

APPENDIX 1

United States Court of Appeals for the Fifth Circuit

No. 23-20441

United States Court of Appeals
Fifth Circuit

FILED

August 26, 2024

Lyle W. Cayce
Clerk

FERNANDO YATES,

Plaintiff—Appellant,

versus

SPRING INDEPENDENT SCHOOL DISTRICT,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:22-CV-2121

Before WIENER, HAYNES, and HIGGINSON, *Circuit Judges.*

STEPHEN A. HIGGINSON, *Circuit Judge:*

Plaintiff-Appellant Fernando Yates—a math teacher in his late sixties—alleges that the Spring Independent School District (“Spring ISD”) discriminated and retaliated against him in violation of the Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. §§ 621 *et seq.*; Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. §§ 2000e *et seq.*; and the Americans with Disabilities Act of 1990 (“the ADA”), 42 U.S.C. §§ 12101 *et seq.*; and defamed him under Texas law. Because summary judgment on all claims was warranted, we AFFIRM.

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I.

We set forth below the factual and procedural background of this appeal.

A.

Yates began working at Spring ISD’s Spring Leadership Academy during the 2021–2022 school year as one of two eighth-grade math teachers. A few weeks into the school year, Spring ISD placed Yates on a “support plan” based on alleged concerns with his performance and preparation. The plan required Yates to, among other measures, have coaching sessions with other educators at least three times a week; observe another teacher modeling the first-period lesson daily; and receive regular walkthroughs from the instructional leadership team. Yates received support in the form of training, lesson planning assistance, feedback, and curriculum guidance.

Shortly thereafter, the other eighth-grade math teacher resigned, and Spring ISD combined the two eighth-grade math classes and assigned a different teacher as the lead teacher. Around this same time, Spring ISD placed Yates on a second support plan, which required him to observe other teachers daily, complete observation notes and practice activities, and undergo daily coaching sessions with other educators. This plan additionally entailed “moving Mr. Yates to provide ‘push-in’ services for the classroom of the 6th grade math teacher.” In this “push-in” role, Yates was no longer a lead teacher responsible for his own classroom but was instead located inside the sixth-grade math teacher’s classroom working with some of that teacher’s students. Spring ISD describes Yates’s role as “work[ing] with smaller groups of students to deliver targeted instruction designed to help those students catch up to their peers.” Yates describes this role as effectively a long-term substitute position, where he was frequently called out of the classroom

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to monitor metal detectors and restrooms or to cover for other teachers' classrooms.

Yates served in this role for a few weeks, until the seventh-grade math teacher resigned. Spring ISD initially assigned Yates to fill that teacher's position but then replaced him soon after with Melissa Lugo, a Hispanic woman in her twenties who was "straight out of teach[er] college." Yates was sixty-seven years old at the time. In his testimony, Spring Leadership Academy Principal Kevin Banks stated that, based on his walkthrough evaluations of Yates in October 2021, he still had ongoing concerns about Yates's performance, and determined that a stronger teacher was needed for the seventh-grade class moving forward. So, Spring ISD moved Yates back to the sixth-grade "push-in" position, which he occupied for about two months.

In March 2022, after a dispute between Yates and the sixth-grade math teacher, Spring ISD assigned Yates to "report to the [school's] Media Center . . . while [it] developed a new support/intervention plan for him to continue doing push-in support." Yates began a new role providing support for three eighth-grade math students, whom he instructed separately in the library. Spring ISD also placed Yates on a new support plan that required him to undergo 45-minute planning and 45-minute professional development sessions each day, review a series of videos and other resources, and submit lesson plans and other materials to Spring ISD for review. On March 11, 2022, Yates sent an email to Spring ISD Assistant Superintendent Michelle Starr in which he complained, for the first time, that "Principal Dr. Banks and Assistant Principal Mr. McAfee continue discriminating against me." Shortly thereafter, on March 18, 2022, Yates filed a Charge of Discrimination with the EEOC, alleging that he faced discrimination and retaliation on

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account of his race, national origin, color, age and disability under Title VII, the ADEA, and the ADA.¹

Yates requested to transfer to another school and began working at Bailey Middle School, also in Spring ISD, for the 2022–2023 school year. Once at Bailey Middle School, Principal Shundra Brown also noticed that Yates exhibited issues related to planning and classroom organization. Associate Principal Dr. Leonard Brown noted some of these concerns in an email exchange with Yates on August 25, 2022. In response to those emails, on August 28, 2022, Yates emailed Spring ISD Superintendent Lupita Hinojosa and accused Principal Brown of retaliating against him because of his pending lawsuit against Spring ISD. Principal Brown, however, testified that she had no actual knowledge of Yates's EEOC complaint or his pending lawsuit against Spring ISD at the time Yates transferred to Bailey Middle School, and did not learn about it until Yates's August 28, 2022 email.

In October 2022, Spring ISD received complaints from three students and one parent that Yates was yelling at students and not allowing them to use the restroom or visit the nurse's office during class. Spring ISD provided the facts of the allegations, without the name or identifying information of the accused teacher, to Pam Farinas, the Spring ISD Assistant Superintendent for Human Capital. Farinas recommended that the teacher be placed on leave pending an investigation into the allegations, so that any students interviewed would not feel pressured by a teacher who was still in the classroom—a “common practice in [Spring ISD].”

¹ The EEOC has filed an amicus brief in support of Yates and in favor of reversal in this appeal because it “has a substantial interest in ensuring the proper application of the laws it enforces.”

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Spring ISD placed Yates on paid administrative leave for roughly four months while it conducted an investigation. Under the terms of this administrative leave, Yates could not visit his school or any Spring ISD facility; participate in any Spring ISD activities; or have any contact with students, parents, or colleagues. Spring ISD ultimately cleared Yates to return to work following the investigation. Yates still works at Bailey Middle School.

B.

On June 29, 2022, Yates filed a complaint alleging that Spring ISD discriminated and retaliated against him in violation of the ADEA, Title VII, and the ADA by reassigning him to the “push-in” position, putting him on support plans, and placing him on administrative leave for four months.²

On August 31, 2023, the district court granted Spring ISD’s motion for summary judgment. The court rejected Yates’s discrimination claims on the ground that none of the employment actions Yates challenged amounted to actionable discrimination. It reached this conclusion by erroneously relying on this court’s former “ultimate employment decision” standard for Title VII discrimination claims, even though, thirteen days prior, this court had issued its en banc decision in *Hamilton v. Dallas County*, 79 F.4th 494 (5th Cir. 2023) (en banc), which abandoned this standard.

Applying the wrong (pre-*Hamilton*) standard, the district court first found Yates’s reassignment not actionable because it did not amount to an “ultimate employment decision[] such as hiring, granting leave, discharging, promoting, or compensating.” *McCoy v. City of Shreveport*, 492 F.3d 551, 559

² The case below was also consolidated with C.A. No. 4:22-cv-03770, which contained a single defamation claim that the court addressed in its summary-judgment ruling. However, even when “liberally construed,” Yates’s opening brief fails to address his state-law defamation claim, so he has forfeited it. *Coleman v. United States*, 912 F.3d 824, 829 n.5 (5th Cir. 2019).

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(5th Cir. 2007) (per curiam), *abrogated by Hamilton*, 79 F.4th 494. Second, with respect to the support plans imposed on Yates, the court concluded that an “employer’s decision to place an employee on a performance improvement plan is not an adverse employment action,” quoting a pre-*Hamilton* decision that applied the “ultimate employment decision” standard. *Welsh v. Fort Bend Indep. Sch. Dist.*, 941 F.3d 818, 824 (5th Cir. 2019), *abrogated by Hamilton*, 79 F.4th 494. Third, with respect to Yates’s four-month administrative leave period, the court held that placing a plaintiff “on paid leave—whether administrative or sick—[is] not an adverse employment action,” again quoting a pre-*Hamilton* decision that applied the “ultimate employment decision” standard. *McCoy*, 492 F.3d at 559.

The district court also rejected Yates’s ADEA discrimination claim on the separate ground that he failed to “make out a *prima facie* case of age discrimination.” In reaching this conclusion, the court recited the elements required for a *prima facie* case of ADEA *retaliation*. The court then found that Yates failed to satisfy the “causal connection” element of this test regarding his reassignment from the seventh-grade math teacher position to the “push-in” position because he established only that his replacement “was younger in age (in her 20’s)” and adduced no evidence of “age-related statements” or of “a pattern or practice of hiring younger applicants.” The court thus held that Yates could not establish a *prima facie* case of age discrimination. Nonetheless, the court conducted a *McDonnell Douglas*³ analysis as an alternative ground for granting Spring ISD’s motion for summary judgment. The court determined that Spring ISD offered legitimate, nondiscriminatory reasons for its actions, and that Yates failed to

³ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

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offer competent summary-judgement evidence to show that the reasons offered were a pretext for race, age, or disability discrimination.

The court acknowledged that Yates brought a retaliation claim, but did not explicitly discuss this claim. Instead, it applied the ADEA *retaliation* standard in its ADEA *discrimination* analysis, thereby effectively (if unintentionally) conducting a retaliation analysis. Yates timely filed a notice of appeal.

II.

We have jurisdiction over the appeal under 28 U.S.C. § 1291 and we review a summary judgment de novo. *Windermere Oaks Water Supply Corp. v. Allied World Specialty Ins. Co.*, 67 F.4th 672, 674 (5th Cir. 2023). Summary judgment is appropriate where “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). A dispute is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party,” and a material fact issue is one that “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “All evidence is viewed in the light most favorable to the nonmoving party and all reasonable inferences are drawn in that party’s favor.” *Johnson v. Cooper T. Smith Stevedoring Co.*, 74 F.4th 268, 272 (5th Cir. 2023) (citation omitted). However, “[s]ummary judgment may not be thwarted by conclus[ory] allegations, unsupported assertions, or presentation of only a scintilla of evidence.” *McFaul v. Valenzuela*, 684 F.3d 564, 571 (5th Cir. 2012). Moreover, “[w]e may affirm a summary judgment on any ground supported by the record.” *Campos v. Steves & Sons, Inc.*, 10 F.4th 515, 520 (5th Cir. 2021) (citation omitted).

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III.

At the outset, we consider whether the district court erred in concluding that Yates could not establish that he suffered an adverse employment action sufficient to sustain his discrimination claims.

In rejecting Yates's discrimination claims, the district court erroneously relied on this court's former "ultimate employment decision" standard for Title VII discrimination claims, under which discrimination is actionable only if it amounts to an "ultimate employment decision[] such as hiring, granting leave, discharging, promoting, or compensating." *McCoy*, 492 F.3d at 559 (internal quotation marks omitted). However, in *Hamilton*, our court held that a plaintiff need not show "discrimination with respect to an 'ultimate employment decision'" but instead only "that [he] was discriminated against, because of a protected characteristic, with respect to . . . the 'terms, conditions, or privileges of employment'—just as the statute says." 79 F.4th at 506 (quoting 42 U.S.C. § 2000e-2(a)(1)). *Hamilton* recognized that Title VII "does not permit liability for de minimis workplace trifles" but declined to address "the precise level of minimum workplace harm" necessary to sustain a discrimination claim. *Id.* Subsequently, in *Muldrow v. City of St. Louis*, the Supreme Court held that "[a]lthough an employee must show some harm . . . to prevail in a Title VII suit, [he] need not show that the injury satisfies a significance test." 601 U.S. 346, 350 (2024).

Spring ISD correctly concedes that, for purposes of this appeal, Yates's claims regarding his "reassignment to the 'push-in position'" and his "being placed on administrative leave for four months" constitute adverse employment actions under *Hamilton*. However, Spring ISD contests any characterization of Yates's placement on support plans as an adverse action, even after *Hamilton*. We need not decide today whether placement

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on support plans constitutes an adverse action under *Hamilton*. Assuming arguendo that the imposition of support plans here rose to the level of an adverse action, for the reasons explained below, the district court did not err in alternatively concluding that Spring ISD rebutted any prima facie case by providing a nondiscriminatory reason for any adverse action.

IV.

Again, we assume arguendo that (1) Yates has established that he suffered an adverse employment action sufficient to sustain his discrimination claims and (2) that Yates established a prima facie case of age discrimination under the ADEA.⁴ But because Spring ISD gave a nondiscriminatory reason for Yates's reassignment and Yates failed to show that reason was pretextual, we affirm the summary judgment as to Yates's age-discrimination claim on this alternative ground.

Once a plaintiff has established a prima facie case, the defendant has “the burden of producing an explanation to rebut the prima facie case—*i.e.*, the burden of producing evidence that the adverse employment actions were taken for a legitimate, nondiscriminatory reason.” *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993) (internal quotation marks and citation omitted). If the defendant meets this burden, “the presumption raised by the prima facie case is rebutted, and drops from the case,” *id.* at 507 (internal

⁴ We agree with the district court, for the reasons it gave, that Yates failed to prove prima facie cases of discrimination based on race under Title VII or disability under the ADA. Nonetheless, *Hamilton* and *Muldrow* apply with equal force to Yates's ADEA discrimination claim. *See, e.g., Smith v. City of Jackson*, 351 F.3d 183, 188, 196 (5th Cir. 2003) (explaining that it “is no coincidence” that “the core sections” of the ADEA and Title VII “overlap[] almost identically,” as “the prohibitions of the ADEA were derived *in haec verba* from Title VII” (quoting *Lorillard v. Pons*, 434 U.S. 575, 584 (1978))); *see also Milczak v. Gen. Motors, LLC*, 102 F.4th 772, 787 (6th Cir. 2024) (applying *Muldrow* “in the ADEA context”).

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quotation marks and citation omitted), and the burden of production reverts to the plaintiff to show that the employer's articulated reasons are a pretext for discrimination, *see Tex. Dep't of Cnty. Affs. v. Burdine*, 450 U.S. 248, 255-56 (1981); *McDonnell Douglas*, 411 U.S. at 804-07.⁵ "To establish pretext, [a plaintiff] must show that [the defendant's] proffered explanation is false or unworthy of credence." *Vaughn v. Woodforest Bank*, 665 F.3d 632, 637 (5th Cir. 2011) (internal quotation marks and citation omitted).

Although the district court erred by relying on pre-*Hamilton* case law to conclude that the employment actions at issue did not rise to the level of adverse actions, it still conducted a *McDonnell Douglas* analysis in the alternative. The court correctly determined that Spring ISD offered legitimate, nondiscriminatory reasons for its actions, and that Yates failed to offer adequate summary-judgement evidence to show that the reasons offered were a pretext for age discrimination.

Spring ISD provided a facially nondiscriminatory reason for the adverse actions it took: Its ongoing concerns about Yates's preparation and performance informed its decision to replace Yates with Lugo and reassign Yates to the push-in role. And Spring ISD substantiated that reason with record evidence, through Principal Banks's testimony concerning his walkthrough evaluations⁶—in which he expressed "ongoing concerns about

⁵ "It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *St. Mary's Honor Ctr.*, 509 U.S. at 507 (cleaned up).

⁶ Contrary to Yates's contention on appeal, the district court did not err in relying on Principal Banks's sworn declaration, which Yates has failed to show was "perjured," as he alleges. The issues that Yates takes with Banks's testimony do not raise any disputed facts as to its truthfulness, nor could they in the absence of any evidence submitted by Yates in the district court.

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Mr. Yates'[s] performance, as he continued to struggle with the level of the rigor of his instruction, his pacing and time management, his checks for understanding, and his classroom management”—as well as numerous instances of constructive feedback from supervisors on Yates’s performance.

Yates failed to provide sufficient evidence in the district court supporting an argument that the evaluations or performance plans he received were the result of discrimination, or that the well-documented concerns his supervisors had about his performance were pretextual. *See St. Mary’s Honor Ctr.*, 509 U.S. at 507. Indeed, the sole testimony Yates gave for his belief that his replacement by Lugo was age discrimination was their respective ages.

Yates’s best argument is that his performance was satisfactory, as evidenced by his “proficient average” summative evaluation from the end of the 2021–2022 school year, which is what allowed him to transfer to Bailey Middle School. But because those scores were recorded at the end of the school year, after Yates had been on the support plans, those higher scores could well have been the result of Yates’s improvement, attributable to the support plans, over the course of the year. Indeed, Yates’s “T-TESS Walkthrough” reports from earlier in the school year reveal that he was still “Developing,” rather than “Proficient,” in many areas.

Because “a reasonable factfinder could [not] infer discrimination” from Yates’s end-of-year evaluation, *Owens v. Circassia Pharms., Inc.*, 33 F.4th 814, 826 (5th Cir. 2022) (citation omitted), Yates has failed to establish a genuine dispute of material fact as to whether Spring ISD’s nondiscriminatory explanation was “false or unworthy of credence,” *Vaughn*, 665 F.3d at 637; *see Saketkoo v. Adm’rs of Tulane Educ. Fund*, 31 F.4th 990, 1002 n.8 (5th Cir. 2022) (“[E]ven an incorrect belief that an employee’s

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performance is inadequate constitutes a legitimate, non-discriminatory reason.” (citation omitted)).⁷

V.

We agree with the district court’s alternative conclusion that Spring ISD rebutted any *prima facie* case by providing a nondiscriminatory reason for any adverse action. So, we AFFIRM the summary judgment.

⁷ Even when “liberally construed,” Yates’s opening brief fails to discuss any retaliation claim, so he has forfeited it. *Coleman*, 912 F.3d at 829 n.5.

ENTERED

August 31, 2023

Nathan Ochsner, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

FERNANDO YATES,

§

Plaintiff,

§

VS.

§

**SPRING INDEPENDENT SCHOOL
DISTRICT,**

§

Defendant.

§

CIVIL ACTION NO. 4:22-CV-2121

ORDER

Pending before the Court is Defendant Spring Independent School District (“Spring ISD” or “Defendant” or the “District”) Motion for Summary Judgment. (Doc. No. 87). Plaintiff Fernando Yates (“Yates” or “Plaintiff”) Yates filed a Response (Doc. No. 89), and Defendant filed a Reply (Doc. No. 90). Plaintiff filed a Sur-Reply. (Doc. No. 91). Plaintiff also filed a document that is titled “Exhibits.” (Doc. No. 92). Defendant responded to Plaintiff’s document (Doc. No. 93), and Plaintiff filed a Reply. (Doc. No. 94). After considering the motions, the evidence, and the applicable law, the Court grants Defendant’s Motion for Summary Judgment. (Doc. No. 87)

I. BACKGROUND

This is an alleged employment discrimination case. Plaintiff Yates began working as an eighth-grade math teacher for Spring ISD at Spring Leadership Academy. A few weeks into the school year it became evident that he needed assistance, so the District designed a support plan for Plaintiff. The purpose of the support plan was to assist Plaintiff in areas of need, including lesson planning and structural development.

After a few months, the only other eighth grade math teacher resigned, leaving her students without an instructor. At that point, the Defendant chose to combine all eighth-grade math classes

and had the class assigned to Carolyn Martinez (“Martinez”). At first, Plaintiff remained an eighth-grade math teacher with Martinez. Eventually, Spring ISD asked him to provide “push-in” support for 6th grade math. As a push-in teacher, Plaintiff was tasked with working with smaller groups of students who needed assistance catching up to their peers. Plaintiff did not work in a classroom of his own but instead taught in the media center.

A month later, Plaintiff was reassigned to teach seventh grade math, but shortly after, he was again replaced. This time he was replaced my by Melissa Lugo (“Lugo”), a new teacher straight out of college. Yates was then placed back in the “push in” position—this time in sixth grade.

Later that year, Plaintiff requested a transfer from Spring Leadership Academy to another Spring ISD school. Defendant approved his transfer, and he was offered the chance to teach at Bailey Middle School (“Bailey”) for the 2022-2023 school year.

At Bailey, students (and parents) submitted complaints that Plaintiff was yelling at them and not allowing them to go to the restroom or the nurse’s office. The Defendant assigned the complaints to Assistant Superintendent for Human Capital, Pam Farinas (“Farinas”). Farinas did not know that the Plaintiff was the accused but based on the file recommended that the accused teacher be placed on leave pending an investigation. The Defendant followed Farina’s recommendation and placed Plaintiff on leave pending the conclusion of the investigation. Plaintiff was subsequently placed on paid leave. The investigation showed that the Plaintiff failed to allow one student to go to the restroom, but he was otherwise cleared of all the allegations. Plaintiff still works at Bailey.

Plaintiff brought this case alleging discrimination, retaliation, and defamation. He alleges he was discriminated on the basis of race, color, national origin, age, and disability. The Defendant contests Plaintiff's claims in its Motion for Summary Judgment.

II. LEGAL STANDARD

Summary judgment is warranted "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). "The movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–25 (1986)).

Once a movant submits a properly supported motion, the burden shifts to the non-movant to show that the Court should not grant the motion. *Celotex*, 477 U.S. at 321–25. The non-movant then must provide specific facts showing that there is a genuine dispute. *Id.* at 324; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A dispute about a material fact is genuine 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). The Court must draw all reasonable inferences in the light most favorable to the nonmoving party in deciding a summary judgment motion. *Id.* at 255. The key question on summary judgment is whether there is evidence raising an issue of material fact upon which a hypothetical, reasonable factfinder could find in favor of the nonmoving party. *Id.* at 248.

III. ANALYSIS

Defendant presents three arguments in its Motion for Summary Judgment: (1) the Plaintiff's discrimination and retaliation claims fail as a matter of law because Plaintiff has not suffered any adverse employment action; (2) the Defendant is entitled to summary judgment on

Plaintiff's discrimination and retaliation claims because he cannot establish a *prima facie* claim¹ and because he has no evidence of pretext; and (3) the Defendant is immune from Plaintiff's defamation claim.

The Court will address each contention.

A. Adverse Employment Action

Defendant first argues that Plaintiff is not entitled to summary judgment because he has not suffered from an adverse employment action. (Doc. No. 87 at 7).

Under Title VII of the Civil Rights Act of 1964, it is "an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The Age Discrimination and Employment Act ("ADEA") prohibits an employer from discriminating on the basis of age. *Goudeau v. Nat'l Oilwell Varco, L.P.*, 793 F.3d 470, 473 (5th Cir. 2015). Under the Americans with Disabilities Act ("ADA"), an employer is not allowed to "discriminate against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA]." *Lyons v. Katy Indep. Sch. Dist.*, 964 F.3d 298, 303–04 (5th Cir. 2020).

A party can establish Title VII, ADA, or ADEA discrimination or discrimination through either direct or circumstantial evidence. *Laxton v. Gap, Inc.*, 333 F.3d 572, 578 (5th Cir. 2003). Where, as in this case, the plaintiff's case is built upon circumstantial evidence, a court relies upon the *McDonnell Douglas* framework for its analysis. *McDonnell Douglas Corp. v. Green*, 411 U.S.

¹ Since Plaintiff's burden to prove a *prima facie* case requires a showing that plaintiff was subject to an adverse employment action, the Court will discuss Defendant's first and second arguments together.

792, 802 (1973). In *McDonnell Douglas*, the Supreme Court outlined a three-part framework to analyze a discrimination claim. First, the plaintiff must establish a *prima facie* case of discrimination. *Id.* If the plaintiff does so, the burden then shifts to the employer “to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” *Id.* If the employer provides a legitimate, nondiscriminatory reason for the employee’s rejection, the burden shifts back to the plaintiff to prove that the employer’s reason was pretext for discrimination. *Id.* at 804–05.

To establish a *prima facie* case under Title VII, the ADEA, and the ADA, a Plaintiff must show that he suffered an adverse employment action. *Paske v. Fitzgerald*, 785 F.3d 977, 985 (5th Cir. 2015) (to establish a *prima facie* case of Title VII discrimination a plaintiff must show “(1) he is a member of a protected class, (2) he was qualified for the position at issue, (3) he was the subject of an adverse employment action, and (4) he was treated less favorably because of his membership in that protected class than were other similarly situated employees who were not members of the protected class, under nearly identical circumstances.”); *Holtzclaw v. DSC Commc’ns Corp.*, 255 F.3d 254, 259 (5th Cir. 2001) (“To establish a *prima facie* retaliation claim under the ADEA, Holtzclaw must show (1) that he engaged in a protected activity, (2) that there was an adverse employment action, and (3) that a causal link existed between the protected activity and the adverse employment action.”); *Lyons*, 964 F.3d 298 (“To establish a *prima facie* case of unlawful retaliation under the ADA, the plaintiff must show that: (1) she engaged in an activity protected by the ADA, (2) she suffered an adverse employment action, and (3) there is a causal connection between the protected activity and the adverse action.”).

Defendant takes issue with Plaintiff’s ability to establish that he suffered an adverse employment action. Specifically, Defendant contends that Plaintiff “has failed to provide any

competent evidence to support his claim" that he was demoted, or otherwise suffered from an adverse employment action, during the 2021-2022 school year. (Doc. No. 87 at 7).

1. Change of Assignment

While Defendant does not dispute that Plaintiff's teaching setting and curriculum changed, it argues that such changes are a reality of being a teacher and do not constitute an adverse employment action. (See Doc. No. 87 at 8). Plaintiff disagrees, claiming he suffered several adverse employment actions: (1) he was placed on a support plan; (2) he was demoted to teach students who are at risk and special needs (Doc. No. 89 at 30); (3) he was placed on administrative leave for four months (Doc. No. 89 at 32); and (4) other teachers provided him with negative feedback. The Court will discuss why each of Defendant's actions do not constitute adverse employment decisions for purposes of Title VII, the ADA, or the ADEA.

"Adverse employment actions include only ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating." *McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007). "[A]n employment action that 'does not affect job duties, compensation, or benefits' is not an adverse employment action." *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 282 (5th Cir. 2004). A loss of some job responsibilities does not constitute an adverse employment action, but, in certain cases, a "change in or loss of job responsibilities ... may be so significant and material that it rises to the level of an adverse employment action." *Thompson v. City of Waco, Tx.*, 764 F.3d 500, 504 (5th Cir. 2014).

2. Support Plan

Importantly, the Fifth Circuit has directly held that an "employer's decision to place an employee on a performance improvement plan is not an adverse employment action." *Welsh v. Fort Bend Indep. Sch. Dist.*, 941 F.3d 818, 824–25 (5th Cir. 2019) (placing a teacher on an

improvement plan “did not result in a material loss of job responsibilities; … [the plaintiff’s] title, hours, salary, and benefits did not suffer as a result.”). In the case at hand, the Defendant placed Plaintiff on a support plan to help improve his ability to prepare his curriculum and effectively teach students. Plaintiff, however, “was not terminated; his title, hours, salary, and benefits remained the same; he was moved back to a regular seventh grade classroom when he requested it; and when he requested to transfer to another school, his transfer request was approved and he was transferred to the school he requested.” (Doc. No. 87 at 8). Plaintiff offered no evidence to the contrary. As such, the case at hand is similar to *Welsh v. Fort Bend Indep. Sch. Dist.*, 941 F.3d 818 (5th Cir. 2019), and like in *Welsh*, Plaintiff did not suffer an adverse employment action.

Accordingly, Defendant’s decision to place Plaintiff on a support plan was not an adverse employment decision for Title VII, ADA, or ADEA purposes.

3. Teaching Children at Risk

Next, Plaintiff asserts that he suffered an adverse employment action when he was “demoted” to teaching children at risk.²

The Fifth Circuit has held that “changes to the curriculum and assignment to classes with ‘at risk and special needs’ students” do not constitute adverse employment actions. *Welsh*, 941 F.3d at 828. Indeed, the Fifth Circuit has gone so far to recognized that “a reasonable administrator may decide to assign only their best teachers to educate students with ‘special needs.’” *Id.*

It is true that Plaintiff was moved from teaching eighth and seventh grade students in classrooms to instructing children at risk or children with special needs in the media center, but there is no competent summary judgment evidence that the new position constituted a reduction

² Plaintiff does not contend that he was fired. Instead, he argues that the reassignment to teaching students at risk or special needs students was a demotion.

in job responsibilities or menial or degrading work. As such, as recognized in *Welsh*, the reassignment to a new teaching setting did not constitute an adverse employment decision.

4. Administrative Leave

Plaintiff also claims that he suffered a discriminatory adverse employment action cognizable under Title VII, the ADA, and the ADEA when Defendant placed him on administrative leave pending an investigation.

In the Fifth Circuit, “[a]dverse employment actions include only ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating.’ Under this standard ... placing [the plaintiff] on paid leave—whether administrative or sick—[is] not an adverse employment action.” *McCoy*, 492 F.3d at 559. In fact, school districts have a compelling reason to place teachers on leave after students and parents have filed complaints.

As such, placing Plaintiff on leave pending an investigation was not sufficient to constitute an adverse employment decision.

5. Teacher’s Comments

While Plaintiff does not directly list the teacher’s and principal’s comments as adverse employment actions, to be thorough the Court will discuss whether such conduct amounts to an adverse employment action.

Several teachers sat in on Plaintiff’s classes and e-mailed him performance reviews. The performance reviews contained both statements of positive encouragement and constructive but negative feedback. The teachers’ feedback is not sufficient to constitute an adverse employment action. Likewise, Principal Bank’s feedback about his performance is not sufficient to qualify as an adverse employment action. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997) (holding that “disciplinary filings, supervisor’s reprimands, and ... poor performance by the

employee" do not constitute adverse employment actions), abrogated on other grounds by *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345.

For the aforementioned reasons, Plaintiff cannot show that he suffered an adverse employment action. Therefore, summary judgment is proper. That being the case, the Court need not analyze Defendant's other arguments. Nevertheless, in order to be thorough, the Court will discuss each contention.

B. Title VII (Race, National Origin, Color)

The *McDonnell Douglas* framework first requires Yates to establish a *prima facie* case of discrimination. Under Title VII, a *prima facie* case of discrimination based on disparate treatment requires a showing that the plaintiff: (1) is a member of a protected class, (2) was qualified for the position at issue, (3) was the subject of an adverse employment action, and (4) was treated less favorably because of his or her membership in that protected class than were other similarly situated employees who were not members of the protected class, under nearly identical circumstances. *Paske*, 785 F.3d at 985. Plaintiff pleads that he is Hispanic and that other Hispanic and white employees were treated less favorably than the African American employees.

Plaintiff alleges, and Spring ISD does not dispute, that Plaintiff is a member of a protected class. That said, Defendant argues that Plaintiff failed to put forth evidence of any adverse employment action taken against him. As discussed earlier, Plaintiff was not subject to an adverse employment action. The Court will not repeat its reasoning as it was explained *supra*. Instead, the Court will focus its attention on the contested fourth element: whether Plaintiff was treated less favorably because of his or her membership in that protected class than were other similarly situated employees who were not members of the protected class, under nearly identical circumstances.

Plaintiff's Complaint and Response allege that he and other Hispanic and white employees are treated less favorably than Black employees. (Doc. No. 87 at 13). Defendant states that he has no evidence to support that assertion.

As evidence of the alleged disparate treatment, Plaintiff presents the Court with an e-mail. The e-mail is written by Plaintiff, and it is addressed to his own e-mail address. At the end of the e-mail Plaintiff writes, "I swear under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge." (Doc. No. 1-1, Exhibit V). Given Plaintiff's *pro se* status, the Court will consider this to be an affidavit despite its somewhat unusual format. Even so, the statements do not create a fact issue that would survive summary judgment.

The declaration provides numerous examples of incidents where white and Hispanic teachers were treated differently from Black teachers. Plaintiff does not, however, provide sufficient facts to conclude that the employees were similarly situated employees or that they were "under nearly identical circumstances." *Paske*, 785 F.3d at 985.

Thus, Plaintiff fails to establish a *prima facie* case of Title VII discrimination or retaliation for two reasons: (1) Plaintiff does not establish that there was an adverse employment action and (2) Plaintiff failed to present evidence that he was treated less favorably because of his or her membership in that protected class than were other similarly situated employees who were not members of the protected class, under nearly identical circumstances. Thus, the Court grants summary judgment in favor of Defendant on Plaintiff's discrimination and retaliation claims under Title VII.

C. Age Discrimination in Employment Act

Defendant also moved for summary judgment on Plaintiff's age discrimination claim. In addition to arguing that there was no adverse employment decision, Defendant contends that the

Court should grant summary judgment on Plaintiff's age discrimination claim because he cannot make out a *prima facie* case of age discrimination. Alternatively, Defendant has offered a legitimate nondiscriminatory reason for removing Plaintiff from the seventh-grade position, and asserts that Plaintiff cannot show the reasons he was removed were pretext for age discrimination. (Doc. No. 86-87).

Plaintiff states in his Response that the decision to place Plaintiff under a "support plan" was solely based on Plaintiff's age. (Doc. No. 89 at 10). His entire argument on the issue is as follows: "Plaintiff (sic) 67, Lugo was in her 20's." (Doc. No. 89 at 35).

As discussed, to assert a *prima facie* case under the ADEA, a plaintiff must show: (1) that he engaged in a protected activity, (2) that there was an adverse employment action, and (3) that a causal link existed between the protected activity and the adverse employment action. *Holtzclaw*, 255 F.3d at 259.

While Plaintiff's replacement (Lugo) was younger in age (in her 20's), Plaintiff has brought forth no evidence establishing that there is a causal connection between the decision to place him on a support plan and the Plaintiff's age. Plaintiff does not argue, much less direct the Court to any evidence that Defendant's employees made any age-related statements to Plaintiff. Neither does Plaintiff offer any statistical proof that Defendant has a pattern of practice of hiring younger applicants. A difference in age alone is not sufficient to establish a causal connection. Accordingly, Plaintiff cannot satisfy the causal link requirement.

Defendant also reasons that Plaintiff's ADEA claims must fail because it has a legitimate, non-discriminatory reason for choosing Lugo over Yates. "An employer may avoid liability for . . . discrimination . . . by producing evidence tending to show that it had a legitimate, nondiscriminatory reason for its disputed decision." *Patrick v. Ridge*, 394 F.3d 311, 316 (5th Cir.

2004). “This burden is one of production, not persuasion; it ‘can involve no credibility assessment.’” *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 142 (2000) (quoting *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 509 (1993)).

Defendant primarily contends that its legitimate, nondiscriminatory reason for reassigning Plaintiff was due to “ongoing concerns about his performance.” (Doc. No. 87 at 18). Otherwise stated, Defendant believes the reassignment was warranted due to Plaintiff’s lack of improvement despite a support plan. The District supports its conclusion in part by directing the Court to a declaration by Principal Kevin Banks (“Principal Banks”). (Doc. No. 87-2). In that sworn declaration, Principal Banks explains that “[b]ased on walkthrough evaluations that both Mr. McAfee and I did of Mr. Yates in October 2021 … [Spring ISD] still had ongoing concerns about Mr. Yates’ performance, as he continued to struggle with the level of the rigor of his instruction, his pacing and time management, his checks for understanding, and his classroom management.” (Doc. No. 87-2 at ¶ 9). As such, the Defendant “determined that a stronger teacher was needed for the 7th grade class.” (Doc. No. 87-2 at ¶ 18). The Defendant chose to hire Lugo “a brand-new teacher straight out of teaching college who we felt had the potential to be better with the 7th grade classes. [Principal Banks] moved Mr. Yates back to the 6th grade push-in position, as [Principal Banks] believe[d] that he would do better working with smaller groups of students.” (Doc. No. 87-2 at ¶ 10). Considering the declaration, the District has clearly brought forth a legitimate, nondiscriminatory reason for hiring Lugo and reassigning Plaintiff. As such, the Court finds that the Defendant has met its burden as to this issue.

Lastly is step three of the *McDonnell Douglas* analysis. In this part of the test, Yates must bring forth evidence to establish a genuine issue of material fact that Defendant’s legitimate reason is a pretext. Defendant argues that Yates cannot meet his burden in establishing that its legitimate,

nondiscriminatory reasons for hiring Lugo and reassigning Plaintiff is pretextual or that Yates' age played a role in its selection.

Once the employer satisfies its burden of providing a legitimate, nondiscriminatory reason for the employment decision:

[T]he onus shifts back to the plaintiff to prove either that the defendant's articulated reason is merely a pretext for race [color, sex, national origin, or age] discrimination, or that the defendant's reason, while true, is only one of the reasons for its decision, and another 'motivating factor' is the plaintiff's protected characteristic (the mixed-motives alternative).

Autrey, 704 F.3d at 347. Neither party offers much, if any, argument (and certainly no evidence) as to the mixed-motives alternative, so the Court will focus its analysis on the pretext alternative.

The plaintiff "must substantiate his claim or pretext through evidence demonstrating that discrimination lay at the heart of the employer's decision." *Price v. Fed. Exp. Corp.*, 283 F.3d 715, 720 (5th Cir. 2002). "A plaintiff may establish pretext by showing that a discriminatory motive more likely motivated [his or her] employer's decision, such as through evidence of disparate treatment, or that her employer's explanation is unworthy of credence." *Haire v. Bd. of Supervisors of La. State Univ. Agric. & Mech. Coll.*, 719 F.3d 356, 363 (5th Cir. 2013); *see also Brown v. Wal-Mart Stores East, L.P.*, 969 F.3d 571, 578 (5th Cir. 2020) ("Pretext can be proven by any evidence that casts doubt on the credence of the employer's proffered justification for the adverse employment action.").

In response, Plaintiff reiterates that the "'support plan' was a pretext to demote Mr. Yates, for his race, color, age (almost 70 years old), and perceived disability." (Doc. No. 89 at 19). Yates' unsupported, conclusory assertions that the Defendant's conduct was pretextual is not competent summary judgment evidence; it is not sufficient to create a fact issue as to whether Defendant's acts were pretextual.

Accordingly, the Court grants summary judgment on Plaintiff's ADEA claims.

D. Americans with Disabilities Act

Next, Defendant contends that "Plaintiff has provided no evidence of having a disability or that he was treated differently or subjected to adverse employment action due to a disability." (Doc. No. 87 at 18). Plaintiff disagrees, claiming his hearing loss is a disability and that he was discriminated on the basis of his hearing loss.

In an ADA case, a plaintiff must show (1) he engaged in an activity protected by the ADA, (2) he suffered an adverse employment action, and (3) there is a causal connection between the protected activity and the adverse action. *Lyons*, 964 F.3d 298.

In Plaintiff's deposition he explains that he has hearing loss in one ear, and therefore, has to sit with his other ear facing the speaker. (Doc. No. 87-1 at 74:20-76:17). He goes on to state that he told Principal Banks about his hearing loss, and in response, "he didn't say anything." (Doc. No. 87-1 at 75:9). When asked if Principal Banks ever brought it up his hearing loss again, Plaintiff at first answered "no." (Doc. No. 87-1 at 75:19-21). He later explained that sometimes in meetings Principal Banks would ask if Plaintiff could hear. (Doc. No. 87-1 at 75:25-26:17).

Such conduct is neither an adverse employment action nor is it discriminatory.

E. Defamation

Defendant's last argument addresses Plaintiff's defamation claim. Defendant argues that it, as a public school, is immune from a defamation claim.

In Texas, under the doctrine of sovereign immunity, a governmental entity or political subdivision cannot be held liable for the actions of its employees unless there is a constitutional or statutory provision waiving such immunity. *See City of Amarillo v. Martin*, 971 S.W.2d 426, 427 (Tex.1998); *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341

(Tex.), cert. denied, 525 U.S. 1017, 119 S.Ct. 541, 142 L.Ed.2d 450 (1998); *Harris County v. Dillard*, 883 S.W.2d 166, 168 (Tex. 1994). A political subdivision of the state is defined under the act to include school districts. Tex. Civ. Prac. & Rem. Code § 101.001(3).

“Like the state, counties and other political subdivisions can only be liable where an exception to such immunity is provided for in the Texas Tort Claims Act.” *Diaz*, 802 F.2d at 14 (citing Tex. Civ. Prac. & Rem. Code § 101.001(3)(B)). The Texas Tort Claims Act contains a limited exception that allows for cases to be brought against school districts when a plaintiff’s injuries are proximately caused by an employee’s operation or use of a motor-driven vehicle or motor-driven equipment or by a condition or use of tangible real or personal property. Tex. Civ. Prac. & Rem. Code § 101.021. Here, the Plaintiff’s claim of defamation does not involve the operation or use of a motor vehicle or the condition or use of tangible personal or real property. Therefore, the claim does not fall within the scope of the Texas Tort Claims Act, and the Defendant is immune from liability. The Court grants summary judgment on Plaintiff’s defamation claims. *Leatherwood v. Prairie View A&M Univ.*, 2004 WL 253275, *3 (Tex. App.—Houston [1st Dist.] Feb. 12, 2004, no pet.) (“[I]ntentional torts, such as defamation, do not fall within the scope of the waiver of immunity under the Tort Claims Act.”).

IV. CONCLUSION

For the reasons mentioned, the Court grants the Defendant’s Motion for Summary Judgment. (Doc. No. 87). All other pending motions are denied as moot.

Signed this 31st day of August, 2023.



Andrew S. Hanen
United States District Judge

ENTERED

August 31, 2023

Nathan Ochsner, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

FERNANDO YATES,

§

Plaintiff,

§

VS.

§

**SPRING INDEPENDENT SCHOOL
DISTRICT,**

§

Defendant.

§

CIVIL ACTION NO. 4:22-CV-2121

ORDER

Pending before the Court is Defendant Spring Independent School District's ("Defendant") Motion to Dismiss. (Doc. No. 23). Defendant has also filed a Motion for Summary Judgment. (Doc. No. 87). Plaintiff Fernando Yates filed Responses to both motions. (Doc. Nos. 26, 89). After reviewing the Motion to Dismiss, the Motion for Summary Judgment, and all other relevant findings, the Court finds that the Motion to Dismiss (Doc. No. 23) should be denied as moot in light of Defendant's filing of a Motion for Summary Judgment. *See, e.g., King v. Bigler LP*, No. H-10-0580, 2011 WL 1542737, at *8 (S.D. Tex. Apr. 20, 2011) (finding motion to dismiss moot in light where motion for summary judgment adequately disposed of arguments raised in motion to dismiss); *Bell v. Dallas Hous. Auth.*, No. 302CV1829L, 2003 WL 2245585, at *11 (N.D. Tex. Sept. 23, 2003) (denying as moot motion to dismiss because arguments therein "[were] subsumed in [the] summary judgment motion").

Accordingly, Defendant's Motion to Dismiss is denied as moot.

Signed this 31st day of August, 2023.



Andrew S. Hanen
United States District Judge

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