IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MICHAEL DOBBS, Plaintiff, v. MARTIN MARIETTA MATERIALS, INC., Defendant.	CIVIL ACTION FILE NO. 1:19-cv-04170-MHC-LTW

MAGISTRATE JUDGE'S FINAL REPORT AND RECOMMENDATION

Plaintiff Michael Dobbs filed the above-styled employment discrimination action on September 16, 2019. [Doc. 1]. Plaintiff Dobbs asserts claims against Defendant Martin Marietta Materials, Inc. ("Martin Marietta") pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* [Id.]. Plaintiff alleges that Defendant terminated his employment and refused to rehire him on the basis of his age and in retaliation for his complaints of age discrimination. [Doc. 1, Counts I, II]. This case is presently before the Court on two Motions for Summary Judgment [Docs. 49, 70] filed by Defendant Martin Marietta pursuant to Federal Rule of Civil Procedure 56.

DEFENDANT'S FIRST SUMMARY JUDGMENT MOTION

I. FACTS

Defendant Martin Marietta hired Plaintiff Michael Dobbs in 1999. [Doc. 84-2, Plaintiff's Statement of Additional Material Facts Responding to Defendant's Second Summary Judgment Motion ("PSMF2") ¶ 1]. Plaintiff Dobbs is sixty-six years old. [Id.]. Defendant Martin Marietta is in the business of supplying aggregates and heavy building materials, such as asphalt for roads and sidewalks. [PSMF2 ¶ 2]. Dobbs is an experienced manager of quarries where aggregate plants operate. [PSMF2 ¶ 3]. During the relevant time period, Dobbs served as either Plant Manager or Area Manager over Defendant's Forsyth Quarry in North Georgia. [PSMF2 ¶ 4]. While Dobbs was employed by Defendant, he was highly regarded by the Southeast Region President Joe Reilly. [PSMF2 ¶ 5].

On June 26, 2017, Martin Marietta issued a press release announcing its intent to acquire Bluegrass Materials Company ("Bluegrass") in a $1.625 billion transaction. [PSMF2 ¶ 6]. This transaction caught the attention of the U.S. Department of Justice's ("DOJ") Antitrust Division, and Assistant U.S. Attorney Kerrie Freeborn began investigating the Bluegrass acquisition in the summer of 2017. [PSMF2 ¶ 7]. Freeborn "investigate[s] proposed transactions to determine if there would be anticompetitive results and, if appropriate, either litigate or settle those investigations." [PSMF2 ¶ 8].

By January 2018, Defendant proposed divestiture of one of its Georgia quarries, its Forsyth Quarry, in exchange for being able to acquire Bluegrass. [PSMF2 ¶ 9]. The plant manager who ran the Forsyth Quarry until approximately January 2018 was Wilson Lin, who is approximately thirty-three years old. [PSMF2 ¶ 10]. Plaintiff Dobbs was Lin's supervisor. [PSMF2 ¶ 24]. Southeast Region President Joe Reilly made inquiries, unbeknownst to Dobbs and without Dobbs expressing an intent to retire, regarding when Dobbs planned to retire. [PSMF2 ¶ 17].

On February 8, 2018, Defendant's management forwarded an internal communication where its General Counsel and relevant Human Resources staff identified all of the employees at Forsyth who would be going to Midsouth as part of the sale. [PSMF2 ¶ 21]. Each Forsyth employee's birth date was listed in these communications. [PSMF2 ¶ 22].

On or about February 12, 2018, Reilly met with Forsyth Quarry employees, in Plaintiff Dobbs' presence, to inform them that Martin Marietta would be divesting its quarry as part of the Bluegrass transaction and the employees would be changing employers to work for the acquirer (MidSouth). [PSMF2 ¶ 23; Doc. 49-1, Defendant's Statement of Material Facts in Support of First Summary Judgment Motion ("DSMF1") ¶ 2]. Forsyth Quarry Plant Manager Wilson Lin was also at this meeting.

[PSMF2 ¶ 24]. No one informed Plaintiff Dobbs, Lin's supervisor, that Lin had been promoted and would not be going with the rest of the Forsyth crew. [PSMF2 ¶ 24].

Region President Joe Reilly then met privately with Plaintiff Dobbs on the same day, February 12, 2018. [PSMF2 ¶ 25]. Dobbs wrote a memo stating that Reilly said the following:

> [T]he Department of Justice said that the company needed to keep Forsyth operating. They would have to retain the crew and have management available. Joe [Reilly] said the plant manager will be transferred to engineering and I would be offered to the new buyers to run the operation. I would receive $100,000 as a retention bonus to stay on for two years. I was in shock at the separation. Joe said I would be made whole in the transaction between companies.

[Id.]. Plaintiff testified that he understood that his employment was going to be separated from Martin Marietta and that this was a requirement with the DOJ. [Doc. 79, Plaintiff's Deposition ("Pla. Dep.") at 36, 89-92]. Plaintiff also testified that Reilly told him that if he tried to apply for employment at Martin Marietta, he would not be rehired. [Pla. Dep. at 151-52]. Plaintiff was asked and testified to the following:

> Q. On February 12th of 2018, did you think that – that the reason for your demotion and for your separation from Martin Marietta was based at all on your age?
> A. Yes.
> Q. So as early as February 12th of 2018, you had personally reached the conclusion that Martin Marietta was demoting you and was going to terminate you based on your age, correct?
> A. Correct.

[Pla. Dep. at 92-93]. Plaintiff testified that at some point during the next two weeks, he spoke to the Buckley Beal law firm because he was interested in filing a wrongful termination claim against Martin Marietta. [Pla. Dep. at 146-48].

Plaintiff Dobbs testified that on April 10, 2018, Region President Joe Reilly again notified Dobbs that his employment was ending and that he was not eligible for rehire based on the DOJ's ruling. [DSMF1 ¶ 1; Pla. Dep. at 149, 272-74]. Plaintiff documented the April 10, 2018 conversation in his contemporaneous notes: "4/10 - Called to office for a meeting with Joe [Reilly], Curt [Neth] & Rich [Knizer]. I was told the D.O.J. is requiring me to stay at Forsyth to run the plant. I would receive 100K severance and not be eligible for rehire with Martin." [DSMF1 ¶ 7; Pla. Dep. at 34-35, 39-41, Ex. 1 at 5]. Plaintiff was asked and testified to the following:

> Q. So on April 10th, once again, you knew that you were being separated from employment at Martin Marietta, just like you had previously thought that to be the case back in February – on February 12th of 2018, correct?
> A. That's what I was told, yes.
> Q. Okay. So now – so now on April 10, 2018, once again you're thinking to yourself, wait a second, this could be a wrongful termination, correct?
> A. Correct.
> Q. Okay. And was that because you thought they were treating you differently based on your age?
> A. Because they transferred a younger plant manager that should have been there. And there's another plant managers that could have ran the plant, yes.
> Q. Right. So as of April 10, 2018, you had reached the conclusion that you were being terminated based on your age, correct?
> A. Yes.

[Pla. Dep. at 149]. Plaintiff was also asked and testified:

> Q. [B]ack on April 10th of 2018, you had reached the conclusion that they were treating you poorly in order to favor a younger employee, is that fair?
> A. I felt that.
> Q. Okay. Back on April 10th of 2018?
> A. I felt that in February when they told me they were transferring Wilson Lin out.

[Pla. Dep. at 180-81]. When the acquisition and divestment closed, Plaintiff became a Midsouth employee. [DSMF1 ¶ 10].

On October 22, 2018, Plaintiff Dobbs filed his first charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). [Pla. Dep. at 164; Doc. 49-2, Ex. 7; DSMF1 ¶ 13]. Plaintiff alleged in the EEOC charge that Defendant Martin Marietta terminated him and refused to rehire him based on age and retaliation. [Doc. 49-2, Ex. 7; DSMF1 ¶ 14]. Plaintiff also alleged that Martin Marietta claimed that its employees at the most profitable location "could not transfer to another location to remain with the company, but it permitted Wilson [Lin], who was the Plant Manager subordinate to me, and two other younger employees with qualifications inferior to mine, to transfer to another location to preserve their jobs." [Doc. 49-2, Ex. 7].

On September 16, 2019, approximately eleven months after Plaintiff filed his first EEOC charge, he filed the present lawsuit asserting claims against Defendant Martin Marietta for age discrimination and retaliation based on the ADEA. [Doc. 1].

On June 10, 2020, Plaintiff filed a second EEOC charge alleging failure-to-hire based on age discrimination and retaliation. [DSMF1 ¶ 17; Doc. 49-2 at 45].

Additional facts will be set forth as necessary during discussion of the parties' arguments.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "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). The movant bears the initial responsibility of asserting the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Apcoa, Inc. v. Fidelity Nat'l Bank, 906 F.2d 610, 611 (11th Cir. 1990). The movant is not required, however, to negate its opponent's claim; the movant may discharge its burden by merely "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325. After the movant has carried its burden, the non-moving party is then required to "go beyond the pleadings" and present competent evidence designating specific facts showing that there is a genuine disputed issue for trial; the non-moving party may meet its burden through affidavit and deposition testimony, answers to interrogatories, and the like. Id. at 324 (quoting Fed. R. Civ. P. 56(e)).

While the court is to view all evidence and factual inferences in a light most favorable to the non-moving party, Nat'l Parks Conservation Ass'n v. Norton, 324 F.3d 1229, 1236 (11th Cir. 2003), "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original). A fact is material when it is identified as such by the controlling substantive law. Id. at 248. Moreover, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citations omitted). Instead, "the nonmoving party must present evidence beyond the pleadings showing that a reasonable jury could find in its favor." Fickling v. United States, 507 F.3d 1302, 1304 (11th Cir. 2007) (citing Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990)). An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." Anderson, 477 U.S. at 249-50. Thus, the Federal Rules mandate the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of *every* element essential to that party's case on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322.

III. DISCUSSION

A. Timeliness of EEOC Charge

Defendant Martin Marietta, as previously noted, has filed two Motions for Summary Judgment [Docs. 49, 70]. In its first summary judgment motion, Defendant argues that Plaintiff Dobbs' ADEA discrimination and retaliation claims are time-barred. [Doc. 49]. According to Defendant, Plaintiff failed to file an EEOC charge of discrimination within 180 days of receiving notice of the adverse employment action. [Id.]. Defendant contends that because Plaintiff's EEOC charge was untimely, summary judgment is warranted and his Complaint should be dismissed. [Id.].

"The ADEA requires that an individual exhaust available administrative remedies by filing a charge of unlawful discrimination with the EEOC before filing a lawsuit." Bost v. Fed. Express Corp., 372 F.3d 1233, 1238 (11th Cir. 2004); accord 29 U.S.C. § 626(d); Duble v. FedEx Ground Package Sys., Inc., 572 F. App'x 889, 892 (11th Cir. 2014) ("Prior to filing an action in federal court for discrimination or retaliation, a plaintiff must file an administrative charge with the EEOC.") (citing Gregory v. Georgia Dep't of Human Resources, 355 F.3d 1277, 1279 (11th Cir. 2004)). "The purpose of the exhaustion requirement is to allow the EEOC the first opportunity to investigate the alleged practices and to perform its role 'in obtaining voluntary compliance and promoting conciliation efforts.'" Duble, 572 F. App'x at 892 (quoting

Gregory, 355 F.3d at 1279). A "plaintiff must file a timely charge of discrimination with the EEOC within 180 days of the last discriminatory act." H&R Block Eastern Enterprises, Inc. v. Morris, 606 F.3d 1285, 1295 (11th Cir. 2010) (citation omitted); accord Wilkerson v. Grinnell Corp., 270 F.3d 1314, 1317 (11th Cir. 2001) ("For a charge to be timely in a non-deferral state such as Georgia, it must be filed within 180 days of the last discriminatory act."). A failure to file a charge with the EEOC within the 180-day time period bars a plaintiff's claims. See Ross v. Buckeye Cellulose Corp., 980 F.2d 648, 662 (11th Cir. 1993).

The Supreme Court, however, has held that the "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982). "Under equitable modification, a limitations period does not start to run until the facts which would support a charge of discrimination are apparent or should be apparent to a person with a reasonably prudent regard for his rights." Sturniolo v. Sheaffer, Eaton, Inc., 15 F.3d 1023, 1025 (11th Cir. 1994). "Equitable tolling allows a plaintiff to avoid the bar of the limitations if, despite all due diligence, he is unable to obtain vital information bearing on the existence of his claim." Smiley v. Alabama Dep't of Transp., 778 F. Supp.2d 1283, 1294 n.7 (M.D. Ala. 2011). "The Plaintiff has the burden of proving

that equitable tolling is appropriate." Pierri v. Cingular Wireless, LLC, 397 F. Supp. 2d 1364, 1373 (N.D. Ga. 2005) (citing Ross, 980 F.2d at 660). The Court finds that Plaintiff Dobbs has not carried this burden.

The Eleventh Circuit has held, "The 180 days begins running from the date the employee knows or reasonably should know that he or she has been discriminated against." Hill v. Metro. Atlanta Rapid Transit Auth., 841 F.2d 1533, 1545 (11th Cir. 1988), opinion amended on reh'g, 848 F.2d 1522 (11th Cir. 1988); accord Grayson v. K Mart Corp., 79 F.3d 1086, 1100 n.19 (11th Cir. 1996) ("[T]he time for filing an EEOC charge begins to run when the employee receives unequivocal notice of the adverse employment decision."). Defendant Martin Marietta argues Plaintiff Dobbs knew or reasonably should have known that he was being subjected to discrimination on February 12, 2018, and no later than April 10, 2018. [Doc. 49 at 3-5, 8]. According to Defendant, Plaintiff was informed on these dates his employment with Martin Marietta was ending and he would not be rehired, and Plaintiff concluded that his age was the real reason for the termination decision. [Id.]. Defendant argues that because the limitations clock started no later than April 10, 2018, the 180-day time period expired on October 8, 2018 at the latest. [Id.].

In response, Plaintiff Dobbs argues that Defendant gave him "notice of termination on April 10, 2018, but Dobbs had no notice of tangible adverse action if,

at the same time of this notice of termination, he was told he would be made whole by immediately having another job at the same salary, and be paid out his entire pension and stock."[1] [Doc. 83 at 13]. Plaintiff also contends that he "did not have facts to support his age discrimination claim with respect to MM's selection of him to go to Midsouth until he found out that MM lied to him about the reason for his termination." [Doc. 83 at 14]. Finally, Plaintiff argues the EEOC deadline should be equitably tolled because "he did not have notice of an age discrimination claim on [April 10, 2018] because Defendant affirmatively deceived him about the reasons for his termination." [Doc. 83 at 15]. According to Plaintiff, he "did not learn the facts necessary to act on his suspicion of age discrimination until he received inadequate payment for his pension loss on May 15, 2018" and he was "unaware that Defendant lied to him about the substantive reason for his termination until January 7, 2019."[2] [Doc. 83 at 18]. The Court finds Plaintiff's arguments unpersuasive.

"It is not necessary for a plaintiff to know all the facts that support his claim in order to file a claim." Sturniolo, 15 F.3d at 1025 (citation omitted). "[A] plaintiff who is aware that [he] is being replaced in a position [he] believes [he] is able to handle by

[1] Plaintiff does not offer any citation to the record in support of this assertion. [Doc. 83 at 13].

[2] Again, Plaintiff does not offer a single citation to the record in support of any of these assertions. [Doc. 83 at 14].

a person outside the protected age group knows enough to support filing a claim." Id. (citation and internal quotation marks omitted). In the present case, Plaintiff testified that he felt he was being subjected to age discrimination as early as February 12, 2018. On that date, Plaintiff understood from Martin Marietta's Southeast Region President Joe Reilly that his employment was going to be separated and that if he again tried to apply for employment with Martin Marietta, he would not be rehired. [Pla. Dep. at 36, 89-92, 151-52]. Plaintiff also testified that by February 12, 2018, he had concluded that Martin Marietta's decision to terminate his employment was based on his age. [Id. at 92-93]. Plaintiff explained that he arrived at this conclusion when he learned that Martin Marietta permitted a younger employee, Wilson Lin, "who was the Plant Manager subordinate to [Plaintiff], and two other younger employees . . . to transfer to another location to preserve their jobs." [Doc. 49-2, Ex. 7; PSMF2 ¶¶ 10, 24].

As previously noted, "a limitations period does not start to run until the facts which would support a charge of discrimination are apparent or should be apparent to a person with a reasonably prudent regard for his rights." Sturniolo, 15 F.3d at 1025. Plaintiff now asserts that he "did not have facts to support his age discrimination claim" until after April 10, 2018. [Doc. 83 at 14]. However, Plaintiff's deposition testimony contradicts this assertion. Plaintiff was asked and testified to the following:

> Q. On February 12th of 2018, did you think that – that the reason for your demotion and for your separation from Martin Marietta was based at all on your age?
> A. Yes.
> Q. So as early as February 12th of 2018, you had personally reached the conclusion that Martin Marietta was demoting you and was going to terminate you based on your age, correct?
> A. Correct.

[Pla. Dep. at 92-93]. Plaintiff was also asked and testified:

> Q. [B]ack on April 10th of 2018, you had reached the conclusion that they were treating you poorly in order to favor a younger employee, is that fair?
> A. I felt that.
> Q. Okay. Back on April 10th of 2018?
> A. I felt that in February [of 2018] when they told me they were transferring Wilson Lin out.

[Pla. Dep. at 180-81]. In addition, Plaintiff was asked and testified to the following:

> Q. So on April 10th, once again, you knew that you were being separated from employment at Martin Marietta, just like you had previously thought that to be the case back in February – on February 12th of 2018, correct?
> A. That's what I was told, yes.
> Q. Okay. So now – so now on April 10, 2018, once again you're thinking to yourself, wait a second, this could be a wrongful termination, correct?
> A. Correct.
> Q. Okay. And was that because you thought they were treating you differently based on your age?
> A. Because they transferred a younger plant manager that should have been there. And there's another plant managers that could have ran the plant, yes.
> Q. Right. So as of April 10, 2018, you had reached the conclusion that you were being terminated based on your age, correct?
> A. Yes.

[Pla. Dep. at 149]. Finally, Plaintiff testified that in the latter part of February 2018, after he believed that Martin Marietta made the decision to terminate his employment based on his age, he spoke to the Buckley Beal law firm because he was interested in filing a wrongful termination claim against the company. [Pla. Dep. at 146-48].

In an attempt to argue that his EEOC charge was timely, Plaintiff points to actions that occurred after his notice of termination, such as receiving "inadequate payment for his pension loss" and learning that Defendant allegedly "lied to him about the substantive reason for his termination." [Doc. 83 at 18]. However, these later actions do not save Plaintiff's untimely claim. As noted *supra*, Plaintiff Dobbs repeatedly, consistently, and unambiguously testified that as early as February 12, 2018, and no later than April 10, 2018, he believed that Defendant Martin Marietta was subjecting him to discrimination based on his age. On these dates, Defendant informed Plaintiff that the company had made the decision to terminate his employment and that he was not eligible for rehire. The fact that other actions related to the termination decision occurred at a later time is not relevant to the issue of whether Plaintiff filed his EEOC charge in a timely manner.

"The limitations period begins to run when the challenged employment decision is made and the employee receives notice of the allegedly discriminatory act, not when the consequences of the decision become painful to the employee." Davis v. DeKalb

County, Georgia, No. 1:03-CV-2853-WSD, 2005 WL 8154356, at *6 (N.D. Ga. May 31, 2005), report and recommendation adopted, No. 1:03-CV-2853-WSD, 2005 WL 8154358 (N.D. Ga. July 25, 2005) (citing Delaware State College v. Ricks, 449 U.S. 250, 257, 259 (1980); Brewer v. Alabama, 111 F. Supp. 2d 1197, 1205 (M.D. Ala. 2000) ("The limitations period begins to run when an employee receives notice of the alleged discriminatory act, not the point at which the consequences of the act become painful.") (citation and internal quotation marks omitted)). "In holding that the triggering event for limitations purposes is the employer's notice to the employee of the adverse employment decision, the Supreme Court explained that the act of termination is not itself illegal. . . . Rather, the illegal act is the improper motive in the employment decision itself." Brewer, 111 F. Supp. 2d at 1205 (citing Ricks, 449 U.S. at 258-59); accord Wright v. AmSouth Bancorporation, 320 F.3d 1198, 1201 (11th Cir. 2003) ("[A] final decision to terminate, rather than actual termination, constitutes the alleged unlawful practice that triggers the filing period. Thus, the 180–day period is counted from the date the employee receives notice of termination.") (citing Cocke v. Merrill Lynch & Co., Inc., 817 F.2d 1559, 1561 (11th Cir. 1987) (internal quotation marks omitted)). Consequently, "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002).

Because "the 180–day period is counted from the date the employee receives notice of termination[,]" the time period for Plaintiff Dobbs to file an EEOC charge began running no later than April 10, 2018. Wright, 320 F.3d at 1201 (citing Cocke, 817 F.2d at 1561) (internal quotation marks omitted). This means that Plaintiff was required to file his EEOC charge on or before October 8, 2018.[3] Plaintiff, however, waited until October 22, 2018, to file a charge of discrimination with the EEOC. [Pla. Dep. at 164; Doc. 49-2, Ex. 7; DSMF1 ¶ 13].

In summary, Eleventh Circuit caselaw holds that the limitations period begins to run when "the facts which would support a charge of discrimination are apparent or should be apparent to a person with a reasonably prudent regard for his rights." Sturniolo, 15 F.3d at 1025. Plaintiff Dobbs consistently testified that as early as February 12, 2018, and no later than April 10, 2018, he believed that Defendant Martin Marietta made the decision to terminate his employment on the basis of his age. Given Plaintiff's own unambiguous testimony, a reasonable factfinder could not conclude that Plaintiff did not have facts to support his age discrimination claim until after April 10, 2018. Despite Plaintiff's belief on February 12 and April 10, 2018, that Defendant was subjecting him to age discrimination, Plaintiff did not file an EEOC charge until

[3] One-hundred and eighty days after April 10, 2018 was October 7, 2018, but this date was a Sunday.

October 22, 2018, two weeks after the 180-day deadline passed. See Moses v. Crestline Hotels & Resorts, Inc., No. 1:09-CV-917-ODE-ECS, 2009 WL 10670686, at *3 (N.D. Ga. Sept. 21, 2009) (dismissing Title VII claim because the EEOC "charge was filed one day too late"), report and recommendation adopted, 2009 WL 10671858 (N.D. Ga. Oct. 15, 2009). Because Plaintiff did not file an EEOC charge within the limitations period set forth by the ADEA and he has not pointed to facts which would permit a reasonably jury to find that the limitations period should be equitably tolled, the Court concludes that Plaintiff's ADEA claims are time-barred. It is, therefore, **RECOMMENDED** that Defendant Martin Marietta's First Motion for Summary Judgment [Doc. 49] be **GRANTED** on Plaintiff Dobbs' ADEA claims, which are the only claims asserted by Plaintiff in his Complaint [Doc. 1].

B. ADEA Retaliation Claim

Defendant also persuasively argues Plaintiff's ADEA retaliation claim should be dismissed for another independent reason; namely, the claim is temporally impossible. [Doc. 49 at 8-9]. The ADEA prohibits an employer from retaliating against an employee who has "opposed any practice made unlawful" by the ADEA. 29 U.S.C. § 623(d). Plaintiff Dobbs alleges that Defendant terminated his employment and refused to rehire him in retaliation for his complaints of age discrimination. [Doc. 1, Count II].

When a plaintiff brings a retaliation claim pursuant to the ADEA, the claim is evaluated using the burden-shifting framework established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See King v. Adtran, Inc., 626 F. App'x 789, 792 (11th Cir. 2015) (citing Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 919 (11th Cir. 1993)). Under this framework, the allocation of burdens and order of presentation and proof are as follows: (1) the plaintiff has the burden of proving a *prima facie* case of retaliation; (2) if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant to articulate some legitimate, non-retaliatory reason for the action taken against the employee; and (3) should the defendant carry this burden, the plaintiff must have an opportunity to prove that the legitimate reason offered by the defendant was a pretext for retaliation. See McDonnell Douglas, 411 U.S. at 802-05. "A plaintiff alleging retaliation establishes a prima facie case by showing that (1) he engaged in a statutorily protected expression, (2) he suffered an adverse employment action, and (3) there was a causal link between the protected expression and the adverse action." King, 626 F. App'x at 792 (citing Hairston, 9 F.3d at 919).

Plaintiff is unable to establish a *prima facie* case of retaliation under the ADEA because he cannot show that any protected activity was causally related to his termination. Plaintiff alleges in his Complaint that he engaged in protected expression

when he filed his EEOC charge alleging age discrimination (and retaliation) on October 22, 2018. [Doc. 1 at 20; Doc. 49-2, Ex. 7]. Plaintiff also asserts in his response brief that he "expressed a concern that Defendant was discriminating against him based on his age on August 23, 2018, to Defendant's Chief Human Resources Officer and General Counsel." [Doc. 83 at 22].[4] The deficiency in Plaintiff's argument is that both of these complaints of alleged discrimination occurred *after* Defendant made the decision to terminate Plaintiff's employment.

Plaintiff testified that on February 12, 2018, Southeast Region President Joe Reilly informed Plaintiff that his employment was going to be separated from Martin Marietta and that he would not be rehired. [Pla. Dep. at 36, 89-92, 151-52]. Plaintiff testified that on April 10, 2018, Reilly again notified him that his employment was ending, and he was not eligible for rehire. [DSMF1 ¶ 1; Pla. Dep. at 149, 272-74]. Plaintiff, however, alleges that the first time he engaged in protected activity was four months later on August 23, 2018. [Doc. 83 at 22].

"Logic dictates that the protected conduct must precede the act of retaliation." Tucker v. Florida Dep't of Transportation, 678 F. App'x 893, 896 (11th Cir. 2017) (citing Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 799 (11th Cir. 2000)

[4] Plaintiff offers no citation to the record in support of this assertion. [Doc. 83 at 22].

("A decision maker cannot have been motivated to retaliate by something unknown to him.")). Because the record reveals that Defendant announced its decision to terminate Plaintiff's employment months prior to his complaints of discrimination, Plaintiff is unable to show that the termination decision was causally connected to any of his protected activity. See Tucker, 678 F. App'x at 896; Kenfield v. Colorado Dep't of Public Health & Environment, 557 F. App'x 728, 733 (10th Cir. 2014) ("By its very nature, retaliatory conduct must come *after* the protected activity.") (emphasis in original); Pipkins v. City of Temple Terrace, Florida, 267 F.3d 1197, 1201 (11th Cir. 2001) ("Even assuming, however, that Houldsworth suffered an adverse employment action, any protected expression on her part occurred only after the commencement of the adverse employment actions of which she complains."). Plaintiff has not created a genuine issue of material fact with respect to whether he was terminated based on any protected activity. Therefore, he is unable to establish a *prima facie* case of retaliation and summary judgment is warranted on Plaintiff's ADEA retaliation claim.

DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT

Defendant Martin Marietta filed a Second Motion for Summary Judgment on March 17, 2021. [Doc. 70]. Defendant's arguments in the second motion address the merits of Plaintiff Dobbs' ADEA age discrimination and retaliation claims. [Id.]. Because the Court finds that Defendant's First Motion for Summary Judgment should

be granted and all of Plaintiff's claims dismissed, it is **RECOMMENDED** that Defendant's Second Motion [Doc. 70] for Summary Judgment be **DENIED AS MOOT**.

IV. CONCLUSION

Based on the foregoing reasons and cited authority, the undersigned **RECOMMENDS** that Defendant Martin Marietta's First Motion for Summary Judgment [Doc. 49] be **GRANTED** on Plaintiff Dobbs' claims and that this action be **DISMISSED WITH PREJUDICE**.

The undersigned further **RECOMMENDS** that Defendant's Second Motion [Doc. 70] for Summary Judgment be **DENIED AS MOOT**.

As this is a Final Report and Recommendation and there are no other matters pending before this Court, the Clerk is directed to terminate the reference to the undersigned.

SO REPORTED AND RECOMMENDED, this 22 day of June, 2021.

Linda T. Walker

LINDA T. WALKER
UNITED STATES MAGISTRATE JUDGE