UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BEVON LOYBE TRAIL,
Plaintiff,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,
Defendant.

OPINION AND ORDER

17 CV 7273 (VB)

Briccetti, J.:

Plaintiff Bevon Loybe Trail, proceeding pro se and in forma pauperis, brings this action under Title VII of the Civil Rights Act of 1964 ("Title VII"), alleging defendant New York State Department of Corrections and Community Supervision ("DOCCS") discriminated and retaliated against him on account of his race, color, and national origin, and subjected him to a hostile work environment.[1]

Before the Court is defendant's motion for summary judgment. (Doc. #79).

For the reasons set forth below, the motion is DENIED IN PART and GRANTED IN PART.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

BACKGROUND

The parties have submitted briefs, statements of material fact, supporting affidavits, declarations, and exhibits, which together reflect the following factual background.[2]

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[1] By Opinion and Order dated August 3, 2018, the Court dismissed plaintiff's 42 U.S.C. § 1981 and the New York State Human Rights Law claims against DOCCS. (Doc. #30). The Court also dismissed all claims against Taconic Correctional Facility. (Id.).

[2] Plaintiff submitted a declaration from his union president, Shirley Dimps, as part of his opposition to the instant motion. (Doc. #100). The Court has not considered this declaration,

During the time of the complained-of events, plaintiff, a black man of Jamaican descent, was employed by DOCCS as a general mechanic in the Maintenance Department at Taconic Correctional Facility ("Taconic") in Bedford Hills, New York. Robert Schmelmer was plaintiff's supervisor at Taconic.

I. Hostile Work Environment

According to plaintiff, on several unspecified dates, Schmelmer called Anthony Mangione, Everton Brown—two other employees of the Maintenance Department—and plaintiff "nigger," and asked Mangione to "step outside." (Doc. #83 ("Shevlin Decl.") Ex. A ("Trail Tr.") at 24–25).[3] Mangione is Hispanic, and Brown, like plaintiff, is black and Jamaican.

In addition, plaintiff claims Brown told him that on June 13, 2016, Schmelmer asked Brown, "[D]o you want to step outside you punk-ass-nigga[?]" (Doc. #5 ("Am. Compl.") at ECF 8).[4] Plaintiff was not present during this incident, but felt discomforted by it because

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because it is not based upon "concrete particulars," but rather replete with "conclusory allegations" that DOCCS discriminates against black employees. See Bickerstaff v. Vassar Coll., 196 F.3d 435, 451–52 (2d Cir. 1999), as amended on denial of reh'g (Dec. 22, 1999). Unless otherwise indicated, case quotations omit all internal citations, quotations, footnotes, and alterations.

In addition, plaintiff refers in his opposition to confidential materials the Office of the Attorney General ("AG") sent to the New York Legal Assistance Group ("NYLAG"). According to plaintiff, these materials were marked as confidential, and, consequently, he was unable to submit these materials to the Court to substantiate his claims. He also claims he was unable to view many of these confidential documents. However, the parties' stipulation of confidentiality and protective order, which plaintiff signed on June 20, 2019, and the Court so-ordered on June 21, 2019, provides that plaintiff had the opportunity to review such documents and sets forth the means by which plaintiff could have submitted such documents to the Court. (See Doc. #68 ¶¶ 2, 11, 12).

[3] Citations to "Trail Tr. at _" refer to the page number on the top right-hand corner of each transcript page.

[4] "ECF __" refers to the page numbers automatically assigned by the Court's Electronic Case Filing system.

plaintiff is also black. Plaintiff testified that during this encounter, Schmelmer also called Mangione the "n-word" (Trail Tr. at 43).

Defendant, however, claims Schmelmer did not use the "n-word" at work. Schmelmer attests he never asked any employee to "step outside" with him to resolve a dispute, or referred to any employee as "punk-ass nigga." (Doc. #90 ("Schmelmer Decl.") ¶ 3). In addition, Mangione attests he was not employed at Taconic on June 13, 2016, and he is not aware of Schmelmer ever using the "n-word." And although Brown signed a letter dated October 31, 2016, to the DOCCS Office of Diversity Management ("ODM"), confirming Schmelmer asked him "do you want to step outside you punk-ass-nigga," (Am. Compl. at 41–42), in his declaration dated August 14, 2019, Brown states he does not recall Schmelmer using any discriminatory or racially derogatory language during that incident or otherwise. (Doc. #87 ("Brown Decl.") ¶ 3). Brown does attest, however, that on June 13, 2016, Schmelmer called him "punk ass" and asked Brown if he wanted to step outside. (Id.).

Plaintiff further testified that Raj Kanojia, a Maintenance Department employee of Indian descent, called him a "Jamaican Coconut" on several occasions. (Trail Tr. at 27, 62). Kanojia denies ever having referred to plaintiff as such.

Plaintiff also claims Schmelmer harassed him by following him around at work to tell him he could not work with Brown, but allowed Kanojia to work together with another employee. Schmelmer attests he neither followed plaintiff around to tell him he could not work with Brown nor otherwise prohibited plaintiff from working with Brown.

Plaintiff's union president, Shirley Dimps, submitted a letter dated June 20, 2016, to Taconic Deputy Superintendent of Security ("DSS") Michael Daye, stating Kanojia had called plaintiff a Jamaican Coconut on "numerous occasions and Trail felt offended about this." (Am.

Compl. at ECF 16). That same day, Dimps also submitted a letter to DSS Daye about the "verbal confront[ation]" between Brown and Schmelmer on June 13, 2016, in which Schmelmer asked Brown to "step outside." (Id. at ECF 17). On June 30, 2016, DSS Daye responded to Dimps and indicated the letters were forwarded to ODM for investigation. (Id. at ECF 28).

II. June 2016 Notice of Discipline

On June 16, 2016, plaintiff and Kanojia were involved in a physical altercation in the mess hall area at Taconic. The video of the incident shows that as Kanojia attempted to move a cabinet past plaintiff, Kanojia pushed a hand truck toward plaintiff and walked a few steps into the area in front of plaintiff. (Doc. #85 ("Shipley Decl.") Ex. C). Kanojia then pushed several boxes toward plaintiff, which caused plaintiff to take several steps backward. (Id.). The video then shows plaintiff projecting his right arm toward Kanojia. (Id.). Kanojia admits to having used profane language toward plaintiff during this incident, but claims he did not "hit" plaintiff. (Doc. #89 ("Kanojia Decl.") ¶ 5–6).

On June 17, 2016, Kanojia reported to Schmelmer that plaintiff had hit him the previous day. Schmelmer reported the incident to his supervisor, Deputy Superintendent for Administration ("DSA") Bridget Wojnar, who, after reviewing the video with Superintendent ("Supt.") Wendy Featherstone, reported the incident to DOCCS' Bureau of Labor Relations ("Labor Relations"). That same day, at Labor Relations' direction, Supt. Featherstone placed plaintiff on administrative leave with pay until further notice, pending completion of the investigation.

Director of Labor Relations ("Dir."), John Shipley, who makes final decisions as to whether discipline should be imposed and its nature and duration, disciplined both plaintiff and Kanojia. (Shipley Decl. ¶ 2). Plaintiff was issued a notice of discipline, dated June 23, 2016,

and signed by Dir. Shipley, which recommended dismissal from service and loss of any accrued leave. This was ultimately lessened to an unpaid suspension from June 23 to July 7, 2016. Kanojia received a lesser punishment, comprising a formal counseling session and follow-up memorandum. According to Shipley, plaintiff and Kanojia received different punishments because their "actions [were] not comparable." (Shipley Decl. ¶ 13). Plaintiff, however, maintains both he and Kanojia should have received the same discipline for their involvement in this incident and that plaintiff received a more serious punishment because DOCCS prefers Indian and white employees over black employees.

III. ODM Complaint

Union president Dimps sent a letter dated June 28, 2016, to ODM, detailing various complaints concerning Schmelmer's supervisory conduct, especially with respect to his treatment of African-American employees in the Maintenance Department. The letter included, among other things, a description of the June 13, 2016, "punk-ass-nigga" comment Schmelmer allegedly made to Brown, and the June 16, 2016, altercation between Kanojia and plaintiff, stating that Schmelmer's "supervisory style . . . has played a role in this matter between Kanojia and Trail." (Am. Compl. at ECF 8, 24).

IV. October Weekend Work

In mid-October 2016, Schmelmer approved both plaintiff and Brown to work weekend overtime to mow the lawn at Taconic. Plaintiff claims Schmelmer paid Brown for this overtime work, but not plaintiff. Schmelmer claims he had no involvement in processing overtime payments for Brown or plaintiff, and that after plaintiff told him plaintiff had not been paid overtime, Schmelmer contacted the facility payroll office and arranged for plaintiff to be paid.

V. October 2016 Notice of Discipline

On October 20, 2016, Schmelmer met with Maintenance Department employees, including plaintiff, to inform them of a DOCCS requirement that each take a turn to ensure all the Maintenance Department's tools were accounted for and sign a tool accountability form indicating such inspection had occurred. Plaintiff informed Schmelmer he would not do so because it was not part of his job.

That same day, Schmelmer informed DSA Wojnar of plaintiff's refusal to comply with the tool directive. Wojnar then directed Schmelmer to send plaintiff to Wojnar's office so she could speak with him. According to Schmelmer, he found plaintiff sleeping in his truck, and this was not the first time Schmelmer caught plaintiff sleeping on the job. Schmelmer claims he woke plaintiff up, directed him to Wojnar's office, and later informed Wojnar that he had found plaintiff sleeping on the job.

Dir. Shipley, Supt. Featherstone, and DSA Wojnar agreed plaintiff should be formally counseled about sleeping on the job, and Wojnar directed Schmelmer to formally counsel plaintiff. Furthermore, on October 20 or 21, 2016, Wojnar instructed plaintiff to sign the tool accountability form; she does not recall whether she informed plaintiff he would be formally counseled for sleeping.

On October 21, 2016, Schmelmer called plaintiff to his office to give him a formal counseling memorandum for sleeping on the job. Plaintiff's contemporaneous written account of the incident states that when he went to Schmelmer's office, Schmelmer told plaintiff he had been sleeping on the job, and plaintiff said he had not been sleeping and then walked out. (Shipley Decl. Ex. F). At his deposition, however, plaintiff testified he told Schmelmer that Schmelmer was lying and that plaintiff slammed the door and walked out. (Trail Tr. at 85). The

parties dispute whether plaintiff said the following to Schmelmer: "You got something for me, you got something for me, well I got something for you! What about the other guys? You gonna write them too?" (Shipley Decl. Ex. G). Plaintiff said this because about one week prior, he told DSA Wojnar that he saw Schmelmer's son, who also worked at Taconic, sleeping on the job. Schmelmer did not issue the counseling memorandum to plaintiff, but informed Wojnar of the incident and followed up by sending her a written memorandum detailing the incident, which Wojnar then sent to Dir. Shipley. (Id. Ex. F).

DSA Wojnar sent both plaintiff's and Schmelmer's written accounts to Dir. Shipley. Later that day, following standard operating procedure for when an employee is alleged to have been insubordinate, Shipley directed that plaintiff be escorted by security out of the facility and to Taconic's business office, outside of the facility's fence. Plaintiff claims he was escorted to the business office in view of DOCCS inmates, and other employees, as part of an effort to harass and retaliate against him for refusing to sign the tool accountability form and for complaining about Schmelmer's son.

Plaintiff was directed to wait at the business office while Labor Relations investigated the incident between plaintiff and Schmelmer. Plaintiff claims he was told to wait until DSS Daye spoke to him, but that he was ultimately sent home without speaking to Daye. Daye states plaintiff was sent home later that day because Labor Relations had not yet resolved the investigation.

On October 24, 2016, Labor Relations issued to plaintiff a notice of discipline, signed by Dir. Shipley, advising plaintiff he was being suspended for forty-five days, without pay, for being "uncivil and discourteous" to Schmelmer on October 21, 2016. According to Shipley, when he issued the notice of discipline, he was not aware of Dimps' June 28, 2016, complaint to

ODM, which, among other grievances, protested that plaintiff and Kanojia had been disciplined differently because DOCCS preferred Indian employees over black employees. Shipley states plaintiff was issued the October 24 notice of discipline because "plaintiff was insubordinate to his supervisor and was unreceptive to an attempt to counsel him for sleeping while on duty." (Shipley Decl. ¶ 25).

Labor Relations ultimately lessened plaintiff's punishment from a forty-five-day suspension without pay to a forfeiture of seven days' annual leave.

DISCUSSION

I. Standard of Review

The Court must grant a motion for summary judgment if the pleadings, discovery materials before the Court, and any affidavits show there is no genuine issue as to any material fact and it is clear the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

A fact is material when it "might affect the outcome of the suit under the governing law. . . . Factual disputes that are irrelevant or unnecessary" are not material and thus cannot preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

A dispute about a material fact is genuine if there is sufficient evidence upon which a reasonable jury could return a verdict for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. at 248. The Court "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried." Wilson v. Nw. Mut. Ins. Co., 625 F.3d 54, 60 (2d Cir. 2010). It is the moving party's burden to establish the absence of any genuine issue of material fact. Zalaski v. City of Bridgeport Police Dep't, 613 F.3d 336, 340 (2d Cir. 2010).

If the non-moving party fails to make a sufficient showing on an essential element of his case on which he has the burden of proof, then summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. at 322–23. If the non-moving party submits "merely colorable" evidence, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. at 249–50. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts, and may not rely on conclusory allegations or unsubstantiated speculation." Brown v. Eli Lilly & Co., 654 F.3d 347, 358 (2d Cir. 2011). The mere existence of a scintilla of evidence in support of the non-moving party's position is likewise insufficient; there must be evidence on which the jury reasonably could find for him. Dawson v. County of Westchester, 373 F.3d 265, 272 (2d Cir. 2004).

On summary judgment, the Court construes the facts, resolves all ambiguities, and draws all permissible factual inferences in favor of the non-moving party. Dallas Aerospace, Inc. v. CIS Air Corp., 352 F.3d 775, 780 (2d Cir. 2003). If there is any evidence from which a reasonable inference could be drawn in the non-movant's favor on the issue on which summary judgment is sought, summary judgment is improper. Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc., 391 F.3d 77, 83 (2d Cir. 2004).

In deciding a motion for summary judgment, the Court need consider only evidence that would be admissible at trial. Nora Beverages, Inc. v. Perrier Grp. of Am., Inc., 164 F.3d 736, 746 (2d Cir. 1998). The burden to proffer admissible evidence applies "equally to pro se litigants." Varughese v. Mt. Sinai Med. Ctr., 2015 WL 1499618, at *4 (S.D.N.Y. Mar. 27, 2015) (citing Holtz v. Rockefeller & Co., 258 F.3d 62, 73 (2d Cir. 2001)).[5] Accordingly, bald

[5] Plaintiff will be provided copies of all unpublished opinions cited in this decision. See Lebron v. Sanders, 557 F.3d 76, 79 (2d Cir. 2009).

assertions, completely unsupported by admissible evidence, are not sufficient to overcome summary judgment. Carey v. Crescenzi, 923 F.2d 18, 21 (2d Cir. 1991).

II. Discrimination and Retaliation Claims

Defendant argues it is entitled to summary judgment on plaintiff's Title VII race, color, and national origin discrimination and retaliation claims.

The Court disagrees inasmuch as plaintiff's discrimination claim is based on the punishment he received as a result of the June 16, 2016, incident between him and Kanojia, but agrees with respect to plaintiff's other discrimination and retaliation claims.

A. Legal Standard

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII's anti-retaliation provision "forbids employer actions that 'discriminate against' an employee (or job applicant) because he has 'opposed' a practice that Title VII forbids." Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 59 (2006) (quoting 42 U.S.C. § 2000e-3(a)).

The familiar three-step McDonnell Douglas burden-shifting framework applies to plaintiff's Title VII discrimination and retaliation claims. See Littlejohn v. City of New York, 795 F.3d 297, 312, 316 (2d Cir. 2015).

Under the McDonnell Douglas framework, a plaintiff must first establish a prima facie case. Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000). To establish a prima facie case of discrimination, a plaintiff must show "(i) membership in a protected class; (ii) qualifications for the position; (iii) an adverse employment action; and (iv) circumstances

surrounding that action giving rise to an inference of discrimination." Collins v. N.Y.C. Transit Auth., 305 F.3d 113, 118 (2d Cir. 2002). To establish a prima facie case of retaliation, plaintiff must show (i) he engaged in a protected activity; (ii) the employer was aware of this activity; (iii) the employer took adverse employment action against him; and (iv) a causal connection exists between the alleged adverse action and the protected activity. Zann Kwan v. Andalex Grp. LLC, 737 F.3d 834, 844 (2d Cir. 2013).

An adverse employment action is a "materially adverse change in the terms and conditions of employment." Sanders v. N.Y.C. Human Res. Admin., 361 F.3d 749, 755 (2d Cir. 2004). It must be "more disruptive than a mere inconvenience or an alteration of job responsibilities." Id. "Examples of such a change include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation." Id.

With respect to a discrimination claim, "[a] plaintiff may make a prima facie case for an inference of discrimination by showing that a similarly situated individual not in [plaintiff's] protected group was treated differently." Loucar v. Bos. Mkt. Corp., 294 F. Supp. 2d 472, 479 (S.D.N.Y. 2003). "If a comparison with another employee is to lead to an inference of discrimination," however, "it is necessary that the employee be similarly situated in all material respects." Staff v. Pall Corp., 233 F. Supp. 2d 516, 536 (S.D.N.Y. 2002).

With respect to the "protected activity" prong of a retaliation claim, "Section 704(a) of Title VII contains both an opposition clause and a participation clause, making it unlawful for an employer to retaliate against an individual 'because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified,

assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.'" Townsend v. Benjamin Enters., Inc., 679 F.3d 41, 48 (2d Cir. 2012) (citing 42 U.S.C. § 2000e–3(a)). "When an employee communicates to her employer a belief that the employer has engaged in a form of employment discrimination, that communication virtually always constitutes the employee's opposition to the activity." Littlejohn v. City of New York, 795 F.3d 297 at 317.

In addition, "[t]he temporal proximity of events may give rise to an inference of retaliation for the purposes of establishing a prima facie case of retaliation under Title VII, but without more, such temporal proximity is insufficient to satisfy [plaintiff's] burden to bring forward some evidence of pretext." El Sayed v. Hilton Hotels Corp., 627 F.3d 931, 933 (2d Cir. 2010).

Once a plaintiff presents a prima facie case of discrimination or retaliation, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse action. Weinstock v. Columbia Univ., 224 F.3d at 42. If a defendant meets this burden, the plaintiff must then point to evidence that would be sufficient to permit a rational factfinder to conclude the employer's explanation is merely a pretext for actual discrimination or retaliation. Id.

To satisfy the burden of showing pretext on summary judgment, a plaintiff must "produce not simply some evidence, but sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered by the defendant were false, and that more likely than not discrimination was the real reason for the employment action." Weinstock v. Columbia Univ., 224 F.3d at 42. "In short, the question becomes whether the evidence, taken as a whole, supports a sufficient rational inference of discrimination." Id.

B. Discrimination Claim

The record evidence indicates a genuine dispute of material fact as to why plaintiff received a harsher punishment than Kanojia for his involvement in the June 16, 2016, altercation with Kanojia. Defendant contends plaintiff received a harsher punishment—a two-week, unpaid suspension, lessened from an original punishment of dismissal and loss of accrued leave—rather than what Kanojia received—a formal counseling memorandum—because plaintiff's "actions were more serious." (Shipley Decl. ¶ 13). According to defendant, "Mr. Kanojia cursed at Mr. Trail, but Mr. Trail tried to punch Mr. Kanojia. The two actions are not comparable." (Id.).

But here, based on the record evidence, a reasonable factfinder could conclude defendant's articulated reason for the varying discipline is a mere pretext for unlawful discrimination. Indeed, the video shows Kanojia did not just curse at plaintiff, as defendants contend, but that he also pushed a hand cart at plaintiff, walked toward plaintiff, and then pushed boxes at plaintiff, which made contact with plaintiff and caused plaintiff to take several steps back, before plaintiff projected his right arm at Kanojia.

Accordingly, although the record evidence, including the video and plaintiff's testimony, indicates plaintiff projected his right arm toward Kanojia at some point in time, it does not demonstrate such contact was the only contact between plaintiff and Kanojia during the altercation. Indeed, the counseling memorandum Kanojia received states that DSA Wojnar "reminded [Kanojia] that Taconic and the department have zero tolerance for any type of work place violence," suggesting DOCCS viewed Konojia's actions to also have been violent. (Doc. #92).[6] However, defendant's stated reason for plaintiff's harsher punishment was that he made

[6] Although originally filed under seal (see Doc. #84 ("Wojnar Decl.") Ex. A), the Court unsealed this document upon defendant's withdrawal of its request to file it under seal. (Doc. #95).

physical contact with Kanojia. Accordingly, there are genuine disputes of material fact as to why Kanojia received a lesser punishment than did defendant, and whether defendant's stated reason for the different discipline imposed was mere pretext for otherwise discriminatory conduct.

As to plaintiff's other claims of discrimination, however, based on the indisputable facts, no reasonable juror could conclude plaintiff was unlawfully discriminated against based on his race, color, or national origin.

First, plaintiff has not adduced evidence to demonstrate that Schmelmer's allegedly having prohibited plaintiff from working with other employees was an adverse employment action. See Cunningham v. N.Y. State Dep't of Labor, 326 F. App'x 617, 619 (2d Cir. 2009) (summary order) ("As we have previously held, everyday workplace grievances, disappointments, and setbacks do not constitute adverse employment actions.").

Similarly, plaintiff's contention that he did not receive an administrative hearing with respect to either the June or October 2016 incidents—an argument plaintiff raises for the first time in his opposition to the instant motion—does not implicate any material issue of fact with respect to an adverse employment action suffered by plaintiff. Indeed, plaintiff does not point to any rule or requirement that required he be given an administrative hearing prior to being issued a notice of discipline. Accordingly, plaintiff fails to adduce evidence that not being given an administrative hearing resulted in a "materially adverse change in the terms and conditions of [his] employment." Sanders v. N.Y.C. Human Res. Admin., 361 F.3d at 755.

Second, plaintiff's claim that Kanojia's alleged references to plaintiff as a Jamaican Coconut constitute actionable discrimination fails as a matter of law because no record evidence suggests Kanojia was anything other than plaintiff's co-worker or that Kanojia issued any of the

discipline plaintiff received. See Opoku-Acheampong v. Depository Tr. Co., 2005 WL 1902847, at *3 (S.D.N.Y. Aug. 9, 2005) ("[S]tray comments are not evidence of discrimination . . . if they are made by individuals without decision-making authority.").

Third, plaintiff similarly fails to present any evidence suggesting Brown was paid for overtime sooner than plaintiff was paid for same, on account of plaintiff's race, ethnicity, or other trait. Indeed, Brown is also black and Jamaican.

Fourth, plaintiff fails to adduce any evidence that gives rise to an inference of discriminatory intent with respect to his claim that he was formally counseled for allegedly sleeping on the job, but Schmelmer's son was not. Specifically, plaintiff does not present evidence that he and Schmelmer's son were "similarly situated in all material respects." Staff v. Pall Corp., 233 F. Supp. 2d at 536. Indeed, plaintiff states he told DSA Wojnar that he once saw Schmelmer's son sleeping on the job, but the record evidence suggests Schmelmer caught plaintiff sleeping on the job more than once. Thus, even if plaintiff, who is not a supervisor, saw Schmelmer's son sleeping at work and reported this to a supervisor, plaintiff fails to explain how being caught, by his own supervisor and on more than one occasion, sleeping on the job, which resulted in a counseling memorandum, was mere pretext for unlawful discrimination.

Fifth, with respect to the October 21, 2016, incident, defendant has carried its burden of proffering a legitimate, non-discriminatory reason for plaintiff's escort from the Taconic facility—that such escort was pursuant to standard operating procedure when an employee is accused of insubordination. Defendant has also demonstrated that plaintiff was issued the October 24 notice of discipline because plaintiff was insubordinate. The record is devoid of any evidence suggesting plaintiff's escort from the facility and resulting discipline amounted to

pretext for unlawful discrimination. Indeed, plaintiff himself concedes he called his supervisor a liar and slammed the door on the way out of his supervisor's office.

Moreover, to the extent plaintiff asserts that, before being issued the above discipline or the June 2016 notice of discipline, DOCCS should have informally counseled plaintiff, the record is devoid of any evidence suggesting the existence of such a requirement. DOCCS has also attested there is no requirement, contrary to plaintiff's contention, that when two or more employees have fought, they must be given an opportunity to informally resolve the differences between themselves before they are formally disciplined. The record is devoid of any evidence to show otherwise; moreover, plaintiff has not offered any evidence that these legitimate non-discriminatory explanations are mere pretext.

C. Retaliation Claim

Plaintiff claims the following incidents comprised unlawful retaliation: (i) his escort from the Taconic facility to the business office on October 21, 2016; and (ii) his October 24, 2016, notice of discipline.

As an initial matter, plaintiff has adduced evidence that he engaged in protected activities. First, plaintiff's union president submitted a letter dated June 20, 2016, to DSS Daye indicating Kanojia had called plaintiff a Jamaican Coconut on "numerous occasions" and that plaintiff "felt offended about this." (Am. Compl. at ECF 16). Second, the union president also submitted a letter dated June 28, 2016, to ODM, recounting issues plaintiff and other black Maintenance Department workers had with Schmelmer. Plaintiff's complaints to his union representative are protected employment activities.

Plaintiff's claims that he told DSA Wojnar he had seen Schmelmer's son sleeping on the job and plaintiff's refusal to comply with the tool accountability form requirement, however, are not protected employment activities. See Townsend v. Benjamin Enters., Inc., 679 F.3d at 48.

As to plaintiff's claims that being escorted out of Taconic in view of inmates and other employees on October 21, 2016, and being issued a notice of discipline on October 24, 2016, were retaliatory, as explained above, plaintiff fails to identify any evidence for a rational factfinder to conclude defendant's proffered non-discriminatory reasons for its conduct were pretextual.

Moreover, as explained above, plaintiff's claims that he did not receive an administrative hearing with respect to the June and October 2016 notices of discipline, he was not informally counseled before being issued such discipline, and he was not given an informal opportunity to resolve his differences with Kanojia prior to receiving formal discipline, fail as a matter of law. Plaintiff has offered no evidence that DOCCS was required to take such actions, and the record evidence demonstrates there were no such requirements.

III. Hostile Work Environment

Defendant argues plaintiff fails as a matter of law to establish a Title VII hostile work environment claim.

The Court disagrees.

"[T]o establish a hostile work environment claim under Title VII, a plaintiff must produce enough evidence to show that the workplace is permeated with 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." Rivera v. Rochester Genesee Reg'l Transp. Auth., 743 F.3d 11, 20 (2d Cir. 2014). In considering whether a plaintiff

has met this burden, courts should examine the totality of the circumstances, including: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the victim's job performance." Id.

"[T]he test has objective and subjective elements: the misconduct shown must be severe or pervasive enough to create an objectively hostile or abusive work environment, and the victim must also subjectively perceive that environment to be abusive." Rivera v. Rochester Genesee Reg'l Transp. Auth., 743 F.3d at 20. In Schwapp v. Town of Avon, the Second Circuit concluded that "whether racial slurs constitute a hostile work environment typically depends upon the quantity, frequency, and severity of those slurs, considered cumulatively in order to obtain a realistic view of the work environment." 118 F.3d 106, 110–11 (2d Cir. 1997). The Second Circuit has since clarified, however, that Schwapp "did not foreclose the possibility that the one-time use of a severe racial slur could, by itself, support a hostile work environment claim when evaluated in the cumulative reality of the work environment." Daniel v. T & M Prot. Res., LLC, 689 F. App'x 1, 2 (2d Cir. 2017) (summary order).

Because "individuals are not subject to liability under Title VII," a successful Title VII claim requires a specific basis to impute harassment liability to an employer. Patterson v. County of Oneida, 375 F.3d 206, 221 (2d Cir. 2004). Thus, under Title VII, an employer's liability for workplace harassment "may depend on the status of the harasser." Vance v. Ball State Univ., 570 U.S. 421, 424 (2013). If the harassing employee is a "supervisor," the employer will be strictly liable for his unlawful conduct unless "(1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) . . . the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided." Id. "If the

harassing employee is the victim's co-worker," however, "the employer is liable only if it was negligent in controlling working conditions." Id.

Here, the record evinces a material factual dispute respecting whether plaintiff was subjected to a hostile work environment.

Plaintiff testified at his deposition that during various incidents, Schmelmer called three subordinates, Brown, Mangione, and plaintiff, "nigger" or "punk-ass-nigga." (Trail Tr. at 24–25). At least one of these instances was reported to ODM. (Am. Compl. at 41–42). DOCCS has offered no evidence that any corrective action was taken in response to such report.

Moreover, "perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." Rivera v. Rochester Genesee Reg'l Transp. Auth., 743 F.3d at 24. The fact that plaintiff was not present during every alleged use of this derogatory term does not undermine the incidents' relevancy; whether they in fact contributed to a hostile work environment is a question for the jury. Schwapp v. Town of Avon, 118 F.3d at 111–12.

It is true plaintiff appears to have confused certain details of the instances during which he claims Schmelmer used the "n-word." For instance, during his deposition, plaintiff stated Mangione was present during the June 13, 2016, incident, but Mangione attested he no longer worked at Taconic on that date. But that plaintiff was unable to recall specific details of Schmelmer's use of the "n-word" does not preclude a finding by a reasonable factfinder that Schmelmer did in fact use racial slurs toward a subordinate, especially when supported by contemporaneous evidence in the form of the October 31, 2016, letter to ODM in which Schmelmer's use of the term "punk-ass-nigga" toward Brown was detailed. See Rivera v.

Rochester Genesee Reg'l Transp. Auth., 743 F.3d at 23 ("Although [plaintiff] could not recall certain details of [an] incident [during which a the 'n-word' was allegedly used] during his deposition testimony, he provided enough details, which were supported by contemporaneous evidence in the form of an EEOC charge . . . ."); cf. id. at 22 (noting summary judgment was appropriate in a case where the "District Court found nothing in the record to support plaintiff's allegations other than plaintiff's own contradictory and incomplete testimony"). Nor are comments made outside of plaintiff's presence inadmissible hearsay; such comments have not been offered "to prove the truth of the matter[s] asserted in the statement[s]." See Fed. R. Evid. 801(c)(2).

Furthermore, in addition to informing ODM about Schmelmer's use of the "n-word" toward his subordinate Brown, plaintiff's union president wrote to DSS Daye that Kanojia had called plaintiff a Jamaican Coconut on "numerous occasion and Trail felt offended about this." (Am. Compl. at ECF 16). Daye informed the union president that the letter had been forwarded to ODM. (Am. Compl. at ECF 28). DOCCS has not submitted any evidence that any action was taken in response to such complaint. Accordingly, there exists a genuine factual dispute as to whether DOCCS acquiesced in, or did nothing to prevent, Kanojia's alleged contribution to the creation of a hostile work environment. See Williams v. Consol. Edison Corp. of N.Y., 255 F. App'x 546, 550 (2d Cir. 2007) (reversing summary judgment for defendant when factual questions existed as to whether appropriate remedial action had been taken in response to a racially hostile work environment); see also 29 C.F.R. § 1604.11(d) (stating an employer is liable for co-worker harassment when it "knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action").

Although this is a close call, having construed the facts, resolved all ambiguities, and drawn all permissible factual inferences in plaintiff's favor, the Court cannot conclude at this time as a matter of law that plaintiff is unable to prevail on his hostile work environment claim.

CONCLUSION

The motion for summary judgment is DENIED IN PART and GRANTED IN PART.

Plaintiff's discrimination claim shall proceed inasmuch as it concerns the discipline he received as a result of the June 16, 2016, altercation with Kanojia. Plaintiff's hostile work environment claim shall also proceed. The motion is granted in all other respects.

The Court will conduct a case management conference on October 16, 2020, at 10:00 a.m., at which time the parties shall be prepared to discuss, among other things, the setting of a trial date and a schedule for pretrial submissions, and what efforts they have made or will make to settle this case. In light of the current public health crisis, the conference will be conducted by telephone conference. Plaintiff and defense counsel shall attend the conference by calling the following number and entering the access code when requested:

Dial-In Number: (888) 363-4749 or (215) 446-3662
Access Code: 1703567

The Clerk is instructed to terminate the motion. (Doc. #79).

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore in forma pauperis status is denied for the purpose of an appeal. See Coppedge v. United States, 369 U.S. 438, 444–45 (1962).

Dated: September 10, 2020
White Plains, NY

SO ORDERED:

Vincent L. Briccetti
United States District Judge