IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROBERT E. ALEXANDER,

Plaintiff,

v.

WISCONSIN DEPARTMENT
OF HEALTH AND FAMILY SERVICES,
SUSAN MORITZ, CLAIRE NAGEL,
DONNA CARLSON, ARLENE MOUAR,
PATSY VILLWOCK, PAUL SKALLON,
BRIAN FANCHER, ROBIN GRUCHOW,
GEORGE BANCROFT, GERALD DYMOND,
KITTY JURGENS FRIEND
AND STEVEN WATTERS,

Defendants.

OPINION AND
ORDER

99-C-0429-C

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This is a civil action for monetary and injunctive relief in which plaintiff Robert E. Alexander originally contended that defendants Wisconsin Department of Health and Family Services, Susan Moritz, Claire Nagel, Donna Carlson, Arlene Mouar (correctly, Moura), Patsy Villwock, Paul Skallon (correctly, Scallon), Brian Fancher, Robin Gruchow, George Bancroft, Gerald Dymond, Kitty Jurgens Friend and Steven Watters discriminated against him and

harassed him at his workplace because of his race. Subject matter jurisdiction is present. See 28 U.S.C. § 1331.

Plaintiff has now limited his claims against defendant Wisconsin Department of Health and Family Services to a claim for discrimination and retaliation under Title VII of the Civil Rights Act of 1964, as amended, stemming from a ten-day suspension without pay arising from an incident that occurred on February 29, 1996, and from a suspension with pay and subsequent termination arising out of an incident on October 24, 1996. In addition, plaintiff raises claims under 42 U.S.C. §§ 1981 and 1983 against defendants Moritz, Carlson and Gruchow for the two adverse employment actions and for a five-day suspension arising out an incident that occurred on August 3, 1995. Plaintiff has abandoned all other claims against all other defendants. Accordingly, all claims against defendants Nagel, Moura, Villwock, Scallon, Fancher, Bancroft, Dymond, Jurgens and Watters will be dismissed pursuant to Fed. R. Civ. P. 41(a).

Now before the court is defendants' motion for summary judgment. Because I find that plaintiff has not produced evidence that would allow a trier of fact to reasonably conclude that he was disciplined because of his race or in retaliation for complaining about discrimination, defendants' motion will be granted.

Before reciting the undisputed facts, a word is warranted regarding their source. Plaintiff

objects to many of defendants' proposed facts by stating that they are "self-serving." In an adversarial system of litigation, it is not surprising that parties propose facts that are in their interest. As is explained in this court's Procedures to be Followed on a Motion for Summary Judgment, a copy of which was given to each party with the preliminary pretrial conference order on September 28, 1999, if the nonmoving party wishes to place the movant's proposed fact in dispute, it must do so by explaining the basis of the dispute and citing to record evidence that places the proposed fact in doubt. Merely noting that a proposed fact is self-serving is insufficient to place it into dispute. Accordingly, defendants' proposed facts to which plaintiff objects solely on the basis that they are self-serving have been accepted as undisputed.

Defendants have moved to strike portions of the affidavits of some of plaintiff's witnesses because they contend that those witnesses lack personal knowledge of the matters about which they have testified. Motions to strike are disfavored because they delay proceedings. See Heller v. Financial, Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1294 (7th Cir. 1989); U.S. v. 416.81 Acres of Land, 514 F.2d 627, 631 (7th Cir. 1975). Defendants are correct that "affidavits must be based on personal knowledge and must set forth the facts in a manner that would be admissible in evidence." Davis v. City of Chicago, 841 F.2d 186, 188 (7th Cir. 1988). However, just as in Davis, affidavits not based on personal knowledge are best dealt with during the court's ruling on summary judgment rather than through motions to strike. Defendants

properly dispute all of plaintiff's proposed facts that rely on the allegedly objectionable parts of the affidavits. Proposed facts that are based on testimony of witnesses who lack personal knowledge of the matters about which they testify are disregarded when the court makes findings of undisputed fact. Therefore, defendants' motion to strike is unnecessary and will be denied.

From facts proposed by the parties, I find the following to be material and undisputed.

## UNDISPUTED FACTS

Plaintiff is an African-American. He was employed as a food service worker by the Department of Health and Family Services in the Central Wisconsin Center, a care center for developmentally disabled residents. During plaintiff's employment, he never received a bad employment evaluation. The Center employed approximately 1000 employees who cared for approximately 470 residents. The food service department employed approximately 100 people. During his tenure, plaintiff was supervised by several people, including defendant Carlson and her supervisor defendant Moritz. Other supervisors included defendants Moura, Scallon, Villwock and Nagel.

In March 1993, plaintiff filed a discrimination complaint with the Center's affirmative action office, alleging that co-worker Leroy Ganser had made racially derogatory comments.

Ganser made such statements to plaintiff as “kiss my lily white ass,” “black people don't like to work,” “rap music is jungle bunny music” and “blacks should still be slaves.” The affirmative action office issued a report in June 1993, concluding that the comments were harassment. However, because Ganser was on medical leave, he was not disciplined. Ganser made no more harassing comments when he returned.

In March 1993, three co-workers put towels on their heads, made bugging eyes and stated in a southern drawl that they were “Aunt Jemima.” Plaintiff complained about the incident to defendant Moritz but would not identify the employees involved. Management did not learn their identities until plaintiff filed a discrimination complaint with the Personnel Commission in 1996. After plaintiff filed his complaint, defendant Moritz interviewed one of plaintiff's co-workers involved in the incident, who explained that one of her co-workers was wearing a bandana while doing dishes and another commented that the style in which she wore it resembled that of “that pancake lady, Aunt Jemima.” Defendant Moritz concluded the incident was not directed toward plaintiff and took no further action.

In September 1994, plaintiff requested a two-week leave of absence without pay because he was in jail. The center did not allow personal leave for jail time, but plaintiff was allowed to return to work when he got out of jail and was not disciplined.

In 1994, an African-American friend of plaintiff's was visiting him at his work site.

Defendant Carlson told plaintiff's friend to leave. By rule, no employees or visitors are allowed in the production or service area without a hair net. Plaintiff had observed white co-workers visited by friends who were not wearing hair nets and who were not asked to leave. Defendant Carlson has asked white employees and their friends to leave under similar circumstances.

In 1994, plaintiff's co-worker Helen Klein had a party at her home to which she invited some co-workers but not plaintiff. Co-worker Phyllis Larson told plaintiff he was not invited because of his race. None of the defendants were aware of the party incident until plaintiff filed his complaint with the Personnel Commission in 1996. On November 20, 1996, defendant Moritz interviewed Klein about the incident. Klein reported that she told plaintiff that she could not invite him because her sister-in-law's father disliked African-Americans and she did not want to create a scene at the party. Defendant Moritz did not discipline Klein because she concluded that Klein had not intended to insult plaintiff and the incident had occurred long before and did not occur during work time or at the Center.

In 1995, plaintiff's co-worker Randy Severin told him that two "niggers" had ripped him off, but that plaintiff was not a "nigger." None of the managers or supervisors were aware of Severin's use of the word. Although plaintiff told affirmative action officer Rudy Bentley about the remark at some point, it was not part of the informal complaint plaintiff filed with Bentley in 1996.

August 3, 1995 was a very hot day. Defendant Scallon was supervising the food line. He gave employees regular breaks in the air-conditioned break room. Plaintiff did not return to the line immediately when defendant Scallon called upon him to do so because he felt sick. Co-worker Severin told plaintiff that he wanted to get started and said to plaintiff, "If you're not feeling well, why don't you fucking go home." Severin and plaintiff exchanged heated words. Defendant Scallon told plaintiff to go to a different part of the kitchen to cool down, but plaintiff put down a chair near Severin and stared at him. Defendant Scallon told plaintiff to move but plaintiff refused. Severin walked off saying, "I'm not taking this." Klein and another co-worker, Lenore Ryan, began to cry and stated that they were afraid of what plaintiff might do. Plaintiff then moved, but continued to stare at Severin. Severin asked defendant Scallon to keep plaintiff away from him.

Defendant Scallon later saw plaintiff walking away from Severin's car. Another worker told Scallon that plaintiff had threatened to kill Severin. Plaintiff did not threaten to kill Severin. Severin called defendant Scallon at home that night and complained that plaintiff had been throwing kisses and making faces.

Defendant Scallon reported the incident to defendant Moritz. Defendant Moritz investigated the incident, set a meeting with plaintiff to discuss the incident and recommended initially that plaintiff be terminated. During the preliminary investigation of the Severin

incident, defendant Moritz told plaintiff that plaintiff was the only one who had a problem with his race. Following a pre-disciplinary meeting with plaintiff and his union steward, plaintiff was given a five-day suspension because defendant Moritz believed he was the aggressor in the incident. Severin was not disciplined.

In 1990, two white employees had a fight that included physical contact. One employee received a one-day suspension and the other received a written reprimand. The Center has a lower tolerance for violence today than in 1990 and the employees would have received greater discipline today.

In February 1996, plaintiff asked defendant Moritz for a meeting with her and defendant Carlson because he believed defendant Carlson was harassing him. Defendant Moritz told plaintiff to make a list of his allegations with specific issues and dates and then she would set up the meeting. Plaintiff never did so and no meeting was scheduled. Defendant Moritz did not usually require a written list of allegations before scheduling a meeting.

On February 29, 1996, defendant Carlson received a report that plaintiff had not strapped any of the food carts, which was part of his job that day. Because defendant Carlson believed plaintiff would deny the claim if she asked him about it, she went to observe him at work. Defendant Carlson did not see plaintiff strap any carts, although he had strapped approximately seven before she arrived. Defendant Carlson told plaintiff to strap the carts.

In response, plaintiff asked defendant Carlson why she did not strap them herself. In a loud voice, defendant Carlson told plaintiff to strap the carts and that failure to do so was insubordination. When plaintiff did not strap the carts immediately, defendant Carlson told him to leave. Plaintiff started to strap the carts, but again defendant Carlson ordered him to leave. Defendant Carlson reported the incident to defendant Moritz. Defendant Moritz investigated the incident and held a pre-investigatory meeting with plaintiff, who denied wrongdoing. Defendant Moritz believed defendant Carlson and recommended that plaintiff be disciplined. Plaintiff received a ten-day suspension for insubordination.

Defendant Moritz may have asked food service workers to keep an eye on plaintiff. She may have asked defendants Carlson, Moura and Nagel to report to her on plaintiff's activities.

On March 1, 1996, defendant Moritz asked defendants Carlson and Moura to look for plaintiff. Defendant Carlson observed plaintiff enter the men's locker room holding up his apron in front of him. Defendant Moura told defendant Carlson she had just seen plaintiff leaving the milk cooler. Defendant Carlson thought that plaintiff may have been carrying milk in his apron. She obtained defendant Moritz's permission to enter the locker room and found two empty half-pint chocolate milk containers, still cold to the touch, in the waste basket. Defendants Carlson and Moura went to the milk locker and found two half-pint chocolate milk containers missing. Defendant Carlson reported these events to defendant Moritz. Defendant

Moritz asked plaintiff whether he drank the milk and plaintiff said that he had not. Plaintiff was not disciplined or reprimanded.

On March 4, 1996, a pre-disciplinary meeting was held in regard to the food cart incident. Usually such a meeting is attended by the employee, a union steward and the employee's supervisor. Plaintiff brought with him two union representatives, who were also witnesses to the incident, Sandra Bohling and Jalene Roth, as well as a lawyer from the NAACP and department affirmative action officer Bentley. Defendant Moritz then brought defendants Bancroft and Gruchow to the meeting. Before the meeting, defendant Moritz had spoken with defendant Carlson several times, but she had not spoken with plaintiff. Bohling and Roth, who had witnessed the incident, believed plaintiff had been treated unfairly by defendant Carlson.

On the same day, plaintiff filed an informal complaint of discrimination on the basis of race against defendants Carlson and Moritz with affirmative action officer Bentley. In his complaint, plaintiff alleged that (1) in 1992, before his employment, co-worker Sharon Novotny had had her daughter verify whether plaintiff had a criminal record; (2) on October 3, 1994, plaintiff was denied a leave of absence; (3) in 1994, a black employee visiting plaintiff at his work site was ordered to leave by defendant Carlson; (4) in 1994, plaintiff passed the Food Service Worker 3 exam, but defendant Carlson told him he would have to take it again; (5) in about January 1995, and on other occasions, defendant Carlson touched plaintiff's face;

(6) about the same time, defendant Carlson grabbed plaintiff by his shirt; (7) in August 1995, plaintiff received a five-day suspension; (8) on about September 21, 1995, defendant Moritz told plaintiff, as she had on previous occasions, that he had a problem with his race; (9) on February 29, 1996, defendant Carlson charged plaintiff with insubordination for failing to strap the food carts when she ordered him to do so; (10) on March 1, 1996, defendants Carlson and Moura had searched the men's locker room and implied that plaintiff had stolen and drunk two cartons of milk; (11) at some time, plaintiff reported to defendant Moritz that two female co-workers were in the men's room; (12) a daybook was maintained that listed plaintiff's alleged work violations exclusively; (13) defendant Carlson displayed favoritism toward members of "the clique," (a group of workers that did not include plaintiff); and (14) defendant Carlson had subjected plaintiff to discriminatory behavior for the last two years.

Plaintiff did not pass the Food Service Worker 3 exam; he failed it because defendant Moritz claimed she had observed him cheating by referring to the Diet Manual during the exam. Plaintiff did not ask to take the exam again. Plaintiff has a criminal record of which managers, supervisors and co-workers in the food service department were aware, but they did not obtain that information from either Novotny or her daughter and did not ask them to run a criminal history check on plaintiff. Supervisors and managers in the food service department at the Center used a "daybook" to keep track of events during the day and to communicate

with other supervisors and managers. No daybook was kept on plaintiff alone, although another employee told him that there was.

In April and May 1996, Bentley sent questionnaires regarding plaintiff's informal complaint of discrimination to defendants Carlson and Moritz. Defendant Carlson was given the option of answering the questionnaire in person. Defendant Fancher was the human resources director at the Center. Defendant Carlson brought the questionnaire to defendant Fancher seeking advice in how to respond. Defendant Fancher read the questions and became concerned because he considered the questions hostile and somewhat accusatory. In defendant Fancher's experience, it was unusual for an affirmative action officer to use a written questionnaire as opposed to interviewing people. In Bentley's experience, the procedure was not unusual.

Defendant Fancher asked Bentley about his procedure and plaintiff's complaint. Bentley asked defendant Fancher to put his questions in writing and to explain his need to know the answer to his inquiries. Defendant Fancher directed defendants Moritz and Carlson not to answer the questionnaire until defendant Fancher received guidance from the department leadership regarding the appropriateness of Bentley's methods. As a result, there was a delay in answering the questionnaire. Defendant Gruchow was the Center's personnel specialist. He also believed Bentley's investigation procedure was not regular. Ultimately,

Bentley wrote up his investigation without input from defendants Carlson and Moritz.

Plaintiff's co-worker Irene Sanderson told defendant Moritz that she felt constantly threatened and intimidated by plaintiff. Because Sanderson had given plaintiff her phone number and invited him to her home on one occasion, plaintiff believed she was romantically interested in him. Defendant Moritz called a meeting with plaintiff and Sanderson. Plaintiff was surprised at the meeting because he thought it would be about an incident between him and another co-worker, Joyce Kamrath. Defendant Moritz believed that plaintiff and Sanderson worked through their differences at the meeting. Following a tray line incident with Sanderson (it is unclear whether from the proposed facts whether this is the same incident that led to the meeting with defendant Moritz), defendant Carlson would not allow plaintiff to use the phone to contact Bentley.

In a memorandum to division administrator Tom Alt dated June 20, 1996, Bentley reported the results of his investigation of plaintiff's complaint. Bentley concluded that plaintiff had been subjected to harassing behavior and recommended discipline. The department did not take any disciplinary action based on Bentley's report because it found that it was incomplete.

On July 15, 1996, co-worker Ruth Gunderson showed plaintiff a picture of a bulldog and told him it looked like him. Plaintiff did not tell Gunderson he was offended, although his

face showed his offense. Plaintiff reported the incident to Bentley, but defendant Moritz did not learn about it until plaintiff filed his complaint with the personnel commission. Then, on November 14, 1996, defendant Moritz interviewed Gunderson. Gunderson stated that she meant no harm, that she and plaintiff both liked dogs and that she thought the picture evoked an image of strength. Because defendant Moritz believed Gunderson did not mean to demean plaintiff, she took no further action.

On July 16, 1996, while he was on his lunch break, co-worker Don Rebholz told plaintiff that there was a picture of him in the newspaper, then showed plaintiff a picture of an orangutan. Plaintiff told Rebholz that he was offended and reported the orangutan incident to Bentley, but no supervisors or managers at the Center were aware of the incident until plaintiff filed his personnel commission complaint. Then, on November 14, 1996, defendant Moritz interviewed Rebholz about the matter. Rebholz stated that he and plaintiff were good friends and always joked in that manner and that he had not intended the joke as a comment on plaintiff's race. Because defendant Moritz believed that Rebholz had not intended to harass plaintiff, she took no further action.

On July 18, 1996, defendant Moritz met with plaintiff and co-worker Melody Stumpf at Stumpf's request. Plaintiff stated that Stumpf yelled at him not to stare at her. Plaintiff denied staring at Stumpf. Stumpf claimed it was not the first time plaintiff had done it. They

agreed to work together; they also agreed that Stumpf would let plaintiff know when she was unhappy with some aspect of his behavior.

Bohling warned management on numerous occasions that Stumpf and other members of "the clique" were intent on harassing plaintiff with false accusations.

In a memorandum to the food service unit dated August 27, 1996, the department affirmative action officer stated that each employee was responsible for "ensuring a harassment free atmosphere" in the department. In September 1996, the Center formalized its "zero tolerance" for violence policy. The union representative received a copy of the policy, and plaintiff learned about it through his representative.

In the fall of 1996, a co-worker told plaintiff that defendant Carlson had asked whether plaintiff had been sampling food improperly.

Also in the fall of 1996, co-worker Lenore Ryan said something to plaintiff about attending a black wedding covered in "Shinola." Plaintiff told Bentley about the incident, but no managers or supervisors at the center were aware of it until plaintiff filed his personnel commission complaint. On November 11, 1996, defendant Moritz asked Ryan about the incident. Ryan told Moritz she had told plaintiff she would not mind attending a black wedding even if they (presumably, African-Americans at the imaginary wedding) wanted her to wear shoe polish. Ryan stated that plaintiff had laughed and asked what kind, to which she

replied, "Shinola." Defendant Moritz took no disciplinary action against Ryan because she did not believe Ryan intended to insult or offend plaintiff.

On October 9, 1996, plaintiff filed a charge of discrimination with the Wisconsin Personnel Commission, alleging that he was subjected to discrimination and harassment at the Center because of his race. The department learned of the complaint on October 23, 1996. The complaint was cross-filed with the EEOC and plaintiff received a right to sue letter.

On October 12, 1996, defendant Moritz would not allow plaintiff to select his vacation time because she believed it was not his seniority turn until November 7, 1996, to schedule vacation. Three union representatives told plaintiff he should have been allowed to schedule his vacation. Defendant Fancher asked defendant Moritz to allow plaintiff to schedule his vacation on November 20, 1996. Plaintiff did so and received his choices.

In about October 1996, Carlson and co-workers believed they had observed plaintiff and co-worker Debbie Kohl leaving work early. When defendant Moritz spoke to Kohl about it, Kohl apologized and stated that she had not realized that it was early. When defendant Moritz spoke to plaintiff about it, plaintiff denied he had left early and claimed that Carlson was lying about him because he is black. Defendant Moritz reminded plaintiff not to leave before the end of his shift.

On October 24, 1996, Stumpf accused plaintiff of making a throat-slashing gesture at

her (plaintiff denies ever making such a gesture). No one was near them when the gesture was allegedly made. Stumpf told defendant Nagel, who informed defendant Moritz. Defendant Moritz called defendant Gruchow, who called plaintiff to the personnel office and told him he had been accused of making a threatening gesture and that he would have to leave the premises while there was an investigation. Defendant Gruchow placed plaintiff on paid administrative leave.

On October 30, 1996, plaintiff, his wife, union steward Bohling, and defendants Bancroft, Gruchow and Moritz held an investigatory meeting. Center management arranged for security personnel to stand by at the meeting, an occasional practice during tense personnel meetings to ensure employee safety. Plaintiff denied knowing anything about any threat toward Stumpf. Plaintiff stated he knew he was accused of making a throat-slashing gesture because defendant Gruchow had told him that on October 24. However, defendant Gruchow denied having told plaintiff that the threatening gesture was a throat-slashing one.

Bohling again warned defendants Moritz and Gruchow that Stumpf was intent on harassing plaintiff with false accusations. However, defendant Moritz had believed since the end of 1993 that plaintiff's problems were not because his co-workers were against him. Bohling reminded defendants that plaintiff frequently touched his beard guard at his throat while working. She suggested that Stumpf may have seen plaintiff adjusting his beard guard and

misconstrued it as a threatening gesture.

Defendant Gruchow scheduled a meeting with plaintiff for December 9, 1996 to review his discipline, but plaintiff canceled because of car trouble and illness. The meeting was rescheduled for December 10 and then December 11, but plaintiff canceled for the same reasons. Defendant Gruchow spoke with plaintiff's doctor, but the doctor did not provide Defendant Gruchow with a medical excuse. Plaintiff had a medical excuse from his doctor but did not give it to defendants before he was fired. Defendant Gruchow then sent plaintiff a letter asking him to give his response to the investigation in writing. Plaintiff responded in writing.

Plaintiff was terminated on December 17, 1996, because management believed Stumpf's account of the throat-slashing incident and that plaintiff was lying. Management believed plaintiff was not credible because plaintiff knew that he had been accused of making a throat-slashing gesture without having been told so by defendant Gruchow and because there had been a long history of confrontation initiated by plaintiff against co-workers. Because plaintiff had had a five-day and then ten-day suspension, termination was the next step in progressive discipline.

## OPINION

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). All evidence and inferences must be viewed in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). "This standard is applied with added rigor in employment discrimination cases where intent and credibility are crucial issues." Id. at 547 (quoting Sarsha v. Sears, Roebuck, & Co., 3 F.3d 140, 145 (7th Cir. 1995)). However, even in employment discrimination cases, the non-moving party must carry his burden with more than mere conclusions and allegations. See Celotex v. Catrett, 477 U.S. 317, 321-22 (1986). If the non-movant fails to make a showing sufficient to establish the existence of an essential element on which that party will bear the burden of proof at trial, summary judgment for the moving party is proper. See id.

In Wisconsin, a plaintiff alleging discrimination under Title VII must file a complaint with either the Equal Employment Opportunity Commission or the appropriate Wisconsin administrative body within 300 days of the alleged discriminatory conduct. See 42 U.S.C. § 2000e-5(e); Speer v. Rand McNally & Co., 123 F.3d 658, 662 (7th Cir. 1997); Alvey v. Rayovac Corp., 922 F. Supp. 1315, 1326 (W.D. Wis. 1996). On October 9, 1996, plaintiff filed a complaint with the Wisconsin Personnel Commission. Plaintiff has not argued that

defendants' discriminatory conduct created a hostile environment that falls within "continuing violation" doctrine, which "allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period." Selan v. Kiley, 969 F.2d 560, 564 (7th Cir. 1992). Therefore, plaintiff is barred from bringing a Title VII claim for discriminatory conduct occurring 300 days before October 9, 1996.

Plaintiff has challenged only the legitimacy of the suspensions and his firing. Because his five-day suspension occurred more than 300 days before October 9, 1996, he does not contend that defendant department discriminated or retaliated against him under Title VII by that suspension. Rather, he contends that defendants Carlson, Moritz and Gruchow acted wilfully in violation of 42 U.S.C. § 1981, which proscribes interference with the ability of non-whites to make and enforce contracts, and the due process clause of the Fourteenth Amendment (a claim brought via § 1983). In regard to the ten-day suspension and termination, plaintiff contends that defendant department imposed the discipline as a pretext for racial discrimination and in retaliation for complaining about discrimination, in violation of Title VII, and that defendants Carlson, Moritz and Gruchow violated his rights under § 1981 and the due process clause.

Under both Title VII and § 1981, plaintiff may establish a prima facie case of race discrimination through indirect evidence utilizing a modified version of the familiar McDonnell

Douglas burden shifting framework. Defendants concede for purposes of this motion that plaintiff has established a prima facie case on his claims of unlawful discrimination and retaliation. Because plaintiff has established a prima facie case, the burden of production shifts to defendants to produce a legitimate, nondiscriminatory reason for their action. See Perdomo v. Browner, 67 F.3d 140, 144 (7th Cir. 1995). If defendants articulate a nondiscriminatory reason, they have satisfied their burden of production and the modified McDonnell Douglas test is no longer relevant. See id. Plaintiff then assumes his original burden of proof and must establish by a preponderance of the evidence that the defendants' articulated reason is pretextual. See id. At trial, plaintiff would be required to prove both that the legitimate reason articulated by defendants is pretextual and that the real reason was racial discrimination or retaliation. See id. at 145. To preclude summary judgment, however, plaintiff need only establish that defendants' reason is pretextual because a fact finder could infer intentional discrimination or retaliation from an employer's untruthfulness. See id.

Defendants have articulated legitimate, nondiscriminatory reasons for their disciplinary decisions. According to defendants, plaintiff was given a five-day suspension because defendant Moritz believed plaintiff had disobeyed supervisor Scallon's orders and behaved in a threatening manner toward co-worker Severin. Plaintiff was given a ten-day suspension because defendant Moritz believed plaintiff had been insubordinate to defendant Carlson regarding

strapping the carts, following his five-day suspension. Plaintiff was fired because defendant Gruchow believed he had made a threatening gesture toward co-worker Stumpf and had lied about it.

Plaintiff has proffered ample evidence that several of his co-workers were bigots and that their bigotry made his work environment extremely difficult. However, plaintiff has offered no evidence that the disciplinary measures he is challenging were motivated by his race or by his complaints of discrimination rather than by defendants' legitimate belief that such discipline was justified by plaintiff's conduct. Pretext may be established by producing evidence that suggests that defendants did not believe the reasons given for the suspensions and firing. See Ghosh v. Indiana Dept. of Environment Management, 192 F.3d 1087, 1091 (7th Cir. 1999). Plaintiff has not produced such evidence.

1. Five-day suspension

Plaintiff's five-day suspension followed an angry confrontation with co-worker Severin. Plaintiff had ample reason to dislike Severin, who had earlier described certain African-Americans as "niggers" in a conversation with plaintiff (notwithstanding Severin's ham-handed attempt to assure plaintiff that in his opinion plaintiff was not a "nigger"). On the day of the incident that led to plaintiff's suspension, however, plaintiff's behavior was much worse than

Severin's. Severin swore at plaintiff when plaintiff did not obey supervisor Scallon's directive to return to work following his break and the two exchanged angry words. What followed next justified plaintiff's punishment rather than Severin's. Plaintiff placed a chair near Severin and stared at him in a manner apparently intimidating enough to cause two other co-workers to cry in fear of what plaintiff might do next. Severin asked supervisor Scallon to keep plaintiff away from him. Scallon ordered plaintiff to go cool off, but plaintiff refused, causing Severin to leave. Scallon later observed plaintiff at Severin's car in the parking lot. Although it is disputed what, if anything, plaintiff said to Severin in the parking lot, it is undisputed that another co-worker reported to Scallon that plaintiff had threatened to kill Severin. It is also undisputed that plaintiff was blowing kisses and making faces at Severin. Scallon reported the incident to defendant Moritz, who investigated. Initially defendant Moritz wanted to fire plaintiff, but decided on a five-day suspension.

Plaintiff alleges that defendant Moritz discriminated against him because of his race and violated his rights under the due process clause, but plaintiff offers no evidence other than his conclusory statements that Moritz conducted a sham investigation of the incident because she was biased against him because of his race. If some of plaintiff's co-workers (such as Ganser or Severin) had been the decision makers in question, he would have presented sufficient evidence to raise the specter of racial discrimination in the decision to suspend him. But he has produced

no evidence whatsoever that defendant Moritz was a bigot or was motivated by bigotry in her decision making and therefore, that her stated belief that plaintiff was the aggressor in the Severin incident was a lie. Plaintiff argues that the fact that he was punished and Severin was not shows that Moritz was biased against him because of his race, but it is not probative that Severin was not punished; the undisputed facts suggest that defendant Moritz could have concluded reasonably that plaintiff was the aggressor in the incident. Even if defendant Moritz's decision was a bad one, that does not mean that it was bad because of plaintiff's race. "[T]he Due Process Clause does not protect people against ill-considered decisions." Schacht v. Wisconsin Dept. of Corrections, 175 F.3d 497, 504 (7th Cir. 1999).

Plaintiff argues that the evidence establishes that the five-day suspension was unduly harsh because it was the first discipline ever imposed on plaintiff and because it was for a minor offense. Plaintiff is wrong; he has produced no evidence that five-day suspensions were unusual for first offenses involving implicit threats of violence. Although it is undisputed that two white employees who came to blows five years earlier were not suspended, it is also undisputed that defendant department subsequently adopted a stricter policy regarding workplace violence and that the workers would have been punished more severely under that policy.

Plaintiff also appears to claim that defendants Carlson and Gruchow violated his due process rights with regard to this incident, but he has failed to allege facts that they were

involved in any way in the decision to suspend him for this incident.

2. Ten-day suspension

Plaintiff received a ten-day suspension for insubordination following the February 1996 incident in which defendant Carlson ordered him to strap food carts. Plaintiff argues that he and two co-workers who witnessed the incident believed that defendant Carlson's actions were unjustified. In addition, he claims that defendant Moritz conducted a sham investigation by speaking with defendant Carlson about the incident but not with him and that the ten-day suspension was a punishment disproportionate to the wrong committed. Plaintiff claims that through this disciplinary action, defendant department violated his rights protected by Title VII not to be discriminated against because of his race or retaliated against for complaining about such discrimination. In addition, he claims that defendants Carlson, Moritz and Gruchow violated his rights under §§ 1981 and the due process clause of the Fourteenth Amendment.

In support of his claim, plaintiff has offered his opinion and that of two co-workers that the punishments he received were unduly harsh and that defendants were out to get him. Those opinions are insufficient by themselves to allow a trier of fact to conclude reasonably that defendants' proffered legitimate reasons for their actions are "phony." See Plair v. E. J. Brach

& Sons, Inc., 105 F.3d 343, 348 (7th Cir. 1997). Plaintiff's and two co-workers' subjective beliefs that defendants were out to get him are not based on personal knowledge and must be ignored. See Friedel v. City of Madison, 832 F.2d 965, 969-970 (7th Cir. 1987) ("Affidavit testimony that the affiant believes is true but that is not based on personal knowledge must be ignored"). In conformity with Rule 56, I cannot consider such opinions because they fall within the prohibition of "statements outside the affiant's personal knowledge or statements that are the result of speculation or conjecture or merely conclusory." Stagman v. Ryan, 176 F.3d 986, 995 (7th Cir. 1999). That they considered the discipline uncalled for is mere opinion; that they considered defendant Carlson to be motivated by bias is speculation. Those workers attended the pre-disciplinary meeting with plaintiff and at least one of them expressed her opinion to defendant Moritz that defendant Carlson was out to get plaintiff.

Defendant Moritz was entitled to believe either defendant Carlson's version of events or plaintiff's, as long as she did not base her belief on plaintiff's race. Defendant Moritz had undisputed evidence that plaintiff responded to his supervisor's demand that he strap food carts by asking her why she did not do it herself. Defendant Carlson's report of the incident was consistent with plaintiff's earlier refusal to obey defendant Scallon's orders to return to work and to go cool off during the incident that led to plaintiff's earlier suspension. Even if defendant Carlson over-reacted, as plaintiff argues, he has offered no evidence that white

employees who refused to carry out the direct orders of a supervisor were not similarly punished. As for plaintiff's argument that the punishment was excessive, it is undisputed that defendants maintained a progressive disciplinary system that mandated a longer suspension than plaintiff's previous five-day suspension.

In addition, plaintiff has offered no evidence that the ten-day suspension was in retaliation for his complaints of race discrimination. It is undisputed that plaintiff had asked defendant Moritz for a meeting with her and defendant Carlson earlier that month because he believed defendant Carlson was discriminating against him because of his race. (Plaintiff did not file his complaints with the affirmative action officer and the Personnel Commission until after the cart strapping incident.) It is also undisputed that defendant Moritz asked plaintiff to list specific instances of defendant Carlson's allegedly discriminatory conduct in writing before scheduling a meeting, which was a reasonable request given the nature of the charges even if it was not her usual practice, and that plaintiff failed to do so. However, there is no evidence that defendant Carlson was aware of plaintiff's request and there is no reason to conclude she disciplined plaintiff in retaliation for it. In addition, plaintiff has offered no evidence that suggests that defendants Moritz and Gruchow were motivated to retaliate against him because of his complaint about defendant Carlson. In short, plaintiff has not produced sufficient evidence to allow a trier of fact to conclude reasonably that the ten-day

suspension was motivated by his race or in retaliation for his discrimination complaint.

3. Termination

Plaintiff was terminated because defendants believed that he had made a throat-slashing gesture at his co-worker Melody Stumpf. There were no witnesses to the alleged throat-slashing incident. Plaintiff argues that Stumpf was lying in order to curry favor with defendant Carlson and the clique of workers who were allied against him because of his race and that defendants Moritz and Gruchow conducted a sham investigation to build a false case for his termination. In addition, he argues that the termination was in retaliation for his filing a complaint with the Personnel Commission; defendant department learned of the complaint on October 23, 1996, and plaintiff was suspended the next day.

Again, however, plaintiff has offered no evidence to support his conclusions. Rather, he simply argues in conclusory fashion that the discipline "was for no good reason, and management and the three individually-named defendants knew or should have known that." Pltf's Brf. in Opp. to Dfts.' M. for Summ. J., Dkt. # 42, at 8. Why they should have known that is unclear. "Arguments that are not developed in any meaningful way are waived." Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999); see also Finance Investment Co. (Bermuda) Ltd. v. Geberit

AG, 165 F.3d 526, 528 (7th Cir. 1998); Colburn v. Trustees of Indiana University, 973 F.2d 581, 593 (7th Cir. 1992) ("[plaintiffs] cannot leave it to this court to scour the record in search of factual or legal support for this claim); Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs, Benefits Review Board, 957 F.2d 302, 305 (7th Cir. 1992) (court has "no obligation to consider an issue that is merely raised, but not developed, in a party's brief").

A co-worker with whom plaintiff had quarreled in the past reported that plaintiff had made a throat-slashing gesture at her. Plaintiff had earlier been suspended for engaging in threatening behavior toward Severin. Another co-worker, Irene Sanderson, had complained that she felt constantly threatened and intimidated by plaintiff. Even if Stumpf were mistaken or lying, as plaintiff argues, that does not mean that Moritz and Gruchow believed Stumpf simply because of plaintiff's race. Plaintiff's co-worker Roth believed that the investigation was not genuine, but plaintiff offers no specific facts to support a finding to that effect and offers no basis for Roth's opinion other than her unsupported belief. It may be true that defendants were inclined to discount plaintiff's version of events, but that could be true for any number of reasons unrelated to race, including plaintiff's past disputes with management over a number of alleged workplace violations and his past conflicts with co-workers. A trier of fact could not conclude that race was a motivating factor in defendants' decision other than through

speculation.

Not only has plaintiff failed to raise a triable issue of fact to support his claim of discrimination, he has not produced evidence that he was fired in retaliation for filing his discrimination complaints. Although it is undisputed that defendant department became aware of his Personnel Commission complaint the day before he was suspended, plaintiff has not produced evidence that any of the actors involved in his suspension (Stumpf, Moritz and Gruchow) had any knowledge of his complaint before his suspension. Timing can imply retaliation, see McClendon v. Indiana Sugars, Inc., 108 F.3d 789, 797 (7th Cir. 1997), but timing alone is inadequate to overcome defendants' facially reasonable and nondiscriminatory reasons for imposing discipline on plaintiff.

Plaintiff also contends that the discipline violated his due process rights under the Fourteenth Amendment because the investigation and hearing he received were a sham. "Before one may be deprived of a constitutionally protected property interest in one's public employment . . . due process requires that a pretermination hearing be held." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)). Though necessary, such hearings "need not be elaborate." Id. at 545. "In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." Id. (citing Mathews v. Eldridge, 424 U.S. 319, 343 (1976)). The pretermination hearing need not definitively resolve the propriety of the

discharge; rather, it should be an initial check to insure there are reasonable grounds to believe the charges against the employee and that the charges support the proposed action. See id. at 545-46. Essentially, all that is required is notice and an opportunity to respond. See id. at 546. "To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." Id. Plaintiff received notice and a hearing as well as an opportunity to tell his side of the story and to present witnesses before he was terminated. Clearly, this is sufficient to comply with the directive of Loudermill.

A fair and impartial decision maker is a requirement of procedural due process. Withrow v. Larkin, 421 U.S. 35, 46 (1975). This requirement is denied when an administrative decision maker performing a quasi-judicial function has a "personal or financial stake" in the outcome that creates an unacceptably high probability of bias. Hortonville Joint Sch. Dist. No. 1 v. Hortonville Ed. Assoc., 426 U.S. 482, 491-92 (1975). However, administrative adjudicators are entitled to a strong presumption of "honesty and integrity" that a plaintiff alleging unconstitutional bias must overcome. Withrow, 421 U.S. at 46. Plaintiff has offered no evidence to overcome the presumption of honesty and integrity to which defendants are entitled in this case other than his own opinion and those of two co-workers who lacked personal knowledge of defendants' motivations.

In short, plaintiff has produced evidence of bigotry among his co-workers, but no evidence that defendants' articulated legitimate reasons for disciplining him are a pretext for discrimination or retaliation or that defendants violated his rights under § 1981 or the due process clause of the Fourteenth Amendment. Accordingly, defendants' motion for summary judgment must be granted.

ORDER

IT IS ORDERED that:

1. All claims against defendants Clair Nagel, Arlene Mouar (Moura), Patsy Villwock, Paul Skallon (Scallon), Brian Fancher, George Bancroft, Gerald Dymond, Kitty Jurgens Friend and Steven Watters are DISMISSED pursuant to Fed. R. Civ. P. 41(a); and

2. The motion of defendants Wisconsin Department of Health and Family Services, Susan Moritz, Donna Carlson and Robin Gruchow for summary judgment is GRANTED; and

3. The motion of defendants to strike portions of affidavits submitted by plaintiff Robert E. Alexander is DENIED; and

4. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this _____ day of May, 2000.

BY THE COURT:

_____
BARBARA B. CRABB
District Judge