IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PATRICK LEE,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 3:06-CV-00873**
	§	
GROUP 1 SOFTWARE, INC.	§	
and PITNEY BOWES INC.	§	
	§	
Defendants.	§	

DEFENDANT GROUP 1 SOFTWARE, INC.'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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DEFENDANT GROUP 1 SOFTWARE, INC.'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant Group 1 Software, Inc. ("Group 1" or "Defendant"), pursuant to and in compliance with Federal Rule of Civil Procedure 56 and Local Rule 56.3, files this Motion for Summary Judgment. Each of the matters required by Local Rule 56.3(a) will be set forth herein.

I. SUMMARY

A. Legal Claims on Which Summary Judgment is Sought

Defendant seeks summary judgment in regard to Plaintiff's ("Lee") causes of action for (1) termination in retaliation for opposition to discrimination, (2) termination in retaliation for association with persons opposing discrimination and participating in Title VII proceedings and (3) termination in retaliation for participating in an investigation and proceeding under Title VII.[1]

Lee is required to show that (1) he engaged in activity protected by Title VII, (2) that Group 1 took action against Lee that a reasonable employee would consider materially adverse and (3) a causal connection exists between the protected activity and the adverse employment action. *Mukerji v. Southern University of New Orleans,* 2006 WL 3760253, *11 (E.D. La. December 18, 2006). In the event that Lee makes such showings, a "modified *McDonnell Douglas*" framework, *arguendo,* will be analyzed. As this Court noted in *Akop v. Goody Goody Liquor, Inc.,* 2006 WL 119146, *11 (N.D.Tex. January 17, 2006), the Fifth Circuit has not conclusively resolved whether the modified *McDonnell Douglas* framework applies to Title VII retaliation claims. However, as this Court notes, the Fifth Circuit has applied this standard to

[1] Plaintiff makes the same allegations under applicable Texas statutes. The Court's determinations in regard to the Title VII claims will be dispositive of the Texas claims so they are not separately addressed. *See Caballero v. Cent. Power & Light Co.,* 858 S.W.2d 359, 361 (Tex. 1993)("Another stated reason [of the Texas Commission on Human Rights Act] is to coordinate and conform with the federal law under Title VII of the Civil Rights act of 1964, as amended."); *Martin v. El Nell, Inc.*, 2005 WL 2148651, *1 (N.D. Tex.).

retaliatory discharge claims under the Family Medical Leave Act and some district courts in the Fifth Circuit have applied the framework to retaliation claims under Title VII. *Id.* at *10. Therefore, Group 1 will analyze the retaliation claims under the modified *McDonnell Douglas* standard applied, *arguendo*, by this Court in *Akop*.

B. Summary of Facts

Lee was a regional sales director for Group 1 in its Texas region. At the time of his termination, Lee's region was the lowest performing region in his supervisor's territories, Lee had three consecutive quarters well below Lee's expected quota, Lee's quota attainment for his last three quarters was only 48.8%, Lee's pipeline of prospective sales which are necessary for sustained accomplishment of quarter-to-quarter success was "dry," and Lee had mismanaged his sales reports, causing dissension and poor morale among his sales reports. Lee was terminated on December 31, 2004.

In his EEOC filing, Lee claimed his termination was based solely on his support for three female employees. In the instant case, he alleges that the termination was solely for his support for one of those female employees, Sally Rose who sued Group 1 and Lee's superior, Andrew Naden.

However, immediately following his termination, Lee raised three completely different reasons (the Houston Contract issue, the Naden Resume issue and the *Diot* lawsuit issue) for which he alleged retaliation termination before the Department of Labor in filing a Sarbanes-Oxley Act of 2002 ("SOX") claim. Lee, in great detail, and in sworn testimony, asserted these SOX claims as the sole reasons for his termination.

After things did not go well for Lee before OSHA, Lee, for the first time, asserted Title VII reasons for his termination before the EEOC. Lee asserted various

association/opposition/participation retaliation claims in connection with his "support" of three female employees: Sally Rose, Samantha Hawkins and Catherine Dube. Incredibly, Lee, who supervised Rose for only six months, sought to terminate her three times (Group 1 refused each request) and, eventually, was the reason **Rose quit (over a dispute with Lee).** Moreover, Rose, in her deposition testified that during that six month period of time it was Lee who harassed her and never asserted that Lee assisted her. Similarly, Hawkins, by affidavit, states that Lee did not support her and that, in fact, Lee was such a poor and abusive manager that **Hawkins left Group 1's employment because of Lee** and, after Lee was terminated, she returned to work for Group 1. Finally, as to Dube, even Lee admits that, rather than supporting Dube, it was **Lee who sought to terminate Dube,** which was refused by Group 1. Undeterred by the factual inconsistency with his sworn EEOC positions, Lee now asserts that Group 1's failure to allow him to terminate Dube (the person he swears he was supporting) was one of the ways in which Group 1 retaliated against Lee.[2]

Lee's claims before OSHA were found to be "meritless" and the EEOC found no evidence to support any violations of Title VII. Lee now brings this suit having abandoned all of the sworn reasons he previously asserted as to the reasons for his termination except for the claims relating to Sally Rose.

II.
SUMMARY JUDGMENT EVIDENCE

Defendant's Motion is based on the following evidentiary support:

1) Plaintiff's Original Complaint and Jury Demand filed herein on May 12, 2006; Exhibit "A," Apx. 1-17;

[2] Lee now contends that Group 1 retaliated against him by not letting him terminate Dube and, therefore, he had to keep a substandard employee. Apx. 247, Lee Depo. 270:21-271:24.

2) Affidavit of Dennis Reisher, former Manager of Human Resources at Group 1, Exhibit "B," Apx. 18-21;

3) Affidavit of Alan Teicher, Lee's supervisor at Group 1, Exhibit "C," Apx. 22-30;

4) Samantha Hawkins affidavit, Exhibit "D," Apx. 31-32;

7) Carol Maginn affidavit, Exhibit "E," Apx. 33-34;

8) Separation recommendation, Exhibit "F," Apx. 35-37;

9) Lee's EEOC Charge of Discrimination, Exhibit "G," Apx. 38-39;

8) Lee's SOX Complaint, Exhibit "H," Apx. 40-44;

9) Lee's SOX Appeal, Exhibit "I," Apx. 45-52;

10) Lee's Memorandum to Sally Rose, Exhibit "J," Apx. 53-54;

11) Lee notes, Exhibit "K," Apx. 55-58;

12) Lee's request for employment action re Sally Rose, Exhibit "L," Apx. 59;

13) Excerpts from Sally Rose deposition in *Diot* litigation; Exhibit "M," Apx. 60-66;

14) SOX no merit finding, Exhibit "N," Apx. 67-70;

15) SOX Dismissal, Exhibit "O," Apx. 71;

16) EEOC finding of no evidence to support claim, Exhibit "P," Apx 72;

17) Lee's monthly quota attainment, Exhibit "Q," Apx. 73-76;

18) Lee's response brief in SOX proceeding, Exhibit "R," Apx. 77-96;

19) Wayne Arden letter to Sally Rose, Exhibit "S," Apx. 97;

20) Naden deposition, Exhibit "T," Apx. 98-146;

21) Bowen deposition, Exhibit "U," Apx. 147-170;

22) Pitney Bowes SOX Responses, Exhibit "V," Apx. 171-218;

23) Excerpts from Lee's deposition, Exhibit "W," Apx. 219-251;

24) Excerpts from Carrie Hoffman deposition, Exhibit "X," Apx. 252-258;

25) Excerpts from Doug Haloftis deposition, Exhibit "Y," Apx. 259-269;

26) Excerpts from Alan Teicher deposition, Exhibit "Z," Apx. 270-286;

27) *Ramirez v. Gonzales*, Exhibit "A-1," Apx. 287-294;

28) Excerpts from Dennis Reisher deposition, Exhibit "B-1," Apx. 295-313; and

29) September Quota, Exhibit "C-1," Apx. 314.

III.
FACTS RELIED ON FOR SUMMARY JUDGMENT

A. Lee's First Year of Employment – Failure to achieve quota and concerns raised

1. Lee was employed with Group 1 as a regional sales vice president in its Dallas office on March 8, 2002. Apx. 2, Plaintiff's Complaint, ¶8; Apx. 18, Reisher Aff. ¶3.

2. Lee's employment with Group 1 was at will. Apx. 224, Lee Depo. 47:10-17. In Plaintiff's Original Complaint filed with this Court, Lee asserts that he "paid the price for his support of Rose. His otherwise positive 2002 review completed shortly after this 'go-to' incident [where Lee says he referred to Rose as his "go-to" employee] rated Lee as low as possible for the category partially described as, 'Understands the skills and experience of his/her people.'" Apx. 7. At Lee's deposition, however, Lee thought the questions about his 2002 employment review were funny. Apx. 251A-251B, Lee Depo. 335:22-25; 337:10-25. Lee was laughing because it was Lee himself that filled out his own 2002 employment review, giving himself the low review of which he asserts to this Court is a basis for Group 1's retaliation against him. Apx. 251A-251B, Lee Depo. 335:22-337:25. By his Complaint, Lee misleads this Court regarding a fact which at his deposition he finds humorous.

3. Approximately a week before or after March 31, 2003, the end of Group 1's fiscal year, Lee's supervisor at Group 1, Alan Teicher ("Teicher") complained to Group 1's Human

Resources Manager, Dennis Reisher ("Reisher"), that Lee did not possess the skills and ability to successfully perform the job and that his performance was substandard. Apx. 23, Teicher Aff. ¶¶4-6; Apx. 19, Reisher Aff. ¶4. **For the 12 month period ending March 31, 2003, Lee's branch generated the least amount of revenue of Group 1's seven branches and attained the second lowest percentage of assigned quota of the branches for the year.** Apx. 23, Teicher Aff. ¶5.

4. Group 1's procedures required a manager to obtain approval of both the Human Resources and Legal Departments before any associate could be terminated. Apx. 23, Teicher Aff. ¶6. Even though Lee was under performing in an important sales region for Group 1, the Human Resources and Legal Departments determined that Lee should be given additional time to perform. Apx. 19, Reisher Aff. ¶5.

5. Teicher proposed a performance plan for Lee but the concept was rejected because of senior management's belief that performance plans were counter productive. Apx. 285-286, Teicher Depo. 127:13-21; 137:16-18; Apx. 135-136, Naden Depo. 146:14-147:16; 148:12-151:18, Apx. 300, Reisher Depo. 21:1-25:18. Lee's counsel attempts to misconstrue these facts. Lee's counsel initially argued that the performance plan was **written to retaliate** against Lee for being interviewed by outside counsel in the *Diot* lawsuit. However, the performance plan was prepared weeks before Lee was even interviewed. Apx. 285A, Teicher Depo. 133:2-134:6. Never to be deterred by the facts, Lee now argues that the **failure to put him** on a performance plan was a form of retaliation. Regardless, Lee has testified that he was well aware of the requirements of his job, including the matters set forth in the performance plan that he was never given. Apx. 237-238, Lee Depo. 229:12-230:7.

B. Lee's Second Year of Employment – Quota achieved but concerns persist

6. Throughout 2003, Teicher continued to raise concerns that Lee could not establish a pipeline of sales and actual sales to achieve quarter-to-quarter success on a sustained basis. Apx. 23, 25; Teicher Aff. ¶¶4-5, 12, 14; Apx. 19, Reisher Aff., ¶4; Apx. 272-275; 279-280, Teicher Depo. 23:12-22; 26:15-27:2; 33:16-34:14; 38:3-40:23; 68:12-72:16.

7. For the fiscal year ending March 31, 2004, Lee's branch did exceed its assigned quota and was the number one branch among Group 1's branch offices. However, this was primarily due to two very large transactions which accounted for more than 40% of the total revenue of Lee's branch. Apx. 23-24, Teicher Aff. ¶8. Of great concern to Teicher was the fact that the two large sales were not the result of the efforts of Lee but rather to the efforts of others and that, in fact, Lee's involvement had been such that, if Lee's direction had been followed, the sales would have been significantly discounted. Apx. 23-24, Teicher Aff. ¶¶8-10.

8. Teicher continued to be convinced that in the long term Lee would not be able to satisfactorily perform his job as regional sales director and that his underlying weaknesses were masked by the two large transactions that had been secured. Apx. 24, Teicher Aff. ¶10. Teicher continued of the opinion that Lee was not able to establish a sales process among his team that would accomplish a repeatable, sustainable, predictable revenue stream. Apx. 24-25, Teicher Aff. ¶11. Relying on one or two big deals was not an effective means to grow a branch. Apx. 24, Teicher Aff. ¶11. Instead, Teicher expected each branch to generate significant activity from a number of prospects or existing accounts and to accurately forecast expected revenue attainments. Apx. 24-25, Teicher Aff. ¶11.

9. Of course, the success of the Texas branch was of great importance to Teicher since his income and ability to succeed in his position depended on the success of his branches. Apx. 271, Teicher Depo. 9:15-10:8.

C. Lee's Third Year of Employment – "Embarrassing[ly]" bad numbers for Lee

10. Teicher's concerns and what he had been trying to avoid by seeking to replace Lee came to fruition. Lee's failure to establish a pipeline of sales evidenced itself dramatically during the last three calendar quarters of 2004. Lee's numbers were again the worst among Teicher's branches. Apx. 25, Teicher Aff. ¶12. Lee's quota attainment was an off the charts disaster:

Month/Year	**% of Quota Attainment**
April 2004	8.3%
May 2004	11.2%
June 2004	35.2%
July 2004	29.2%
August 2004	27.3%
September 2004	43.2%[3]
October 2004	38.8%
November 2004	42.1%
December 2004	48.4%

Apx. 73-76, Lee's Monthly Quota Attainment (proved up through Lee's Depo., Apx. 245, Lee Depo. 261:7-18, Exhibit 21). Lee does not dispute this poor performance but rather agrees that the performance was "subpar." Apx. 229, 237, Lee Depo. 146:15-21; 228:5-229:16.

11. For the fiscal year ending December 31, 2004, Lee's branch, as noted, was only 48.4% of its assigned quota and was Teicher's lowest performing branch. Apx. 25, Teicher Aff. ¶12. Throughout 2004, Teicher was also concerned about Lee's leadership skills, his ability to motivate his staff, his propensity to offer discounts in excess of Group 1's policies as well as his ability to work with his colleagues to achieve the goals of his branch and he continued to raise these concerns with Human Resources. Apx. 25, Teicher Aff. ¶12; Apx. 19, Reisher Aff. ¶7.

[3] Apx. 245-246, Lee Depo. 261:12-262:2; Apx. 314, September Quota.

12. In the late summer of 2004, Teicher's concerns about Lee's ability to perform came to fruition as Lee's quota attainment, in an important region, continued to plummet below expected quota attainment, and the Human Resources and Legal Departments became convinced that Teicher was correct in his assessment that Lee could not adequately perform the job to Group 1's expectations. Apx. 301-302, Reisher Depo. 33:17-34:19; Apx. 21, Reisher Aff. ¶12.

13. During this time, there was a lawsuit pending by former female employees in the Dallas office against Group 1 (the "*Diot* lawsuit"). The lawsuit was nearing completion and, as with any employment decisions affecting the Dallas office during the pendency of the litigation, outside counsel was consulted regarding the timing of any potential termination. Outside counsel, Doug Haloftis ("Haloftis"), advised Group 1 that, of course, it could make a termination decision it desired if it felt an employee was not meeting expectations but also advised that in the event that Lee was called as a witness, obtaining his appearance at trial would be easier were he still employed at Group 1. Apx. 261-262, 265-268, Haloftis Depo. 22:10-23:15; 31:7-13; 44:8-18; 45:5-19; 51:5-14;120:12-23. This was the same advice that Haloftis had given previously to Group 1 throughout the *Diot* lawsuit and routinely has given to other clients in similar situations throughout his career. Apx. 260, 262, Haloftis Depo. 20:1-18; 30:16-31:13. Haloftis is an accomplished attorney and an expert in employment law and his advice and a resulting action of Group 1 to terminate or delay the termination of Lee would, in his view, not be improper in any manner (nor was it). Apx. 263-264, Haloftis Depo. 36:16-37:2.

14. In the fall of 2004, Lee had a teleconference with Reisher, the Manager of Human Resources, to raise concerns. During this call, Lee did not pull any punches regarding his complaints about his superiors; he complained in graphic detail about the management styles of Teicher and Teicher's boss, Andrew Naden ("Naden"). Apx. 242, Lee Depo. 246:3-248:11; Apx.

304-308, Reisher Depo. 58:7-75:3. **Nonetheless, during this frank call in which no punches were withheld, Lee never raised any of the concerns he subsequently raised to OSHA or the different concerns he raised to the EEOC regarding the Houston contract issue, the *Diot* lawsuit issue, the Naden resume issue, or any association/opposition/participation retaliation claims regarding Rose, Hawkins or Dube.** Apx. 20, Reisher Aff. ¶11; Apx. 242, Lee Depo. 246:3-248:11; Apx. 304-308, Reisher Depo. 58:7-75:3. Of significance in evaluating the nature of this call, Lee considered Reisher his confidant and friend, knew that they both disliked Teicher's management style and that Lee was free to be open in his discussion with Reisher. Apx. 242, Lee Depo. 246:16-247:2; Apx. 301, 303, Reisher Depo. 32:20-33:16; 57:8-18.

D. Lee's Termination

15. In December 2004, Teicher prepared and on December 27, 2004 submitted a separation recommendation, outlining the concerns he had, and had been raising, regarding Lee's position. Apx. 25, Teicher Aff. ¶13 (and attached Separation Recommendation, Apx. 28-30).[4] **The following is an outline of the reasons for Lee's termination by Group 1, as expressed by Teicher in the Separation Recommendation, along with Lee's, and others, admissions of the same:**

a. **Lee's job was to build and enhance a team that would accomplish a repeatable, sustainable, predictable revenue stream;** Apx. 35-37, Separation Recommendation.

Lee agrees that was his job and he failed in that regard. Apx. 240, Lee Depo. 239:19-240:2.

Robert Bowen, former President of Group 1 agrees. Apx. 147H, Bowen Depo. 35:11-36:10.

[4] Hereafter referenced as the "Separation Recommendation."

b. **Lee continued to deliver results below quota, the Texas branch attainment was projected to be below 49% [which it was] and there was a 58% downturn in business year over year;** Apx. 35-37, Separation Recommendation.

Lee agrees. Apx. 240, Lee Depo. 240:6-12. Lee testified repeatedly that Group 1 was a "numbers driven company" meaning that you will not be there if you do not make the numbers and further that his numbers were, in fact, bad to the company and not satisfactory to him. Apx. 237-238, Lee Depo. 228:2-230:7; 231:4-6. In fact, Lee, in telephone conversations that he had surreptitiously recorded with Teicher, agreed that if you missed two consecutive quarters of quota attainment you would be fired. Apx. 236-283, Lee Depo. 199:25-201:17; 229:24-230:7. At the time of Lee's termination, Lee had missed his quota attainment for three consecutive quarters. Apx. 236, Lee Depo. 201:14-17.

Teicher testified that at Group 1 it was "all about making the numbers," meaning that you will not be there if you do not make the numbers. Apx. 283, Teicher Depo. 101:5-23.

Reisher testified that Group 1 was a "numbers driven company," meaning that you will not be there if you do not make the numbers. Apx. 298, Reisher Depo. 15:7-16:14.

Robert Bowen, the former President of Group 1, testified that 49% quota attainment is a basis for terminating a sales manager unless it was regarded as temporary which was not the case with Lee. Apx. 147I, Bowen Depo. 38:5-12. He testifies that these numbers are "grossly unsatisfactory." Apx. 147I, Bowen Depo. 39:2-5. Further, two of the three years of quota numbers for Lee were "terrible." Apx. 147I, Bowen Depo. 40:11-14.

c. **Evidencing Lee's failure to motivate his people, Lee had three senior or tenured sales associates delivering sales significantly below quota;** Apx. 35-37, Separation Recommendation.

Teicher confirmed these facts and, in regard to his conversation with Lee about these issues, he says that Lee tried to deflect responsibility and that he received no adequate explanation. Apx. 277-278; Teicher Depo. 59:15-61:20.

Bowen says this reflects that the branch is doing "terribly" and says this puts a "spotlight of concern very much on the manager." Apx. 148, Bowen Depo. 42:14-44:17.

d. **Poor management and repeated incidents where sales associates claimed matters were not moving forward due to Lee and Lee blamed the sales associates. Provides an example in regard to a price discrepancy between the list price and a proposed discount where Lee blamed the associate even though the ultimate responsibility rested with the regional sales director; this also evidenced Lee's efforts to shift accountability on matters that are clearly his responsibility.** Apx. 35-37, Separation Recommendation.

Lee blames the sales associate involved in the Nissan transaction, Samantha Hawkins[5] but agrees, after pressing, that he "had some culpability." Apx. 241, Lee Depo. 242:5-243:21.

Samantha Hawkins, no longer employed by Group 1, states that Lee falsely blamed her for the discounting problem with Nissan, that Lee was dishonest in his dealings with sales associates, that Lee was a poor manager, and that his management style resulted in mismanagement **and lost sales opportunities** and morale in the Dallas office. Apx. 32, Hawkins Aff. ¶¶4-5. In fact, Lee was such a poor and unprofessional manager that Hawkins quit her employment at Group 1 rather than continue working for Lee. Apx. 31-32, Hawkins Aff. ¶¶3 and 5. Confirming the truth of her assertion, after Lee left Group 1, Hawkins came back to work for Group 1. Apx. 32, Hawkins Aff. ¶5.

Likewise, Carol Maginn, another sales associate that worked for Lee, states in her affidavit that Lee was a poor manager which resulted in **lost sales opportunities**; specifically, stating that Lee's unprofessional conduct with customers resulted in **lost sales opportunities** such as with Swiss Re and Clark American Checks (Apx. 33-34, Maginn Aff. ¶3); that Lee was not honest or fair in his dealings with sales associates, and; that he played favorites with sales associates not based on merit resulting in poor morale and negatively impacting sales efforts. Apx. 34, Maginn Aff. ¶4. Like Hawkins, Maginn was in the process of ending her employment with Group 1 because of Lee at the time of Lee's termination, and as a result, she stayed with Group 1. Apx. 33-34, Maginn Aff. ¶3. Maginn made Lee's manager, Alan Teicher, aware of her concerns regarding Lee. Apx. 33-34, Maginn Aff. ¶3.

16. Lee was terminated by Group 1 on December 31, 2004, the end of Group 1's then fiscal year for the reasons set forth in the Separation Recommendation. Apx. 25, Teicher Aff. ¶14; Apx. 21 Reisher Aff. ¶12.

[5] Interestingly, this is one of the persons Lee has sworn he was protecting from discrimination. Apx. 38-39, EEOC Charge.

17. Teicher, no longer employed at Group 1 at the time of his deposition (Apx. 270A, Teicher Depo. 5:5-7) testified that Lee was terminated by Group 1 for the reasons set forth in his Separation Recommendation. Apx. 277-280, Teicher Depo. 59:3-65:23; 68:12-72:7. In fact, Teicher testified that he was completely unaware of any of the issues raised by Lee in his EEOC Charge on or before the time Lee was terminated (in fact, his knowledge in that regard was that Hawkins, Rose and Dube had problems with Lee). Apx. 281-282B, Teicher Depo. 77:2-91:9.

18. Reisher, also no longer employed by Group 1, testified at his deposition which occurred after he left Group 1, that Lee was terminated by Group 1 for the legitimate business reasons set forth in the Separation Recommendation. Apx. 312, Reisher Depo. 118:17-119:4. Specifically, Reisher identifies Lee's inability to comply with Group 1's sales policies, communicate effectively, establish a repeatable, sustainable and predictable sales process, motivate his subordinates and obtain and maintain the respect of his peers and co-workers. Apx. 21, Reisher Aff. ¶12. Reisher admits that Group 1 terminated Lee for legitimate business reasons even though he acknowledges that he still considers Lee a friend, did not like Teicher, and that he no longer works for Group 1. Apx. 296-297, 301, 303, 312, 313, Reisher Depo. 33:11-13; 57:11-18; 120:15-121:2; 176:20-177:1; 5:20-6:1.

E. Lee fails in his effort to set up Group 1 by surreptitiously recording hours of conversations

19. Before his termination, Lee surreptitiously recorded hours of conversations with various persons at Group 1 in an effort to further his attempt to make claims against Group 1. Apx. 235, Lee Depo. 195:18-197:9. Lee initially tried to cover-up the reason for making the recordings by testifying that he made the recordings to further his management efforts, but ultimately admitted the recordings were for the purpose of trying to further a claim against Group 1. Apx. 235, Lee Depo. 195:18-197:9.

20. Even though Lee was the only one that knew the conversations were being recorded and that he recorded hours of conversations, there is not one admission against interest by any one from Group 1 in the recordings – though Lee tried to steer the conversations in a way to do so. Apx. 236A-236B, Lee Depo. 203:5-205:13. Instead, the tapes are replete with Group 1 persons, primarily Teicher, repeatedly saying that Group 1 is "all about the numbers," "focusing on the importance of numbers" and "creating a pipeline" and warning Lee that "his pipeline is dry " (and Lee agreeing his pipeline is dry). Apx. 236-238, Lee Depo. 198:3-25; 199:21-231:18. In fact, these points, were reiterated to Lee time after time in these recorded conversations. Apx. 236-238, *id.*

21. Neither Lee nor Group 1 discuss the claims Lee now asserts in this lawsuit on the tapes. Apx. 236A-236B, Lee Depo. 203:5-205:7. Given that it was Lee's purpose in recording the telephone calls to further his claim against Group 1,[6] surely if he had such complaints at the time, he would have raised the complaints on tape. He did not. *See Id.*

F. After his termination Lee, for the first time, alleged that there were nine prohibited reasons for his termination which, according to Lee, infected his employment, beginning in as early as 2002 and continuing throughout his employment, yet Lee never raised any of these concerns prior to his termination on December 31, 2004 – the SOX and EEOC proceedings

(i) Filing of the SOX Complaint

22. On March 31, 2005, Lee commenced an administrative proceeding before the United States Department of Labor, OSHA asserting violations of the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, 18 U.S.C. §1514A (the "SOX Complaint"[7]) asserting that he was discriminated against because of

[6] Apx. 235, Lee Depo. 195:18-197:9.

[7] *In the Matter of Patrick Lee, Complainant vs. Pitney Bowes Inc., Respondent*; Case No. 2006-SOX-5. The SOX proceeding was asserted against Pitney Bowes Inc. ("Pitney Bowes") because SOX proceedings must be against a public company. Pitney Bowes acquired the public stock of Group 1 in or about July of 2004. Even though Pitney

and terminated as a result of Lee reporting (1) alleged accounting irregularities in connection with a Group 1 sale of software to the City of Houston (the "Houston Contract issue"), (2) an executive of Group 1's allegedly misleading credentials in an SEC filing (the "Naden Resume issue") and (3) the purported failure of Group 1 to disclosed a lawsuit in merger documents (the "*Diot* lawsuit issue"). Apx. 40-44, SOX Complaint. Lee filed extensive briefs in the SOX proceeding detailing the facts supporting his contention that he was discriminated against and terminated as a result of the Houston Contract issue, the Naden Resume issue and the *Diot* lawsuit issue. Apx. 40-44, SOX Complaint. **In all his briefing, Lee asserts these as the sole reasons for his termination.**[8] Apx. 40-44, SOX Complaint.

23. From this point forward, Lee was represented by counsel. Apx. 40-44, SOX Complaint; Apx. 1-17, Plaintiff's Complaint.

24. Lee sets forth, in great detail, his explanation for why he was discriminated against and terminated as a result of the Houston Contract issue:

> The City of Houston purchased such software from Group 1. In October 2003, Samantha Hawkins, a sales representative reporting to Lee, was attempting to sell additional software to the city. A difficulty arose in the transaction. Houston required a purchase order and would not accept a Group 1 addendum, insisting that this had always been the city's policy. Hawkins reviewed the file and determined that Group 1's records reflected that Houston *had* signed an addendum in the previous sale. Houston insisted that it had issued a purchase order on the contract.
>
> Hawkins soon learned that both were partially right. Nancy Linder, a then-Group 1 sales representative who is no longer employed by the company, told Hawkins of the fraudulent nature of that transaction when Hawkins called her. When Linder had been unable to get a deal through because of the policies of each side, she and Robert Stigers

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Bowes played no role in the termination of Lee, this did not deter Lee from asserting a claim against Pitney Bowes as he does in this case..

[8] "Instead, Lee was terminated in retaliation for his reports of Group 1's and Pitney Bows 's (sic) violations of 18 U.S.C. §§ 1341 and 1348, the rules and regulations of the Securities and Exchange Commission and other provisions of federal law regulating fraud against shareholders." Apx. 40, SOX Complaint. "Lee was terminated in retaliation for his reports of [SOX] violations on December 31, 2004." Apx. 43, SOX Complaint. "I am confident you will find . . . that Patrick Lee's termination from Group 1 and Pitney Bowes constituted discrimination on the basis of his complaints of the company's violations of federal securities laws, accounting laws, and mail fraud laws." Apx. 43, SOX Complaint.

had devised a plan to make both entities believe they were receiving what they wanted in the contract. Stigers, who was not authorized to commit the City of Houston, would sign the addendum Group 1 wanted but would conceal it from the city. Linder would accept the city's purchase order and its terms on behalf of Group 1 but would conceal it from the company. This fraudulent contract remained in effect, and it resulted in significant potential liabilities that Group 1 did not disclose, as required. Typically, such contracts are mailed.

Lee first reported this issue to Linder's manager Dan Bogar. Bogar stated he wanted to "stay out of that mess." He then reported it to Rodney Frye, who had been Linder's manager at the time the deal was signed. He also refused to deal with it. Lee reported it to Teicher and Naden, his first and second-level supervisors. Neither would do anything. Lee went to Group 1 attorney Wayne Arden, who also did nothing. In July 2004, Lee physically went to Group 1 Comptroller and acting CFO John Renehan's office in Lanham, Maryland to explain the fraudulent violation and provide him a detailed file documenting it. Lee told Renehan that this transaction would have caused Group 1 to report income in prior years' SEC filings that was earned pursuant to an invalid contract not consistent with accepted accounting principles. Renehan contended that the transaction was not big enough that he would have to restate earnings but that he would look into it and promised to get back with Lee. He never did.

Lee continued to pursue the issue because it affected his ongoing ability to deal with the City of Houston, addressing Teicher on the issue almost daily. Teicher became frustrated with Lee's persistence. "I'm sick and tired of hearing about this deal," Teicher told Lee in October 2004. "I don't want to hear about Houston ever again."

In December 2004, Lee saw Elizabeth Walters, Executive Vice President of Sales for the division responsible for selling the software. Walters told Lee he had asked Linder about it and Linder had told her Lee had it all wrong. Lee suggested that Walters contact Group 1 attorney Arden to confirm the truth of what he was saying. Walters told Lee that if what he was saying was true, Linder should have been fired and Walters would have fired her.

Lee reasonably believed that booking this fraudulent transaction violated accepted accounting standards and caused a misstatement of earnings that violated federal securities laws. Lee also believed that the transaction itself violated federal mail fraud laws. In fact, he was correct on the illegality of each of these violations.

Apx. 41-42, SOX Complaint. Lee testified to the accuracy of these facts to support his contention that the Houston Contract issue was the reason he was terminated. Apx. 231, Lee Depo. 166:2-13; 168:13-169:3.

25. Likewise, Lee details his position as to why he was discriminated against and terminated for raising the *Diot* lawsuit issue:

> For approximately two years, Group 1 has had ongoing a multi-party high-profile and hard-fought sexual harassment and retaliation lawsuit with four former employees. During the Pitney Bowes merger, Lee looked at the merger documents and noticed that nowhere in the potential legal liabilities section was this disclosed. Lee's second-level supervisor Naden was personally named in the suit. He and Teicher had been key players in the conduct alleged in the suit, and both were extremely sensitive to anything regarding that suit.
>
> In July 2004, Lee, in a recorded conversation, called his supervisor Teicher to ask why this had not been disclosed. Teicher, irritated, explained that it was simply too small to report in the merger, and that Pitney Bowes "already knew about it." While Pitney executives may have known about it, their shareholders reviewing the merger documents likely did not. To Lee's knowledge, Group 1 never did disclose to its or Pitney Bowes's shareholders the existence of that suit.
>
> Lee reasonably believed that this failure to disclose the lawsuit violated securities laws, and the non-disclosure did, in fact, violate those laws.

Apx. 42, SOX Complaint. Lee testified in the SOX proceedings as to the accuracy of these facts to support his contention the *Diot* lawsuit issue was the reason he was terminated. Apx. 232, Lee Depo. 173:7-20.

26. Likewise, Lee, graphically details his position as to why he was discriminated against and terminated for raising the Naden Resume issue:

> Before coming to Group 1, Naden and Teicher had worked together at Software AG of Americas. There, Naden had been a subordinate of Teicher's. At Group 1, the roles were reversed. When Naden and Teicher were at Software AG, Teicher told Pat repeatedly **that Naden was simply a "struggling, out-of-control, bag-carrying salesman." "This guy couldn't even get into my office," he would say.**
>
> During the summer 2004, Teicher came to Dallas and went to dinner with Lee at a North Dallas Restaurant. After a few drinks, Teicher said to Lee, "Let me teach you about leverage. Let me teach you about blackmail." Teicher told Lee that he had enough leverage to "bring the whole company down." Teicher bragged that he had served as a reference for Naden when Naden came to Group 1. Teicher had supported Naden's claims regarding his experience at Software AG, which were significantly embellished. When Group 1 hired Naden, it adopted his claims regarding his experience, and had published that information in its SEC filings, Teicher told Lee. The statements made in the SEC filings were untrue, **Teicher said. "I know things that if these guys fuck with me, I can bring them down,"** he told Lee.

> In fact, the description of Naden's experience in Group l's SEC filings, including but not limited to its 2004 10-K, were untrue.
>
> Frustrated by the behavior he was exposed to and encouraged by signals from Pitney Bowes that it would operate the company in a different manner. Lee approached Group 1 Human Resources Director Dennis Reisher in late-September 2004 and requested a meeting to address violations within the company. After asking legal and Pitney Bowes HR how to handle Lee's request, Reisher instructed Lee to compile notes and set up a meeting with him. Lee did. On October 1, 2004, Lee detailed to Reisher what Teicher had told him about the leverage he had on Group 1. Lee specifically mentioned to Reisher Teicher's claim that Naden's falsifications concerning his experience were contained in SEC filings. These claims were also made in press releases mailed at the time. Reisher told Lee he had taken the report to Wayne Arden, Group 1's attorney and Naden's close friend. Arden had concluded, Reisher told Lee, that nothing illegal had been reported.
>
> Lee reasonably believed that this misrepresentation violated federal securities laws. The misrepresentation did, in fact, violate such laws, as well as mail fraud laws.

Apx. 42-43, SOX Complaint. Lee testified in the SOX proceedings as to the accuracy of these facts, and more, to support his contention the Naden Resume issue was the reason he was terminated. Apx. 231-232, Lee Depo. 166:2-170:6.[9]

(ii) Lee's SOX Complaint begins to crumble so now, for the first time, Lee asserts wholly new reasons for his termination to the EEOC

27. Pitney Bowes' responses clearly established the lack of merit to his SOX claims. These were served on Lee on April 25 and May 19, 2005, respectively. Apx. 171-218, Pitney Bowes SOX Responses.

[9] However, after his SOX claim was dismissed Lee recanted all of his detailed reasons given for termination under SOX and, in an effort to pursue this claim, refuted his own prior sworn testimony by simply stating he was wrong:

Q: So the reason that you fervently believed enough to make a claim with the federal government [the SOX Complaints], you were completely and utterly wrong about, true?

A: Yes.

Apx. 232, Lee Depo. 170:2-6.

28. Not coincidentally, on June 29, 2005, Lee filed a Charge of Discrimination against Group 1 and Pitney Bowes before the EEOC alleging wholly new reasons for his termination; none of which he had revealed to OSHA or ever before asserted.[10] Apx. 38-39, EEOC Charge of Discrimination. In the EEOC Charge, for the first time (never having hinted while at Group 1 that he had been subjected to any retaliatory treatment), Lee asserts as the reason for his termination a whole host of new allegations: (1) association and (2) opposition retaliation in connection with the employment of Sally Rose, (3) participation in the investigation of discrimination claims of Sally Rose, (4) association and (5) opposition retaliation in connection with the employment of Samantha Hawkins and (6) opposition retaliation in connection with the employment of Catherine Dube. Apx. 38-39, Charge of Discrimination. In the sworn EEOC Charge, in setting forth the reasons for his termination, Lee sets forth only the foregoing six reasons and never revealed the purported SOX reasons for his termination which he had asserted before OSHA. Apx. 38-39, Charge of Discrimination.

(iii) Lee's SOX claims are determined by OSHA to be "meritless," Lee appeals and, ultimately, the appeal is dismissed

29. After a thorough and extensive investigation, in which Lee was permitted to submit all evidence supporting his SOX claims, on September 8, 2005 OSHA concluded that Lee's "complaint was investigated and determined to have no merit." Apx. 67, SOX Finding.

30. Even though simultaneously proceeding under different legal and factual basis before the EEOC, Lee appealed the OSHA finding to an Administrative Law Judge (the "ALJ") continuing to assert he was terminated because of the SOX complaints. Apx. 45-52, SOX

[10] While it is conceivable that an employee might simultaneously assert a SOX and Title VII claim, it is not legitimate to assert the reasons for termination as being SOX related and then, when that proceeding is failing, assert for the first time wholly new never disclosed reasons for the same employment action (here, termination) before another administrative agency. Further, Lee's filings never disclosed the differing factual allegations to either administrative agency. Defendants revealed this information to the administrative agencies.

Appeal. Nonetheless, shortly before the filing of a summary judgment by Pitney Bowes in the SOX proceeding, on February 9, 2006, Lee dismissed his appeal legally terminating any right to further right to proceed on the claims asserted in the SOX proceeding. Apx. 71, SOX Dismissal.

(iv) Facts regarding Lee's EEOC claims reflect the opposite of his allegations

(a) Sally Rose – Association/Opposition/Participation

31. Lee claims he was terminated because of association/opposition/participation retaliation in regard to Sally Rose. Apx. 38-39, Charge of Discrimination.

32. Contrary to such bare assertions, Lee was anything but a supporter of Rose. Lee began his employment with Group 1 in March of 2002 as a regional sales director in Group 1's Dallas office and Sally Rose was one of his direct report sales associates. Apx. 2, Plaintiff's Complaint ¶8. Almost immediately, according to Lee's sworn testimony, Lee began having problems with Rose, the employee he alleges to this Court that he was protecting. In the first three months of supervising Rose, Lee repeatedly requested permission of Group 1 to terminate Rose. Apx. 226-227, 250-251, Lee Depo. 137:14-139:1; 301:24-302:1. Group 1 refused. Apx. 223, 226-227, Lee Depo. 38:23-41:8; 137:21-138:5.

33. Lee kept notes of Rose's behavior chronicling, among numerous other matters, the following statement made by Rose regarding Lee:

> [Rose] berated me for "giving the product away."
>
> [Rose] indicated she was having a very difficult time working with me and was going to report me to my superior.
>
> [Rose] repeatedly indicated I had no respect for her.
>
> [Rose] said that Verizon was "taking advantage of me and making a fool out of me."

Lee's notes then conclude "I regretfully concluded that Sally Rose's position with Group 1 be terminated." Apx. 58, Lee's notes (proved up by Lee's Depo.: Apx. 227-228, Lee Depo. 141:16-142:13). Again, the request was rejected by Group 1. Apx. 221, Lee Depo. 37:18-20.

34. On May 1, 2002, after being rebuffed by Group 1 in his repeated efforts to terminate Rose, Lee sent Rose a memorandum stating, among other things, that:

> "Over the last several weeks I have counseled you repeatedly on your unacceptable behavior, which constitutes insubordination. **The behavior, which I'm speaking about, includes verbally abusive outbursts, failure to follow specific directions from management, and communicating of confidential insider information pertaining to pending software sales, to outside parties.**
>
> Your verbally abusive behavior has included loud outbursts and inappropriate language on several occasions. On March 20, 2002 I witnessed you in the building-parking lot screaming openly. When I attempted to approach your car you sped off. On March 22, 2002 after insisting on new pipeline reports, **you were verbally abusive and mentioned hatred towards Alan Teicher and myself. On March 26, 2002 . . . you aggressively approached me sticking your middle finger in my face** and stated "why don't you just give that account to someone more professional like Crissy." Once again on March 28, 2002 you were verbally abusive when asked to complete your pipeline reports. Finally, on April 25, 2002 you were verbally abusive during a conversation pertaining to the Verizon account. This pattern is unacceptable and as a Sr. Sales Representative I would have expected more professionalism on your part.
>
> * * *
>
> Finally, I have witnessed and **you have admitted to, sharing confidential information** pertaining to the pending Verizon deal with non Group 1 Associates. I shouldn't have to remind that Group 1 is a public company and **such acts are illegal** and once again inappropriate.
>
> This behavior continues to have an adverse affect on your performance and must stop immediately. Please consider this memo a final written warning. If you should display and (sic) further inappropriate outbursts of anger, continue to ignore management direction or share insider information with non Group 1 Associates from this point on, **you will be subject to further disciplinary action up to and including immediate termination of employment."**

Apx. 53-54, Lee's Memorandum to Rose (emphasis added) (proved up by Lee's Depo., Apx. 221, Lee Depo. 16:1-17:17).

35. In August of 2003, Lee again sent a memorandum to Group 1, yet again requesting that action be taken against Rose and asserting that her behavior had "reached a limit of professional behavior and decorum" and requesting that the matter be resolved in accordance with the May 2002 reprimand (in which, he informed Rose that she would be terminated for future inappropriate behavior). Apx. 59, Lee's request for employment action re Rose (proved up by Lee Depo. Exhibit 20: Apx. 244, Lee Depo. 257:14-18). Once again, Group 1 refused Lee's efforts to terminate Rose.

36. Ultimately and not surprisingly, in early September 2003, Rose quit her employment over a dispute with Lee regarding commission splitting. Apx. 227, 249, Lee Depo. 139:5-141:1; 282:5-9.

37. In the lawsuit filed by Rose against Group 1, Rose accused Lee of discriminating against her. She never alleges that Lee "protected" her. In fact, at deposition after her departure from Group 1, Rose swore that Lee said and did the following:

> A: So I'm going to fire [Rose] one of these days and you're going to take over the Verizon deal and you're going to get it closed for me. Well, Christine was right down the hall from me. Okay?
> Also, it was to my understanding that he also told someone else in the organization that, yeah, [Rose] doesn't know how to sell. All she does is go out there and flirt. And I was out there on an appointment with her and she started crying to the buying manager and that they handed her some tissues and said, I'll be happy to get this signed for you sweety. And he said, the only thing she ever did other than that was flirt.

Apx. 61, Rose Depo. 188:18-189:4.

> My phone – I wasn't off that plane and my phone rang, and Pat Lee started yelling at me, screaming at me saying, you know, you only made a small percentage of your – I don't even remember what he said – like a percentage of your quota last year and I have the right to fire you at any time.

Apx. 62, Rose Depo. 190:25-192:5.

> And he just yelled at me. Mean, just – and I'm sure I yelled back, quite honestly. It just got to a boiling point where Pat and I would walk about and he'd act like he was my buddy, and he'd say, so when you get the commission check from Verizon, are you out of here? If he really wanted me to stay, whey would he say that? He said that on numerous occasions. Hey, Sal, let's grab a smoke. So are you out of here? Are you doing anything if you ever leave here? Is there anything you're going to do? Are you going to call some attorneys or something?

Apx. 62, Rose Depo. 192:12-21.

> Q: Why do you believe Mr. Lee's conduct, the problem that you had with his management style, was based on your complaints about sexual harassment concerning Mr. Naden?
>
> A: I don't necessarily know if that's exactly what I said. But he did make the comments to me that, you know you're cancer. You know, we got – you know, we got to cut out – you know what they do with cancer, they cut out cancer and we got cancer in this office. How would you take that?

Apx. 62, Rose Depo. 193:7-16.

38. Lee, without basis, contends that he was retaliated against for telling Rose that she should report any discrimination. Apx. 220, Lee Depo. 7:19-8:13. In fact, Group 1 repeatedly informed Rose about the remedies available for her to report discrimination, as evidenced by a letter from Group 1 to her informing her of this fact and providing persons she could immediately contact in the event she ever felt she was being discriminated or retaliated against. Apx. 97, Arden letter. Apx. 251C, Lee Depo. 346:8-20.

39. To support his participation claim, Lee points out that he was interviewed in early May 2003, by an attorney for Group 1, Carrie Hoffman, in connection with the lawsuit filed by Rose. Ms. Hoffman generally considered facts known by Lee to be unimportant given the fact that the matters alleged in the *Diot* lawsuit occurred before Lee came to work for Group 1. Moreover, the facts that Lee was aware of related to Lee's contention that Rose was a poor employee whom he wanted to terminate. Apx. 253-254, 256-257, Hoffman Depo. 29:2-21; 40:5-25; 57:20-22; 60:19-23; 70:22-71:1. Ms. Hoffman was not convinced that Lee would be a

witness if the Rose suit went to trial. Apx. 255, Hoffman Depo. 48:14-23. Importantly, no action was taken against Lee as a result of the interview. Apx. 258, Hoffman Depo. 89:7-14; Apx. 269, Haloftis Depo. 133:12-19; 134:8-13; Apx. 311, Reisher Depo. 111:6-10, Apx. 284, Teicher Depo. 111:17-21; Apx. 115, Naden Depo. 68:18-69:10; Apx. 147G, Bowen Depo. 30:1-6. Of note, the Lee interview with Ms. Hoffman occurred eighteen (18) months before Lee's termination. Further, Teicher had requested that Lee be removed from his position almost two months before Lee was ever interviewed; yet, again no action was taken against Lee as a result of the Hoffman interview. To the contrary, even though Lee's job performance was substandard at that point, the Human Resources and Legal Departments supported giving Lee more time to achieve. Apx. 19, Reisher Aff. ¶¶4-5.

40. So, while Lee's bare assertion to this Court is that he was retaliated against for association/opposition/participation conduct relating to Rose; in fact, Lee was anything but protecting Rose. Quite to the contrary, Group 1 was constantly protecting Rose from Lee. *See* ¶¶29-35 above.

(b) Samantha Hawkins – Association/Opposition

41. Before the EEOC, Lee also claimed to have been terminated for association/opposition conduct in regard to Samantha Hawkins, another sales associate that worked for Lee. Apx. 38-39, Charge of Discrimination. Hawkins, no longer employed by Group 1, swears that no one treated her improperly at Group 1, **except Lee.** Apx. 31, Hawkins Aff. ¶3. **She says Lee was unprofessional, unfair and offensive.** Apx. 31, Hawkins Aff. ¶13.

42. Hawkins actually quit her employment with Group 1 because she could not tolerate Lee as a manager and, after Lee was terminated, Ms. Hawkins re-applied for employment with Group 1 and was, in fact, re-hired. Apx. 31-32, Hawkins Aff. ¶¶3 and 5. This

is amazing testimony in light of Lee's contention to the EEOC that he was terminated by Group 1 for association/opposition conduct in regard to Hawkins.

(c) Catherine Dube - Opposition

43. Lee also alleged to the EEOC that he was terminated by Group 1 for opposing discrimination against Catherine Dube. In his deposition, however, Lee testified that it was he, in fact, who sought Ms. Dube's termination and that Group 1 refused the request. Apx. 249, Lee Depo. 282:5-9. Never discouraged by factual inconsistency, Lee actually now claims that he was retaliated against by Group 1 because Group 1 did not approve his request to terminate Ms. Dube. Apx. 247-249, Lee Depo. 270:22-271:12; 279:2-8.

(v) EEOC finds no evidence to support a claim

44. On February 10, 2006, after having had an opportunity to review all of the evidence submitted by Lee, the EEOC concluded, in dismissing Lee's claim, that it "was unable to conclude that the information obtained establishes violations of the statutes." Apx. 72, EEOC finding of no evidence to support claim.

G. Lee's claims before this Court

45. On May 12, 2006, Lee commenced this action, abandoning all of his previously sworn reasons given to OSHA for his termination as well as abandoning three of the six sworn reasons given to the EEOC for his termination; now, stating that the sole reason for his termination were the Rose Association/Opposition/Participation claims. Apx. 1-17, Plaintiff's Complaint.

46. Demonstrating a total disregard for his previous sworn testimony and the detailed factual assertions made in the SOX proceeding, Lee now conveniently testifies in this case that he was wrong in regard to the SOX reasons stated for his termination. Apx. 232, Lee Depo.

170:2-172:23. Lee explains that "he and his lawyer" decided that, after the depositions in the SOX case, that they were "wrong" about the positions they had been asserting for two years. Apx. 232, *id.*

47. Everyone in this case giving testimony except Lee has testified that only legitimate business considerations were considered in Group 1's reaching a termination decision regarding Lee and had nothing to do with Lee purportedly supporting Rose.

IV.
ARGUMENTS AND AUTHORITIES

A. Summary Judgment Standard

Under Rule 56(c), summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1356 (1986)(quoting *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S. Ct. 1575, 1592 (1968)). A party opposing a properly supported motion under Rule 56 "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2510 (1986). When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007).

B. Retaliation

1. Legal Requirements

Lee must demonstrate that (1) he engaged in statutorily protected activity, (2) he suffered an adverse employment action, and (3) there was a causal link between the protected activity and the adverse employment action. *Septimus v. Univ. of Houston,* 399 F.3d 601, 610 (5th Cir. 2005).

2. Lee cannot establish protected activity in regard to his association/opposition claims

a. Lee's Association Claim

The Fifth Circuit has prohibited employers from discriminating against an employee on the basis of certain interpersonal relationships, *i.e.*, related to the employee's race. *Pittman v. General Nutrition Corp.,* 2007 WL 1296784, *18 (S.D. Tex. May 2, 2007). However, an individual does not have automatic standing to sue for retaliation simply because a friend or spouse engaged in protected activity; rather the individual must have engaged in conduct that is in opposition to an unlawful employment practice. *Holt v. JTM Indus., Inc.,* 89 F.3d 1224, 1226-27 (5th Cir. 1996) cited in *Ramirez v. Gonzales*, 2007 WL 329207 (5th Cir. 2007)(unpublished).[11] In the instant case, there is not any evidence that Lee and Rose had a personal, social or intimate relationship or any evidence that Lee participated in Rose's protected conduct. In fact, Group 1 has submitted summary judgment evidence of an animus relationship between Lee and Rose in which Lee sought to have Rose terminated repeatedly. *See* ¶¶32-40 above. Further, even had Lee "participated" in Rose's protected conduct, there is a "serious question" in the Fifth Circuit as to whether a non-intimate relationship would enjoy association

[11] Apx. 287-294.

protection. *Pittman v. General Nutrition Corp.,* 2007 WL 1296784, *18 (S.D. Tex. May 2, 2007).

In any event the "relationship" between Lee and Rose would never be the type to receive such protection. Lee was constantly attempting to have Rose fired. *See* ¶¶32-35 above. Rose was protected from Lee by Group 1. *See* ¶¶32-35 above. Further, the record is replete with Rose's antagonism toward Lee. *See* ¶¶33-37 above. Lee's association claim fails to establish protected activity.

b. Lee's Opposition Claim

To establish a claim under the opposition clause, Lee must demonstrate that he was engaged in conduct that was in opposition to an unlawful practice of Group 1. *Payne v. McLemore's Wholesale & Retail Stores,* 654 F.2d 1130 (5th Cir. 1981). Again, the record is clear that it was Group 1 which protected Rose from Lee. In a never ending effort to find a claim, Lee attempts to re-write history to support his opposition claim; ignoring Lee's own attacks on Rose, such as: Lee's repeated efforts to have Rose terminated, Lee's accusing Rose of being verbally abusive and failing to follow management directives, and accusing Rose of engaging in illegal securities activities. *See* ¶¶32-35 above. It is also contrary to the corresponding animus Rose had toward Lee, such as: shouting she hated Lee, aggressively sticking her middle finger in his face, threatening to report Lee to his superior and calling him a fool. *See* ¶¶33-37above. It is also contrary to Rose's testimony that Lee referred to her as cancer in the office, that Lee, was trying to get rid of her, that Lee said that she could only flirt not sell, and that Rose actually quit her employment at Group 1 because of Lee. *See* ¶¶36-37 above.

Typical opposition conduct would involve an employee reporting harassment of a co-worker. *See Jenkins v. Orkin Exterminating Co.,* 646 F. Supp. 1274, 1277-78 (E.D.Tex.

1986)(holding that co-worker's report of harassment of colleague to corporate headquarters, calling for investigation and resulting in his termination, constituted protected opposition). Here, even though Lee had a friendship with the Manager of Human Resources and considered him a confidant, Lee never reported any improper conduct on the part of anyone as it elated to Rose. *See* ¶14 above. Rather, Lee's constant and repeated reports to Group 1 regarding Rose constituted his reports of her improper behavior and his efforts to have her terminated. *See* ¶¶32-36 above. Lee's opposition claim fails to establish a protected activity.

3. Adverse Employment Action

Lee claims he was terminated for the alleged protected activity. Apx. 12, 13 and 15, Plaintiff's Complaint ¶¶57, 58, 67, 68, 77, 78.

4. Lee cannot establish a causal connection between his association/ opposition/participation retaliation claims and his termination

Lee has the burden to come forward with evidence of a causal connection between his purported protected activity and his termination. There is no such evidence.

Further, Lee has no compelling temporal proximity argument. As to his alleged association/opposition conduct with Rose, Rose left the employment of Group 1 (as a result of the actions of Lee) in early **September 2002** and Lee was terminated **27 months later**. As to Lee's alleged participation conduct, he gave an interview in early **May 2003** and was terminated **20 months later**. *See* ¶¶36 and 39 above. These time periods are significantly longer than those recognized in case law to create a presumption of retaliation. For instance, a gap of six months from the filing of the lawsuit and eleven months from the filing of the EEOC charge is "too great to establish retaliation based merely on temporal proximity." *Foster v. Solvay Pharmaceuticals, Inc.*, 160 Fed. Appx. 385, 389 (5th Cir. 2005).

Only in the event that Lee has demonstrated protected activity and adverse employment action, and a causal connection between the protected activity and his termination, should a "modified *McDonnell Douglas*" framework be analyzed.[12] In *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305 (5th Cir. 2004), the Fifth Circuit modified the *McDonnell Douglas* burden-shifting paradigm. *See also Keelan v. Majesco Software, Inc.* 407 F.3d 332, 340-41 (5th Cir. 2005); *Martin v. El Nell Inc.*, 2005 WL 2148651, * 2 (N.D. Tex. Sept. 7, 2005)(Fitzwater, J.). The modified *McDonnell Douglas* framework consists of three stages (only after Lee has established a *prima facie* case), (1) the burden shifts to Group 1 to proffer "legitimate, nondiscriminatory reasons for its employment action and, if Group 1 meets its production burden then Lee must establish a fact issue in regard to either (2) a pretext analysis or (3) a mixed motive analysis). *See Keelan v. Majesco Software, Inc.*, 407 F.3d at 341.

5. Legitimate, nondiscriminatory basis for Lee's termination

Group 1's burden is "one of production, not proof, and involves no credibility assessments. *See Martin v. El Nell Inc.*, 2005 WL 2148651, * 2 (N.D. Tex. Sept. 7, 2005)(Fitzwater, J.). Nonetheless, Group 1 has come forward with substantial evidence as to legitimate, nondiscriminatory basis for Lee's termination. In this regard, Group 1 has established that (1) Lee's job was to "build a team that would accomplish a repeatable sustainable, predictable revenue stream" (which Lee agreed with and admitted that he failed in that regard), (2) at the time of Lee's termination his region was the lowest performing region in his supervisor's territory and obtained only 48% of his quota attainment, (3) that Lee's deficiencies in

[12] As stated above and as this Court noted in *Akop v. Goody Goody Liquor, Inc.*, 2006 WL 119146, *11 (N.D.Tex. January 17, 2006), the Fifth Circuit has not conclusively resolved whether the modified *McDonnell Douglas* framework applies to Title VII retaliation claims. However, again as this Court notes, the Fifth Circuit has applied this standard to retaliatory discharge claims under the Family Medical Leave Act and some district courts in the Fifth Circuit have applied the framework to retaliation claims under Title VII. *Id.* at *10. Therefore, Group 1 will analyze the retaliation claims under the modified *McDonnell Douglas* standard given that such an analysis

regard to the ability to achieve quarter–to-quarter quota attainment had been noted and its importance pointed out to Lee, Lee acknowledged that this was a requirement of the job, (4) the importance of maintaining a pipeline of sales which Lee failed to do, (5) Lee failed to motivate his team which is demonstrated in the affidavits of the two employees who worked for Lee that testified to his poor management, the low morale caused by his management style of deceit and his inappropriate behavior resulting in lost sales (one quit because of Lee and returned when Lee was fired and the other was about to leave when Lee was fired), (6) Lee deflected responsibility to others for areas that were his responsibility, and (7) the testimony of current and former employees shows Lee was terminated for these legitimate non-discriminatory reasons. *See* ¶15 above. Group 1 has established legitimate, nondiscriminatory reasons for Lee's termination.

6. Lee cannot establish pretext in regard to each of the legitimate, nondiscriminatory reasons given for is termination

Under the pretext alternative, Lee must "offer sufficient evidence to create a genuine issue of material fact that Group 1's reasons are not true, but instead are a pretext for discrimination. *Martin v. El Nell Inc.*, 2005 WL 2148651, * 2 (N.D. Tex. Sept. 7, 2005)(Fitzwater, J.). Lee has the burden to "put forward evidence to rebut *each one* of a defendant's nondiscriminatory explanations for the employment decision at issue. Thus, a plaintiff relying upon evidence of pretext to create a fact issue on discriminatory intent falters if he fails to produce evidence rebutting *all* of a defendant's proffered nondiscriminatory reasons." *Id.* at *8, *citing Machinchick v. PB Power, Inc.*, 398 F.3d 345, 351 (5th Cir. 2005)(emphasis added). Lee must demonstrate that "but for" his alleged protected activity he would not have been terminated. *Mukerji v. Southern University of New Orleans,* 2006 WL 3760253 (E.D. La. December 18, 2006).

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encompasses the traditional *McDonnell Douglas* framework (pretext) and, as this Court did in *Akop*, assume for

Lee cannot meet his burden. Empirically and admittedly, Lee's sales were below quota. *See* ¶15 above. Further, Lee has admitted that his performance was "subpar," you are subject to termination if you have two consecutive quarters below quota attainment, and that he had three consecutive quarters below quota at the time of his termination. *See* ¶15 above. Two former sales associates who worked for Lee have sworn that Lee was a poor manager, that he lied about associates to cover up his own mistakes, that morale was poor as a result and that Lee was abusive and that sales were lost because of Lee's inappropriate behavior. *See* ¶15 above. Such evidence, including Lee's own testimony, establishes through persons that no longer even work for Group 1 that Group 1 was justified in its termination of Lee for legitimate business reasons.

7. Lee would have been terminated regardless of any improper consideration argued by Lee

Under the mixed motive analysis, Lee needs to offer sufficient evidence to create a genuine issue of fact that Group 1's "reason for terminating him, although true, was but one of the reasons for its conduct, another of which was retaliation." *Akop v. Goody Goody Liquor, Inc.,* 2006 WL 119146, *10 (N.D. Tex. January 17, 2006), *citing Rachid v. Jack in the Box, Inc.,* 376 F.3d 305, 312 (5th Cir. 2004). Only upon such an evidentiary demonstration by Lee does the burden shift to Group 1 to show "it would have taken the same employment action in the absence of the impermissible motivating factor." *Rachid v. Jack in the Box, Inc.,* 376 F.3d 305, 312-13 (5th Cir. 2004).

Here, Lee has no evidence that a prohibited consideration was involved in his termination. As discussed above, Lee does not even have a colorable temporal proximity argument. The fact that the legitimate business reasons for Lee's termination were so overwhelming this is strong evidence that Group 1 would have taken the same employment

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purposes of argument the modified analysis applies (mixed motive).

action regardless of Lee's claim of improper consideration. Lee, as did all witnesses, testified that Group 1 was "a numbers driven company" and that you had to "hit the numbers" to keep your job and that Lee, admittedly was not hitting his numbers and had not been hitting his numbers for nine months at the time of his termination. *See* ¶15 above. In fact, in Lee's meeting with the Manager of Human Resources for Group 1 shortly before he was terminated, Lee acknowledged that his job was "hanging by thread" because of his poor numbers. *See* ¶14 above. In the telephone calls that Lee surreptitiously recorded, he was repeatedly told that he needed to hit his sales numbers and build his pipeline of sales – both of which he failed to do. *See* ¶20 above. Group 1 has also submitted summary judgment evidence for the additional legitimate business reasons for which Lee was terminated: testimony from Teicher and two former sales associates of Lee regarding the poor morale in Lee's region and Lee's poor management; in addition to the testimony of Reisher and Bowen. *See* ¶15 above.

Also, Lee's own sworn testimony, if it is to be believed (and if it is not, it should not form the basis for a mixed motive defense) establishes that he would have been terminated regardless of his purported support of Rose. Lee has sworn he was terminated for supporting Hawkins and Dube, which are not part of his claims in this lawsuit. *See* ¶¶41-43 above. Of course, Group 1 denies such facts, but Lee should be required to accept his own sworn testimony which means he would have been terminated regardless of his purported assistance to Rose. Lee has previously sworn that he was also terminated for the issues raised in his SOX complaint, which were dismissed and he has subsequently tried to abandon as the cause for his termination. *See* ¶¶22-26 above. Again, Group 1 denies such allegations, but Lee should be required to accept his own sworn testimony which means he would have been fired regardless of his purported assistance to Rose.

V.
ATTORNEYS' FEES

Group 1 requests that the Court award it attorneys' fees under Title VII. Such fees can be awarded to a successful defendant "only upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." *See Akop,* 2006 WL 119146, *12; *quoting Tutton v. Garland Indep. Sch. Dist.*, 733 F. Supp. 1113, 1117 (N.D. Tex. 1990)(internal quotation marks omitted). Plaintiff has provided numerous and conflicting explanations, under oath, as to the reasons for his termination – although he somehow always misses the obvious, his poor sales numbers, poor pipeline and poor management style – legitimate business reasons for Lee's termination which his own testimony confirms. Having failed in his exhaustive effort before OSHA, Lee abandoned those numerous and detailed sworn reasons for his termination, after consultation with his lawyer, and then asserted with the EEOC outrageous claims of support for three female employees that Lee knew that he not only did not support but whom he harassed, according to the female employees themselves. In this lawsuit, Lee abandons most of those previous reasons sworn to for his termination, setting upon his claim as to Rose in this suit, knowing that in the short time he supervised her that he repeatedly sought Rose's termination (including, as recently as just a week or so before she quit) and that Rose quit her employment with Group 1 because of Lee. Further, Lee knew that it was Group 1 that was protecting Rose from Lee. By his own sworn testimony and the conflicting reasons Lee has provided for his termination, Lee knew this action against Group 1, based upon his purported protection of Rose, is frivolous, unreasonable or without foundation. Group 1 prays that the Court award it reasonable attorneys' fees.

VI.
PRAYER

Wherefore, premises considered, Defendant prays that its Motion for Summary Judgment be granted in all respects, and that it be awarded attorney's fees and costs and such other and further relief to which it is justly entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that on May 15, 2007, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case files system of the court. The electronic case files system sent a "Notice of Electronic Filing" to the following individuals who have consented in writing to accept this Notice as service of this document by electronic means: Matthew Hill, Esq., 8080 North Central Expressway, Suite 1480, Dallas, Texas 75206.

Bobby G. Pryor