

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

NANCY BISHOP,)	
)	
Plaintiff,)	Case No. 1:02CV00208
)	
v.)	OPINION
)	
AERUS, LLC,)	By: James P. Jones
)	United States District Judge
Defendant.)	

Charlton R. DeVault, Jr., Kingsport, Tennessee, for Plaintiff; Suzanne H. Bauknight and Steven H. Trent, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Knoxville and Johnson City, Tennessee, for Defendant.

In this Title VII¹ employment action, the plaintiff, Nancy Bishop, a former employee of the defendant Aerus, LLC (“Aerus”), claims that she was denied a promotion and later terminated because of unlawful sex discrimination and retaliation. The question before me is whether the plaintiff has produced sufficient evidence of discrimination and retaliation so as to withstand the defendant’s motion for summary judgment. After consideration of the pertinent law, I find that the plaintiff does not have sufficient evidence to escape summary judgment.

¹ Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 2003).

I

Bishop initially filed an administrative charge with the Equal Employment Opportunity Commission (“EEOC”) alleging that Aerus² discriminated against her on account of her sex. The EEOC issued a right-to-sue letter on that charge and Bishop filed suit under Title VII in this court, claiming that she had been subjected to sexual discrimination and harassment, a hostile work environment, and retaliation. During the progression of that litigation, Bishop supplemented her original complaint with the additional assertions that she had been unlawfully denied another promotion and then wrongfully terminated. As a result, part of the lawsuit centered on conduct that took place after the filing of the original EEOC complaint. I therefore dismissed any claims based on events arising after March 30, 2001 (when the EEOC closed its file) without prejudice to Bishops’ further exhaustion of her available administrative remedies with the EEOC. However, I granted summary judgment on the merits in favor of Aerus on Bishop’s remaining claims. *See Bishop v. Electrolux*, No. 1:01CV00074, 2002 WL 653900, at *5 (W.D. Va. Apr. 19, 2002).

² Aerus was formerly named Electrolux, LLC, but for purposes of clarity, I will refer to the defendant employer as Aerus, even when referencing time periods before the name change. Aerus is a nationwide company that manufactures and distributes floor care products, including vacuum cleaners.

Bishop thereafter filed another charge with the EEOC premised on the employer's later conduct. The EEOC issued a right-to-sue letter on this second charge as well, and Bishop filed the present action on December 27, 2002, alleging sex discrimination by failure to promote, retaliatory failure to promote, and retaliatory dismissal. The defendant has now filed a motion for summary judgment, which motion has been briefed and argued and is ripe for decision.

The facts in this action are complex but are essential to a resolution of Bishop's claims and thus will be recited in this opinion in considerable detail. The facts are either undisputed or, where disputed, are recited in the light most favorable to Bishop based on the available record.³

In early 1999, Bishop applied with Aerus for the position of Advertising Services Manager. In interviewing with Neal Henson, the Director of Human Resources at the time, and Wayne Sullins, a supervisor in the Purchasing Department at the time, she was told that her primary responsibilities would be to devise a system to consolidate the company's advertisement purchases, so that all advertising needed by the branch offices would be administered through a central system. Although

³ The summary judgment record contains a transcript of Bishop's deposition as well as affidavits submitted by Bishop; Sharon Buck, Aerus' former Director of Supply Chain Management; and Teresa Carter, Aerus' Manager of Human Resources during a part of the relevant time period.

requiring significant initiative early on, the position would eventually become clerical. Bishop claims she was told that once she implemented the new system in all the branches, there would be opportunities for promotion to the position of a commodity buyer. Bishop now views this promotion as having been “promised.” (Compl. ¶ 4.) She was hired on February 10, 1999, and initially worked long hours, designing, creating, and implementing the necessary database herself because of the unavailability of any help from the company's information services unit.

Bishop maintains that sexual harassment arose almost as soon as she started with Aerus. Primarily involving Sandy Sproles, who was the secretary assisting Ed Schreiber, the Purchasing Director, the harassment involved sexual remarks and conduct willingly exchanged between Sproles and males working in the office. Bishop’s office was directly adjacent to Sproles’ office, so Bishop could hear all the sexual talk, had a direct line of sight to Sproles’ conduct, and had to frequently cross paths with her. Bishop has also related that Sproles disliked her and any young, attractive woman because Sproles was accustomed to being “Queen” in the office. (Bishop Dep. 96.) Bishop complained frequently to Henson and Sullins about Sproles’ conduct. They responded only that they could not change her behavior and that Bishop ought to address her concerns with Sproles directly or close her door. Bishop eventually approached Schreiber and requested to move her office so as to

distance herself from Sproles. Schreiber granted the request, and Bishop moved into another office located farther away from Sproles. Bishop continued to encounter Sproles' conduct, although less frequently and primarily by receiving complaints from the temporaries working under her, and continued to bring the conduct to the attention of her supervisors.

Bishop's claims center on commodity buyer positions that became available at Aerus' Bristol plant on three separate occasions. Although the record is less than clear as to the chronology, it appears that a position relevant to the present case first opened in June 1999 and was posted internally, pursuant to a company policy under which open positions were posted internally for three days to provide promotional opportunities for current employees. Bishop claims she applied for this position, although Carter states in her affidavit that there were no internal applicants. The position was eventually awarded to Les Barrett, who was a commodity buyer at the company's Piney Flats plant and was laterally transferred to the position in Bristol.

A second commodity buyer position opened up in September 1999 due to the retirement of the previous position-holder. Aerus claims that it again posted the position internally and that four employees, but not Bishop, timely applied for the position. Because none of the internal applicants had the requisite education or experience, Aerus publicly advertised the position. Carter maintains in her affidavit

that, at some point during the public advertising process, Bishop placed her resume face down in Henson's chair while he was out of his office.

While this second commodity buyer position was open, Bishop received a call from Bob Burkhardt, who had previously been an employee in Bristol but had recently been promoted to a position in Dallas, where Aerus' headquarters are located. Burkhardt claimed he was familiar with Bishop's background by having talked with one of her former college classmates who was working under him at the time, and wanted to discuss the open commodity buyer position with her. Bishop maintains that she had not expressed an interest in the job to Burkhardt and is unsure how he knew of it. When she mentioned the prospective meeting to Sullins, he cautioned, "I'd be careful." (Bishop Dep. 131.)

Soon thereafter, Burkhardt came to Bristol on business and suggested that he and Bishop meet over drinks, telling her he could secure her appointment to the open commodity buyer position. Interested in the professional opportunity, Bishop met Burkhardt at the bar at a local Holiday Inn after work one day where they began discussing the promotion. When another Aerus employee appeared and began talking with them intermittently, Burkhardt suggested that he and Bishop go up to his room to finish their discussion without disturbance or meddling from the recently-arrived employee. Once the two arrived in Burkhardt's room, Bishop asserts that Burkhardt

made sexual advances toward her, which she refused. Upon Bishop's refusal, Burkhardt asked if he owed her an apology, to which she said yes, and he apologized, after which she left the room. It is unclear how long Bishop and Burkhardt were in the room or how soon upon arrival the alleged sexual advances occurred.

The next working day, Bishop told Sullins about the incident. Sullins' response was that "perhaps Burkhardt just didn't want to be alone in the Tri-Cities." (Carter Aff. Ex. G.) Aerus claims Burkhardt had no opinion or influence in the commodity buyer hiring decision. Bishop again heard from Burkhardt once when he called regarding a marketing position that had become available in Dallas. She told him she was not interested in leaving the Tri-Cities area.

Aerus eventually selected an outside candidate, Richard Kiser, to fill this second open commodity buyer position and designated him as Senior Commodity Buyer. Aerus claims he was hired because of his extensive purchasing experience and familiarity with the motor industry. Henson wrote Bishop a letter during this time frame saying the ideal candidate needed to have motor experience because she or he would eventually be moved to the company's Piney Flats plant and Mike Cross, a commodity buyer in Piney Flats at the time, would be transferred to Bristol. The prospective move to Piney Flats never happened, and Kiser remained in Bristol during his employment with Aerus.

When Bishop learned Kiser was not going to be moved to Piney Flats, she suspected the company never had a genuine intention to move him. She questioned Sullins about the decision, who told her she did not get the position because she did not “have the branches implemented.” (Bishop Dep. 187.) Bishop emphasized that it was an unfair evaluation because the information services unit did not have the database ready for her, causing her work to slow down. Sullins also told her that Schreiber “did not like women working for him,” and that it might be better for her to not be working at the company because she seemed to prefer “a more professional environment.” (Bishop Dep. 159, 162.) Bishop also went to talk with Mike Fuller, Sullins’ superior, who told her that her suspicions were untrue and to “back away” from him. (Bishop Dep. 160.)

Once Kiser started work, he repeatedly asked Bishop to have dinner with him, saying he wanted her to help him understand the “politics” of the Purchasing Department. (Bishop Dep. 117.) She consistently declined the invitation, feeling it would be unprofessional. One Friday evening, while she was working late, Bishop ran into Kiser between the parking area and their office. Kiser was leaving the building while Bishop was returning to the office. Kiser again asked her to have dinner, to which she responded with a frustrated “no.” By the time Bishop reached her office, Kiser had left her a lengthy voice mail saying he “would really like to go

out . . . have [a] drink or have dinner.” (Bishop Dep. 119.) Bishop came to work again the next day, Saturday, and again saw Kiser in the office. Bishop claims she tried to engage him in normal conversation, but he “almost ran over” her and “turned around and looked at [her] like he could kill [her] and didn’t say one word.” (Bishop Dep. 120.) Bishop became frightened by Kiser’s conduct and left the office immediately. She told Sullins about the incident the following Monday morning. Although he offered to “talk to [Kiser],” Bishop declined because she expected that the proper response would be to terminate him and felt that Sullins’ proposed response would only make “a bad situation worse.” (Bishop Dep. 121.) Although Kiser remained with the company, there is no evidence in the record regarding any further interactions between Kiser and Bishop for the remainder of his tenure at Aerus.

In October 1999, Bishop wrote a memorandum to her superiors requesting a pay increase. She requested a fifteen percent increase in salary and was granted five percent. At the time she made this request, as Bishop later learned, Sullins wrote a memorandum to his superiors regarding her performance and request in which he criticized her character and accused her of holding “the advertising system hostage” if she did not receive the raise. (Bishop Dep. 186.) Bishop inadvertently discovered this memo in Sullins’ office while she was searching, with another executive’s

permission, for another document. At the time she found the memo, she made a copy for herself and took the original to Henson to bring Sullins' conduct to his attention. Later, in August 2000, once Bishop's legal actions against Aerus had been initiated, the company demanded that she return her copy of this memorandum.

In March 2000, Aerus hired Jim Rye as the Director of Materials. Bishop asserts that "Rye made it a practice to come into [her] office on a daily bases [sic] and discuss [her] impending promotion to a commodity buyer position." (Carter Aff. Ex. G.) Rye would say that Sullins had told him that Bishop was ready for the position. He told her that the promotion was planned for June, that "the company [was] creating a position for [her]," and that she would be handling primarily literature and packaging materials. (*Id.*) Sullins confirmed the seemingly forthcoming promotion on other occasions, telling Bishop that the game plan was to distribute to her some of the commodities handled by Kiser. Sullins also told her that the promotion would mean a thirteen percent increase in pay and suggested she shorten a planned vacation in order to continue working and get the system fully implemented, which Bishop did.

During Rye's regular visits to Bishop's office, he would sometimes see her stretch and rotate her neck so as to relieve tension in her shoulder muscles. Saying he could show her some back exercises that would help relieve her condition, Rye frequently invited Bishop to "work out" with him at the health room in the local

Holiday Inn. (*Id.*) Bishop says she always declined his offers politely. At the end of April 2000, Bishop relates that Rye became distraught and flustered with her because she refused to accompany him to the gymnasium. He remarked that she was “the type of person who liked to complain and not do anything about it,” to which Bishop firmly retorted that when she “had issues [she] took care of them.” (*Id.*) Rye appeared to be taken aback by Bishop’s unexpected candor. He thereafter ceased visiting her office and never mentioned the promotion to her again.

Bishop finished implementing the system to all of the branches during the summer of 2000. One week after completing the project, she was transferred to the Field Operations unit. She was advised of the transfer in a meeting with Sullins, Fuller, and Bill Campbell, who was the Vice President of Field Operations. Bishop protested the transfer, maintaining that she had been promised a promotion. Upon transferring, Bishop’s duties did not change, although the goals as to which she was evaluated shifted from cost savings or purchase price variance to customer service to the branches.

Bishop had also started training on the Cullinet computer software while she was in the Purchasing Department. Campbell initially told her that she could continue training even though she was now in Field Operations. However, he later withheld the training, saying he had to secure approval from Sharon Buck, who was

the Director of Quality at the time. Campbell also later told Bishop that there would be “no opportunity for a promotion in the near future.” (*Id.*) Although Bishop claims Aerus withheld Cullinet training at this stage in her employment, she has also confirmed that the company at some point during her employment, allowed her to prepare to become a “certified purchasing manager” and reimbursed her for the costs of doing so. (Bishop Dep. 38.)

On July 31, 2000, Bishop questioned Henson, Sullins, and Campbell about her concerns that Aerus maintained a sexually charged and hostile work environment and that her refusal to comply with the after-hours demands of members of the male management had compromised her promised promotion. She was told at this time that “the promised position did not exist.” (Carter Aff. Ex. G.) During this meeting, Campbell also questioned Sullins as to any promises he had made to Bishop regarding a promotion. Sullins admitted that he had spoken to her regarding a job but denied that he had promised it.

On August 3, 2000, at Henson’s encouragement, Bishop met with Henson, Campbell, and Rye, so as to confront the latter about her suspicions. Rye admitted asking her to meet him at Holiday Inn to work out, claiming his intent was to help her with her back and shoulders. He said he had not realized that his visits to her office had suddenly ceased. Rye offered in explanation that his visits may have become

rarer because his secretary “got ‘huffy’ with him whenever he talked to another female.” (*Id.*) Bishop stated that she “did not appreciate the male managers of the company trying to do business with [her] at Holiday Inn.” Rye also admitted not having the authority to promise Bishop a job, and she was told there was no commodity buyer position reserved for her. After the meeting, Rye came to Bishop’s office and told her “I’m sorry if I promised you a promotion, if I did I did it in my stupidity.” (Bishop Dep. 192.)

Later that month, Bishop went back to Henson to ascertain what his official response would be to the concerns and allegations she had expressed against the male executives and the company. When Henson failed to do anything to improve her work environment or to remedy the unfair treatment she felt she had endured, Bishop first consulted an attorney. Soon thereafter, she filed a charge against Aerus with the EEOC, claiming that the company maintained a sexually hostile work environment and that she had suffered discrimination and retaliation on account of sex. She protested Aerus’ failure to follow through with a promised promotion to the commodity buyer position after she had refused her supervisor’s request to work out with him at the local Holiday Inn. She also asserted she was discriminatorily refused training on the Cullinet computer software. The EEOC issued a dismissal on March 30, 2001, saying it was “unable to conclude that the information obtained establishes

violations” of Title VII. (Carter Aff. Ex. G.) The agency authorized Bishop to file a suit, and she filed her first Title VII action in this court in June 2001.

In July 2001, the relevant commodity buyer position became open for a third time, as Kiser terminated his employment with Aerus. The job was again posted internally and required a successful applicant to have a college degree “in a related discipline or five years of experience in a related field.” (Carter Aff. Ex. D.) The posting did not specify the types of disciplines or fields that would be considered “related.” Bishop timely applied for the position, as did Billy Whited, a supervisor in the Bristol facility, and two others. The application process was administered by Sharon Buck, who was then the Director of Supply Chain Management.

After reviewing the applications, Buck determined that none of the four applicants met the minimum qualifications for the position. Bishop’s college degree in graphics design and minor in business were not considered to be in a “related discipline,” and she did not have at least five years of experience in a field related to purchasing. Likewise, the other three candidates did not have college degrees or sufficient purchasing experience. As a result, Buck, with Carter’s approval, designed a matrix containing various criteria that she deemed relevant to the position and that she planned to use to evaluate and compare the candidates. The criteria were years of college, experience with the Cullinet computer software, knowledge of parts and

products, prior purchasing experience, verbal communication skills, initiative, and attendance history. They were weighed 3, 4, 4, 3, 4, 4, 5, respectively. Bishop claims Aerus favored promoting Whited, and Buck devised the matrix so as to deliberately minimize Bishop's strengths in education and purchasing experience and maximize the impact of the factory-floor experience Whited had acquired as a production supervisor. Buck admits talking with Whited and another applicant before the interviews began about the years of college they had attended, but it is unclear whether she did this before or after she devised the matrix. In any event, Whited supplemented his application with a second resume that, unlike his first resume, reflected his educational qualifications and the college classes he had taken.

Once Buck collected the resumes and devised the matrix, she interviewed the candidates, asking them questions related to the matrix categories. During Bishop's interview, Buck told her "she was going to hire a woman for the job" but did not mention that the college degree requirement had been changed into a years-of-college requirement or that her major in graphics design and minor in business were not considered to be "related" to the commodity buyer position. (Bishop Dep. 165.) Buck also knew at the time of the interview that Bishop had filed an EEOC charge and a Title VII lawsuit alleging discrimination.

Buck scored the interviewees based on the criteria in the matrix. Bishop scored as high as or higher than the other three candidates in five of the seven categories. Because she had little experience with the Cullinet software and had scarcely any knowledge of parts and products, Bishop scored third out of the four candidates overall. Whited had production floor experience, so was familiar both with the company's current parts and products as well as with the Cullinet computer software, and scored first among the candidates. Accordingly, Buck awarded the promotion to Whited.

A few months thereafter, in December 2001, Aerus terminated Bishop's employment. She was notified of the dismissal by Campbell, who was aware of her lawsuit against Aerus and who told her that the company was terminating the advertising consolidation program because "it cost the company too much money, including [Bishop's] salary." (Bishop Aff. ¶ 35.) He said that the departments were being forced to reduce their workforce and that Bishop "was the one who had to go." (Bishop Aff. ¶ 33.) She was the only permanent employee out of a staff of sixty in the Field Operations unit who was dismissed at this time, and she had never received any reprimand for performance deficiencies during the entirety of her employment with Aerus. During her tenure at Aerus as Advertising Services Manager, Bishop

claims the centralized advertising program saved the company \$533,000 in 1999, \$143,000 in 2000, and \$68,000 through June 2001.

Bishop maintains in the present action that Aerus tailored and refined the hiring criteria in September 2001 so as to ensure that she was not promoted. She alleges Aerus' conduct was a result of her refusal to accede to the sexual advances of her male superiors and constituted discrimination against her on account of her sex and retaliation. She further claims that had she not been discriminatorily denied the promotion to the commodity buyer position in September 2001, she would not have been in a position that could be so easily and pretextually eliminated by the company. Finally, she maintains that the failure to promote and the termination were a paired strategy on the part of Aerus to retaliate against her for filing the EEOC charge and a Title VII lawsuit and to remove her from its employ.

II

Summary judgment is appropriate only if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). All reasonable inferences are “viewed in the light most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Although the

moving party must provide more than a conclusory statement that there are no genuine issues of material fact to support a motion for summary judgment, it “‘need not produce evidence, but simply can argue that there is an absence of evidence by which the nonmovant can prove his case.’” *Cray Communications, Inc. v. Novatel Computer Sys., Inc.*, 33 F.3d 390, 393-94 (4th Cir. 1994) (quoting 10A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2720, at 10 (2d ed. Supp. 1994)); *see also Celotex*, 477 U.S. at 325 (“[T]he burden on the moving party may be discharged by ‘showing’-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party’s case.”). Once the moving party has met its burden, “the nonmoving party must come forward with ‘specific facts showing that there is a *genuine issue for trial.*’” *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The nonmoving party’s evidence must be probative, not merely colorable, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); cannot be “conclusory statements, without specific evidentiary support,” *Causey v. Balog*, 162 F.3d 795, 801-02 (4th Cir. 1998); cannot be hearsay, *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996); and must “contain admissible evidence and be based on personal knowledge.” *Id.*

III

Bishop's first claim alleges that Aerus discriminated against her on account of sex when it failed to promote her to a commodity buyer in September 2001. To establish a claim of employment discrimination by disparate treatment, a plaintiff must present either direct evidence showing that the defendant intended to discriminate or circumstantial evidence "of sufficiently probative force to raise a genuine issue of material fact." *Evans*, 80 F.3d at 959. Failing to meet either of these two thresholds, a plaintiff may proceed via the *McDonnell Douglas* proof scheme, under which she must first establish a prima facie case of discrimination by a preponderance of the evidence. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The plaintiff makes a prima facie case by showing that: (1) she is a member of a protected class; (2) her employer had an open position for which she applied or sought to apply; (3) she was qualified for the position; and (4) she was rejected for the position under circumstances giving rise to an inference of intentional and unlawful discrimination. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The plaintiff satisfies the last factor for purposes of making a prima facie case by merely showing that the position in question was filled by a male applicant. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 186-87 (1989). Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to

produce evidence that shows a “legitimate, nondiscriminatory reason” for its actions. *Tex. Dep’t of Cmty. Affairs*, 450 U.S. at 254. In making hiring or promotion decisions, an employer is permitted to base its decision on relative employee qualifications and may also “choose among equally qualified candidates, provided the decision is not based on unlawful criteria.” *Id.* at 259. If the defendant meets this burden, the onus shifts back to the plaintiff to show that the reason proffered by the defendant was merely a pretext for discrimination and that the defendant discriminated against her intentionally. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). The plaintiff may meet this burden by showing that the defendant knew she was the more qualified candidate for the position in question but nevertheless hired someone less qualified. *Evans*, 80 F.3d at 960.

Bishop has not presented any direct evidence or any circumstantial evidence of sufficient probative value to raise a genuine issue of material fact regarding her allegations that Aerus intentionally discriminated against her on account of her sex when it denied her the promotion to a commodity buyer position in September 2001. I therefore must apply the *McDonnell Douglas* burden-shifting scheme and first determine whether Bishop has made a prima facie case of discrimination by showing that it was more likely than not that Aerus’ failure to promote her was motivated by discriminatory intents.

Bishop has shown that she is a member of a protected class and that Aerus had an open commodity buyer position for which she timely and properly applied. She has also sufficiently shown that she was qualified for the position of commodity buyer, as evidenced by the fact that Buck accepted her candidacy for the position and proceeded to evaluate her in light of the matrix criteria. Likewise, Bishop has shown that the position was eventually awarded to a male, thereby meeting her burden of making a prima facie case that Aerus engaged in intentional and unlawful sex discrimination.

Although she has established a prima facie case, Bishop has not proffered sufficient probative evidence showing that any legitimate, non-discriminatory reasons advanced by Aerus for its refusal to promote her to a commodity buyer are pretextual or “unworthy of credence.” *Tex. Dep’t of Cmty. Affairs*, 450 U.S. at 256. Aerus claims it did not promote her in September 2001 because, under its objective and numerical evaluation process, she simply was not the most qualified candidate. It is established that an employment decision based on “relative employee qualifications” is valid and non-discriminatory, even if the decision is adverse with regard to the plaintiff. *Id.* at 258-59. In order to show that Aerus’ offered explanation is pretextual, Bishop must show “both that the reason given for the adverse action by

the employer was false, and that discrimination was the real reason.” *Taylor v. Va. Union Univ.*, 193 F.3d 219, 230 (4th Cir. 1999).

Bishop maintains that Aerus’ claim that it selected the most qualified candidate is pretextual and that the promotion decision was tailored so as to intentionally discriminate against her. She argues that the matrix was inconsistent with the posted job qualifications, contained criteria that were specifically designed to enhance the strengths of the less qualified male employee the company wanted to promote, and weighed criteria in a discriminatory manner so as to minimize her strengths. Specifically, Bishop protests Buck’s modification of the college degree requirement to a “years of college” criterion and her inclusion of factors such as Cullinet experience, rather than Cullinet proficiency, and knowledge of parts and products. Bishop also notes that Buck weighed education and purchasing experience lower and gave greater weight to experience with the Cullinet system and knowledge of parts and products. Finally, she notes that no such matrix was developed for the hiring of Kiser when the position opened up in September 1999, and that Kiser, the very employee whose retirement had created the July 2001 opening, was hired even though he was an outsider and had no knowledge of Cullinet or of the company’s parts and products.

Bishop's protests attempting to show Aerus' decision to not promote her was a pretext for intentional discrimination are not persuasive. As a preliminary matter, Buck designed the matrix because, in her view, none of the candidates met the minimal qualifications for the position. The criteria upon which Buck settled for her matrix cannot be second-guessed because they are closely connected to the responsibilities described in the "Position Description" section of the job posting and to traits that common sense dictates would make for hardworking, successful employees. Buck, as a supervisor in that field, would have been in the best position to know the relevant selection criteria, and I cannot question her judgment based on the evidence in the record.

Bishop's distinction between Cullinet experience and Cullinet proficiency is exaggerated and irrelevant because the few hours of training she received on the system likely did not qualify her as proficient or as having proficiency comparable to what would be required in the daily performance of the job. Buck's weighing of the various criteria and her use of the matrix for the first time are also not pretextual, because, as Carter testified, the weights given to each criteria were based on Buck's business judgment that the company needed a candidate with strong Cullinet and parts and products credentials because it had just lost two experienced commodity buyers. Similarly, at the time Kiser was hired, almost two years prior to the opening

in contention here, the business environment and the defendant's staffing needs may have been different, and Aerus is in the best position to make that judgment. An employer's emphasis on certain job criteria to the exclusion of other such criteria cannot alone be probative of pretext. "[T]he business world is a 'dynamic' one in which the relative importance of various job qualifications may change over time." *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 646 n.2 (4th Cir. 2002). Moreover, Kiser was overly qualified with regard to the minimum qualifications set forth in the job posting to which he applied, so the development of a matrix with additional criteria was never an issue.

The crux of Bishop's argument to show that Aerus' purportedly non-discriminatory reason is false appears to be that she was more qualified for the position than was the male candidate who was ultimately hired. However, when the only evidence of pretext presented by a plaintiff is as to her superior qualifications, a reasonable jury can find pretext only where the superiority of her qualifications are so "apparent as virtually to jump off the page and slap you in the face." *Deines v. Tex. Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 280-81 (5th Cir. 1999); *see also Dennis*, 290 F.3d at 648. Bishop's presentation of her qualifications does not meet this standard. Although she had a college degree whereas the other candidates

did not, her degree was not within a “related” field, and her experience-based qualifications for the position were comparable to those presented by Whited.

Not only has Bishop failed to carry her burden of showing that the defendant’s justification for not promoting her is pretextual, she has also not otherwise shown that Buck and Carter intentionally discriminated against her on account of her sex. The record contains no evidence that Buck was aware of the specific nature of the disagreements Bishop had been having with her male supervisors or that Buck’s awareness of Bishop’s EEOC claim or lawsuit played into her ultimate decision in any way.

Bishop relies on two Tenth Circuit cases, *Simms v. Okla. ex rel. Dep’t of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1328 (10th Cir. 1999) and *Mohammed v. Callaway*, 698 F.2d 395, 399 (10th Cir. 1983), for the proposition that an employer’s manipulation of hiring or promotional criteria establishes a strong inference of discrimination. These two cases do not support Bishop’s cause. In *Mohammed*, the court viewed the modification of promotional criteria with skepticism where the new criteria were in direct contradiction to the criteria stated on the job posting. In that context, and juggling the application of both the old and new criteria, the court determined that the defendant had engaged in racial discrimination where the two candidates were not “equally qualified,” and the plaintiff’s

qualifications were “objectively superior” to those of the candidate actually promoted. *Id.* at 400-01. This view is in line with the national standard in employment discrimination cases that an employer who compares employee qualifications and promotes the most qualified employee does not engage in unlawful discrimination even if those not promoted belonged to one or more protected classes, as long as the protected status is not the basis of the employer’s decision. *Tex. Dep’t of Cmty. Affairs*, 450 U.S. at 259. Accordingly, Bishop’s case is properly distinguished because the criteria Buck utilized in her matrix to evaluate the candidates were extensions of the posted criteria and were closely related to the stated tasks in which a commodity buyer would be involved. Aerus further asserts that it used the criteria to compare the candidates as required by law and determined that Whited was better qualified than was Bishop for the position. Bishop is unable to dispute Aerus’ contention that its decision on this matter was objective because she has not shown that she was objectively more qualified for the position than was Whited. Again, Bishop’s degree was not in a field related to the position, and her experience was comparable to, though different from, and not superior to, Whited’s experience.

Similarly, *Simms* reaffirms my reasoning that an employer’s manipulation of hiring criteria to include additional criteria that are clearly related to the position in question do not raise suspicions of pretext unless the plaintiff shows that the criteria

are illegitimate or that they are irrelevant to the position. Here, Bishop has not shown that the criteria Buck included in the hiring matrix were in any way irrelevant to competent and effective performance as a commodity buyer.

Bishop references the Supreme Court's clarification in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves* is also of no consequence to the present case, because Bishop has not shown that Aerus' proffered reasons for its decision to not promote her are false. *See Dachman v. Shalala*, 9 Fed. Appx. 186, 190 n.4 (4th Cir. 2001) (unpublished).

IV

In her second claim, Bishop alleges that she was denied the September 2001 promotion to the commodity buyer position and then was terminated by Aerus in retaliation for having filed a charge of sexual discrimination with the EEOC and subsequently a civil lawsuit. The plaintiff treats her claims of retaliatory failure to promote and retaliatory discharge as coupled, and I will also treat them as so for purposes of resolving the present summary judgment motion. In the absence of direct

evidence, the proof- and burden-shifting scheme established by *McDonnell Douglas* and clarified by *Texas Department of Community Affairs* also applies to retaliation claims. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). To make a prima facie case of retaliation, an employee must show that: (1) she “engaged in protected activity;” (2) her “employer took adverse employment action against” her; and (3) “a causal connection existed between the protected activity and the adverse action.” *Id.* The plaintiff can establish a causal connection by showing that the employer knew the employee had engaged in protected conduct and that there was sufficient “temporal proximity” between the protected conduct and the retaliation. *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994). Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to produce evidence that shows a “legitimate, nondiscriminatory reason” for the adverse action. *Tex. Dep’t of Cmty. Affairs*, 450 U.S. at 254. If the defendant meets this benchmark, the onus shifts back to the plaintiff to prove retaliation by demonstrating that the reason proffered by the defendant is merely a pretext for intentional retaliation and that the adverse action would not have come about “but for” the protected conduct in which the employee engaged. *Ross*, 759 F.2d at 366; *see also St. Mary’s Honor Ctr.*, 509 U.S. at 511; *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 n.6 (1989); *McDonanld v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976).

Bishop has not presented any direct evidence of retaliation, so the *McDonnell Douglas* analysis must be applied. Bishop has made a prima facie case of retaliation. She engaged in protected activity when she filed her first EEOC charge in August 2000 and her first Title VII suit against Aerus in June 2001. She suffered adverse employment action when she was denied the promotion to a commodity buyer and was dismissed from her employment. *See Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981)) (“[E]mployment action adversely affecting an employee [includes] ultimate employment decisions, such as hiring, granting leave, discharging, promoting, and compensating.”). Bishop has also proven a causal connection between the protected activity and the adverse action. The record indicates that Buck, the primary decision maker with regard to the promotion decision, was aware of Bishop’s lawsuit against Aerus. Carter and Campbell, the two officials who administered the plaintiff’s termination of employment in December 2001, also knew of her suit. As for temporal proximity, the record shows that Bishop filed her first EEOC charge in August 2000 and her first lawsuit in June 2001. She was thereafter denied the promotion, and allegedly first sustained retaliation, in September 2001. Although the thirteen months between the filing of the EEOC charge and the denial of the promotion may present an attenuated causal connection, the fact that the promotion denial came less than three months after the filing of the Title VII suit does present sufficient causal

connection. The Fourth Circuit has maintained that the temporal proximity between the protected activity and the adverse employment action is to be assessed in light of both the actual date of the filing as well as the time at which intermediate procedural developments in the legal action occurred. *Carter*, 33 F.3d at 460. Here, Bishop's filing of the Title VII suit is such an intermediate legal step that must be taken into account in assessing causal connection. Proving a prima facie case of causality is intended to be a "less onerous burden," *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989), and I find that the less than three months that separated the plaintiff's filing of a Title VII civil action and Aerus' denial of the promotion to her demonstrates sufficient temporal proximity to prove a causal connection.

In response to Bishop's prima facie case, Aerus successfully responds that it had a legitimate, nondiscriminatory reason for both its adverse actions against the plaintiff. It maintains that it did not award the September 2001 commodity buyer position to Bishop because another candidate who had applied for the position was more qualified than her. Similarly, it contends that its decision to terminate Bishop's employment was a strategic decision resulting from its discontinuance of the advertising consolidation program and its need to reduce costs.

The burden therefore shifts to Bishop to show that Aerus' proffered reasons are pretextual, and she makes a number of arguments. She first reiterates the arguments

she presented with regard to pretext in her discrimination claim. Bishop also argues that Aerus' claim regarding the elimination of the advertising consolidation program is pretextual because the savings generated by the program were greater than its costs and because Campbell, at the time he terminated her, did not tell her that the program was being terminated because of complaints from branch managers. She also claims that she was intentionally denied training on the Cullinet software once she was transferred to the Field Operations unit in order to prevent her from being qualified for promotions to any commodity buyer positions that might become available. Bishop cites the example of Angie Daniels, Buck's assistant, who was provided training and eventually promoted but who had not filed discrimination charges against Aerus. Finally, the plaintiff recites her work history as proof that Aerus maintained a sexually charged environment, one that necessarily led to retaliation against her because both her EEOC charge and her lawsuit were premised on sexual discrimination.

Again, as was the case with her discrimination claim, Bishop's arguments fall short of creating a genuine issue of material fact regarding the sincerity of Aerus' proffered reasons for her failure to be promoted and her termination. Although a defendant employer's post hoc invention of a reason for a termination would be strong evidence of a pretext, that is not the case here. Campbell may not have told

Bishop at the time of her termination that the advertising program was being discontinued due to complaints from branch managers, but he did tell her of its discontinuance and of the resulting wastefulness of her salary. This appears to be a sufficient justification shared by a supervisor with a supervisee. Similarly, in citing financial figures to demonstrate the cost savings generated by the advertising consolidation program, Bishop misreads Aerus' arguments. Aerus asserts that it eliminated the program because it was encountering significant opposition from its branch managers. Having decided to eliminate the program, Aerus claims it terminated Bishop's employment because her salary would no longer result in any cost savings and its elimination itself became a useful cost-saving tool for the company. Bishop's assertion of the savings generated by her implementation of the advertising consolidation program do not refute either of these rationales advanced by Aerus. Although she also asserts that Aerus' contention that branch managers were unhappy with the program is factually untrue, Bishop has not presented any evidence in support of this contention, other than the conclusory statements in her affidavit.

Bishop's contention regarding the company's denial of Cullinet software training to her also does not withstand scrutiny. Bishop claims the company began withholding authorization to allow her to train on the Cullinet software once she was

transferred to the Field Operations unit in the summer of 2000. The time period between summer 2000 and the first allegedly retaliatory action in September 2001 is too long to reasonably allow an inference that the company was scheming against her during that entire time period with the intent of denying her a promotion that was more than one year away. In addition, it is clear from the record that Buck's decision to include Cullinet software experience as a qualifying criteria for a commodity buyer was a relatively last-minute one and did not occur until after July 2001. The inference is therefore weak that Aerus had preconceived the events that would play out during 2001 and had this strategy to retaliate against Bishop up its sleeve since the summer of 2000. Likewise, Bishop's reference to Daniels is irrelevant because she has not shown that Daniels' situation was comparable to her situation, in terms of department, job responsibilities, job performance, future potential, or any other related trait.

Finally, although Bishop's description of her work history is both informative and helpful in contextualizing her complaint, it does not enhance the legitimacy of her claims because most of the incidents she recounts occurred prior to the filing of her EEOC charge. In addition, the primary individuals with whom she had significant conflicts were not the ones who held decision-making authority in both the promotion and termination decisions. Indeed, from the record, it appears that Campbell and

Buck were both quite respectful of Bishop and did not attempt to harass or alienate her at any time.

Because Bishop has created no genuine issue of fact with regard to her retaliation claims, I must grant summary judgment in favor of Aerus. Aerus' decisions, both to promote Whited and to terminate Bishop, were not in violation of Title VII and appear to be legitimate business decisions whose wisdom is best left to Aerus.

V

For the foregoing reasons, the defendant's Motion for Summary Judgment will be granted and final judgment entered in its favor.

DATED: December 3, 2003

United States District Judge