**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TENNESSEE**
**WESTERN DIVISION**

| | | |
|---|---|---|
| **BEVERLY JONES,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **vs.** | ) | **No. 10-2915 AJT/TMP** |
| | ) | |
| **COMPLEX INDUSTRIES, INC.,** | ) | |
| | ) | |
| **Defendant.** | ) | |

**REPORT AND RECOMMENDATION**

Before the court are defendant Complex Industries, Inc.'s ("Complex") Motion for Summary Judgment, filed on November 30, 2011, and plaintiff Beverly Jones's Motion to Deem as Admitted Plaintiff's Statement of Additional Disputed Facts ("Motion to Deem Facts Admitted"), filed on February 8, 2012. (ECF Nos. 30 & 38.) Jones filed a response in opposition to Complex's Motion for Summary Judgment on January 6, 2012. Complex did not file a reply to Jones's opposition brief, nor did it file a response to the Motion to Deem Facts Admitted. Both motions were referred to the Magistrate Judge for a report and recommendation on June 5, 2012.[1]

Based upon a review of the briefs filed by the parties and supporting materials, the court recommends that Jones's Motion to

[1]This case was recently reassigned to U.S. District Judge Arthur J. Tarnow, as a Visiting Judge from the Eastern District of Michigan.

Deem Facts Admitted be granted and Complex's Motion for Summary Judgment be denied.

## I. PROPOSED FINDINGS OF FACT

This case arises from allegations that Complex denied Beverly Jones (who is Caucasian) a promotion and fired her from her position as warehouse manager in retaliation for reporting incidents of workplace racial hostility to her supervisors. Prior to working at Complex, Jones worked for eight years at Vintage Verandah, a lamp company. (Def.'s Statement of Undisputed Material Facts ("SUMF") ¶ 13; Jones Dep. 13:22-14:3, Aug. 24, 2011, ECF No. 31.) At Vintage Verandah, Jones started as an order puller, which involved receiving orders, pulling the orders with a forklift, and then staging them on a deck where she wrapped the orders for shipment. (Id. ¶ 11; Jones Dep. 16:24-17:14.) As an order puller, she did not supervise any employees. (Id. ¶ 12; Jones Dep. 17:15-17.) Jones later performed data entry work for approximately three months. (Id. ¶ 10; Jones Dep. 16:16-23.) Later, Jones became a receiving clerk, which involved receiving containers and performing quality control duties. (Id. ¶ 5; Jones Dep. 13:25-16:12.) The majority of the time, Jones did not supervise other employees in her role as a receiving clerk. However, on two or three occasions, Jones supervised up to eight temporary employees who were hired to perform reboxing duties. (Id. ¶¶ 6, 7, 9; Jones Dep. 15:6-16:12.) Prior to working at Vintage Verandah, Jones was a homemaker for

eight years. (Id. ¶ 14; Jones Dep. 17:8-20.) Prior to that, she worked at AutoZone as an order puller, where she performed duties similar to those she performed as an order puller at Vintage Verandah. (Id. ¶¶ 15-16; Jones Dep. 17:21-18:3.) Jones did not graduate from high school, has not taken any vocational classes since leaving high school, and has never received any formal management training. (Id. ¶¶ 1-3; Jones Dep. 13:2-21.)

Jones began working at Complex on March 17, 2008, in the position of warehouse manager.[2] (Id. ¶ 19; Jones Dep. 22:8-21.) At that time, there were two divisions in the warehouse: fencing/building products ("building products") and lamps/home decor ("home decor"). (Id. ¶ 21; Jones Dep. 22:22-23:12.) In her capacity as warehouse manager, Jones, who was supervised by Jade Tang, was responsible only for the building products side of the warehouse and had nothing to do with the home decor division. (Id. ¶¶ 20, 22; Jones Dep. 22:22-24:11.) Another Complex employee, "Angel," was manager of the home decor division when Jones was

[2]Jones admits that she performed duties of a warehouse manager, but disputes that she or other managerial employees at Complex held any official titles or that Complex had an official organizational chart. (Pl.'s Resp. to Def.'s SUMF ¶ 19.) In paragraphs 1 and 2 of her Statement of Additional Disputed Facts, Jones states that "Complex had no organizational chart which set forth the job duties, job descriptions and responsibilities of persons employed by Complex" and "Complex did not really have official titles for employees [in] its management positions."

hired, and was supervised by Tom Yang.[3] (Id. ¶ 23; Jones Dep. 24:12-16.) When Jones started working at Complex, she supervised six employees in building products, and at that time, home decor had approximately twenty employees. (Id. ¶ 24; Jones Dep. 24:19-24.) During her employment at Complex, Jones supervised as many as nine employees, and as few as three. (Id. ¶ 25; Jones Dep. 26:1-9.) In March 2009, Jones supervised five employees in the building products division: Kevin Shields, Orlando Gamble, and Ezekial Coleman (who are African-American) and Benita Vela Garcia and Eufemio Diaz (who are Mexican-American). (Id. ¶ 25; Jones Dep. 26:10-24.)

The events that allegedly led to Jones's termination began on Friday, March 27, 2009. On that day, Garcia attempted to place a noose around Gamble's neck (hereinafter referred to as the "noose incident"). (Pl.'s Resp. to Def.'s SUMF ¶ 26(b); Green Dep. 57:7-58:2, Sept. 29, 2011, ECF No. 36-17.) On the following Monday morning, March 30, the noose incident was reported to Jones by Gamble and Shields. (Id.; Jones Dep. 33:21-34:2.) Gamble and Shields showed the actual noose to Jones, which Jones photographed with a camera. (Id.; Jones Dep. 34:22-35:21.) On that same day, Jones reported the noose incident to her supervisor, Tang, and showed her the photograph of the noose. (Id. ¶ 26(c); Pl.'s

[3]As stated in footnote 2, Jones disputes that Angel or Yang had any official title or job description. (Pl.'s Resp. to Def.'s SUMF ¶ 23.)

Statement of Additional Disputed Facts ("SADF") ¶¶ 7-8; Jones Dep. 38:16-39:9; Tang Dep. 42:12-44:1, Aug. 25, 2011, ECF No. 36-11.) Tang did not know the significance of the noose. (Pl.'s SADF ¶ 9; Tang Dep. 44:14-45:14.) Jones informed Tang of the racial significance of the noose and that "there were laws against this happening in a workplace." (Pl.'s Resp. to Def.'s SUMF ¶ 26(c); Jones Dep. 40:6-41:19; Tang Dep. 44:14-45:14.) Jones informed Tang that serious disciplinary action must be taken, given the seriousness of this event. (Id.; Jones 41:15-41:19.) Within an hour after her conversation with Jones, Tang called a meeting with Jones and the employees from the building products division of the warehouse. (Id. ¶ 26(d); Jones Dep. 42:5-43:6.) During this meeting, Garcia admitted that the noose incident occurred. (Id.; Jones Dep. 45:11-12.) At this meeting, Tang told everyone that "they need to work together and get along" and that "if it happened again, that someone would be in trouble." (Id.; Jones Dep. 45:13-17.) Jones was then informed that Tang would supervise the two Mexican-American employees in the building products division, while Jones would continue supervising the three African-American employees in building products.[4] (Id. ¶ 26(e); Pl.'s SADF ¶ 11; Jones Dep. 57:2-9, 177:22-178:1.) Garcia later received a written warning regarding the noose incident from Tang. (Pl.'s SADF ¶ 12.)

[4]In her deposition, Tang denied that she became responsible for supervising the Mexican-American employees in the building products division of the warehouse. (Id. ¶ 11; Tang Dep. 116:7-117:19.)

The African-American employees informed Jones that they believed Garcia should have received more discipline and been suspended. (Pl.'s Resp. to Def.'s SUMF ¶ 26(f); Jones Dep. 45:22-46:9.) Jones discussed with Tang the African-American employees' concerns about how Tang handled the noose incident; however, Tang told Jones that she thought it was handled properly. (Id.; Jones Dep. 51:14-54:7.)

Complex then hired an outside consultant, Arnetta Green, to perform an internal investigation. (Pl.'s SADF ¶ 13; Green Dep. 9:12-10:9.) On April 13, 2009, Green took statements from several Complex employees, including Jones, Tang, Gamble, Shields, Coleman, and Diaz. (Id.; Green Dep. 10:15-11:22.) During her investigation, Green confirmed that the noose incident occurred and that there were other incidents of racial hostilities occurring in the warehouse which included threats about killing people, finding the words "fat nigger" written on water bottles and on doors, and Mexican-American employees making racial slurs towards African-American employees. (Id. ¶ 14; Green Dep. 23:11-25:18, 57:7-58:2.) During the investigation, Jones informed Green that she was fearful that she might be terminated for reporting the noose incident. (Id. ¶ 15; Green Dep. 20:24-21:10.) Green later met with Jerry Lee, the owner and President of Complex, concerning her investigation. (Pl.'s Resp. to Def.'s SUMF ¶ 26(h); Green Dep. 67:5-6.) Green expressed dissatisfaction with the discipline imposed against Garcia. (Id. ¶ 26(i); Green Dep. 81:14-23.)

Jones did not work from April 15 through April 17, 2009, due to a death in her family. (Id. ¶ 26(j); Tang Dep. 75:24-76:14; Jones Personnel File, ECF No. 36-8 at 29-30.) When she returned to work on Monday, April 20, 2009, she was called into a meeting with Tang.[5] (Id.; Jones Dep. 57:19-23.) Tang presented Jones with a hand-written list of ten things to do, including "Don't use Mr. Lee or Jade [Tang] to tell something which is not true" and "Move office." (Id.; Jones Dep. 58:8-59:8; List from Tang, ECF No. 36-2 at 1.) After this meeting, Jones began taking notes of the events occurring at work because she felt that she was being blamed for the noose incident, being given more job duties, and because she believed she was being treated differently by Tang and Lee. (Id. ¶ 26(k); Jones Dep. 75:14-76:20, 90:10-20; Jones Notes, ECF No. 36-3.) Prior to the noose incident, Jones performed her job as required and never received any formal disciplinary write-ups or action. (Pl.'s SADF ¶ 6; Def.'s Resp. to Interrogatory 11, ECF No. 36-6; Jones Personnel File, ECF No. 36-8; Jones Dep. 156:19-20, 178:24-179:2; Tang Dep. 36:21-37:2, 77:22-81:14.)

On April 20, 2009, at approximately 10:00 a.m., Jones was called into a meeting with Lee. (Id. ¶ 26(l); Jones Dep. 78:14-20.) During this meeting, Lee informed Jones that African-American

[5]Jones claims that the meeting was only with Tang, while Tang testified at her deposition that this meeting involved all of the employees in the building products division of the warehouse. (Jones Dep. 59:22-60:11; Tang Dep. 87:16-88:12.)

employees would not get any money and that he would pay lawyers to make their complaints "go away." (Id.; Jones Dep. 78:24-79:11; Lee Dep. 96:9-99:1, Aug. 25, 2011, ECF No. 30-5.) Lee informed Jones that if she would have handled the noose incident differently, he would not be facing potential lawsuits. (Id.; Jones Dep. 80:2-81:4.) Jones informed Tang about what Lee had told her (Jones) at this meeting. (Id.; Jones Dep. 84:14-85:4.) After the April 20 meeting with Lee, Jones was informed that she would have to drive Garcia and Diaz to Nashville to fix a door on April 22. (Id. ¶ 26(m); Jones Dep. 82:12-83:2.) Jones had never before been asked to travel out of town for repair work. (Id.; Jones Dep. 83:3-7.) At approximately 4:00 p.m. on April 20, Tang called a meeting with Jones and the employees in the building products division. (Id. ¶ 26(n); Jones Dep. 72:12-73:7.) During this meeting Tang went over the list provided to Jones earlier that morning and her own list. (Id.; Jones Dep. 94:22-99:8; Jones Notes, ECF No. 36-3; Tang Notes, ECF No. 36-12; Tang Notes Translation, ECF No. 36-13.)

After April 20, 2009, Jones reported several other incidents of racial hostilities between Mexican-American and African-American employees to Tang. (Pl.'s SADF ¶ 18; Jones Dep. 106:4-116:13.) These events included the following: (1) when Jones was traveling to Nashville on April 22, she was contacted by Shields, who told her that Mexican-American employees had harassed him and made a throat cutting gesture; Jones reported this to Tang when she

returned to work on April 23; (2) on April 23, at approximately 11:00 a.m., Shields reported to Jones that Mexican-American employees approached him at the vending machine, called him a "fat lazy nigger," laughed at him, and made a choking gesture with their hands as they walked away; Jones reported this incident to Tang on April 23; and (3) on April 23, at approximately 11:56 a.m., Jones observed a Mexican-American employee purposely bump into Shields; Jones reported this incident to Tang and further stated that "something bad is going to happen" if Tang or Lee did not do something. (Pl.'s Resp. to Def.'s SUMF ¶ 26(o); Jones Dep. 106:4-116:3; Jones Notes, ECF No. 36-3.)

On April 24, 2009, Tang called a meeting with Jones, the Mexican-American employees from the home decor division of the warehouse, and Shields. (Id. ¶ 26(p); Jones Dep. 118:19-119:5.) During this meeting, Tang told all of the employees to get along because Lee could fire everyone. (Id.; Jones Dep. 120:14-24.) Afterwards, Jones was called into a meeting with Lee and was terminated. (Id. ¶ 26(q); Jones Dep. 121:18-21.) Lee told Jones that he was eliminating her position and hiring a person to supervise both the building products and home decor divisions of the warehouse. (Id.; Jones Dep. 121:22-122:6.) Lee informed her that Complex was hiring someone stronger and more experienced to oversee both divisions. (Def.'s SUMF ¶¶ 26, 27; Jones Dep. 125:10-22.)

Sometime on April 24, Lee interviewed Kenneth Lumpkin to fill the new warehouse manager position. (Id. ¶ 26(r); Lumpkin Dep. 14:4-23, Aug. 25, 2011, ECF No. 30-4.) Lumpkin had previously worked fourteen years for StyleCraft, another home decor company that was roughly the same size as Complex and also imported products from China which it sold locally. (Def.'s SUMF ¶¶ 37, 38; Lumpkin Dep. 7:6-8:7.) At StyleCraft, Lumpkin held management positions involving inventory control, quality control, and receiving. (Id. ¶¶ 40, 41.; Lumpkin Dep. 7:11-21.) Lumpkin had known Lee for years, and learned about the possibility of employment at Complex from former colleagues at StyleCraft who were now working for Complex. (Id. ¶¶ 42, 43; Lumpkin Dep. 12:12-22.) Lumpkin initially spoke with Brian Williams (of Complex) during the week of April 20, 2009, about working for Complex, but Williams was unable to meet with Lumpkin. (Id. ¶¶ 44-45; Lumpkin Dep. 14:4-15, 17:3-23.) The first time Lumpkin spoke with Lee about potential employment at Complex was on April 24, at which time Lee gave him a walking tour of the warehouse. (Id. ¶¶ 46, 47; Lumpkin Dep. 15:7-12, 19:2-17.) Lumpkin did not complete an application or provide a resume. (Id.; Lumpkin Dep. 13:1-3.) Lee informed Lumpkin that he wanted "someone to run the whole operation" but that he wanted Lumpkin "to start out in the fence division." (Id.; Lumpkin Dep. 19:18-20:8, 22:17-23:13, 38:14-21, 82:10-86:10.) As Lumpkin toured the warehouse with Lee, he observed problems with

organization, material handling, and issues with disruptive behavior among the employees. (Def.'s SUMF ¶ 57; Lumpkin Dep. 24:23-25:24.) Lee did not inform Lumpkin of any deficiencies in Jones's work performance. (Pl.'s Resp. to Def.'s SUMF ¶ 57; Lumpkin Dep. 26:21-27:9.) Lee offered Lumpkin the warehouse manager job on April 24, Lumpkin accepted the job that same day, and he started working on April 27, 2009. (Pl.'s SADF ¶ 20; Def.'s SUMF ¶ 36.) After Lumpkin was hired, he primarily worked in the building products division and another employee, "Jorge," ran the day-to-day operations in the home decor division. (Pl.'s Resp. to Def.'s SUMF ¶ 26(r); Lumpkin Dep. 82:10-86:10.) Lumpkin was not required to perform the tasks contained in the list that Tang had provided to Jones on April 20. (Id.; Lumpkin Dep. 74:10-75:1.)

After Jones's termination, Complex submitted documents to the Arkansas Department of Workforce Development in order for Jones to receive unemployment benefits. (Id. ¶ 26(s); Scott Dep. 19:22-21:4, Aug. 25, 2011, ECF No. 36-7; Jones Personnel File, ECF No. 36-8 at 38-39.) Complex indicated that Jones did not violate company policy, was never warned about her conduct, performed her job satisfactorily in the past, and performed her job duties to the best of her ability.[6] (Id.)

[6]Jones points out that on the day before the discovery period closed, Complex provided amended Rule 26(a)(1) initial disclosures, which included 121 invoices which Complex alleged documented shipping errors attributable to Jones. (Pl.'s Resp. to Def.'s SUMF ¶ 26(u)-(x).) However, Complex later reduced the invoices to

Jones contends in her amended complaint that she was subjected to illegal retaliation for reporting the noose incident to her superiors, as well as for reporting subsequent incidents of a racially hostile work environment, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. (Count I) and 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991 (Count II). Jones alleges that because of her protected activity, she was fired, and to the extent a "new" warehouse manager position was created, she was denied the promotion to that new position. Complex now moves for summary judgment.

## II. PROPOSED CONCLUSIONS OF LAW

### A. Summary Judgment Standard Under Fed. R. Civ. P. 56

Federal Rule of Civil Procedure 56 provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Geiger v. Tower Auto., 579 F.3d 614, 620 (6th Cir. 2009). In reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted). "The moving party bears the initial

---

nineteen, although only three apparently had supporting documentation. (Id.; McGehee Dep. at 75.) Complex does not rely on these invoices or any purported shipping errors to support its Motion for Summary Judgment.

burden of production." Palmer v. Cacioppo, 429 F. App'x 491, 495 (6th Cir. 2011) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Once the moving party has met its burden, "the burden shifts to the nonmoving party, who must present some 'specific facts showing that there is a genuine issue for trial.'" Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 200 (6th Cir. 2010) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "[I]f the nonmoving party fails to make a sufficient showing on an essential element of the case with respect to which the nonmovant has the burden, the moving party is entitled to summary judgment as a matter of law." Thompson v. Ashe, 250 F.3d 399, 405 (6th Cir. 2001). "The central issue 'is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Palmer, 429 F. App'x at 495 (quoting Anderson, 477 U.S. at 251-52).

This court's Local Rule 56.1 sets out additional requirements that must be met by both the moving and nonmoving parties when filing briefs in support of and in opposition to summary judgment. The rule states in relevant part:

> (a) Moving Party. In order to assist the Court in ascertaining whether there are any material facts in dispute, any motion for summary judgment made pursuant to Fed. R. Civ. P. 56 shall be accompanied by a separate, concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact shall be set forth in a separate, numbered paragraph. Each fact shall be supported by

> specific citation to the record. . . .
>
> (b) Non-moving Party. Any party opposing the motion for summary judgment must respond to each fact set forth by the movant by either:
>
> (1) agreeing that the fact is undisputed;
>
> (2) agreeing that the fact is undisputed for the purpose of ruling on the motion for summary judgment only; or
>
> (3) demonstrating that the fact is disputed.
>
> Each disputed fact must be supported by specific citation to the record. . . . In addition, the non-movant's response may contain a concise statement of any additional facts that the non-movant contends are material and as to which the non-movant contends there exists a genuine issue to be tried. Each such disputed fact shall be set forth in a separate, numbered paragraph with specific citations to the record supporting the contention that such fact is in dispute. . . .
>
> (c) Reply by Moving Party. Leave of Court is not required to file a reply to a response to a motion for summary judgment. Replies must be filed within 14 days after the response is served. *If the non-moving party has asserted additional facts, the moving party shall respond to these additional facts by filing a reply statement in the same manner and form as specified in section (b) above*. . . .
>
> (d) Failure to respond to a moving party's statement of material facts, or a non-moving party's statement of additional facts, within the time periods provided by these rules *shall indicate that the asserted facts are not disputed for purposes of summary judgment.*

Local Rule 56.1 (emphasis added).

As a preliminary matter, the court will address Jones's Motion to Deem Facts Admitted. As stated by Local Rule 56.1, the nonmoving party may include in its response to a summary judgment motion "a concise statement of any additional facts that the non-

movant contends are material and as to which the non-movant contends there exists a genuine issue to be tried." Local Rule 56.1(b). If the nonmoving party chooses to do this, the moving party must "respond to these additional facts by filing a reply statement in the same manner and form as specified in section [56.1(b)]." Local Rule 56.1(c). Failure to do so "shall indicate that the asserted facts are not disputed for purposes of summary judgment." Local Rule 56.1(d). In her response to Complex's summary judgment motion, Jones included a Statement of Additional Disputed Facts in Opposition to Defendant's Motion for Summary Judgment. (ECF No. 37-3.) Complex did not file a reply, nor did it file a response in opposition to Jones's Motion to Deem Facts Admitted. By rule, the court must consider these additional facts undisputed for purposes of summary judgment. Therefore, to the extent Jones seeks in her Motion to Deem Facts Admitted simply to enforce Local Rule 56.1, the court recommends that the motion be granted as to those additional facts not previously addressed in Complex's Statement of Undisputed Material Facts.

**B. Retaliation**

Title VII and Section 1981 prohibit an employer from retaliating against an employee who has opposed racial discrimination in the workplace. 42 U.S.C. § 2000e-3(a); 42 U.S.C. § 1981; CBOCS W., Inc. v. Humphries, 553 U.S. 442, 451 (2008) (holding Section 1981 covers retaliation claims). Specifically,

Title VII makes it unlawful for an employer "to discriminate against any . . . employee or applicant . . . because [the employee] has opposed any practice, made an unlawful employment practice by this sub chapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this sub chapter." 42 U.S.C. § 2000e-3(a). Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." Rev. Stat. § 1977, 42 U.S.C. § 1981(a).

A plaintiff may satisfy her burden to establish a retaliation claim through either direct evidence of retaliation or circumstantial evidence that supports an inference of retaliation. Imwalle v. Reliance Med. Prods., 515 F.3d 531, 543-44 (6th Cir. 2008); Abbott v. Crown Motor Co., 348 F.3d 537, 542 (6th Cir. 2002). "Direct evidence is that evidence which, if believed, *requires* the conclusion that unlawful retaliation was a motivating factor in the employer's action and proves the existence of a fact without any inferences or presumptions." Abbott, 348 F.3d at 542 (emphasis in original). Once a plaintiff has produced direct evidence of retaliation, she does not bear the burden of disproving other possible non-retaliatory reasons for the adverse action; the burden shifts to the employer to prove by a preponderance of the

evidence that it would have made the same decision absent the impermissible motive. Weigel v. Baptist Hosp. of E. Tenn., 302 F.3d 367, 382 (6th Cir. 2002). "It is well established that isolated and ambiguous comments are not sufficient to make out a direct-evidence case of employment discrimination." Id. (citing Phelps v. Yale Sec., Inc., 986 F.2d 1020, 1025 (6th Cir. 1993)).

Jones argues that she has presented direct evidence of retaliation. First, Jones points to her April 20 meeting with Lee, during which Lee informed Jones that the African-American employees would not get any money and that he would pay lawyers to make their complaints "go away." Lee informed Jones that if she had handled the noose incident differently, he would not be facing any potential lawsuits. Second, Jones points to the events of April 24, when Tang called a meeting with Jones, the Mexican-American employees in the home decor division, and Shields, and told them to get along because Lee could fire everyone. Later that same day, Lee terminated Jones and hired Lumpkin. Jones contends that the events on April 20 and 24 constitute direct evidence of retaliation. The court disagrees. Jones's tendered evidence is not direct because, even if it were believed, it would not *require* the conclusion that Complex unlawfully retaliated against her. Instead, one could draw that conclusion only by making a series of inferences arising from this evidence. Therefore, the court must consider whether Jones has sufficiently presented circumstantial

evidence of retaliation, by analyzing her claim under the McDonnell Douglas burden-shifting framework.

Employer retaliation claims brought under 42 U.S.C. § 1981 are governed by the same burden-shifting analysis as are retaliation claims brought under Title VII. Newton v. Meijer Stores Ltd. P'ship, 347 F. Supp. 2d 516, 522 (N.D. Ohio 2004) (citing Wade v. Knoxville Utils. Bd., 259 F.3d 452, 464 (6th Cir. 2001)). "We have explained that on a motion for summary judgment, a district court considers whether there is sufficient evidence to create a genuine dispute at each stage of the McDonnell Douglas inquiry." Risch v. Royal Oak Police Dep't, 581 F.3d 383, 390-91 (6th Cir. 2009) (internal quotation marks and citations omitted). Under this framework, "the plaintiff must first submit evidence from which a reasonable jury could conclude that he or she established a *prima facie* case of discrimination." Blair v. Henry Filters, Inc., 505 F.3d 517, 524 (6th Cir. 2007), abrogated on other grounds by Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009). To establish a *prima facie* case of retaliation, Jones must demonstrate that: (1) she engaged in protected activity; (2) which was known to Complex; (3) she suffered an adverse employment action; and (4) there is a causal connection between the protected activity and the adverse employment action. Wasek v. Arrow Energy Servs., Inc., 682 F.3d 463, 468-69 (6th Cir. 2012); Little v. BP Exploration & Oil Co., 265 F.3d 357, 363 (6th Cir. 2001). The burden of establishing a

*prima facie* case of retaliation is not onerous. Melton v. U.S. Dept. of Labor, 373 F. App'x 572, 576 (6th Cir. 2010); Allen v. Mich. Dep't of Corr., 165 F.3d 405, 413 (6th Cir. 1999). The Sixth Circuit has held that "caution should be exercised in granting summary judgment once a plaintiff has established a *prima facie* inference of retaliation through direct or circumstantial evidence." Singfield v. Akron Metro. Housing Auth., 389 F.3d 555, 564 (6th Cir. 2004). Once a plaintiff establishes a *prima face* case of retaliation based on circumstantial evidence, the burden of production shifts to the defendant to articulate a legitimate, non-retaliatory explanation for the adverse employment action. Id. at 563. Should the defendant meet its burden of production, the burden shifts back to the plaintiff "to identify evidence from which a reasonable jury could conclude that the proffered reason is actually a pretext for unlawful [retaliation]." Blair, 505 F.3d at 524. "A plaintiff can demonstrate pretext by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." Dews v. A.B. Dick Co., 231 F.3d 1016, 1021 (6th Cir. 2000).

With respect to Jones's *prima facie* case, Complex does not allege in its summary judgment motion that she fails to satisfy any of the four prongs. In its motion, Complex describes the burden-shifting framework and then immediately proceeds to argue its non-

discriminatory reason for Jones's termination, without any discussion of Jones's *prima facie* case. Based on an examination of the record, the court submits that Jones has presented sufficient evidence from which a reasonable jury could conclude that she has established a *prima facie* case of retaliation. First, she has presented evidence that she engaged in protected activity, by reporting the noose incident and subsequent incidents of a racially hostile work environment to her superiors. Second, she has shown that Lee (the owner and President of Complex) and Tang (her direct supervisor) knew that she engaged in this protected activity. Third, Jones has shown that she suffered an adverse employment action, based on her termination and the denial of a promotion. Fourth, Jones has sufficiently demonstrated that there is a causal connection between her reporting and the adverse employment actions. Jones reported the noose incident to Tang on March 30, she reported additional racially hostile incidents to Tang on April 23, and she was fired on April 24. The close temporal proximity between Jones's reporting and her termination - while by itself insufficient under the facts of this case to establish a causal connection, see Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 525-26 (6th Cir. 2007) - is certainly strong evidence of a causal connection.

Moreover, Jones has presented other evidence of a causal connection, including evidence that after Jones reported the noose

incident, Tang assumed supervision of certain employees who had previously been supervised by Jones; Tang gave Jones a list of additional duties and things to do, including "Don't use Mr. Lee or Jade [Tang] to tell something which is not true" and "Move office"; Tang required Jones to go on an out-of-town assignment, which had never been previously required of Jones; Lee told Jones that she did not handle the noose incident properly and that he would pay lawyers to make the African-American employees' complaints "go away"; Tang met with Jones and other employees on the day Jones was terminated and told them that if they did not get along, Lee could fire them all; Jones worked as a warehouse manager for Complex for thirteen months, and prior to the noose incident, she had never received any discipline or write-ups; Lee interviewed and hired Lumpkin the same day that Jones was fired; Lumpkin's initial duties as the new warehouse manager only involved supervising the building products division, and not the entire warehouse; and documents submitted by Complex to the Arkansas Department of Workforce Development indicate that Jones did not violate company policy, was never warned about her conduct, performed her job satisfactorily in the past, and performed her job duties to the best of her ability.[7]

Once a plaintiff has established a *prima facie* case of

[7]Jones also argues in her opposition brief that she was the only employee terminated as a result of Complex's purported reorganization plan. However, Jones has failed to cite to any portion of the record to support this argument. Therefore, the court gives it no consideration.

retaliation, the burden shifts to the defendant to advance a legitimate reason for the adverse employment action. Complex argues that it had a legitimate reason to terminate Jones, based on the elimination of her position due to reorganization, and that it hired Lumpkin instead of promoting Jones to the new warehouse manager position because Lumpkin was better qualified for the position. Based on a review of the record, the court submits that Complex has produced sufficient evidence from which a reasonable jury could conclude that Complex had a legitimate, non-discriminatory reason for terminating Jones and denying her the promotion.

Lastly, the court submits that Jones has sufficiently identified evidence from which a reasonable jury could conclude that Complex's proffered reason is actually a pretext for unlawful retaliation. Evidence offered to establish causation may also serve to establish pretext. Cantrell v. Nissan N. Am., Inc., 145 F. App'x 99, 107-08 (6th Cir. 2005) (holding "the same circumstances which established a causal connection between [the employee's] protected activity and her termination also serve as sufficient evidence" of pretext); Long v. Procter & Gamble Mfg. Co., No. 03-1097, 2005 WL 2491551, at *6 (W.D. Tenn. Oct. 6, 2005) ("The evidence showing the causal connection requirement and that the proffered reason for termination is pretextual may overlap."); Wooley v. Madison Cnty., 209 F. Supp. 2d 836, 848 (W.D. Tenn. 2002)

(stating that plaintiff's evidence of a causal connection could be used to establish pretext). Indeed, the Sixth Circuit has noted that the showing of a causal connection between protected activity and an adverse employment action, "if sufficiently strong, also necessarily rebuts a proffered legitimate, non-discriminatory reason for the adverse action." Cantrell, 145 F. App'x at 108 n.2. The court finds that the evidence discussed above relating to causation also supports Jones's pretext argument. From that evidence, a reasonable jury could find that Jones was fired not because her position was eliminated as part of a reorganization plan, but because she reported incidents of racial hostility at the warehouse. A reasonable jury could also find from this evidence that this new warehouse manager position was created by Complex to cover up Jones's retaliatory termination and that Lumpkin was hastily interviewed and hired on the same day of Jones's termination in an effort simply to replace Jones.

## III. RECOMMENDATION

For the above reasons, the court recommends that Jones's Motion to Deem Facts Admitted be granted and Complex's Motion for Summary Judgment be denied.

Respectfully submitted,

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

August 9, 2012
Date

**NOTICE**

**ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.**