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United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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July 18, 2017

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 16-60582 Harvey Anderson v. Ben Wade
USDC No. 3:12-CV-231

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Dantrell L. Johnson, Deputy Clerk
504-310-7689

Mr. Harvey Anderson
Ms. Nakimuli Oni Davis-Primer
Mr. Bradley Clayton Moody

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 16-60582

HARVEY ANDERSON,

Plaintiff - Appellant

v.

VENTURE EXPRESS,

Defendant - Appellee

Appeal from the United States District Court for the
Southern District of Mississippi, Jackson

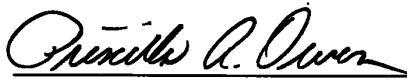
ON PETITION FOR REHEARING

Before REAVLEY, OWEN, and ELROD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60582
Summary Calendar

D.C. Docket No. 3:12-CV-231

United States Court of Appeals
Fifth Circuit

FILED

June 16, 2017

Lyle W. Cayce
Clerk

HARVEY ANDERSON,

Plaintiff - Appellant

v.

VENTURE EXPRESS,

Defendant - Appellee

Appeal from the United States District Court for the
Southern District of Mississippi, Jackson

Before REAVLEY, OWEN, and ELROD, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.



Certified as a true copy and issued
as the mandate on Jul 26, 2017

Attest:

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX B

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 16-60582
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

June 16, 2017

Lyle W. Cayce
Clerk

HARVEY ANDERSON,

Plaintiff–Appellant,

v.

VENTURE EXPRESS,

Defendant–Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:12-CV-231

Before REAVELY, OWEN, and ELROD, Circuit Judges.

PER CURIAM:*

Harvey Anderson appeals the district court’s grant of summary judgment in favor of Venture Express (Venture) and the accompanying dismissal of Anderson’s discrimination and retaliation claims. 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.

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I

It is well established that “Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”¹ When the moving party demonstrates the absence of a genuine issue of material fact as to an essential element of the case, “the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial.”² “We review the grant of a motion for summary judgment *de novo*,”³ viewing the facts in the light most favorable to the nonmovant.⁴

II

We note that Anderson has repeatedly failed to point the court to any evidence that would support his claims of discrimination.⁵ However, given his *pro se* status, this court has attempted to consider all competent record evidence in reviewing the grant of summary judgment.⁶

Venture employed Anderson, an African-American male who was fifty-nine years old when terminated, as a truck driver. During the course of his employment, Venture counseled Anderson multiple times and suspended him for log violations, insubordination, and related issues. He also received a

¹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see* FED. R. CIV. P. 56(c).

² *Willis v. Roche Biomedical Labs., Inc.*, 61 F.3d 313, 315 (5th Cir. 1995).

³ *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 377 (5th Cir. 2010).

⁴ *Id.*

⁵ *See RSR Corp. v. Int’l Ins. Co.*, 612 F.3d 851, 857 (5th Cir. 2010) (noting that “the party opposing the summary judgment is required to identify specific evidence in the record and to articulate precisely how this evidence supports his claim” and that the court is not required “to search the record for material fact issues”).

⁶ *See Grant v. Cuellar*, 59 F.3d 523, 524 (5th Cir. 1995) (noting that though the court “liberally construe[s] briefs of *pro se* litigants and appl[ies] less stringent standards to parties proceeding *pro se* than to parties represented by counsel,” *pro se* litigants must still “reasonably comply with the standards of Rule 28”).

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citation from the Alabama Department of Transportation for a violation of driver hours-of-service regulations.⁷ Anderson disputed some of the log violations, negative reviews, and comments he received. Venture ultimately terminated Anderson's employment, citing continued log-related issues and insubordination. Anderson subsequently filed a complaint with the EEOC, alleging discrimination based on age and race, and obtained a right to sue letter from the EEOC.

Anderson brought suit in federal court against Venture and various individuals, alleging discrimination under Title VII.⁸ In a two sentence statement of the facts, he asserted that "[t]he firing was a conspiracy by all five parties involved because I would not agree to some violations that had not occurred [sic]. This was wrongful termination, discrimination, retaliation, failure to comply with D.O.T. rules and regulations and company rules." Anderson subsequently dismissed all defendants except Venture. Venture moved for summary judgment, asserting that because Anderson failed to answer written requests for admission, the requested admissions should be deemed admitted, admissions which established that Anderson had no discrimination claim. Venture also argued that the record conclusively showed that Anderson was fired for "repeated company policy violations, not because of his race or his age." The district court construed Anderson's complaint and other filings as charging retaliation and discrimination based on race and age. It granted Venture's motion for summary judgment and dismissed Anderson's claims. Anderson timely appealed and now argues that the violations he

⁷ See 49 C.F.R. § 395.3(a)(2) ("A driver may drive only during a period of 14 consecutive hours after coming on duty following 10 consecutive hours off duty. The driver may not drive after the end of the 14-consecutive-hour period without first taking 10 consecutive hours off duty.").

⁸ Anderson's civil cover sheet listed causes of action based on "Employment," "Fair Labor Standards Act," "Other Civil Rights," and "EPA."

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allegedly committed were not, in fact, violations of the law, that Venture did not show he was unqualified for his position, and that Venture's own actions were in violation of the law.

III

We first address Anderson's race discrimination claim. Title VII protects individuals from discrimination by an employer based on the "individual's race, color, religion, sex, or national origin."⁹ For a race-based claim, a plaintiff in a Title VII action must "establish[] a prima facie case of racial discrimination."¹⁰ A prima facie case 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 than were other similarly situated employees who were not members of the protected class, under nearly identical circumstances.¹¹

If a plaintiff makes a prima facie case, then the defendant must provide a legitimate, nondiscriminatory reason for the complained-of action.¹² If the defendant meets this burden, "the onus shifts back to the plaintiff" to provide substantial evidence that the given reason is merely pretext or that the stated reason "is only one of the reasons . . . and another 'motivating factor' is the plaintiff's protected characteristic."¹³ "[C]onclusory allegations, speculation, and unsubstantiated assertions," without more, are insufficient to satisfy the nonmovant's burden at the summary judgment stage.¹⁴

⁹ 42 U.S.C. § 2000e-2(a)(1).

¹⁰ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹¹ *Paske v. Fitzgerald*, 785 F.3d 977, 985 (5th Cir. 2015).

¹² *Autry v. Fort Bend Indep. Sch. Dist.*, 704 F.3d 344, 347 (5th Cir. 2013).

¹³ *Id.* (quoting *Vaughn v. Woodforest Bank*, 665 F.3d 632, 636 (5th Cir. 2011)); accord *Auguster v. Vermilion Par. Sch. Bd.*, 249 F.3d 400, 402-03 (5th Cir. 2001).

¹⁴ *Ramsey v. Henderson*, 286 F.3d 264, 269 (5th Cir. 2002) (quoting *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc) *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1)).

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Our review of the record reveals no competent summary judgment evidence suggesting that Anderson was treated less favorably than other employees who were not members of a protected class, nor does it reveal that he was replaced by someone outside his protected class. Venture provided an uncontested affidavit showing that Anderson was replaced by a forty-six-year-old African-American male. Anderson fails to offer any evidence that similarly situated non-African-Americans received more favorable treatment. His EEOC charge identifies two “younger Whites who have committed violations . . . [and] have not been disciplined or discharged.” However, the record shows that Venture terminated one of these individuals for log violations prior to Anderson, undermining Anderson’s claim that this individual received more favorable treatment, and that the other individual, described by Anderson only as “Mack (LNU),” has yet to be identified in the course of this litigation. Further, Venture provided a list of at least six other Caucasian individuals who were terminated for log violations between 2011 and 2013. Anderson has failed to identify any similarly situated members outside his protected class who were treated more favorably than he. Because Anderson has failed to make out a prima facie case of discrimination, summary judgment in favor of Venture was proper.

IV

The district court did not err in dismissing Anderson’s retaliation claims. Anderson failed to exhaust his administrative remedies by failing to include the retaliation claim in his EEOC charge, either by checking the box or describing retaliation. While a cause of action may be based on “any kind of discrimination like or related to the charge’s allegations” it is “limited . . . by the scope of the EEOC investigation that could reasonably be expected to grow

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out of the initial charges.”¹⁵ Given that Anderson filed his EEOC charge after his termination, an investigation into retaliation could not be reasonably expected to grow out of the initial EEOC charge. Therefore, his failure to allege retaliation in his EEOC charge supports dismissal of this claim for failure to exhaust administrative remedies.¹⁶

V

Finally, we address Anderson’s age discrimination claim. Though Anderson’s complaint does not reference age discrimination, his EEOC charge and some subsequent filings reference age as a potential basis for termination. Given Anderson’s *pro se* status, we address his claim, and we affirm the district court’s dismissal.

Under the Age Discrimination in Employment Act (ADEA), an employer may not “discharge any individual . . . because of such individual’s age.”¹⁷ A *prima facie* case of age discrimination requires the plaintiff to show that

(1) he was discharged; (2) he was qualified for the position; (3) he was within the protected class at the time of discharge; and (4) he was either i) replaced by someone outside the protected class, ii) replaced by someone younger, or iii) otherwise discharged because of his age.¹⁸

¹⁵ *Fine v. GAF Chem. Corp.*, 995 F.2d 576, 578 (5th Cir. 1993) (quoting *Fellows v. Universal Rests., Inc.*, 701 F.2d 447, 451 (5th Cir. 1983)).

¹⁶ *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378-79 (5th Cir. 2002) (explaining that “[e]mployment discrimination plaintiffs must exhaust administrative remedies before pursuing claims in federal court”); *see also Teffera v. N. Tex. Tollway Auth.*, 121 F. App’x 18, 21 (5th Cir. 2004) (per curiam) (affirming dismissal of retaliation claim when plaintiff checked retaliation box only on the EEOC intake form but not on the EEOC charge); *Luna v. Lockheed Martin Corp.*, 54 F. App’x 404, *1 (5th Cir. 2002) (per curiam) (holding that when plaintiff failed to check the national origin box on his EEOC charge, plaintiff failed to exhaust administrative remedies, and thus the court had no jurisdiction to consider the claim).

¹⁷ 29 U.S.C. § 623(a).

¹⁸ *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 378 (5th Cir. 2010) (quoting *Berquist v. Wash. Mut. Bank*, 500 F.3d 344, 349 (5th Cir. 2007)).

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“[T]he burden of persuasion to establish that age was the ‘but-for’ cause of the employer’s adverse action” remains always on the plaintiff.¹⁹

Anderson’s briefing before this court focuses on the fact that he was not unqualified because he should not have received any log violations. But this court’s inquiry concerns whether the termination was the result of discrimination—not the correctness of the employer’s decision. Anderson wholly fails to present any legal arguments or record evidence that would support his ADEA claim. Assuming the claim is not waived for inadequate briefing,²⁰ we find no evidence in the record before us to support any causal connection between Anderson’s termination and his age. Given the numerous warnings and violations Anderson incurred, he cannot show that his age was the “but-for” cause of his termination,²¹ and dismissal was appropriate.

VI

We do not doubt the sincerity of Anderson’s belief that the violations for which he was terminated were not violations of the law. However, our inquiry is limited to whether Anderson’s employer illegally discriminated or retaliated against him, and he has not pointed to any specific facts showing there is any genuine issue for trial. Summary judgment in favor of Venture was appropriate.

* * *

For the foregoing reasons, the district court’s judgment is AFFIRMED.

¹⁹ *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009); *see also id.* at 173-75 (contrasting this requirement with the *Price Waterhouse* burden shifting framework applied in “mixed-motive” Title VII claims).

²⁰ *See* FED. R. APP. P. 28(a)(8)(A) (requiring that the appellant’s argument contain “appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies”); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) (explaining that a party abandons arguments by failing to argue them in briefing).

²¹ *See Gross*, 557 U.S. at 177-78.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

HARVEY ANDERSON

PLAINTIFF

V.

CIVIL ACTION NO. 3:12CV231 DPJ-FKB

VENTURE EXPRESS, INC.

DEFENDANT

ORDER

This employment-discrimination action is before the Court on four motions: Defendant Venture Express Inc.’s Motion for Summary Judgment [66], Plaintiff Harvey Anderson’s two Motions for Summary Judgment [70, 115], and Plaintiff’s Motion for Status Conference [176]. Having considered the submissions of the parties, the Court finds that Defendant’s motion [66] should be granted and Plaintiff’s motions [70, 115, 176] are considered moot.

I. Facts and Procedural History

Plaintiff Harvey Anderson, an African-American, worked for Defendant Venture Express, Inc. (“Venture”) as a truck driver. Beginning in July 2010, Venture notified Anderson of issues regarding his driving logs, including failure to properly note fuel stops, missing or illegible mileage notations, and exceeding the allowable hours of service. Letter [66-9]. Anderson’s non-compliance continued.

In January 2011, Anderson received a citation from the Alabama Department of Public Safety Motor Carrier Safety Unit for a “14 hour rule violation.” Violation Report [66-23]. Soon thereafter, Venture suspended him for three days, citing his continuing failure to maintain his log book and manage his hours of service. Letter [66-10]. This suspension included a warning that similar problems in the future “will be grounds for your immediate termination.” *Id.* Then in July 2011, Venture informed Anderson that he had failed to submit twelve (12) logs, in violation

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of company policy and United States Department of Transportation rules. Letter [66-11]. Further counseling took place in August 2011 regarding Anderson's failure to take the required breaks while driving. Email [66-13].

On September 13, 2011, Ben Wade, Venture's Safety and Compliance Officer, recommended firing Anderson, observing that his "continued actions are proof that he is unwilling to adapt/conform with Venture." Email [66-15]. Agreeing with Wade's assessment, Defendant terminated Anderson's employment for violations of company policy and federal regulations governing hours of service and logging requirements. At the time, Anderson was 59 years old.

Aggrieved, Anderson filed a charge of discrimination with the Equal Employment Opportunity Commission. He asserted discrimination based on race in violation of Title VII and age in violation of the Age Discrimination in Employment Act (ADEA). Compl. [1] at 4 (EEOC Charge). He alleged that he had been "falsely accused" of log violations and that a Mississippi Department of Transportation Investigator had reviewed the charges and "found none of them to be true." *Id.* Finally, Anderson claimed that two similarly situated younger white employees committed violations and were not discharged or disciplined. *Id.*

After receiving notice of his right to sue, Anderson filed this *pro se* action. The entirety of Anderson's Complaint is the following statement: "The firing was a conspiracy by all five parties involved because I would not agree to some violations that had not occurred. This was wrongful termination, discrimination, retaliation, failure to comply with DOT rules and regulations and company rules." Compl. [1] at 2. As relief, Anderson seeks "[r]einstatement of monetary compensation [;] no reprisal from Venture." *Id.* Though Anderson cites Title VII as

the exclusive basis for jurisdiction and makes no reference to age-based discrimination, his EEOC charge referenced age as do a few of his many filings.

Once Venture moved for summary judgment, the parties filed numerous motions and briefs related to various issues. But because Anderson is representing himself, and out of an abundance of caution, the Court endeavored to review multiple filings [70, 103, 115, 154, 164, 166, 168] which might touch on Venture's motion for summary judgment or Anderson's own motions for summary judgment. Having done so, the Court concludes that it has subject-matter and personal jurisdiction and that the issues are fully briefed.¹

II. Summary Judgment Standard

Summary judgment is warranted under Rule 56(c) of the Federal Rules of Civil Procedure when evidence reveals no genuine dispute regarding any material fact and that the moving party is entitled to judgment as a matter of law. The rule "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact. *Id.* at 323. The non-moving party

¹The Court notes that these motions have not been handled in the normal time frame for resolving disputes. The way this action was coded prevented it from appearing on the Court's electronic tracking system, and it slipped through the cracks. The Court regrets any resulting inconvenience.

must then go beyond the pleadings and designate “specific facts showing that there is a genuine issue for trial.” *Id.* at 324. Conclusory allegations, speculation, unsubstantiated assertions, and legalistic arguments are not an adequate substitute for specific facts showing a genuine issue for trial. *TIG Ins. Co. v. Sedgwick James of Wash.*, 276 F.3d 754, 759 (5th Cir. 2002); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1997); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). Instead, when the movant shows the absence of a genuine issue of material fact, “the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial.” *Willis v. Roche Biomedical Labs., Inc.*, 61 F.3d 313, 315 (5th Cir. 1995). A simple plea for a jury trial on the bare assertion that there are genuine issues of material fact is not a sufficient response to a motion for summary judgment. *F.D.I.C. v. Brewer*, 823 F. Supp. 1341, 1347 (S.D. Miss. 1993) (citing *Washington v. Armstrong World Indus., Inc.*, 839 F.3d 1121, 1122–23 (5th Cir. 1988)).

In reviewing the evidence, factual controversies are to be resolved in favor of the nonmovant, “but only when . . . both parties have submitted evidence of contradictory facts.” *Little*, 37 F.3d at 1075. When such contradictory facts exist, the court may “not make credibility determinations or weigh the evidence.” *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 150 (2000).

These rules apply equally to *pro se* litigants. Although *pro se* pleadings must be viewed liberally, such plaintiffs are still required to follow Federal Rule of Civil Procedure 56. In particular, the Court has no discretion to consider unsupported assertions and evidentiary materials that fall short of Rule 56’s requirements. *See Gordon v. Watson*, 622 F.2d 120, 123 (5th Cir. 1980); *see also McAlpine v. Porsche Cars N. Am. Inc.*, No. 09-10407, 2010 WL

6768322, at *3 (5th Cir. June 2, 2010) (noting lack of discretion).

Finally, “[t]he court has no duty to search the record for material fact issues. Rather, the party opposing the summary judgment is required to identify specific evidence in the record and to articulate precisely how this evidence supports his claim.” *RSR Corp. v. Int’l Ins. Co.*, 612 F.3d 851, 857 (5th Cir. 2010) (citations omitted). Here, Anderson’s Response generally fails to properly cite the record. But given Plaintiff’s *pro se* status, the Court has attempted to consider all competent evidence. Having conducted that review, it appears that many of the assertions found in his filings—if considered—are not supported by sworn affidavits or other competent summary-judgment evidence.

III. Analysis

In its motion for summary judgment, Venture addresses potential claims for race discrimination, age discrimination, and retaliation.

A. Discrimination

Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer . . . 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). Likewise, the Age Discrimination in Employment Act (ADEA) prohibits discrimination in the workplace based on age and protects workers over the age of forty (40). 29 U.S.C. § 623. Both race and age discrimination claims follow the *McDonnell-Douglas* burden-shifting analysis.

The plaintiff must first establish a *prima facie* case of discrimination by showing (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 replaced by someone outside the protected class, or in the case of disparate treatment, he was treated less favorably than similarly situated employees under nearly identical circumstances. *See Lee v. Kan. City S. Ry.*, 574 F.3d 253, 259 (5th Cir. 2009); *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 513 (5th Cir. 2001); *see also McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If the plaintiff establishes a prima facie case, the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. *Lee*, 574 F.3d at 259. Once that burden is met, to prevail on a race discrimination claim, the plaintiff must offer evidence to show “either (1) that the defendant’s reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant’s reason, while true, is only one of the reasons for its conduct, and another ‘motivating factor’ is the plaintiff’s protected characteristic (mixed-motive alternative).” *Rachid v. Jack in the Box*, 376 F.3d 305, 312 (5th Cir. 2004). The ADEA does not permit the mixed-motive alternative, so the plaintiff “must prove that age was the ‘but-for’ cause of the employer’s adverse decision.” *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009); *see also Davis v. Farmers Ins. Exch.*, 372 F. App’x 517, 519 (5th Cir. 2010).

1. Race Discrimination

Venture submits that Anderson cannot make out a prima facie case of race discrimination because: (1) he was not replaced by someone outside his protected class and (2) the evidence does not support his claim that similarly situated white truck drivers were treated more favorably.² Venture first points out that within two weeks of Anderson’s termination, it hired

² Defendant also argues that Anderson was not “qualified” for the position of truck driver due to his repeated rule violations. Because Plaintiff cannot meet the fourth prong of the prima facie case, the Court declines to pursue this approach. *See Bienkowski v. Am. Airlines*,

Selester Penegar, an African American, as a truck driver. Fucci Decl. [66-17] at 2. Second, there is no record evidence of a more favorably treated comparator. *Id.*

On this latter point, Anderson offers no argument or evidence regarding specific comparators in his summary-judgment responses. But in his EEOC charge, he mentioned Hugh Walker and “Mack LNU” as examples of younger white males who have not been disciplined or discharged. Venture rebuts those conclusory claims with evidence indicating that Walker was in fact terminated. Def.’s Sworn Discovery Resps. [66-22] at 3–4. Anderson has not shown otherwise. As for “Mack LNU,” it is unclear who that is, and Anderson produced no evidence to confirm his identity or explain the status of his employment.

Finally, Anderson’s hope of creating a prima facie case fails because numerous other employees outside Plaintiff’s protected class were terminated for similar violations. Fucci Decl. [66-17] at 2. Specifically, the following white truck drivers were terminated or suspended for log violations/false logs: Hugh Walker was terminated on June 14, 2011; Jerry Brothers was suspended on August 19, 2011, but never returned; Anthony Freeman was suspended on April 22, 2011, then terminated on October 18, 2011; Roy Sinko was suspended on December 5, 2011, then terminated on December 13, 2011; James Tierney was suspended on January 31, 2012, then terminated on February 7, 2013; and Steve Papastefanou was given a verbal warning on June 21, 2012, then terminated on January 11, 2013. Def.’s Sworn Discovery Resps. [66-22] at 3–4. *See*

Inc., 851 F.2d 1503, 1506 n.3 (5th Cir. 1988) (observing that a plaintiff is considered qualified for a position he has held, unless he has “suffered physical disability or loss of a necessary professional licence or some other occurrence that rendered him unfit for the position for which he was hired”).

Washington v. Louisiana, 628 F. App'x 914, 918 (5th Cir. 2015) (finding no prima facie case where “similarly situated employees who acted as [plaintiff] did received the same treatment”); *Banks v. AT & T Wireless, Inc.*, 113 F. App'x 614, 616 (5th Cir. 2004) (same).

The Court has no reason to doubt that Anderson believes he suffered race-based discrimination. But the mere subjective belief that discrimination has occurred is not sufficient to defeat a properly supported motion for summary judgment. *See Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 654 (5th Cir. 2004) (citing *Lawrence v. Univ. of Tex. Med. Branch at Galveston*, 163 F.3d 309, 313 (5th Cir. 1999); *Ramsey v. Henderson*, 286 F.3d 264, 269 (5th Cir. 2002)). Under Rule 56(c), which contrary to Anderson's argument does apply to this case, he was required to offer competent record evidence establishing each of the elements of a prima facie case. He has not as to the fourth element. Summary judgment is therefore appropriate.³

2. Age Discrimination

In his EEOC charge, Anderson alleged age discrimination, but in his Complaint, he

³Even assuming a prima facie case, Venture offers a legitimate, non-discriminatory reason for its decision and Anderson has not met his ultimate burden. At best, Anderson disagrees with Venture's interpretation of the rules and his log books and believes Venture misunderstood the rules. Pl.'s Dep. [163-1] at 21–25 (CMCF pagination); *see id.* at 22–23 (“I stopped talking to [Wade] right then because I knew he did not know what he was trying to enforce . . .”). But “the relevant issue in a Title VII case is whether an employer discriminated against its employee, not whether it made a correct disciplinary determination.” *McVile v. Inter-Community Healthcare, Inc.*, 460 F. App'x 353, 355 (5th Cir. 2012) (citing *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995) (“[T]he employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination.”); *Deines v. Tex. Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 278 (5th Cir. 1999) (“Whether the employer's decision was the correct one, or the fair one, or the best one is not a question within the jury's province to decide. The single issue for the trier of fact is whether the employer's [action] was motivated by discrimination.”)). Anderson has not offered any competent record evidence showing pretext or mixed motives.

invoked Title VII as the basis for jurisdiction and made no reference to age. *See* Compl. [1] at 1–2. Likewise, in his response to Venture’s motion, he repeatedly cites Title VII. Pl.’s Resp. to Def.’s Misinterpretation of the Law & Opp’n to Def.’s Summ. J. [168] at 1–2. He does mention the ADEA in “Plaintiff’s Motion to Resubmit Manifesto of the Law,” which included one page titled “Title VII: Development in Federal Employment Related Jurisprudence, Age Discrimination.” Pl.’s Mot. [166] at 2. That filing [166] is mostly comprised of photocopied pages from legal books and articles—most of which touch on race discrimination. More significantly, Anderson fails to ever substantively address Venture’s legal arguments and record evidence regarding the age claim. So to the extent Anderson ever intended an ADEA claim, it appears to have been either abandoned or unsupported under Rule 56(c). Anderson has not shown that but for his age, he would not have lost his job. Summary judgment is therefore appropriate to the extent there was ever an ADEA claim.

B. Retaliation

To state a *prima facie* case of retaliation, Anderson must show that (1) he engaged in activity protected by Title VII; (2) an adverse employment action occurred; and (3) a causal link exists between the protected activity and the adverse employment action. *Zmora v. City of Houston*, 798 F.3d 326, 331 (5th Cir. 2015). Venture may produce a legitimate, non-retaliatory reason for its action, and then Anderson must establish that his protected activity was “a but-for cause of the alleged adverse action.” *Id.*

First, Anderson did not administratively exhaust a retaliation claim because he did not mention retaliation or any type of protected activity in his EEOC charge. Compl. [1] at 4; *see Randel v. U.S. Dep’t of Navy*, 157 F.3d 392, 395 (5th Cir. 1998) (noting that discrimination and

retaliation claims are distinct and affirming dismissal of racial discrimination claim not mentioned in EEO charge); *see also* *Bouvier v. Northrup Grumman Ship Sys., Inc.*, 350 F. App'x 917, 921 (5th Cir. 2009) (affirming dismissal where EEO charge mentioned sex discrimination but not retaliation or “any prior complaints of sex discrimination”).

Second, Anderson has not alleged that he engaged in protected activity prior to his discharge. An employee has engaged in protected activity if he has: (1) opposed any practice made unlawful by Title VII, or (2) made a charge, testified, or participated in a proceeding. *Byers v. Dall. Morning News, Inc.*, 209 F.3d 419, 427–28 (5th Cir. 2000). As pointed out by Defendant, filing an EEOC charge after Plaintiff's termination cannot support a retaliatory termination claim. *See Ellis v. Compass Grp. USA, Inc.*, 426 F. App'x 292, 297 (5th Cir. 2011) (affirming summary judgment on retaliation claim where the EEOC charge was filed after the suspension, noting “the alleged retaliation occurred before the filing of an EEOC charge”); *Byers*, 209 F.3d at 428 (holding that “‘participation clause’ is irrelevant because [plaintiff] did not file a charge with the EEOC until *after* the alleged retaliatory discharge took place”) (emphasis in original). As for the opposition clause, Anderson has not directed the Court to any evidence that he complained internally about perceived unlawful discrimination prior to his termination.

In sum, Defendant's motion should be granted; Plaintiff's race discrimination, age discrimination, and retaliation claims are dismissed.

IV. Conclusion

The Court has considered all arguments raised by the parties. Those not addressed in this order would not have changed the outcome.

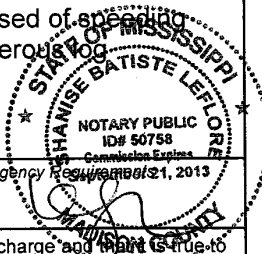
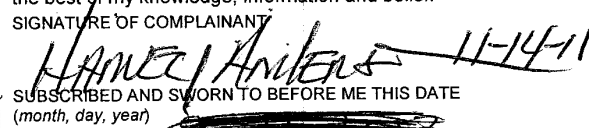
Based on the foregoing, Defendant's motion for summary judgment is granted. Because summary judgment is appropriate, Plaintiff's motions [70, 115, 176] are moot. Plaintiff's claims are dismissed with prejudice.

A separate judgment will be entered in accordance with Federal Rule of Civil Procedure 58.

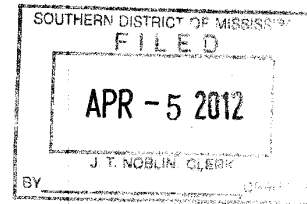
SO ORDERED AND ADJUDGED this the 5th day of August, 2016.

s/ Daniel P. Jordan III

UNITED STATES DISTRICT JUDGE

CHARGE OF DISCRIMINATION This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.		Charge Presented To: _____ Agency(ies) Charge No(s): 846-2012-04169 ☐ FEPA ☒ EEOC	
_____ and EEOC State or local Agency, if any			
Name (indicate Mr., Ms., Mrs.) Mr. Harvey Anderson		Home Phone (Incl. Area Code) (601) 859-7447	
Date of Birth REDACTED 1952			
Street Address City, State and ZIP Code 3443 N. Liberty St., Canton, MS 39046			
Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)			
Name VENTURE EXPRESS		No. Employees, Members Unknown	
Phone No. (Include Area Code) (601) 859-4565			
Street Address City, State and ZIP Code 255 Commercial Parkway, Canton, MS 39046			
Name		No. Employees, Members	
Phone No. (Include Area Code)			
Street Address City, State and ZIP Code			
DISCRIMINATION BASED ON (Check appropriate box(es).) ☒ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☐ RETALIATION ☒ AGE ☐ DISABILITY ☐ GENETIC INFORMATION ☐ OTHER (Specify)		DATE(S) DISCRIMINATION TOOK PLACE Earliest Latest 09-12-2011 09-12-2011 ☐ CONTINUING ACTION	
THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)). I was hired by the above named employer on 5/4/2004 and was last employed as a Transportation Driver. I was discharged from this position on 9/12/2011. Ben Wade, Log Auditor (W/M) and Becky (LNU) (W/F), from the Safety Department informed me I was being discharged for log violations. I believe I have been discriminated against because of my race (Black) in violation of Title VII of the Civil Rights Act of 1964 as amended and because of my age (59) in violation of ADEA of 1967 as amended since: I was falsely accused by Ben Wade of committing log violations between 6/2/2011 - 8/18/2011. Sgt. Jerry Daniels, MDOT Investigator, investigated each of these charges and found none of them to be true. Similar situated younger Whites who have committed violations such as speeding citations and numerous log violations have not been disciplined or discharged. Hugh Walker (W/M) has been accused of speeding citations and numerous log violations and Mack (LNU) (W/M), has been accused of numerous log violations.			
I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.		NOTARY - When necessary for State and Local Agency Requirements 	
I declare under penalty of perjury that the above is true and correct.		I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.	
SIGNATURE OF COMPLAINANT 		SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year) 11-14-11	
Date 11-14-11 Charging Party Signature 			

16-60582.22



IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Harvey Anderson
(Plaintiff's name)

PLAINTIFF

VS.
NO. _____

CIVIL ACTION

3:12 CV 231 DP5-FKB

(to be provided by the Court)

BEN WADE
(Defendant(s) name(s))

DEFENDANT(S) JURY
DEMAND

ADAM COOK BECKY UNKNOWN
JASON FURCI
WENDY WINKLER

COMPLAINT

COMES NOW, plaintiff, HARVEY ANDERSON, pro se, and for cause of action
against the defendant(s), BEN WADE, would state:

JURISDICTION

TITLE SEVEN - THE DISCRIMINATION TOOK PLACE
IN CANTON, MS IN MADISON CO.

I.

Plaintiff is an adult resident citizen of the County of MADISON, State of Mississippi.

The defendant BEN WADE is an adult resident citizen of the County of UNKNOWN

State of TENNESSEE

16-60582.19

FACTS

The firing was a conspiracy by all five parties involved because I would not agree to some violations that had not occurred. This was wrongful termination, discrimination, retaliation, failure to comply with D.O.T rules and regulations and company rules.

RELIEF

Reinstatement of monetary compensation
no reprisal from Venture

Respectfully submitted, this the 29 day of March, 2012.

Harvey Anderson

NAME, ADDRESS AND PHONE NUMBER OF PLAINTIFF:

Harvey Anderson
3443 N. Liberty St
Canton MS 39046
601-750-5383-601-859-7447

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE (ISSUED ON REQUEST)

To: Harvey Anderson
3443 N. Liberty St.
Canton, MS 39046

From: Jackson Area Office
100 West Capitol Street
Suite 207
Jackson, MS 39269

☐ On behalf of person(s) aggrieved whose identity is
CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No.

EEOC Representative

Telephone No.

846-2012-04169

Willie L. Schaffer,
Enforcement Supervisor

(601) 948-8404

(See also the additional information enclosed with this form.)

NOTICE TO THE PERSON AGGRIEVED:

Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), or the Genetic Information Nondiscrimination Act (GINA): This is your Notice of Right to Sue, issued under Title VII, the ADA or GINA based on the above-numbered charge. It has been issued at your request. Your lawsuit under Title VII, the ADA or GINA **must be filed in a federal or state court WITHIN 90 DAYS of your receipt of this notice**; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

- ☐ More than 180 days have passed since the filing of this charge.
- ☒ Less than 180 days have passed since the filing of this charge, but I have determined that it is unlikely that the EEOC will be able to complete its administrative processing within 180 days from the filing of this charge.
- ☒ The EEOC is terminating its processing of this charge.
- ☐ The EEOC will continue to process this charge.

Age Discrimination in Employment Act (ADEA): You may sue under the ADEA at any time from 60 days after the charge was filed until 90 days after you receive notice that we have completed action on the charge. In this regard, the paragraph marked below applies to your case:

- ☒ The EEOC is closing your case. Therefore, your lawsuit under the ADEA **must be filed in federal or state court WITHIN 90 DAYS of your receipt of this Notice**. Otherwise, your right to sue based on the above-numbered charge will be lost.
- ☐ The EEOC is continuing its handling of your ADEA case. However, if 60 days have passed since the filing of the charge, you may file suit in federal or state court under the ADEA at this time.

Equal Pay Act (EPA): You already have the right to sue under the EPA (filing an EEOC charge is not required.) EPA suits must be brought in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.**

If you file suit, based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission



Wilma Scott,
Area Director

2/09/12
(Date Mailed)

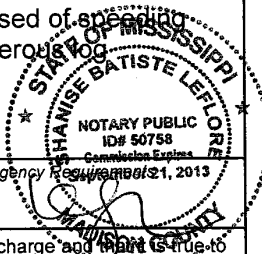
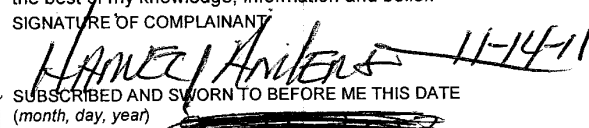
Enclosures(s)

cc:

Brad Allen, President
VENTURE EXPRESS
255 Commercial Parkway
Canton, MS 39046

Zachary B. Busey, Esquire
Pos Officer Box 14167
Jackson, MS 39236

16-60582.21

CHARGE OF DISCRIMINATION This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.		Charge Presented To: _____ Agency(ies) Charge No(s): 846-2012-04169 ☐ FEPA ☒ EEOC	
_____ and EEOC State or local Agency, if any			
Name (indicate Mr., Ms., Mrs.) Mr. Harvey Anderson		Home Phone (Incl. Area Code) (601) 859-7447	
Date of Birth REDACTED 1952			
Street Address City, State and ZIP Code 3443 N. Liberty St., Canton, MS 39046			
Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)			
Name VENTURE EXPRESS		No. Employees, Members Unknown	
Phone No. (Include Area Code) (601) 859-4565			
Street Address City, State and ZIP Code 255 Commercial Parkway, Canton, MS 39046			
Name		No. Employees, Members	
Phone No. (Include Area Code)			
Street Address City, State and ZIP Code			
DISCRIMINATION BASED ON (Check appropriate box(es).) ☒ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☐ RETALIATION ☒ AGE ☐ DISABILITY ☐ GENETIC INFORMATION ☐ OTHER (Specify)		DATE(S) DISCRIMINATION TOOK PLACE Earliest Latest 09-12-2011 09-12-2011 ☐ CONTINUING ACTION	
THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)). I was hired by the above named employer on 5/4/2004 and was last employed as a Transportation Driver. I was discharged from this position on 9/12/2011. Ben Wade, Log Auditor (W/M) and Becky (LNU) (W/F), from the Safety Department informed me I was being discharged for log violations. I believe I have been discriminated against because of my race (Black) in violation of Title VII of the Civil Rights Act of 1964 as amended and because of my age (59) in violation of ADEA of 1967 as amended since: I was falsely accused by Ben Wade of committing log violations between 6/2/2011 - 8/18/2011. Sgt. Jerry Daniels, MDOT Investigator, investigated each of these charges and found none of them to be true. Similar situated younger Whites who have committed violations such as speeding citations and numerous log violations have not been disciplined or discharged. Hugh Walker (W/M) has been accused of speeding citations and numerous log violations and Mack (LNU) (W/M), has been accused of numerous log violations.			
I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.		NOTARY - When necessary for State and Local Agency Requirements 	
I declare under penalty of perjury that the above is true and correct.		I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.	
SIGNATURE OF COMPLAINANT 		SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year) 11-14-11	
Date 11-14-11 Charging Party Signature 			

16-60582.22

Harvey Anderson
3443 North
Canton Mississippi
601 750 5

Street

Equal Employment
100 West
Jackson Mississippi
Opportunity Commission
Post Office Box 207

C/O: Chief
Police Officer

Dear Sir or

Madam,
I, Harvey Anderson, am writing to you to recommend my
petition of
complaint against Venture Express to include the following names:

James Fucci - Safety Director

Wendy Winkler

Adam Cook

I would also
disciplined for
others who committed log violations but have never been
disciplined for:
ETC

Earl Earp

I appreciate your
researching this matter.

Thank You

Harvey Anderson

Harvey Anderson

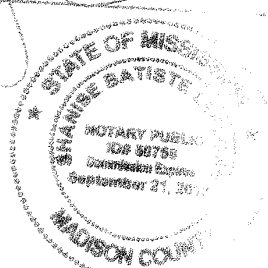
WITNESS OF ME

SUBSCRIBE THIS 14th DAY OF November 2011

WITNESS

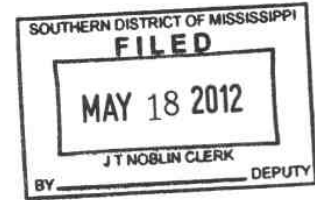
[Signature]

[Signature]
(NOTARY)



16-60582.23

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
DIVISION



Harvey Anderson
(Plaintiff's name)

PLAINTIFF

VS.

CIVIL ACTION

3:12cv231 DPJ-FKB

NO

(to be provided by the Court)

VENTURE EXPRESS
(Defendant(s) name(s))

DEFENDANT(S)

JIMMIE ALLEN - OWNER
BLAKE ALLEN - CHIEF EXECUTIVE OFFICER
WENDY WINTER
RUBEN WILKIE
COMPLAINT . Amended

COMES NOW, plaintiff, HARVEY ANDERSON, pro se, and for cause of action
against the defendant(s), VENTURE EXPRESS, would state:

JURISDICTION

TITLE SEVEN - THE DISCRIMINATION TOOK PLACE
IN CANTON, MS IN MADISON CO.

I.

Plaintiff is an adult resident citizen of the County of Madison, State of Mississippi.

The defendant Madison is an adult resident citizen of the County of Madison.

State of MISSISSIPPI.

16-60582.25

FACTS

The firing was a conspiracy by all five parties involved because I would not agree to some violations that had not occurred. This was wrongful termination, discrimination, retaliation, failure to comply with D.O.T. rules and regulations and company rules.

RELIEF

Reinstatement or monetary compensation
no reprisal from Venture

Respectfully submitted, this the 29 day of March, 2012.

Harvey Andersen

NAME, ADDRESS AND PHONE NUMBER OF PLAINTIFF:

Harvey Andersen
3443 N. Liberty St
Canton MS 39046
601-250-5383-601-859-7447