

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**
Senior District Judge Richard P. Matsch

Civil Action No. 15-cv-01441-RPM

JOSEPH R. HART and
KENDALL S. PALMER,

Plaintiffs,

v.

UPS FREIGHT,
Defendant.

ORDER FOR SUMMARY JUDGMENT DISMISSING ALL CLAIMS OF
PLAINTIFF JOSEPH R. HART

Joseph R. Hart (“Hart”) and Kendall S. Palmer (“Palmer”) are African-American men who were formerly employed by UPS Freight (“UPS”). Their amended complaint, filed September 24, 2015, alleges four claims for relief against UPS, styled as: (1) race-based discrimination, hostile work environment, and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (“Title VII”); (2) gender discrimination in violation of Title VII; (3) retaliation in violation of Title VII, and (4) racial discrimination, gender discrimination, retaliation and hostile work environment in violation of the Colorado Anti-Discrimination Act, C.R.S. § 24-34-402.

Jurisdiction is provided by 28 U.S.C. § 1331 and Title VII. Supplemental jurisdiction for the plaintiffs’ state law claims is provided by 28 U.S.C. § 1367.

UPS filed two motions pursuant to Fed. R. Civ. P. 56, separately addressing the claims alleged by Palmer and Hart and seeking dismissal of all claims. Plaintiffs opposed the motions in a combined response, and UPS replied. The Court heard arguments of counsel on June 21, 2017.

Palmer and Hart were coworkers and they allege the same legal claims, but the facts regarding each plaintiff's employment, disciplinary history, and discharge are different and are considered in separate rulings.

The following facts pertaining to Hart's claims are undisputed, except where otherwise stated.

UPS is in the freight delivery business. Hart was hired by UPS in June, 2013, as a tractor-trailer freight driver/dockworker at its Denver Service Center. Hart received varying assignments from UPS each day and would start work at different shifts. Def.'s Ex. 1, Hart Dep. at 234:21-25; 235:1-10. At times he would be called upon to pick up or deliver freight apart from the route assigned that day. *Id.* at 190:5-20.

There is a collective bargaining agreement, entitled National Master UPS Freight Agreement, between UPS and the Teamsters Local Union No. 17. Def.'s Ex. 2 ("the CBA"). Hart was a union member, and the CBA applied to his employment.

Article 6 of the CBA addresses suspension, discipline and discharge. Article 7 addresses grievance procedures. The agreement also provides in Article 28:

The Company and the Union agree not to discriminate against any individual with respect to hiring, compensation, terms or conditions of employment because of such individual's race, color, religion, sex, age or national origin nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of race, color, religion, sex, age, or national origin or engages [sic] in other discriminatory acts prohibited by the American With Disabilities Act.

CBA at p. 74.

Dara Bossio, a woman, worked for UPS as a dispatcher. She was one of Hart's supervisors. Hart heard Bossio say that the problem at UPS was that she had to work with "a bunch of fucking men." There is a factual dispute about how often Bossio made such a remark. It is assumed that Bossio made that comment on several occasions.

In August, 2013, Hart and other men complained about Bossio to terminal manager Marc Snyder. In September, 2013, Hart and others spoke with someone in UPS's Human Resources department about Bossio's conduct. Bossio was not disciplined.

Kendall Palmer was one of Hart's coworkers and a union steward. On November 27, 2013, Palmer filed Union Grievance No. 45991 on behalf of Hart and others, asserting that Bossio's comments about men were discriminatory and violated Article 28 of the collective bargaining agreement. Pls.' Ex. 4. That grievance was withdrawn because it was not timely.

On December 3, 2013, Hart filed a National Labor Relations Board charge, complaining that UPS had retaliated against him for "standing up for coworkers and for asserting rights under the collective bargaining agreement, including seniority rights." Def.'s Ex. 7. Hart dismissed that NLRB charge on January 14, 2014, and instead filed an EEOC charge of racial discrimination, gender discrimination, and retaliation. Def.'s Ex. 5; Pls.' Ex. 22. In that EEOC charge, Hart stated that he had received numerous disciplinary actions on the "Pittsburgh form,"

which is the first step in the disciplinary process, and that employees of color were disciplined more frequently and more severely than white employees for the same or similar incidents. The EEOC charge cited Bossio's comments, stating that Bossio harassed all the men, and men of color were harassed even more. Hart's charge also stated that he had been retaliated against for complaining about discrimination and harassment. *Id.*

Hart filed Union Grievance No. 47549 on January 30, 2014, complaining that drivers with less seniority were given work when he was given part of the day off due to weather and a shortage of freight volume. Def.'s Ex. 8 & 9; Pls.' Ex. 25. On the grievance form, Hart said that was discrimination and harassment, and he requested compensation for the time off. That grievance was settled and withdrawn. *Id.*

On August 26, 2014, Hart was called to a meeting with terminal manager Marc Snyder ("Snyder"), service center manager Rick Etzler ("Etzler"), and Union representative Lonnie Sansburn. *See* Def.'s Ex. 9 at UPS 1690. At the meeting, Hart was told that he was going to be given a warning letter for being "on property" too long without notifying his supervisor of yard delays and for failing to begin his route on time. "On property time" refers to how long a driver is on the UPS property in the morning before taking off to start his assigned route. Hart Dep. at 261:22 - 262:1. Hart then filed Union Grievance No. 48505, complaining that he was being harassed and targeted. Pls.' Ex. 26. Hart was given the warning letter on August 29, 2014. Def.'s Ex. 9 at USPS 1690.

Months later, on the morning of April 22, 2015, Hart missed the morning meeting of drivers because he spent approximately 10 minutes in the bathroom after he clocked in. When Hart emerged from the bathroom, Bossio told him that he would not be paid for the time he spent

in the bathroom. Bossio said that to Hart in front of his coworkers. Hart filed Union Grievance No. 49502, complaining about Bossio's conduct and stating that assistant terminal manager Ray Jenkins ("Jenkins") took a special interest in the bathroom habits of Black employees. On the grievance form, Hart described Bossio and Jenkins as "tag team bigots," and requested that Bossio and Jenkins be discharged for violating Article 28 of the CBA. Def.'s Ex. 10; Pls.' Ex. 27. After discussion, Etzler determined that Hart would be paid for the time he spent in the bathroom and told Hart not to make a habit of that behavior. Def.'s Ex. 4, Etzler Dep. at 119:14-25; 120:1-21. Hart still insisted he had been the target of discrimination and requested that the matter be presented to the CBA's Regional Grievance Panel consisting of three union and three UPS members. The Panel found no contract violation and rejected Hart's demand that Bossio's and Jenkins' employment be terminated. Def.'s Ex. 10 at 1601.

On April 22, 2015, Hart was assigned a route in the mountains. The tractor assigned to Hart did not have an engine brake known as a "Jake brake," and Hart protested to Bossio that a tractor without a Jake brake was unsafe for that mountainous route. Bossio referred Hart's protest to Jenkins, who threatened to terminate Hart for refusing to work as directed. The situation was resolved when Etzler told Hart to take a tractor that was equipped with an engine brake. After that incident, Hart filed Union Grievance No. 49503, complaining of contract violations and requesting that Jenkins be discharged. Pls.' Ex. 28, Def.'s Ex. 12. The committee that heard that grievance found no contract violation. Pls.' Ex. 7.

On April 30, 2015, Hart received a warning letter for failing to adhere to the company's attendance policy. Def.'s Ex. 13 at UPS 1576. That letter referred to four instances of tardiness in the last 90 days. Hart filed Union Grievance No. 45976 on April 30, 2015, complaining that

Jenkins and Bossio were targeting him and retaliating for his grievances against them. Pls.' Ex. 30. Hart acknowledged he had been late but said the excuse was legitimate and his tardiness was not habitual. He asked that the warning letter be dismissed. *Id.*

The next day, on May 1, 2015, Hart's supervisors called him into a meeting known as a "telematics review" and told Hart that he was performing below expectations because he had too many "bring backs." *See* Def.'s Ex. 13 at UPS1583. UPS records showed that Hart had the worst rate of freight bring backs in the entire company. Def.'s Ex. 13 at UPS1584-86; Def.'s Ex. 3, Christensen Dep. at 91:10-25; 92:1-18. After that meeting, Hart filed Union Grievance No. 45975, alleging that Bossio and Jenkins were targeting him for special discipline and complaining of violation of Article 28 of the CBA. Pls.' Ex. 29. The committee that heard that grievance found no contract violation. Pls.' Ex. 7.

On May 17, 2015, Hart viewed Jenkins' public Facebook page and discovered that Jenkins' postings included a photo of President Obama and his wife that was racially offensive. Hart Aff. ¶ 12. Jenkins was offended by the photo and considered it proof of racial hostility on the part of Jenkins. Hart took a screenshot of the photo and sent it electronically to other African-American employees at UPS during working hours. *Id.* ¶ 13.

Etzler learned about the photo and contacted the UPS human resources department about it. Def.'s Ex. 4, Etzler Dep. at 146:13 - 147:11; 150:8-14. UPS investigated the incident. *Id.* at 146:6 - 154:18.

Etzler and Alton Edwards (a UPS human resources representative) met with Hart on May 19, 2015, to discuss the matter of the photo. Hart Aff. ¶¶ 14-15. During that meeting Edwards

criticized him for calling Jenkins a bigot and for circulating the photo to coworkers during working hours. *Id.*

Etzler and Edwards also talked with Jenkins about the photo. Def.'s Ex. 4, Etzler Dep. at 147:6 - 150:7; 153:12 - 154:12; 159:4-22. Jenkins said that he and his wife had access to the Facebook page but denied that either one of them posted the photo. *Id.* Jenkins removed the photo from his Facebook page on May 20, 2015. *Id.* at 149:18-22; Hart Aff. ¶ 12.

Hart filed Union Grievance No. 49510 on May 22, 2015, complaining that the posting of the offensive photo on Jenkins' Facebook page was a violation of Article 28 of the collective bargaining agreement. Pls.' Ex. 31. The Regional Grievance Panel found no CBA violation. Pls.' Ex. 7.

Hart and Palmer filed this action on July 8, 2015.

On July 16, 2015, Hart was speaking with Etzler and secretly recording their conversation with a hidden black device. Def.'s Ex. 1, Hart Dep. at 177:5 - 179:4. UPS has a written policy that states:

The use of all recording devices in any UPS facility for any purpose other than authorized UPS business purposes is ***strictly prohibited***. Individuals may possess cell phones with cameras or other devices capable of recording pictures, video or audio, while on UPS facilities, provided that the recording capabilities are not used for any purpose other than authorized UPS business purposes.

Pls.' Ex. 32. Etzler asked Hart whether he was recording their conversation. Hart did not give a direct answer and instead made a show of displaying his phone as a decoy. Def.'s Ex. 1, Hart Dep. at 177:5 - 179:4.

Etzler considered Hart's evasive answer to be insubordination and reported it to Michael Christensen, UPS's District Labor Relations Manager in Denver. Pls.' Ex. 6, Christensen Dep.

at 100:21 - 101:3. Christensen and Etzler discussed the matter and decided that Hart's employment should be terminated. Christensen testified that he was the ultimate decisionmaker. *Id.* Etzler then told Hart that he was fired.¹

UPS says that Hart was fired because of his insubordination in refusing to give a direct and truthful answer to Etzler's question about whether Hart was recording their conversation. *See* Def.'s mot. at p. 8.

On July 16, 2015, Hart filed Union Grievance No. 47329, asserting that he was discharged in retaliation for having filed a lawsuit against the company. Def.'s Ex. 15 at USPS 1649. UPS defended that grievance, contending that the Denver office of UPS Freight was not aware of the lawsuit when Hart's employment was terminated. *Id.* at USPS 1647. The Regional Grievance Committee rejected the Union's claim and upheld the termination. *Id.* at 1621.

Hart filed an EEOC charge of discrimination on July 17, 2015, claiming that his discharge was retaliatory. He received a Notice of Right to Sue on September 15, 2015. Plaintiffs amended complaint their on September 24, 2015, adding factual allegations about Hart's discharge.

Hart's second claim for relief alleges gender-based harassment/hostile work environment. That claim is premised on Bossio's remarks about having to work with "a bunch of fucking men." Plaintiffs' evidence about Bossio's derogatory comments shows nothing more than a few isolated remarks. Those comments were crude, but Plaintiffs' evidence about Bossio's conduct is not sufficient to show that the work environment was hostile to men.

¹UPS cites pages 165:13-25 and 166:1-24 of Etzler's deposition, Def.'s Ex. 4, to show that Etzler fired Hart. Those pages are not in the court record, but there appears to be no dispute that Etzler and Christensen were the decisionmakers.

Hart also claims that his employment was terminated in retaliation for his complaints about Bossio's comments.

That claim fails for lack of evidence of a causal nexus between Hart's complaints about gender discrimination and the termination of his employment. The EEOC charge regarding Bossio's comments was filed on January 14, 2014. Hart was discharged by Christensen and Etlzer on January 16, 2015. There is no evidence that Bossio participated in the decision to terminate Hart's employment. There is no evidence that Etlzer or Christensen considered Hart's complaints of gender discrimination when they decided that Hart should be discharged. When Hart was deposed, he said that he did not believe that his discharge was based on gender. Hart Dep. at 251:6-23.

Hart also alleges that he was subjected to racially biased disparate discipline. "A prima facie case of disparate discipline may be established if the plaintiff proves by a preponderance of the evidence that (1) the plaintiff is a racial minority, (2) the plaintiff was disciplined by the employer, and (3) the employer imposed the discipline under circumstances giving rise to an inference of racial discrimination." *Jones v. Denver Post Corp.*, 203 F.3d 748, 752 - 53 (10th Cir. 2000). Hart's evidence is not sufficient to show that the disciplinary incidents occurred under circumstances giving rise to an inference of racial discrimination.

Plaintiffs' combined opposition states that Neil Coyle (a coworker who served as a union steward) provided a sworn affidavit stating that Hart and Palmer were specifically targeted, disciplined and harassed by UPS. Plaintiffs have provided only an unsigned, undated, and incomplete affidavit of Coyle. Pls.' Ex. 14-1. That document is not admissible evidence, and even if it were, it does not mention racial bias as a motive for the alleged harassment.

When Hart was deposed, he described supportive statements of Coyle and other drivers. Hart Dep. at 263:15 - 276:9. Hart's testimony about those statements of others is inadmissible hearsay.

Plaintiffs' combined opposition brief also states that in 2014, a UPS supervisor named Tim Sellenger told Palmer that he (Sellenger) could see that Black employees were treated differently. Palmer Aff. ¶ 10. Plaintiffs have not provided any sworn testimony of Sellenger. Palmer's report of Sellenger's statement is hearsay, and Plaintiffs have not shown that any exception to the hearsay rule applies. Sellenger's statement is not attributable to UPS as an admission because there is no evidence that Sellenger was involved in the relevant decision-making.

Plaintiffs' combined opposition brief points to the deposition testimony of Teamster official Duane Grove, who said he believed that Palmer and Hart "could have been" discriminated against by UPS. Pls.' Ex. 1, Grove Dep. at 152:3 - 153:6. That statement by Grove is speculation, and it has not been shown that Grove had any firsthand knowledge of the relevant workplace.

Hart states in paragraph 11 of his affidavit that Grove said on June 11, 2015, "I'm sick of the racist bullshit going on around here." That is inadmissible hearsay.

Plaintiffs' combined opposition brief chronicles Hart's union grievance proceedings, arguing that UPS and the Union failed to address adequately complaints of discrimination. Hart's dissatisfaction with the results of those proceedings is not, in itself, evidence of racial discrimination on the part of UPS.

With respect to the bathroom incident, Hart testified that Jenkins hid behind pillars and boxes to watch Black employees, followed Black employees to the bathroom, and once made a comment to Hart that he walked too slow. Ex. 1 to Def's Reply, Hart Dep. at 324-328 (full). Hart said that he had not heard of Jenkins ever policing white employees in that way. *Id.* at 325:15-24. With respect to the discipline that Hart received for excessive "on property time," Hart testified that Bossio policed his use of time but not that of white employees. Hart Dep. at 259:17-25; 260:1-25; 261:1-9. Hart says he observed white employees standing around smoking cigarettes with manager Ken Zandarski and, to his knowledge, they were not similarly disciplined. *See* Ex. 1 to Def.'s reply, Hart Dep. at 260:22 - 263:4.

Hart's testimony about his belief that white employees received more favorable treatment is not sufficient to show that the disciplinary incidents were racially motivated.

With respect to the incident when Hart objected to driving his assigned truck on a mountainous route, the undisputed evidence shows that conflict was resolved when Etzler found a different vehicle for Hart to drive. Def.'s Reply Ex. 2, Christensen Dep. at 76:3-17.

With respect to the warning letters that Hart received for being late to work, UPS has provided its records of disciplinary history for the Denver facility, showing that discipline for tardiness was even-handed and numerous white employees were similarly disciplined during the relevant period. Def.'s Ex. 13; Def.'s Ex. 3, Christensen Dep. at 91:10-25, 92:1-18. Hart has no evidence to the contrary.

With respect to the warning that Hart received for not delivering all his freight (i.e. excessive "bring-backs"), UPS's records demonstrate that Hart had the worst bring-back record

of any UPS employee nationwide. See Def.'s Ex. 13. Hart has no evidence to support his contention that the discipline he received for excessive bring-backs was racially motivated.

The evidence regarding the offensive photo of the Obamas on the private Facebook page of Jenkins and his wife is troubling. Although Jenkins stated that neither he nor his wife posted the photo, jurors could question Jenkins' credibility and conclude that he did. Even assuming that Jenkins posted the photo, that does not show that Hart's discharge was racially motivated. The decision to fire Hart was made by Etlzer and Christensen – not Jenkins. There is no evidence that Jenkins participated in that decision. Hart has not provided any evidence of racial bias on the part of Etlzer or Christensen.

The undisputed evidence is that Hart did not directly answer Etlzer's question and misled Etlzer by showing a "decoy" recording device. UPS says that Hart was fired for insubordination because he refused to give a direct and truthful answer to Etlzer's question about whether he was recording their conversation.

In his affidavit, Hart describes an incident on May 1, 2014, when he told a different terminal manager (Steve Haig) that he (Hart) would be recording management discussions because of UPS's lying and refusal to address his complaints of discrimination. Hart Aff. ¶17. Hart apparently suggests that if UPS objected to Hart's recording of workplace conversations, then UPS should have told Hart to stop doing it before July 16, 2015. Hart Dep. at 165:23 -167:12. Hart knew he was violating company policy as shown by his evasive actions.

Hart also contends that the discharge was retaliatory for his filing of this civil action against UPS and his complaints about discrimination in the workplace. Hart argues that the

proof of service shows that UPS knew about the complaint when Hart was fired on July 16, 2015.

The proof of service, signed by the process server on July 13, 2015, states that the complaint and summons were served on July 10, 2015, by service on the Corporation Service Company, as the registered agent of UPS, at 1500 Broadway, Unit 2090, Denver, Colorado, 80202. (Doc. 5.) Christiansen testified that when he and Etzler decided to terminate Hart's employment on July 16, 2015, neither of them knew about Hart's complaint in this civil action. Def.'s Ex. 3, Christensen Dep. at 98:21 - 100:20. Hart has not provided any evidence to the contrary. The fact UPS's registered agent had received the complaint and summons a few days before July 16, 2015 does not show that Etzler or Christiansen knew about it on that date.

The evidence about Hart's interaction with Etzler on July 16, 2015 is not disputed. Reasonable jurors could conclude only that UPS's stated reason for the termination was the actual reason, and retaliation was not the motive.

Based on the foregoing, it is

ORDERED that Defendant's motion for summary judgment as to all claims of Plaintiff Joseph R. Hart (doc. 33) is granted.

The clerk shall enter judgment dismissing the claims of plaintiff Joseph R. Hart with an award of costs to the defendant.

Dated: July 19, 2017

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior Judge