IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

RUDY BARLOW, JR.,

OPINION AND ORDER

Plaintiff,

10-cv-319-bbc

v.

KRAFT FOODS GLOBAL INC.,

Defendant.

- -

Defendant Kraft Foods Global Inc. has filed a motion for summary judgment in this employment discrimination case brought under Title VII of the Civil Rights Act of 1964, and 42 U.S.C. § 1981. The question raised by defendant's motion is whether a reasonable jury could find that defendant gave plaintiff an undesirable assignment and later suspended him from his job as a pipefitter because of his race or because he complained about racial discrimination. I conclude that plaintiff has made the necessary showing with respect to his claims that defendant assigned him to the pretreatment department and disciplined him because of his race. However, plaintiff's retaliation claim must be dismissed because he failed to give defendant notice of that claim in his complaint in this case.

From the parties' proposed findings of fact and the record, I find that the following

facts are undisputed.

UNDISPUTED FACTS

In 1993 defendant Kraft Foods Global Inc. hired plaintiff Rudy Barlow, Jr. as a meat packer at its Oscar Mayer food processing plant in Madison, Wisconsin. In 2002 plaintiff joined defendant's pipefitter group, which includes six employees and is divided into three assignments: troubleshooter, pump specialist and project person. Plaintiff is a troubleshooter, which means he is the "first responder dealing with issues involving water, air and steam" and has duties that may include fixing leaky or clogged pipes and fixing toilets. He is the only African American pipefitter at the plant.

A. Plaintiff's Assignment in the Pretreatment Department

The pretreatment department involves the treatment of waste water at the plant. The area is "dirty and smelly." (Plaintiff says that the smell is "vile" and that, after working in the area, an employee's skin "smells like rotting meat and waste." Jerzewski Aff. ¶ 11, dkt. #40.) Because only one employee works in that department, defendant needs a replacement for that employee when he takes a vacation. Under a 1994 memo that was in effect until 2006, the pipefitters became responsible for filling in when the pretreatment employee takes vacation time, which may be as much as six weeks each year. The memo states that the

assignment for a vacation replacement "will be based on seniority, project work and availability."

Shortly after plaintiff joined the pipefitter group, plaintiff became the vacation replacement for the pretreatment department. Plaintiff did not volunteer for the assignment, but Michael O'Hara, the maintenance supervisor, made plaintiff the vacation replacement anyway on the ground that he had the least seniority. Anyone who works in the pretreatment department must be trained for at least two weeks. (Defendant says that more than two weeks of training is needed.)

O'Hara decided that plaintiff would be the sole vacation replacement for the pretreatment department, even though plaintiff complained about the assignment. Mark Wilhite, plaintiff's supervisor, also knew that plaintiff did not want to work in pretreatment. (Plaintiff says that various supervisors promised him at crew meetings to train others to be the vacation replacement, but this never happened.) In 2004, Joseph Duarte, Brian Uselman, Dave Davis and Marcus Yochens joined the pipefitters group. Although plaintiff was no longer the most junior member, he remained the vacation replacement. (The parties dispute whether, before plaintiff became the vacation replacement, defendant followed the practice of keeping the same vacation replacement, even when a new person joined the pipefitters group.)

Uselman, Duarte and Yochens volunteered to be trained in the pretreatment

department. They received some training, but each decided that he did not like the department and was not required to return. Joe Jerzewski was trained to work in the pretreament department in 2008.

In 2005, defendant's collective bargaining agreement with its employees made the vacation replacement for the pretreatment department a "posted" position, which means that union members other than pipefitters could apply for it. On May 4, 2006, defendant posted a position for "pretreatment: vacation replacement." Thomas Lohmiller, Adam Grabski and William Lawrence applied for the position. Although Grabski had the most senority, defendant chose Lohmiller to fill the position. However, Lohmiller was "unable to be released to perform the vacation replacement duties" because of his "responsibilities as the Head Clerk Dispatcher." Dft.'s PFOF ¶ 69, dkt. #20. Plaintiff was assigned to the position again. In October 2009, Lohmiller joined the pipefitter group and has worked as the vacation replacement since then.

B. The Group Complaint

On April 27, 2008 sixteen African American employees, including plaintiff, filed a "group race discrimination complaint." The employees alleged that a member of the "quality department" created a "photographic lineup of only black employees for [the] purpos[e] of determining which of them violated good manufacturing policies." Plt.'s PFOF ¶ 56, dkt.

#36. Bacon was aware of the grievance and admits the allegation regarding the employee from the quality department. (Defendant says it fired that employee. Plaintiff does not allege that Bacon or any of his supervisors were involved in investigating the black employees.)

Defendant has since terminated three of the employees who signed the group complaint. The Wisconsin Equal Rights Division found that defendant discriminated against one these employees, Darice Fowler, because of his race.

C. Plaintiff's Discipline

On August 2, 2007, plaintiff received a "work performance write up":

> This written interview is being issued because of your poor work performance on 7-18-07. You were found sleeping by members of management in the Prince control room. This type of work performance is not acceptable and will not be tolerated.

As a result of the write up, plaintiff received a "one day disciplinary time off." (The parties do not explain what that is, but presumably it is a one-day suspension.)

On March 28, 2008, plaintiff received a second "work performance write up":

> This written warning interview is being issued because of your poor work performance on 3/24/08. You were instructed to remove and replace the Alkar stick wash pump. The pump was installed but was not secured to the base causing a safety hazard if the pump were to be started. This type of work performance is not acceptable and will not be tolerated.

As a result of this write up, plaintiff received a "three-day disciplinary time off."

On January 7, 2009, plaintiff supervisor's at the time, Wilhite, told plaintiff to fix a leaking pipe in the hard salami department without giving him detailed instructions. The pipe ran along the ceiling of a room where salami was hung on sticks. Two or three weeks earlier, John Marshall, the supervisor of the department, told Wilhite about the problem and Wilhite instructed Marshall to clear the area of food. It is the responsibility of the production supervisor to remove food or shield it before a repair. Marshall "opened up" the bay on each side of the pipe and asked Wilhite to "inspect it and see if this is sufficient." Marshall Dep., dkt. #28, at 60. Marshall does not know whether Wilhite inspected the area.

When plaintiff arrived, Marshall showed him the leaking pipe, which was 10-11 feet above the floor and in the middle of a 3-foot-wide bay. No salami was hung within five feet of the leak. (Plaintiff says that Marshall told him that he had moved "two rows of meat" to accommodate the pipe work and that plaintiff deferred to Marshall's judgment about the necessary precautions for protecting the meat.)

Marshall left the room and plaintiff began working on the pipe, but did not cover the meat or have it removed from the room. Defendant "has no written guidelines as to how far meat should be moved" from a pipe being repaired and no written policies "requiring pipefitters to put up barriers when they are working on pipes that have sludge." Plt.'s PFOF, ¶¶ 74 and 95, dkt. #36. Plaintiff did not have the authority to move the meat.

During the repair, "sludge" came out of the pipe, falling onto the floor and splashing on the hanging meat. Plaintiff spoke with "a line tech and another coworker," stating, "go get John [Marshall], tell him we got a meat emergency," but plaintiff did not contact Wilhite or Marshall himself. Ten minutes later, plaintiff finished the job and left.

Tim Emond conducted an investigation of the incident and determined that plaintiff had failed to cover the meat or have it moved from the area, but Emond does not know whether plaintiff had authority to move the meat. (The parties did not identify Emond's position in their proposed findings of fact, but Emond testified in his deposition that he was a human resources manager. Emond Dep., dkt. #27, at 8.) Emond did not criticize the technique of plaintiff's repair. Bacon concluded that plaintiff violated company policy by failing to protect the product while performing maintenance. Although Bacon believed that Marshall had moved some of the meat to facilitate the repair, he believed that plaintiff showed poor workmanship by failing to realize during the repair that Marshall had failed to remove enough meat. Wilhite believes that it was the responsibility of both plaintiff and the "production technicians" to clear food from the area. Bob West, the facilities manager, did not believe that plaintiff should be disciplined for the incident.

Because of this incident, plaintiff received a "suspension pending termination," which defendant gives to any employee who is disciplined within one year of a three-day "disciplinary time off." Since at least 2007, no other pipefitter has been disciplined for

damaging product. Marshall was not disciplined for the incident.

Plaintiff filed a grievance regarding the suspension. The grievance was resolved on February 5, 2009, when plaintiff signed a "condition of employment, " which is "a last chance agreement that allows an employee [who] has been placed on suspension pending termination to return to work." Bacon made the decision to give plaintiff this option. Generally, defendant's practice is to limit the condition of employment to 12 months, but plaintiff''s did not include a date. (Defendant says the omission was inadvertent.) Defendant later informed plaintiff that the condition of employment would be treated as if it included a one-year review date. Plaintiff was allowed to return to work on February 6, subject to placement under "heightened scrutiny."

OPINION

There is some confusion in the briefs regarding the scope of plaintiff's claims. In its opening brief, defendant discusses a number of incidents that it believes plaintiff is claiming to be discriminatory, but that it argues are not sufficiently adverse to give rise to a claim, such as "increased scrutiny" and being required to "tur[n] on and off the heat in the Spice Area." Dft.'s Br., dkt. #19, at 17. See also Hancock v. Potter, 531 F.3d 474, 478 (7th Cir. 2008) ("[I]n order to be actionable, adverse actions must be materially adverse . . . meaning more than a mere inconvenience or an alteration of job responsibilities.") (internal

quotations omitted).) Although plaintiff includes some of these matters in his proposed findings of fact, his brief is limited to two adverse actions: a one-month suspension in 2009 and an assignment as the "vacation replacement" in the pretreatment department for several years. (To be more precise, plaintiff does not seem to be challenging his initial assignment to the pretreatment department, but to defendant's refusal after 2004 to give the responsibility to someone else when he was no longer the most junior pipefitter.) Accordingly, I conclude that plaintiff has waived a challenge to any other alleged adverse treatment. At a minimum, he has acquiesced to defendant's view by failing to respond to defendant's arguments regarding the other adverse treatment. Wojtas v. Capital Guardian Trust Co., 477 F.3d 924, 926 (7th Cir. 2007) ("A failure to oppose an argument permits an inference of acquiescence and "acquiescence operates as a waiver.").

In its reply brief, defendant assumes that the suspension and the temporary reassignment are sufficiently adverse to support a claim under Title VII and § 1981, so I will do the same. Lloyd v. Swifty Transportation, Inc., 552 F.3d 594, 602 (7th Cir. 2009) (suspension is adverse employment action); cf. Duncan v. Fleetwood Motor Homes of Indiana, Inc., 518 F.3d 486, 492 (7th Cir. 2008) (transfer to "objectively less-desirable jo[b]" is adverse employment action). Further, defendant does not argue that plaintiff should be barred from litigating the suspension or the assignment because either is outside the scope of the complaint or the EEOC charge, so I do not consider those issues either.

Although Title VII and § 1981 are not identical statutes, both prohibit employment discrimination because of race and retaliation for complaining about racial discrimination. 42 U.S.C. § 2000e-2(a) (Title VII prohibits employment discrimination "because of race"); 42 U.S.C. § 2000e-3 (Title VII prohibits retaliating against employee for "oppos[ing]" discrimination prohibited by statute or "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding" with EEOC); CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008) (§ 1981 prohibits retaliation for complaining about race discrimination); Walker v. Abbott Laboratories, 340 F.3d 470, 475-77 (7th Cir. 2003) (§ 1981 prohibits racial discrimination in employment contracts, even at-will relationships). The parties agree that, for the purpose of this case, there are no relevant differences in the standard for proving a discrimination or retaliation claim under the two statutes. Stephens v. Erickson, 569 F.3d 779, 786 (7th Cir. 2009) ("We apply the same elements to retaliation claims under Title VII and § 1981."); Paul v. Theda Medical Center Inc., 465 F.3d 790, 794 (7th Cir. 2006) ("The framework governing liability under Title VII also applies to section 1981 claims.").

A. Assignment to Pretreatment Department

Plaintiff is not clear in his brief regarding which legal theories (discrimination or retaliation) he is asserting with respect to each adverse action (suspension and assignment

to the pretreatment department.) However, the only protected conduct that he identifies with respect to his retaliation claim is the group complaint that he joined in April 2008. Because that is several years after he believes that he should have been taken off the assignment in the pretreatment department, his retaliation claim cannot encompass that decision. Accordingly, race discrimination is the only theory I will consider.

Defendant devotes most of its briefs to arguing that plaintiff cannot satisfy the evidentiary requirements of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In that case, the Supreme Court set forth the requirements for establishing a "prima facie" case under Title VII when the plaintiff is alleging that he was not hired because of his race. "This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." Id. at 802. If the plaintiff makes that showing, the question is whether he can show that any nondiscriminatory reasons advanced by the defendant are pretexts for discrimination. Id. at 804-05.

Over the years, McDonnell Douglas has become ubiquitous in discrimination cases. Courts have adapted the test to apply it to nearly every type of adverse employment decision, Stinnett v. City of Chicago, 630 F.3d 645, 646 (7th Cir. 2011) (denial of

promotion); Caskey v. Colgate-Palmolive Co., 535 F.3d 585, 591 (7th Cir. 2008) (disciplinary decisions); Pantoja v. American NTN Bearing Manufacturing Corp., 495 F.3d 840, 846 (7th Cir. 2007) (termination); Merrillat v. Metal Spinners, 470 F.3d 685 (7th Cir. 2006) (reduction in force), and nearly every type of discrimination, Runyon v. Applied Extrusion Technologies, Inc., 619 F.3d 735, 739 (7th Cir. 2010) (age); Patterson v. Indiana Newspapers, Inc., 589 F.3d 357, 364 (7th Cir. 2009) (religion); Farr v. St. Francis Hosp. and Health Centers, 570 F.3d 829, 833 (7th Cir. 2009) (sex discrimination against men); Germano v. International Profit Association, Inc., 544 F.3d 798, 806 (7th Cir. 2008) (disability); Lucas v. PyraMax Bank, FSB, 539 F.3d 661, 666 (7th Cir. 2008) (sex discrimination against women), as well as retaliation. Everroad v. Scott Truck Systems, Inc., 604 F.3d 471, 481 (7th Cir. 2010). Although the decision in McDonnell Douglas contains little discussion regarding the origin of the standard or even the reasons for it, the Court has explained since that it is a result of the fact that "the question facing triers of fact in discrimination cases is both sensitive and difficult, and that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141 (2000) (internal quotations omitted). In other words, the purpose of the McDonnell Douglas framework is to address the employee's difficulty in proving an employer's discriminatory intent and to emphasize that direct evidence of discrimination is not required.

Although courts often apply the McDonnell Douglas framework by rote, it is not a straitjacket on parties or the court, limiting proof of discrimination to a narrow band of evidence: "The method suggested in McDonnell Douglas . . . was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). That is, the choice for plaintiffs in proving their claim is *not* between McDonnell Douglas or direct evidence, as defendant suggests. Dewitt v. Proctor Hospital, 517 F.3d 944, 951 (7th Cir. 2008) (Posner, J., concurring) ("[I]t was a mistake for the parties in this case to think that the way to litigate it was to address the two methods of establishing a prima facie case as if each were in its own sealed compartment."). Rather, the McDonnell Douglas framework represents *one* kind of circumstantial evidence that may support a showing of discrimination. Troupe v. May Dept. Stores Co.., 20 F.3d 734, 736 (7th Cir. 1994).

In each case the ultimate question is not whether the evidence "fit[s] into a set of pigeonholes," Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996), but simply whether a reasonable jury could find that the defendant discriminated against the plaintiff because of a characteristic protected by the statute, in this case race. Simple v. Walgreen Co., 511 F.3d 668, 670-71 (7th Cir. 2007) ("Despite the minutiae of the various proof schemes set forth in McDonnell Douglas . . . the straightforward question to be answered in

discrimination cases is whether the plaintiff has successfully demonstrated that she was the victim of . . . discrimination on the part of the employer.") (internal quotations omitted). Further, even when McDonnell Douglas applies, the test may be adjusted to accommodate the facts of the particular case. Merrillat, 470 F.3d at 690 ("McDonnell Douglas . . . is appropriately adapted where necessary to reflect more fairly and accurately the underlying reality of the workplace.") (internal quotations omitted).

Defendant points to a particular formulation of the McDonnell Douglas test that it says plaintiff cannot meet: 1) he is a member of a protected class, 2) his job performance was meeting his employer's legitimate expectations, 3) he was subject to a materially adverse employment action, and 4) the employer treated similarly situated employees outside the protected class more favorably. Dft.'s Br., dkt. #19, at 14. Defendant cites Durham v. Lindus Construction/Midwest Leafguard, Inc., 675 F. Supp. 2d 936, 941 (W.D. Wis. 2009), a case in which the plaintiff was terminated. Defendant says that plaintiff was not meeting its legitimate expectations and cannot point to other employees that receive more favorable treatment.

In support of its argument that plaintiff was not meeting its legitimate expectations, defendant points to the three instances that plaintiff was disciplined at work. However, there are at least two reasons why these disciplinary decisions cannot support defendant's motion for summary judgment as to plaintiff's assignment in the pretreatment department.

First, it makes little sense to consider plaintiff's level of performance in the context of the decision to keep plaintiff as the vacation replacement for the pretreatment department because defendant does not suggest that the quality of plaintiff's work had anything to do with that decision. Rather, its position is that it kept plaintiff in the position of vacation replacement even after plaintiff was no longer the least senior pipefitter because it did not want to spend the resources training someone else to do the job. It insists that it would have treated anyone else in plaintiff's position the same. Second, the first disciplinary matter defendant cites occurred in 2007, long after plaintiff asked to be relieved of his duties as the vacation replacement.

The other factor that defendant disputes, whether "similarly situated" employees received better treatment, merges with the question of pretext in this case. Everroad v. Scott Truck Systems, Inc., 604 F.3d 471, 477-78 (7th Cir. 2010) ("[T]he prima facie case and pretext inquiry often overlap; we may skip the analysis of the prima facie case and proceed directly to the evaluation of pretext if the defendant offers a non-discriminatory explanation for its employment decision.") (citing Adelman-Reyes v. Saint Xavier University, 500 F.3d 662, 665 (7th Cir. 2007)). It is undisputed that plaintiff was the *only* employee at the Madison plant who was required to act as the vacation replacement from 2002-2009. Thus, plaintiff meets this factor unless no one at the plant is similarly situated to him, even others in the pipefitter group. Generally, employees with the same job responsibilities and

supervisors are similarly situated for the purpose of establishing a prima facie case under McDonnell Douglas. Salas v. Wisconsin Dept. of Corrections, 493 F.3d 913, 923 (7th Cir. 2007) (factors to consider include "whether the employees 1) had the same job description, 2) were subject to the same standards, 3) were subject to the same supervisor, and 4) had comparable experience, education, and other qualifications.").

Defendant seems to adopt the extreme position that plaintiff in fact was a class of one and that none of his coworkers were similarly situated to him. However, to evaluate defendant's position, it is necessary to evaluate defendant's reason for keeping plaintiff as the vacation replacement. Defendant does not argue that any rules or policies required it to keep plaintiff in the position. Rather, as noted above, its sole stated reason is that no other pipefitter had the necessary training to act as the vacation replacement and it did not want to use the resources necessary to train a new person.

If this explanation is true, it is sufficient to avoid liability under Title VII or § 1981, even if it seems unfair to plaintiff. Federal law does not require the employer to be fair or reasonable, so long as it does not discriminate on the basis of a protected characteristic. Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976, 979 (7th Cir. 2000) ("Title VII is not a 'good cause' statute."). However, I cannot grant summary judgment to defendant because plaintiff has adduced evidence that defendant's stated reason is pretextual.

First, it is genuinely disputed whether defendant had a consistent practice of training only one vacation replacement at a time and refusing to train less senior pipefitters when they joined the group. Defendant says that it did, but it does not point to any written rule or policy that supports its position. The collective bargaining agreement says only that the assignment for a vacation replacement "will be based on seniority, project work and availability." The agreement does not prohibit defendant from training new employees and may be read as supporting plaintiff's view that a new replacement would be considered when plaintiff was no longer the least senior pipefitter. Federal law does not require a written policy, but even with respect to defendant's practices, the parties dispute whether defendant treated plaintiff the same as it had others in his situation in the past. According to plaintiff, before he became the vacation replacement, defendant had used multiple employees to serve as the vacation replacement and took volunteers rather than simply requiring one employee to serve as long as he remained in the pipefitter group.

Second, it is undisputed that three pipefitters with less seniority than plaintiff received training in the pretreatment department after 2004. Defendant says that none of them received all the training they needed to act as the vacation replacement, but this misses the point. If defendant did not want to spend resources training another pipefitter to act as the vacation replacement, why was it giving *any* training for the pretreatment department? Defendant has no explanation for this. If conserving resources was the true concern, it

makes little sense to give several employees *some* training, but not enough that they can use the training to perform the job.

According to plaintiff, the reason the other pipefitters did not finish their training was unrelated to resources, but simply that those pipefitters did not like working in the pretreatment department. This supports plaintiff's view that defendant's decision to continue to require him to act as the vacation replacement had less to do with resources and more to do with plaintiff's status as a less favored employee. Because defendant does not argue that decisions regarding the vacation replacement had anything to do with performance level and defendant does not identify any other reasons for treating plaintiff less favorably, a reasonable jury could infer that defendant was motivated by race, particularly because plaintiff was the only black pipefitter. Reeves, 530 U.S. at 147 ("[I]t is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation.")

Another piece of evidence that undermines defendant's explanation is the sequence of events that preceded Lohmiller's assignment as the vacation replacement in 2009. In 2005 defendant changed the collective bargaining agreement so that employees who were not pipefitters could become the vacation replacement for the pretreatment department. Lohmiller volunteered for the position in 2006, but could not fulfill the duties because of a conflict with his primary assignment at the plant. Although defendant points to Lohmiller's

assignment as the vacation replacement as evidence of nondiscrimination, it actually further undermines defendant's argument that concerns about resources were the true reason plaintiff was stuck with the assignment in the pretreatment department. The 2005 change in the collective bargaining agreement shows that defendant was willing to expend the resources necessary to train another employee to act as the vacation replacement. Even if it is true that defendant did not foresee that Lohmiller would be unable to fill the position right away, this does not explain why defendant did not look for another replacement when Lohmiller became unavailable or simply assign a less senior employee to the position, as it had done with plaintiff. Instead, defendant waited another three years until Lohmiller became a member of the pipefitter group before relieving plaintiff of the responsibility of being the primary vacation replacement.

In sum, plaintiff may not have the strongest case of discrimination with respect to his assignment in the pretreatment department, but he has enough to survive defendant's motion for summary judgment. A reasonable jury could find that defendant was treating white employees more favorably than plaintiff and that defendant's stated concern of conserving resources is a pretext for race discrimination.

B. Suspension

Again, it is important to be clear about the scope of plaintiff's claim. Although plaintiff is not explicit in his brief, I do not understand from it that he is challenging the discipline he received in 2007 and 2008. Rather, his claim of race discrimination and retaliation is limited to the one-month suspension he received in 2009 because of the incident in the hard salami department.

1. Retaliation

Defendant argues that plaintiff's retaliation claim is barred because he did not include the April 2008 group complaint in his charge with the Equal Employment Opportunity Commission or in his complaint in this court. Defendant did not file a copy of the EEOC charge with this court, so I cannot determine whether plaintiff's retaliation claim falls within the scope of the charge. Jones v. Res-Care, Inc., 613 F.3d 665, 670 (7th Cir. 2010) ("Title VII claims that were not included in an EEOC charge are barred. "). In any event, even if I concluded that plaintiff's claim under Title VII was barred, this would leave plaintiff's retaliation claim under § 1981, which does not include an exhaustion requirement. Chaudhry v. Nucor Steel-Indiana, 546 F.3d 832, 836 (7th Cir. 2008) ("42 U.S.C. § 1981 . . . does not require plaintiffs to file an EEOC charge first.").

However, defendant is correct that plaintiff says nothing about the April 27, 2008 group complaint in his original complaint filed in this court or in the amended complaint.

To satisfy the pleading requirements of Fed. R. Civ. P. 8, a plaintiff must give the defendant notice of his claim in his complaint. In the context of a claim for retaliation, this means that the plaintiff must identify the protected speech or conduct that he says prompted the defendant to retaliate against him. EEOC v. Concentra Health Services, Inc., 496 F.3d 773, 775 (7th Cir. 2007) ("[T]he EEOC's amended complaint fails to provide the notice required by Rule 8(a)(2); it must further specify the 'conduct in the workplace' that [the employee] reported."); Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002) ("Had Higgs merely alleged that the defendants had retaliated against him for filing a suit, without identifying the suit or the act or acts claimed to have constituted retaliation, the complaint would be insufficient."). Although plaintiff included a retaliation theory in his complaint, the only potentially protected conduct he identified was the filing of his EEOC charge in April 2009. Plaintiff has abandoned that claim by failing to develop any evidence or argument in support of it and he cannot change the factual premise of his claim in the context of his brief in opposition to defendant's motion for summary judgment. Grayson v. O'Neill, 308 F.3d 808, 817 (7th Cir. 2002). Accordingly, plaintiff's retaliation claim must be dismissed.

2. Discrimination

The three disputed issues under the McDonnell Douglas framework with respect to plaintiff's suspension are whether plaintiff was meeting defendant's legitimate expectations,

whether similarly situated, non-African American employees received better treatment and whether defendant's reason for disciplining plaintiff is a pretext for discrimination. These questions overlap substantially. Defendant's position is that it disciplined plaintiff because he failed to take any steps to protect the meat while he was repairing the pipe. Plaintiff's view is that protecting the meat was the responsibility of the department supervisor, John Marshall, and Marshall's staff and that, if anyone should have been disciplined it was Marshall, not plaintiff.

Plaintiff's strongest evidence of discrimination is the different treatment that he and Marshall received. (The parties assume that Marshall is not black, so I will do the same.) It is undisputed that Marshall and plaintiff had shared responsibility for protecting the meat, yet plaintiff was suspended and Marshall received no discipline. In terms of the conduct at issue, it would be difficult to find a more similarly situated employee; plaintiff and Marshall committed the same offense. Everroad, 604 F.3d at 480 (employees are more likely to be similarly situated if alleged differential treatment occurred at same time); Peirick v. Indiana University-Purdue University Indianapolis Athletics Dept., 510 F.3d 681, 689 (7th Cir. 2007) ("The central question for our review, then, is whether Peirick and her colleagues engaged in similar misconduct, but received dissimilar treatment. . . . Comparable seriousness may be shown by pointing to a violation of the same company rule, or to conduct of similar nature.")

Defendant says that Marshall and plaintiff are not similarly situated for three reasons: (1) Marshall did not have plaintiff's disciplinary history; (2) Marshall is a supervisor; (3) Marshall did not perform the repair that led to the damaged product. However, defendant does not explain why any of these differences matter in the context of this case. An employer cannot avoid a trial simply by listing any and all differences that may exist between two employees; the question is whether they are similar "in all material respects," Patterson v. Avery Dennison Corp., 281 F.3d 676, 680 (7th Cir. 2002), which depends on the context of each case. A factor that is particularly important is whether evidence exists that a particular difference was important to the employer. Stinnett v. City of Chicago, 630 F.3d 645, 646-48 (7th Cir. 2011); Peirick, 510 F.3d at 688. If not, the difference is likely not a material one.

Plaintiff's disciplinary history would support a conclusion that plaintiff should receive a more severe sanction, but it does not explain why Marshall was not disciplined at all. Runyon v. Applied Extrusion Technologies, Inc., 619 F.3d 735, 738 (7th Cir. 2010) (differences in disciplinary history supported employer's decision to suspend one employee but fire another). Defendant does not cite a policy or practice that gives employees a "free pass" on their first infraction.

Similarly, Marshall's status as a supervisor might suggest that the disciplinary process would be different for him, but that fact alone does not explain why Marshall would suffer

no consequences for making the same mistake plaintiff did. Cf. Filar v. Board of Education of City of Chicago, 526 F.3d 1054, 1061-63 (7th Cir. 2008)("[T]he simple fact that the comparator is more senior to the plaintiff may not be dispositive, even where the employer must credit seniority in employment decisions."); Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781, 791 (7th Cir. 2007) ("The difference in job title alone is not dispositive."). Again, defendant cites no policy that exempts supervisors from the standards of conduct that other employees must follow. If anything, one would think that supervisors would be held to even higher standards than lower ranking employees. If the supervisors who disciplined plaintiff did not have authority over Marshall, that might show that Marshall was not a proper comparator, e.g. Ellis v. United Parcel Service, Inc., 523 F.3d 823, 826-27 (7th Cir. 2008), but defendant does not suggest that this is the case.

Finally, the fact that plaintiff performed the repair would be important only if plaintiff had been disciplined for the way he conducted the repair. It may be that plaintiff was "the better judge of what needed to be done to fix the pipe," Dft.'s Br., dkt. #53, at 8, but that observation is irrelevant because defendant points to no problems with plaintiff's technique and does not suggest that plaintiff could have stopped the sludge from coming out. Rather, it is undisputed that he was disciplined because he failed to take precautionary measures *before* he began working.

The problem with defendant's justification is that defendant identifies no reason why

plaintiff would be in any better position than Marshall to know in advance what precautions were needed. Although plaintiff presumably had more experience than Marshall with fixing pipes, defendant does not suggest that the ordinary pipe leak would lead to large amounts of "sludge" pouring out of the pipe or that plaintiff's experience would have helped him predict that would happen on January 9. Rather, it seems that both Marshall and plaintiff would have relied on their common sense to determine how much meat should be removed or covered. Both plaintiff and Marshall misjudged what precautions were needed, but only plaintiff was disciplined for this mistake.

Generally, summary judgment is inappropriate when evidence exists that the plaintiff was treated less favorably than a similarly situated employee outside his class. E.g., Elkhatib v. Dunkin Donuts, Inc., 493 F.3d 827 (7th Cir. 2007); Curry v. Menard, Inc., 270 F.3d 473, 479 (7th Cir. 2001). After all, "[t]he critical issue [in a discrimination case] is whether members of one [protected group] are exposed to disadvantageous terms or conditions of employment to which members of [an]other [group] are not exposed." Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998) (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). Thus, "[a]ll things being equal, if an employer takes an action against one employee in a protected class but not another outside that class, one can infer discrimination." Filar, 526 F.3d at 1061. In addition, the facts that defendant has not cited any rule or policy that plaintiff violated and that some of plaintiff's

supervisors did not believe he deserved any discipline is some support for the drawing of an inference that defendant's "stated reason, even if actually present to the mind of the employer, wasn't what induced him to take the challenged employment action. . . [and] was a pretext." Forrester v. Rauland-Borg Corp., 453 F.3d 416, 418 (7th Cir. 2006).

Accordingly, I conclude that plaintiff has adduced sufficient evidence to proceed to trial on this claim. Defendant is free to testify at trial that it honestly believed that plaintiff was more at fault than Marshall, but the circumstances of the two employees are similar enough to raise a genuine issue whether the difference in treatment is a result of race discrimination rather than greater culpability on plaintiff's part.

Although I am denying defendant's motion for summary judgment on this claim, not all of plaintiff's evidence is probative or even admissible. To clarify the issues for trial, I will explain why this other evidence does not support plaintiff's claim.

First, plaintiff says that no other pipefitters have been disciplined for damaging product since 2007. This fact would be probative only if other pipefitters had actually damaged product during this time period *and* if any of the relevant decision makers in this case had been aware of the other incidents. Plaintiff has not adduced evidence of either situation. In fact, in the deposition plaintiff cites for the fact that other pipefitters had not been disciplined for damaging product, the witness testified that he was not aware of any employees other than plaintiff who damaged product. Emond Dep., dkt. #27, at 47.

Second, plaintiff says that defendant has fired three other African Americans, but he does not provide enough context to allow a determination whether these other incidents might be relevant to his claim. The closest he comes is the termination of Darice Fowler. Plaintiff cites a decision of the Wisconsin Equal Rights Division finding that defendant discriminated against Fowler because of his race and skin color, but even that is not sufficient for two reasons. First, the decisions of the Equal Rights Division and the EEOC are not binding on this court, Silverman v. Board of Education of City of Chicago, No. 10-2977, — F.3d —, 2011 WL 941518, *1 (Mar. 21, 2011), so I cannot simply assume because of the division's finding that Fowler was fired because of his race. (For what its worth, defendant is appealing that decision.) Even if I could make this assumption, that would not be relevant evidence to show that *plaintiff's* suspension was race discrimination unless plaintiff could show that the circumstances were similar or at least that the decision makers were the same in both cases. Grayson v. O'Neil, 308 F.3d 808, 816 (7th Cir. 2002) ("Evidence of generalized racism directed at others is not relevant unless it has some relationship with the employment decision in question."). Because plaintiff says nothing about the circumstances of Fowler's termination, it cannot serve as evidence of discrimination against him.

Third, plaintiff cites his own deposition testimony that he "believed that Bacon wanted him fired because of his race. He was told that Bacon had stated that he did not want Barlow around." Plt.'s PFOF ¶ 63, dkt. #36. The first sentence is not helpful because

plaintiff's subjective beliefs are not evidence. Ost v. W. Suburban Travelers Limousine, Inc., 88 F.3d 435, 441 (7th Cir. 1996). The second sentence is neither admissible (because it is hearsay, MMG Financial Corp. v. Midwest Amusements Park, LLC, 630 F.3d 651, 656 (7th Cir. 2011)), nor probative (because general dislike of an employee is not evidence of racial animus).

Fourth, plaintiff cites testimony of the union president that plaintiff's disciplinary history is "above average," meaning that he has been "disciplined less" than the "average employee." Jerzewski Aff. ¶ 20, dkt. #42. The point of this testimony is not clear. To the extent plaintiff means to argue that defendant treated plaintiff too harshly by choosing to suspend him rather than give him a lesser sanction, that argument fails because it is undisputed that a third infraction in three years requires a suspension under defendant's progressive discipline policy. In any event, Jerzewski's testimony is far too vague to allow a determination whether any other employees were treated more leniently under similar circumstances.

Finally, plaintiff argues that defendant is lying when it says that it failed inadvertently to include a temporal limitation on plaintiff's "condition of employment," but it is not clear how this argument could support his claim. Defendant says that it treated plaintiff's condition of employment as if it had a one-year limitation and plaintiff does not allege that he has suffered any adverse consequences as a result of the omission from the document.

Thus, regardless whether the omission was intentional, it does not support the drawing of an inference that plaintiff's suspension was the result of discriminatory animus.

ORDER

IT IS ORDERED that defendant Kraft Foods Global Inc.'s motion for summary judgment, dkt. #18, is DENIED with respect to plaintiff Rudy Barlow, Jr.'s claims that defendant required him to work in the pretreatment department from 2004 to 2009 and disciplined him in January 2009 because of his race. Defendant's motion is GRANTED in all other respects.

Entered this 13th day of April, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge