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dba FEDEX EXPRESS (erroneously sued herein as
FedEx Corporation, dba FedEx Express)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EDWARD ALVARADO, JOHN AZZAM, CHARLOTTE BOSWELL, TANDA BROWN, BERTHA DUENAS, PERNELL EVANS, CHARLES GIBBS, JANICE LEWIS, MARIA MUNOZ, KEVIN NEELY, LORE PAOGOFIE, DYRONN THEODORE, LASONIA WALKER and CHRISTOPHER WILKERSON, Plaintiffs, v. FEDEX CORPORATION, a Delaware corporation, dba FEDEX EXPRESS, Defendant.	Case No. C04-0098 SI **DEFENDANT'S NOTICE OF RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND MEMORANDUM IN SUPPORT (PERNELL EVANS)** Date: April 18, 2007 Time: 9:00 a.m. Judge: Hon. Susan Illston

DEFENDANT'S NOTICE OF RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND MEMORANDUM IN SUPPORT (PERNELL EVANS), CASE NO. C04-0098 SI

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NOTICE OF DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

PLEASE TAKE NOTICE that Federal Express Corporation's ("FedEx") Renewed Motion for Judgment as a Matter of Law is to come on for hearing before this Honorable Court on April 18, 2007 at 9:00 a.m. in Courtroom 10 on the 19th floor of the United States District Courthouse for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California 94102. Pursuant to Fed. R. Civ. P. 50(b), FedEx renews its motions for judgment as a matter of law and requests that the Court enter an Order dismissing each of Plaintiff's claims and directing entry of judgment as a matter of law in favor of Defendant on all counts. Judgment should be entered for FedEx as Plaintiff failed to prove the essential elements of his retaliation, race discrimination (disparate treatment), and punitive damages claims at trial. On these grounds as well as those more fully stated herein, FedEx respectfully requests that the Court grant its motion and enter judgment in its favor on all claims.

DATED: March 14, 2006.

FEDERAL EXPRESS CORPORATION

By: /s/ David A. Billions
David A. Billions
Senior Attorney
Attorneys for Defendant
Federal Express Corporation

MEMORANDUM OF LAW

I. INTRODUCTION

A jury trial was held in this matter on November 13 – 21, 2006. A verdict for Plaintiff in the amount of $475,000 in compensatory damages and $475,000 in punitive damages was returned on November 21, 2006. The Court entered a final judgment on February 28, 2007.[1]

At trial, Plaintiff alleged he was subjected to racial discrimination (disparate treatment) and retaliation in violation of Title VII, 42 U.S.C. §1981, and FEHA. The claims were based on four events: (1) on June 26, 2002, Plaintiff received an e-mail from Robin Van Galder (hereinafter "Van Galder") requiring him to take corrective action against a driver who reported to him because the employee violated company policy by working in excess of 55 hours per week without management approval; (2) on February 7, 2003, Evans received a one sentence e-mail from Ev Rey (hereinafter "Rey") asking him to take corrective action against a driver who failed to properly operate a scale trailer; (3) Plaintiff's shift was changed in January 2004 to a different workgroup as a result of a reorganization; and (4) Plaintiff received a form memo from Van Galder on April 30, 2004 requiring him to submit a copy of his Survey Feedback Action (hereinafter "SFA") plan as well as notes from his quarterly follow-up feedback meetings because his SFA score fell below the corporate average.

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[1] At the conclusion of Plaintiff's proof on November 16, 2006, FedEx moved the Court pursuant to Fed. R. Civ. P. 50 for an order dismissing each of Plaintiff's claims as a matter of law. During oral argument, the Court appeared to agree with FedEx's position but nevertheless denied the motion without prejudice. FedEx again moved the Court for judgment as a matter of law on November 20, 2006 at the conclusion of its case. This motion also was denied without prejudice. After the jury returned a verdict in favor of Plaintiff on November 20, 2006, FedEx once again moved for judgment as a matter of law, which the Court denied without prejudice. Finally, following the jury's punitive damages verdict on November 21, 2006, FedEx again moved the Court for judgment as a matter of law. This motion also was denied without prejudice.

Despite these general allegations, the proof presented at trial showed that Evans was never subjected to any materially adverse treatment as the result of these four events or any other matter connected with his employment at FedEx. Indeed, the following facts are undisputed: Plaintiff is a 17 year employee who is currently employed as an Operations Manager; he has never been terminated, demoted or suspended; he has never lost any employment benefits; his compensation has never been reduced; he has not received any written warning letters, performance reminders, or OLCC's;[2] his performance evaluations admittedly are exemplary; and his job duties as an Operations Manager were not altered. In short, Plaintiff did not present any evidence at trial which showed that he was materially harmed in any way.

Further, although Plaintiff contends he was discriminated against on the basis of his race, he acknowledged that his supervisors never commented on his race, never directed any racial slurs toward him, and never engaged in any conduct which demonstrated that his race factored into any employment decision. Plaintiff presented no evidence demonstrating he was treated less favorably than similarly-situated white employees or that any actions on the part of FedEx were pretextual.

As such, Plaintiff's retaliation and disparate treatment claims are wholly without merit and should be dismissed as a matter of law.

II. RULE 50 LEGAL STANDARD

Under Fed. R. Civ. P. 50, judgment as a matter of law is appropriate if there is "no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1); Montiel v. City of Los Angeles, 2 F.3d 335, 342 (9th Cir. 1993). Defendant is

[2] Although Plaintiff received one instance of written discipline in 1991, no evidence of this discipline was presented at trial.

entitled to judgment as a matter of law unless "viewing the evidence as a whole, 'there is substantial evidence present that could support a finding, by reasonable jurors, for the nonmoving party.'" United California Bank v. THC Financial Corp., 557 F.2d 1351, 1356 (9th Cir. 1977) (citing Quichocho v. Kelvinator Corp., 546 F.2d 812, 813 (9th Cir. 1976)). "Substantial evidence is more than a mere scintilla." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938); Chisholm Bros. Farm Equipment Co. v. International Harvester Co., 498 F.2d 1137, 1140 (9th Cir. 1974). In other words, "[i]f the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion . . . is proper." United California Bank v. THC Financial Corp., 557 F.2d 1351, 1356 (9th Cir. 1977) (quoting Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969)). A movant may renew its request for judgment as a matter of law by filing a motion no later than ten (10) days after entry of the final judgment. See Fed. R. Civ. P. 50(b).

III. PLAINTIFF'S RETALIATION CLAIMS SHOULD BE DISMISSED AS A MATTER OF LAW AS EVANS DID NOT SHOW HE WAS SUBJECTED TO ANY ADVERSE EMPLOYMENT ACTION OR THAT THE ALLEGED ILLEGAL EMPLOYMENT DECISIONS WERE CAUSALLY LINKED TO HIS PROTECTED ACTIVITY.

The Court erred in denying FedEx's motions for judgment as a matter of law on each of Plaintiff's retaliation claims because he failed to present any proof evidencing he suffered a materially adverse employment action or that the challenged actions were causally linked to his filing of DFEH complaints or an EEOC charge. As such, the Court should reverse its earlier decisions and enter judgment in favor of FedEx on each retaliation claim.

To establish a case of retaliation under Title VII, the plaintiff must prove that (1) he engaged in protected activity; (2) he was subjected to an adverse employment action; and (3) a causal connection exists between the two. See Manatt v. Bank of America, 339 F.3d 792, 800 (9th Cir. 2003); see also Brooks v. City of San Mateo, 229 F.3d 917, 928 (9th Cir. 2000) (referring to Payne v. Norwest Corp., 113 F.3d 1079, 1080 (9th Cir. 1997)). A retaliation claim also requires proof that the plaintiff was treated differently from other employees. See Brooks, 229 F.3d at 929. If the plaintiff successfully establishes these elements, the burden of production shifts to the employer to present legitimate reasons for the adverse action. See Payne, 113 F.3d at 1080. Once the employer carries this burden, the plaintiff has the burden of showing the reason advanced by the employer was pretext.[3] Id.

Recently, the Supreme Court established an objective standard for determining what constitutes an adverse employment action. See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. --, 126 S.Ct. 2405, 165 L. Ed. 2d 345 (2006). The Court stated: "a plaintiff must show that a reasonable employee would have found the challenged action **materially adverse**, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Id. at 2415 (emphasis added) (internal quotations omitted). In developing this standard, the Court noted that not every decision amounts to an adverse employment action. "Petty slights or minor annoyances that often take place at work and that all employees experience" do not constitute materially adverse employment actions. Id.

[3] FEHA claims are examined under the same burden-shifting structure. See Brooks, 229 F.3d at 928 (9th Cir. 2000) (relying on Flait v. North Am. Watch Corp., 3 Cal. App. 4th 467, 476 (Cal. Ct. App. 1992)).

Accordingly, a crucial element of an adverse employment action requires evidence that the challenged actions "materially affect[ed] compensation, terms, conditions, or privileges" of employment, Kortan v. California Youth Auth., 217 F.3d 1104, 1109 (9th Cir. 2000), examples of which may include "termination, dissemination of a negative employment reference, issuance of an undeserved negative performance review and a refusal to consider for promotion." Brooks v. City of San Mateo, 229 F.3d 917, 928 (9th Cir. 2000). Although this list of employment actions is not exclusive, a decision which in no way affects the terms and conditions of a plaintiff's employment cannot constitute a materially adverse employment action because it would not dissuade a reasonable employee from engaging in protected activity.

A plaintiff must also demonstrate that the challenged decision is causally connected to the protected activity. The "causal link" element may be established by circumstantial evidence of the employer's knowledge of the protected activity and proximity in time between the protected activity and the challenged employment action. See Morgan v. The Regents of the University of California, 88 Cal. App. 4th 52, 105 Cal. Rptr. 2d 652 (Cal. App. 2000). "Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity." Id.; see also Raad v. Fairbanks N. Star Borough, 323 F.3d 1185, 1197 (9th Cir. 2003) (requiring proof that the particular principal who refused to hire plaintiff was aware of protected activity); Vasquez v. County of Los Angeles, 349 F.3d 634, 646 (9th Cir. 2004) (rejecting retaliation claim when person responsible for alleged adverse employment action was not named in initial charge of discrimination).

Thus, a retaliation claim must be dismissed as a matter of law, if a plaintiff fails to prove by a preponderance of the evidence that (1) he engaged in protected activity; (2) he suffered an

adverse employment action; **and** (3) the challenged action was causally connected to the protected activity. As will be shown, Alvarado failed to establish these essential elements in support of his claims.

a. 55 hour E-Mail

At trial, Evans claimed he suffered an adverse employment action because he received a one sentence e-mail from Van Galder on June 26, 2002 asking him to take corecetive action against another employee. Despite this assertion, Plaintiff presented no evidence which demonstrated he received any discipline, lost any compensation or benefits, incurred a change in job status, or suffered any other tangible harm as the result of the e-mail. In fact, the proof showed that this routine message, which is similar to hundreds of e-mails Van Galder has sent to other managers of all races during his career, was not even included in Evans' station file or any other part of his personnel record. No evidence was presented which established that Evans was impacted in any way by this innocuous and routine e-mail.

Van Galder testified that he sent the e-mail because a driver who reported to Evans violated the 55 hour policy. This policy prohibited employees from working more than 55 hours per week without management approval. When Van Galder discovered the discrepancy during a routine review of employee time records, he sent the e-mail to Evans asking him to take corrective action against the employee who had violated the policy.[4] No evidence was presented which showed that Evans received any corrective action as a result of this incident or that Van Galder ever suggested that Evans was subject to discipline because one of his drivers violated the

[4] Van Galder testified he sent the e-mail, rather than Plaintiff's Senior Manager, because at that time, there was no Senior Manager. Robert Montez had just retired, and Ev Rey had not yet assumed Senior Manager duties.

policy. Evans did not offer any proof that he received a warning letter, performance reminder, OLCC or any other written form of discipline, or that he lost compensation or any other employment benefits as the result of this matter. In fact, Evans did not receive any discipline even after he ignored Van Galder's request and refused to take corrective action against the driver. Indeed, no action was ever taken against Evans in connection with this incident.[5]

Evans presented no evidence which showed that the e-mail was in any way causally linked to his filing of DFEH complaints on July 6, 2002 or an EEOC charge in May 2003. As shown on numerous occasions during the course of the trial, the e-mail could not have been retaliatory because it was sent on June 26, 2002, a full ten (10) days before Plaintiff filed his first

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[5] In response to FedEx's motion for judgment as a matter of law, Plaintiff's counsel mustered only one argument to support his theory that the e-mail was an adverse employment action. He asserted the e-mail was somehow part of FedEx's "progressive disciplinary program" and although it did not constitute discipline, in and of itself, it could lead to discipline at some point in the future. This argument is specious. As indicated, the record is devoid of any evidence which demonstrates that the e-mail was ever a part of Evans' personnel record or was ever included in any file maintained by FedEx. Further, no proof was introduced which showed that a routine e-mail of this nature would ever serve as a predicate to further discipline. Finally, Plaintiff admitted he was never in fact disciplined (i.e. he never received a warning letter, performance reminder or OLCC) as a result of the incident referenced by the e-mail or his failure to comply with the request contained in the e-mail.

This issue was addressed by the Ninth Circuit in Lyons v. England, 307 F.3d 1092, 1118 (9th Cir. 2002). In that case, the plaintiff alleged he received two "average" performance evaluations in retaliation for filing an EEOC charge and civil complaint. Id. The court held that the defendant's conduct had not yet matured into an adverse employment decision because it did not give rise to any negative employment action. Id. For example, the plaintiff did not demonstrate his employer relied upon the evaluations in making any further employment decisions or that the evaluations were accompanied by any meaningful change in work assignments. Id. Because nothing ever happened to the plaintiff as a result of the two evaluations, the Ninth Circuit upheld the district court's dismissal of the retaliation claim on summary judgment. See also Kortan v. California Youth Authority, 217 F.3d 1104, 1112-13 (9th Cir. 2000) (evaluation that did not give rise to further negative employment action was not an adverse employment action). Similarly, there is no dispute that nothing happened to Evans as the result of the 55 hour e-mail.

round of DFEH complaints. Since the e-mail was sent before Plaintiff ever filed a DFEH complaint or an EEOC charge, he clearly was not dissuaded from engaging in protected activity because he chose to file the DFEH complaints and EEOC charge after receiving the e-mail. See Burlington, 126 S.Ct. at 2415. At trial, the Court appeared to agree with this argument but nonetheless denied FedEx's motion finding that the e-mail which was sent **before** Plaintiff ever engaged in protected activity was somehow retaliatory.[6] This clear error should be corrected at the trial court level.

Plaintiff never offered any proof which showed that Van Galder sent the e-mail because he engaged in protected activity. Van Galder testified that he was not aware of any complaints filed by Evans when he drafted the e-mail (because no such complaints even existed at that time). Further, Plaintiff did not call any witnesses or introduce any documents which showed that Van Galder made any comments or engaged in any conduct which suggested he sent the e-mail because he somehow could predict that Plaintiff would filed DFEH complaints and an EEOC charge in the future. No evidence whatsoever was presented on this issue.

Plaintiff also failed to demonstrate that he was treated differently from other employees. See Brooks, 229 F.3d at 929. Evans presented no proof which showed that other Operations Managers did not receive similar e-mails when drivers who reported to them violated the 55 hour

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[6] In its order on summary judgment, the Court recognized the July 2002 DFEH complaints and the May 2003 EEOC charge as the only protected activity in question. See Doc. No. 367, p. 32:14-15. Realizing the 55 hour e-mail was actually sent before he engaged in this protected activity, Plaintiff attempted to change his theory at trial by claiming he engaged in protected activity in 1999 when he allegedly complained about racially neutral comments purportedly made by Dave Perry (i.e "kick the asses" of the drivers and "those people are stupid"). Even assuming this newly devised theory were factual, no evidence was presented at trial which showed that Van Galder sent an innocuous, routine e-mail to Plaintiff three years after he allegedly complained about Perry for the purpose of retaliating against him. There is absolutely no causal connection between Plaintiff's alleged complaints in 1999 and the 55 hour e-mail or any other decision challenged by Plaintiff in this case.

policy or other company procedures. To the contrary, Rey testified he sent e-mails to Carl Bowersmith, a similarly-situated Caucasian Operations Manager, when Bowersmith's drivers exceeded the 55 hour limit without management approval. Plaintiff did not rebut this point.

If the Court continues to hold that the 55 hour e-mail was retaliatory, no manager will ever be permitted to request, direct or instruct, a subordinate to fulfill his job duties once that employee engages in protected activity. Every action (whether materially adverse or not) taken by management concerning the employee will be deemed retaliatory. The Supreme Court specifically sought to prevent this result in Burlington. The Court noted that "[a]n employee's decision to report discriminatory behavior **cannot immunize** that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." Burlington, 126 S.Ct. at 2415 (emphasis supplied). Here, Evans did not even prove he was subjected to a minor annoyance or petty slight by receiving the e-mail; rather he was simply asked to do his job (i.e. take corrective action against an employee who reported directly to him who violated company policy). As such, Plaintiff's retaliation claim on this issue is wholly without merit and should be dismissed as a matter of law.

b. Scale Trailer E-Mail

Plaintiff alleges he was retaliated against because on February 7, 2004 he received a one sentence e-mail from Ev Rey requesting that he take corrective action against a driver who failed to properly operate a scale trailer.[7] Once again, nothing happened to Evans as a result of this situation. He was not terminated, demoted or suspended; he did not receive any discipline; he

[7] The entire message from Rey reads: "I need you to do the corrective action for this incident. thx p..." See Plaintiff's Exhibit 6c.

did not lose any compensation or benefits; he did not receive lower performance evaluations; and his job duties were not changed. This was a non-event.

In fact, Rey testified he had no independent recollection of the e-mail or the incident described in the message; only after reviewing the e-mail on the stand, did he indicate it was nothing more than a request for Evans to follow-up with the employee who failed to properly operate a scale trailer. As Evans' Senior Manager, Rey had no choice but to send the e-mail when he was notified of the issue. Rey simply did his job in asking Evans to follow-up with a driver who failed to comply with a FedEx procedure.

Rey testified that even after Evans ignored the request and refused to address the issue with the driver, nothing happened to him and the issue was dropped. Because of its routine nature, the e-mail was not included in Evans' station file or any other part of his personnel record. Plaintiff offered no proof to rebut any of these points.[8]

Evans introduced no evidence linking the e-mail to his DFEH complaints or EEOC charge. The message was sent on February 7, 2004, nineteen (19) months after Plaintiff filed his DFEH complaints and fifteen (15) months after he filed the EEOC charge. In the Ninth Circuit, to establish causal link on the basis of temporal proximity, a plaintiff must prove that the challenged action occurred "close on the heels of the protected activity." Ray v. Henderson, 217 F.3d 1234, 1244 (9th Cir. 2000); see also Passantino v. Johnson & Johnson Consumer Prods., 212

[8] Importantly, a close review of the e-mail shows that Rey did not even initiate the message. Rey received notice of the scale trailer discrepancy from William Fisher on February 4, 2004; then forwarded the message to Evans a few days later requesting that he take corrective action against the driver who violated the policy. See Plaintiff's Exhibit 6c. The e-mail alone shows that Rey simply responded to the situation and did not "create" the issue as a means of retaliating against Evans. To accept Plaintiff's theory, one must presume William Fisher was involved in a conspiracy with Rey to retaliate. Fisher was not called by either party, and no evidence was presented concerning Fisher or his potential knowledge of this matter.

F.3d 493, 507 (9th Cir. 2000) (requiring that the challenged action take place "within a reasonable period of time" after the protected activity). The Ninth Circuit has held that events occurring nine months apart are not sufficient to establish a causal link between a plaintiff's protected activity and the allegedly retaliatory conduct. See Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1065 (9th Cir. 2002) (finding that 18-month lapse was too long to create an inference of causation); Manatt v. Bank of America, 339 F.3d at 802 (holding that nine months was not sufficiently close to establish a causal link). Thus, as a matter of law, the 15-19 month gap between Evan's protected activity and the scale trailer e-mail is too expansive to establish a causal connection based on temporal proximity alone.

No proof was presented which demonstrated that Rey sent the e-mail because Evans engaged in protected activity. Rey testified he was not aware of any complaints filed by Evans when he sent the e-mail. Plaintiff did not call any witnesses or introduce any documents which showed that Rey made any comments or engaged in any conduct which suggested he sent the e-mail because Plaintiff filed DFEH complaints or an EEOC charge.

Because Evans utterly failed to establish that the scale trailer e-mail was materially adverse or that it was in any way causally connected to his filing of DFEH complaints or an EEOC charge, the Court erred in denying FedEx's motion for judgment as a matter of law. As such, the Court should reverse its decision and enter judgment for FedEx on this issue.

c. SFA Memo

Plaintiff alleges he suffered an adverse employment action because in April 2004 he received a standardized form memo from Van Galder requesting that he send him a copy of his

SFA action plan and notes of his quarterly feedback meetings. This claim has no merit and should be dismissed as a matter of law.

Van Galder testified that he sent the SFA memo to Evans because Evans' SFA score of 4.4 fell below the corporate average of 4.5. According to Van Galder's unrebutted testimony, all Operations Managers who score below the SFA corporate goal receive the same memo that was sent to Evans. Indeed, Van Galder testified that over the course of his career as a Managing Director, he has forwarded the same standard memo to at least thirty (30) Operations Managers. In April 2004, the same memo was sent to Jim Freese (Caucasian Operations Manager) because he received a score of 3.9 as well as Jack Jordan (African-American Operations Manager) because he received a score of 3.8. Both Van Galder and Freese provided unrebutted testimony on this point.[9]

Although Evans initially refused to comply with the memo, he was not disciplined. He did not receive a warning letter, performance reminder or OLCC; he was not demoted or suspended; his shift was not altered; and he did not lose any pay or benefits. Nothing happened to him as a result of receiving the memo and initially failing to comply with his supervisor's request.

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[9] Again, to prove a claim of retaliation, Evans was required to show that he was treated differently than other employees. See Brooks v. City of San Mateo, 229 F.3d 917, 929 (9th Cir. 2000). Although the Court barred FedEx from introducing the SFA memos that Van Galder sent to Freese and Jordan (which are identical in every respect to the SFA memo Evans received), the Court did allow Van Galder to testify that he sent the same memo to Freese and Jordan. The Court also permitted Freese to testify that he received the same memo although he was barred from testifying to the substance of the document. As Plaintiff offered no evidence to rebut this testimony, he failed to show that he was treated differently.

At trial, FedEx introduced the SFA policy which explains that all managers must complete an action plan and conduct feedback meetings regardless of their score.[10] Robert Speroff (Managing Director of Human Resources) provided extensive testimony on the SFA process. The memo required Plaintiff to do nothing more than make copies of some notes and send an extra copy of his action plan (that he was already required to develop) to Van Galder. In essence, Van Galder asked Evans to make a few copies. The Court's finding that a memo requiring an employee to make copies constitutes an adverse employment action in no way comports with the law and should be corrected at the trial court level.

Plaintiff also failed to link the memo to his filing of DFEH complaints or an EEOC charge. As shown, Van Galder sent the same memo to other managers, which demonstrates he did not single out Plaintiff. Further, Plaintiff did not call any witnesses or introduce any documents which showed that Van Galder made any comments or engaged in any conduct which suggested he sent the memo because Plaintiff filed DFEH complaints or an EEOC charge. Plaintiff presented no evidence on this issue.

To find that this standardized memo which Van Galder also sent to Plaintiff's Caucasian counterpart, Jim Freese, is somehow an adverse employment action or retaliatory, is clear error. Again, nothing ever happened to Evans as the result of receiving the memo. He was only asked to make some copies. Accordingly, judgment should be entered for FedEx on this issue.

d. Shift Change

Plaintiff's claim that FedEx retaliated against him because his shift changed in January 2004 is baseless and should be dismissed as a matter of law. As a threshold matter, Plaintiff does not dispute the shifts of **all** six Operations Managers were put up for bid in November 2003, not

[10] See Defendant's Exhibit 300g- Section 5-70 Survey/Feedback/Action (SFA) Program.

just his shift. This fact, alone, proves that Plaintiff was not singled out or treated differently than his fellow employees. To prove a claim of retaliation, Evans must demonstrate that he was treated differently. See Brooks, 229 F.3d at 929 (stating that absent a showing of disparate treatment, the challenged decision cannot be deemed retaliatory). Plaintiff was not treated differently because the shift bid applied to all Operations Managers, and the shifts of other managers changed as the result of the bidding process (i.e. Kalini Boykin's shift changed to the 1:00 a.m. shift). This point was undisputed at trial.

Moreover, the shifts were restructured for a legitimate purpose. The shifts were put up for bid because Don Porter, an Operations Manager, retired as part of the I-Service program in October 2003. Since Plaintiff's management group was not allowed to replace Porter because of I-Service, FedEx had to use one less manager to cover the same amount of hours of operation. Thus, the shifts needed to be restructured to provide the operationally needed coverage. During the shift bidding process, each manager, including Evans, chose a shift in accordance with the process. Rey and Van Galder provided extensive testimony on these points.

The crux of Plaintiff's claim is that Rey and/or Van Galder "chose" to bid the shifts based on "time in management" rather than "time in location." Plaintiff had less seniority under "time in management." As shown at trial, this theory lacks merit since "time in management" was the mandated seniority measurement dictated under the I-Service program--a program that affected all 140,000 domestic employees and which was created by management officials in Memphis who had no idea of Evans' circumstances or which managers would retire under the program.

At trial, FedEx offered undisputed proof that neither Rey nor Van Galder made the decision to implement "time in management." Robert Speroff testified that "time in

management" was used because it was the appropriate procedure under the I-Service program, which was in effect at the time of the shift bid. Speroff had no knowledge of Evans or the fact that he had filed DFEH complaints or an EEOC charge. Rey testified that his human resources representative, Karen Keaton, directed him to use "time in management." Van Galder also testified that he was instructed to use "time in management." Indeed, FedEx introduced a number of I-Service documents which mandated "time in management" as the appropriate process.[11] On the other hand, Plaintiff did not introduce a single document or call a single witness to testify that "time in location" was the appropriate procedure. The only proof offered by Evans on this point was his unsupported belief that "time in location" should have been used.

Plaintiff failed to link the shift bid to his filing of DFEH complaints or an EEOC charge. Speroff, who directed Van Galder to use "time in management," had no knowledge of Evans' DFEH complaints or EEOC charge. No evidence was introduced to rebut these essential points.

To hold that the shift bid was retaliatory, the Court would have to accept the theory that FedEx was willing to restructure the shifts of all six Operations Managers and put the shifts up for bid for the sole purpose of retaliating against Evans. Under this line of reasoning, Van Galder (because he approved the bidding process), Rey (because he implemented the shift bid), Keaton (because she directed Rey to use "time in management"), Speroff (because he confirmed "time in management"), Freese (because, according to Plaintiff, he received a better shift), Porter (because the shifts could not have been rebid if he had not retired reducing the number of managers from 7 to 6) and possibly others, all would have to be involved in a grand conspiracy

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[11] For example, see Defendant's Exhibit 323 (I-Service documents sent to all AGFS managers from Bill Logue, Vice-President AGFS, indicating in four separate places that "time in management" is the appropriate process).

to retaliate against Evans. This preposterous theory amounts to nothing more than pure conjecture, and certainly was not proven at trial.

As Plaintiff failed to show that he was treated differently; that the shift change had a materially adverse impact on the terms and conditions of his employment; that the shifts were put up for bid for an illegitimate purpose; or that the shift bid was causally connected to his protected activity, the Court abused its discretion in denying FedEx's multiple motions for judgment as a matter of law.[12]

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[12] The Court also erred in denying summary judgment on this issue. In its Order, the Court reasoned Plaintiff presented sufficient proof that he suffered negative consequences associated with the shift change. See Doc. No. 367, pp. 32-33. The only evidence to support this notion was Plaintiff's contention that because of the shift change, he was given a new workgroup just before the SFA survey, and that as a result, he received a lower SFA score. Again, no evidence was presented at trial which showed that the lower SFA score in any way negatively impacted Evans (i.e. he was not demoted; he did not lose pay, etc...). Moreover, Freese took over a new workgroup as the result of the shift bid and, in turn, received an even lower SFA score than Evans. Thus, Plaintiff was not treated differently than his Caucasian counterparts.

The decision in Wu v. Pacifica Hotel Co., 2001 U.S. Dist. LEXIS 6048 at*20-21 (N.D. Cal. Apr. 25, 2001) (attached as an Exhibit to Saylors Decl.), which was cited by FedEx at the summary judgment level, speaks directly to this point. There, the court held that standing alone, a shift change does not constitute an adverse employment action. The plaintiff must show something further such as a change in the terms or benefits of his employment. See also Steiner v. Showboat Operation Co., 25 F.3d 1459, 1465 n. 6 (9th Cir. 1994) cert denied, 513 U.S. 1082, 130 L. Ed. 2d 636, 115 S.Ct. 733 (1995) (questioning whether transfer from swing shift to day shift was "adverse" employment action where employee "was not demoted, or put in a worse job, or given any additional responsibilities"); Nidds v. Schindler Elevator Corp., 113 F.3d 912, 919 (9th Cir. 1997) (holding that transfer with no reduction in compensation did not constitute an adverse employment action); Yates v. Avco Corp., 819 F.2d 630, 638 (6th Cir. 1987) (no adverse employment action where temporary transfer did not result in loss of salary or benefits); Gu v. Boston Police Dept., 312 F.3d 6, 21 (1st Cir. 2002) (noting that "[w]hen a general reorganization results in some reduction in job responsibilities without an accompanying decrease in salary, or grade, those changes cannot be dubbed adverse employment actions.").

IV. PLAINTIFF'S DISCRIMINATION CLAIMS SHOULD BE DISMISSED AS A MATTER OF LAW AS EVANS DID NOT SHOW HE WAS SUBJECTED TO AN ADVERSE EMPLOYMENT ACTION OR THAT HE WAS TREATED LESS FAVORABLY THAN SIMILARLY-SITUATED CAUCASIAN EMPLOYEES.

Plaintiff's racial discrimination (disparate treatment) claims are based on the same four events described in *Section III, supra*. At trial, Plaintiff inexplicably made no effort to show that he was treated differently than similarly-situated Caucasian employees with respect to any of the four challenged actions. He called no witnesses and introduced no exhibits on these issues. During oral argument on the first motion for judgment as a matter of law, Plaintiff's counsel only presented arguments in response to FedEx's request for dismissal of the retaliation claims. Counsel made no statements concerning the disparate treatment claims.

Because Plaintiff seemingly abandoned the disparate treatment claims by failing to offer any evidence in support, the Court erred in denying FedEx's motions for judgment as a matter of law. For the reasons set forth below, FedEx requests that the Court reverse its decision and enter judgment in its favor on all four claims.

a. Legal Standard

The elements of Plaintiff's discrimination claims are governed by the burden-shifting procedure and analysis of McDonnell Douglas v. Green, 411 U.S. 792 (1973).[13] If the employer meets its burden of offering a legitimate, non-discriminatory reason for the action, the plaintiff must show that the articulated reason is pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the

[13] The same analysis is applicable to claims under 42 U.S.C. § 1981 and FEHA. See Taron v. County of Los Angeles, 123 F.3d 1259, 1263 n.2 (9th Cir. 1997) (test for determining discrimination under Title VII applies to FEHA); Rodriguez v. General Motors Corp., 904 F.2d 531, 532 (9th Cir. 1990) (applying McDonnell-Douglas test for *prima facie* case to § 1981 claim).

employer's proffered explanation is unworthy of credence." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

The plaintiff must demonstrate that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably. See Peterson v. Hewlett Packard Co., 358 F.3d 599, 604 (9th Cir. 2004).

In the end, the ultimate issue in any employment discrimination action under Title VII, FEHA, or § 1981 is whether intentional discrimination took place. Miller v. Fairchild Industries, Inc., 797 F.2d 727, 733 (9th Cir. 1986). "Mere unhappiness and inconvenience are not actionable under Title VII. At a minimum, the employee must show a qualitative or quantitative change in the terms and conditions of employment." Haywood v. Lucent Technologies, 323 F.3d 524, 532 (7th Cir. 2003).

b. Plaintiff was not subjected to an adverse employment action.

As shown in *Section III, supra*, Plaintiff failed to demonstrate he experienced an adverse employment action with respect to any of the four alleged events. This is an essential element of a disparate treatment claim. See Peterson, 358 F.3d at 604. As such, the Court erred in denying Defendant's motions for judgment as a matter of law.

c. No proof was offered at trial which showed that Plaintiff was treated less favorably than similarly-situated Caucasian employees.

Plaintiff presented no evidence showing that he was treated less favorably than similarly-situated Caucasian employees. No proof was offered that white Operations Managers did not receive e-mails from their supervisors if drivers who reported to them violated the 55 hour policy or failed to properly operate a scale trailer. Plaintiff's counsel did not question Van Galder, Rey,

Freese, or any other witness on these points.[14] In fact, the only evidence presented on this issue was elicited by FedEx. Rey testified he sent e-mails to Carl Bowersmith (Caucasian Operations Manger) when Bowersmith's drivers exceeded the 55 hour limit without approval. These points are undisputed.

Furthermore, as already shown, Van Galder sent the same SFA memo to at least thirty (30) other managers. Both Freese (similarly-situated Caucasian Operations Manager) and Jordan (African-American Operations Manager) received the same memo for the same reasons and at the same time as Evans. No attempt was made by Plaintiff to rebut these points.

Plaintiff was not treated less favorably with respect to the shift change because, as previously pointed out, the shifts of all six managers were put up for bid at the same time; the bidding process applied equally to all six managers; other manager's shifts changed as a result of the bidding process; and Bowersmith (one of only two similarly-situated white Operations Managers) bid **after** Evans based on the "time in management" bidding process. More significantly, under "time in management," Jack Jordan, an African-American manager, was given the first bid because he had the highest seniority. Since an African-American bid first and a Caucasian bid after Plaintiff, this refutes any possible claim that Defendant used the "time in

[14] The only evidence presented on this point by Evans was his testimony that two drivers who reported to Bowersmith exceeded the 55 hour limit; however he did not know whether Bowersmith ever received an e-mail asking him to take corrective action against the two drivers. Plaintiff does not have access to Bowersmith's e-mail files and would have no way of knowing what e-mails Bowersmith receives from management. Plaintiff did not call Bowersmith or any other witness to testify on this point.

management" process as a means of discriminating against Evans.[15] This fact, alone, demonstrates just how frivolous this claim is.

Finally, Plaintiff did not present any evidence that Van Galder, Rey, or any other decision-maker made a comment about his race, used racial slurs, or engaged in any other conduct which showed that Evans' race factored into any of the four challenged decisions. The record is devoid of any proof on this matter. Accordingly, Plaintiff's disparate treatment claims are without merit and should be dismissed as a matter of law.

V. PLAINTIFF'S PUNITIVE DAMAGES CLAIM SHOULD BE DISMISSED AS A MATTER OF LAW.

Evans presented no evidence which showed he experienced any form of discrimination or retaliation--let alone any proof that would justify an award of punitive damages. There was absolutely no evidence of intentional discrimination as Plaintiff's case was entirely circumstantial.

Plaintiff was not subjected to any treatment that a reasonable juror could find egregious, malicious, outrageous, or in conscious disregard of Evans' federally protected rights. For example, Plaintiff was not subjected to any racial slurs or inappropriate comments; he was not physically assaulted or threatened; he was not terminated, demoted or suspended; he lost no pay; he received no written discipline; his performance evaluations were not lowered; and he did he lose any employment opportunities or other benefits as a result of any actions on the part of

[15] Plaintiff also complained that as a result of the shift change, he received a new workgroup which gave him a low score on the April 2004 SFA. He alleged that it was unfair for a new workgroup to rate him. This argument is also without merit. Just like Evans, Freese also received a new workgroup after the shifts were put up for bid. His new workgroup gave him a score of 3.9, substantially lower than Evans' score of 4.4. Jack Jordan received a score of 3.8 from his new workgroup. Evans was not treated differently than any of his fellow Operations Managers.

FedEx. Indeed, he still works for FedEx as an Operations Manager with the same job duties and responsibilities he has had since FedEx promoted him to that position in 1998. These facts are undisputed.

A Title VII plaintiff is entitled to punitive damages if his or her employer engaged in discriminatory practices "with malice or with reckless indifference to [his] federally protected rights." 42 U.S.C. § 1981a(b)(1). "Malice" or "reckless indifference" do not require "a showing of egregious or outrageous" conduct, but instead require proof that the employer acted "in the face of a perceived risk that its actions [would] violate federal law." Kolstad v. American Dental Ass'n, 527 U.S. 526, 535-36, 119 S. Ct. 2118, 144 L. Ed. 2d 494 (1999). There must be evidence of conscious wrongdoing on the part of the defendant. Id. (citations omitted). "Where there is no evidence that gives rise to an inference of actual malice or conduct sufficiently outrageous to be deemed equivalent to actual malice, the trial court need not, and indeed should not, submit the issue of punitive damages to the jury." Chizmar v. Mackie, 896 P.2d 196, 209 (Ala. 1995) (cited with approval in Koldstad).[16]

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[16] The jury received the following punitive damages instruction:

> You will be asked to determine whether conduct by defendant FedEx was malicious, oppressive or in reckless disregard of the plaintiff's rights. ...
>
> Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another. Conduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects complete indifference to the plaintiff's safety and rights, or the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law. An act is oppressive if the person who performs it injures or damages or otherwise violates the rights of the plaintiff with unnecessary harshness or severity, such as by the misuse or abuse of authority or power or by the taking advantage of some weakness or disability or misfortune of the plaintiff.

Here, the record is devoid of any evidence that Van Galder, Rey or any other FedEx manager, engaged in any malicious conduct toward Plaintiff or anyone else. Evans presented no proof of intentional discrimination. For instance, he did not call any witnesses or introduce any evidence which showed that Van Galder or Rey told other employees they intended to harm Plaintiff. There is absolutely nothing in the record to support a finding that FedEx had an evil intent to discriminate or retaliate against Evans.

There is no case law which stands for the proposition that when a plaintiff asserts claims for retaliation and disparate treatment based on race and suffers absolutely no tangible detriment to his employment, he is entitled to punitive damages. It is preposterous that the jury was allowed to consider whether e-mails and a memo which only asked Plaintiff to do his job, which led to no further action, and which were not even maintained in Plaintiff's personnel file, could somehow serve as a basis for an award of punitive damages. The same is true concerning the shift change which was applied evenly to all six Operations Managers.

To allow the jury to consider punitive damages was a clear abuse of discretion. Accordingly, the Court should reverse its previous decision, and enter judgment in favor of FedEx on this issue.

CONCLUSION

For the reasons articulated above, FedEx requests that the Court grant its Renewed Motion for Judgment as a Matter of Law, and direct entry of judgment in its favor on all claims.

See Doc. No. 645. Again, there was no evidence presented at trial which even remotely suggested that FedEx engaged in any conduct which would meet the standards outlined in this instruction.

DATED: March 14, 2006.

FEDERAL EXPRESS CORPORATION

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