

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 KENDALL S. PALMER

Kendall S. Palmer (“Palmer”) and Joseph R. Hart (“Hart”) are African-American men 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. The 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 allege the same legal claims, but the facts regarding each plaintiff's employment, disciplinary history, and discharge are different. The two motions are addressed in separate rulings.

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

UPS is in the freight delivery business. Palmer was hired by UPS in August, 2008, as a tractor-trailer freight driver/dockworker at its Denver Service Center. When Palmer began working for UPS, he worked at different times, receiving various assignments. Later he successfully bid for routes based upon seniority and was assigned a daily route. He could be called upon by UPS to pick up or deliver freight apart from his regular route.

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"). Palmer was a union member, and the CBA applied to his employment. Palmer served as a union steward.

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.

On November 22, 2013, Palmer was criticized for taking too much time on pre-trip inspections of his truck. Pls.' Ex. 14, Palmer Aff. ¶ 17. He filed a complaint with the Motor Carrier Safety Section of the Colorado State Patrol, complaining that UPS was not allowing employees enough time to do thorough pre-trip inspections of their trucks and that employees were being disciplined for taking more than 25 minutes to perform inspections. *Id.* & Pls.' Ex. 14-2.

Palmer filed a National Labor Relations Board ("NLRB") charge against UPS on November 22, 2013, complaining that he had been "disciplined, harassed, and micromanaged" on account of "his status as a Shop Steward and other protected concerted activity." Palmer Aff. ¶ 16 & Pls.' Ex. 12. Shortly thereafter he filed a second NLRB charge, complaining that UPS had increased its discipline after he filed his first charge. Pls.' Ex. 13. The NLRB dismissed Palmer's second charge, concluding there was no evidence to support it. *Id.* Palmer then withdrew his first NLRB charge. Def.'s Ex. 1, Palmer Dep. at 130:9-12.

Dara Bossio, a woman, worked for UPS as a dispatcher. She was one of Palmer's supervisors. Some of Palmer's coworkers 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 she said it on several occasions.

Palmer did not hear Bossio make the remark but others told him about it. Palmer felt that Bossio talked to him in a belittling manner, and he found Bossio's demeanor to be offensive. Palmer Dep. at 95-100 (all).

On November 27, 2013, Palmer filed a union grievance on behalf of coworker Joseph Hart and others, complaining that Bossio's comments about men were discriminatory. Pls.' Ex. 4. That grievance was untimely, and Palmer withdrew it. Palmer Aff. ¶ 8. Bossio was not disciplined for her comments.

Palmer filed another union grievance, claiming that he was being disciplined unfairly due to his race after he was issued a warning for not following company rules about clocking in and out for lunch. That grievance was denied by the UPS/Union panel. Christensen Dep. at 60:4-20.¹

On another occasion, Palmer received discipline for using the restroom before he took a break. Palmer Aff. ¶ 20. He filed a union grievance about that matter, but withdrew it and instead filed EEOC Charge No. 541-2014-00383 on December 19, 2013, complaining of racial and sex discrimination based on allegations of harassment and discriminatory discipline. Pls.' Ex. 10. Palmer's EEOC charge stated that he had received disciplinary notices for taking five-minute bathroom breaks and also described Bossio's comments about having to work with "a bunch of fucking men." *Id.* The EEOC charge stated that other drivers within his protected groups had been similarly harassed and disciplined, whereas non-Black drivers had received more lenient discipline or no discipline when they committed similar violations of company policies and rules. *Id.*

¹In his deposition testimony, Christensen refers to this as Grievance No. 45590. *See* Christensen Dep. at 60:4-61:23, Ex. 1 to Def.'s reply (doc. 39-1). It is not in the record.

On September 24, 2014, Palmer attempted to initiate a grievance to complain that UPS was assigning the most undesirable late-day pick-up jobs to minority drivers. Palmer Aff. ¶ 19; Pls.' Ex. 14-4. When he asked Bossio to sign the grievance form, there was a confrontation, and Palmer walked away and clocked out. As Palmer was walking away, he was paged by intercom, but he did not respond. The next day, Rick Etzler, the manager of the Denver Service Center, told Palmer that his employment was being terminated for failing to follow an order. Palmer filed a union grievance to protest his discharge. He was reinstated that day. Palmer Dep. at 254:1 - 258:14.

Palmer filed an amended EEOC charge on October 18, 2014, describing the incident of September 24-25, 2014, and complaining of racial discrimination, sex discrimination and retaliation. Def.'s Ex. 10.

On October 20, 2014, assistant service manager Marc Snyder ("Snyder") told Palmer that he would receive a warning letter for being tardy that day. Palmer Aff. ¶ 12; Pls.' 14-3 & Ex. 17. Palmer had no track record of tardiness, and he says he punched in only one minute late. Palmer filed Union Grievance No. 47925, complaining of harassment and violation of Article 20 of the CBA, which addresses a "fair day's work for fair day's pay." That grievance process resulted in the warning letter being withdrawn. Palmer Aff. ¶ 12.

Around that same time (October 20, 2014), Palmer told Bossio that he would be absent due to his mother's illness. Snyder then told Palmer that he would be receiving a warning letter for not following the company's rules about scheduling use of discretionary days. Palmer Aff. ¶ 11 & Pls.' Ex. 16. In response, Palmer filed Union Grievance No. 47926, complaining of harassment, discrimination, retaliation and violation of the CBA's Article 20. *Id.*

Palmer received a warning letter for absenteeism when he took time off on December 5, 2014. He protested that discipline by filing Union Grievance No. 48656, stating that the leave was approved FMLA leave and complaining of a violation of Article 20. Pls.' Ex. 18. He also called the Company's hotline and reported that he was being harassed for using FMLA leave. Palmer Dep. at 187:15-25; 188:1-6. The discipline was withdrawn by agreement. *Id.* at 185:2-4.

On December 9, 2014, Palmer was driving his UPS truck through an alley and hit an overhead wire. Palmer Aff. ¶ 13. Rick Etzler, the Denver service center manager, gave Palmer a warning letter for that accident. Palmer Dep. at 142:6-9. Palmer filed Union Grievance No. 48657, protesting that the accident report should be removed from his file and complaining of unfair treatment in violation of Article 20. Pls.' Ex. 19; Palmer Dep. at 143:6 - 145:8.

On January 8, 2015, Palmer was dispatched for a delivery at Best Buy, which was not on his regular route. Palmer Dep. at 235:4-10. Best Buy has security screening procedures which include a metal detector. Palmer wore steel-toe boots for work, and he did not want to remove them. On a previous occasion when Palmer had gone to Best Buy to make a delivery, he had objected to taking off his boots for the security screening, and UPS manager Marc Snyder had told him to complete that delivery without removing his boots. *Id.* at 235:4-238:4; Pl.'s Ex. 6, Christensen Dep. at 65:25- 68:23.

When Palmer arrived at Best Buy on January 8, 2015, a receiving clerk told Palmer that the Best Buy security personnel wanted him to take his shoes off and walk through the metal detector. Palmer refused to remove his boots. It had snowed that day, and the carpet was wet, and Palmer felt that removing his boots would be unsanitary and unsafe. He says the carpet could have had splinters, staples or glass, although he did not see any such hazards. Palmer Dep.

at 238:5 -243:21. Palmer told the clerk that in the past he had received permission from a UPS manager to keep his boots on. Palmer offered to make the delivery at a different door. *Id.* at 238:5 - 239:1.

When Palmer refused to remove his boots on January 8, 2015, the Best Buy clerk spoke with her manager and then told Palmer that Best Buy did not want him there any more if he would not comply with Best Buy's policies. *Id.* at 238:5 - 239:6.

Palmer then got in his truck and called UPS. Bossio answered and routed the call to Ray Jenkins, another one of Palmer's supervisors. Palmer explained the situation, expressed his safety concerns and told Jenkins that Snyder had allowed him to keep his boots on when making deliveries to Best Buy. Jenkins told Palmer to comply with UPS's security procedures and take his boots off. Palmer refused. *Id.* at 239:2-24.

When Palmer failed to follow Jenkins' order, Jenkins told Palmer he was fired and instructed Palmer to stay at Best Buy until someone came to relieve him. Palmer disobeyed that instruction and drove his tractor-trailer back to the UPS facility. *Id.* at 249:12 - 250:11.

UPS says that Palmer was fired for insubordination for failing to follow Jenkins' orders. Def.'s Ex. 3, Christensen Dep. at 68:7-18. UPS also states that Palmer's termination was based on his failure to work as directed – that is, Palmer disregarded the principle of “work now, grieve later.” (Def.'s mot. at pp. 3, 15.) That is a guiding principle of UPS/Union relations and means that if an employee disagrees with a management directive, he is to perform as directed and utilize the CBA grievance process later.

Palmer filed Union Grievance No. 48670 on January 13, 2015, complaining that his discharge was discriminatory and retaliatory for his opposition to discrimination. Def.'s Ex. 15.

That grievance was heard by the CBA's Regional Grievance Panel consisting of union and UPS members and an impartial arbitrator. Duane Grove, the Teamster's principal agent at UPS, presented Palmer's position. Michael Christensen, the UPS District Labor Relations Manager in Denver, presented the company's position. The panel upheld the termination. Def.'s Ex. 18.

On April 6, 2015, Palmer filed an amended EEOC charge complaining that his discharge on January 8, 2015, was the result of racial discrimination, sex discrimination and retaliation. Def.'s Ex. 16. The EEOC dismissed Palmer's EEOC charge as amended and issued a Notice of Right to Sue on April 15, 2015. Def.'s Ex. 6; Pls.' Ex. 11. Palmer and Hart filed this civil action on July 8, 2015.

Palmer alleges that from the beginning of his employment in 2008, he was harassed and subjected to disparate discipline due to his race. Palmer says that neither UPS nor the Union adequately addressed issues of discrimination in the workplace.

UPS argues any alleged discriminatory conduct that occurred before February 21, 2013, is not relevant because 42 U.S.C. § 2000e-5(1) limits claims of discrimination to alleged acts of discrimination that occurred within 300 days before the filing of an EEOC charge. In response, Palmer argues that events before February 21, 2013, are relevant to show that UPS and the Union had a longstanding practice of failing to address violations of Article 28 of the CBA.

Notably, this action does not include any claim for violation of the collective bargaining agreement. Palmer has not asserted any claim against the Union for breach of the duty of fair representation. This is a Title VII action. Although the Court rejects the defendant's argument about the 300-day time limitation, the timeliness issue is of little significance. The specific

incidents that Palmer describes as harassment and discrimination occurred within the 300-day period.

Palmer's claim that he was subjected to gender-based harassment and hostile work environment is premised on Bossio's comments about having to work with "a bunch of fucking men."

A claim of hostile work environment requires evidence of "discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1138 (10th Cir. 2008). A gender-based claim of hostile environment claim "requires a showing not only of severe and pervasive harassment, but of severe and pervasive harassment based on gender." *Chavez v. New Mexico*, 397 F.3d 826, 832 (10th Cir. 2005).

The evidence about Bossio's comments shows only stray remarks, which Palmer learned about from coworkers and did not hear himself. They were not directed to him. Palmer testified that Bossio belittled him, but he did not provide any specific examples. Palmer has not presented any other evidence of abusive conduct related to his gender. Bossio's remarks were crude, but Palmer's evidence about Bossio's conduct is not sufficient to show that the work environment was hostile to men.

Palmer also claims that UPS retaliated against him for his complaints about Bossio's comments about men.

To establish a prima facie case of retaliation, Palmer must show (1) that he engaged in protected activity; (2) that he suffered a materially adverse action either after or contemporaneous with his protected activity; and (3) a causal connection between the protected

activity and the adverse action. *Chavez*, 397 F.3d at 838 (citing *Penry v. Fed. Home Loan Bank of Topeka*, 155 F.3d 1257, 1263-64 (10th Cir.1998)).

“[A] plaintiff making a retaliation claim under § 2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.” *Davis v. Unified Sch. Dist. 500*, 750 F.3d 1168, 1170 (10th Cir. 2014). [A] retaliatory motive can be inferred from the fact that an adverse employment action follows charges by an employee against [his] employer.” *Candelaria v. EG & G Energy Measurements, Inc.*, 33 F.3d 1259, 1261-62 (10th Cir. 1994)). An inference of retaliatory motive can be made only when “‘close temporal proximity’ exists between the bringing of charges and the subsequent adverse action.” *Id.* (citing *Smith v. Maschner*, 899 F.2d 940, 948-49 (10th Cir. 1990)).

Palmer’s retaliation claim fails because the evidence, viewed in a light most favorable to Palmer, does not support an inference of any causal connection between the circumstances of Palmer’s discharge and his complaints about Bossio’s conduct toward men. As set forth above, Palmer initiated his union grievance about Bossio on November 27, 2013, and then withdrew it. His EEOC charge citing Bossio’s comments was filed on December 19, 2013. Palmer was fired by Ray Jenkins on January 8, 2015, after Palmer refused to comply with Jenkins’ orders. There is no evidence that Bossio had any involvement in the decision to terminate Palmer’s employment. There is no evidence that Jenkins considered Palmer’s complaints about Bossio when Jenkins discharged Palmer. The discharge decision occurred more than a year after Palmer’s complaints about Bossio’s comments. Reasonable jurors could not conclude that Palmer was fired in retaliation for his complaints of alleged gender discrimination.

Palmer also claims that he was the victim of 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).

Plaintiffs’ combined opposition brief states that Neil Coyle, a coworker who served as a union steward, provided a sworn affidavit stating that Palmer and Hart were specifically targeted, disciplined and harassed by UPS. Palmer Aff. ¶ 15. 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, Coyle’s statement does not mention racial bias as a motive for the alleged harassment.

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 statements is inadmissible 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 any relevant decision-making process. “An employee’s statements are not attributable to his employer as a party-opponent admission in an employment dispute unless the employee was ‘involved in the decisionmaking process affecting the employment action’ at issue.” *Johnson v. Weld County, Colo.*, 594 F.3d 1202 (10th Cir. 2010) (quoting *Jaramillo v. Colo. Judicial Dep’t*, 427 F.3d 1303,

1314 (10th Cir. 2005) (per curiam) and *Aliotta v. Nat'l R.R. Passenger Corp.*, 315 F.3d 756, 762 (7th Cir. 2003)).

Plaintiffs' combined opposition brief cites 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.

Palmer says he was criticized unfairly for taking longer than the allotted time to conduct pre-trip inspections and that white drivers were not similarly disciplined. Palmer Aff. ¶¶ 17-18, Pl.'s Ex. 14-2. When Palmer was deposed, he identified several white employees and said he observed them staying in the yard as long as he did on the day that he was disciplined. Palmer also acknowledged, however, that he had no firsthand knowledge of whether any of those employees were disciplined, and no documentary evidence to support his claim that white employees received preferential treatment. Palmer Dep. at 201-203; 204:1-20; 207:15-23; 209:6-11.

Palmer says that his bathroom breaks were unfairly scrutinized and that he had never heard of this issue having come up with white employees. Palmer Dep. at 224:8-25; 225:1-11. Palmer also acknowledged that he did not know whether or not any whites had been similarly disciplined. *Id.*

Palmer says he was unfairly disciplined for being tardy, pointing to the incident on October 20, 214, when he was given a warning letter. That letter was withdrawn. When Palmer

was deposed, he said that he believed that Neil Coyle, a white employee, was tardy without being disciplined. *Id.* at 216:23-25; 217:1-7.

Palmer says that his requests for FMLA leave were unfairly denied, but when he was deposed, Palmer acknowledged that he had no firsthand knowledge of any disparate treatment by white employees regarding FMLA. Palmer dep. at 186:21-25; 187:3-11.

Palmer contends it was unfair for a letter to be put in his file regarding the accident on December 9, 2014. Rick Etzler is the manager who disciplined Palmer for the accident, and Palmer has not provided any evidence that Etzler was racially biased. When Palmer was deposed, he said that James Montoya, a Hispanic, was not disciplined after he was involved in an accident with a wire. *Id.* at 146:6 - 148:3. Palmer acknowledged that the lack of discipline for Montoya (an Hispanic) is inconsistent with Palmer's testimony that "minorities got the worst of it." *See id.* at 147:20 - 148:3. In his affidavit, Palmer added that Mark Hoskins (a Caucasian) also hit low-hanging wires and was not disciplined. Palmer Aff. ¶ 13. Palmer did not mention Hoskins during his deposition, and there is not enough information in the record about these other accidents to determine whether they are comparable incidents.

In his deposition testimony, Palmer said that Mark Manpoya, a UPS employee from Africa, was followed and teased by a UPS driver- trainer identified as "Ray Junior." Palmer Dep. at 148:4 - 25. Plaintiffs' opposition brief does not mention any incidents involving Manpoya as evidence of racial discrimination. Palmer testified that he did not have any evidence to show anything UPS did regarding Manpoya was racially biased. *Id.* at 153:9-6.

The termination of Palmer's employment was abrupt because he was not afforded a progressive discipline plan. Nevertheless, UPS has come forth with a legitimate non-

discriminatory reasons for the discharge – Palmer’s insubordination in refusing to follow Jenkins’ orders.

The burden is on Palmer to show that UPS’s stated reason was a pretext for racial discrimination. “[A] plaintiff demonstrates pretext by showing either that a discriminatory reason more likely motivated the employer or that the employer’s proffered explanation is unworthy of credence.” *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160, 1166 (10th Cir. 2007).

Palmer says that on a previous occasion, Snyder told him that he could complete a delivery at Best Buy without removing his boots. That evidence does not create a triable issue on the question of pretext. It is undisputed that Palmer was expected to follow the principle of “work now, grieve later.” An exception to that principle applies when a directive of the employer violates a law or involves safety or compliance issues. Palmer has not shown that taking off his boots at Best Buy posed a compliance issue or any actual threat to his safety.²

Palmer also claims that UPS retaliated against him for opposing racial discrimination. Palmer engaged in protected activity when he complained of racial discrimination in his union grievances and EEOC charges. Palmer’s discharge on January 8, 2015 was an adverse employment action. Plaintiffs’ evidence, however, is not sufficient to show a causal connection between his opposition to racial discrimination and the termination of his employment. The evidence regarding Palmer’s conduct on January 8, 2015 is undisputed, and the only supportable inference to be drawn from the record evidence is that Palmer was fired for insubordination.

²Plaintiffs have provided evidence showing that in May, 2015 (approximately four months after Jenkins fired Palmer), a photo of President Obama and his wife that was racially offensive was displayed on Jenkins’ Facebook page. Pls.’ Ex. 7 at UPS 1619. That evidence is not sufficient to create a triable issue on Palmer’s claim of wrongful discharge, in light of the undisputed evidence that Palmer refused to work as directed on the day he was fired.

That is, reasonable jurors could conclude only that UPS' stated reason for the termination decision was the actual reason, and Palmer's discharge was not retaliatory.

Based on the foregoing, it is

ORDERED that Defendant's motion for summary judgment as to all claims of Plaintiff Kendall S. Palmer (doc. 32) is granted.

The clerk shall enter judgment dismissing the claims of plaintiff Kendall S. Palmer with an award of costs to the defendant.

Dated: July 19, 2017

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior Judge