REVISED December 7, 2017

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-31247

United States Court of Appeals
Fifth Circuit
FILED
November 28, 2017
Lyle W. Cayce
Clerk

DERRICK ALLEN,

Plaintiff–Appellant,

v.

ENVIROGREEN LANDSCAPE PROFESSIONALS, INCORPORATED,

Defendant–Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:14-CV-506

Before JONES, SMITH, and PRADO, Circuit Judges.

PER CURIAM:*

Derrick Allen appeals the summary judgment dismissal of his retaliation claim based on Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and the denial of his motion for reconsideration of the judgment. For the following reasons, we AFFIRM.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I. BACKGROUND

A. Factual Background

Plaintiff–Appellant Derrick Allen, an African-American male, was hired by Defendant–Appellee Envirogreen Landscape Professionals, Inc. ("Envirogreen") on September 17, 2010. Envirogreen is a landscaping company that provides services in Baton Rouge and other cities. Allen left his supervisor job that paid $15 per hour at another landscaping company, White Oak Plantation, for a position at Envirogreen. Allen interviewed with Envirogreen's owner, Mark Willie, and landscape architect, Todd Griffin. He was given the title of "supervisor" but never explicitly told the scope of his duties. According to Allen, he and Willie were supposed to review an employment agreement to set his exact duties and terms of employment, but Willie "continued to put that off." Allen claims that Willie agreed to pay him $15 per hour.

Allen describes his work as "doing pretty much a little bit of everything, not just -- little to none if so supervising but mainly just routine labor." Despite the agreed upon pay rate of $15 per hour, Allen's first paycheck reflected a rate of $14 per hour. At the time, Allen did not know whether other employees were being paid $14 or $15 per hour. After receiving his paycheck, Allen complained to both Willie and Griffin regarding his pay rate. He also complained to them about Envirogreen's failure to pay overtime.

After he complained about his pay, Allen believes that Envirogreen retaliated against him by placing him in "inappropriate working conditions." According to Allen, he was sent to jobs where he was not familiar with the work, and check on jobs that he didn't initiate. Altogether, Allen reports working between six and eight jobs for Envirogreen, and he alleges that all of them involved inappropriate working conditions since he complained to Willie. Allen inferred that Envirogreen's motive in assigning him to inappropriate working conditions was based on his wage and overtime complaint, not his

race. When asked if race had something to do with his adverse treatment by Envirogreen, Allen responded that race was a factor, because the field workers were predominantly black, but his case was based "on retaliation, not race."

Griffin terminated Allen on December 31, 2010, soon after his 90-day evaluation. According to Allen, he requested an evaluation so he could potentially request a pay increase, but he was fired instead. Griffin told him that "it was apparent that . . . Allen was not satisfied with the way things were going on the job." Willie justified Allen's termination because Allen's employment was "not working out," Allen had poor job performance, and Allen "did not have skills originally agreed upon." Allen reported that he never received a complaint from his employer regarding his performance, nor did he receive any verbal or written warning before he was terminated. Allen thought that he was terminated as retaliation for complaining about his wages, not his race. Envirogreen eventually compensated Allen for "back wages" as a result of a payroll audit.

B. Procedural History

On May 27, 2011, Allen filed a charge of discrimination with the Louisiana Commission on Human Rights ("LCHR") and the Equal Employment Opportunity Commission ("EEOC"). Allen's complaint alleged that he was discriminated against based on race, and retaliated against in violation of LSA R.S. 23:301 et seq. and Title VII of the Civil Rights Act of 1964. Specifically, he complained that "as a supervisor . . . he was not render[ed] the opportunities and training that was agreed upon, he did not get paid the agreed upon wage of $15 an hour, and he worked over 40 hours a week on several occasions and did not get paid overtime wages because of his Race, and he was assigned revolting assignments and fired because of his race and opposition to his employers unlawful practices."

After exhausting his administrative remedies,[1] Allen sued Envirogreen pro se alleging retaliation in violation of Title VII of the Civil Rights Act of 1964. Allen's complaint argues that he informed Envirogreen of its discriminatory employment practices, such as "wages paid, hours of work, and working conditions." Allen claims that as a result, Envirogreen took adverse action by withdrawing his initial salary agreement, not paying overtime, placing Allen in "inappropriate working conditions," and terminating him. Allen did not mention race in his complaint. Since filing his complaint, he repeatedly maintained that his case is "based on [r]etaliation not race, but race surely is a component."

Envirogreen filed a motion for summary judgment arguing that Allen failed to establish a prima facie case for his retaliation claim under Title VII. Allen filed a sur-reply in response, arguing that "he was discriminated against based on race" and that he was treated differently than a similarly situated white employee, Rick, with respect to job assignment, wages, and hours. No details are provided about Rick other than the fact he is a white supervisor at Envirogreen. After a review of the record, the district court found that no reasonable juror could conclude from the uncontested facts that Allen engaged in activity protected by Title VII. The court reasoned that Allen's legal arguments were unsupported, and his factual assertions were conclusory. The district court granted Envirogreen's motion for summary judgment and dismissed Allen's claims with prejudice on May 3, 2016.

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[1] The LCHR issued a finding that the evidence did not support Allen's allegations of employment discrimination. After conducting a substantial weight review of the finding, the EEOC concurred, and "determined that no appropriate evidence was overlooked or misinterpreted in evaluating [Allen's] charge." The EEOC issued a determination letter on May 29, 2014, notifying Allen of his right to bring a private lawsuit within 90 days of receiving the letter.

On May 16, 2016, Allen filed a motion for reconsideration of the judgment invoking Rule 59. He first asserted that the court made a mistake of law in holding that Title VII does not protect "wage issues." He also argued that the court disregarded evidence that supported his claim of discrimination, specifically his charge of discrimination filed with the EEOC. And Allen contended that Envirogreen provided no support for its claim that its actions were not racially motivated. The district court denied Allen's motion on November 21, 2016. Allen timely appealed both the district court's grant of summary judgment in favor of Envirogreen and the court's denial of his motion for reconsideration.

II. DISCUSSION

"We review a district court's grant of summary judgment *de novo*, viewing all facts and drawing all inferences in a light most favorable to the non-moving party." *Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422, 425–26 (5th Cir. 2017) (citation omitted). Summary judgment is proper when 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 genuine dispute of material fact exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Where, as here, 'the burden at trial rests on the non-movant, the movant must merely demonstrate an absence of evidentiary support in the record for the non-movant's case.'" *Alkhawaldeh*, 851 F.3d at 425–26 (quoting *Byers v. Dall. Morning News, Inc.*, 209 F.3d 419, 424 (5th Cir. 2000)). "Once a party meets the initial burden of demonstrating that there exists no genuine issue of material fact for trial, the burden shifts to the non-movant to produce evidence of the existence of such an issue for trial." *Bayle v. Allstate Ins. Co.*, 615 F.3d 350, 355 (5th Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). "Summary judgment may not be thwarted by conclusional allegations,

unsupported assertions, or presentation of only a scintilla of evidence." *McFaul v. Valenzuela*, 684 F.3d 564, 571 (5th Cir. 2012) (citing *Hathaway v. Bazany*, 507 F.3d 312, 319 (5th Cir. 2007)). "On appeal we may affirm a grant of summary judgment on any legal ground raised below, even if it was not the basis for the district court's decision." *Alkhawaldeh*, 851 F.3d at 426 (quoting *Bayle*, 615 F.3d at 355).

A. Summary Judgment

Title VII prohibits employers from retaliating against employees who oppose an employment practice made unlawful by Title VII. *EEOC v. Rite Way Serv., Inc.*, 819 F.3d 235, 239 (5th Cir. 2016) (quoting 42 U.S.C. § 2000e-3(a)). Unlawful employment practices under Title VII include "fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). To establish a prima facie case of retaliation under Title VII, "a plaintiff must show that (1) she participated in an activity protected under the statute; (2) her employer took an adverse employment action against her; and (3) a causal connection exists between the protected activity and the adverse action." *Feist v. La. Dep't of Justice, Office of the Attorney Gen.*, 730 F.3d 450, 454 (5th Cir. 2013) (citing *McCoy v. City of Shreveport*, 492 F.3d 551, 556–57 (5th Cir. 2007)). "If the employee establishes a prima facie case [of retaliation], the burden shifts to the employer to state a legitimate, non-retaliatory reason for its decision." *LeMaire v. Louisiana*, 480 F.3d 383, 388–89 (5th Cir. 2007) (citing *Baker v. Am. Airlines, Inc.*, 430 F.3d 750, 754–55 (5th Cir. 2005)). Once an employer does so, the burden shifts back to the employee to demonstrate that the employer's reason is pretext for retaliation. *Id.* "In order to avoid summary judgment, the plaintiff must show 'a conflict in substantial evidence' on the question of whether the employer

would not have taken the action 'but for' the protected activity." *Feist*, 730 F.3d at 454 (quoting *Long v. Eastfield Coll.*, 88 F.3d 300, 308 (5th Cir. 1996)).

Allen argues that the district court erred in granting summary judgment on his Title VII retaliation claim. The district court concluded that before he was retaliated against, Allen only complained about his wages and had not complained to Envirogreen about racially discriminatory employment practices. Thus, Allen failed to establish a prima facie case for retaliation under Title VII because he did not show that he engaged in activity protected under Title VII. This Circuit has defined protected activity to include "opposition to any practice rendered unlawful by Title VII, including making a charge, testifying, assisting, or participating in any investigation, proceeding, or hearing under Title VII." *Mota v. Univ. of Tex. Hous. Health Sci. Ctr.*, 261 F.3d 512, 519 (5th Cir. 2001) (citing 42 U.S.C. § 2000e-3(a) (2001); *Evans v. City of Hous.*, 246 F.3d 344, 352–53 (5th Cir. 2001)). On appeal, Allen offers two sources of proof for his claim that he engaged in activity protected under Title VII: his written LHCR and EEOC complaint and his verbal complaints to Willie and Griffin. After reviewing these sources, neither is sufficient to establish a prima facie case for retaliation. We therefore conclude that Allen has failed to create a genuine issue of material fact that he engaged in protected activity under Title VII.

First, Allen argues that his LHCR and EEOC complaint regarding Envirogreen's employment practices supports finding that he engaged in activity protected under Title VII. There is no question that Allen engaged in a protected activity when he filed his complaint on May 27, 2011. *See* 42 U.S.C. 2000e-3(a). In his EEOC charge, Allen specifically alleged that "he worked over 40 hours a week on several occasions and did not get paid overtime wages because of his [r]ace, and he was assigned revolting assignments and fired because of his race and opposition to his employer's unlawful practices."

Making a charge that he was discharged or otherwise discriminated against with respect to compensation or conditions of employment because of his race is protected under Title VII. *See Feist*, 730 F.3d at 454. However, this complaint cannot prove that Envirogreen retaliated against him; Allen submitted his complaint with the LHCR and EEOC months after he was fired. Any alleged workplace retaliation necessarily pre-dated his submission of the complaint. Therefore, the LHCR and EEOC complaint cannot support his retaliation claim.

Second, Allen contends that his verbal complaints to Willie and Griffin about the "wages paid, hours of work, and working conditions" constituted "opposition to [Envirogreen's] discriminatory employment practices" and thus he engaged in activity protected under Title VII. In a claim of protected opposition, an employee must at least have referred to conduct that could plausibly be considered discriminatory in intent or effect, thereby alerting the employer of its discriminatory practices. *See, e.g.*, *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 349 (5th Cir. 2007). A vague complaint or general allegation of unfair treatment, without any reference to an unlawful employment practice under Title VII, does not constitute protected activity. *See Davis v. Dall. Indep. Sch. Dist.*, 448 F. App'x 485, 493 (5th Cir. 2011) (unpublished) (per curiam) (finding that a statement complaining about a "hostile work environment" did not constitute protected activity under Title VII because it "lacked a racial or gender basis"); *Tratree v. BP N. Am. Pipelines, Inc.*, 277 F. App'x 390, 396 (5th Cir. 2008) (unpublished) (per curiam) ("Complaining about unfair treatment without specifying why the treatment is unfair, however, is not a protected activity"); *Harris-Childs v. Medco Health Sols., Inc.*, 169 F. App'x 913, 916 (5th Cir. 2006) (per curiam) (finding that an employee did not engage in protected activity when she complained of harassment but did not mention race or sex). Complaints about wages, hours

of work, and working conditions are protected under § 15(a)(3) of the Fair Labor Standards Act ("FLSA") of 1938, 29 U.S.C. § 215(a)(3), but protected activity under Title VII must relate to discriminatory practices based on race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e-2(a)(1).

When his pro se complaint is liberally construed,[2] Allen claims that he complained to Willie and Griffin about a wage disparity based on race. He then argues that he was retaliated against after complaining about this pay disparity, and that he was paid less because of his race. On appeal, Allen maintains that "the true basis of the case" was his race. In support of his assertion, Allen points to interrogatories where he attributed his incorrect pay rate to "race and my opposition to their discriminatory action." Taken at face value, Allen has consistently argued that race was an underlying factor in his complaint, and he appears to have engaged in protected activity under Title VII.

On the other hand, Envirogreen demonstrates that Allen has consistently downplayed the role that race played in his complaint to Willie and Griffin. When Allen describes his opposition to "discriminatory employment practices," he refers only to his complaint to Willie regarding "wages paid, hours of work, and working conditions." On appeal, he describes his opposition as "first, explicitly confronting Mark Willie . . . about the contract agreement, pay rate, failure to pay overtime, and supervisor position." In his deposition, Allen testified that he complained about his wages, a breach of what he believed to be a salary agreement between him and Willie, and a lack of overtime pay. Allen believed that he and Willie agreed that Allen would be paid $15 per hour, but Allen was instead paid $14 per hour and denied

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[2] This court liberally construes pro se litigant briefs, but pro se litigants must still argue issues to preserve them for appeal. *Thomas v. La., Dep't of Soc. Servs.*, 406 F. App'x 890, 894 (5th Cir. 2010) (citing *Longoria v. Dretke*, 507 F.3d 898, 901 (5th Cir. 2007)).

overtime pay. Importantly, Allen did not know what other employees were paid. Thus, he could not have complained about unfair treatment by comparing his wages to a similarly situated white employee. When asked if Envirogreen's wage practices had anything to do with race, Allen responded that he thought "mostly [Willie] was doing it because he was greedy." Instead of explicitly describing that his complaint was about racial discrimination, he only surmises that Envirogreen's motives in originally failing to pay him overtime pay and at the agreed upon rate "were a result of the appellant's RACE." In pointing to these responses, Envirogreen, as movant, has shown that the record does not support Allen's claim that he engaged in protected activity under Title VII.

In response, Allen does not provide evidence suggesting a dispute of material fact. Allen describes many of Envirogreen's actions as discriminatory, but these allegedly discriminatory actions provide little support for a finding that Allen complained to Willie and Griffin about discriminatory practices based on race. For example, Allen argued that Envirogreen engaged in wage discrimination based on race, and Envirogreen "reneged on all his verbal agreements" because Allen was blackHe supports this assertion by offering a comparator, arguing that "[a] white supervisor by the name of Rick Steele was paid accordingly." Allen similarly testified that he believed he was terminated due to his complaint because "all the blacks was working on this level and the whites, but my reason I think it was retaliation because I complained." These examples appear to describe unlawful employment practices under Title VII, *see* 42 U.S.C. § 2000e-2, and perhaps would suffice to support a claim of discrimination, but they do little to clarify the nature of Allen's complaint to

Willie and Griffin.[3] In describing that conversation, Allen only asserts that he complained about Envirogreen's "discriminatory employment practices" and that Envirogreen's took discriminatory action "because of his race." However, Allen does not provide supporting evidence for these statements by reference to the record. "Summary judgment may not be thwarted by conclusional allegations, unsupported assertions, or presentation of only a scintilla of evidence." *McFaul*, 684 F.3d at 571. Allen thus has not demonstrated that his complaint was made in opposition to discrimination based on race.

Although we review the summary judgment record in the light most favorable to the non-movant, we do not believe that Allen has demonstrated that he complained to Envirogreen about racial discrimination. A party contesting summary judgment by asserting that a fact is genuinely disputed must support the assertion by citing particular materials in the record. Fed. R. Civ. P. 56(c). Because Allen has not shown that he engaged in an activity protected under Title VII by reference to specific facts in the record, he has not established a prima facie case for retaliation. Thus, the district court's grant of summary judgment was proper.

B. Motion for Reconsideration

We review a district court's decision on a Rule 59 motion to reconsider for abuse of discretion. *In re La. Crawfish Producers*, 852 F.3d 456, 462 (5th Cir. 2017). "Under this standard of review, the district court's decision and

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[3] Allen cites to EEOC filings in support of his claim, but these cases address the issue of wage discrimination based on race, not retaliation for opposing unlawful practices under Title VII. *See EEOC v. Corp. Express Office Prods.*, No. 3:09-cv-00516, 2009 BL 251569 (M.D. La. Nov. 23, 2009); *EEOC v. Orkin, Inc.*, No. 05-2657-Ma/P (W.D. Tenn. May 26, 2006); EEOC, *United Air Temp / Air Conditioning & Heating, Inc. Sued by EEOC for Race Discrimination*, 2011 WL 970470 (Mar. 21, 2011). As mentioned above, Allen's argument could perhaps support a claim of retaliation under the FLSA or discrimination under Title VII, but Allen brought neither of those claims in district court. Although pro se complaints are liberally construed, issues still must be briefed to be considered. *See Thomas*, 406 F. App'x at 894.

decision-making process need only be reasonable." *Templet v. HydroChem Inc.*, 367 F.3d 473, 477 (5th Cir. 2004) (citing *Ford Motor Credit Co. v. Bright*, 34 F.3d 322, 324 (5th Cir. 1994)). But to the extent that a ruling involved a reconsideration of a question of law, "the standard of review is de novo." *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005) (citation omitted). Because Allen's motion "calls into question the correctness" of the judgment, we consider it under Rule 59(e). *See Templet*, 367 F.3d at 478 (quoting *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir. 2002)). Rule 59(e) motions serve "the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Id.* (quoting *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989)). "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Id.* at 479 (citation omitted). Accordingly, a motion for reconsideration "is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Id.* (citation omitted). A party's "unexcused failure to present evidence available at the time of summary judgment provides a valid basis for denying a subsequent motion for reconsideration." *ICEE Distribs., Inc. v. J&J Snack Foods Corp.*, 445 F.3d 841, 847 (5th Cir. 2006) (quoting *Templet*, 367 F.3d at 479). As a result, a Rule 59(e) motion "should only be granted where there is new evidence that (1) probably changes the outcome of the case; (2) could not have been discovered earlier by proper diligence; and (3) is not merely cumulative or impeaching." *Molina v. Equistar Chems. L.P.*, 261 F. App'x 729, 733 (5th Cir. 2008) (unpublished).

Allen argues that the court erred in denying his Rule 59 motion to reconsider the judgment. Allen raised three issues in his motion: (1) the court made a mistake of law in regard to Title VII not protecting wage issues; (2) the court overlooked record evidence; and (3) Envirogreen never offered evidentiary support that it did not discriminate against Allen. The district

court rejected all three arguments. On appeal, Allen argues that the court did not apply the appropriate law in ruling on his Motion for Reconsideration in light of new evidence, specifically his Review of Action letter to the EEOC, and showed clear error based on false statements made by Envirogreen in its motion for summary judgment. We conclude that the district court did not abuse its discretion when it refused to reconsider the judgment.

First, Allen argued that the court made a mistake of law in regard to Title VII not protecting wage issues. The district court rejected this argument, reasoning that Allen cited no authority in support of his argument that Title VII protects wage issues. Unlawful activities under Title VII are limited to "fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Although Title VII prohibits racial discrimination with respect to compensation, compensation issues are not protected by Title VII when they do not allege discrimination based on race, color, religion, sex, or national origin. The district court's conclusion was thus not a "manifest error of law." *Waltman*, 875 F.2d at 473. The district court therefore did not commit legal error.

Next, the district court noted that the evidence Allen presented in his motion was available and considered by the court in its ruling on the summary judgment motion. We find the district court's approach reasonable. Allen did not present new evidence in his motion for reconsideration. Allen cannot use his motion for reconsideration to rehash evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment. *Templet*, 367 F.3d at 479. Thus, Allen's motion for reconsideration did not serve the narrow purpose of Rule 59, and the district court did not act improperly when it denied his motion.

On appeal, Allen raises a different issue by presenting "new" evidence in the form of an EEOC review letter dated May 10, 2014. The district court, however, granted summary judgment on May 3, 2016. Allen offers no excuse for his failure to timely present this letter as evidence. Thus, this new evidence cannot justify granting his motion for reconsideration. *See Templet*, 367 F.3d at 479. We conclude that the district court did not err in denying Allen's Rule 59 Motion for Reconsideration of the judgment.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment and denial of Allen's motion for reconsideration of the judgment under Rule 59.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

DERRICK ALLEN

CIVIL ACTION

v.

NO. 14-506-JWD-RLB

ENVIROGREEN LANDSCAPE PROFESSIONALS, INC.

RULING AND ORDER

This matter comes before the Court on the Motion for Summary Judgment (Doc. 11) filed by Defendant Envirogreen Landscape Professionals, Inc. ("Envirogreen" or "Defendant"). Plaintiff Derrick Allen ("Plaintiff" or "Allen") opposes the motion. (Doc. 13.) Oral argument is not necessary. Having carefully considered the law, facts in the record, and arguments of the parties, Defendant's motion is granted. Plaintiff has failed to show that he engaged in activity protected under Title VII. As a result, he has failed to demonstrate a prima facie case of retaliation. Accordingly, Plaintiff's claim is dismissed with prejudice.

I. Relevant Factual Background

Plaintiff is an African-American male. Defendant is a company that provided landscaping services in Baton Rouge, Slidell, and other places. (*See* Doc. 11-1 at 6.)

Plaintiff was hired by Defendant on September 17, 2010. (*Id.* at 5.) Plaintiff interviewed with Mark Willie, the owner, and Todd Griffin, a landscape architect. (*Id.* at 2.) Plaintiff was hired by Defendant to "supervise the guys," and his title was supervisor. (*Id.* at 3.) Plaintiff testified that he and Willie were supposed to get together and go over an employment agreement, his exact duties, and the term of his employment, but Willie "continued to put that off for whatever reason." (*Id.* at 3-4.) According to Plaintiff, "[t]he only thing we talked about was me supervising, and then we said, okay, can we put that on paper, and Mark was in agreement with

P. 2

putting it on paper but never produced it." (*Id.* at 4.) Plaintiff claims no one explained to him what his job duties were, and it was never put on paper. (*Id.* at 5.) Plaintiff submits Defendant's responses to requests for production, wherein Defendant's state "there is no written document entitled 'Employment Agreement' between Defendant and Plaintiff." (Doc. 13-1 at 2.)

After Plaintiff started working, he would report to Defendant's office, and then he would be sent to jobs to do landscaping around buildings, houses, day cares, or "whatever contract they [were] able to get." (Doc. 11-1 at 6). At the jobs, Plaintiff "was doing pretty much a little bit of everything, not just – little to none if so [sic] supervising but mainly just routine labor." (*Id.*) Plaintiff ran the trencher, the Bobcat, and the augur. (*Id.* at 7.)

With respect to compensation, Plaintiff claims that Willie said Plaintiff would make $15 per hour, but, when Plaintiff received his first check, it was $14. (*Id.* at 5.) When this happened, Plaintiff talked to Griffin and then Willie. (*Id.*) Plaintiff claims that Defendant violated a "salary agreement" – that is, the above agreement for $15 per hour that was never put into writing. (*Id.* at 8.) When that arose, Plaintiff went to Willie and was told "we're going to see about it, we're going to see about it." (*Id.* at 9.) Plaintiff also made a verbal complaint about a lack of overtime. (*Id.* at 10.)

Plaintiff claims that, after the complaint, Defendant retaliated against him by placing him in inappropriate working conditions. (*Id.* at 10.) Plaintiff testified:

> for instance, they would go out and start something, like they sent me and another guy to Slidell to finish a job that someone else had started that I wasn't familiar with, like setting you up to fail. But I went out there and had to do a demonstration on the clock that I didn't set up. So I did it and I came back and from that point on it was just like they were trying to make up stuff, you know, to just give me. But it was never a write-up, there was never a complaint from the people I was working for, it was never none of that. So it just popped up all of a sudden, he said I have to release you. For what, what have I done? What's going wrong?

(*Id.* at 11.) Plaintiff then confirmed that one of the inappropriate working conditions was "sending [him] out to a job that [he wasn't] familiar with and having [him] check things that [he] had not done personally." Plaintiff stated "That's one. That's a set up. You know, if you go on a job, you don't want to go behind someone else and do their work." (*Id.*) Plaintiff admitted he was a supervisor, but he stated that, though he was supposed to oversee and check what people did, that only applies to "something that you initiate. (*Id.* at 12.) As a project manager or anything like that, you don't take off where somebody left off unless they've given you the information to read over, to get an understanding of what's going on with that project." (*Id.*) Plaintiff did between six and eight jobs for Defendant, and he stated that, since his conversation with Willie, all of them were inappropriate working conditions, though he initially said it was only two to three such jobs. (*Id.* at 12-13.)

Griffin told Plaintiff that he was being terminated. (*Id.* at 15.) Griffin stated that Willie wanted to let him go. (*Id.*) Griffin handed Plaintiff a piece of paper and showed him what was on it. (*Id.*) Both parties submit an unauthenticated document entitled "Separation Notice Alleging Disqualification" (Doc. 11-1 at 18; Doc. 13-2 at 1) that appears to be the termination letter. The notice states that Plaintiff was discharged (i.e., fired), and the explanation listed is, "not working out", "job performance poor", and "did not have skills ordinarily agreed upon." (*Id.*)

Plaintiff also testified as to the motive behind Defendant's action:

> Q: Why did you think he was taking that position?
>
> A: Well, let's look at it like this, if I come to you and say, you're not paying overtime and you been doing this for a while, right, and it's saving you money and someone points that out, that would be a problem. And then if I'm asking you for an agreement and you never produced that agreement and then you give me a dollar under what you told me you were going to

give me and I come to you about that, each time I feel something is wrong I'm coming to you, you know, that's like a pest or a problem.

Q: Did you think they were doing these things because of your race?

A: I think mostly he was doing it because he was greedy.

(*Id.* at 13.) Plaintiff later testified:

Q: Do you feel like, had you not complained about the wages, would they have terminated you?

A: I don't think they would have.

Q: So being black had nothing to do with it.

A: Well, you can say so, either way. It had something to do with it to the point where everyone out there was in the field on a constant basis, that when I was there, was black. Now, in my case, once again, on retaliation, not race.

Q: In your case you felt they terminated you for retaliation, not race.

A: Right.

Q: And that retaliation was because you had complained about the wages.

A: Right.

(*Id.* at 14-15.) Plaintiff further stated:

Q: And in your complaint back to your termination, you stated that you were terminated because you complained about discriminatory employment practices. And that was the manner in which you were being paid.

A: Correct.

Q: And were those practices related to your race? You already said that you didn't think it was related to your race.

A: Once again, I'll say all the blacks was working on this level and the whites, but my reason I think it was retaliation because I complained.

(*Id.* at 16.)

On May 27, 2011, Plaintiff filed his EEOC Charge of Discrimination. (Doc. 11-1 at 17, 26). Plaintiff claimed discrimination based on race and retaliation. (*Id.* at 26) Plaintiff claimed:

> I began my employment with the Respondent on September 17, 2010, as a Landscape and Irrigation Supervisor. The Respondent employs over 500 employees. On December 31, 2010, I was terminated.
>
> On September 27, 2010 and December 13, 2010, I complained to Mark Willie, Owner regarding being paid at a[n] incorrect pay rate but nothing was done to correct my pay rate. On December 31, 2010, Todd Griffin, White Supervisor, [sic] I was terminated due to the job not working out, poor job performance, and not possessing the skills originally agreed upon.
>
> I believe I have been discriminated against based on race, black and retaliation in violation of LSA R.S. 23:301 et seq and Title VII of the Civil Rights Act of 1964, as amended respectfully.

(*Id.*)

With his surreply, Plaintiff also submits an unsworn, unauthenticated document that appears to provide a narrative of his complaints against the Defendant. (Doc. 17-1 at 4.) In the document, Plaintiff claims he is treated differently than a white employee named Rick with respect to job assignments training, wages and hours. (*Id.*) No details are given about Rick, other than that he is white. (*Id.*) Defendant further claims that he was fired because of his race. In the document, Plaintiff explains how, after he got $14.00 on his first pay check, he "felt violated by Envirogreen, so he brought it to their attention." (*Id.*) The document states that "Allen was subsequently fired, and Griffen stated during their debriefing that it was apparent Allen was not satisfied with the way things were going on the job and he could find another job with no problem." (*Id.* at 5.) The document further states:

> The complainant informed his employer of his opposition to their practices because the practices were unlawful. Envirogreen hired Derrick Allen as a supervisor and he was not render [sic] the opportunities and training that was agreed upon, he did not get paid the agreed upon wage of $15 an hour, and he

> worked over 40 hours a week on several occasions and did not get paid overtime wages because of his Race, and he was assigned revolting assignments and fired because of his race and opposition to his employer's unlawful practices.

(*Id.* at 5.)

II. Legal Standard

"The court shall grant summary judgment if the movant shows 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). If the mover bears his burden of showing that there is no genuine issue of fact, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts ... [T]he nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 , 586—587, 106 S.Ct. 1348 , 89 L.Ed.2d 538 [*2] (1986) (internal citations omitted). The nonmover's burden is not satisfied by "conclusory allegations, by unsubstantiated assertions, or by only a 'scintilla' of evidence." *Little v. Liquid Air Corp.*, 37 F.3d 1069 , 1075 (5th Cir.1994) (citations and internal quotations omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co.*, 475 U.S. at 587. Further:

> In resolving the motion, the court may not undertake to evaluate the credibility of the witnesses, weigh the evidence, or resolve factual disputes; so long as the evidence in the record is such that a reasonable jury drawing all inferences in favor of the nonmoving party could arrive at a verdict in that party's favor, the court must deny the motion.

International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257 , 1263 (5th Cir.1991).

III. Discussion

A. Parties Arguments

Defendant makes two main arguments. First, Defendant contends that Plaintiff cannot establish a prima facie case of retaliation because he did not engage in protected activity;

Plaintiff complained only about his pay, which is not within the ambit of Title VII. Second, Defendant argues that, even if Plaintiff established a prima facie case, Defendant has shown legitimate, non-discriminatory reasons for the termination, including poor performance and not possessing the skills originally agreed upon. The burden thus shift backs to the Plaintiff to show pretext, and, according to Defendant, Plaintiff cannot do so. He cannot prove that race was the "but for" cause of his termination.

Plaintiff responds in his briefs that he was retaliated against after complaining about his pay. Plaintiff argues in his opposition that "plaintiff's race was a precursor to their retaliation because the plaintiff's opposed their misconduct based on Title VII." (Doc. 13 at 2.) In his surreply, Plaintiff asserts more directly that he was paid less "because of race (black) and it would not have happened otherwise." (Doc. 17 at 2.)

Moreover, Plaintiff contests that Defendant had a legitimate, non-discriminatory reason for terminating him; Defendant asserts that Plaintiff did not have the skills originally agreed upon, but there was no employment agreement laying out what skills were exactly required. Additionally, Defendant claims Plaintiff had poor performance, but there is no evidence of write ups.

Finally, Plaintiff asserts he was retaliated against because of his race. Plaintiff states the retaliation was "on the grounds of retaliation (reprisal) and not on the grounds of race. However, race was a component." (Doc. 13 at 3.)

B. Analysis

The Court grants the Defendant's motion. No reasonable juror could conclude from the uncontested facts that the Plaintiff engaged in protected activity. Accordingly, summary judgment is appropriate on this basis alone, and the Court need not reach the other issues.

To establish a prima facie case of retaliation under Title VII, the plaintiff must prove, among other things, that he "participated in an activity protected under the statute." *Feist v. Louisiana, Dep't of Justice, Office of the Atty. Gen.*, 730 F.3d 450, 454 (5th Cir. 2013) (citing *McCoy v. City of Shreveport*, 492 F.3d 551, 556–57 (5th Cir.2007)). "An employee has engaged in activity protected by Title VII if []he has either (1) 'opposed any practice made an unlawful employment practice' by Title VII or (2) 'made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing' under Title VII.' " *Davis v. Dallas Indep. Sch. Dist.*, 448 F. App'x 485, 492 (5th Cir. 2011) (per curiam) (citations omitted). "Thus, Title VII prohibits retaliation in instances of either protected opposition or protected participation." *Alack v. Beau Rivage Resorts, Inc.*, 286 F. Supp. 2d 771, 774 (S.D. Miss. 2003).

Here, only protected opposition is at issue. For this, the Plaintiff must prove that, at the time he made his complaint, he was engaged in conduct that was in opposition to one of Defendant's employment practices that was unlawful under Title VII, or which he reasonably believed to be unlawful under Title VII. *Id.* (citation omitted).

An "unlawful employment practice" under Title VII includes "fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin.*" 42 U.S.C. § 2000e-2(a)(1) (emphasis added). "Thus, if the conduct complained of by the plaintiff had nothing to do with race, color, religion, sex, or national origin, a retaliation claim cannot be maintained under Title VII." *Bartz v. Mitchell Ctr.*, No. A-05-CA-959-LY, 2008 WL 577388, at *2 (W.D. Tex. Jan. 23, 2008), *report and recommendation adopted,* (Feb. 27, 2008) (holding that Plaintiff's complaint regarding her employer's failure to provide sufficient special education services to their students

did "not oppose any practices made unlawful under Title VII (such as race or sex discrimination), and thus is not 'protected activity' under Title VII").

Moreover, an employee's complaints do not constitute protected activity when they are based on salary or wages and when they are unrelated to discrimination against a protected group. *See Martinez v. Bohls Bearing Equip. Co.*, 361 F. Supp. 2d 608, 616 (W.D. Tex. 2005) (finding that plaintiff had no claim for retaliation under Title VII when he complained to the Department of Labor about not receiving overtime pay and later filed a Wage Claim with the Texas Workforce Commission about overtime benefits and his salary; "Plaintiff confuses retaliation claims under Title VII and under the FLSA. A retaliation claim under Title VII requires that a plaintiff engage in activity protected by Title VII. Plaintiff's response points only to his action with regard to his overtime claim. . . as protected activity. This activity is protected under the FLSA, not Title VII."); *Callahan v. Bancorpsouth Ins. Servs. of Mississippi, Inc.*, 244 F. Supp. 2d 678, 684-85 (S.D. Miss. 2002), *aff'd sub nom. Callahan v. Bancorpsouth Ins.*, 61 F. App'x 121 (5th Cir. 2003) (finding, where plaintiff complained about the denial of a bonus and requested an hourly wage so she would be eligible for overtime, that summary judgment was appropriate because "[n]owhere in her deposition testimony or brief does she allege that she complained specifically about gender-based discrimination, except for [one] cryptic remark," and a reasonable person in the vice-president's position would not have "understood that plaintiff was threatening a gender-based discrimination lawsuit."); *Jones v. New York City Health & Hosp. Corp.*, No. 00 CIV. 7002, 2003 WL 30412, at *4 (S.D.N.Y. Jan. 3, 2003), *aff'd sub nom. Jones v. New York City Health & Hosps. Corp.*, 102 F. App'x 223 (2d Cir. 2004) (granting summary judgment on retaliation claim because, while Plaintiff complained about her salary

numerous times, there was no issue of fact concerning whether Defendants were aware, prior to terminating plaintiff, that she had complained of discrimination.").

Additionally, the Fifth Circuit has "consistently held that a vague complaint, without any reference to an unlawful employment practice under Title VII, does not constitute protected activity." *Davis*, 448 F. App'x at 492 (finding that district court properly concluded that a complaint of a "hostile work environment" did not constitute protected activity within the meaning of Title VII because "this complaint lacked a racial or gender basis"); *See also Harris-Childs v. Medco Health Sols., Inc.*, 169 F. App'x 913, 916 (5th Cir. 2006) (per curiam) (affirming district court's finding that plaintiff failed to show that she engaged in protected activity under Title VII because, while Plaintiff complained of unfair treatment, she did not demonstrate that she put the employer on notice that her complaint was based on racial or sexual discrimination); *Tratree v. BP N. Am. Pipelines, Inc.*, 277 F. App'x 390, 396 (5th Cir. 2008) (per curiam) (finding no error in the granting of summary judgment when plaintiff complained of unfair treatment but "never referred to the discriminatory treatment as age-based"); *Moore v. United Parcel Serv., Inc.*, 150 F. App'x 315, 319 (5th Cir. 2005) (finding, when plaintiff argued he was retaliated against for filing a grievance, that district court correctly granted summary judgment because plaintiff did "not engage in a protected activity, as his grievance did not oppose or protest racial discrimination or any other unlawful employment practice under Title VII. Rather, [plaintiff] simply complained that [defendant] had violated its agreement with the union. [Plaintiff's] grievance . . . made no mention of race discrimination. . .").

Here, Plaintiff has failed to create a genuine issue of fact that he opposed a practice made unlawful by Title VII. First, Plaintiff testified that he complained about Defendant violating a

"salary agreement" and about a lack of overtime (Doc. 11-5 at 8, 10.) There is no evidence in the record that, when Plaintiff made this complaint, he did so on the basis of race.

Second, no reasonable juror could conclude that Defendant's failure to pay Plaintiff the right wage was unlawful under Title VII. Plaintiff testified.

> Q: And in your complaint back to your termination, you stated that you were terminated because you complained about discriminatory employment practices. And that was the manner in which you were being paid.
>
> A: Correct.
>
> Q: And were those practices related to your race? You already said that you didn't think it was related to your race.
>
> A: Once again, I'll say all the blacks was working on this level and the whites, but my reason I think it was retaliation because I complained.

(*Id.* at 16.) Plaintiff's testimony that "all the blacks was working on this level" refers to earlier testimony in which he was asked if being African-American had anything to do with his termination, and Plaintiff responded that "[i]t had something to do with it to the point where everyone out there was in the field on a constant basis, that when I was there, was black." (*Id.* at 14-15.) Taking both of these statements together, and even construing them in a light most favorable to the Plaintiff, a reasonable juror simply could not conclude that Defendant discriminated against Plaintiff solely from the fact that Defendant had only African-American employees as laborers.

Third, there is no evidence in the record that Plaintiff reasonably believed that Defendant's conduct violated Title VII. Again, the fact that Defendant employed mostly or even all African-American employees as laborers is not a reasonable basis for believing that Title VII was violated. Moreover, a lack of reasonable belief is demonstrated indirectly by Plaintiff's testimony regarding why Defendant retaliated against him. Plaintiff was specifically asked if

Defendant was reatliating "because of [his] race," and he testified, "I think mostly [Willie] was doing it because he was greedy." (Doc. 11-15 at 13.) Finally, Plaintiff specifically stated twice in his deposition that he was terminated "for retaliation, not race."

Even the Plaintiff's "strongest" piece of evidence – the narrative complaint submitted with Plaintiff's surreply – does not save the Plaintiff. First, the document is unsworn and unauthenticated. As this Court stated in *Hall v. Johnson,* No. CIV.A. 12–00099–BAJ, 2013 WL 870230 (M.D.La. Mar. 7, 2013).

> To be considered by the court, 'documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence.'... A document which lacks a proper foundation to authenticate it cannot be used to support a motion for summary judgment." *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.,* 896 F.2d 1542 (9th Cir.1989). *See also Martin v. John W. Stone Oil Distributor, Inc.,* 819 F.2d 547 (5th Cir.1987) ("Unsworn documents are ... not appropriate for consideration [on motion for summary judgment]"); *Moffett v. Jones County,* 2009 WL 1515119 (S.D. Miss., June 1, 2009) ("The records are not certified ... nor sworn in any way, thus they are inadmissible"); *Rizzuto v. Allstate Ins. Co.,* 2009 WL 1158677 (E.D. La., April 27, 2009) (same); 10A Charles Alan Wright, et al., Federal Practice & Procedure § 2722 (3rd ed.1998).

Id. at *1 n. 1. Thus, this document is inadmissible.

Second, even the Court were to consider the document, this document does not demonstrate the above burden. The closest Plaintiff comes are the following stream-of-conscious statements:

> The complainant informed his employer of his opposition to their practices because the practices were unlawful. Envirogreen hired Derrick Allen as a supervisor and he was not render [sic] the opportunities and training that was agreed upon, he did not get paid the agreed upon wage of $15 an hour, and he worked over 40 hours a week on several occasions and did not get paid overtime wages because of his Race, and he was assigned revolting assignments and fired because of his race and opposition to his employer's unlawful practices.

(Doc. 17-1 at 5.)

But this "testimony" does not establish that the Plaintiff engaged in protected activity. First, even if these statements had been in affidavit form, the declaration that Defendant acted "because of his Race" is, at best, conclusory and thus cannot defeat summary judgment. *See Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992) (citing *Broadway v. City of Montgomery*, 560 F.2d 657, 660 (5th Cir. 1976)) ("conclusory assertions cannot be used in an affidavit on summary judgment"); *Stewart v. May Dep't Stores*, 294 F. Supp. 2d 841, 845 (M.D. La. 2003) (citations omitted) ("Neither shall conclusory affidavits suffice to create or negate a genuine issue of fact."); 10B Charles A. Wright, *et al., Federal Practice and Procedure* § 2738 (3d ed. 2016) ("[Rule 56(c)(4)] further limits the matter to be properly included in an affidavit to facts, and the facts introduced must be alleged on personal knowledge. Thus, ultimate or conclusory facts and conclusions of law . . . cannot be utilized on a summary-judgment motion."). Second, these assertions cannot reasonably be construed as indicating that Plaintiff told Defendant that the basis of his complaint was race-based. Thus, even construing the facts in a light most favorable to the Plaintiff, none of the above "testimony" demonstrates (1) that Defendant's employment practices were unlawful under Title VII, (2) that Plaintiff ever told Defendant that his wage complaints related to race, or (3) that Plaintiff reasonably believed that Defendant's employment practices were unlawful.

Plaintiff also submits another document dated July 1, 2011, and stating at the top "LA OFFICE OF HUMAN RIGHTS." (Doc. 17-1 at 7.) This document lists "Three Elements of Retaliation," and, under the "Protected Activity" section, Plaintiff states, "I opposed their employment practices and work assignments in comparison to Rick a white supervisor for the company." (*Id.*) But this document is also unsworn and unauthenticated; thus will not be considered. Moreover, even if it were admissible, it too is conclusory and thus does not establish

a question of fact as to any of the above three issues.

Plaintiff also makes several factual assertions in his brief about the above issues. For instance, Plaintiff states in his opposition, "Basically, Envirogreen's retaliation was an attempt to deter plaintiff from opposing their discriminatory actions or participating in an EEOC process because I plaintiff was not terminated at that point. Subsequently, after plaintiff did not back down, but continued to oppose their discriminatory actions[,] Envirogreen terminated plaintiff." (Doc. 13 at 5.) Plaintiff similarly says in his surreply, "defendant reneged on all his verbal agreements [about his hourly rate] which were in good faith toward plaintiff. Plaintiff believes this occurred because of race (black) and it would not have happened otherwise. At this juncture, plaintiff complained to the defendant (Mark Willie) about the situation." (Doc. 17 at 2.)

But, on a motion for summary judgment, "[a] party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other material". Fed. R. Civ. P. 56(c). Plaintiff cannot defeat summary judgment merely by relying on unsupported factual statements in a brief. *See Helmich v. Kennedy*, 796 F.2d 1441, 1443 (11th Cir. 1986) (citing *Sims v. Mack Truck Corp.*, 488 F.Supp. 592, 597 (E.D.Pa.1980)) ("Statements of fact in a party's brief, not in proper affidavit form, cannot be considered in determining if a genuine issue of material fact exists."); *Brunette v. Dann*, 417 F. Supp. 1382, 1386 (D. Idaho 1976) (citing Fed. R. Civ. P. 56(c)) ("On motion for summary judgment the opposing party cannot rely on bare allegations in the pleadings or briefs."). Plaintiff had the burden of "identif[ing] specific evidence in the record and articulat[ing] the manner in which that evidence support[ed] [his] claim," *Duffie v. United States*, 600 F.3d 362, 371 (5th Cir. 2010) (citation omitted), and he simply failed to do so.

In sum, no reasonable juror could conclude that the Plaintiff engaged in activity protected under Title VII. As a result, Plaintiff has failed to sustain his burden of showing a prima facie case of retaliation, and Defendant is entitled to summary judgment.

C. Request for Additional Discovery.

Finally, in his surreply, Plaintiff states:

> There were several black employees working with Envirogreen that were being discriminated against because of race, but they were scared to say something about the discrimination because of the fear of retaliation. This is why plaintiff asked defendant for files on Fair Labor Law Case vs plaintiff, which they lost. By ordering Envirogreen to release the file the court can clearly see if Rick (white male) was treated different from plaintiff (black male) in regard to pay. Rick was not one of the employees that was entitled to overtime pay due to violation of Fair Labor Law Act.

(Doc. 17 at 5.) The Court finds that, under a liberal construction afforded to this pro se plaintiff, this paragraph appears to be a request for further discovery.

Under Fed. R. Civ. P. 56(d), "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or to take discovery; or (3) issue any other appropriate order." Rule 56(d) "carries forward without substantial change the provisions of" Rule 56(f). Fed. R. Civ. P. 56, Advisory Committee Notes (2010); *see also* 10B Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 2740 (3d ed. 2016) ("When Rule 56 was rewritten in 2010, the provisions in Rule 56(f) were moved to a new subdivision (d), without any substantial changes.")

Preliminarily, the Court notes that, "[u]nder the rule a party who seeks the protection of [this] subdivision . . . must state by affidavit the reasons why he is unable to present the necessary opposing material." 10B Charles Alan Wright, *et al.*, *Federal Practice and Procedure*

§ 2740 (3d ed. 2016). Here, Plaintiff has failed to comply with that rule. On this ground alone, the request for additional discovery is denied.

Nevertheless, the Court finds that, even if Plaintiff had complied with this rule, summary judgment would be appropriate. First, if a plaintiff "has not diligently pursued discovery ... []he is not entitled to relief under rule 56(f)" *Beattie v. Madison Cty. Sch. Dist.*, 254 F.3d 595, 606 (5th Cir. 2001) (citing *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 28 F.3d 1388, 1397 (5th Cir.1994)). "Even though rule 56(f) motions should be liberally granted, '[a] district court has broad discretion in all discovery matters, and such discretion will not be disturbed ordinarily unless there are unusual circumstances showing a clear abuse.' " *Id.* (citing *Kelly v. Syria Shell Petroleum Dev., B.V.*, 213 F.3d 841, 855 (5th Cir. 2000)).

Here, suit was filed in August of 2014. (Doc. 1.) The discovery cutoff was November 2, 2015. (Doc. 10.) This motion for summary judgment was filed November 13, 2015. (Doc. 11.) Plaintiff did not make this "Rule 56(d) motion" until he filed a surreply on December 28, 2015. (Doc. 16.) Trial is now five months away. To date, Plaintiff has still not filed a motion to reopen discovery.

Under these circumstances, the Court finds that Plaintiff has not diligently pursued discovery. If he legitimately believed that Defendant had the file but was not producing it, he could have filed a motion to compel. No such motion was filed. Moreover, Plaintiff has brought forward no actual evidence of spoliation. Nor has he brought forward much other evidence of how much discovery he conducted on this issue.[1] Without more, the Court cannot find that he

[1] Indeed, the only discovery submitted by Plaintiff was the Defendant's Responses to Plaintiff's Document Requests. (Doc 13-1 at 1-4.) Plaintiff asked for a "List of the employees effected/reimbursed by Envirogreen's labor law violation," and Defendant replied, after objecting, that "the United States Department of Labor has already provided the Plaintiff with a redacted version of its report and findings which provides him with information regarding the total amount paid by Defendant in connection with the alleged violation with regard to overtime payment." (*Id.* at 3.) Plaintiff also requested "[f]iles on other employees and their rates of pay," to which Defendant objected by provided a list of employees employed by Defendant during the 4th Quarter of 2010. The responses

acted diligently in seeking these documents, particularly given the fact that the discovery deadline has passed with no motion to compel filed.

But even putting this aside, it does not appear that a Rule 56(d) motion is appropriate. The Fifth Circuit has laid out the following standard when evaluating these motions:

> We review district court dispositions of Rule 56(f) motions to suspend summary judgment for abuse of discretion. *Stearns Airport Equip. v. FMC Corp.*, 170 F.3d 518, 534 (5th Cir.1999). Rule 56(f) discovery motions are "broadly favored and should be liberally granted" because the rule is designed to "safeguard non-moving parties from summary judgment motions that they cannot adequately oppose." *Culwell v. City of Fort Worth*, 468 F.3d 868, 871 (5th Cir.2006). The nonmovant, however, "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts." *SEC v. Spence & Green Chem. Co.*, 612 F.2d 896, 901 (5th Cir.1980). Rather, a request to stay summary judgment under Rule 56(f) must "set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion." *C.B. Trucking, Inc. v. Waste Management Inc.*, 137 F.3d 41, 44 (1st Cir.1998) (internal quotation marks and citations omitted). "If it appears that further discovery will not provide evidence creating a genuine issue of material fact, the district court may grant summary judgment." *Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 720 (5th Cir.1999); *see also Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir.1990) ("This court has long recognized that a plaintiff's entitlement to discovery prior to a ruling on a motion for summary judgment is not unlimited, and may be cut off when the record shows that the requested discovery is not likely to produce the facts needed by the plaintiff to withstand a motion for summary judgment.").

Raby v. Livingston, 600 F.3d 552, 561 (5th Cir. 2010).

Here, Defendant claims that ordering Defendant to release its "files on Fair Labor Law Case vs. plaintiff," the Court can "clearly see if Rick (white male) was treated differently from plaintiff (black male) in regard to pay. Rick was not one of the employees that was entitled to overtime pay due to violation of Fair Labor Law Act." Even if this fact was true, it does not

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were filed on November 3, 2015, so Plaintiff had 12 days to file a motion to compel to obtain more adequate responses.

show that Plaintiff specifically complained to Defendant about racial discrimination or otherwise put Defendant on notice that his complaint was race-based, as required by the above case law. That is, even with this evidence, Plaintiff has not shown he engaged in activity protected by Title VII.

In sum, Plaintiff is not entitled to a continuance to conduct further discovery. He submitted no affidavit, he does not appear to have diligently pursued discovery, and it appears that further discovery will not create an issue of fact. Accordingly, for the above reasons, summary judgment is warranted.

IV. Conclusion

Accordingly,

IT IS ORDERED that the Motion for Summary Judgment (Doc. 11) filed by Defendant Envirogreen Landscape Professionals, Inc. is **GRANTED**;

IT IS FURTHER ORDERED that that Plaintiff's claims against Defendant are **DISMISSED WITH PREJUDICE**; and

IT IS FURTHER ORDERED that the oral argument currently scheduled for May 5, 2016, is **CANCELLED**.

Signed in Baton Rouge, Louisiana, on May 3, 2016.

S

JUDGE JOHN W. deGRAVELLES
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

DERRICK ALLEN **CIVIL ACTION**

VERSUS **NUMBER 14-506-JWD-RLB**

ENVIROGREEN LANDSCAPE PROFESSIONALS, INC.

ORDER

The plaintiff in this cause having tendered to the Court a complaint (R. Doc. 1) and application to proceed in district court without preparing fees or costs (R. Doc. 2),

IT IS HEREBY ORDERED that Plaintiff's Application to proceed in district court without preparing fees or costs (R. Doc. 2) is **GRANTED.** The Clerk of Court will file Plaintiff's complaint without prepayment of costs or security. Plaintiff is responsible for serving the defendant in the manner required by Rule 4 of the Federal Rules of Civil Procedure. The plaintiff shall promptly provide the Clerk of Court with a properly completed summons for the defendant to be served, and the Clerk is directed to issue process to the defendant(s) upon receipt of a properly completed summons.[1]

Signed in Baton Rouge, Louisiana, on November 19, 2014.

RICHARD L. BOURGEOIS, JR.
UNITED STATES MAGISTRATE JUDGE

[1]A properly completed summons shall include the name of the party to be served and a physical address for service of process.

AO 240 (Rev. 07/10) Application to Proceed in District Court Without Prepaying Fees or Costs (Short Form)

UNITED STATES DISTRICT COURT

for the

Derrick Allen
Plaintiff/Petitioner

v.

Envirogreen Landscape Professionals Inc
Defendant/Respondent

Civil Action No. EEOC charge No. 461-2011-00754

APPLICATION TO PROCEED IN DISTRICT COURT WITHOUT PREPAYING FEES OR COSTS (Short Form)

I am a plaintiff or petitioner in this case and declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief requested.

In support of this application, I answer the following questions under penalty of perjury:

1. *If incarcerated.* I am being held at: _____.
If employed there, or have an account in the institution, I have attached to this document a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months for any institutional account in my name. I am also submitting a similar statement from any other institution where I was incarcerated during the last six months.

2. *If not incarcerated.* If I am employed, my employer's name and address are: "Part-time Bi Weekly pay" CPHC, 861 Main St, Baton Rouge, LA 70802, and Common Cents Magazine, 17425 Opportunity Ave, Baton Rouge, LA 70817

My gross pay or wages are: $ 250.00, and my take-home pay or wages are: $ 200.00 per Bi-Weekly (specify pay period) _____. Common Cents 6/87. Bi-weekly

CPHC

3. *Other Income.* In the past 12 months, I have received income from the following sources *(check all that apply)*:

(a) Business, profession, or other self-employment	☑ Yes	☐ No
(b) Rent payments, interest, or dividends	☐ Yes	☐ No
(c) Pension, annuity, or life insurance payments	☐ Yes	☐ No
(d) Disability, or worker's compensation payments	☐ Yes	☐ No
(e) Gifts, or inheritances	☐ Yes	☐ No
(f) Any other sources	☐ Yes	☐ No

If you answered "Yes" to any question above, describe below or on separate pages each source of money and state the amount that you received and what you expect to receive in the future.

I Bring Home (Net) about $200.00 - 400.00 per week. plus. It is Seasonal Work. My expenses include daily items such as Water, food, gas, bags, ice and etc. My bank statement are attached to this paperwork.

4. Amount of money that I have in cash or in a checking or savings account: $ 55.00 .

5. Any automobile, real estate, stock, bond, security, trust, jewelry, art work, or other financial instrument or thing of value that I own, including any item of value held in someone else's name *(describe the property and its approximate value)*:

Trailer - $900.00 Hand Tools - 300.00
Weedeater $100.00
Electri Saw $45.00
Mower - 650.00
T/Cer - 300.00

6. Any housing, transportation, utilities, or loan payments, or other regular monthly expenses *(describe and provide the amount of the monthly expense)*:

Apartment - $625.00 Accion $227.66 Food/Lunches $350.00 Month
Truck - $200.00 Child Support $300.00 Vehicle/ATM - $100. month
Insurance - 156.00 Storage $125.00 Credit Card Matrix
Cox - 134.00 GAS $300.00 w/c Credit Card Capital One
Cell phone - 105.00 Oil $35.00 Month

7. Names (or, if under 18, initials only) of all persons who are dependent on me for support, my relationship with each person, and how much I contribute to their support:

Samuel Allen - My goal is to give three Hundred when I have it, if not I give what I can.

Raven Bailey - Cousin (God Child) under my mother's Care, I try to help my mother with her. I give one hundred to $150.00 when I can.

8. Any debts or financial obligations *(describe the amounts owed and to whom they are payable)*:

Matrix - $50.00 - $100.00
Capital One $50.00 - 100.00

VOTE: Look at Attachments

Declaration: I declare under penalty of perjury that the above information is true and understand that a false statement may result in a dismissal of my claims.

Date: 08-12-2014

Derrick Allen
Applicant's signature

Derrick Allen
Printed name

Plaintiff has an open case in UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF LOUISIANA, which is listed below. Plaintiff was allowed in the case listed below to proceed in district court without paying the cost of the proceedings and believes that the documents delivered with application supports plaintiff entitlement to the relief requested in this case as well.

Derrick Allen

Plaintiff
v.

Jeh Johnson,
Secretary, United States
Department of Homeland Security, and
Federal Emergency Management Agency
Defendant

CIVIL ACTION NO. 13-503-SDD-SCR

/s/ Derrick S. Allen,

Date; 08/12/2014

Additional material from this filing is available in the Clerk's Office.