation. *See Feng*, 2009 WL 679669, at *11 (temporal proximity alone is insufficient to raise a fact issue as to but-for causation requirement in retaliation claim) (citing *Strong*, 482

Long, 88 F.3d at 305 n.4. The court went on to explain that the standards of proof applicable to these inquiries differ significantly, and the standard of proof for but-for causation is more stringent. *Id.* Accordingly, as courts have held that a months-long period of time between a plaintiff's protected activity and subsequent termination is too long to support a causal link for purposes of the prima facie case, we hold that the same extended period of time is insufficient to raise a fact question as to but-for causation.

F.3d at 807-08). On this record, the timing of Lopez's request for a status update does not create a genuine issue of material fact that Lopez's termination would not have occurred when it did but for his request. The subject of his request was the conversation he had with Khan about Moe's comments over one year earlier.[13] This is not sufficient to rebut Exxon's stated reasons for Lopez's termination.

Second, Lopez argues that we nevertheless should consider the temporal proximity of his April 2014 request for follow-up relative to his termination, and that the timing between the two events, "coupled with Machado and Kudlak's ageist remarks," provides a causal link between his protected activity and Lopez's termination.[14] Again, Lopez did not argue in his summary judgment response that Machado's and Kudlak's remarks, coupled with their timing in relation to his termination, constituted sufficient evidence of but-for causation.

In any event, Lopez cites a case stating that temporal proximity may be evidence of a causal connection when a person with input into the employment decision was aware of the protected activity. *See Crutcher v. Dallas Indep. Sch. Dist.*, 410 S.W.3d 487, 496 (Tex. App.—Dallas 2013, no pet.). *Crutcher* is inapplicable here, for several reasons. The holding on which Lopez relies related to whether the plaintiff in *Crutcher* had established her prima facie case. *Id.* at 496-97. As we note above, a plaintiff's burden to establish a causal link for his prima facie case differs from his burden to establish but-for causation in rebutting his employer's nonretaliatory explanation. *See Long*, 88 F.3d at 305 n.4. More important, Lopez's brief, and the record, suggest that Machado and Kudlak voiced

[13] In his brief, Lopez suggests that he pressed Khan for updates during the time period between March 2013 and April 2014. However, Lopez offered no summary judgment evidence identifying the dates, or the substance, of those purported conversations.

[14] Lopez cites to "admissions by Khan that Machado and Kudlak were annoyed by [Lopez's] persistent complaints of discrimination and that [Lopez] was 'old and stubborn.'"

their allegedly retaliatory remarks *prior* to Lopez's 2014 follow-up meeting with Khan. Specifically, Lopez states that, when he spoke to Khan in April 2014, Khan told Lopez that "he had talked to Oswald Machado and Dave Kudlak recently about [Lopez's] discrimination complaints." This indicates a prior conversation, which cannot be evidence of Kudlak's and Machado's knowledge of Lopez's follow-up meeting with Khan, assuming arguendo that Lopez's request for a status update during the meeting is a protected activity. *Cf. Crutcher*, 410 S.W.3d at 496.

According to the record, Kudlak recommended to Plugge in late February or early March 2014 that Exxon terminate Lopez. This undermines Lopez's argument that he would not have been terminated but for his request for a status update from Khan in April 2014. *Accord Brewer v. Coll. of the Mainland*, 441 S.W.3d 723, 732 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (evidence showed that plaintiff's adverse employment action came before—and thus was not causally related to—her later protected activity). Lopez did not controvert this testimony and there exists no other evidence that had Lopez not requested a status update in April 2014, Exxon would not have terminated him. *See Pineda*, 360 F.3d at 490. Those who knew of Lopez's March 2013 discrimination complaint and were involved in the recommendation to terminate in fact made the recommendation before Lopez's April 2014 request to Khan for a status update. Further, there is no evidence that Plugge knew of Lopez's April 2014 request for a status update when he accepted the recommendation to terminate Lopez's employment.

Third, Lopez points to the fact that one of Exxon's business managers asked Lopez to work on a new project to begin in March 2014.[15] Lopez asks rhetorically

[15] Exxon contends this argument was waived below by the failure to raise it. We disagree. While stated in the factual background, and not the argument section, of his response to Exxon's motion, Lopez stated, "the mere fact that [Exxon supervisory personnel] were reassigning Lopez to a new challenging position . . . is evidence of lack of the required justification to terminate him."

why he would be given the opportunity in March to continue working, if Exxon believed Lopez's performance was so deficient as to ultimately warrant termination in April. But, as with his discrimination claim, simply providing examples of other personnel within Exxon who held favorable views of Lopez is insufficient to raise a fact issue as to whether Exxon's stated reason for firing him is false or that Lopez's request for a status update from Khan was the but-for cause of his termination. *See Navy*, 407 S.W.3d at 903; *Donaldson*, 495 S.W.3d at 436. At bottom, in the absence of evidence raising a fact question as to causation, Lopez's "generalized assertions do not raise a fact issue as to pretext." *Crutcher*, 410 S.W.3d at 498 (citing *Coastal Transp.*, 136 S.W.3d at 232). As mentioned, Lopez's summary judgment evidence does not raise a genuine issue of material fact that Exxon's stated reason was pretextual.

We have carefully reviewed all of the summary judgment evidence in the light most favorable to Lopez, crediting evidence favorable to Lopez if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *See Mack Trucks*, 206 S.W.3d at 582; *Dias*, 214 S.W.3d at 675-76. Based on this review, we have determined that reasonable and fair-minded jurors could not conclude that Exxon's proffered reason for Lopez's termination was a pretext or that Lopez's engaging in the alleged protected activity was the but-for cause of his employment termination. Therefore, the trial court did not err in granting Exxon's motion for summary judgment on Lopez's retaliation claim.

Conclusion

For the above reasons, we affirm the trial court's summary judgment.

/s/ Kevin Jewell
Justice

Panel consists of Justices Boyce, Donovan, and Jewell.