UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL G OLIVERI,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 4:17-CV-01970
	§	
SHELL OIL COMPANY,	§	
	§	
Defendant.	§	

ORDER

Before the Court are Defendant Shell Oil Company's Motion for Summary Judgment (Doc. #16), Plaintiff Michael Oliveri's Response (Doc. #26), and Defendant's Reply (Doc. #29). The Court also heard oral argument on October 5, 2018. After reviewing the parties' arguments and the applicable legal authority, the Court denies in part and grants in part Defendant's Motion for Summary Judgment.

Michael Oliveri ("Plaintiff") brings claims against Defendant ("Shell") under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, and the Texas Commission on Human Rights Act ("TCHRA"), Tex. Lab. Code Ann. § 21.001 *et seq.*, alleging age and sex discrimination and retaliation, based upon a series of employment actions taken against Plaintiff by Shell.

I. Legal Standard

In deciding a summary judgment motion, the Court draws all reasonable inferences in the light most favorable to the nonmoving party. *Darden v. City of Fort Worth*, 866 F.3d 698, 702 (5th Cir. 2017). "Summary judgment is appropriate only if 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Vann v. City of Southaven,*

Miss., 884 F.3d 307, 309 (5th Cir. 2018) (citations omitted); *see also* Fed. R. Civ. P. 56(a). "A genuine dispute of material fact exists when the 'evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Burrell v. Prudential Ins. Co. of Am.*, 820 F.3d 132, 136 (5th Cir. 2016) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)).

II. Analysis

A. Discrimination

Plaintiff alleges that Shell rescinded the offer of a new corporate security job position previously extended to Plaintiff and subsequently cancelled his existing employment contract because of Plaintiff's age and gender. The ADEA and the TCHRA prohibit employers from discharging or otherwise discriminating against any individual because of his or her age. *Miller v. Raytheon Co.*, 716 F.3d 138, 144 (5th Cir. 2013) (citing *McClaren v. Morrison Mgmt. Specialists, Inc.*, 420 F.3d 457, 461 (5th Cir. 2005)). The familiar burden-shifting framework used to analyze Title VII claims as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), also applies to Plaintiff's age discrimination claims under both the ADEA and TCHRA statutes. *Id.* Under *McDonnell Douglas*, if no direct evidence of discrimination exists then the Plaintiff must make a prima facie showing of discrimination. *Wesley v. Gen. Drivers, Warehousemen & Helpers Local 745*, 660 F.3d 211, 213 (5th Cir. 2011). A prima facie case of age discrimination is established if a plaintiff shows 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." *Berquist v. Wash. Mut. Bank*, 500 F.3d 344, 349 (5th Cir. 2007) (citations omitted).

Shell contends that Plaintiff cannot establish a prima facie case of age discrimination because he was not replaced by someone outside of his protected class. Doc. #16 at 17. However,

Plaintiff may establish the fourth prong of his prima facie case with evidence that he was "otherwise discharged because of his age." *Palasota v. Haggar Clothing Co.*, 342 F.3d 569, 576 (5th Cir.2003) (quoting *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993)). In determining whether an employee is "otherwise discharged because of . . . age[,]" courts consider the evidence the employee proffers in support of his discrimination claim generally. *See, e.g., Goudeau v. National Oilwell Varco, L.P.*, 793 F.3d 470, 475–76 (5th Cir. 2015).

Plaintiff presents the discriminatory remarks of Shell's Vice President of Corporate Security James Hall ("Hall") as evidence that Shell's negative employment decisions against Plaintiff were made because of his age and gender. Doc. #26 at 24. "To be relevant evidence considered as part of a broader circumstantial case, [remarks] must show: '(1) discriminatory animus (2) on the part of the person [who] is either primarily responsible for the challenged employment action or by a person with influence over the relevant decisionmaker.'" *Goudeau*, 793 F.3d at 475-76 (citing *Reed*, 701 F.3d at 441). Here, Hall (who had direct influence over the decision to rescind Plaintiff's job offer) sent emails which contained ageist and sexist remarks which expressed disapproval of the selection of Plaintiff for the corporate security job position. *See* Doc. #26, Ex. 20, Ex. 38–41, Ex. 63. Hall's repeated statements to his subordinates that he wanted a younger female candidate for the position, instead of Plaintiff, is sufficient evidence that Plaintiff's age and gender had a determinative influence on the decision-making process—which resulted in rescission of the Plaintiff's job offer and the ultimate refusal to extend his then-existing work contract. Furthermore, Plaintiff produced evidence that Crockett Oaks ("Oaks") (one of the Shell managers involved in the decision to hire Plaintiff) was terminated after complaining to Shell that Plaintiff had been discriminated against because of his age and gender.

See Ex. 99. Therefore, the Court finds that Plaintiff satisfied his burden of showing a prima facie case of discrimination.

After the plaintiff successfully makes out a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the termination. *Goudeau*, 793 F.3d at 474. Shell argues that the reason for the rescission of Plaintiff's job offer was not because of his age or gender but rather due to the undisclosed relationship between Plaintiff and Oaks. Doc. #16 at 8. "Evidence demonstrating the falsity of the defendant's explanation, taken together with the prima facie case, is likely to support an inference of discrimination even without further evidence of defendant's true motive." *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002). "The plaintiff can survive summary judgment by producing evidence that creates a jury issue as to the employer's discriminatory animus or the falsity of the employer's legitimate nondiscriminatory explanation." *Id.* Shell alleges that Plaintiff's job offer was rescinded due to Oaks' failure to register a "Conflict of Interest" with Shell concerning his relationship with Plaintiff thereby violating Shell's Code of Conduct Conflict Policy. Doc. #16 at 8. However, there is evidence in the record demonstrating that Hall and other Shell managers were aware that both Oaks and Plaintiff served in the Army Reserves together and that the two were acquaintances. *See e.g.* Doc. #26, Ex. 14, Ex. 16, Ex. 19, Ex. 99 ¶¶ 32–35, Ex. 120 at 128. Furthermore, Plaintiff produced evidence that Oaks formally disclosed the nature of his relationship with Plaintiff prior to the time the new job position was officially extended to Plaintiff. Ex. 49–50, Ex. 54. Additionally, there is evidence suggesting the relationship between Oaks and Plaintiff may not have violated the Conflict Policy. Doc. 26, Ex. #120 at 161, Ex. 121 at 69.

Viewing the evidence in the light most favorable to Plaintiff, the Court finds that there is a genuine issue of material fact as to whether Shell's proffered reason for rescinding Plaintiff's job

offer was mere pretext for discrimination under ADEA and TCHRA. Accordingly, summary judgment is not appropriate as to Plaintiff's discrimination claim.

B. Retaliation

Additionally, Plaintiff alleged a third-party "zone of interest" retaliation claim based upon employment actions taken by Shell after Oaks filed an EEOC complaint and lawsuit against Shell which identified Plaintiff as a victim of Shell's discrimination. Plaintiff argues that because he was a co-worker of Oaks identified in Oaks' EEOC complaint and subsequent lawsuit against Shell that Plaintiff fits within "zone of protectable interests" as defined by the Supreme Court in *Thompson*. Doc. #26 at 30. In *Thompson*, the Court found that a person who engaged in protected activity whose spouse was then terminated may file a claim of retaliation because they fall within the "zone of interests protected by Title VII." *See Thompson v. North American Stainless, L.P.*, 562 U.S. 170, 174, 178 (2011) (explaining that "a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."). The Supreme Court declined to identify a fixed class of relationships that would qualify for third-party "zone of interest" retaliation claims, however the Court stated that firing a close family member will almost always qualify but that inflicting a milder reprisal on a mere acquaintance will almost never qualify. *Id.* at 175. Beyond those relationships, the Court stated it was "reluctant to generalize." *Id.*

Here, Plaintiff is not arguing his third-party retaliation claim is valid because he and Oaks were close friends or relatives. Rather, Plaintiff argues that because he was "the victim" identified in Oaks' complaints against Shell that he was at the center of Oaks' protected activities, and therefore fits within the *Thompson* "zone of protectable interests." Doc. #26 at 30. Plaintiff cites the *Kastor v. Cash Express of Tenn., L.L.C.* case to support this argument. 77 F. Supp. 3d 605 (W.D. Ky. 2015). In *Kastor*, the district court found that a plaintiff who had been identified as a

comparator by a former co-worker in the co-worker's lawsuit was in the "zone of protectable interests" under *Thompson* even though the two were mere co-workers, and not friends. *Id.* at 610–11. However, the Fifth Circuit has not extended *Thompson* to cover third-party retaliation claims brought by co-workers that do not have familial or close friendship relationships. *See, e.g., Zamora v. City of Houston*, 2011 WL 1834245, *2 (5th Cir. 2011) (allowing a third-party retaliation claim for actions taken against the plaintiff because of the EEOC charge and lawsuit filed by his father); *see also Assariathu v. Lone Star HMA L.P.*, 2012 WL 12897341, *9 (N.D. Tex. Mar. 12, 2012) (finding no evidence of a "relationship beyond friendly work relations" that would justify allowing the plaintiffs to bring third-party retaliation claims under *Thompson*). Aside from *Kastor*, the Plaintiff has not cited nor has the Court found a case in any circuit where the *Thompson* "zone of interest" has been applied to third-party retaliation claims brought by co-workers without a familial or close relationship. Accordingly, because the law in this circuit does not support extending *Thompson* in this case, the Court finds that summary judgment in favor of Shell is appropriate as to Plaintiff's retaliation claim.

C. Conclusion

For the foregoing reasons, the Court concludes that there is a genuine issue of material fact such that a reasonable jury could find that the actions taken by Shell against Plaintiff constituted discrimination under ADEA and TCHRA. However, the Court will not extend *Thompson* to cover Plaintiff's third-party retaliation claim. Accordingly, Shell's Motion for Summary Judgment is DENIED as to the claim of discrimination and GRANTED as to the claim of retaliation.

It is so ORDERED.

JAN 15 2019

Date

The Honorable Alfred H. Bennett
United States District Judge