

Defendant's Motion for Summary Judgment is DENIED and Defendant's Motion to Strike is MOOT.¹

Summary Judgment Standard

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). All evidence and the reasonable inferences to be drawn therefrom must be viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). In addition, “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (quoting with approval *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

The moving party bears the burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial, and of identifying those portions of the record that demonstrate such an absence. *Celotex*, 477 U.S. at 323. Once the moving party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The party defending against the motion for summary judgment cannot defeat the motion unless he provides specific facts that show the case presents a

¹The Court finds that the issue of whether Hubbard is entitled to compensatory damages will be submitted to the jury, and the framing of the appropriate questions for the jury will be handled at the Charging Conference. The Court further finds that whether to treat the Cowboys Red River Clubs as an integrated enterprise for purposes of establishing the proper damages cap pursuant to 42 U.S.C. § 1981a, and whether Plaintiffs are entitled to permanent injunctive relief against Cowboys Red River are matters for the Court after the jury reaches its verdict.

genuine issue of material fact, such that a reasonable jury might return a verdict in his favor. *Liberty Lobby*, 477 U.S. at 248.

Facts

Based on its review of the summary judgment evidence submitted by the parties, and in light of the summary judgment standard set forth directly above, the Court summarizes the relevant material facts as follows:

Cowboys Red River is the Dallas branch of a trio of country and western dance halls located in Dallas, Texas, Arlington, Texas and Atlanta, Georgia. In or about September 1997, Hubbard transferred from her job as a bartender at the Cowboys Red River in Arlington to the Cowboys Red River in Dallas. In January 1998, Hubbard informed her manager at Cowboys Red River, Larry Robinson, that she was pregnant and that she had experienced some spot-bleeding, but that her doctor had cleared her to return to her duties. On or about January 24, 1998, Robinson transferred Hubbard from bartender to door girl for the first time. Hubbard was physically able to perform her normal duties as a bartender according to her physician, John Jeffers, M.D. After being told of Hubbard's pregnancy and related medical condition, Robinson repeatedly told Hubbard and others at Cowboys Red River that Hubbard was a potential liability to Cowboys Red River because of her pregnant condition. On or about April 25, 1998, against Hubbard's wishes, Robinson permanently transferred Hubbard from her position as a bartender to a position of door girl. Robinson told Hubbard that he, Mike Murphy (President of the Club) and Kari Wade (Personnel Administrator) had spoken and agreed that Hubbard and her pregnancy were a liability to the Cowboys Red River and that they did not want to be held responsible if something happened to the baby.

On or about April 29, 1998, Hubbard filed a Charge of Discrimination with the EEOC, complaining that Cowboys Red River unlawfully demoted her to a position as a door girl because of her pregnancy. On or about May 6, 1998, Investigator Armando Matamoros personally served the Charge of Discrimination on Cowboys Red River. Subsequently, Hubbard told Robinson that she had filed the Charge of Discrimination with the EEOC. Robinson admits that he heard that Hubbard had filed the Charge while she was still employed with Cowboys Red River. He recalls also having told Mike Murphy and Kari Wade about the Charge. On May 6, Robinson placed a false disciplinary report in Hubbard's personnel file alleging that she had missed work and threatening her with suspension without pay for any other unexcused absence. Hubbard never saw the disciplinary report and never signed it. Hubbard testifies she never had any unexcused absences.

On or about Thursday, May 28, 1998, when Hubbard came to work her time card was missing. When she asked for her card, a coworker told her that Robinson would talk to her. Hubbard went to Robinson, who asked her where she had been on Wednesday night. She informed him that when she called to get her schedule, she was told she was not scheduled for Wednesday. Robinson and Hubbard went to look at the schedule for Wednesday night. Hubbard was not on the schedule. Robinson asked her to "get her [expletive] and get out of here."

Ms. Phares, the floor manager, similarly testifies that on May 28, 1998, a day which stands out in her mind because it was the day of a concert by famous country and western star, Merle Haggard, she saw Hubbard and Robinson present at Cowboys Red River. Ms. Phares was in the restroom when Hubbard came in appearing upset, telling Ms. Phares that "Larry just fired

me. He told me to take my [expletive] and go.” Ms. Phares also testifies that Hubbard told her she did not come in Wednesday night because she had called in and told she was not scheduled.²

Discussion

I. Pregnancy Discrimination

The PDA prohibits discrimination against females because of or on the basis of “pregnancy, childbirth, or related medical conditions” 42 U.S.C. § 2000e(k). Pursuant to the PDA, a pregnant employee’s ability or inability to work are the only permissible factors to consider in making employment decisions. EEOC Regulation, 29 C.F.R. § 1604.10(a), states that: “Any employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth, or related medical conditions is in prima facie violation of Title VII.”

A *prima-facie* case of pregnancy discrimination can be met under the indirect burden shifting approach set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) or, alternatively, the plaintiff may produce sufficient evidence, whether direct or circumstantial, to create a triable issue as to whether pregnancy was a motivating factor in the complained of employment decision. *Marshall v. American Hospital Ass’n*, 157 F.3d 520, 525 (7th Cir. 1998).

First, the Court rejects Cowboys Red River’s reliance on *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707-708 (5th Cir. 1997), which Cowboys Red River erroneously cites in support of its claim that a transfer without a loss of pay is not actionable under the anti-discrimination provisions of Title VII set forth at 42 U.S.C. § 2000e-2(a)(1). *Mattern* is inapplicable here, as it

²Ms. Phares’ testimony is merely corroborative of Hubbard’s. Because the Court’s decision to deny Cowboys Red River’s Motion for Summary Judgment would be the same without Ms. Phares’ testimony, the Court need not decide the merits of Cowboys Red Reiver’s Motion to Strike Ms. Phares’ testimony as hearsay.

applies only to the retaliation provisions of Title VII, 42 U.S.C. § 2000e-3. In cases alleging discrimination under 42 U.S.C. sec. 2000e-2(a)(1), such as Plaintiffs' pregnancy discrimination claims, *Mattern* is inapplicable and an unwanted transfer may constitute an actionable employment decision. See *LULAC v. City of Galveston*, 979 F.Supp. 514, 518-19 (S.D. Tex. 1997); *Florence v. Runyon*, 990 F.Supp. 485, 496 (N.D. Tex. 1997). The *Mattern* court itself contrasted the standard for establishing an adverse employment action under the anti-retaliation provision of § 2000e-3 with the "more vague proscription" found in § 2000e-2(a)(1), (2) which "reaches acts which merely 'would tend' to affect the employee." *Mattern*, 104 F.3d at 708-09. See *Levin v. Delta Air Lines*, 730 F.2d 994, 996 (5th Cir. 1984) (placing pregnant flight attendants on ground duty was adverse employment action); *Forsyth v. City of Dallas*, 91 F.3d 769, 773 (5th Cir. 1996), *cert. denied*, 522 U.S. 816 (1997) (transfer of police officers from intelligence division to uniformed night patrol constituted demotion); *LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 448 (5th Cir. 1996) (demotion from service manager to mechanic created fact issue as to whether an adverse employment action had occurred); *Rizzo v. Children's World Learning Ctrs., Inc.*, 84 F.3d 758, 765 (5th Cir. 1996), *cert. denied*, 531 U.S. 958 (2000) (employer's decision to lower disabled employee's hours, to require her to work a "split shift," and to change her position from bus driver to cook produced fact issue as to whether there had been adverse employment action); *Click v. City of Copeland*, 970 F.2d 106, 109 (5th Cir. 1992) (simply because sheriff deputies received no decrease in pay did not mean their transfers were not demotions); *Fyfe v. Curlee*, 902 F.2d 401, 404 (5th Cir. 1990) (transfer to less desirable but equal paying job constituted demotion).

Second, under the *McDonnell-Douglas* burden-shifting approach, the Court finds that

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Plaintiffs have submitted sufficient evidence to create an issue of fact for the jury as to whether Cowboys Red River's proffered reasons for transferring Hubbard were pretextual. Cowboys Red River alleges that it transferred Hubbard from bartender to door girl not because of her pregnancy and related medical condition, but because she had a propensity to become involved in altercations by coming out from behind the bar in violation of its "stay behind the bar policy." Robinson claims that he moved Hubbard from behind the bar because she was involved in three (3) incidents in which she became involved in altercations between customers. Robinson has admitted that other bartenders who also came out from behind the bar and got involved in altercations in front of the bar were merely reprimanded, not fired, transferred or moved to the position of door girl. Robinson says that these other bartenders were only reprimanded because they only came out from behind the bar and intervened once. Hubbard denies she was involved in three (3) incidents. She admits to being involved in one (1) incident only, after which Robinson verbally reprimanded her, and she never violated the "stay behind the bar policy" again. The evidence shows that when Robinson transferred her to the position of door girl, he told her it was because of fears of liability due to her pregnancy, and did not tell her it was because she violated the "stay behind the bar policy." Ms. Phares, floor manager, testifies that she only saw Hubbard in front of the bar near an altercation on one (1) occasion.

Moreover, Cowboys Red River makes much of the fact that during the time Hubbard worked for them, it had other pregnant bartenders in its employ, each of whom allegedly stayed at her bartender position until she took maternity leave. The PDA prohibits discrimination against females because of or on the basis of "pregnancy, childbirth, or related medical conditions" 42 U.S.C. § 2000e(k). Cowboys Red River has submitted no evidence to show that these other

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bartenders had any “related medical conditions,” such as the spot bleeding condition that Hubbard experienced and reported to Robinson. Thus, the Court finds unavailing Cowboys Red River’s references to these other pregnant women with dissimilar and uneventful pregnancies.

In sum, the Court finds that under the *McDonnell-Douglas* burden-shifting approach, the Court finds that Plaintiffs have submitted evidence sufficient to create a genuine issue for trial as to whether Cowboys Red River’s proffered reasons for transferring her from bartender to door girl were merely pretextual.

II. Retaliation

Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer to discriminate against any of his employees” who have either availed themselves of Title VII’s protections or assisted others in so doing. 42 U.S.C. § 2000e-3(a) (1994). To state a *prima facie* case for retaliation, plaintiff must prove that (1) she engaged in a protected Title VII activity; (2) she suffered an adverse employment decision; and (3) a causal nexus between the protected activity and the adverse employment decision exists. *See Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 427 (5th Cir. 2000). The establishment of a *prima facie* case gives rise to an inference of retaliation. This inference, in turn, shifts the burden of proof to the defendant who must articulate a legitimate non-discriminatory reason for the challenged employment action. After the defendant has met its burden, the burden shifts back to the plaintiff to introduce sufficient evidence to create a material issue of fact on the issue of pretext. *See Shackelford v. Deloitte & Touche*, 190 F.3d 398, 407-408 (5th Cir. 1999). Close timing between an employee’s protected activity and an adverse action against him may provide the “causal connection” required to make out a *prima facie* case of retaliation. *Armstrong v. City of Dallas*, 997 F.2d 62,

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67 (5th Cir. 1993). Where there is close temporal proximity between the employee's protected activity and an adverse employment action, the employer must offer a "legitimate non-discriminatory reason that explains both the adverse action and the timing." *Swanson v. General Saving's Administration*, 110 F.3d 1180, 1188 (5th Cir. 1997), *cert. denied*, 522 U.S. 948 (1997). Finally, a Plaintiff need not prove that her protected activity was the sole factor motivating the employer's challenged decision in order to establish a causal link. *Long v. Eastfield College*, 88 F.3d 300, 305 n. 4 (5th Cir. 1996). Cowboys Red River argues that summary judgment should be entered in its favor since Plaintiffs failed to demonstrate a fact issue as to whether Hubbard suffered an adverse employment action. Having reviewed the relevant summary judgment evidence submitted by the parties, the Court rejects Cowboys Red River's argument.

An adverse employment action is defined as an ultimate employment decision, including acts such as "hiring, granting leave, discharging, promoting, and compensating[,]" but does not include "every decision made by employers that arguably might have some tangential effect upon those employment decisions." *Mattern*, 104 F.3d at 707; *Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A.*, 139 F.3d 532, 540 (5th Cir. 1998).

The evidence, viewed in the light most favorable to Plaintiffs, shows that on or about April 29, 1998, Hubbard filed a Charge of Discrimination with the EEOC alleging that she had been transferred and demoted because of her pregnancy. Robinson was informed of Hubbard's filing shortly thereafter and, without notifying her, placed an unfounded disciplinary report in Hubbard's file alleging that she missed work. Less than one (1) month later, Robinson terminated Hubbard's employment, on the false allegations of missing a shift for which she claims she was not scheduled.

Cowboys Red River's proffered non-discriminatory reasons in response to Plaintiffs' allegations of retaliatory discharge are that (i) Robinson never terminated Hubbard; (ii) Robinson never saw or spoke to Hubbard on Thursday, May 28, 1998; (iii) Robinson never told her that she had missed a shift on Wednesday and that she could "get her [expletive] and go;" and (iv) Hubbard abandoned her job. Fact issues exist as to all Cowboys Red River's proffered reasons.

The Court finds, after reviewing the summary judgment evidence, that Plaintiffs have introduced sufficient evidence to create a material issue of fact on the issue of pretext. (*See supra* at 4-5).

In short, viewing the summary judgment evidence in the light most favorable to the nonmoving party, the Court determines that, with regard to Plaintiffs' claims that Cowboys Red River unlawfully terminated Hubbard, "the evidence presents a sufficient disagreement to require submission to a jury" (*Liberty Lobby*, 477 U.S. at 251-52; *Reeves*, 530 U.S. at 150-51), thereby precluding entry of summary judgment in Cowboys Red River's favor.

III. Cowboys Red River's Motion to Strike


Because none of the evidence challenged in Cowboys Red River's Motion to Strike is necessary for the Court's decision to deny Cowboys Red River's Motion for Summary Judgment, the Court finds the Motion to Strike moot.

Conclusion

ACCORDINGLY, it shall be and it is hereby ORDERED that Defendant Cowboys Red River d/b/a Cowboys Red River and Cowboys Red River Dance Hall and Saloon's Motion for Summary Judgment is DENIED. FURTHER, it shall be and it is hereby ORDERED that Defendant Cowboys Red River d/b/a Cowboys Red River and Cowboys Red River Dance Hall and Saloon's Motion to Strike is MOOT.

So Ordered.

Signed this 27th day of September, 2001.



JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE