

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

**UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Plaintiff,**

**TED MAINES,
Intervenor-Plaintiff,**

-vs-

Case No. 6:02-cv-1112-Orl-28DAB

**FEDERAL EXPRESS CORPORATION,
Defendant.**

ORDER

In this action under Title VII of the Civil Rights Act of 1964, as amended, the Florida Civil Rights Act, and Florida's Private Sector Whistleblower Act, the Equal Employment Opportunity Commission ("EEOC") and Intervenor Ted Maines ("Mr. Maines") have brought retaliation claims against Defendant Federal Express ("FedEx"). Plaintiffs contend that FedEx retaliated against Mr. Maines by disciplining him and constructively discharging him after he complained about what he reasonably believed was an unlawful employment practice at FedEx.

This cause is before the Court on Defendant's Motion for Summary Judgment (Doc. 33) and Plaintiffs' Response in Opposition thereto (Doc. 45). The assigned United States Magistrate Judge has submitted a Report and Recommendation (Doc. 68) recommending that the motion be denied. FedEx has filed Objections to the Report (Doc. 69), and Plaintiffs have filed a Response to those Objections (Doc. 71). The Court has reviewed the record

and, as required by 28 U.S.C. § 636(b)(1), has made “ a de novo determination as to those portions of the report . . . to which objection is made.” Having done so, the Court agrees with the magistrate judge’s recommendation that FedEx’s motion for summary judgment be denied.

The Report concludes that Plaintiffs have made a prima facie showing of retaliation because they have established (1) that Mr. Maines engaged in activity protected by Title VII when he complained to FedEx’s legal department about what he believed was discriminatory treatment of two minority candidates for management positions; (2) that he suffered an adverse employment action when, among other things, he was “offered the choice” of a demotion or a warning letter that included the threat of immediate termination after one more “mistake,” his e-mail and telephone calls were monitored, his e-mail capacity was reduced, and he ultimately resigned under circumstances that a reasonable jury could find to have amounted to constructive discharge; and (3) that there was a causal connection between the protected activity and the adverse action because of their close temporal proximity. The Report further concludes that, once FedEx came forward with its proffered legitimate nondiscriminatory reason for its treatment of Mr. Maines – that he had acted deficiently as a manager in selecting his secretary for a managerial position – Mr. Maines succeeded in raising a genuine issue of material fact as to pretext to survive summary judgment.

As Plaintiffs correctly note in their Consolidated Response to FedEx’s Objections, for the most part “Defendant’s objections are not presented in the context of the Magistrate Judge’s findings regarding the prima facie elements of this Title VII retaliation case, nor his findings with respect to evidence of pretext.” (Doc. 71 at 1). Instead, FedEx takes issue

with several statements in the Factual Background section of the Report and argues that they render the Report erroneous. Specifically, FedEx contends "that the Magistrate mistakenly construed crucial undisputed facts as disputed throughout the course of his Report, which resulted in an erroneous recommendation that FedEx's summary judgment motion be denied." (Doc. 69 at 1). FedEx is incorrect.

FedEx disputes five specific statements in the Report: (1) "The parties sharply dispute whether Ms. Miller met the minimum specifications for the position" (Report at 3); (2) "Jenkins reviewed the selection matrix and authorized the selection of Reece and Miller" (Report at 3); (3) "Mattman decided to nullify the selection process" (Report at 3); (4) "The next day, February 8, 2001, Mattman formally nullified the selection of Reece and Miller, summarily removed and demoted Christian from her position as Maines' Managing Director, appointing Carmon Lannom in her stead" (Report at 4); and (5) The offer of a non-management position to Maines would have resulted in "a pay cut of approximately \$50,000" (Report at 4).

Although FedEx has identified these five statements as erroneous, it argues almost exclusively about the first statement, regarding whether the parties dispute whether Ms. Miller, Mr. Maines's secretary, was qualified for the position into which Mr. Maines promoted her. FedEx asserts that "this erroneous conclusion . . . infects [the] entire Report" and that therefore the Report should be rejected and FedEx's summary judgment motion granted. (See Doc. 69 at 2).

FedEx's assertion on this point is incorrect for several reasons. First, the issue of whether Ms. Miller was or was not qualified for the position, while not totally irrelevant to the

case, is not dispositive of the issue of whether Mr. Maines engaged in statutorily protected activity when he complained about her promotion being revoked. What is determinative is whether Mr. Maines reasonably thought she was qualified at the time he selected her so as to render his belief genuine regarding whether discrimination had occurred at the time he complained to the legal department. The magistrate judge correctly explained that there is no evidence that Mr. Maines did not believe during the relevant time period that Ms. Miller was qualified. The fact that Mr. Maines may now realize that some of the calculations in the paperwork were done incorrectly does not affect whether he had a good-faith belief at the pertinent time. Moreover, at least one other former FedEx employee stated in a deposition that she believed Ms. Miller was qualified for the position, (Dep. of Karen Ings, Doc. 49 at 49), and Mr. Maines still maintains that Ms. Miller would have served ably in the management position in any event (Vol. II of Dep. of Ted Maines, Doc. 48 at 284-87).

In sum, while it may have perhaps been more accurate to say that there is a difference of opinion among the witnesses as to whether Ms. Miller was qualified for the promotion, the statement in the Report that “[t]he parties sharply dispute whether Ms. Miller met the minimum qualifications for the position” does not “infect” the Report with error. Opinions vary as to her qualifications, but what is important – and what was correctly concluded by the magistrate judge – is that there is evidence that Mr. Maines believed Ms. Miller was qualified at the pertinent time. This alleged error does not invalidate the Report. And, as noted in the Report, Ms. Miller's lack of qualification would not have anything to do with whether Ms. Reece – whose promotion was also revoked – was qualified.

The second factual statement challenged by FedEx is that "Jenkins reviewed the selection matrix and authorized the selection of Reece and Miller." This statement refers to Eddie Jenkins, the Human Resources representative who was involved in the selection process at issue. FedEx argues in its Objections that Jenkins did not approve the selection of Ms. Reece or Ms. Miller but instead only approved the selection "process." However, the record supports the statement contained in the Report; Jenkins acknowledged in his deposition that he told "Mr. Maines that they're approved, that it's okay to extend offers to Guadalupe Miller and Annette Reece." (Dep. of Eddie Jenkins, Doc. 38 at 80).

The third statement about which FedEx complains is that "Mattman decided to nullify the selection process" (Doc. 69 at 3) (quoting Report at 3). FedEx contends that "[i]t is undisputed that both Mattman and Karen Christian decided to nullify Maines' promotions." (Doc. 69 at 3). Whatever difference this makes, there are numerous references in the record to Mattman being the one who nullified the promotions. (See, e.g., Dep. of Eddie Jenkins, Doc. 38 at 103, 106, 107, 154, & 297; Ex. 9 to Dep. of Eddie Jenkins (FedEx internal memorandum dated 03/21/01 from Catherine Banks to Eddie Jenkins stating that "the overall selection process was 'nullified' by Vice President Diane Mattman"))).

The fourth statement challenged by FedEx is that on February 8, 2001, Mattman "summarily removed and demoted Christian from her position as Maines' Managing Director, appointing Carmon Lannom in her stead." (Doc. 69 at 3) (quoting Report at 4). FedEx complains that Christian was not demoted on February 8 but instead moved to a different organization on May 23, 2001. As with the third statement discussed above, it is not clear what difference this statement makes to the summary judgment motion, but in any event

Christian did testify in her deposition that on February 8 Mattman “removed the whole operation from” Christian. (Dep. of Karen Christian, Doc. 36 at 65-66).

The final Factual Background statement about which FedEx complains is that the non-management position which Maines was offered after the subject incident would have resulted in “a pay cut of approximately \$50,000.” (Doc. 69 at 3) (quoting Report at 4). Citing the deposition testimony of Lex Lannom, FedEx contends that the pay reduction would only have been 15-18% and not \$50,000. However, Mr. Maines – a FedEx employee for over twenty years – plainly testified that his pay cut would have been \$50,000. (Vol. II of Dep. of Ted Maines, Doc. 48 at 347). Hence, although there may be conflicts in the evidence as to how much the pay cut would have been, at the summary judgment stage the evidence is to be construed in the nonmovant’s favor. Thus, the Report’s statement in this regard is not erroneous.

Additionally, several other times in its objections, FedEx mischaracterizes the magistrate judge’s Report. For example, FedEx states that “[t]he Magistrate seems to suggest that if Maines made a mistake rather than intentionally promoting his unqualified secretary, then FedEx is prohibited from disciplining him.” (Doc. 69 at 8). However, the magistrate judge suggests no such thing; instead, the Report correctly notes that there is no evidence that Mr. Maines knew at the time he made his complaint to the legal department that Ms. Miller did not in fact meet the minimum qualifications for the position, on the way to concluding that a reasonable jury could find that Mr. Maines had a good faith belief that discrimination had occurred. (See Report at 8). The Report was not even addressing FedEx’s right to discipline Mr. Maines, much less saying that it had no such right. FedEx’s

similar assertion later in its objections "that the Magistrate erred by suggesting that FedEx may not discipline Maines for making a mistake" (Doc. 69 at 9) is similarly flawed. Nowhere does the Report state or suggest that FedEx may not discipline its employees. Additionally, although FedEx criticizes the magistrate judge's characterization of the discipline as an "ultimatum choice," the Court is quite confident that the oxymoronic nature of this term was not lost on the magistrate judge and indeed was the point of the statement.

Finally, there is absolutely no merit to FedEx's objection regarding the Report's reliance on "close temporal proximity" to establish the causal connection element of Plaintiffs' prima facie case. (See Objections, Doc. 69 at 11). The objection conflates the issue of the prima facie showing with the issue of whether a legitimate nondiscriminatory reason has been articulated. As noted in the Report, it is well-established in this circuit that close temporal proximity is enough to satisfy the causation element of a plaintiff's prima facie case.

Therefore, it is **ORDERED** as follows:

1. The Report and Recommendation (Doc. 68) is **ADOPTED** and **CONFIRMED** and made a part of this Order.

2. Defendant's Motion for Summary Judgment (Doc. 33) is **DENIED**.

DONE and **ORDERED** in Orlando, Florida this 11 day of October, 2004.


JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party
United States Magistrate Judge David A. Baker