IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

OPINION AND ORDER

Plaintiff,

12-cv-214-bbc

v.

NORTHERN STAR HOSPITALITY INC., D/B/A SPARX RESTAURANT; NORTHERN STAR PROPERTIES, LLC; and NORTH BROADWAY HOLDINGS, INC.,

Defendants.

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Plaintiff Equal Employment Opportunity Commission has brought this action against defendants Northern Star Hospitality Inc., d/b/a Sparx Restaurant, Northern Star Properties, LLC, and North Broadway Holdings, Inc. pursuant to its authority under 42 U.S.C. § 2000e-5(f)(1) to sue for violations of Title VII of the Civil Rights Act of 1964. Plaintiff contends that managers working for defendants subjected Dion Miller, a former employee, to racial harassment and that defendants failed to take appropriate action in response. In addition, plaintiff contends that defendants retaliated against Miller by firing him after he complained about the harassment. Now before the court is defendants' motion for summary judgment under Fed. R. Civ. P. 56, in which they contend that no reasonable jury could find in plaintiff's favor. Dkt. #41.

Because I conclude that genuine issues of material fact remain about defendants'

decision to terminate plaintiff, I am denying defendants' motion for summary judgment with respect to plaintiff's retaliation claim. However, I am granting the motion with respect to plaintiff's harassment claim. Plaintiff has not adduced sufficient evidence from which a reasonable jury could conclude that Miller was subject to severe or pervasive harassment.

From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed. (I note that defendants proposed several facts that were not supported by the evidence in the record. In particular, they asserted several facts for which they cited only their answer as evidence. However, the allegations in defendants' answer are not admissible evidence. Additionally, they asserted several broad factual propositions that were not supported by the deposition testimony they cited. For example, defendants asserted as fact that "[Miller's supervisor] had given Miller verbal warnings on several occasions for his poor attitude," DPFOF, dkt. #60, ¶ 17, and that "Sparx also had numerous problems regarding Miller's poor job performance." Id. at ¶ 21. The portions of deposition transcripts cited by defendants for those propositions do not provide any factual support for the factual assertions. Finally, defendants assert several facts for the first time in their reply brief, including facts about the sequence of events at issue. I have disregarded all of defendants' unsupported assertions and facts asserted for the first time in their reply brief.)

## UNDISPUTED FACTS

Defendant Sparx Restaurant was a family-style restaurant in Menomonie, Wisconsin. (Sparx is no longer in business, but plaintiff has asserted claims against the other defendants as successors in interest. Defendants do not argue for the purpose of summary judgment

that they cannot be held liable as successors.) Dion Miller, who is black, was hired as a line cook for Sparx in the spring 2009 and was promoted to the position of assistant kitchen manager sometime later that year. As assistant kitchen manager, plaintiff earned $14 an hour and was responsible for ordering products for the restaurant. There was one other black employee at Sparx at the time.

On September 30, 2010, Miller was scheduled to help with the monthly inventory of the kitchen food supplies after the 11:00 p.m. closing of the restaurant. When Miller arrived at the restaurant, Evan Openshaw and Chris Jarmuzek were working. Evan Openshaw was the kitchen manager and plaintiff's direct supervisor. Jarmuzek was the kitchen supervisor and former kitchen manager. He had stepped down from his position and was in the process of training Opensahw. When Miller arrived, Openshaw told Miller to go home because he was not needed.

The next day, October 1, Miller arrived at the restaurant shortly before his scheduled 9:00 a.m. shift. He was greeted by another kitchen employee who told him to look at what had been posted on the kitchen cooler. There, Miller saw a picture of Gary Coleman, an African-American actor. Above the picture was a notice to kitchen employees about rotating food in the cooler. A defaced one-dollar bill had been placed over the notice. On the bill, someone had drawn a noose around George Washington's neck, a swastika on his forehead and a "dark area" on his cheek; next to Washington's portrait was a man on horseback and a "hooded klansman" with "KKK" written on his hood had been drawn next to Washington.

Miller was offended and hurt by the display on the cooler. Miller asked a coworker to take a picture of the display with her phone "as evidence that somebody had just

committed racist harassment in the workplace." About an hour later, the front-of-the-house manager Kim Deasy arrived at the restaurant. Miller approached Deasy immediately and asked her to look at the items posted on the cooler. Deasy told Miller that she did not know anything about the items and that "Evan and those guys" were the last ones to leave the building the night before. Deasy did not take a close look at the display because her hands were full and the telephone was ringing in her office. She told Miller she would come back after she put her stuff down and answered the phone call.

Openshaw came in sometime before 11 a.m. and Miller confronted him about the display. Openshaw told him that he had put up the picture of Coleman to remind employees to rotate the food stock. Openshaw said that Jarmuzek had attached the dollar bill to the picture as a joke. (The parties dispute whether Openshaw and Jarmuzek would have known that Miller would be opening the restaurant on October 1. Miller says that he started regularly at 9:00 a.m. and that both Openshaw and Jarmuzek knew his schedule. Defendants deny that Openshaw or Jarmuzek knew Miller would be there that morning.) Miller said it was not funny and demanded that it be taken down. Openshaw responded by asking whether Miller would be offended by a picture of David Hasselhoff, the former star of the televison shows "Baywatch" and "Knight Rider," who is white, instead of the picture of Gary Coleman. Miller said he would not. Openshaw took down the dollar bill and replaced the picture of Coleman with one of Hasselhoff. (Although defendants asserted in their proposed findings of fact that the Hasselhoff picture had been posted before October 1, they produced no evidence to support the assertion. DPFOF, dkt. #60, ¶ 33.)

Miller worked the remainder of his shift on October 1. (The parties dispute whether

Deasy said anything else to Miller about the display. According to plaintiff, Deasy went into her office and said nothing further to him about the display that day or ever. Defendants say that Deasy, Openshaw and Miller met in Deasy's office to discuss the cooler display. During the discussion, Openshaw said that the dollar bill had been a tip from a customer and he denied encouraging or condoning Jarmuzek's decision to post it. According to defendants, Deasy asked Miller and Openshaw whether everything was "good" and they both said that it was. Additionally, defendants say that shortly after the discussion Miller and Openshaw were joking and laughing together while they worked. Miller denies joking or laughing with Openshaw that day.)

Miller did not encounter Jarmuzek for several days. When they did see each other, Miller confronted Jarmuzek and told him he was racist. Jarmuzek said the dollar bill had been a joke. Jarmuzek testified later that he had put the bill up next to the poster as a joke, knowing that Miller and the other kitchen employees would see it. (The parties dispute whether Jarmuzek apologized to Miller and whether Miller told him that everything was fine.)

At some point, Deasy told Thomas Nesheim, Sparx's general manager, about the Gary Coleman picture and dollar bill. She also told Nesheim that Miller was upset by the display. (Deasy could not remember whether she told Nesheim about the specific racist marks on the dollar bill or whether she just told him it was a "graffiti-covered" bill.) Under Sparx's employee policies, the posting of a dollar bill with racist images constituted a terminable offense. Jarmuzek was not terminated. Both Openshaw and Deasy gave Jarmuzek a warning and reprimand and told him not to do anything like that again. Jarmuzek retained his

position as kitchen supervisor and did not lose any shift time. Openshaw was not disciplined in any way. No investigation was conducted to see who had defaced the bill or whether other employees were offended.

In the days after Miller complained about the dollar bill and Coleman picture, Openshaw criticized Miller's work several times. Before this time, Miller had never been disciplined, warned or reprimanded by Openshaw or any other manager. (The parties dispute whether Nesheim had met with Miller before October 1 in response to a newer employee's complaints about Miller's unwillingness to train her. Nesheim testified that he met with Miller and told him that he needed to work with the new person. Miller denies that Nesheim ever criticized or counseled him.) Openshaw chastised Miller because another cook missed an order and he accused Miller of throwing the other cook "under the bus" by not catching her mistake earlier. Openshaw did not reprimand the employee who made the mistake. Openshaw also met with Jarmuzek and discussed Miller's work and attitude. Jarmuzek had never had a meeting with Openshaw about Miller before Miller complained about the dollar bill and Coleman picture. Prior to Miller's complaints, Jarmuzek had considered Miller an "ideal" kitchen employee on whom he could count. After Miller's complaint, Jarmuzek told Openshaw that Miller was not prepping the right way and that his attitude had gone south. Miller was also accused of leaving work without prepping food for the night shift. (Miller denies that he ever left without prepping properly.)

On October 23, 2010, three weeks after the dollar bill incident, Miller was fired. Both Openshaw and Nesheim were present at the termination. Nesheim presented Miller

with a termination notice that listed the following reasons for Miller's termination:

> 1. Attitude
> a. Management had received numerous complaints from other employees about his attitude;
> b. Dion would talk back when given instruction or direction;
> c. Dion would make excuses when spoken to about issues regarding performance, attitude or other issues;
> d. Dion had a general negative attitude towards working and particular[ly] working with certain co-workers
>
> 2. Other issues
> a. Dion was promoted to Assistant Kitchen Manager before my arrival, and was reduced to Kitchen Supervisor as we had no need for an Assistant Kitchen Manager, at the current time. During that time Dion never showed leadership skills of either a[n] Assistant Kitchen Manager or Kitchen Supervisor during [the] past 5 months
> b. Instead of stepping up when kitchen manager left in August, Dion cho[se] to become confrontational to changes and his attitude became more of [an] issue. These problems [were] not correct[ed] when new kitchen manager was hired.
> c. Dion was unwilling to teach other employees how to cook when he was ask[ed] or training other employees how to do simple tasks
> d. Dion did not set the example in the kitchen although he was a supervisor
> e. Instead of being a team player, Dion ch[ose] to do things his own [way] and not communicate with other employees
> f. When asked to do certain tasks by manager, Dion did not complete those tasks all the time or in a consistent way.

Dkt. #53-4.

Nesheim testified that he considered input from Openshaw and Deasy in making the decision to terminate Miller. In turn, Openshaw considered the input of Jarmuzek. (It is not clear from the record or the parties' proposed findings of fact whether Nesheim made the ultimate decision to terminate Miller. Nesheim testified that the decision to terminate Miller was a joint decision among himself, Deasy and Openshaw. Nesheim Dep., dkt. #50, at 50. However, Deasy testified that she did not participate in the decision to terminate Miller and did not know he was being terminated until the day it happened. Deasy Dep.,

dkt. #54, at 54.) Nesheim, Deasy and Openshaw had discussions about Miller's willingness to train new employees, work as a team player and listen to instructions. They had also had conversations about Miller's attitude toward other employees. (Neither Deasy nor Nesheim provided much detail regarding these conversations in their depositions and neither side submitted a deposition or declaration from Openshaw.) Deasy testified that she agreed with Miller's assessment of some of the employees, including a previous kitchen manager who allegedly slammed a cooler door shut on a female employee. She also testified that all of the cooks complained about each other. Nesheim testified that there had been talk of terminating Miller before the dollar bill incident, but that the final decision was not made until after Miller's complaints about the display. During his deposition, Nesheim testified that one of the reasons he terminated Miller was because Miller was one of the highest paid employees at the restaurant and that when a restaurant is struggling financially, the highest paid employees are the "first or second person[s] to go." Nesheim Dep., dkt. #55, at 20, 38.

Defendant had a progressive discipline policy in place at the time Miller was terminated. The policy had five stages of progressive discipline for employee violations of company policy: (1) verbal warning; (2) written warning; (3) one day suspension; (4) one week suspension; and (5) termination. Under the policy, "[s]ome violations of policy require more serious disciplinary action." Dkt. #53-4. Nesheim did not follow the progressive discipline policy in terminating Miller. Miller had not received any verbal or written warnings or suspensions. Nesheim testified that he had fired one or two other people for poor attitudes in the past. (He did not say whether he followed the progressive discipline

policy when he had fired those employees.)

After he was fired, Miller attempted unsuccessfully to find a new job in the restaurant industry. (The parties dispute whether Miller asked to be rehired at Sparx. Miller denies asking to be rehired; Deasy says Miller asked to be rehired on two occasions.)

## OPINION

Defendants contend that they are entitled to summary judgment on plaintiff's claims that Miller was (1) subject to racial harassment; (2) fired because of his race; and (3) fired in retaliation for his complaints about the cooler display. However, plaintiff did not assert a claim that Miller was fired because of his race, so I am disregarding defendants' arguments that are related solely to that nonexistent claim.

### A. Harassment

Title VII prohibits an employer from engaging in racial harassment that creates a hostile or offensive working environment. Williams v. Waste Management of Illinois, 361 F.3d 1021, 1029 (7th Cir. 2004). Plaintiff contends that the combination of the Gary Coleman picture and defaced dollar bill displayed on the cooler constituted racial harassment and a hostile working environment. To prevail on his claim, plaintiff must prove that the display was (1) both objectively and subjectively offensive; (2) based on Miller's race; and (3) severe or pervasive. In addition, there must be a basis for employer liability. May v. Chrysler Group, LLC, 692 F.3d 734, 742 (7th Cir. 2012).

Defendants challenge plaintiff's ability to satisfy any element of its claim. However, I need not consider all of defendants' arguments because I agree with defendants that the cooler display was not "pervasive" and was not "severe" enough to constitute a hostile working environment on its own. The requirement for "severe or pervasive" conduct is grounded in the language of Title VII, which is limited to discriminatory acts that alter the terms or conditions of employment. 42 U.S.C. § 2000e-2(a); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). In determining whether the harassment rises to this level, courts may consider a number of factors, such as the frequency of the conduct, whether it is humiliating or physically threatening and the extent to which it interferes with the employee's work performance. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993); Ezell v. Potter, 400 F.3d 1041, 1047 (7th Cir. 2005).

Miller was understandably offended by the dollar bill containing racist images. The dollar bill was offensive on its own, but the fact that it was posted next to a picture of a black actor emphasized the racist nature of the symbols on the bill. Further, as one of the only two black employees at Sparx, Miller thought he had been targeted. However, the cooler display was the only incident of racism or harassment that Miller experienced while working at Sparx, and the display was taken down immediately after Miller complained about it to Openshaw. Miller did not testify that the cooler display was severe enough to interfere with his work performance. He did not have problems with Openshaw or Jarmuzek before the display and plaintiff did not adduce evidence suggesting that Miller had trouble working with either Openshaw, Jarmuzek or any other employee after the display. In addition,

although Miller testified that the display was offensive, hurtful and made him angry, he did not testify that he felt physically threatened, intimidated or humiliated by the display. In fact, there is no evidence that anyone intended to threaten Miller with the display. The dollar bill was not created by a Sparx employee and the evidence suggests only that the display was a very bad joke. From these facts, no reasonable jury could conclude that the cooler display was severe enough on its own to constitute a hostile work environment.

The cases cited by plaintiff are distinguishable. In each case, the plaintiff was the victim of harassment much more severe or pervasive than that suffered by Miller in this case. In Daniels v. Essex Group, Inc., 937 F.2d 1264, 1266-67 (7th Cir. 1991), the plaintiff endured years of racist insults and violent threats from his coworkers and multiple incidences of racist graffiti on the bathroom walls with messages such as, "All niggers must die" and "Hi Bob [the plaintiff's name] KKK." In addition, a coworker hung a dummy from a doorway that had a black face and looked as if it were dripping blood. Id. In Rodgers v. Western-Southern Life Insurance Co., 12 F.3d 668, 671 (7th Cir. 1993), the plaintiff's supervisor used the term "nigger" on multiple occasions, said "black guys are too fucking dumb to be insurance agents" and told the plaintiff that he had been advised not to hire any more black agents. Finally, in Porter v. Erie Foods International, Inc., 576 F.3d 629, 632-33 (7th Cir. 2009), the plaintiff was presented with multiple nooses and veiled threats to the point that he feared for his own safety and that of his family.

Not only was the harassment more severe in these cases, the plaintiffs also presented evidence that the harassment was intended to be physically threatening or humiliating and

interfered with their ability to perform their work duties. Plaintiff presented no such evidence in this case. Rather, the evidence shows that the cooler display was an isolated incident that was intended as a joke, although a bad one. The display did not rise to the level of a hostile work environment. Therefore, I am granting defendants' motion for summary judgment on plaintiff's harassment claim.

B. Retaliation

Title VII prohibits retaliating against employee for "oppos[ing]" discrimination prohibited by statute, 42 U.S.C. § 2000e-3, or for opposing conduct the plaintiff "reasonably believed to be unlawful" under the statute. Loudermilk v. Best Pallet Co., 636 F. 3d 312, 315-16 (7th Cir. 2011). To prevail on a retaliation claim under Title VII, plaintiff must prove that (1) he engaged in a statutorily protected activity; (2) he suffered a materially adverse action by his employer; and (3) a causal connection exists between the two. Stephens v. Erickson, 569 F.3d 779, 786 (7th Cir. 2009). Plaintiff contends that Miller was terminated because he complained to Openshaw, Deasy and Jarmuzek about the racist display that was on the cooler and those complaints were passed on to Nesheim. Under plaintiff's theory, Openshaw and Jarmuzek were especially upset and annoyed by Miller's complaints and responded by critiquing Miller's work unfairly. Openshaw then reported these unfair and false criticisms of Miller to Nesheim, thereby causing Nesheim to terminate Miller.

Defendants have not argued that Miller did not engage in a protected activity under

Title VII, so I will not consider that element of plaintiff's claim. Pourghoraishi v. Flying J, Inc., 449 F.3d 751, 765 (7th Cir. 2006) ("The party opposing summary judgment has no obligation to address grounds not raised in a motion for summary judgment."). Defendants do argue that Miller did not suffer an adverse action, but that argument is frivolous. Miller's termination was clearly an adverse action.

The closer question is whether plaintiff adduced sufficient evidence to allow a reasonable jury to find that Miller was fired because of his complaints about the cooler display. Leitgen v. Franciscan Skemp Healthcare, Inc., 630 F.3d 668, 673 (7th Cir. 2011) (to establish retaliation under Title VII, plaintiff must establish causal connection between protected activity and adverse employment action). Plaintiff points to several pieces of evidence that it says support such a finding. First, Miller was fired just three weeks after his complaints to Openshaw, Deasy and Jarmuzek about the October 1 cooler display, and Nesheim admitted that although he had considered firing Miller before October 1, he made the final decision to fire Miller after October 1 and on the basis of input from Openshaw and Deasy. Further, plaintiff adduced evidence showing that Miller had never been warned, counseled, reprimanded or disciplined about his attitude or his work performance before the cooler display incident. Rather, according to Miller's version of events, Openshaw and Jarmuzek began "nit-picking" Miller only after he complained about the cooler display and accused Jarmuzek of being racist. In light of this sequence of events, a jury could conclude reasonably that Miller's termination was related causally to his complaints about the cooler display. Loudermilk, 636 F.3d at 315 ("Occasionally . . . an adverse action comes so close

on the heels of a protected act that an inference of causation is sensible."); see also Magyar v. St. Joseph Regional Medical Center, 544 F.3d 766, 772 (7th Cir. 2008) ("This court has found a month short enough to reinforce an inference of retaliation.").

Defendants are correct that temporal proximity alone is generally not sufficient to imply causation and create a triable issue of fact. Kasten v. Saint-Gobain Performance Plastics Corp., 703 F.3d 966, 974 (7th Cir. 2012). However, in addition to the evidence of suspicious timing, plaintiff presents evidence of ambiguous statements regarding the reasons for Miller's discharge. Although Nesheim provided Miller a written explanation for his termination, neither Nesheim nor Deasy could provide more than one or two specific examples of Miller's purported attitude problems during their depositions. Additionally, Deasy admitted that although Miller complained about his coworkers or supervisors, all of the cooks complained about each other and Deasy actually agreed with several of Miller's complaints. During his deposition, Nesheim provided a wholly new rationale for Miller's termination, stating that Miller was fired in part because his salary was too high and the restaurant was struggling. Because neither Nesheim nor Deasy was able to articulate clearly the reasons for Miller's discharge, a reasonable jury could infer that the purported reasons were pretextual. Volovsek v. Wisconsin Department of Agriculture, Trade & Consumer Protection, 344 F.3d 680, 689 (7th Cir. 2003) (jury may infer retaliation if it concludes that employer's reason for adverse employment action was pretextual); Simple v. Walgreen Co., 511 F.3d 668, 671 (7th Cir. 2007) (inconsistent or incoherent statements are evidence of pretext).

Finally, both Deasy and Nesheim admitted that the restaurant had a progressive discipline policy and that generally, an employee received verbal and written reprimands or discipline before being terminated. Nonetheless, Miller did not receive any formal discipline before his termination and Nesheim did not follow the progressive discipline policy when terminating him. A reasonable jury could infer that Nesheim's failure to follow the progressive discipline policy or provide Miller with any warning about his termination is evidence that the real reason Miller was fired was because of his complaints about the cooler display, and not because of his purported attitude problem. Davis v. Wisconsin Dept. of Corrections, 445 F.3d 971, 976-77 (7th Cir. 2006) (failure to follow progressive discipline policy is evidence of pretext); Rudin v. Lincoln Land Community College, 420 F.3d 712, 723 (7th Cir. 2005) (employer's failure to follow its own employment policies can constitute circumstantial evidence of retaliation).

Defendants argue that even if Openshaw or Jarmuzek wanted Miller to be fired because of his complaints about the cooler display, a jury could not reasonably conclude that Nesheim wanted Miller to be fired because of his complaints. However, Nesheim testified that he terminated Miller on the basis of discussions with Openshaw and Deasy, and Jarmuzek testified that he had discussions with Openshaw about Miller's work performance and attitude after the display. Even if Nesheim had no retaliatory motive, defendants may be liable for retaliation under Title VII if Nesheim was "manipulated by a subordinate who does have such a motive and intended to bring about the adverse employment action." Cook v. IPC International Corp., 673 F.3d 625, 628 (7th Cir. 2012). As explained in Staub v.

Proctor Hospital, 131 S. Ct. 1186, 1193 (2011), "[s]ince a supervisor is an agent of the employer, when he causes an adverse employment action the employer causes it; and when discrimination is a motivating factor in his doing so, it is a 'motivating factor in the employer's action.'"

In sum, plaintiff may not have the strongest case of retaliation, but it has enough to survive defendants' motion for summary judgment on this claim. A reasonable jury could find a causal link between Miller's complaints about the cooler display and his termination. Accordingly, I am denying defendants' motion for summary judgment on plaintiff's retaliation claim.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Northern Star Hospitality Inc., d/b/a Sparx Restaurant, Northern Star Properties, LLC, and North Broadway Holdings, Inc., dkt. #41, is GRANTED IN PART and DENIED IN PART. The motion is GRANTED with respect to plaintiff Equal Employment Opportunity Commission's harassment claim. The motion is DENIED in all other respects.

Entered this 9th day of May, 2013.

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