IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

JAIME ADAN BALLESTEROS	§	
	§	
VS.	§	CIVIL NO. A-99-CA-158 JN
	§	
TEXAS DEPARTMENT OF PUBLIC SAFETY	§	
	§	

ORDER

Before the Court is Defendant's Motion for Summary Judgment (Doc. No. 24) filed on July 12, 2000; the Plaintiff's Response filed on August 11, 2000; Defendant's Reply filed on August 25, 2000; and Defendant's Objections to Plaintiff Ballesteros' Affidavit filed on August 25, 2000. Based on the motion, the response, the reply, the applicable legal authority and the entire case file, the Court enters the following Order.

I. Background

Plaintiff Jaime Adan Ballesteros, a former Texas Department of Public Safety ("DPS") Trooper, alleges a cause of action for retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e *et seq*. Plaintiff alleges that his employment was terminated due to his refusal to fire another employee, Wendy Raumaker, after Raumaker made sexual harassment allegations against her former supervisor. The Court finds that Plaintiff has failed to offer sufficient evidence of a causal nexus between the alleged protected activity and the adverse employment action. Thus, Defendant's motion for summary judgment will be granted.

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II. Facts

Plaintiff Ballesteros began his employment with Defendant DPS in 1979 as a Trooper I in Corpus Christi, Texas. Ballesteros was subsequently transferred to Laredo, then to McAllen, and finally to Halletsville, Texas, where he was promoted to the position of Trooper II in 1982. Ballesteros transferred back to McAllen in 1985 and began work in the "narcotics task force for Troopers." (Def.'s Ex. D-1 at 24-25.) Ballesteros received two more promotions while stationed in McAllen. He was promoted to Narcotics Investigator in 1987 and then to Lieutenant in 1993.

After his 1993 promotion to Lieutenant, Ballesteros requested a transfer out of the Valley. He was subsequently assigned to the Narcotics Training Unit in Austin, Texas. Ballesteros alleges that shortly after he assumed his duties in Austin, he was instructed by his commander, Mike Scott, in the presence of DPS Captain Mike Eeds and possibly Commander Jim Murray, to "fire Wendy Raumaker." (Def.'s Ex. D-1 at 209.) Shortly after this meeting, Ballesteros claims that he told Captain Eeds that he would not fire Raumaker, (Pl.'s Ex. 12 at 342), and that Eeds responded by telling Ballesteros to "make her leave on her own accord." (Def.'s Ex. D-1 at 211-12.) Both Eeds and Scott deny these statements were made. (Def.'s Ex. D-41 at 2; D-42 at 1-2.)

Wendy Raumaker was a subordinate of Ballesteros who had filed a sexual harassment claim against her former supervisor, Ballesteros' predecessor. Ballesteros believes that he was ordered to fire Raumaker in retaliation for her filing a sexual harassment complaint. (Def.'s Ex. D-1 at 343.) Ballesteros did not fire Raumaker, nor did he have the authority to fire her. (Def.'s Ex. D-1 at 338.) Ballesteros was never again instructed to fire Raumaker. (Def.'s Ex. D-1 at 222-23.) In fact, Scott and Eeds later approved Ballesteros' suggestion to hire Raumaker in a permanent secretarial

position.[1] (Def.'s Ex. D-1 at 345-46, 351-52.)

During the remainder of Ballesteros' time with the narcotics unit, his supervisors, Eeds and Murray, continually gave him high performance reviews. (Def.'s Ex. D-7; D-8; D-9.) He was subsequently recommended for, and received, an appointment to the Texas Rangers but he declined this position because it would have required relocation to the Valley. (Def.'s Ex. D-1 at 49-52.) In 1994 Ballesteros requested a transfer out of the training unit and into the District Office so that he would be eligible for a promotion to Captain. His transfer was approved and he worked under the supervision of Captain Tony Garcia where he continued to receive high performance evaluations. (Def.'s Ex. D-1 at 171, 173.)

In January 1995 the Internal Affairs Department of DPS received information from the Drug Enforcement Agency ("DEA") that one of Ballesteros' confidential informants, from his early days in the Valley, claimed that Ballesteros and a federal agent, T.K. Solia, had helped him import drugs into the Country without interdiction in 1991. On May 18, 1995, Ballesteros was suspended with pay pending a DPS investigation, led by Captain James Brubaker, of these claims. On September 6, 1996, a formal complaint was filed against Ballesteros. He was charged, in part, with allowing a confidential informant to import cocaine without interdiction, accepting cash gifts from a confidential informant, and failure to make accurate and truthful reports to his supervisors regarding his activities. (Def.'s Ex. D-13) Based on a two year investigation of these allegations, DPS Director Dudley Thomas issued a decision that Ballesteros' employment be terminated on October 20, 1997. That decision became final on January 8, 1998. Ballesteros appealed his termination and was given

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[1]Raumaker was initially employed as a receptionist. (Def.'s Ex. D-1 at 351.) This position was funded by a federal grant set to expire in 1993. (Def.'s Ex. D-42.)

a full evidentiary hearing before the Public Safety Commission. On September 10, 1998, the Commission rendered its decision that Ballesteros was terminated for cause.

III. Summary Judgment Standard

A party moving for summary judgment has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). As the party moving for summary judgment, Defendant bears the initial burden of showing the basis for the motion, and of identifying the pleadings and evidence which they believe demonstrates the absence of a genuine issue of material fact. *Washington v. Armstrong World Indus., Inc.*, 839 F.2d 1121 (5th Cir. 1988). Once a summary judgment motion is made and properly supported, the non-movant must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). Although the non-movant may satisfy this burden by tendering depositions, affidavits and other competent evidence, "[m]ere conclusory allegations are not competent summary judgment evidence, and they are therefore insufficient to defeat or support a motion for summary judgment." *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992). Pleadings are not summary judgment evidence. *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996).

IV. Title VII Retaliation

A showing of three elements is required in order to make out a prima facie case of retaliation: (1) the plaintiff engaged in activity protected by Title VII; (2) an adverse employment action occurred; and (3) there was a causal connection between the participation in the protected activity and the adverse employment action. *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 298 (5th Cir.

1994) (citing *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42 (5th Cir. 1992)). An employee has engaged in activity protected by Title VII if he has either (1) "opposed any practice made an unlawful employment practice" by Title VII or (2) "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e- 3(a). The ultimate determination in an unlawful retaliation case is whether the conduct protected by Title VII was a "but for" cause of the adverse employment decision. *McDaniel v. Temple Indep. Sch. Dist.*, 770 F.2d 1340, 1346 (5th Cir. 1985). In other words, even if a plaintiff's protected conduct is a substantial element in a defendant's decision to terminate an employee, no liability for unlawful retaliation arises if the employee would have been terminated even in the absence of the protected conduct. *Jack v. Texaco Research Ctr.*, 743 F.2d 1129, 1131 (5th Cir. 1984).

V. Prima Facie Case

Plaintiff Ballesteros alleges that his employment was terminated in 1998 because he refused to fire Wendy Raumaker in 1993. Assuming that Ballesteros' unsupported allegation that he was instructed to fire Wendy Raumaker in retaliation for her filing a sexual harassment complaint, which he refused to do, is sufficient prima facie evidence to establish that he engaged in a protected activity under 42 U.S.C. § 2000e-3(a), Plaintiff must then offer proof of a casual connection between his refusal to fire Raumaker in 1993 and his termination in 1998. Plaintiff has failed to offer relevant evidence regarding this causal connection.

Ballesteros' argument is that the DEA investigation was nothing less than a "witch hunt," (Pl.'s Resp. at ¶33), initiated in retaliation for his refusal to fire Raumaker. He argues that evidence of a baseless and vindictive investigation is sufficient to show the required causal nexus between his protected activity – refusing to fire Raumaker – and the adverse employment action. While the

Court finds that evidence of a sham investigation would be sufficient evidence to establish a prima facie case, Plaintiff has failed to offer evidence that the investigation was baseless and motivated by a retaliatory intent.

Plaintiff analogizes the investigation of his case to that of another DPS officer, Robert Nestoroff, who was also investigated for allowing the importation of controlled substances without interdiction. In the investigation of Nestoroff's case, unlike Ballesteros', Defendant DPS supported Nestoroff and helped pay for his legal defense. (Pl.'s Ex. 9 at 39-41) Plaintiff claims the lack of DPS support in his situation is evidence that the investigation of his activities was merely pretext for retaliation. The Court finds the facts underlying each officers' situations are fundamentally different.

Officer Nestoroff's activities were performed under the supervision of his superiors at DPS and other federal agencies. (Pl.'s Ex. 9 at 18-28; Ex. 2 at 53) Nestoroff was under orders not to interdict the importation of drugs from his confidential informant. (Pl.'s Ex. 9 at 18-28). Ballesteros, on the other hand, allegedly acted without the approval or knowledge of his supervisors. (Def.'s Ex. D-13) This is the basis of the allegations asserted against him. (*Id.*) The investigation ultimately concluded that Ballesteros did assist an informant in illegally importing drugs without permission or authority to do so. Thus the Court finds that Nestoroff's and Ballesteros' situations are fundamentally different such that any comparison of DPS's investigation of Nestoroff's alleged wrongful conduct with DPS's investigation of Ballesteros' alleged unlawful conduct is irrelevant.

In contrast, there is abundant evidence of a lack of a causal nexus between the alleged protected activity and the adverse employment decision. Ballesteros received high performance reviews, both before and after the alleged discriminatory statements, from the same supervisors, Eeds and Murray, he alleges retaliated against him. (Def.'s Ex. D-7; D-8; D-9; D-17; D-18.)

Ballesteros was recommended for an appointment to the Texas Rangers by Eeds and Murray in 1994. (Def.'s Ex. D-10) Further, Ballesteros actually received an appointment. (Def.'s Ex. D-21). The Court finds that superior performance evaluations and a recommendation for an appointment to the Texas Rangers is highly inconsistent with any retaliatory intent.

Regarding Wendy Raumaker, Plaintiff Ballesteros lacked the authority to fire her. (Def.'s Ex. D-1 at 338). Additionally, Ballesteros submitted favorable evaluations of Raumaker to his supervisors who then accepted the evaluations without comment. (Def.'s Ex. D-6). This is inconsistent with an intent to constructively discharge Raumaker since Ballesteros' supervisors had the opportunity to make comments on Raumaker's evaluation but chose not to do so. (*See* Def.'s Ex. D-6 at 2.) Further, Raumaker's position was initially funded by a grant. (Def.'s Ex. D-42). When the funds for this position expired in 1993, Commander Scott recommended creating a permanent position. Raumaker was recommended to fill this position and was approved by Eeds and Scott in 1994. (Def.'s Ex. D-1 at 345, 351-52.) The Court finds these actions inconsistent with any retaliatory intent on the part of Eeds and Scott against either Ballesteros or Raumaker.

The investigation into Ballesteros' alleged wrongful conduct began with outside information provided by the DEA. The DPS investigation was conducted by DPS Captain James Brubaker who stated that he was unaware of any retaliatory influence from his supervisors and that he conducted an independent investigation without interference from his supervisors. (Def.'s Ex. D-40 at 2; *see also* D-41 at 2; D-42 at 2.) While Ballesteros argues that the investigation could have been more complete, could could have been done differently, and that he is dissatisfied with the conclusions reached, Plaintiff points to no evidence that suggests that Brubaker's investigation was guided by a retaliatory intent. Plaintiff Ballesteros was further provided an evidentiary hearing before the

Public Safety Commission which concluded that Ballesteros was terminated for cause. (Def.'s Ex. D-16)

Finally, the long lapse of time between the alleged discriminatory statements and Ballesteros' termination, approximately five years, is further evidence that any retaliatory motive is unlikely. *See Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 268 (5th Cir. 1994). Ballesteros did not inform anyone of his beliefs that he was retaliated against for not firing Raumaker until he filed his EEOC complaint in May of 1998. (Def.'s Ex. D-1 at 158-59) Additionally, stray remarks remote in time are not evidence of discriminatory intent. *Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 434 (5th Cir. 1995). Accordingly, the Court finds there is no evidence of any a connection between his failure to obey the two alleged discriminatory orders made in September of 1993 and the decision to terminate Plaintiff's employment five years later (which was made pursuant to an independent investigation of Ballesteros' alleged wrongful conduct and further reviewed by the Public Safety Commission).

VI. Conclusion

In conclusion, the Court finds that Plaintiff Ballesteros has failed to establish a prima facie case of retaliation. Ballesteros has failed to provide any relevant evidence that his refusal to fire Wendy Raumaker in 1993 caused the DPS to terminate his employment in 1998. To the contrary, there is substantial evidence that Plaintiff's supervisors viewed him and his performance favorably. Further, there is substantial evidence that the reason for his termination was tied to activities he engaged in two years prior to any alleged discriminatory statements. His alleged unlawful activity was brought to light by a federal agency and investigated by an independent DPS agent. Upon the completion of the investigation, DPS Director Dudley Thomas (who is not alleged to have been

involved with any discriminatory statements) made the decision to terminate Plaintiff's employment. Finally, this decision was reviewed administratively and Plaintiff was afforded a full evidentiary hearing. Consequently, the Court finds there is no evidence of any causal connection between Plaintiff's alleged protected activity and the adverse employment action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Summary Judgment (Doc. No. 24) is GRANTED and all claims asserted against the Department of Public Safety are hereby DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that this case is CLOSED and any pending Motions are DENIED AS MOOT.

SIGNED AND ENTERED this 20th day of September, 2000.

JAMES R. NOWLIN
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 00-51095

Summary Calendar

JAMIE ADAN BALLESTEROS,

Plaintiff-Appellant,

versus

TEXAS DEPARTMENT OF PUBLIC SAFETY,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(A-99-CV-158)

April 2, 2001

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:*

In this Title VII retaliation case, Jaime Adan Ballesteros appeals from a grant of summary judgment against him. Ballesteros claims that he was investigated on corruption charges in retaliation for his refusal to fire a secretary that had submitted a sexual harassment claim. The district court found that Ballesteros had not demonstrated a causal connection between his refusal to fire the secretary and the subsequent investigation; and further that substantial evidence supported Ballesteros's

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*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.

termination. Having reviewed the case, we are persuaded that the district court was correct to so hold.

AFFIRMED.