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

ANGEL ORTIZ,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. H-19-2282
	§	
INGURAN, LLC,	§	
	§	
Defendant.	§	

ORDER

Pending before the Court is Defendant Inguran, LLC's Motion for Summary Judgment on Plaintiff Angel Ortiz's Claims (Document No. 34). Having considered the motion, submissions, and applicable law, the Court determines the motion should be granted in part and denied as moot in part.

I. BACKGROUND

This is an employment discrimination case. Plaintiff Angel Ortiz ("Ortiz") was formerly employed at Defendant Inguran, LLC d/b/a Sexing Technologies ("Inguran") as a software developer in Navasota, Texas. While employed at Inguran, Ortiz alleges he experienced discrimination, retaliation, and a hostile work environment on the basis of his age and his Cuban national origin. Ortiz alleges this discrimination, retaliation, and hostile work environment manifested in Inguran's

denial of a raise, denial of a promotion, refusal to provide him with longer vacation benefits, and, ultimately, his termination.

Based on the foregoing, on June 25, 2019, Ortiz filed this lawsuit. On November 13, 2019, Ortiz filed an amended complaint bringing claims under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Age Discrimination in Employment Act of 1967 (the "ADEA") for: (1) discrimination on the basis of his age and national origin; and (2) retaliation. On October 5, 2020, Inguran moved for summary judgment.

II. STANDARD OF REVIEW

Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court views the evidence in a light most favorable to the nonmovant. *Coleman v. Hous. Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997). Initially, the movant must present the basis for the motion and the elements of the causes of action upon which the nonmovant is unable to establish a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmovant to identify specific facts demonstrating a genuine issue for trial. *See* Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). A dispute of "material fact is 'genuine' if the evidence

is such that a reasonable jury could return a verdict for the nonmoving party." *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993) (citation omitted).

But the nonmovant's bare allegations, standing alone, are insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The nonmovant cannot rest on his allegations to get to a jury without any significant probative evidence tending to support those allegations. *Nat'l Ass'n of Gov't Emps. v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 713 (5th Cir. 1994). If a reasonable jury could not return a verdict for the nonmovant, then summary judgment is appropriate. *Liberty Lobby, Inc.*, 477 U.S. at 248. It is not the function of the Court to search the record on the nonmovant's behalf. *Topalian v. Ehrman*, 954 F.2d 1125, 1137 n.30 (5th Cir. 1992). Therefore, while the Court views "the evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmovant, the nonmoving party . . . must respond by setting forth specific facts indicating a genuine issue for trial." *Goodson v. City of Corpus Christi*, 202 F.3d 730, 735 (5th Cir. 2000) (quoting *Rushing v. Kan. City S. R.R. Co.*, 185 F.3d 496, 505 (5th Cir. 1999)).

III. LAW & ANALYSIS

Inguran moves for summary judgment, contending: (1) Ortiz's claims for age and national origin discrimination fail as a matter of law; and (2) Ortiz's claims for retaliation fail as a matter of law.[1] The Court addresses each contention in turn.

A. Discrimination

i. Title VII

Inguran contends Ortiz's Title VII claim for discrimination on the basis of national origin fails as a matter of law because Ortiz fails to produce evidence showing he was treated less favorably than similarly situated non-Cuban employees. Ortiz contends he produces sufficient evidence to overcome a motion for summary judgment.

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[1] Inguran also contends Ortiz's claim for hostile work environment fails as a matter of law. Ortiz contends he produces sufficient evidence to overcome a motion for summary judgment. An amended complaint supersedes and replaces an original complaint unless the amendment specifically refers to or adopts the earlier pleading. *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994); *Amegy Bank Nat'l Ass'n v. Monarch Flight II, LLC*, 870 F. Supp. 2d 441, 449 (S.D. Tex. 2012) (Rosenthal, C.J.). When a plaintiff fails to reassert a particular claim from the original complaint in the amended complaint, and the amended complaint does not refer to or incorporate the original pleading, the claim from the original complaint is no longer pending in the litigation. *See Amegy Bank*, 870 F. Supp. 2d at 449. On November 13, 2019, Ortiz filed an amended complaint. Although Ortiz pleaded hostile work environment as a cause of action in his original complaint, his amended complaint does not include that claim. *Compare Plaintiff's Original Complaint*, Document No. 1 at 7–8, *with Plaintiff's First Amended Complaint*, Document No. 18 at 9–11. The amended complaint does not incorporate or specifically refer to the original complaint. The deadline to amend pleadings has passed. *Rule 16 Scheduling Order*, Document No. 14 at 1. Accordingly, the Court finds there is no hostile work environment claim pending in this litigation. The motion for summary judgment is therefore denied as moot as to the hostile work environment claim.

Claims for Title VII discrimination resting entirely on circumstantial evidence are subject to the *McDonnell Douglas* burden-shifting framework. *Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422, 426 (5th Cir. 2017) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 807 (1973)). Pursuant to this framework, the initial burden rests with the claimant to produce evidence he: (1) is a member of a protected class; (2) was qualified for the position he held; (3) was subject to an adverse employment action; and (4) was treated less favorably than others similarly situated outside of his protected class. *Id.* "The 'similarly situated' prong requires a Title VII claimant to identify at least one coworker outside of his protected class who was treated more favorably 'under nearly identical circumstances.' " *Id.* "This coworker, known as a comparator, must hold the 'same job' or hold the same job responsibilities as the Title VII claimant; must 'share[ ] the same supervisor or' have his 'employment status determined by the same person' as the Title VII claimant; and must have a history of 'violations' or 'infringements' similar to that of the Title VII claimant." *Id.*

Ortiz alleges Brazilian employees were treated better than non-Brazilians on the basis of their nationality.[2] It is undisputed Ortiz is of Cuban national origin.[3] The

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[2] *See Plaintiff's Response to Defendant's Motion for Summary Judgment*, Document No. 41 at 7.

[3] *See Plaintiff's Response to Defendant's Motion for Summary Judgment*, Document No. 41 at 5.

only Brazilian employee Ortiz specifically identifies in his response to the motion for summary judgment is Daniel Castellani ("Castellani"), a software developer working at Inguran's Navasota facility on the same project as Ortiz.[4] Castellani managed a team of approximately six Brazilian software developers working remotely out of Inguran's facility in Brazil (the "Brazilian Development Team").[5] Ortiz did not manage a team.[6] It is undisputed Ortiz and Castellani did not have the same job.[7] Further, Castellani had different job responsibilities from Ortiz, such as managing a team.[8] Ortiz does not produce evidence showing Castellani had a history of violations or infringements similar to Ortiz's own history of violations or

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[4] *See Defendant Inguran, LLC's Motion for Summary Judgment on Plaintiff Angel Ortiz's Claims*, Document No. 34 [hereinafter *Motion for Summary Judgment*], Exhibit A at 3 (*Declaration of Mike Evans*); *see also Substitute Declaration of Mike Evans*, Document No. 37.

[5] *Motion for Summary Judgment*, supra note 4, Exhibit A at 3 (*Declaration of Mike Evans*); *see also Substitute Declaration of Mike Evans*, Document No. 37.

[6] *Motion for Summary Judgment*, supra note 4, Exhibit A at 3 (*Declaration of Mike Evans*); *Substitute Declaration of Mike Evans*, Document No. 37; *Motion for Summary Judgment*, supra note 4, Exhibit B-1 at 129 (*Oral Deposition of Angel Ortiz*).

[7] *See Motion for Summary Judgment*, supra note 4, Exhibit B-1 at 34–36 (*Oral Deposition of Angel Ortiz*) (describing the distinctions between Ortiz's job and Castellani's job).

[8] *Motion for Summary Judgment*, supra note 4, Exhibit A at 3 (*Declaration of Mike Evans*); *Substitute Declaration of Mike Evans*, Document No. 37; *Motion for Summary Judgment*, supra note 4, Exhibit B-1 at 129 (*Oral Deposition of Angel Ortiz*).

infringements.[9] Accordingly, the Court finds Ortiz fails to produce evidence showing Castellani was similarly situated.

Other possible comparators are the members of the Brazilian Development Team managed by Castellani.[10] Ortiz produces no evidence showing the members of the Brazilian Development Team have the same job or same job responsibilities as Ortiz, share the same supervisor, have their employment status determined by the same person, or had a history of violations or infringements similar to Ortiz's.[11] Accordingly, the Court finds Ortiz fails to produce evidence showing the members of the Brazilian Development Team are similarly situated. The Court therefore finds Ortiz has failed to establish a *prima facie* case for employment discrimination under Title VII on the basis of national origin and thus the motion is granted as to Ortiz's claims for employment discrimination under Title VII.

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[9] *Motion for Summary Judgment*, supra note 4, Exhibit A at 3 (*Declaration of Mike Evans*) (recounting "serious issues with Ortiz's performance" observed by his supervisor); *Substitute Declaration of Mike Evans*, Document No. 37.

[10] *Plaintiff's Response to Defendant's Motion for Summary Judgment*, Document No. 41 at 8.

[11] *Motion for Summary Judgment*, supra note 4, Exhibit A at 3 (*Declaration of Mike Evans*); *Substitute Declaration of Mike Evans*, Document No. 37.

ii. ADEA

Inguran contends Ortiz is unable to establish a genuine issue of material fact as to his ADEA claim. Ortiz contends he produces sufficient evidence to overcome a motion for summary judgment.

ADEA discrimination claims resting entirely upon circumstantial evidence are subject to the *McDonnell Douglas* burden-shifting framework. *Miller v. Raytheon Co.*, 716 F.3d 138, 144 (5th Cir. 2013). Under this framework, the claimant must show: (1) he was discharged; (2) he was qualified for the position; (3) he was within the protected class at the time of the 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. *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 350 (5th Cir. 2005). "Under the ADEA, a plaintiff must prove age was the 'but for' cause of the challenged adverse employment action." *Reed v. Neopost USA, Inc.*, 701 F.3d 434, 440 (5th Cir. 2012).

Inguran produces evidence, and Ortiz does not dispute, that Ortiz was not replaced after being terminated.[12] Thus, to establish a *prima facie* case for employment discrimination based on age, Ortiz must show he was discharged because of his age. *See Machinchick*, 398 F.3d at 350. Ortiz produces no evidence

[12] *See Motion for Summary Judgment*, supra note 4, Exhibit A at 6 (*Declaration of Mike Evans*); *Substitute Declaration of Mike Evans*, Document No. 37.

he was discharged because of his age. Ortiz's age discrimination claim rests solely on the allegation "Castellani treated Plaintiff differently than the other similarly situated younger software developers from Brazil and Colombia."[13] Ortiz does not identify who these younger software developers are, what their ages are, how he knows they are younger than he is, or how they were treated differently. Conclusory allegations unsupported by specific facts cannot prevent an award of summary judgment. *See Nat'l Ass'n of Gov't Emps.*, 40 F.3d at 713. The Court finds Ortiz has not met his burden to show his age was the cause of his termination and thus cannot establish a *prima facie* case for employment discrimination based on age. Accordingly, the motion for summary judgment is granted as to Ortiz's age discrimination claim.

B. Retaliation

Inguran contends Ortiz's claims for retaliation under Title VII and the ADEA fail as a matter of law. Ortiz contends he produces sufficient evidence to overcome a motion for summary judgment.

Retaliation claims are subject to the *McDonnell Douglas* burden-shifting framework. *Jackson v. Honeywell Int'l, Inc.*, 601 F. App'x 280, 286 (5th Cir. 2015). To establish a *prima facie* case for retaliation under both Title VII and the ADEA

[13] *See Plaintiff's First Amended Complaint*, Document No. 18 at 4.

the plaintiff must show: (1) he engaged in a protected activity; (2) an adverse employment action occurred; and (3) there was a causal link between the protected activity and the adverse employment outcome. *See id.* (stating the elements in the Title VII context); *Holtzclaw v. DSC Commc'ns Corp.*, 255 F.3d 254, 259 (5th Cir. 2001) (stating the elements in the ADEA context). An employee has engaged in a protected activity under Title VII when he has "opposed any employment practice made . . . unlawful" by Title VII. 42 U.S.C. § 2000e–3(a); *Lopez v. Donahoe*, 94 F. Supp. 845, 858 (S.D. Tex. 2015) (Tagle, J.). Participation in a complaint that fails to allege discrimination on the basis of race, color, religion, sex, or national origin is not considered a protected activity under Title VII. *Lopez*, 94 F. Supp. at 859. An employee has engaged in a protected activity under the ADEA when he has "opposed any practice" forbidden by the ADEA. 29 U.S.C. § 623(d); *Heggemeier v. Caldwell Cnty.*, 826 F.3d 861, 869 (5th Cir. 2016). To show he opposed an employment practice forbidden by the ADEA, the employee must show he had a reasonable belief the employer was engaged in unlawful employment practices at the time of the complaint. *See Heggemeier*, 826 F.3d at 869. To demonstrate a causal connection between a protected activity and an adverse employment action, the plaintiff must show the employer's action was based at least in part on employee's protected activity. *Lyons v. Katy Indep. Sch. Dist.*, 964 F.3d 298, 305 (5th Cir. 2020).

After an employee demonstrates a *prima facie* case of retaliation, the employer must come forward with a legitimate, nondiscriminatory reason for its action. *Jackson*, 601 F. App'x at 284. This is a burden of production, not persuasion, and does not involve a credibility assessment. *Id.* Once the employer states its reason, the burden shifts back to the plaintiff to demonstrate the proffered reason is just a pretext for retaliation. *Porter v. Houma Terrebonne Hous. Auth. Bd. of Comm'rs*, 820 F.3d 940, 948 (5th Cir. 2015). To demonstrate pretext and avoid summary judgment, a plaintiff must show "a conflict in substantial evidence on the question of whether the employer would not have taken the action 'but for' the protected activity." *Id.*

Ortiz filed three different complaints he alleges resulted in retaliation from his managers at Inguran. The Court addresses each of these complaints in turn.

i. First Complaint

On May 7, 2018, Ortiz sent the first complaint in the form of an email ("First Complaint") to his supervisor.[14] The First Complaint does not allege discrimination on the basis of Ortiz's Cuban national origin and also does not indicate Ortiz believes Inguran is engaged in any employment practices forbidden by the ADEA.[15] The

[14] *Plaintiff's Response to Defendant's Motion for Summary Judgment*, Document No. 41, Exhibit 1 at 1 (*May 7, 2018 Email from Angel Ortiz to Joe Gonzalez*).

[15] The First Complaint instead focuses on an inter-office dispute between Ortiz and Castellani about a technical detail in a project they were working on together. Ortiz takes

Court finds the First Complaint was not a protected activity for the purposes of a retaliation claim under Title VII or the ADEA. Thus, Ortiz cannot make out a *prima facie* claim for retaliation based on the First Complaint.

ii. Second Complaint

On February 26, 2019, Ortiz sent the second complaint in the form of an email ("Second Complaint") to his new supervisor and Inguran's human resources director.[16] The Second Complaint does not allege discrimination on the basis of Ortiz's Cuban national origin and does not indicate Ortiz believes Inguran is engaged in any employment practices forbidden by the ADEA.[17] The Court finds the Second Complaint was not a protected activity for the purposes of a retaliation claim under Title VII or the ADEA. Thus, Ortiz cannot make out a *prima facie* claim for retaliation based on the Second Complaint.

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issue with Castellani asking Ortiz if he was "prepared for a fight" regarding the project and the allegedly threatening manner in which Castellani asked.

[16] *Plaintiff's Response to Defendant's Motion for Summary Judgment*, Document No. 41, Exhibit 11 at 1 (*February 26 Email from Angel Ortiz to Mike Evans and Steven Sfamenos*).

[17] The Second Complaint focuses on Ortiz's displeasure with Castellani's involvement with his salary review and Castellani's statement the worst member of the Brazilian Development Team is a better programmer than Ortiz.

iii. Third Complaint

On March 25, 2019, Ortiz filed a charge of discrimination and retaliation based on his age and national origin with the Equal Employment Opportunity Commission ("Third Complaint").[18] On June 6, 2019, Ortiz was terminated.[19] The Court finds the Third Complaint was a protected activity for the purposes of a retaliation claim under Title VII and the ADEA.[20]

Assuming without deciding Ortiz is able to show a *prima facie* retaliation case based on his termination after filing the Third Complaint, Inguran states Ortiz was terminated because of a variety of performance issues.[21] The only one of these

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[18] *Plaintiff's Response to Defendant's Motion for Summary Judgment*, Document No. 41, Exhibit 16 (*Angel Ortiz's Charge of Discrimination*).

[19] *Plaintiff's Response to Defendant's Motion for Summary Judgment*, Document No. 41 at 12.

[20] Ortiz alleges he experienced unlawful retaliation in the form of a denial of a raise, denial of promotion, refusal to grant him five weeks of vacation, and termination. *Plaintiff's Response to Defendant's Motion for Summary Judgment*, Document No. 41 at 14–15. The only one of these actions to take place after the filing of the Third Complaint, the only complaint Ortiz has shown constitutes a protected activity, is termination. *Plaintiff's Response to Defendant's Motion for Summary Judgment*, Document No. 41 at 3–4. The Court therefore finds Ortiz cannot establish a causal link between his protected activity and any adverse employment action besides his termination. Accordingly, the motion for summary judgment is granted as to the retaliation claims under Title VII and the ADEA as to Ortiz's denial of a raise, denial of a promotion, and refusal to grant him five weeks of vacation.

[21] *See Motion for Summary Judgment*, supra note 4, Exhibit A at 5–7 (*Declaration of Mike Evans*); *Substitute Declaration of Mike Evans*, Document No. 37; *Motion for Summary Judgment*, supra note 4, Exhibit J at 3–8 (*Emails Between Angel Ortiz and Mike Evans*). Ortiz's alleged performance issues included not using official request forms to request vacation time, not submitting vacation requests in a timely manner, arriving late to

performance issues Ortiz asserts is pretextual was the requirement he sign in when arriving at work.[22] However, Inguran produces evidence sign-in sheets are a routine practice for Inguran employees and were required for Ortiz because he was routinely late to work.[23] The Court finds Ortiz has not created an issue of material fact regarding his retaliation claims. Accordingly, the motion for summary judgment is granted as to the retaliation claims.

IV. CONCLUSION

Accordingly, the Court hereby

ORDERS that Defendant Inguran, LLC's Motion for Summary Judgment on Plaintiff Angel Ortiz's Claims (Document No. 34) is **GRANTED** as to the claims of discrimination and retaliation. The Court further

ORDERS that Defendant Inguran, LLC's Motion for Summary Judgment on Plaintiff Angel Ortiz's Claims (Document No. 34) is **DENIED AS MOOT** as to the claims of hostile work environment.

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work, not volunteering to work weekends, minimal involvement on assigned projects, failure to resolve software bugs or feature requests, not putting effort in to learning the project hardware, failure to test code fixes, other employees not wanting to work with him, working remotely at times he was not supposed to, and not coming to work on Thursdays and Fridays.

[22] *Plaintiff's Response to Defendant's Motion for Summary Judgment*, Document No. 41 at 13.

[23] *Motion for Summary Judgment*, supra note 4, Exhibit A at 5–7 (*Declaration of Mike Evans*); *Motion for Summary Judgment*, supra note 4, Exhibit K at 2–5 (*Inguran Sign-In Sheets for March 12–14, 18*); *Substitute Declaration of Mike Evans*, Document No. 37.

The Court will enter a separate final judgment.

SIGNED at Houston, Texas, on this 22 day of February, 2021.

DAVID HITTNER
United States District Judge