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

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

DEFENDANT'S RESPONSE TO PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S OPENING MOTION

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DEFENDANT'S RESPONSE TO PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S OPENING MOTION

Defendant George S. May International Company ("May") files this response to Hilgert's cross motion for summary judgment, and reply to Plaintiff's response to Defendant's opening motion, showing in support as follows:

I. PROCEDURAL BACKGROUND

On September 2, 2009, May filed its motion to dismiss / motion for summary judgment ("May's opening motion"), and requested that the Court dismiss the new claims set forth in Hilgert's consolidated complaint. In response to May's opening motion, Hilgert filed a cross motion for summary judgment / opposition to May's motion. May now files this response to Hilgert's motion, which also serves as a reply to Hilgert's response to May's opening motion.

May's opening motion conclusively demonstrates that, as a matter of law, Hilgert's age discrimination, retaliation, hostile work environment,[1] and public policy claims cannot succeed.

[1] As explained below, May's position is that Hilgert's so called hostile work environment claim is really a claim of alleged unlawful retaliation under Title VII.

May hereby incorporates its opening motion, together with all exhibits, and relies primarily on the arguments, legal authority, and evidence set forth therein, to rebut Hilgert's motion / response.[2] Rather than reiterate those points in whole, May sets forth the salient points from its opening motion, and a few rebuttal points below.

II. ARGUMENT AND AUTHORITIES

A. Hilgert's Age Discrimination Claim Fails As A Matter Of Law Because He Has Insufficient Evidence To Establish That May's Reason For Terminating Him Is False, And He Cannot Show That "But For" His Age, He Would Have Remained Employed.

As explained thoroughly in its opening motion, May terminated Hilgert from his sales position, pursuant to May's sales quota rule, because he did not generate any sales for over three months.[3] 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 May's reason is not true, but is instead a pretext for age discrimination, and that "but for" his age, he would have remained employed. *Running v. Guaranty Federal Bank FSB*, slip op., 2009 WL 2835763, at *10 (N.D. Tex., Sept. 2, 2009)[4] (citing *Smith v. City of Jackson, Miss.*, 351 F.3d 183, 196 (5th Cir. 2003), *aff'd* 544 U.S. 228, 125 S. Ct. 1536, 161 L.Ed.2d 410 (2005); *West v. Nabors Drilling USA, Inc.*,

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[2] *See* Ex. 1, May's opening motion and evidence.

[3] *See* Ex. 1, May's opening motion and evidence pp. 7-10; Ex. 1-B., Hilgert Dep. at 289-90; Ex. 1-C., Affidavit of Brian Vaill at ¶ 4.

[4] *See* Ex. 3.

330 F.3d 379, 385 (5th Cir. 2003)); *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). To meet this burden at the summary judgment stage, "the plaintiff must produce substantial evidence of pretext." *Auguster v. Vermilion Parish School Bd.*, 249 F.3d 400, 402-03 (5th Cir. 2001). Hilgert does not have substantial evidence to show that May's stated reason for terminating him is false.

As a starting point, Hilgert does not dispute that he failed to make any sales for the three month period leading up to his termination.[5] This admission makes Hilgert's burden very difficult to meet. *See Chaney v. New Orleans Public Facility Mgt., Inc.*, 179 F.3d 164, 168 (5th Cir. 1999) ("In a case in which the employer has articulated a rational justification for terminating an employee, and the facts supporting that justification are not seriously disputed, the task of proving pretext becomes quite difficult.").

Moreover, Hilgert admitted at deposition that his age discrimination claim was based purely on his subjective belief, and nothing else.[6] Well settled legal precedent from the Fifth Circuit establishes that Hilgert's subjective belief is no proof of discrimination at all. *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); *see also Waggoner v. City of Garland, Tex.*, 987 F.2d 1160, 1164 (5th Cir. 1993) ("We have held that a plaintiff's subjective belief that his

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[5] *See* Ex. 1, May's opening motion and evidence, p 8; Ex. 1-B., Hilgert Dep. at 290-291; Ex. 1-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. 1-B., Hilgert Dep. at 288.

[6] *See* Ex. 1, May's opening motion and evidence, pp. 9-10; Ex. 1-B., Hilgert Dep. at 318-19.

discharge was based on age is simply insufficient to establish an ADEA claim.") citing *Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 567 (5th Cir. 1983)).

In response, Hilgert submits a sham affidavit, in which he claims the following:

> Due to the fact, as the time of the deposition, [sic] I gave on Oct. 11, 2007 I had not had the opportunity to research the legal facts in either the retaliation or age claims and in the deposition I misspoke and therefore resine [sic] my statements [sic] that my belief was only subjective.[7]

The law does not permit a party to avoid summary judgment by submitting an affidavit in which he changes his testimony. *Cleveland v. Policy Management Sys. Corp.*, 526 U.S. 795, 806-07 (1999) (observing that circuit courts "have held with virtual unanimity that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement"); *Copeland v. Wasserstein*, 278 F.3d 472, 482 (5th Cir. 2002) (upholding summary judgment where plaintiff's evidence purporting to create a genuine issue of material fact was an affidavit that conflicted with the affiant's prior testimony); *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 198 (4th Cir. 1997) ("A genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct.").

That point aside, Hilgert still has not offered any evidence to show that May's legitimate, non-discriminatory reason for terminating him is false, nor has he offered any evidence to show that "but for" his age, he would have remained employed. *See Gross*, 129 S. Ct. at 2352. At best, Hilgert has made a conclusory statement in his motion that an employee who is "20+" years younger than him was hired as his replacement.[8] Hilgert's statement in his motion is not

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[7] *See* Doc. Entry 57, Hilgert's motion / response, at Ex. D.

[8] *See* Doc. Entry 57, Hilgert's motion / response, p. 28.

competent evidence and thus it cannot be used to avoid summary judgment. *See Ragas v. Koch Gateway Pipeline Co*., 136 F.3d 455, 458 (5th Cir. 1998) (explaining that unsubstantiated assertions are not competent summary judgment evidence sufficient to defeat a properly supported motion).

But even if Hilgert had presented competent evidence that a younger individual was hired as his replacement, such evidence would only help Hilgert establish his *prima facie* case of age discrimination. *Guerrero v. Preston*, slip op., 2009 WL 2581568, at * 4 (S.D. Tex. Aug. 18, 2009) (noting that such proof is necessary to establish an initial *prima facie* case).[9] Assuming that Hilgert could establish a *prima facie* case of intentional age discrimination, Hilgert still retains the burden to produce substantial evidence that May intentionally discriminated against him because of his age. *See, e.g., Bell v. Raytheon*, slip op., 2009 WL 2365454, at *7-8 (N.D. Tex., July 31, 2009) (granting summary judgment because plaintiff did not set forth sufficient evidence to establish that age was the but-for cause of the adverse employment action, even though—unlike Hilgert—plaintiff offered evidence of age-related remarks made by supervisors).[10] Hilgert has not met this burden because he has simply failed to offer any evidence (much less the required substantial evidence) that May's reason for terminating him is false, and he has presented no evidence (much less the required substantial evidence) that he would have remained employed but for his age. *See, e.g.*, *Guerrero*, 2009 WL 2581568, at * 4-5 (granting summary judgment because plaintiff failed to show that his employer's reason for termination was false, and failed to show that he would have remained employed but for his age,

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[9] *See* Ex. 4

[10] *See* Ex. 5.

even though plaintiff presented evidence that he was the oldest employee).[11] Therefore, his age discrimination claim cannot survive summary judgment.

B. Hilgert's Retaliation Claim Fails As A Matter Of Law Because He Did Not Engage In A Protected Activity Under Title VII When He Opposed Customer Discrimination

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. 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.

As explained thoroughly in May's motion for summary judgment, Title VII does not prohibit *customer* discrimination, and thus an employee does not engage in a protected activity under Title VII when he opposes such alleged discrimination.[12] *Denham v. Saks Inc*. slip op., 2008 WL 2952308, at *6 (N.D. Ill. July 30, 2008) (employee did not engage in protected activity under Title VII when he complained about customer discrimination because Title VII only prohibits employee discrimination based on the employee's race);[13] *Rossell v. County Bank*, 270 Fed. Appx. 217 (3rd Cir. 2008) (unpublished) (same).[14] The law is well settled that Title VII only applies to discrimination against employees or prospective employees. *See, e.g.*, *Bakhtiari*

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11 *See* Ex. 4.

12 *See* Ex. 1, May's opening motion and evidence, pp. 10 – 14.

13 *See* Ex. 6.

14 *See* Ex. 7.

v. Lutz, 507 F.3d 1132, 1137 (8th Cir. 2007) (holding that the plaintiff's retaliation claim fails because complaint about student discrimination is not a protected activity under Title VII); *Evans v. Kansas City Mo. Sch. Dist.*, 65 F.3d 98, 101 (8th Cir. 2001) (same); *Artis v. Francis Howell N. Band Booster Ass'n. Inc.*, 161 F.3d 1178, 1183-84 (8th Cir. 1998) (same); *Wimmer v. Suffolk County Police Dep't.*, 176 F.3d 125 (2d Cir. 1999) (holding that the plaintiff's retaliation claim fails because a complaint about discriminatory treatment of minority *citizens* is not a protected activity under Title VII.). For this reason, Hilgert's retaliation claim cannot succeed.

Despite this well settled principle of law, Hilgert argues in his motion / response that he engaged in a protected activity because Congress meant to create a cause of action under Title VII for commission only employees who are adversely affected by alleged customer discrimination.[15] Hilgert cites no case law to support his novel theory. Rather, he argues that the plain language of Title VII supports his theory. Hilgert is incorrect.

Title VII prevents discrimination against an individual *based on that individual's* race, color, religion, sex, or national origin:

> 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*.

42 U.S.C. § 2000-e2(a)(1) (emphasis added). Hilgert argues that Congress's use of the word "individual" supports his argument. In fact, the opposite is true. If Congress wanted to create a cause of action under Title VII for any employee who is adversely affected by customer discrimination (as Hilgert claims he was), then it would have substituted the phrase "such individual" with "any individual." The use of the phrase "such individual" unambiguously

[15] *See* Hilgert's Motion / Response at p. 3.

expresses an intent to create a cause of action only for those individuals who are discriminated against because of their own race, color, religion, sex, or national origin. *Id.* All of the above-cited cases support this conclusion.

C. Hilgert's Public Policy Claim Fails As A Matter Of Law

As explained thoroughly in May's opening motion, Hilgert's purported common law based public policy claim for wrongful termination fails because Texas does not recognize such a cause of action.[16] The only common law based public policy claim for wrongful termination recognized in Texas is a *Sabine Pilot* claim—and Hilgert has not alleged or submitted any evidence to satisfy the elements necessary to establish a *Sabine Pilot* claim. For this reason alone, his public policy claim fails. Moreover, Hilgert has not even responded to May's argument regarding his public policy claim, and thus the Court should grant May's motion to dismiss the claim for this reason as well. FED. R. CIV. P. 56(e); *Bookman v. Schubzda*, 945 F. Supp. 999, 1002 (N.D. Tex. 1996) ("A summary judgment nonmovant who does not respond to [a claim in] the motion is relegated to [his] unsworn pleadings, which do not constitute summary judgment evidence.") (brackets in original) (citing *Solo Serve Corp. v. Westowne Assocs.*, 929 F.2d 160, 165 (5th Cir. 1991)).

D. Hilgert's Hostile Work Environment Claim Fails As A Matter Of Law

As May established in its opening brief, 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.[17] Thus, his so-called

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[16] *See* Ex. 1, May's opening motion and evidence, pp. 14-15.

[17] *See* Ex. 1, May's opening motion and evidence, p 10, n. 19; Hilgert's New Complaint, at ¶¶ 46-55.

hostile work environment claim is really a claim of unlawful retaliation under Title VII. It follows that his "hostile work environment claim" fails for the reasons outlined above in section II B—namely that he did not engage in a protected activity under Title VII.

But even if the Court construes Hilgert's so-called hostile work environment claim as a separate cause of action, his claim fails as a matter of law for the following reasons.

1. Hilgert Has Not Adequately Pled A Hostile Work Environment Claim

A *prima facie* case of hostile work environment based on race, color, or national origin requires the plaintiff to satisfy five elements: (1) the employee belongs to the protected group; (2) the employee was subjected to unwelcome harassment; (3) the harassment complained of was based on the employee's protected characteristic (*e.g.*, race, national origin, etc); (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action. *See Frank v. Xerox Corp.*, 347 F.3d 130, 138 (5th Cir. 2003); *Ramsey v. Henderson,* 286 F.3d 264, 270 (5th Cir. 2002). Although Hilgert uses the term "hostile work environment" as a heading to a section of his pleading, an examination of his pleading reveals that he has not pleaded any of the *prima facie* elements of a hostile work environment claim.[18] So his claim fails for this reason alone. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (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 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007)).

It logically follows that Hilgert has also failed to plead any facts to support for his hostile work environment claim. For example, he does not identify what protected class he is referring

[18] *See* Hilgert's New Complaint, at ¶¶ 46-55.

to, how the alleged harassment relates to any protected characteristic, or how the alleged harassment was severe or pervasive. At one point in his pleading he does use the conclusory phrase "severe and pervasive" but that assertion is not entitled to a presumption of truth because it is nothing more than "naked assertions [of fact] devoid of further factual enhancement." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly* 550 U.S. at 555). Thus, Hilgert's "hostile work environment" claim should be dismissed under Rule 12(b)(6).

2. Hilgert's "Hostile Work Environment" Claim Cannot Succeed On The Merits

At his deposition, Hilgert claimed that May discriminated against some of its prospective customers because they were Hispanic, Asian, African American, and Arab.[19] Assuming that Hilgert is bringing his hostile work environment claim based on this alleged discrimination, and assuming that he has properly asserted such a claim, his claim would still fail as a matter of law because he cannot satisfy the first, third, or fourth elements of a hostile work environment claim.

To satisfy the first element, Hilgert would have to be a member of the same protected group that was allegedly harassed. *See, e.g., Kortan v. State of Cal*., 5 F. Supp. 2d 843, 850 (C.D. Cal. 1998) (hostile work environment claim fails on the first element because plaintiff was Caucasian and her supervisor's inappropriate remarks of "black goon" and "black ape" were directed at African Americans). Here, Hilgert's claim fails because he is Caucasian and the customers that he claims May discriminated against were Hispanic, Asian, African American, and Arab.[20] Thus, he cannot satisfy the first element of a hostile work environment claim. *See, e.g.*, *Delon v. McLaurin Parking Co*., 367 F. Supp. 2d 893, 902 (M.D.N.C. 2005) (hostile work

[19] Ex. 2., Hilgert Dep. at 210.

[20] Ex. 2., Hilgert Dep. at 210.

environment claim fails on the first element because "although Plaintiff testifies to feeling embarrassed by what he perceived to be discriminatory treatment of customers, he does not show that this is evidence that he was being harassed based upon *his* race.") (emphasis added); *Moore v. Total Sleep Diagnostics of Kansas, Inc*., slip op., 2001 WL 789231, at *2 (D. Kan., June 29, 2001) ("plaintiff claims that she was offended by her supervisor's use of racial comments. However, plaintiff is not a member of the protected group. Accordingly, plaintiff cannot state a claim for a racially hostile work environment …");[21] *Jones v. City of Overland Park*, slip op., 1994 WL 583153, at *3 (D. Kan., Aug. 15, 1994) ("Title VII prohibits employers from discriminating against employees *because of their* race, color, religion, sex, or national origin.") (emphasis in original).[22] Hilgert's hostile work environment claim fails for this reason alone.

To satisfy the third element, Hilgert would also need to show that the alleged harassment was "because of" a protected characteristic. But Hilgert has no evidence that any client was actually discriminated against *because of* its race, national origin, ethnicity, or any other protected status. *See Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 80-81 (1998) (explaining the plaintiff must show both that harassment was "because of" a protected characteristic). As he admitted at his deposition, he cannot identify any similarly situated client from outside of the protected classes that were treated differently that the Hispanic, Asian, Arab, or African American clients.[23] So his claim also fails for this reason.

Lastly, Hilgert cannot satisfy the fourth element of a hostile work environment claim. "For harassment on the basis of [race] to affect a term, condition, or privilege of employment, as

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21 *See* Ex. 8.

22 *See* Ex. 9.

23 *See* Ex. 2., Hilgert Dep. at 281-83.

required to support a hostile work environment claim under Title VII, it must be 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Ramsey,* 286 F.3d at 268 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). In determining whether a plaintiff's hostile environment claim meets the "severe or pervasive" standard, courts must consider the following circumstances: "the frequency of the discriminatory conduct, its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Walker v. Thompson*, 214 F.3d 615, 625 (5th Cir. 2000) (quoting *Harris*, 510 U.S. at 23).

Nothing Hilgert has alleged – even if taken as 100% true for the sake of argument – would constitute harassment based on any protected characteristic, much less harassment that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Ramsey,* 286 F.3d at 268 (quoting *Harris*, 510 U.S. at 21). By way of example, in *Vaughn v. Pool Offshore Co*., 683 F.2d 922 (5th Cir. 1982), the Fifth Circuit did not find a hostile work environment where plaintiff—unlike Hilgert—was outrageously called racial epithets by coworkers. Similarly, in *Grant v. UOP, Inc.*, 972 F. Supp. 1042 (W.D. La. 1996), *aff'd*, 122 F.3d 1066 (5th Cir. 1997), the court held that five despicable utterances of the word "nigger" directly to the plaintiff (Hilgert alleges none) were insufficient to establish a hostile work environment claim. *See also Mosley v. Marion County, Miss.*, 111 Fed. Appx. 726, 727-28 (5th Cir. 2004) (unpublished opinion) (per curiam) (holding that admissible evidence of three incidents involving use of racial slurs insufficient to establish genuine issue of material fact for Title VII hostile work environment claim);[24] *Fortenberry v. Texas*, 75 Fed. Appx. 924, 928

[24] *See* Ex. 10.

(5th Cir. 2003) (per curiam) (unpublished opinion) (harassing conduct, including two incidents where co-workers used racial slurs did not affect term, condition, or privilege of employment); *Hurst v. Transcont. Gas Corp.*, 62 Fed. Appx. 557 (5th Cir. 2003) (per curiam) (unpublished opinion) (two alleged racial slurs did not suffice to create hostile work environment);[25] *Bolden v. PRC, Inc.,* 43 F.3d 545, 549-52 (10th Cir. 1994) (affirming summary judgment in a racial harassment case even though the plaintiff was subjected to remarks about the Ku Klux Klan, as well as an arguably racist cartoon drawing, and a coworker reprehensibly used the word "nigger" around him); *Smith v. Beverly Health and Rehabilitation Serv., Inc.*, 978 F. Supp. 1116 (N.D. Ga. 1997) (holding that a several utterances of racial epithets by a supervisor were insufficient to support hostile work environment claim); *McCray v. DPC Indus., Inc.*, 942 F. Supp. 288 (E.D. Tex. 1996) (holding that five uses of the terms "black Yankee" and "son," two racial jokes, and the depraved and despicable use of the word "nigger" were insufficient to establish a hostile work environment claim). Hilgert's meek allegation that he was required to go on "bogus" appointments has nothing to do with anyone's race, national origin, or ethnicity; nor does it rise to the level of "severe or pervasive" under well-established Fifth Circuit precedent. Accordingly, his hostile work environment claim should be dismissed.

III. 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 if 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

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[25] *See* Ex. 11.

opposed alleged *customer* discrimination. 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, and Hilgert has not even responded to this argument. And his hostile work environment claim fails because (a) he is not actually alleging a hostile work environment claim (but rather is claiming that it was the means by which he was being retaliated against), and (b) he cannot satisfy the first, third, or fourth elements of a hostile work environment claim.

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.

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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 5th day of October, 2009.

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