

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

FRANK T. WHITEHEAD,

Plaintiff,

v.

JAYSON REYNOILDS and WOODLINE
MFG, INC.,

Defendants.

OPINION AND ORDER

13-cv-490-wmc

Plaintiff Frank T. Whitehead alleges that the plant manager at his former employer sexually harassed and assaulted him. Whitehead asks for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. From the financial affidavit Whitehead has provided, the court concluded that he was unable to prepay the full fee for filing this lawsuit. Whitehead has since made the initial partial payment of \$2.30 required of him under § 1915(b)(1). While Whitehead was incarcerated at the time he filed the complaint, he does not seek “redress from a governmental entity or officer or employee of a governmental entity.” 28 U.S.C. § 1915A. Instead, Whitehead seeks to bring claims against private actors, unrelated to his present incarceration.

Still, because Whitehead seeks to proceed *in forma pauperis*, the court must screen his complaint and determine the proposed action is (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). For the reasons that follow, the court will grant Whitehead leave to proceed on a claim for hostile work

environment in violation of Title VII, 42 U.S.C. § 2000e, against his former employer WoodLine MFG., Inc., and a state law tort claim for battery against Jayson Reynolds.

ALLEGATIONS OF FACT

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). In his complaint, Whitehead alleges, and the court assumes for purposes of this screening order, the following facts:

Frank T. Whitehead is currently incarcerated at Stanley Correctional Institution. Jayson Reynolds is the plant manager at WoodLine MFG., Inc. in Superior, Wisconsin. WoodLine previously was Whitehead's employer.

Beginning in 2007, Reynolds started making "sexual comments" about Whitehead's hands and "privates" in Reynolds' office and in the lunch or break room. (Compl. (dkt. #1) p.3.) When other employees allegedly "started cracking jokes," Whitehead complained, but Reynolds told him that they were 'just playing [and] stop being soft.'" (*Id.* at pp.3-4.) Whitehead repeatedly asked Reynolds to stop, but he did not. Whitehead alleges that this harassment continued through 2008.

In July or August 2009, Whitehead alleges that Reynolds sexually assaulted him at Reynolds' mother's home in Virginia, Minnesota. Reynolds then allegedly told him that "he was my boss," and if Whitehead said anything, he would be fired. (*Id.* at p.4.) Reynolds also allegedly said that no one would believe his "black ass." (*Id.* at p.6.)

Whitehead did not respond, but instead attempted to maintain a friendship with Reynolds.

After that incident, Reynolds allegedly continued to say “sexual things in the lunch room, his office, and even in the plant . . . about my ra[]ce, my hands size and my private parts.” (*Id.* at p.6.) Sometime in 2010, Whitehead alleges that he returned to Reynolds’ mother’s house and that he was “choked” because Whitehead refused to have a “threesome with [Reynolds] and this stripper name[d] Carmen from Duluth, Mn.” (Compl. (dkt. #1) p.4; *id.* at pp.6-7.) During this same time period, Whitehead alleges that Reynolds would also call him into his office and push him up against the wall and grab his privates. During these incidents, Reynolds again threatened to fire Whitehead if he told anyone, and said “no one will believe your black ass.” (Compl. (dkt. #1) p.7.)

In 2011, one night after he had gone out to various bars with Reynolds, they went to WoodLine to retrieve Reynolds’ motorcycle. While there, Reynolds allegedly put his hand down Whitehead’s pants and touched his privates and sexually assaulted him. Whitehead managed to push Reynolds off of him and hid until he saw Reynolds departing. (*Id.* at p.8.) Whitehead alleges that at some point, he told “Gill,” Reynolds’ boss about this incident. Gill allegedly said that he would “take care of it” and thanked Whitehead for telling him. (*Id.* at pp.8-9.)¹

On January 3, 2012, Reynolds called him into his office and said, “I told you, you[‘re] black and I’m right white[.] No one will ever believe you boy.” (*Id.* at p.9.)

¹ Whitehead also alleges that he filed a complaint in 2011 with “Eric M., the plant manager.” (Compl. (dkt. #1) p.9.)

Reynoilds then said that he could “fire him right now, but if you play alon[g.] we can work something out.” (*Id.*)

Whiteheads seeks compensatory damages and \$3.5 million in punitive damages, as well as criminal charges against Reynoilds. (*Id.* at p.10.)

OPINION

I. Possible Federal Law Claims

This is a court of limited jurisdiction. As such, this court generally has jurisdiction over cases: (1) presenting a federal question (*i.e.*, asserting a federal constitutional or statutory claim), 28 U.S.C. § 1331; or (2) where the plaintiff is a citizen of a different state than the defendant and the amount in controversy exceeds \$75,000, 28 U.S.C. § 1332(a). From the face of the complaint, it appears that all parties are citizens of the State of Wisconsin. Therefore, the only available basis for jurisdiction over Whitehead’s claims would be that of a federal question.

In the section of the complaint requesting that plaintiff state his legal theory, Whitehead lists Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, and constitutional violations, in particular an equal protection claim and a “class of one” equal protection claim, citing to *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Whitehead cannot bring a constitutional challenge -- an equal protection claim or any other claim -- against private actors, like defendants here. In order to constitute state action under 42 U.S.C. § 1983, “the [constitutional] deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by

the state or by a person for whom the State is responsible . . . [and] the party charged with the deprivation must be a person who may fairly be said to be a state actor.” *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982). There is nothing in the complaint that would support finding Reynolds or WoodLine MFG., Inc. to be state actors.

This means that Title VII of the Civil Rights Act of 1964 is Whitehead’s only possible avenue for federal relief. Title VII makes it unlawful for “an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.” 42 U.S.C. § 2000e-2(a)(1). Sexual discrimination under Title VII encompasses sexual harassment, because “when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). Title VII protects both men and women, and the prohibition on sexual harassment extends to instances where the harasser and victim share the same sex. *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998). Harassment is actionable “to the extent that it occurs ‘because of’ the plaintiff’s sex.” *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1007 (7th Cir. 1999) (citing *Oncala*, 523 U.S. 75).

To plead a hostile work environment claim generally, Whitehead must allege that (1) he was subjected to unwelcome harassment; (2) the harassment was based on his sex; (3) the harassment was sufficiently severe or pervasive so as to alter the conditions of his employment and create a hostile or abusive atmosphere; and (4) there is a basis for employer liability. *Luckie v. Ameritech Corp.*, 389 F.3d 708, 713 (7th Cir. 2004). To be sufficiently hostile or abusive, the work environment must be “both objectively and

subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998).

Taking Whitehead’s allegations as true -- as the court must at this stage in the proceedings -- Whitehead has sufficiently alleged each element. The complaint alleges that Whitehead was subjected to sexual harassment and assaults, including rape, over a four or five year period by the plant manager at his place of employment. Whitehead also alleges that he was targeted by Reynolds as a black man, which is sufficient -- at this stage -- to allege that the harassment was because of his sex, and perhaps because of his sex *and* race. Whitehead’s allegations that he was also continually harassed and touched in a sexual way (if not assaulted) at his place of employment, and that he was threatened if he told anyone about the harassment, is sufficient to allege that the harassment was severe *and* pervasive. *See Lambert v. Peri Formworks Sys., Inc.*, 723 F.3d 863, 868 (7th Cir. 2013) (noting certain factors to consider in determining whether conduct is sufficiently severe or pervasive, including frequency or conduct, whether it is physically threatening, and whether it was directed at the plaintiff).

In addition, Whitehead alleges that as his boss Reynolds threatened to fire him on several occasions and subjected him to ongoing sexual harassment and assault, as well as that Whitehead informed two other members of the management of the company of Reynolds’s harassment and assault. *See Lambert*, 723 F.3d at 866 (“An employer is strictly liable if a supervisor harasses the employee and the employer cannot establish the affirmative defense recognized in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.

Ct. 2257, 141 L.Ed.2d 633 (1998), when a co-worker harasses an employee, the employer is liable only if the employer is negligent in discovering or remedying the harassment.”).

Whitehead also alleges in his complaint that he was the only African American at the plant and was not included in a video made about WoodLine. Presumably this allegation is meant to bolster Whitehead’s claim of racial harassment, but to the extent Whitehead is attempting to allege a separate race discrimination claim, he must allege an adverse employment action because of that discrimination. *See, e.g., Burks v. Wis. Dep’t of Transp.*, 464 F.3d 744, 751 n.3 (7th Cir. 2006). WoodLine’s failure to include Whitehead in a video about the company does not constitute an adverse employment action. *See Lavalais v. Vill. of Melrose Park*, 734 F.3d 629, 634 (7th Cir. 2013) (“[A] materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.”) (internal citation, quotation marks an emphasis omitted).

Finally, while the court will allow Whitehead to proceed on a Title VII hostile work environment claim against his former employer Woodline Mfg., Inc., Whitehead may not proceed on this claim against Reynolds. *See, e.g., Robinson v. Sappington*, 351 F.3d 317, 332 (7th Cir. 2003) (“It is only the employee’s employer who may be held liable under Title VII.”).

II. State Law Claims

Pursuant to 28 U.S.C. § 1367, the court may exercise its supplemental jurisdiction “over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article II of the United States Constitution.” Here, Whitehead’s allegations of sexual assault on the part of Reynolds also state a tort claim for battery under Wisconsin law.

Under Wisconsin law, “[b]attery is defined as a harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such contact, or apprehension that such a contact is imminent.” *Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 320 n.3, 565 N.W.2d 94, 96 n.3 (1997) (finding teenage parishioner’s allegations of sexual assault by a priest describe a “sexual battery”). Accordingly, the court also will grant Whitehead leave to proceed on a claim of battery or sexual battery against defendant Jayson Reynolds.

ORDER

IT IS ORDERED that:

- 1) Plaintiff Frank T. Whitehead is GRANTED leave to proceed on his hostile work environment claim in violation of Title VII, 42 U.S.C. § 2000e, against defendant Woodline Mfg., Inc.
- 2) Plaintiff is GRANTED leave to proceed on a state law claim for battery against defendant Jayson Reynolds.
- 3) The summons and complaint are being delivered to the U.S. Marshal for service on defendants.
- 4) For the time being, plaintiff must send defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendant, he should serve the lawyer directly rather than

defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendant or to defendant's attorney.

- 5) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 12th day of November, 2014.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge