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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MARK MAYES,

11 Plaintiff,

12 v.

13 AMAZON.COM.DEDC LLC,

14 Defendant.

CASE NO. C18-176 MJP

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

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16 THIS MATTER comes before the Court on Defendant's Motion for Summary Judgment
17 (Dkt. No. 63), Plaintiff's Motion for Summary Judgment, and Defendant's Motion to Strike
18 (Dkt. No. 80). Having reviewed the motions, the responses (Dkt. Nos. 69, 70, 76), the replies
19 (77, 78, 82), and all related papers, the Court GRANTS Defendant's Motion for Summary
20 Judgment and Motion to Strike and DENIES Plaintiff's Motion for Summary Judgment.

21 **Background**

22 For Plaintiff Mark Mayes, who is African-American, the problems began almost
23 immediately after he started working as a full-time Fulfillment Associate for the Defendant,
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1 Amazon.com.dedc LLC (“Amazon”). (Dkt. No. 1 ¶ 6; Dkt. No. 64, Declaration of Jeff Heckel
2 (“Heckel Decl.”), Ex. D at 40.)

3 During his first week, Mr. Mayes approached an HR Administrative Assistant, whose
4 shirt said “gangsta napper,” thinking that the shirt said “gangsta nigger.” (Dkt. No. 68,
5 Declaration of Linda Walton (“Walton Decl.”), Ex. Z at 138:20-139:13; Dkt. No. 65, Declaration
6 of Keiko Napier (“Napier Decl.”) ¶ 2 Ex. U.) This conversation took place in front of a message
7 board that Mr. Mayes believed referred to the exclusively Caucasian managers in the fulfillment
8 center as “owners.” (Walton Decl., Ex. Z at 138:25, 199:20-25.) Amazon claims the referenced
9 “owners” are any employee who acts in response to a comment posted on the board. (Heckel
10 Decl. ¶ 11, Ex. C at 45-47.)

11 The following day, Mr. Mayes received his first write-up for making four errors, caught
12 by Amazon’s automated system that monitors errors and timing as employees scan products.
13 (Heckel Decl., Ex. E at 53-54; Id. ¶ 8.) Other new employees also received write-ups in their
14 first weeks. (Walton Decl., Ex. Z at 182:6-13, 204:19-205:6.) Between June 11 and June 24,
15 Mr. Mayes received additional write-ups for not wearing his badge, (Id., Ex. Z at 205:20-25),
16 taking a break at the wrong time (Heckel Decl. Ex. G), making quality errors, (Id. Ex. H), and for
17 performing at only 50% of the speed expectation (Id.).

18 Mr. Mayes also asked his manager “to meet outside in the parking lot,” which prompted a
19 response from Senior Human Resources Assistant, Emily Larsen. (Walton Decl. Ex. Z at
20 143:18-22.) Mr. Mayes apologized during a meeting in Ms. Larsen’s office but as he was
21 leaving Ms. Larsen, while making a gun symbol with her hand, said, “We’re gunning for you.”
22 (Id. at 146:22-24; 148:9-11.) Mr. Mayes took Ms. Larsen’s comment as a threat and was so
23 terrified he “went back to [his] station and[] almost passed out.” (Id. at 148:7-24.)
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1 Mr. Mayes called the Kent Police Department to report Ms. Larsen’s comment and
2 another comment from a manager allegedly telling Mr. Mayes he had “14 bullets” for him.
3 (Walton Decl., Ex. BB.) Ms. Larsen explained that she meant she was rooting for Mr. Mayes
4 and did not mean to threaten him. (Id. at 86.) The manager denied using the phrase “14 bullets”
5 but said if he had used the term he was referring to 14 action items that would help Mr. Mayes
6 succeed. (Id.) Mr. Mayes later acknowledged that the comment, “I got 14 bullets for you,” was
7 a reference to “the bullets of the topics that he went over.” (Id., Ex. Z at 149:20 22; 200:16 18.)
8 The Kent Police Department closed the case. (Id. at 227:4-228:23, Ex. BB at 86-87.)

9 In response to the disproportionate HR activity surrounding Mr. Mayes, a senior
10 operations manager initiated an investigation that found Mr. Mayes received several unwarranted
11 reprimands. (Declaration of Aaron Reynolds (“Reynolds Decl.”), Ex. Y at 8.) The manager
12 concluded, “I can completely understand how [Mr. Mayes] feels like we are ‘badgering’ him,
13 especially with the frequency of documented feedback[] in this one week period.” (Id.) After the
14 meeting, several of Mr. Mayes’s write-ups were exempted and he was reassigned to a new
15 manager, although his performance remained in the bottom five percent of all fulfilment center
16 employees. (Id. at 9, 10.)

17 In the following days, Mr. Mayes met separately with an operations manager and an HR
18 business partner, making the statements: “I just can’t do this anymore” and “I don’t know how I
19 can keep up.” (Heckel Decl. Ex. P at 4.) Then, on July 7, 2017—five weeks after Mr. Mayes
20 began working for Amazon—he told his manager he was unable to work because of a
21 doctor-prescribed boot he was wearing to ease pain from an earlier surgery. (Id. Ex. O at 1.) Mr.
22 Mayes was escorted to the onsite medical office where he was given paperwork for a worker’s
23 compensation claim. (Id.) He left after the meeting without completing the paperwork and
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1 never returned to Amazon. (Id. ¶¶ 25–27, Ex. R at 151.) Mr. Mayes was notified of his
2 “voluntary resignation due to job abandonment” on October 18, 2017. (Id., Ex. S.)

3 Mr. Mayes now brings claims for (1) discrimination on the basis of race in violation of
4 Title VII of the 1964 Civil rights Act, 42 U.S.C. § 2000e et seq.; (2) creating a hostile work
5 environment due to race or color in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C.
6 § 2000e et seq.; (3) retaliation in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §
7 2000, and; (4) race discrimination and wrongful termination in violation of the Washington State
8 Law Against Discrimination, RCW chapter 49.60. (Dkt. No. 19.) Both parties seek summary
9 judgment on all claims. (Dkt. No. 63, 71.)

10 Discussion

11 I. Amazon’s Motion to Strike

12 As an initial matter, Defendant moves to strike one of Plaintiff’s many surreplies (Dkt.
13 No. 78), which contains 11 pages of substantive argument. (Dkt. No. 80 at 1-3.) As there can be
14 no dispute that new arguments raised in a surreply are improper, see, e.g., Amazon.com LLC v.
15 Lay, 758 F. Supp. 2d 1154, 1171 (W.D. Wash. 2010); Zamani v. Carnes, 491 F.3d 990, 997 (9th
16 Cir. 2007), the Court GRANTS the Motion to Strike and declines to consider these arguments in
17 its assessment of the Parties’ Motions for Summary Judgment.

18 II. Amazon’s Motion for Summary Judgment

19 A. Legal Standard

20 Summary judgment is proper if the pleadings, depositions, answers to interrogatories,
21 admissions on file, and affidavits show that there is no genuine issue of material fact and that the
22 moving party is entitled to judgment as a matter of law. FRCP 56(c). The movant bears the
23 initial burden to demonstrate the absence of a genuine dispute of material fact. Celotex Corp. v.
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1 Catrett, 477 U.S. 317, 323 (1986). A genuine dispute over a material fact exists if there is
2 sufficient evidence for a reasonable jury to return a verdict for the non-movant. Anderson v.
3 Liberty Lobby, Inc., 477 U.S. 242, 253 (1986). On a motion for summary judgment, “[t]he
4 evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his
5 favor.” Id. at 255.

6 The Ninth Circuit imposes a high standard for granting summary judgment in
7 employment discrimination cases. The court has stated that “very little evidence” is required to
8 survive summary judgment because “the ultimate question is one that can only be resolved
9 through a searching inquiry—one that is most appropriately conducted by the factfinder, upon a
10 full record.” Schnidrig v. Columbia Mach., Inc., 80 F.3d 1406, 1410 (9th Cir. 1996) (internal
11 quotation marks and citation omitted).

12 **B. Hostile Work Environment**

13 To succeed on a Title VII hostile work environment claim based on race, an employee
14 must demonstrate: (1) he was subjected to verbal or physical conduct of a racial nature; (2) the
15 conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the
16 conditions of employment and create an abusive work environment. Reynaga v. Roseburg
17 Forest Products, 847 F.3d 678, 687 (9th Cir. 2017). “[S]imple teasing, offhand comments, and
18 isolated incidents (unless extremely serious) will not amount to discriminatory changes in the
19 terms and conditions of employment.” Faragher v. City of Boca Raton, 524 U.S. 775, 776
20 (1998). Additionally, “[t]he working environment must both subjectively and objectively be
21 perceived as abusive.” Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir.1995).

22 Mr. Mayes alleges he was subjected to the following verbal or physical conduct of a
23 racial nature:

- 1) He encountered a member of the HR department who wore a T shirt with the phrase “gangsta napper,” which he believed said “gangsta nigger” (Dkt. No. 19 ¶ 7);
- 2) he was disciplined more severely than employees who were not African-American (Id. ¶ 9);
- 3) managers sarcastically told him to “hang in there” while standing in front of a board that referred to the exclusively Caucasian managers as “owners” (Id. ¶ 11);
- 4) a co-worker told Mr. Mayes that he smelled like watermelon in front of another manager, who is Caucasian (Id. ¶ 10); the second manager then told Mr. Mayes “I’m bright” while pointing at his skin (Id.);
- 5) Ms. Larsen told Mr. Mayes “I’m gunning for you” while making a gun gesture with her hand (Id. ¶ 12), and;
- 6) A manager threatened Mr. Mayes by telling him, “I got fourteen bullets for you” (Id. ¶ 14).

Based on these allegations and the evidence in the record, Mr. Mayes has not made a prima facie case for a hostile work environment claim. To begin, the evidence demonstrates that Mr. Mayes was mistaken about the offending shirt worn by a member of the HR department which said “gangsta napper.” (Napier Decl. ¶ 2 Ex. U.) When presented with a picture of the shirt, Mr. Mayes asserted that even if the shirt did not include the offensive term, it was still a reference to an offensive racial slur (Walton Decl., Ex. Z at 170:6 23), which constitutes unwelcome conduct of a racial nature, Reynaga, 847 F.3d at 687. But ultimately, even viewing the evidence in the light most favorable to Plaintiff, the shirt constitutes an isolated incident that does not rise to a change in the terms and conditions of employment, Faragher, 524 U.S. at 776, where Mr. Mayes submits no probative evidence that any of the other alleged conduct was racial

1 in nature. U.A. Local 343 v. Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir.1995); see
2 also FRCP 56.

3 Second, while there is some evidence that Mr. Mayes received an excessive number of
4 write-ups, (Reynolds Decl., Ex. Y at 3), other non-African-American employees received
5 write-ups in their first several weeks of employment (Walton Decl., Ex. Z at 204:19 205:6), Mr.
6 Mayes told a manager that he was unable to keep up with his work (Heckel Decl. Ex. P at 82),
7 and based on computer-generated reports, Mr. Mayes's performance was in the bottom five
8 percent of all employees. (Reynolds Decl. Ex. Y at 10.)

9 Other allegations are contradicted by Mr. Mayes himself. He testified he thought "hang
10 in there" was a racist remark "only because we were in front of the board," but later
11 acknowledged the board did not state managers owned people, as he originally believed.
12 (Walton Decl. Ex. Z at 235:18 21.) He also admitted that the comment, "I got 14 bullets for
13 you," was a reference to "the bullets of the topics [his manager] went over." (Walton Decl., Ex.
14 Z at 149:20 22; 200:16 18.)

15 Yet other allegations are supported by no evidence at all. Mr. Mayes asserts that Ms.
16 Larsen said "gunning for you" because she related to the way African Americans are depicted on
17 television but submits no evidence that Ms. Larsen was doing anything other than using a
18 common idiom in order to encourage him. (Walton Decl. Ex. Z at 156:21-25; Id. Ex. BB at 86;
19 Dkt. No. 63 at 21.) And there is no record of the 'watermelon' and 'bright' comments because
20 Mr. Mayes did not complain about them to Amazon and did not mention the alleged comments
21 until his supplemental submissions to the EEOC. (Id. Ex. FF.) The manager accused of making
22 the comments has declared he was not present for any conversation where watermelon was
23 referenced, never said "I'm bright" (Reynolds Decl. ¶ 11), and Mr. Mayes did not mention these
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1 | comments when asked repeatedly about instances of discrimination at Amazon. (See Walton
2 | Decl. Ex. Z at 226:21 227:3, 228:24 229:16.)

3 | Because Mr. Mayes has not made out a prima facie case, his hostile work environment
4 | claim is dismissed.

5 | **C. Employment Discrimination**

6 | Plaintiff asserts employment discrimination claims under Title VII, Section 1981, and
7 | WLAD on the basis of race, alleging he was subjected to disparate treatment because he is
8 | African-American. (Dkt. No. 19 ¶¶ 8-9, 17.) Absent direct evidence of discrimination,
9 | employment discrimination claims under Title VII, Section 1981, and WLAD typically are
10 | analyzed under the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792,
11 | 802 (1973). Hawn v. Exec. Jet Mgmt., Inc., 615 F.3d 1151, 1155 (9th Cir. 2010). The plaintiff
12 | bears the initial burden of establishing a prima facie case of discrimination by showing (1) he is a
13 | member of a protected class; (2) he was qualified for his position or performing satisfactory
14 | work; (3) he suffered an adverse employment action, and (4) similarly situated employees
15 | outside the protected class were treated more favorably, or other circumstances surrounding the
16 | adverse action give rise to an inference of discrimination. Id. If the plaintiff succeeds, the
17 | burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the
18 | adverse employment action. Id. If the defendant succeeds, then the plaintiff must produce
19 | evidence that defendant's articulated reason is mere pretext for unlawful discrimination. Id.

20 | Mr. Mayes has not demonstrated that he was doing satisfactory work, receiving multiple
21 | computer-generated write-ups (Heckel Decl., Exs. E at 53-54, H at 60-62, I at 64, K at 68), and
22 | performing in the bottom five percent of employees (Reynolds Decl. Ex. Y at 10). Nor has he
23 | introduced any comparators outside his protected class who were treated more favorably;

1 | instead, there is evidence that non-African-American employees were also disciplined for their
2 | work performance. (Id. at 204:19-205:6; Reynolds Decl. Ex. Y at 10).

3 | Ultimately, although an employee’s burden in opposing an employer’s motion for
4 | summary judgment is minimal, Chuang v. Univ. of Cal. Davis, 225 F.3d 1115, 1124 (9th Cir.
5 | 2000), Mr. Mayes has not met this burden with respect to his employment discrimination claim.

6 | **D. Retaliation**

7 | To establish a prima facie case of retaliation under Title VII, Plaintiff must show that (1)
8 | he engaged in a protected activity, (2) suffered an adverse employment action, and (3) there was
9 | a causal link between his activity and the employment decision. Stegall v. Citadel Broadcasting
10 | Co., 350 F.3d 1061, 1065-66 (9th Cir. 2003). “If a plaintiff has asserted a prima facie retaliation
11 | claim, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for
12 | its decision.” Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000). “If the defendant
13 | articulates such a reason, the plaintiff bears the ultimate burden of demonstrating that the reason
14 | was merely a pretext for a discriminatory motive.” Id.

15 | Viewing the evidence in the light most favorable to Mr. Mayes, a reasonable fact-finder
16 | could determine that he established a prima facie case; but ultimately he fails to substantiate his
17 | retaliation claim. Mr. Mayes alleges that in response to his complaints about the “Gangsta
18 | Napper” shirt he received retaliatory write-ups that led one manager to acknowledge, “I can
19 | completely understand how he feels like we are ‘badgering’ him.” (Dkt. No. 19, ¶ 9; Reynolds
20 | Decl., Ex. Y at 8.) Mr. Mayes’s complaints to supervisors are protected activity and immediately
21 | preceded his write-ups, allowing the Court to infer a causal link between Mr. Mayes’s protected
22 | activity and the alleged retaliatory actions. Ray, 217 F.3d at 1241; Yartzoff v. Thomas, 809 F.2d
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1 1371, 1376 (9th Cir. 1987); Santillan v. USA Waste of California, Inc., 853 F.3d 1035, 1048 (9th
2 Cir. 2017) (citations omitted).

3 In response, Amazon asserts that Mr. Mayes received write-ups only for legitimate
4 performance infractions. (Heckel Decl. Ex. H.) And after Mr. Mayes complained to HR, his
5 manager exempted all but one write-up, the opposite of retaliation. (Dkt. No. 63 at 23; see also
6 Heckel Decl. Ex. Y at 9.) Submitting no evidence in response, Mr. Mayes fails to carry the
7 “ultimate burden” of demonstrating that Amazon’s proffered legitimate nondiscriminatory
8 reasons for the write-ups are merely pretext. Ray v. Henderson, 217 F.3d at 1240.

9 **E. Wrongful Termination**

10 To establish wrongful discharge in violation of public policy under Washington law, a
11 plaintiff must “show that his discharge may have been motivated by reasons that contravene a
12 clear mandate of public policy” and “that the public-policy-linked conduct was a ‘significant
13 factor’ in the decision to discharge the worker.” Martin v. Gonzaga Univ., 425 P.3d 837, 844
14 (Wash. 2018) (internal quotation marks omitted). Plaintiff has not satisfied either prong of a
15 prima facie wrongful discharge claim where the evidence only demonstrates that Mr. Mayes was
16 let go three months after he stopped working without filing the necessary paperwork for leave.
17 (Dkt. No. 76 at 5; Dkt. No. 64, Ex. S.)

18 **F. Plaintiff’s Motion for Summary Judgment**

19 Although styled as a cross-motion for summary judgment, Mr. Mayes’s Motion deals
20 exclusively with discovery. (Dkt. No. 71.) Mr. Mayes seeks video footage of specific instances
21 of discriminatory conduct and seeks sanctions against Amazon for failing to preserve this
22 evidence. (Dkt. No. 71 at 1-3.) He has previously moved for this video footage, which Amazon
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1 has consistently asserted does not exist, and the Court has already ruled on these issues. (Dkt.
2 No. 50 at 2-6; Dkt. No. 59.) Mr. Mayes's Motion for Summary Judgment is therefore DENIED.

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4 **Conclusion**

5 Having concluded that Mr. Mayes lacks the evidence to support his claims, the Court
6 GRANTS Defendant's Motion for Summary Judgment and DENIES Plaintiff's Motion for
7 Summary Judgment.

8 The clerk is ordered to provide copies of this order to all counsel.

9 Dated June 4, 2019.

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12 Marsha J. Pechman
13 United States District Judge
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