UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASVHILLE DIVISION

RONNIE L. OUTLAW, Plaintiff, v. SBH SERVICES, INC, Defendant.	Case No. 3:16-CV-2466 Hon. Terrence G. Berg Hon. Alistair Newbern

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Dkt. 37)

I. Introduction

This case concerns allegations of unlawful employment practices. Plaintiff Ronnie L. Outlaw ("Outlaw" or "Plaintiff") alleges that SBH Services, Inc. ("SBH" or "Defendant") discriminated against him because of his race, that SBH engendered a racially hostile work environment, and that SBH retaliated against Plaintiff after he complained about SBH's alleged unlawful practices. Outlaw alleges that SBH has violated Title VII of the 1964 Civil Rights Act and 42 U.S.C. § 1981, both of which prohibit discrimination in the workplace. Defendant has moved for summary judg-

ment, which Plaintiff opposes. For the reasons outlined below, Defendant's motion is **GRANTED** with respect to Plaintiff's allegations of race discrimination and retaliation, but **DENIED** with respect to Plaintiff's allegations of a hostile work environment.

II. Background

SBH Services, Inc. ("SBH") is a commercial construction company based in Anchorage, Alaska. Dkt. 30, PageID.99; Decl. of Sharon Athas-Cote, Dkt. 40-2, PageID.196–97. Through the Small Business Administration's Section 8(a) "Mentor-Protégé Program," SBH and CORE Construction Company (CORE) were jointly awarded a contract to build an elementary school at the United States Army base at Fort Campbell, Kentucky. Dkt. 40-2, PageID.196. The Section 8(a) program allows a "small, disadvantaged and/or minority business" to partner with a larger company to allow the smaller company to bid on contracts that it would not normally qualify to bid on, and to learn how the larger company handles a contract. *Id.* In this case, CORE, a national construction contracting firm, acted as mentor for protégé SBH, and this was SBH's first project outside of Alaska. *Id.*

In early October 2014, Ronnie Outlaw, a citizen and resident of Montgomery County, Tennessee, was hired to work on the Fort Campbell project as a carpenter. *Id.* at 197–98; Dkt. 30, PageID.100; Dkt. 40, PageID.406–09. Though interviewed and

hired by CORE, Plaintiff was technically employed and paid by SBH. Dkt. 40-10, PageID.407. Plaintiff and all other hourly production workers—except any working for subcontractors—were employed by SBH, while all on-site supervisory personnel were employed by CORE. Dkt. 40-2, PageID.198; and Dkt. 40-8, PageID.275–76 ("As a general rule, the hourly employees hired to work on [the] ICF[1] crew and on [the] general contract crew were SBH employees, and all the salaried supervisory and administrative staff were employees of CORE.").

Plaintiff was an hourly worker on the "ICF Crew" and employed by SBH. Plaintiff was supervised directly by various Foremen, including Philip Anderson and Charles Harms, both of whom were employed by SBH. *See* Dkt. 46, PageID.584–85; *see also* Decl. of Charles Harms, Dkt. 48-1. Dan Marchant and Secundino Lizzaraga, co-equal "ICF Superintendents" who worked for CORE were also direct supervisors of Plaintiff, and they supervised the various foremen as well. Decl. of Saravanan Sathya, Dkt. 40-8, PageID.275. Messrs. Marchant and Lizarraga both reported to three people: Dave Tucker (Quality Control Manager, employed by CORE), Mark Murphy (Project Executive, employed by CORE), and Sharon Athas-Cote (Project Executive, sole owner and operator of

[1] "ICF" stands for Insulated Concrete Forms, and refers to a building technique that was used on the project. *See* Outlaw Dep., Dkt. 40-10, PageID.408.

SBH). Messrs. Tucker and Murphy were stationed on the job site daily, and they "frequently walked the grounds of the Project to assess productivity and quality." Dkt. 40-8, PageID.275. Ms. Athas-Cote was based in Alaska, and it is unclear how often she visited the site. Both she and Saravanan Sathya (Project Engineer and Project Manager; employed by CORE) described her as visiting relatively often. Decl. of Athas-Cote, Dkt. 40-2, PageID.199 ("During the Project, I visited the job site approximately every other month. When I visited, I typically stayed 3 to 5 days, and sometimes longer. When I visited, I was intentionally "hands-on" and visible so workers would feel free to talk to me and tell me what was happening on the site."); Decl. of Sathya, Dkt. 40-8, PageID.275 ("…Sharon visited the job site fairly frequently throughout work on the Project."). But Plaintiff testified he had never seen nor met Ms. Athas-Cote:

> [Mr. Estes]: …Have you met Miss Cote before?
> [Mr. Outlaw]: No, I haven't.
> Q: Do you know who she is?
> A: No, I don't.
> Q: Okay. You've never known who Miss Cote is?
> A: No.
> Q: Or never seen her on the job site --
> A: No.
> Q: -- when you worked --
> A: No.
> Q: When you worked on the Barkley School project?
> A: No, I never seen her.

Outlaw Dep., Dkt. 40-10, PageID.402. Doug Pauly was on site as a Superintendent and a co-equal to Messrs. Marchant and Lizarraga, although he oversaw the general contracting crew, not the ICF crew. *Id*. Mr. Pauly was a CORE employee, and not a direct supervisor of Plaintiff, but he "was familiar with [Plaintiff] and often observed him interacting with others on the job site." Decl. of Doug Pauly, Dkt. 40-7, PageID.270. Lastly, Layne Jacobs and Brian Carr were permanently located on site. Decl. of Sathya, Dkt. 40-8, PageID.275. Messrs. Jacobs and Carr are "Site Safety and Health Officers" and employees of CORE. *Id*. Despite being employed by CORE, Messrs. Jacobs and Carr did not answer to anyone on the site. Decl. of Carr, Dkt. 40-3, PageID.215–16. Instead, they reported only to John LaPorte, a CORE manager based in Frisco, Texas. *Id*. Messrs. Jacobs and Carr were tasked with ensuring safety on the worksite, and had summary firing authority. *Id*. That is, Jacobs and Carr did not have to clear any decision to fire an SBH or CORE employee with anyone other than John LaPorte.

Immediately upon being hired by Messrs. Marchant and Lizarraga,[2] Plaintiff began lobbying for assignments as a forklift operator, because that position is more lucrative than carpenter, and Plaintiff was certified to perform both kinds of work. Decl. of

[2] "I remember when we hired Ronnie Outlaw. Dan [Marchant] interviewed him, and I reviewed his application paperwork, and we both agreed to hire him." Decl. of Lizaragga, Dkt. 40-5, PageID.228.

Dan Marchant, Dkt. 40-5, PageID.237; *see also* Outlaw Dep., Dkt. 40-10, PageID.413. Messrs. Marchant and Lizarraga agreed to give Plaintiff the forklift operator assignment, even though other workers were also qualified for that position. Dkt. 40-5, PageID.228–29.

Plaintiff alleges that in December 2014, he complained to an "assistant general superintendent"[3] that he was being discriminated against because of his race. Dkt. 30, PageID.100; Dkt. 40-10, PageID.440. Plaintiff did not identify the person to whom he made the complaint, other than to indicate the person's title, and the record does not disclose who held the specific title "assistant general superintendent." Plaintiff also claims that in January 2015 he complained to Dan Marchant about Secundino Lizarraga "being disrespectful and acting inappropriately" toward Plaintiff. Dkt. 30, PageID.100. This complaint did not mention any element of racial discrimination. *Id.* In March 2015, Plaintiff complained to the "defendant's general superintendent," about "inappropriate, malicious, [and] discriminatory treatment" he was experiencing, and Plaintiff requested a transfer to a different crew. *Id.* at PageID.101. Here again, Plaintiff neglects to name the person to whom he complained. But Doug Pauly, CORE's superintendent for the general contracting crew, states in his affidavit that "Ronnie had a hard

[3] Though it is not clear to whom Plaintiff made this complaint, every supervisor-level employee present at the site was employed by CORE.

time working with other workers on the job site, and complained quite a bit about his work assignments." Dkt. 40-7, PageID.270. Mr. Pauly also recounts that "…not long after he started working on the Project, Ronnie came to me and asked me if he could work as my assistant on the general contractor crew." *Id*. Though Mr. Pauly is not named, Plaintiff does say he complained to "defendant's general superintendent" and requested a transfer. Plaintiff further alleges that he was not transferred, and that—in retaliation for his complaints—the inappropriate treatment "intensified." *Id*.

In late March 2015, Plaintiff heard Mr. Lizarraga shout "f--k that ni---r" in a group meeting. Dkt. 40-10, PageID.432; Dkt. 30, PageID.101. Mr. Lizarraga—upon seeing Plaintiff—then said, "Oh my bad Ronnie, I wasn't talking about you." Dkt. 40-10 at *id*. This occurred shortly after Plaintiff made his complaint to the general superintendent about racial discrimination on the work site. SBH attempts to rebut this claim by admitting that Mr. Lizarraga said "f--k that ni---r" but explaining that he was referring to a different black person, the famous boxer Bernard Hopkins. SBH Reply, Dkt. 55, PageID.808–09 ("Undisputed for the purpose of ruling on the Motion for Summary Judgment only, with the addition that Plaintiff admits he cannot dispute that this comment was not directed to Plaintiff, but was in reference to a professional boxer (Bernard Hopkins).").

On or about March 31, 2015, Plaintiff "informed the foreman, Mr. Phillip Anderson[4] about Mr. Lizarrag[a]'s inappropriate, racist, and unprofessional behavior[,]" but no actions were taken. Dkt. 30, PageID.101. SBH does not dispute that Mr. Anderson was present when Mr. Lizarraga used the slur, or that Plaintiff discussed this issue with Mr. Anderson. Dkt. 55, PageID.809–10.

Plaintiff alleges further that Messrs.. Lizarraga and Marchant often used the "N-word," both referring to Plaintiff specifically and other African-American people generally, and this allegation is corroborated by Charles Harms, a foreman on the site employed by SBH. Dkt. 40-10, PageID.432; Decl. of Harms, Dkt. 48-1, PageID.665–66. What's more, SBH does not dispute that "Mr. Harms witnessed Mr. Marchant and Mr. Lizarraga use the derogatory term "ni---r" on numerous occasions." Dkt. 55, PageID.810. Nor does SBH dispute that Messrs. Marchant and Lizarraga used the term as a "joke about one being lazy." *Id.* at PageID.811. Lastly, SBH does not dispute that Mr. Harms told Plaintiff he needed "to watch himself" because "there's racism on the job." Dkt. 55, PageID.810. SBH does contend that Mr. Harms' opinion on this matter is not a material fact. *Id.*

[4] Phillip Anderson is a foreman employed by SBH, but he did not provide a statement or declaration for this case. It is unclear whether Anderson, although he held the position of foreman, exercised management authority over Plaintiff. Dkt. 55, PageID. 809; Dkt. 40-10, PageID.411.

Plaintiff says that because of his complaints, and because of his race, he was at some unspecified time removed from his forklift assignment, and that he was never assigned what he believed was a higher-paying "mason tender" classification[5] even though he was doing mason tender work. Dkt. 30, PageID.101; Dkt. 40-10, PageID.418–19, 420–24, 431–32, 445–46. Plaintiff alleges that he was replaced on the forklift job by "a non-African American employee who was paid a higher rate of pay despite Plaintiff having better skills and experience." Dkt. 30, PageID.101; Dkt. 40-10, PageID. 419, 423, 424. However, Plaintiff does not dispute that he was "replaced" by a forklift operator from an entirely different company which is not party to this lawsuit. Defendant's Resp. to SOF, Dkt. 47, PageID.627. Plaintiff further does not dispute that he was assigned alternately to carpentry or forklift work "depending on the needs of the Project." Dkt. 47, PageID.626.

On or about April 7, 2015, Plaintiff observed Alex Cruz, a fellow SBH employee and member of the ICF Crew, improperly handling materials in an unsafe manner. Plaintiff states that he attempted to correct this employee's behavior. Dkt. 30, PageID.101; Dkt. 40-

[5] Though Plaintiff says that mason tender would have been a promotion and pay raise, Saravanan Sathya, a Project Engineer and Manager for CORE, attested that the prevailing wage rate for a Mason Tender Laborer was "$13.89" whereas the prevailing rate for a Carpenter was "$17.29." Dkt. 40-8, PageID.278. It is unclear whether "Mason Tender Laborer" is the same position as "Mason Tender."

10, PageID.452–53. SBH does not dispute that Plaintiff observed Mr. Cruz "engaging in an unsafe act by throwing ICF forms from a scissor lift, through an open window and down to the ground." Defendant's Reply, Dkt. 55, PageID.811. Plaintiff then addressed Mr. Cruz, in an attempt to correct this behavior, and tried to show Mr. Cruz the correct way to perform the task. Outlaw Dep., Dkt. 40-10, PageID.452–53. Plaintiff claims that in response, Mr. Cruz grabbed him, pushed him, and said, "[y]ou punk ass ni---r." 40-10, PageID.453; Dkt. 30, PageID.101. SBH admits that Mr. Cruz assaulted Plaintiff and called him the "n-word," but disputes Plaintiff's characterization of the event. Dkt. 55, PageID.811–12. Specifically, SBH contends that Plaintiff was aggressive and confrontational, and that he called Mr. Cruz a "mother---er." Decl. of Carr, Dkt. 40-3, PageID.217; Decl. of Marchant, Dkt. 40-6, PageID.242; Dkt. 38, PageID.119. SBH insists that "[i]n the Hispanic culture it is extremely offensive to call someone a "Motherf---er" or "Son of a B---h" because mothers are revered and the terms are often taken literally." Dkt. 38, PageID. 119, n.2.

Messrs. Jacobs and Carr, the CORE Site Safety and Health Officers, along with Messrs. Marchant and Lizarraga, the CORE superintendents, investigated the incident. Dkt. 20, PageID. 102; Dkt. 40-3; Dkt. 40-6, PageID.241. No SBH employee participated in the

investigation of this event. During the investigation, Mr. Cruz admitted that he used the slur and assaulted Plaintiff in the way Plaintiff described, although he also claimed that Plaintiff antagonized him and initiated the dispute by criticizing his work and calling him a "stubborn motherf---er." Dkt. 30, PageID.102; Dkt. 40-3. Because Mr. Cruz admitted to assaulting Plaintiff, he was immediately suspended. Dkt. 40-6, PageID. 243.

Following the initial investigation, Plaintiff was asked repeatedly over the next several days by CORE employees Carr, Jacobs, Lizarraga, and Marchant whether he would be able to work with Mr. Cruz again if Mr. Cruz returned to the site. Dkt. 30, PageID.102; Dkt. 40-10, PageID.468–70; Dkt. 40-3. No SBH manager or supervisor-level employee ever spoke to Plaintiff about this incident. Mr. Carr and Mr. Marchant contend that all the investigators believed Plaintiff and Mr. Cruz were equally at fault and deserved the same punishment. Decl. of Carr, Dkt 40-3, PageID.214 ("The bottom line was, we all felt that Outlaw and Cruz were guilty of the same misconduct, and … it would not be fair [if we treated them differently]."); Decl. of Marchant, Dkt.40-6, PageID. 243 ("[T]he two SSHO officers, [Mr. Lizarraga] and I agreed that there was no justification for treating Ronnie and Alex Cruz any differently as far as discipline was concerned[.]"). For this reason, they

allowed Plaintiff the choice to either work with Cruz or suffer his same fate.

But Plaintiff was not comfortable returning to work with Cruz, as he "was fearful of further hostility, violence, and malicious discriminatory harassment from Mr. Cruz." Dkt. 30 at *id.* According to Carr, Plaintiff's claim of fear "did not make sense to me or anyone else involved in the investigation at the time," because Plaintiff allegedly "invited Cruz to meet him outside the gates" and because Plaintiff was "very aggressive and confrontational with Cruz during the incident[.]" Dkt. 40-3, PageID.217. Mr. Carr goes on to note that Plaintiff, in refusing to work with Cruz "would be giving up a job that paid almost $42 an hour as an operator." *Id.*

Mr. Cruz was only permanently fired after Plaintiff refused to agree to let him come back to the site, saying that he was afraid of Mr. Cruz, and in fear for his own safety. Dkt. 40-6, PageID.243; Dkt.40-10, PageID.461. Plaintiff says that after his third refusal to work with Mr. Cruz, he was terminated "under the pretext of poor behavior in the workplace." Dkt. 30, PageID.102. Mr. Carr says that Plaintiff quit, and was not fired. *Id.* at PageID.214. Plaintiff acknowledges in his deposition that he technically chose to leave, saying, "they just gave me an ultimatum either I work with him or I'm fired." Dkt. 40-10, PageID.469. The decision to fire Plaintiff was made by CORE, but his departure from the job was processed by

SBH, which lists him as "terminated" in their employment records. Dkt. 40-2, PageID.201.

III. Procedural History

On or about April 14, 2015, Plaintiff filed an initial complaint of discrimination with the Tennessee Human Rights Commission and the Equal Employment Opportunities Commission, alleging discrimination and retaliation. Dkt. 30, PageID.103. Around May 20, 2016, the EEOC issued a "notification of rights," advising Plaintiff of his right to file suit in federal or state court within ninety (90) days of the notice. *Id.* Plaintiff then timely filed his original Summons and Complaint on August 16, 2016 in the Montgomery County Circuit Court, which was then removed to this Court on September 9, 2016. Plaintiff filed an Amended Complaint in this Court on August 28, 2017. Dkt. 30. On September 8, 2017, Defendant moved this Court for Summary Judgment, claiming that "there exists no genuine issue of material fact, and [Defendant] is entitled to judgment as a matter of law[.]" Dkt. 37, PageID.116.

IV. Standard of Review

Summary Judgment

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact such that the movant is entitled to a judgment as a matter

of law." *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013); *see also* Fed. R. Civ. P. 56(a). A fact is material if it might affect the outcome of the case under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). On a motion for summary judgment, the Court must view the evidence, and any reasonable inferences drawn from the evidence, in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citations omitted); *Redding v. St. Edward*, 241 F.3d 530, 531 (6th Cir. 2001).

As the movant, the Defendant has the initial burden to show that there is an absence of evidence to support Plaintiff's case. *Selby v. Caruso*, 734 F.3d 554 (6th Cir. 2013); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the movant meets that burden, the non-moving party must "set forth specific facts showing that there is a genuine issue for trial." *Ellington v. City of E. Cleveland*, 689 F.3d 549, 552 (6th Cir. 2012) (non-movant "may not rest upon its mere allegations or denials of the adverse party's pleadings[.]"). In so doing, the non-moving party must present more than "a scintilla of evidence." *Anderson,* 477 U.S. at 252. If the disputed evidence is "merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249–50. The Court must de-

termine whether the evidence presents a factual disagreement sufficient to require submission of the claims to a jury, or whether the moving party prevails as a matter of law. *Id.* at 252.

Title VII of the Civil Rights Act of 1964

Title VII prohibits employers from discriminating "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." *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 396 (6th Cir. 2008) (quoting 42 U.S.C. § 2000e-2(a)(1)). When a plaintiff alleges that racial discrimination is only one reason of possibly several reasons for an unlawful employment practice, that claim is called a mixed-motive disparate treatment claim and plaintiff "need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice." *Id.* at 398 (quoting *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92 (2003)) (quotation marks omitted). An "unlawful employment practice" under Title VII is "discrimination on the basis of any of seven prohibited criteria: race, color, religion, sex, national origin, opposition to employment discrimination, and submitting or supporting a complaint about employment discrimination." *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 359–60 (2013).

To prevail on a Title VII claim, a plaintiff must also normally first demonstrate that he had an employment relationship with the defendant. *Halcomb v. Black Mountain Res., LLC,* 303 F.R.D. 496, 500–01 (E.D. Ky. 2014); *McQueen v. Equinox Intern. Corp.,* 36 F. App'x 555, 556 (6th Cir. 2002) (holding that dismissal of a plaintiff's Title VII claim was appropriate because he had not established "the existence of an employer-employee relationship between himself and [the defendant]."); *Gueye v. Gap, Inc.,* No. 2013-144, 2014 WL 197759 at *1 (E.D. Ky. Jan. 2014) ("Plaintiff fails to allege an employment relationship between himself and [Defendants]. This failure is fatal to his Title VII claim."). Title VII defines "employer" as a "person who is engaged in an industry affecting commerce who has fifteen or more employees ... and any agent of such a person." 42 U.S.C. § 2000e(b). This definition is tied to that of an "employee," which Title VII defines as "an individual employed by an employer." 42 U.S.C. § 2000e(f).

Absent a clear employee-employer relationship, there are several scenarios in which a non-employer may still face Title VII liability: when two entities are so interrelated that they may be considered a "single employer;"[6] when one defendant has control over another

[6] *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993 (6th Cir. 1997) (citing *York v. Tennessee Crushed Stone Ass'n,* 684 F.2d 360 (6th Cir. 1982)); *also Fike v. Gold Kist, Inc.*, 514 F. Supp. 722 (N.D. Ala. Feb. 27, 1981), *aff'd,* 664 F.2d 295 (11th Cir. 1981) ("The [single employer] theory is usually put forward in a case involving a parent corporation and its subsidiary.").

company's employees sufficient to show that the two companies are acting as a "joint employer" of those employees,[7] and; when the offending person was acting as an "agent" of the Plaintiff's actual employer.[8] Furthermore, the "interference theory" extends Title VII liability to non-employers under circumstances where someone other than an employer interferes with or affects an individual's access to employment opportunities. *Smiley v. Ohio*, No. 1:10-CV-390, 2011 WL 4481350, at *3 (S.D. Ohio 2011) (citing *Sibley Memorial Hosp. v. Wilson,* 488 F.2d 1338 (D.C. Cir. 1973)).

Most relevant to this case would be the Joint Employer and Agency theories. *See Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993 (6th Cir. 1997) (citing *Carrier Corp. v. NLRB,* 768 F.2d 778 (6th Cir. 1985) (Joint Employer); Rivas *v. Federacion de Asociaciones Pecuarias de Puerto Rico,* 929 F.2d 814 (1st Cir. 1991) (same); *and York v. Tenn. Crushed Stone Ass'n*, 684 F.2d 360 (6th Cir. 1982) (Agent)*; Deal v. State Farm County Mut. Ins. Co. of Texas*, 5 F.3d 117 (5th Cir. 1993) (same); *Fike v. Gold Kist, Inc.*, 514 F. Supp. 722 (N.D. Ala.), *aff'd,* 664 F.2d 295 (11th Cir. 1981)

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[7] *Swallows*, at 993 (citing *Carrier Corp. v. NLRB,* 768 F.2d 778 (6th Cir. 1985); *and Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico,* 929 F.2d 814 (1st Cir. 1991).

[8] *York v. Tenn. Crushed Stone Ass'n*, 684 F.2d 360 (6th Cir. 1982) ("[A] supervisory or managerial employee to whom employment decisions have been delegated by the employer [is an agent."); *Deal v. State Farm County Mut. Ins. Co. of Texas,* 5 F.3d 117 (5th Cir. 1993); *Fike v. Gold Kist, Inc.,* 514 F. Supp. 722 (N.D. Ala.), *aff'd,* 664 F.2d 295 (11th Cir. 1981)).

(same)). As explained in the following section, neither doctrine enables Plaintiff to sue his actual employer, SBH, for discrimination by his non-employer, CORE.

Title VII – Hostile Work Environment

A plaintiff may establish a violation of Title VII by proving that the discrimination based on race created a hostile or abusive work environment. *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993); *Williams v. CSX Transp. Co.*, 643 F.3d 502, 512 (6th Cir. 2011). Discrimination of this type occurs "[w]hen 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." *Harris,* 510 U.S. at *id*. Courts must consider multiple factors, 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 an employee's work performance." *Williams*, 643 F.3d at 512–13 (quoting *Harris,* 510 U.S. at 23).

To succeed on a Title VII claim of a racially hostile work environment, a plaintiff must demonstrate that he (1) belonged to a protected group, (2) was subject to unwelcome harassment, (3) the harassment was based on race, (4) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create

an abusive working environment, and (5) the defendant knew or should have known about the harassment and failed to act. *Williams v. CSX Transp. Co.*, 643 F.3d 502, 511 (6th Cir. 2011) (citing *Moore v. KUKA Welding Sys. & Robot Corp.,* 171 F.3d 1073, 1078–79 (6th Cir. 1999)). Single, isolated incidents "will not amount to discriminatory changes in the 'terms and conditions of employment'" unless they are "extremely serious." *Williams,* 643 F.3d at 512–13 (citing *Faragher v. City of Boca Raton,* 524 U.S. 775, 788 (1998)). Courts should not consider "occasional offensive utterances" to rise to the level of creating a hostile work environment, lest Title VII become a "code of workplace civility." *See Grace v. USCAR,* 521 F.3d 655, 679 (6th Cir.2008).

Title VII – Retaliation

"Title VII provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has made a charge" under Title VII. 42 U.S.C. § 2000e–3(a)." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 173 (2011). Title VII retaliation claims require proof of but-for causation—that the alleged retaliation would not have occurred but for the act of complaining about discrimination. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013). 42 U.S.C. § 1981

Plaintiff brings his claims not only under Title VII, but also 42 U.S.C. § 1981. Plaintiff mentions § 1981, but includes no analysis,

nor any discussion of the application of this law to his case. Similarly, Defendant mentions § 1981 in its Motion for Summary Judgment, but offers no analysis of this section, nor any case law citations, and did not indicate whether they believe Plaintiff has a claim under this section. As such, the Court now sua sponte analyzes the possible implication of this section to Plaintiff's case.

Section 1981 of Title 42 of the United States Code provides for equal rights under the law:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1981(a). The section goes to incorporate these protections for all stages of contract making and performance, and "against impairment by nongovernmental discrimination and impairment under color of State law." *Id.* at (b)&(c).

The United States Supreme Court observed that § 1981 and Title VII share a "necessary overlap." *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 455 (2008) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989)). But the "remedies availa-

ble under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Id.* (quoting *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 461 (1975)). Notably, Title VII provides administrative remedies and other benefits that § 1981 does not. *See id.,* at 457–58 (explaining Title VII remedies available for race-based employment discrimination). "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander v. Gardner–Denver Co.,* 415 U.S. 36, 48–49 (1974).

Though Title VII and § 1981 overlap, they are very differently drafted. Title VII is "a detailed statutory scheme" that enumerates unlawful practices, defines key terms, explains which employer types are exempt, and creates an administrative agency to make and enforce rules. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 356 (2013) (describing portions of Title VII). Section 1981 is not nearly so detailed in its execution, providing instead "broad, general bars on discrimination." *Id.* at 355.

The Sixth Circuit applies the same five-element prima facie test used for Title VII hostile work environment claims to claims brought under § 1981. *See Williams v. CSX Transp. Co.*, 643 F.3d 502, 511 n.4 (6th Cir. 2011) ("This five-element test is usually posited for claims brought under Title VII, but we apply the same test

to claims, as here, brought under § 1981"); *Jackson v. Quanex Corp.,* 191 F.3d 647, 658 (6th Cir. 1999) ("We review claims of alleged race discrimination brought under § 1981 ... under the same standards as claims of race discrimination brought under Title VII...."). Section 1981 also allows for claims of race discrimination in job assignments and retaliation. *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 448, (2008) (section 1981 encompasses retaliation claims); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 573 (6th Cir. 2000) ("The elements of *prima facie* case as well as the allocations of the burden of proof are the same for employment claims stemming from Title VII and § 1981.").

V. Analysis

Plaintiff alleges that his employer, Defendant SBH Services, Inc. engaged in discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and 42 U.S.C. § 1981 ("Section 1981). Specifically, Plaintiff alleges that he was discriminated against on the basis of his race in relation to favorable job assignments, that he was retaliated against when he complained about racial discrimination, and that he was subjected to a hostile work environment. But most of the allegedly discriminatory acts were committed by employees or managers of CORE, not SBH. Plaintiff cites to three cases to show why he believes SBH should be liable for the conduct of CORE.

First—and primarily—Plaintiff points to a 1978 case decided by the Supreme Court of Tennessee. Dkt. 46, PageID.590 (citing *Cecil v. Hardin*, 575 S.W.2d 268 (Tenn. 1978)). That case involved a passenger in a car that struck and killed a bicyclist and it examined the doctrine of joint venture liability. The analysis in that case is irrelevant to the case at hand.

Next, Plaintiff cites to a slip opinion from the United States District Court for the Middle District of North Carolina that examined whether a single supervisor could be sued as an employer under Title VII. Dkt. 46, PageID.590–91 (citing *Alexander v. Diversified Ace Servs. II, AJV*, 2014 U.S. Dist. LEXIS 15508, 2014 WL 502496 (M.D.N.C. Feb. 7, 2014)). In *Alexander*, the court found that an owner of a joint venture may be personally liable for the obligations of the joint venture, just as partners in a partnership may be personally liable for obligations incurred by the partnership. *Id.* This case dealt with liability for business debts, not liability for discriminatory acts, and has no applicability to these facts.

Lastly, Plaintiff points to a 1975 case decided by the Third District Appellate Court of Illinois, another state court. *Baker Farmers Co. v. Harter*, 28 Ill. App. 3d 393, 328 N.E.2d 369 (Ill. App. 3d Dist. 1975). There, the Illinois appeals court held that a corporate member of a joint venture was liable for debts incurred by a non-corporate member in that venture. Again, this case deals with state law,

and the issue of business debts. It likewise does not govern the outcome of this case.

Plaintiff did not cite to the caselaw pertaining to liability under the Joint Employer or Agency theory, but the Court will discuss those more applicable doctrines here.

Joint Employer Doctrine

The Joint Employer doctrine allows an aggrieved employee to sue a non-employer if that employee can sufficiently show the non-employer exerted such control over the actual employer's employees that the two companies are acting as a "joint employer" of those employees. *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993 (6th Cir. 1997) (citing *Carrier Corp. v. NLRB,* 768 F.2d 778 (6th Cir. 1985) (Joint Employer). In *Carrier*, the Sixth Circuit Court of Appeals set forth "the proper legal standard to determine if a joint employer relationship exists" in relation to the National Labor Relations Act.[9] Under that standard, "Where two or more employers exert significant control over the same employees—where from

[9] The "joint employer" doctrine—and the "single employer" doctrine as well—developed in the context of labor relations, so we look to those cases for guidance, even though Plaintiff does not allege any labor violations or issues arising under the National Labor Relations Act. *See Radio & Television Broad. Technicians Local 1264 v. Broadcast Serv. of Mobile, Inc.,* 380 U.S. 255 (1965) (per curiam) (single employer); *Boire v. Greyhound Corp.,* 376 U.S. 473 (1964) (joint employer); *Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico*, 929 F.2d 814, 820 n. 15 (1st Cir. 1991) ("Since it is clear that the framers of Title VII used the NLRA as its model, we find the similarity in language of the Acts

the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment—they constitute 'joint employers.'" *Carrier*, 768 F.2d 778, 781 (6th Cir. 1985) (citing *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.,* 691 F.2d 1117, 1124 (3d Cir. 1982). As the Supreme Court found in *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964), the question of whether one company "possessed sufficient indicia of control to be an 'employer'" was a factual issue, properly to be decided by, in that case, the National Labor Relations Board.. In that instance, the NLRB did find that Greyhound and Floors were "joint employers" because,

> "[W]hile Floors hired, paid, disciplined, transferred, promoted and discharged the employees, Greyhound took part in setting up work schedules, in determining the number of employees required to meet those schedules, and in directing the work of the employees in question. The Board also found that Floors'' supervisors visited the terminals only irregularly—on occasion not appearing for as much as two days at a time—and that in at least one instance Greyhound had prompted the discharge of an employee whom it regarded as unsatisfactory. On this basis, the Board, with one member dissenting, concluded that Greyhound and Floors were joint

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indicative of a willingness to allow the broad construction of the NLRA to provide guidance in the determination of whether, under Title VII, two companies should be deemed to have substantial identity and treated as a single employer.") (quoting *Armbruster v. Quinn,* 711 F.2d 1332, 1336 (6th Cir.1983) (citations omitted); *see also Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993 n. 3 (6th Cir. 1997).

> employers, because they exercised common control over the employees[.]"

Boire, 376 U.S. at 475.

The record contains evidence supporting the conclusion that SBH and CORE operated as Joint Employers of Plaintiff. For example, the companies' operations were so closely intertwined that Plaintiff himself was not sure what company he worked for.

> Q: Who was your—who was the company that employed you on that project?
> A: Oh. SBH/CORE.
> Q: All right. Why do you say that?
> A: Why do I say what?
> Q: Well, what do you base your answer on that you were employed by SBH/CORE?
> A: Because that's what was on my hardhat and that's what I always wore because everybody that you were affiliated with was—they were—everybody had SBH/CORE. So you had two companies working together and you had to take orders from both—both people. Both companies.

Outlaw Dep., Dkt. 40-10, PageID.406. SBH also allowed CORE to hire, discipline, transfer, and fire their employees. Decl. of Sathya, Dkt. 40-8, PageID.275; *see also* Decl. of Athas-Cote, Dkt. 40-2, PageID.200 ("I was not informed about the incident between Ronnie Outlaw and Alex Cruz until well after it occurred, and I don't think I was even informed about it until after Alex was already fired and Ronnie had already quit."). CORE and SBH promulgated joint personnel policies, available to all employees on a bulletin board. Decl. of Athas-Cote, Dkt. 40-2, PageID. 199 ("Another item which was

stapled to the bulletin board throughout the course of the Project was the SBH/CORE Personnel Policy Manual."). These factors tend to show that CORE and SBH operated as Joint Employers. But in all the cases discussing the Joint Employer doctrine, it is applied to bring a non-employer company into a lawsuit, even where there is no employment privity between that company and the employee. It does not make one company liable for the acts of the other, but merely allows a would-be litigant to seek relief from the party most responsible for the wrong. Here, there is no question that SBH is Plaintiff's employer: that company is in direct privity with Plaintiff. The Joint Employer doctrine might have applied if Plaintiff sued CORE, a company that did not hire Plaintiff, but managed him, but this doctrine cannot be used to hold SBH liable for actions that did not involve SBH supervisors or managers.

Agency Doctrine

The Agency Doctrine allows an aggrieved employee to sue a non-employer if that employee can sufficiently show the non-employer was acting as an agent of the employer. *York v. Tenn. Crushed Stone Ass'n*, 684 F.2d 360 (6th Cir. 1982). For the same reasons relating to the Joint Employer doctrine, the Agency Doctrine is an inappropriate method of holding SBH liable for CORE's alleged malfeasance. Though—using the same basic considerations as above—it is plain that at least some of the CORE employees acted

at times as agents of SBH, this doctrine is again intended to allow an aggrieved employee to sue their *non*-employer. SBH, being Plaintiff's direct employer is not the proper party for this doctrine's application.

Title VII seeks to protect American workers at their places of work, and courts enforce this protection even when workers may be beholden to—and abused by—companies other than the one whose name appears on their paycheck. Where an employer-employee relationship exists, courts do not need to go through analytical acrobatics to force bad actors to face consequences. It is only where that relationship does not clearly exist that courts must do more. But courts do not attach liability to companies who are not culpable. When the employee can sue the non-employer company directly through these doctrines for the bad acts it has committed, there is no reason to allow a suit against the employee's direct employer, which was not responsible for any of those bad acts. *See Carrier Corp. v. NLRB,* 768 F.2d 778, 783 (6th Cir. 1985) ("[Because] the evidence in the case did not demonstrate that [Joint Employer A] knowingly participated in the effectuation of the unfair labor practices, [...Joint Employer A] cannot be held monetarily responsible for violations it did not commit.").

Claims 1 and 2: Race Discrimination in Job Assignments and Retaliation

Plaintiff claims that he applied to "[s]ome guy – he would have been the Project Manager named Mark." Outlaw Dep., Dkt. 40-10, PageID.407. Though Plaintiff did not know his last name, it is possible that this Mark is Mark Murphy, the CORE Project Executive, and highest-ranking CORE employee on the site. Plaintiff says that he walked on the site and spoke to "Mark," who told him to come back in a couple of days. *Id*. Plaintiff says that he did return and again spoke with the same person who then told him, "[h]ey, man, you got a job." *Id*. at PageID.408. Plaintiff then returned a few days later to speak with Dan Marchant and Secundino Lizarraga. *Id*. Messrs. Lizarraga and Marchant contend that they were the ones to interview and hire Plaintiff. Decl. of Secundino Lizarraga, Dkt. 40-5, PageID.228 ("I remember when we hired Ronnie Outlaw. Dan [Marchant] interviewed him, and I reviewed his application paperwork, and we both agreed to hire him."). Plaintiff was hired initially as a carpenter, but ended up working under the job titles of carpenter and forklift operator. Decl. of Athas-Cote, Dkt. 40-2, PageID.197–98. The forklift operator position paid substantially more than the carpenter position, and involved far less physical exertion. Decl. of Lizarraga, Dkt. 40-5, PageID.228–29. For these reasons, it was a preferable assignment.

Messrs. Lizarraga and Marchant gave Plaintiff the "promotion"[10] to the forklift operator job after only a few months on the job, despite there being other qualified applicants available. Decl. of Lizarraga, Dkt. 40-5, PageID.228. Plaintiff alleges that he was removed from the forklift operator position and relegated to carpenter assignments because of his race and in retaliation for making complaints about discrimination on the site. Outlaw Dep., Dkt. 40-10, PageID.420–24. Plaintiff says that he told Doug Pauly, a CORE supervisor, that there were "black and white" issues on the site. *Id.* at PageID.421–22 ("[T]hat's when I had went to Doug and complained about what was going on with Dan Marchant and [Secundino Lizarraga]. You know, I told them there was some black and white issues, it seemed like, going on out here and –and I was about to quit because I had had enough. I'd been harassed and all that."). Defendant points out that on its face, it is not clear that the phrase "black and white issues" means "illegal employment practices" or racial discrimination" specifically, and also that Pauly was not Plaintiff's direct supervisor. Dkt. 38, PageID.137

SBH rebuts Plaintiff's claim that he was demoted by saying that Plaintiff was assigned to forklift or carpentry based on the needs of

[10] Though the forklift operator position paid more, and was arguably a less strenuous job, it is not clear that going from carpenter to forklift operator is properly described as a "promotion." The forklift operator has no additional supervisory role that the carpenter does not have, and is no higher in the hierarchy of positions on the site.

the job on a day-to-day basis. Dkt. 40-5, PageID.229 ("Because Ronnie was classified as both a carpenter and an operator, when workflow and production needs of the job required it we would assign him to work as a carpenter, and others, including supervisors, would fill in and help out on the forklift during his absence."). CORE Project Manager Saravanan Sathya attested that he reviewed Plaintiff's personnel file and payroll information, and that from "mid-November of 2014 until…April 10, 2015, Ronnie logged more hours in the forklift operator's position than any other SBH forklift operator on the Project." Decl. of Sathya, Dkt. 40-8, PageID.277. Mr. Sathya then listed Plaintiff's hours spent in the forklift operator position for paychecks from February 2015 to April 2015—the final two and a half months of Plaintiff's time on the job. *Id*. Upon review, it is clear that Plaintiff's hours on the forklift ebbed and flowed throughout his tenure, but there is no discernible point in time at which Plaintiff gets any fewer hours than in previous weeks, or during which he had no hours in the forklift. Plaintiff fails to present even a scintilla of evidence that he was ever actually removed from the forklift position at all,[11] let alone for reasons of

[11] Plaintiff alleged in his complaint that he was replaced on the forklift by a white man who was then paid more. However, it is undisputed that the forklift operator who "replaced" Plaintiff was the employee of a company that is not party in any way to this suit. Whether that company employed different compensation strategies for its employees is unknown and irrelevant. Plaintiff at a minimum must show that he was actually removed from the forklift operator

racial discrimination or retaliation. No reasonable juror could find for Plaintiff on the claim that he was removed from favorable job positions because of his race or because of complaints he made about on-site discrimination. As such, there is no genuine issue of material fact on the claims relating to favorable job assignments or retaliation, and Defendant's Motion for Summary Judgment as to these claims is **GRANTED**.

Claim 3: Hostile Work Environment

Plaintiff alleges he was the victim of a hostile work environment. He says that the site was pervasively hostile, and points to evidence that CORE supervisors routinely used racial slurs—specifically "ni--r—around Plaintiff and other workers. In support, Plaintiff cites to the declaration of Charles Harms, a fellow SBH employee who says that he heard use of this slur on several occasions, usually in context to mean "lazy." Decl. of Harms, Dkt. 48-1, PageID.665–66. However, Plaintiff points only to use of the slur by CORE employees, not SBH employees, and—for the reasons discussed above—SBH is not liable for an allegedly-pervasively hostile work environment created by exclusively CORE employees. For this reason, Plaintiff's claim of a pervasively hostile work environment fails, even though Plaintiff points to behaviors and actions which may

position, but he presents no evidence showing that, so the race of the person who came to "replace" him is irrelevant.

otherwise present genuine issues of material fact as to whether the worksite was a hostile work environment. Plaintiff simply is attempting to sue the wrong party.

A hostile work environment can also be established by a single event if that event is "extremely serious" or severe enough. *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993); *Williams v. CSX Transp. Co.*, 643 F.3d 502, 512 (6th Cir. 2011). It is undisputed that Plaintiff, while on the job, was assaulted and called a vile racial slur by a fellow SBH employee. This event distally precipitated Plaintiff being fired for refusing to agree to work with the man who attacked him. SBH contends essentially that Plaintiff "started it" and that Plaintiff used a term which may or may not be especially offensive to Hispanic people (SBH does not seem to allege that the term "Motherf---er" has a specific racial connotation the way that the word "ni---r" does, but rather that the word is offensive in its literal meaning, as mothers are revered by Hispanics, generally.). The record thus contains evidence of a single event, created by an SBH employee, that a reasonable jury could consider severe enough to constitute a racially-hostile work environment. Under such circumstances, SBH is not entitled to summary judgment. For this reason, Defendant's Motion for Summary Judgment is **DENIED** as to Plaintiff's claim of a hostile work environment pertaining specifically to this one severe incident.

VI. Conclusion

For the foregoing reasons, Defendant's motion for summary judgment is **GRANTED** with regard to Plaintiff's claims alleging race-based discrimination and retaliatory discharge, but **DENIED** as to Plaintiff's claim pertaining to the creation of a hostile work environment. Genuine issues of fact remain concerning this claim only.

SO ORDERED.

/s/Terrence G. Berg
TERRENCE G. BERG
UNITED STATES DISTRICT JUDGE
SITTING BY SPECIAL DESIGNATION

Dated: February 19, 2019