

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

TREVOR BRIGHT,
Plaintiff,

vs.

GB BIOSCIENCE, INC.,
Defendant.

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CIVIL ACTION H-06-1633

MEMORANDUM AND RECOMMENDATION

This employment discrimination case is before the court on defendant GB Bioscience, Inc.’s motion for summary judgment (Dkt. 28).¹ The motion should be granted.

Background Facts

Plaintiff Trevor Bright began working at GB Bioscience (“GBB”) in March 2003 as a contract employee through Certified Staffing. He started as an operator on the A shift under the training of Craig Murphy. After a couple months, he transferred to the C shift under the supervision of several rotating shift supervisors. In June 2004, Bright unsuccessfully applied for a permanent operator opening with GBB. In July of that year Bright was laid off from his contractor position. Bright filed no discrimination charges about either of those decisions, and they are not the subject of his current complaint.

Bright does complain that in 2005 GBB unlawfully failed to hire him for any of several permanent operator positions filled that year. GBB accepted applications for two operator positions between April and May 2005. Bright testified that he submitted an

¹ This case has been referred to this magistrate judge for pretrial management (Dkt. 3).

application during this period, although he cannot recall the specific date nor produce any documentary evidence of such an application. The human resources manager for GBB, Dixie Mullis, testified that she did not receive an application from Bright in the April/May 2005 time frame. One of the four candidates interviewed for the two available positions was black. GBB ultimately hired two white males for those positions.

Three more operator positions became available at GBB in July 2005. GBB did receive an application from Bright for one of these positions. Dave Lewis, CTL Complex Superintendent and the person who selected candidates for interviews in the July 2005 hiring process, reviewed Bright's resume. He did not select Bright for an interview because Bright did not have the significant chemical process experience he was seeking. However, because Bright had previously worked at GBB as a contract employee, Lewis inquired of Bryce Danna (who was the CTL Complex Superintendent at the time Bright worked at GBB²), whether Danna would consider hiring Bright in a permanent position. Danna informed Lewis that due to performance issues he would not hire Bright. GBB interviewed at least two African-American candidates, and hired James Perry, an African-American, for one of the positions in August 2005. The remaining two positions were filled by a Caucasian male and an Hispanic male.

² In January 2005, Danna was promoted to Task Force Director, reporting directly to the Operations Manager and Dave Lewis was promoted to the position of CTL Complex Unit Superintendent. Mullis Aff., D. Ex. 2, ¶ 17 (Dkt. 28-2).

Bright filed a charge with the EEOC in August 2005 alleging that he was not hired by GBB because of his race (African-American). In the company's position statement to the EEOC, Mullis stated that Bright was not hired due to performance issues when he was a contract worker, identifying Danna and Pat Edwards, a former head operator, as sources of this information. Pat Edwards denies having made any such report, and in fact states he was never asked about Bright in connection with the April/May 2005 or July/August 2005 hiring decisions. GBB concedes that the source of the information was Danna, based on reports from Craig Murphy and Gene Evans, but stands by its non-race based explanation for the decision not to hire Bright.

Bright filed this lawsuit on May 12, 2006 alleging violations of Title VII and 42 U.S.C. § 1981 in failing to hire him for one of the positions filled in May and August 2005. Bright voluntarily dismissed his Title VII claim. GBB now seeks summary judgment on Bright's § 1981 claim of racial discrimination.

Legal Standards

Summary judgment is appropriate if no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The party moving for summary judgment has the initial burden to prove there are no genuine issues of material fact for trial. *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th Cir. 2001). Dispute about a material fact is "genuine" if the evidence could lead a reasonable jury to find for the nonmoving party. *In re Segerstrom*, 247 F.3d 218, 223 (5th Cir. 2001).

“An issue is material if its resolution could affect the outcome of the action.” *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 310 (5th Cir. 2002). If the movant meets this burden, “the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial.” *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (quoting *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995)).

If the evidence presented to rebut the summary judgment is not significantly probative, summary judgment should be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). In determining whether a genuine issue of material fact exists, the court views the evidence and draws inferences in the light most favorable to the nonmoving party. *Id.* at 255.

The standard for granting summary judgment in employment discrimination cases is by now too familiar to warrant extended recitation. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148-49 (2000), succinctly summarizes the appropriate inquiry:

Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff’s prima facie case, the probative value of the proof that the employer’s explanation is false, and any other evidence that supports the employer’s case and that properly may be considered on a motion for judgment as a matter of law.

The court must draw all reasonable inferences in favor of the non-movant, and disregard all evidence favorable to the moving party that the jury is not required to believe. *Id.* at 150-51. Trial courts should not treat discrimination differently than other ultimate questions of fact

for purposes of Rule 50 or 56. *Id.* at 148. The summary judgment analysis is the same for claims of race discrimination under § 1981³ as under Title VII. *Pratt v. City of Houston*, 247 F.3d 601, 606 n.1 (5th Cir. 2001).

Analysis

Defendant's motion attacks Bright's claims of hiring discrimination on two grounds: his failure to establish what it describes as the "fourth element" of the prima facie case, and his failure to show pretext. Defendant's motion is well-taken, but for slightly different reasons than those offered in its brief.

1. Prima Facie Difficulties

GBB maintains that Bright has failed to satisfy the fourth prong of his prima facie case, which it paraphrases from *Burdine*⁴ as follows: "(4) that the position he sought was filled by someone outside the protected class, or he shows otherwise that he was rejected under circumstances giving rise to an inference of race discrimination."⁵ Because an African-American was selected for one of the positions sought, Bright cannot establish a prima facie case and summary judgment is warranted, according to defendant. There are several difficulties with defendant's argument as presented.

³ Section 1981 ensures that all persons have the same right to make and enforce contracts, including the making, performance, modification, and termination of employment contracts. 42 U.S.C. § 1981; *Fadeyi v. Planned Parenthood Assoc. of Lubbock, Inc.*, 160 F.3d 1048, 1050-52 (5th Cir. 1998).

⁴ *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

⁵ Defendant's motion, at 3-4 (Dkt. 28).

First of all, *Burdine* itself does not require, as an element of the prima facie case, that the position sought be filled by “someone outside the protected class.” Instead, *Burdine* contemplates a more generic form of proof: “The plaintiff must prove by a preponderance of the evidence that she was qualified, but was rejected *under circumstances which give rise to an inference of unlawful discrimination.*” 450 U.S. at 253 (emphasis supplied). Filling the position with a non-minority may be one way to create such an inference, but it is plainly not the only way.⁶

While *Burdine* involved discriminatory termination and failure to promote, Bright’s claim is failure to hire, like the plaintiff in *McDonnell Douglas v. Green*, the decision which spawned the whole idea of a Title VII prima facie case.⁷ According to *McDonnell Douglas*, the elements of a plaintiff’s prima facie case of racial discrimination in hiring are: “(i) that he belongs to a racial minority; (ii) that he applied for and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.” 411 U.S. at 802. Notably missing from this formulation is any requirement that the position be filled by a non-minority. Bright

⁶ In the analogous context of discriminatory discharge based on age, the Supreme Court has held that the prima facie case does not include replacement by someone outside the protected class. *O’Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996).

⁷ 411 U.S. 792 (1973). Coincidentally, both Green and Bright were seeking to be rehired for positions from which they had previously been laid off. *See id.* at 794; Mullis Aff., D. Ex. 3, ¶ 3 (Dkt. 28-2).

unquestionably satisfies the elements of the prima facie case as specified in *McDonnell Douglas*, because the employer continued to interview applicants for the position after Bright's application was rejected.⁸

In the years since *McDonnell Douglas* and *Burdine*, however, the Fifth Circuit has often modified the fourth element of the prima facie case in hiring and promotion cases. For example, *Page v. United States Industries, Inc.* phrased that element as follows: “(4) *the employer promoted or hired a non-minority for the job or continued to seek non-minority applicants for the position applied for by the plaintiff.*” 726 F.2d 1038, 1055 (5th Cir. 1984) (emphasis supplied). *See also Risher v. Aldridge*, 889 F.2d 592, 596 n.11 (5th Cir. 1989) (same). No explanation was given for the additional language, and the only citation was to *McDonnell Douglas* itself. In a 2001 promotion case, the Fifth Circuit again modified the fourth element, this time truncated to eliminate the *McDonnell Douglas* vestige: “(4) the position she sought was filled by someone outside the protected class.” *Blow v. City of San Antonio*, 236 F.3d 293, 296 (5th Cir. 2001) (citing *Burdine*). Still another promotion case later that same year quietly restored the *McDonnell Douglas* fourth element: “(4) the employer continued to seek applicants with the plaintiff's qualifications.” *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 355 (5th Cir. 2001). More recently, in an unpublished hiring discrimination opinion, the Fifth Circuit adopted yet another formulation: “(4) others outside the protected group were treated more favorably than she was.” *Sanders*

⁸ Lewis Aff., D. Ex. 5, ¶ 7 (Dkt. 28-3).

v. Anadarko Petroleum Corp., 108 Fed. Appx. 139, 142 (5th Cir. 2004). Measured by the *Blow* or *Sanders* version of the fourth element, Bright probably could not establish a prima facie case, at least with regard to the position filled by another African-American.⁹ Measured against *Celestine* and the original *McDonnell Douglas* formula, on the other hand, Bright meets the test because the identity of the successful applicant is irrelevant to the prima facie case.

For present purposes, however, there is no need to choose between these alternative formulations of the prima facie case. *McDonnell Douglas* itself noted that its standard is “not inflexible,” and cautioned against enshrining it as a template for every Title VII case: “[F]acts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect in differing factual situations.” 411 U.S. at 802 n.13. The main function of the prima facie case in Title VII litigation is not to resolve summary judgment motions,¹⁰ but to specify the evidentiary trigger for shifting the burden of production to the employer to explain its decision:

The phrase “prima facie case” not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff’s burden of producing enough evidence to permit the trier

⁹ Only one of the positions Bright sought was filled by an African-American.

¹⁰ Recall that *McDonnell Douglas* was not a summary judgment case. *Green v. McDonnell Douglas Corp.*, 318 F. Supp. 846 (E.D. Mo. 1970) (findings and conclusions after four day bench trial). The Court specified the prima facie case to assist the lower court’s evaluation of the case on remand.

of fact to infer the fact at issue. 9 J. Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* should have made it apparent that in the Title VII context we use “prima facie case” in the former sense.

Burdine, 450 U.S. at 254 n.7; *see also St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 515 (1993) (proof required for *McDonnell Douglas* prima facie case “is infinitely less than what a directed verdict demands”). Once the employer comes forward with that proof, the precise contours of the prima facie case (as opposed to the evidence itself) are no longer important. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (“Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.”).

In a similar vein, the Fifth Circuit has cautioned against a too rigid application of the prima facie requirements on summary judgment:

If a plaintiff cannot establish some or all of the *McDonnell Douglas* steps, the district court must examine all the evidence that has been adduced for other indicia of racial discrimination. . . and determine whether it is more likely than not that the employer’s actions were based on illegal discriminatory criteria.

Jatoi v. Hurst-Euleless-Bedford Hosp. Auth., 807 F.2d 1214, 1219 (5th Cir. 1987) (citing *Byrd v. Roadway Express, Inc.*, 687 F.2d 85, 86 (5th Cir. 1982) (“The focus of the inquiry may not be obscured by the blindered recitation of a litany.”)). More recent decisions have confirmed the continued viability of this precedent. *See Byers v. The Dallas Morning News, Inc.*, 209 F.3d 419, 427 (5th Cir. 2000) (citing *Nieto v. L&H Packing Co.*, 108 F.3d 621, 624 n.7 (5th Cir. 1997), which cautioned district courts against applying the four-part prima facie case test

too mechanically, noting “that our earlier precedent on this point continues to be controlling law in this circuit.”).

Given these repeated admonitions to avoid a blindered, mechanical, and inflexible approach to the prima facie case, summary judgment based merely on Bright’s alleged failure to satisfy the shape-shifting prima facie case would be inappropriate. Defendant’s remaining prima facie case arguments are also without merit. Bright’s own testimony is sufficient to raise a fact issue whether he actually applied for the April-May 2005 opening.¹¹ Further, the “same actor” inference is not warranted here for a number of reasons, not least of which is that the actual decision-maker involved in Bright’s previous hiring as a contract worker (Danna) was not the same person who rejected his application in 2005 (Lewis).¹²

Nevertheless, summary judgment is warranted based on consideration of the entire summary judgment record in accordance with *Reeves*, as explained below.

2. No Jury Issue of Discriminatory Intent

A. Strength of Prima Facie Case

¹¹ Bright Aff., P. Ex. B (Dkt. 30-3); Bright Dep., P. Ex. A, at 150-51, 183-91 (Dkt. 30-2).

¹² Mullis Aff., D. Ex. 2, ¶ 19-21 (Dkt. 28-2); Lewis Aff., D. Ex. 5, ¶ 4-9 (Dkt. 28-3); Danna Aff., D. Ex. 3, ¶ 6 (Dkt. 28-2). In addition, the Fifth Circuit approved application of the presumption in a termination case, not a failure to hire case. *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996). In any event the issue is more properly considered under the heading of pretext than prima facie case. See *Faruki v. Parsons S.I.P., Inc.*, 123 F.3d 315, 320 n.3 (5th Cir. 1997) (same actor inference “buttressed” conclusion that employer’s proffered reasons were not pretextual).

Reeves instructs that, in determining whether an employment discrimination case should go to a jury, the first factor to consider is “the strength of the plaintiff’s prima facie case.” 530 U.S. at 148-49. The Court does not specify how such “strength” is to be gauged, although presumably this cannot be the same as “weighing” the evidence, which is an impermissible court function under either Rule 50 or Rule 56. *See Reeves*, 530 U.S. at 150 (judgment as matter of law under Rule 50); *Liberty Lobby*, 477 U.S. 242, 554-55 (1986) (summary judgment under Rule 56).

Assessing the strength of a prima facie case necessarily involves consideration of all the “circumstances which give rise to an inference of unlawful discrimination.” *Burdine*, 450 U.S. at 253. *Reeves* tacitly acknowledges that some prima facie cases are “stronger” than others, in the unremarkable sense that some factual scenarios create a more compelling inference of discriminatory intent. For example, a minority plaintiff who can show that a non-minority was selected to fill the position sought (*a la Blow*) generates a stronger inference of discrimination than if he can only show that “the employer continued to seek applications from persons with his qualifications” (*a la Celestine*). The inference of discrimination may be strengthened when the decision-makers are all non-minority. And a plaintiff who can demonstrate that the employer routinely hires non-minorities over qualified minorities has an even stronger prima facie case, especially when the pattern is statistically significant. The case becomes more compelling still when combined with other indicia of bias, such as racial slurs, epithets, or favoritism by decision-makers.

Unfortunately for Bright, his prima facie case is rudimentary at best, tipping only the weaker end of the scale. The most he has shown is that he applied for several operator openings, that he was rejected despite his basic qualifications, and that GBB continued to consider other applicants after he was rejected. These minimal facts generate the barest of discriminatory inferences. Bright has offered no other facts to buttress the inference that discriminatory bias played a role in his non-selection.¹³ An African-American was in fact hired for one of the positions sought.¹⁴ No pattern of racial discrimination in hiring was shown, statistically significant or otherwise. No evidence of racially-biased comments or favoritism on the part of GBB management was shown. Nor was there a history of similar discrimination complaints, charges, or lawsuits against the employer.

B. Probative Value of Pretext Evidence

The second *Reeves* factor is “the probative value of the proof that the employer’s explanation is false.” 530 U.S. at 149. GBB’s reasons for not hiring Bright were essentially two-fold: (1) Bright’s resume was not received during the application period for the April/May 2005 openings; and (2) his history of performance/attendance problems as a contract employee, as well as his relative lack of experience in chemical operations, rendered

¹³ By no means is this intended to resurrect the so-called “pretext-plus” rule which *Reeves* rejected. 530 U.S. at 147-149. The focus here is entirely upon the plaintiff’s prima facie case under *Burdine*, *i.e.*, “the circumstances giving rise to an inference of unlawful discrimination.” 450 U.S. at 253.

¹⁴ Mullis Aff., D. Ex. 2, ¶ 23 (Dkt. 28-2); Lewis Aff., D. Ex. 5, ¶ 9 (Dkt. 28-3).

him less qualified than those actually selected. As explained below, Bright has little if any evidence which would undermine these stated reasons for rejection.

April/May 2005 job openings. Human resources manager Mullis testified unequivocally that she did not receive a resume from Bright between April 14 and May 9, 2005, the time frame when resumes were being accepted for these two openings.¹⁵ In his deposition, Bright was extremely vague about when he submitted applications or resumes to GBB in 2005: “I would say around - - let’s say from March to about June, July, three different resumes.”¹⁶ In his affidavit submitted in opposition to summary judgment, he becomes somewhat more definitive, claiming that he “submitted applications for employment in April, 2005 and in July, 2005.”¹⁷ Even if Bright’s affidavit were generously construed as “explaining” his previous deposition testimony,¹⁸ his imprecise testimony does not directly undermine Mullis’s position that she herself did not receive the application during the relevant period. While Bright’s affidavit may suggest the possibility of clerical error in handling or misplacing his paperwork, it certainly does not justify the inference that his application was deliberately discarded or ignored for reasons of his race. *See Mayberry v.*

¹⁵ Mullis Aff., D. Ex. 2, ¶ 13 (Dkt. 28-2).

¹⁶ Bright Dep., P. Ex. A, at 151, 183-191 (Dkt. 30-2).

¹⁷ Bright Aff., P. Ex. B, at 3d unnumbered paragraph (Dkt. 30-3).

¹⁸ *See Doe v. Dallas Indep. School Dist.*, 220 F.3d 380, 386 (5th Cir. 2000) (party cannot defeat motion for summary judgment with affidavit that contradicts prior testimony without explanation); *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495 (5th Cir. 1996) (same).

Vought Aircraft Co., 55 F.3d 1086, 1091 (5th Cir. 1995) (“the question is not whether an employer made an erroneous decision; it is whether the decision was made with discriminatory motive.”).

Of course, even if Bright’s application had been considered for the April/May 2005 openings, he would still be required to demonstrate a fact issue with regard to GBB’s other articulated reason for rejection, *i.e.*, his history of performance/attendance problems and lack of chemical process experience. *E.E.O.C. v. Texas Instruments, Inc.*, 100 F.3d 1173, 1180 (5th Cir. 1996) (citing *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (*en banc*) (holding that plaintiff in an ADEA disparate treatment case must offer evidence to rebut each of the employer’s articulated, legitimate, nondiscriminatory reasons). As explained below, Bright’s evidence is wholly lacking on this score.

July/August 2005 job openings. Bright’s main contention is that he was the victim of “false rumors” about his job performance and attendance record as a contract employee, which subsequently “poisoned the well” when he was considered for the 2005 openings. This attempt to establish pretext is unconvincing for several reasons.

First, none of the alleged “bad-mouthing” was racial in nature.¹⁹ According to Bright, the source of the false rumors was a co-worker named Craig Murphy, who was supposedly lying about Bright because he was competing against Bright for a permanent position. Even if Bright’s theory were true, it would not warrant any inference of discriminatory bias on the

¹⁹ Bright Dep., P. Ex. A, at 198-216 (Dkt. 30-2); Nelson Dep., P. Ex. F, at 30-32, 69-70 (Dkt. 30-7).

part of GBB. An employer is under no legal obligation to purge the workplace of false rumors or gossip, even were such a thing possible. Basing employment decisions on inaccurate information may be poor personnel policy, but it is not unlawful under Title VII.

As it happens, Bright himself is laboring under a case of mistaken identity. He is confusing one Craig Murphy, the trainer on the Daconyl Unit who gave a negative report about Bright to Danna,²⁰ with Richard Murphy, a fellow contract worker who had no input into the decision-making process. Richard Murphy did unsuccessfully compete for the 2004 opening which Bright also sought. But Craig Murphy has worked for GBB since 1995 and never competed against Bright for a job, so his adverse testimony is not impeachable as that of a self-serving competitor.

Moreover, the evidence of Bright's attendance/performance problems cannot be swept aside as "false rumors." Bryce Danna, the superintendent responsible for hiring Bright as a contract operator, testified that he received complaints about Bright's performance, that Bright took longer to achieve his distillation operator certificate than the other contract employees, and that as a result he transferred Bright to another shift, where he continued to have attendance issues.²¹ These attendance problems were corroborated by Bright's new

²⁰ See Murphy Aff., D. Ex. 7, ¶ 5 (Dkt. 28-3).

²¹ See Danna Aff., D. Ex. 3, ¶ 7 (Dkt. 28-2). Bright's hearsay objections to this affidavit are overruled, inasmuch as Danna had direct (albeit higher level) supervisory authority over Bright throughout his contract employment.

shift supervisor, Gene Evans.²² Finally, Craig Murphy, the operator responsible for training Bright, recalled specific examples of Bright's lack of responsiveness, enthusiasm, and initiative during the training period, and also confirmed that Bright had attendance problems, missing work for personal reasons.²³ This contemporary judgment of Bright's lackluster job performance was confirmed in early spring of 2004, when Bright unsuccessfully applied for a regular full-time operator position with GBB. Among the five contract workers who interviewed for the job, Bright was rated the lowest.²⁴ The interview panel responsible for this rating included three African-American operators, including Pat Edwards.

The fact that Pat Edwards was not the source of information for Bright's rejection in 2005, as Mullis mistakenly thought at that time she prepared GB Bioscience's EEOC response, is of no significance. There is ample evidence (and no contrary evidence) that the person making the 2005 hiring decisions relied on competent information regarding Bright's experience and performance, and not his race, in making his decision.²⁵

²² Evans Aff., D. Ex. 4, ¶ 6 (Dkt. 28-3). Bright's objection to this affidavit on grounds of hearsay are overruled, inasmuch as Evans had personal knowledge as Bright's shift supervisor. Bright also objects to a document attached as Exhibit A to the Evans affidavit, which purports to be a hand-written log of Bright's attendance issues "in November of 2004." Evans Aff., ¶ 5. Because Bright's employment ended in early July 2004 (Danna Aff., ¶ 11), this document does not qualify as a business record. Bright's objection to Exhibit A to the Evans affidavit is sustained, and it is stricken from the summary judgment record.

²³ Murphy Aff., D. Ex. 7, ¶¶ 6-9 (Dkt. 28-3).

²⁴ Danna Aff., D. Ex. 3, ¶¶ 8-10 (Dkt. 28-2).

²⁵ Mullis Aff., D. Ex. 2, ¶¶ 18-20 (Dkt. 28-2); Danna Aff., D. Ex. 3, ¶ 12 (Dkt. 28-2); Evans Aff., D. Ex. 4, ¶¶ 5-6 (Dkt. 28-3); Lewis Aff., D. Ex. 5, ¶¶ 6-8 (Dkt. 28-3); Murphy Aff., D. Ex. 4, ¶¶ 6-8 (Dkt. 28-3); (continued...)

Nor has Bright presented evidence rebutting the attendance problems to which GBB refers. In fact, Bright's own deposition testimony attests to those problems. He admitted missing work on numerous occasions for various personal reasons, including a few days spent in jail, once for a court appearance, three or more times for doctor visits, one time when his pit bull got loose, and another time for a child support interview with state officials.²⁶ This is a substantial number of personal absences during his relatively short (15 months) stint as a contract operator.

C. Other Evidence Supporting Employer's Case

The final *Reeves* factor is "any other evidence that supports the employer's case and that properly may be considered" on summary judgment. 530 U.S. at 149. GBB has offered uncontroverted evidence that over 200 resumes were submitted for the July/August openings; that ten applicants were selected for interviews, two of whom were African-American; that three were hired, including one African-American and one Hispanic; that each of those hired (in fact, each one interviewed) had substantially more chemical operator experience than Bright.²⁷ Moreover, in 2004 Bright had been ranked the lowest among five contract

²⁵ (...continued)
Ex. 7, ¶ 10 (Dkt. 28-3).

²⁶ Bright Dep., P. Ex. A, at 138-48 (Dkt. 30-2).

²⁷ Lewis Aff., D. Ex. 5, ¶ 6 (Dkt. 28-3) (Perry, 24 years; Bradford, 13 years; Rodriguez, 11 years).

operators competing for a permanent position, and the ranking evaluators included three African-American co-workers.²⁸

Absent other evidence of pretext, a plaintiff in a failure to hire case must typically show that he was “clearly better qualified” than the person hired. *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 882 (5th Cir. 2003). Here, there is no evidence that Bright was more qualified, much less “clearly more qualified,” for the positions than the individuals hired by GBB for the operator positions in 2005. GBB’s evidence demonstrates beyond question that the individuals selected had qualifications superior to Bright.

In sum, considering the record evidence as instructed by *Reeves*, GBB is entitled to summary judgment because a reasonable factfinder could not infer from this evidence that GBB’s proffered motivation is not its true one and that GBB discriminated against Bright because of his race.

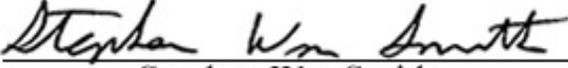
Conclusion and Recommendation

For the reasons discussed above, the court recommends that GBB’s motion for summary judgment (Dkt. 28) be granted and Bright’s case be dismissed with prejudice.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. PRO. 72.

²⁸ One of these African-American co-workers was head operator Pat Edwards, whom Bright paints as a supporter. In fact, Edwards concurred in rating Bright only fifth for the position given to Mario Chapa in 2004. *Edwards Aff.*, D. Ex. 6, ¶ 7 (Dkt. 28-3).

Signed at Houston, Texas on November 20 , 2007.



Stephen Wm Smith
United States Magistrate Judge