IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

CLIVE B. HILGERT, Plaintiff, V. GEORGE S. MAY INTERNATIONAL COMPANY, Defendant.	§ § § § § § § § § §	CASE NO. 7:07-cv-00094 consolidated with 7:09-cv-00154

DEFENDANT'S RULE 12(b)(6) MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

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	§	
Plaintiff,	§	
	§	
V.	§	CASE NO. 7:07-cv-00094
	§	consolidated with 7:09-cv-00154
GEORGE S. MAY INTERNATIONAL COMPANY,	§	
	§	
	§	
Defendant.	§	

DEFENDANT'S RULE 12(b)(6) MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

Defendant George S. May International Company ("May") files this motion to dismiss Plaintiff Clive B. Hilgert's discrimination and retaliation claims under Federal Rule of Civil Procedure 12(b)(6) and motion for summary judgment under Federal Rule of Civil Procedure 56, showing in support as follows:

I. INTRODUCTION

May terminated Hilgert from his sales position because he did not generate any sales for over three months.[1] Despite this undisputed fact, Hilgert recently filed a new lawsuit against May ("the consolidated Complaint") on June 4, 2009.[2] In the consolidated Complaint, Hilgert brings three causes of action: (1) a claim labeled as "age discrimination," (2) a claim of unlawful retaliation under Title VII of the Civil Rights act of 1964, as amended, 42 U.S.C. §2000e, *et. seq*. ("Title VII"), and (3) a purported common law based "public policy" claim for wrongful termination. All three claims fail as a matter of law, as summarized below.

[1] Ex. B., Hilgert Dep. at 289-90; Ex. C., Affidavit of Brian Vaill at ¶ 4.

[2] *See* Ex. A., Hilgert's New Complaint. The Court consolidated Hilgert's new lawsuit with this case on August 6, 2009. *See* August 6, 2009 Minute Entry.

Hilgert's age discrimination claim fails for two reasons. First, his pleading is substantively deficient because he has not pled any of the elements necessary to establish a *prima facie* case of age discrimination; nor has he provided any factual support to establish any of those elements. Instead, Hilgert's pleading provides nothing more than a naked assertion of "age discrimination"—and thus it does not satisfy the pleading requirements recently set forth by the United States Supreme Court. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (Neither a "formulaic recitation of the elements of a cause of action" nor "naked assertions [of fact] devoid of further factual enhancement" is sufficient to withstand dismissal) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007)).

Second, Hilgert's age discrimination claim fails because Hilgert cannot demonstrate that May's reason for his termination is a pretext for age discrimination; nor can he meet the difficult burden of showing that he would have remained employed "but for" his age. *See Gross v. FBL Financial Services Inc.*, 129 S.Ct. 2343, 2352 (2009) (holding that to prove a violation of the ADEA, the plaintiff must show that "but for" his age, the adverse employment action would not have occurred). Indeed, Hilgert himself admits that his age discrimination claim is not based on competent evidence, but rather it is based purely on his subjective belief.[3] *See Bauer v. Albemarle Corp.*, 169 F.3d 962, 967 (5th Cir. 1999) ("This court has consistently held that an employee's subjective belief of discrimination alone is not sufficient to warrant judicial relief.") (internal quotation marks and citation omitted).

Hilgert's Title VII retaliation claim fails because Hilgert never engaged in any protected activity under Title VII. He claims that he engaged in protected activity by opposing May's alleged discrimination against *customers*. Hilgert overlooks the salient point that even if it were

[3] *See* Ex. B, Hilgert Dep. at 318-19.

true that May discriminates against customers, and it is not, such a claim is not actionable under Title VII. *See Rossell v. County Bank*, 270 Fed. Appx. 217 (3rd Cir. 2008) (unpublished) (stating the obvious point that Title VII does not cover discrimination against customers). Hilgert therefore never engaged in a protected activity under Title VII, and his retaliation claim accordingly fails as a matter of law. *See, e.g.*, *Richard v. Cingular Wireless LLC*, 233 Fed. Appx. 334, 338 (5th Cir. 2007) ("complaining of unfair or undesirable treatment not addressed by Title VII will not suffice" to establish protected activity under Title VII's anti-retaliation provision).

Hilgert's purported common law based "public policy" claim for wrongful termination also fails. Under Texas common law, employment relationships are at-will by default, meaning that the employer may terminate the employment relationship for any reason, or no reason at all, unless the termination results from the employee's refusal to commit an unlawful act that carries criminal penalties. *See White v. FCI USA, Inc.*, 319 F.3d 672, 676-77 (5th Cir. 2003) (citing *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985)). Hilgert does not plead, and he has no evidence to even suggest, that he was terminated because of his refusal to commit an unlawful act that carries criminal penalties. Accordingly, his common law based public policy claim for wrongful termination cannot succeed. *See*, *e.g.*, *Hernandez v. Pep Boys*, slip op., 1997 WL 118411, at *2 (N.D. Tex., March 7, 1997) (dismissing *pro se* plaintiff's purported common law claim of wrongful termination because plaintiff's allegations did not fit within the *Sabine Pilot* exception to the employee at-will doctrine); *Ado v. Auchan Hypermarket*, slip op., 1995 WL 902483, at *2 (S.D. Tex., Dec. 5, 1995) (same).

II. LEGAL STANDARDS

A. Standard For Dismissal For Failure To State A Claim Upon Which Relief Can Be Granted

Under Federal Rule of Civil Procedure 12(b)(6), a purported cause of action may be dismissed when the complaint fails to state a claim upon which relief can be granted. To survive a motion to dismiss under Rule 12(b)(6), the complaint must meet two criteria:

1. It must assert a plausible claim; and
2. It must set forth sufficient factual allegations to support the claim.

Iqbal, 129 S. Ct. at 1949-50 (citing *Twombly*, 550 U.S. 554); *see also Frith v. Guardian Life Ins. Co. of Am.*, 9 F. Supp. 2d 734, 737-38 (S.D. Tex. 1998) (explaining that dismissal can be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory).

In *Twombly*, the Supreme Court squarely rejected the Rule 12(b)(6) standard set forth under *Conley v. Gibson* 355 U.S. 41, 45-46 (1957).[4] *Twombly*, 550 U.S. at 560-61. Pleadings are no longer satisfied by "an unadorned the-defendant-unlawfully-harmed me accusation." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly* 550 U.S. at 555). Now, neither a "formulaic recitation of the elements of a cause of action" nor "naked assertions [of fact] devoid of further factual enhancement" is sufficient to withstand dismissal. *Id.*

To satisfy the new standard under *Twombly* and *Iqbal*, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (citing *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the plaintiff pleads enough factual content that allows the court to draw the reasonable inference that the defendant

[4] The old standard under Conley was "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*

is liable under the alleged claim. *Id.* (citing *Twombly*, 550 U.S. at 556). "A court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 1950. Therefore, if allegations are merely "conclusory," they are "not entitled to be assumed true." *Id.* Even if a court decides that the factual allegations are entitled to an assumption of truth, however, the facts must also "plausibly suggest an entitlement to relief." *Id.* at 1951.

B. Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). The party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, but need not negate the elements of the nonmovant's case. *Bourdeaux v. Swift Transp. Co., Inc.*, 402 F.3d 536, 540 (5th Cir. 2005). When the moving party has met its Rule 56(c) burden, the nonmoving party cannot survive a motion for summary judgment by resting on the mere allegations of its pleadings. The nonmovant must identify specific evidence in the record and articulate the manner in which that evidence supports that party's claim. *Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 305 (5th Cir. 2004). This burden is not satisfied by "some metaphysical doubt as to the material facts," "conclusory allegations," "unsubstantiated assertions," or "only a scintilla of evidence." *Young v. Exxonmobil Corp.*, 155 Fed. Appx. 798, 800 (5th Cir. 2005).

III. ARGUMENT AND AUTHORITIES

A. Hilgert Has Not Adequately Pled An Age Discrimination Claim

Hilgert's age discrimination complaint does not come close to meeting the pleading standards under *Twombly* and *Iqbal*. As a threshold matter, he has not pled any of the *prima*

facie elements of age discrimination.[5] His claim fails for this reason alone. *See Iqbal*, 129 S. Ct. at 1949 (noting that a mere "formulaic recitation of the elements of a cause of action"—which Hilgert has failed to do—is not enough survive a motion to dismiss) (citing *Twombly*, 550 U.S. at 555).

Hilgert also fails to clear the second hurdle under *Twombly* and *Iqbal*. That is, Hilgert does not provide any factual support for his conclusory allegation that he was the victim of intentional age discrimination. Under *Iqbal*, mere conclusory statements are not entitled to an assumption of truth:

> A court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than *conclusions, are not entitled to the assumption of truth*. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

129 S. Ct. at 1950 (emphasis added). Therefore, if allegations are merely "conclusory," they are "not entitled to be assumed true." *Id.*

A close examination of Hilgert's "age discrimination" claim reveals that he has failed to even allege that that he was discriminated against because of his age, much less offer any factual support to "plausibly suggest an entitlement to relief." *Id.* at 1951. Hilgert merely uses the title "age discrimination" on his Complaint, and then under that heading, offers a few conclusory statements—none of which make any reference to his age, or provide any factual support to "plausibly suggest an entitlement to relief," as required by *Iqbal*. *Id.* Accordingly, the Court should dismiss Hilgert's age discrimination claim under Rule 12(b)(6).

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[5] *See* Ex. A., Hilgert's New Complaint, at ¶¶ 20-30. To establish a *prima facie* case a plaintiff must demonstrate that he is: (1) a member of a protected class; (2) qualified for the position, (3) suffered an adverse employment action, and that (4) he was either (i) replaced by someone younger, (ii) treated less favorably than similarly situated younger workers, or (iii) otherwise discharged because of his age. *Palasota v. Haggar Clothing Co.*, 342 F.3d 569, 575-76 (5th Cir. 2003).

B. Hilgert Has No Evidence Of Pretext; Nor Can He Show He Would Have Remained Employed "But For" His Age

Assuming that Hilgert could establish a *prima facie* case of age discrimination, May had a legitimate, non-discriminatory reason for terminating Hilgert's employment. May has a rule that all special representatives must make at least two qualified sales in a four week time period.[6] If any employee fails to satisfy this minimum sales quota, the employee is subject to termination.[7] This rule is plainly stated in the parties' Employment Agreement:

> Employee further understands that the performance expectation for the position is one qualified sale per week. If however, Employee fails to achieve at least two qualified sales in any four (4) week period, Employee will be subject to immediate termination. Employee agrees that the foregoing notice constitutes adequate notice prior to termination of employment.[8]

Hilgert admits that he was fully aware of this rule because it is stated in the Employment Agreement, and because Brian Vaill called him, and wrote him a letter to remind him of the rule when his sales came to a complete halt.[9]

The evidence is undisputed that Hilgert failed to make any qualified sales for nearly 13 weeks prior to his termination on June 8, 2007.[10] He admits that he made his last qualified sale on March 8, 2007.[11] On May 30, 2007—a full 12 weeks after Hilgert's last qualified sale—

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6 *See* Ex. C., Affidavit of Brian Vaill at ¶ 4; Ex. D., Employment Agreement, at ¶ 6.

7 *See* Ex. C., Affidavit of Brian Vaill at ¶ 4; Ex. D., Employment Agreement, at ¶ 6.

8 *See* Ex. D., Employment Agreement, at ¶ 6.

9 Ex. B., Hilgert Dep. at 286; Ex. E, Vaill Letter To Hilgert.

10 Ex. C., Affidavit of Brian Vaill at ¶ 4; Ex. F., Hilgert's Performance Record. Hilgert agreed at his deposition that this Exhibit lists the companies that he made sales to while employed by May. *See* Ex. B., Hilgert Dep. at 288.

11 Ex. F., Hilgert's Performance Record. Hilgert agreed at his deposition that this Exhibit lists the companies that he made sales to while employed by May. *See* Ex. B., Hilgert Dep. at 288.

Vaill called Hilgert and inquired about his lack of any sales over the prior three month period.[12] During the call, Vaill informed Hilgert that he would grant an extension of the Employment Agreement for one additional week.[13] He also told Hilgert that he needed to make at least one qualified sale during the next week.[14] That same day, he sent Hilgert a letter to memorialize this understanding:

> To confirm our telephone conversation today, I have granted an extension of your Working agreement until Friday, June 8, 2007, to complete a qualified sale. … As a reminder, Paragraph 6 of your Working Agreement includes the following statement, 'If however, Employee fails to achieve at least two qualified sales in any four (4) week period, Employee will be subject to immediate termination.' Please take this matter seriously and take corrective action.[15]

Hilgert admits that, despite receiving this warning, he still failed to make any sales, much less a qualified sale:

> Q. Okay. So you agree that in the four-week period leading up to your termination, you did not have two qualified sales, correct?
>
> A. Correct.
>
> Q. In fact, you didn't have any sales, correct?
>
> A. No, I did not.[16]

Accordingly, on June 8, 2007, May terminated Hilgert's employment for failing to make any qualified sales.[17]

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[12] Ex. B., Hilgert Dep. at 285-86; Ex. C., Affidavit of Brian Vaill at ¶ 4.

[13] Ex. B., Hilgert Dep. at 285-86; Ex. C., Affidavit of Brian Vaill at ¶ 4.

[14] Ex. B., Hilgert Dep. at 285-86; Ex. C., Affidavit of Brian Vaill at ¶ 4.

[15] Ex. B., Hilgert Dep. at 285-86; Ex. C., Affidavit of Brian Vaill at ¶ 4; Ex. E., Vaill Correspondence to Hilgert.

[16] Ex. B., Hilgert Dep. at 290-291; Ex. F., Hilgert's Performance Record. Hilgert agreed at his deposition that this Exhibit lists the companies that he made sales to while employed by May. *See* Ex. B., Hilgert Dep. at 288.

[17] Ex. B., Hilgert Dep. at 289-90; Ex. C., Affidavit of Brian Vaill at ¶ 4.

Because May has articulated a legitimate, non-discriminatory reason for terminating Hilgert's employment, "the presumption of [age] discrimination created by the *prima facie* case disappears, and the plaintiff is left with the ultimate burden of proving discrimination." *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511-12 (1993)). To survive summary judgment, Hilgert "must then offer sufficient evidence to create a genuine issue of material fact that the defendant's reason is not true, but is instead a pretext for age discrimination, *and* that "but for" his age, he would have remained employed. *See Gross*, 129 S.Ct. at 2352 (explaining that plaintiff must show that he would have remained employed "but for" his age). Hilgert, however, has no such evidence.

Hilgert cannot show that "but for" his age, he would have remained employed because he has no objective proof that May took his age into consideration when it decided to terminate his employment. Indeed, Hilgert concedes that his claim of age discrimination is based purely on his subjective belief, and nothing else:

Q. Why do you think that the company terminated you because of your age?

A. I don't know.

Q. You don't know?

A. I don't know. It's just the belief that I have from the action that they took.

Q. Okay. So it's based on your subjective belief, correct?

A. Yes.

Q. Okay. It's not based on anything else, is it?

A. Not that I can think of right now.

Q. Okay. One thing that you're saying here today on this date, is that that claim that you were terminated, because of your age, is based purely on your subjective belief, correct, at this point?

A. At this point.[18]

Well settled legal precedent from the Fifth Circuit establishes that Hilgert's subjective belief is no proof of discrimination at all. *See Bauer*, 169 F.3d at 967 ("This court has consistently held that an employee's subjective belief of discrimination alone is not sufficient to warrant judicial relief.") (internal quotation marks and citation omitted). Accordingly, he cannot establish that "but for" his age, he would have remained employed. Thus, Hilgert's age discrimination claim fails as a matter of law. *Id*.

C. Hilgert's Title VII Retaliation Claim Fails As A Matter Of Law

1. An Employee Must Engage In A Protected Activity In Order To Establish A Retaliation Claim Under Title VII

Hilgert alleges a retaliation cause of action under Title VII of the Civil Rights Act of 1964. The retaliation that he alleges is that May allegedly created a "hostile work environment" by requiring him to drive to "bogus" appointments and then terminating his employment.[19] The Fifth Circuit has held that "the burden-shifting structure applicable to Title VII disparate treatment cases, as set forth in *McDonnell Douglas Corp. v. Green*, ... is also applicable to Title VII unlawful retaliation cases." *Long v. Eastfield College,* 88 F.3d 300, 304 (5th Cir. 1996). Accordingly, the plaintiff must establish a *prima facie* case at the outset of the case. The *prima facie* elements of a Title VII retaliation claim are: (1) the plaintiff engaged in "protected activity"; (2) an adverse employment action occurred; and (3) there was a causal connection between the plaintiff's protected activity and the adverse employment action. *Strong v.*

[18] Ex. B., Hilgert Dep. at 318-19.

[19] *See* Ex. A, Hilgert's New Complaint, at ¶¶ 46-55. Hilgert labels "hostile work environment" as a separate cause of action in the Consolidated Complaint, but a review of his allegations in the Consolidated Complaint shows that he is alleging that the creation of a hostile work environment was one of the means by which May allegedly retaliated against him. *See id*. Thus, his so-called hostile work environment claim is really a claim of unlawful retaliation under Title VII.

University HealthCare System, L.L.C., 482 F.3d 802, 805 (5th Cir. 2007). If the plaintiff cannot establish a *prima facie* case of retaliation, then his case fails as a matter of law. *Harvill v. Westwood Comm., L.L.C.*, 433 F.3d 428, 439 (5th Cir. 2005). Here, Hilgert cannot satisfy his initial *prima facie* burden because he did not engage in a protected activity under Title VII.

"Under Title VII, an employee has engaged in protected activity if [he] has 'opposed any practice made an unlawful employment practice under [Title VII]'" *Turner v. Baylor Richardson Medical Center*, 476 F.3d 337, 348 (5th Cir. 2007); 42 U.S.C. § 2000e-3(a). To establish that he engaged in protected activity, the employee must show that he held an *objectively reasonable* belief that the complained of conduct violated Title VII. *See Turner*, 476 F.3d at 348. If the belief is not objectively reasonable, then the employee has not engaged in protected activity, and his retaliation claim fails as a matter of law. *See id*. (holding that plaintiff did not have an objectively reasonable belief that her supervisors' use of the phrase "ghetto children" was unlawful under Title VII). As explained below, Hilgert's supposed belief that he was opposing an unlawful practice under Title VII is not objectively reasonable. Thus, he did not engage in protected activity under Title VII and his Title VII retaliation claim fails as a matter of law.

2. Hilgert Opposed Alleged Discrimination Against *Customers*, Not *Employees*—Thus He Did Not Engage In A Protected Activity Under Title VII

Hilgert alleges that he engaged in protected activity because he opposed May's alleged practice of discriminating against its *customers*. Title VII is very clear, however, that it only prohibits unlawful discrimination against *employees* on the basis of the *employee's* race, race, color, religion, sex, or national origin. 42 U.S.C. § 2000-e2(a)(1) ("It shall be an unlawful employment practice for an employer … to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's*

race, color, religion, sex, or national origin .") (emphasis added). Because Hilgert opposed alleged discrimination against *customers*, it was not objectively reasonable for Hilgert to believe that he was opposing a practice made unlawful under Title VII.

Denham v. Saks Inc. slip op., 2008 WL 2952308 (N.D. Ill. July 30, 2008) is directly on point. There, the plaintiff opposed his employer's alleged practice of racially profiling black customers and providing them with bad service. The Court held that such opposition was not a protected activity under Title VII because Title VII is an employment statute that is concerned only with discrimination against *employees*, not customers:

> It is clear that Title VII focuses on how an employer treats his employees, not on how an employer treats his customers. Thus … it was not objectively reasonable for Denham to believe his complaints concerned activity protected under Title VII because his complaints focused on Saks's sales associates' unequal treatment of Saks's African-American *customers*, not on Saks's unequal treatment of its *employees*.

Denham, 2008 WL 2952308, at *7 (emphasis added). The Third Circuit recently reached a similar result where a plaintiff alleged that her "protected activity" was her complaint that her employer mistreated black customers:

> A retaliatory discharge claim must be based on retaliation for an employee's opposition to a Title VII violation. Therefore, the actions underlying the employee's conduct must be activity that Title VII was intended to protect. Rossell's claim is based upon alleged discrimination against the bank's customers, not its employees. She claims that she was fired because she opposed the bank's treatment of certain Black customers. *Whether or not there is a grain of truth in her allegation, it is clear that Congress never intended Title VII to be stretched to cover it.* The district court recognized that and correctly granted the Bank's motion to dismiss. We will affirm that order.

Rossell v. County Bank, 270 Fed. Appx. 217 (3rd Cir. 2008) (unpublished) (emphasis added).

Several other Courts have reached the same conclusion under similar circumstances. *See*, *e.g.*, *Bakhtiari v. Lutz* , 507 F.3d 1132, 1137 (8th Cir. 2007) (holding that the plaintiff's retaliation claim fails because the plaintiff's complaint about his treatment as a *student* was not

protected activity under Title VII); *Evans v. Kansas City Mo. Sch. Dist.*, 65 F.3d 98, 101 (8th Cir. 2001) (teacher's complaint about school's desegregation of students was not a protected activity because it was not objectively reasonable for him to think that his complaint concerned an unlawful employment practice under Title VII); *Wimmer v. Suffolk County Police Dep't.*, 176 F.3d 125 (2d Cir. 1999) (holding that the plaintiff's retaliation claim fails because the plaintiff's reports of his fellow police officers' discriminatory treatment of minority *citizens* was not a protected activity under Title VII.); *Artis v. Francis Howell N. Band Booster Ass'n. Inc.*, 161 F.3d 1178, 1183-84 (8th Cir. 1998) (holding that the plaintiff's retaliation claim fails because the plaintiff's internal complaints to school officials about the treatment of *students* is not a protected activity within the scope of Title VII).

Hilgert's retaliation claim fails as a matter of law for this very reason. As he states in the Consolidated Complaint, his retaliation claim is based on his alleged protected activity of opposing "discrimination against selected *clients*, due to the *clients'* ethnic [sic], race, and national origins."[20] Assuming that Hilgert honestly believes that he was opposing discrimination made unlawful by Title VII, such a belief is not objectively reasonable given the fact that his allegations are so far outside of the scope of Title VII. *Wilson v. Delta State University*, 143 Fed. Appx. 611, 613-14 (5th Cir. 2005) (per curiam) (unpublished opinion) (holding that employee's belief about employment practice is not objectively reasonable if it is settled law that the practice is not unlawful under Title VII); *Harvey v. Chevron*, 961 F. Supp. 1017, 1033 (S.D. Tex. 1997)

[20] Ex. A., Hilgert's New Complaint, at ¶ 16 (emphasis added).

(same). Thus, Hilgert did not engage in a protected activity under Title VII and his Title VII retaliation claim fails as a matter of law.[21]

D. Hilgert's Public Policy Claim Fails As A Mater Of Law

At one point in the Consolidated Complaint, Hilgert alleges that May "wrongfully discharged [him] in violation of public policy, a common law claim."[22] Hilgert's public policy claim cannot succeed because Texas is an employment-at-will state, and Hilgert has not pled sufficient facts to fit within the only recognized exception to the employment-at-will doctrine. *See White*, 319 F.3d at 676-77 (citing *Sabine Pilot*, 687 S.W.2d 733).

Under Texas common law, employment for an indefinite term may be terminated at-will and without cause, unless the termination falls within one narrow exception to the employment-at-will doctrine. *Id.* (citing *Sabine Pilot*, 687 S.W.2d 733 (Tex. 1985)). This exception, referred to as the *Sabine Pilot* exception, prohibits the termination of an employee if the termination is based solely on the employee's refusal to perform an illegal act. *Id.* "In order to establish a *prima facie* case of wrongful termination under *Sabine Pilot*, the plaintiff must prove that: (1) [he] was required to commit an illegal act which carries criminal penalties; (2) [he] refused to engage in the illegality; (3) [he] was discharged; and (4) the sole reason for [his] discharge was [his] refusal to commit [the] unlawful act." *Id.* (citing *Sabine Pilot*, 687 S.W.2d at 735).

Here, Hilgert's purported common law based public policy claim for wrongful termination fails because he has not alleged, and he has no evidence to satisfy the elements

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[21] Additionally, because May has established a legitimate reason for Hilgert's termination (see Section B), Hilgert would be required to show "but for" his opposition to alleged unlawful activity under Title VII, he would not have been terminated. *See Septimus v. Univ. of Houston*, 399 F.3d 601, 608 (5th Cir.2005) (" The proper standard of proof ... [for] a Title VII retaliation claim is that the adverse employment action ... would not have occurred ' but for' [the] protected conduct."). Hilgert has no such evidence, nor does he have any evidence to show that May's reason for terminating him is a pretext for discrimination. Accordingly, summary judgment is appropriate for this reason as well. *See id.*

[22] Ex. A., Hilgert's New Complaint, at ¶ 28.

necessary to establish a *Sabine Pilot* claim. That is, he has not pled, and he has no evidence to establish that he was required to commit an illegal act which carries criminal penalties; that he refused to engage in any illegal act, or that his refusal to do so was the sole reason for his discharge. Accordingly, the Court should dismiss Hilgert's public policy claim for wrongful termination. *See Hernandez*, 1997 WL 118411, at *2 (dismissing *pro se* plaintiff's purported common law claim of wrongful termination because plaintiff's allegations did not fit within the *Sabine Pilot* exception to the employee at-will doctrine); *Ado*, 1995 WL 902483, at *2 (same).

IV. CONCLUSION

In conclusion, Hilgert's claims are fundamentally defective and meritless. His age discrimination is not adequately pled to satisfy the standards under *Iqbal* or *Twombly*, and even it was, he cannot survive summary judgment because he has no evidence to show pretext and no evidence to show that "but for" his age he would have remained employed. His Title VII retaliation claim should be dismissed because he did not engage in protected activity when he opposed alleged *customer* discrimination. And his common law based public policy claim for wrongful termination should be dismissed because it does not fit within the contours of the only recognized common law claim for wrongful termination under Texas law.

Defendant George S. May International Company respectfully prays that the Court grant its motion for dismissal under Federal Rule of Civil Procedure 12(b)(6) and its motion for summary judgment under Federal Rule of Civil Procedure 56, order that Plaintiff Clive B. Hilgert take nothing by way of these claims, and grant Defendant all other relief to which it is justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the fore going document was served upon the counsel of record listed below by the Southe rn District of Texas ECF m ethod or by certified mail, return receipt requested on the 2nd day of September, 2009.

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