

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit,
held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of
New York, on the 27th day of August, two thousand twenty-one.

PRESENT:

**REENA RAGGI,
GERARD E. LYNCH,
MICHAEL H. PARK,**
Circuit Judges.

WEIPING LIU,

Plaintiff-Appellant,

v.

20-64

**INDIUM CORPORATION OF AMERICA,
NING-CHENG LEE, Vice President of
Technology of Indium Corporation,**

Defendants-Appellees,

**DAWN ROLLER, Director of Human Resources of Indium
Corporation, GREG EVANS, President of Indium Corporation,**

Defendants.

FOR PLAINTIFF-APPELLANT:

Weiping Liu, pro se, New Hartford, NY.

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2 **FOR DEFENDANTS-APPELLEES:**

Kevin G. Martin, Martin & Rayhill, P.C.,
Utica, NY.

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5 Appeal from a December 11, 2019 judgment of the United States District Court for the
6 Northern District of New York (Brenda K. Sannes, *J.*).

7 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
8 **DECREED** that the judgment of the district court entered on August 15, 2019 is **AFFIRMED**.

9 Appellant Weiping Liu, through counsel, sued his former employer, Indium Corporation
10 of America (“Indium”), and three of its employees under 42 U.S.C. § 1981, Title VII, 42 U.S.C.
11 § 2000e, et seq., and New York State law. Liu, a former research scientist in Indium’s research
12 and development department (“R&D”), alleged that Defendants discriminated against him based
13 on his Asian race and retaliated against him for complaining of discrimination by firing him in
14 2016. The district court granted summary judgment to Defendants on all claims but that charging
15 Indium and Defendant Ning-Cheng Lee with retaliation. At trial, a jury found in these
16 Defendants’ favor. Proceeding *pro se*, Liu appeals the district court’s partial summary judgment
17 ruling, certain evidentiary rulings at trial, and the jury instructions; he also moves to file a
18 supplemental appendix. Defendants move to file late opposition papers to Liu’s motion. We
19 assume the parties’ familiarity with the underlying facts, the procedural history of the case, and
20 the issues on appeal.

21 **I. SUMMARY JUDGMENT**

22 We review a grant of summary judgment de novo, “resolv[ing] all ambiguities and
23 draw[ing] all inferences against the moving party.” *Garcia v. Hartford Police Dep’t*, 706 F.3d

120, 126–27 (2d Cir. 2013). “Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, ‘there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *Doninger v. Niehoff*, 642 F.3d 334, 344 (2d Cir. 2011) (quoting Fed. R. Civ. P. 56(a)).

5 **A. Federal-Law Claims**

6 1. Title VII and Section 1981 Racial Discrimination Claims Against Indium 7 and Lee

8 Title VII and section 1981 claims are evaluated under the *McDonnell Douglas* framework.
9 *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Vega v. Hempstead Union*
10 *Free Sch. Dist.*, 801 F.3d 72, 82–83 (2d Cir. 2015) (Title VII); *Choudhury v. Polytechnic Inst. of*
11 *N.Y.*, 735 F.2d 38, 44 (2d Cir. 1984) (section 1981). To make out a prima facie case of
12 discrimination, a plaintiff has the burden of establishing that an adverse employment action
13 occurred under circumstances giving rise to an inference of discrimination. *See McDonnell*
14 *Douglas*, 411 U.S. at 802. After a plaintiff establishes a prima facie case of discrimination, the
15 employer must articulate a legitimate, non-discriminatory reason for the adverse employment
16 decision. *See id.* The burden then shifts back to the plaintiff to present evidence that the
17 employer’s proffered reason is pretext for discrimination. *See id.* at 804–05. If the plaintiff
18 cannot establish pretext, the employer is entitled to summary judgment. *See James v. N.Y. Racing*
19 *Ass’n*, 233 F.3d 149, 154 (2d Cir. 2000).

20 At the outset, Liu has failed to establish a prima facie case of discrimination. Liu argues
21 discrimination is evident in the different treatment of Asian and white employees, a lack of
22 promotion opportunities, a rule prohibiting employees from speaking Chinese at the office (the

1 “no Chinese rule”), and R&D’s exclusion from certain company programs. But Lee, who
2 managed the R&D department, is Asian, and the scientists who rotated as Lee’s deputies were all
3 Asian (except for Lee Kresge, who is white). Therefore, it cannot be said that Asian employees
4 were denied any promotional opportunities based on race. *Cf. Brown v. Henderson*, 257 F.3d
5 246, 254 (2d Cir. 2001) (concluding that employees’ treatment was not due to sex when no
6 evidence suggested that plaintiff’s sex was relevant to alleged mistreatment and men and women
7 were treated equally). With respect to the no Chinese rule, Liu failed to offer any evidence that
8 employees were permitted to speak other foreign languages at work or that Chinese employees
9 were otherwise singled out under the rule. *See Joseph v. N. Shore Univ. Hosp.*, 473 F. App’x 34,
10 37 (2d Cir. 2012) (employee prohibited from speaking native French was not discriminated against
11 because she adduced no evidence that coworkers speaking Spanish were treated differently).

12 Liu next asserts that Indium discriminated against Asians by forcing scientists to work
13 extra days, prohibiting R&D employees from competing for an internal company award,
14 disallowing business-class air travel, ignoring Liu’s suggestions to improve the company, and
15 mishandling Liu’s complaints about his coworkers. But Liu did not offer any evidence showing
16 that R&D employees of other racial groups were treated differently with respect to any of these
17 matters. Liu also claimed that white scientists and technicians had been picked to chair sessions
18 at industry conferences. But he offered no evidence that Defendants were responsible for those
19 decisions.

20 Liu next contends that Kresge, a white research scientist, and white technicians in the R&D
21 department were treated more favorably than Liu. But neither of those are suitable comparators.
22 A comparator is similarly situated when he is subject to the same performance standards and

engages in the same conduct. *See Norville v. Staten Is. Univ. Hosp.*, 196 F.3d 89, 96 (2d Cir. 1999). Most of the technicians had only bachelor's degrees while most of the research scientists had Ph.D.s and did not serve as Ning-Cheng Lee's deputies. Thus, they are not similarly situated employees. And although Kresge had the same title as Liu, their duties were different. Kresge also did not have a Ph.D. and, unlike Liu, was not required to publish papers. Nor is there evidence that the white technicians and Kresge were insubordinate or had interpersonal conflicts with other employees as Liu did. Indium's treatment of Liu compared to these white employees is thus insufficient to show a prima facie case of discrimination or that Indium's proffered reasons for firing Liu were pretextual.

Even viewed in the light most favorable to Liu, the evidence does not demonstrate a prima facie case of racial discrimination or that Indium's legitimate, nondiscriminatory reasons for terminating Liu were pretexts for racial discrimination. We therefore affirm the district court's entry of summary judgment in favor of Defendants on Liu's Title VII and section 1981 claims.

2. Section 1981 Retaliation Claims Against Gregory Evans and Dawn Roller

"The elements required to make out a claim of retaliatory discharge under 42 U.S.C. § 1981 are the same as those required to make out such a claim under Title VII." *Taitt v. Chem. Bank*, 849 F.2d 775, 777 (2d Cir. 1988). To establish a prima facie case of retaliation under Title VII, a plaintiff must demonstrate that "(1) [he] was engaged in protected activity; (2) the employer was aware of that activity; (3) the employee suffered a materially adverse action; and (4) there was a causal connection between the protected activity and that adverse action." *Lore v. City of Syracuse*, 670 F.3d 127, 157 (2d Cir. 2012). To establish a section 1981 claim against an individual defendant, a plaintiff must show the defendant's personal involvement with the alleged

1 discrimination or retaliation. *See Littlejohn v. City of New York*, 795 F.3d 297, 314 (2d Cir. 2015).

2 Liu failed to carry his burden as to Indium President Gregory Evans because there was no
3 evidence of his personal involvement in Liu’s termination. The same goes for Vice President
4 Dawn Roller, whose only involvement in Liu’s firing was processing Liu’s termination
5 administratively. And although she knew of a racial discrimination complaint made by Liu in
6 2013, she did not know that Liu had made more recent complaints alleging racial discrimination.
7 A reasonable factfinder thus could not have concluded that there was a causal connection between
8 the protected activity and Roller’s involvement in Liu’s termination. Therefore, Liu’s retaliation
9 claims against these defendants fail at the prima facie step of review.

10 **B. State-Law Claims**

11 1. Breach of Contract

12 The district court properly entered summary judgment in favor of Indium on Liu’s breach-
13 of-contract claim. Insofar as Liu argues that assurances made to him by Lee established an oral
14 contract, his claim fails. The New York Statute of Frauds requires contracts that cannot be fully
15 performed within a year to be in writing. N.Y. Gen. Oblig. Law § 5-701(a)(1). Moreover, New
16 York courts consider oral employment contracts that are indefinite in nature to create at-will
17 employment relationships. *See, e.g., Martin v. N.Y. Life Ins. Co.*, 148 N.Y. 117, 121 (1895) (“[A]
18 general or indefinite hiring is, prima facie, a hiring at will[.]”); *Cunnison v. Richardson*
19 *Greenshields Sec., Inc.*, 107 A.D.2d 50, 55 (1st Dep’t 1985) (“It has long been the law of this State
20 that unless an employment is for a definite period of time, the hiring is presumed to be at will.”).
21 Liu argues that Lee told him that “as long as Lee was with Indium, [Liu’s] job was secure.”
22 Appellant Br. 58. But even if this was true, it does not create a definite end-date for Liu’s

1 employment. And even if there were any ambiguity about Liu's employment being at-will, this
2 was resolved by his acknowledged receipt of Indium's employee handbook; both that written
3 acknowledgement and the handbook reiterated that Indium employment was at-will. Thus, Liu's
4 breach of contract claim was correctly dismissed.

5 2. Defamation

6 The district court properly granted summary judgment to Indium and Lee on Liu's
7 common-law defamation claim. Special harm is an essential element of defamation unless the
8 false statement is defamatory per se. *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dep't
9 1999). Liu argues that a published scientific article attributed to him is defamatory per se because
10 it was an inaccurate statement about the practice of his profession: Liu was listed as first author of
11 an article that falsely claimed that a particular product, an alloy, was Indium's proprietary
12 invention. The Restatement (Second) of Torts provides that claims about a product do not
13 constitute defamation per se, except when they imply that the developer of a product is somehow
14 incompetent or acting fraudulently. Restatement (Second) of Torts § 573(g). The article
15 contains no information about the sources of the alloys and makes no claims about its authors.
16 Accordingly, Liu was required to offer evidence of special harm to establish defamation. He did
17 not, and thus failed to establish a defamation claim.

18 3. N.Y. Civil Rights Law § 51

19 Section 51 of the New York State Civil Rights Law permits a plaintiff to sue for damages
20 when his name is used within New York State "for advertising purposes or for the purposes of
21 trade without plaintiff's written consent." *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85,
22 87 (2d Cir. 1989) (internal quotation marks omitted). Whether a name is used for the purposes of

1 trade is determined by examining whether the plaintiff’s name was used to attract customers to the
2 user—in this case, whether the use of Liu’s name was intended to attract new customers to
3 purchase Indium’s manganese solder products based on the article. *See Griffin v. Harris, Beach,*
4 *Wilcox, Rubin & Levey*, 112 A.D.2d 514, 515–16 (3d Dep’t 1985).

5 Viewed in the light most favorable to Liu, the evidence does not demonstrate that Indium
6 listed Liu’s name on a scientific article for the purpose of attracting customers to Indium. Liu
7 argues the article was a part of a general marketing strategy to prompt consumers to purchase more
8 manganese-based solder products, which were sold by Indium. But the article at issue merely
9 describes the relative strengths of different alloys and does not identity the makers of the alloys or
10 which alloys Indium produces. The district court thus correctly determined that the article was
11 not published to attract customers to Indium.

12 **II. TRIAL**

13 **A. Evidentiary Rulings**

14 Liu faults the district court’s exclusion of certain exhibits he wished to introduce at trial.
15 We review evidentiary rulings for abuse of discretion, reversing only for manifest error. *Cameron*
16 *v. City of New York*, 598 F.3d 50, 61 (2d Cir. 2010). “A district court abuses its discretion when
17 it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the
18 evidence, or renders a decision that cannot be located within the range of permissible decisions.”
19 *United States v. Vayner*, 769 F.3d 125, 129 (2d Cir. 2014) (internal quotation marks omitted).
20 “[A]n evidentiary ruling that is an abuse of discretion is . . . only reversible if it also affects a
21 party’s substantial rights,” which “requires an assessment of the likelihood that the error affected
22 the outcome of the case.” *Manley v. AmBase Corp.*, 337 F.3d 237, 248 (2d Cir. 2003) (internal

1 quotation marks omitted; ellipsis in original).

2 The excluded exhibits were either irrelevant, inadmissible, and/or duplicative, and in any
3 event, none of them would have affected the outcome of the trial. *See* Fed. R. Evid. 402
4 (“Irrelevant evidence is not admissible.”); Fed. R. Evid. 403 (court “may exclude relevant evidence
5 if its probative value is substantially outweighed by . . . needlessly presenting cumulative
6 evidence”); *Manley*, 337 F.3d at 248.

7 **B. Jury Charge**

8 We review unpreserved errors in jury instructions for fundamental error, which is error “so
9 serious and flagrant that it goes to the very integrity of the trial.” *Jarvis v. Ford Motor Co.*, 283
10 F.3d 33, 62 (2d Cir. 2002) (internal quotation marks omitted). Liu argues that the district court
11 erred by instructing the jury, without objection, that “[a]n employer is entitled to make its own
12 policy and business judgment, even if the employer is mistaken and its business judgment is
13 wrong,” “[p]retex is not established just because you disagree with Defendants’ business
14 judgment, unless you find that Defendants’ reason was false and a pretext for retaliation[,]” and
15 “an employer may take adverse decisions against an employee for any reason, good or bad, as long
16 as it is not retaliatory.” App’x at 1342. Specifically, Liu objects to the omission of the word
17 “legitimate” and contends that the instructions misled the jury into believing that any reason
18 proffered by Defendants was sufficient to meet their burden under *McDonnell Douglas*.

19 This argument is meritless. The jury instructions, read in context, clearly informed the
20 jury that they were required to find that the company’s proffered reasons for termination were
21 legitimate and non-retaliatory. *See Montana v. First Fed. Sav. & Loan Ass’n of Rochester*, 869
22 F.2d 100, 106 (2d Cir. 1989) (concluding that courts are not permitted to substitute their own

1 judgment for that exercised by the defendant business but may examine whether a decision was
2 pretextual).

3 **III. MOTIONS**

4 Finally, we deny Liu's motion to file a supplemental appendix containing exhibits that are
5 irrelevant, duplicative of materials in the appendix, or not included in the trial record and deny as
6 moot Defendants' motion to file an untimely response to Liu's motion.

7 * * *

8 We have considered all of Liu's remaining arguments and find them to be without merit.
9 We therefore **AFFIRM** the judgment of the district court, **DENY** Liu's motion to file a
10 supplemental appendix, and **DENY AS MOOT** Defendants' motion to file an untimely response.

11 FOR THE COURT:
12 Catherine O'Hagan Wolfe, Clerk of Court
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