No.

IN THE

Supreme Court of the United States

Flomo Tealeh,

Petitioner,

v.

Ward County,
Melissa Bliss,
Sandy Richter,
Briana Jensen, and
Lenaise Clark

Respondents.

On Petition For Writ Of Certiorari To
The Eighth Circuit Of The United States Court Of Appeals

APPENDIX A - K

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Pro Se Petitioner

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1611

Flomo Tealeh

Plaintiff - Appellant

v.

Ward County; Sandra Richter; Melissa Bliss; John Does 1-200, inclusive

Defendants - Appellees

No: 20-2196

Flomo Tealeh

Plaintiff - Appellant

v.

Ward County; Sandra Richter; Melissa Bliss; John Does, 1-200 inclusive

Defendants - Appellees

Appeal from U.S. District Court for the District of North Dakota - Western
(1:17-cv-00105-DLH)
(1:17-cv-00105-DLH)

JUDGMENT

Before BENTON, MELLOY, and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

March 05, 2021

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
For the Eighth Circuit

No. 20-1611

Flomo Tealeh

Plaintiff - Appellant

v.

Ward County; Sandra Richter; Melissa Bliss; John Does 1-200, inclusive

Defendants - Appellees

No. 20-2196

Flomo Tealeh

Plaintiff - Appellant

v.

Ward County; Sandra Richter; Melissa Bliss; John Does, 1-200 inclusive

Defendants - Appellees

Appeals from United States District Court
for the District of North Dakota - Western

Submitted: March 1, 2021
Filed: March 5, 2021
[Unpublished]

Before BENTON, MELLOY, and KELLY, Circuit Judges.

PER CURIAM.

In these consolidated appeals, Flomo Tealeh appeals the district court's[1] adverse grant of summary judgment and award of costs. After careful review of the record and the parties' arguments on appeal, we find no basis for reversal. See Banks v. John Deere & Co., 829 F.3d 661, 665 (8th Cir. 2016) (grant of summary judgment is reviewed de novo); see also Winter v. Novartis Pharms. Corp., 739 F.3d 405, 411 (8th Cir. 2014) (legal issues on award of costs are reviewed de novo; actual award of costs is reviewed for abuse of discretion). Accordingly, we affirm. See 8th Cir. R. 47B.

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[1]The Honorable Daniel L. Hovland, United States District Judge for the District of North Dakota, adopting the report and recommendations of the Honorable Clare R. Hochhalter, United States Magistrate Judge for the District of North Dakota.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1611

Flomo Tealeh

Appellant

v.

Ward County, et al.

Appellees

No: 20-2196

Flomo Tealeh

Appellant

v.

Ward County, et al.

Appellees

Appeal from U.S. District Court for the District of North Dakota - Western
(1:17-cv-00105-DLH)

ORDER

Appellees shall recover from the appellant the sum the of $380.15 as taxable costs on appeal.

March 15, 2021

Order Entered Under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

20-1611

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Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Flomo Tealeh, Plaintiff, vs. Ward County, Sandra Richter, Melissa Bliss, and John Does 1-200, Inclusive, Defendants.	)	**ORDER ADOPTING REPORT AND RECOMMENDATION** Case No. 1:17-cv-105

Before the Court is a Motion for Summary Judgment filed by Defendants on February 22, 2019. See Doc. No. 367. Magistrate Judge Clare R. Hochhalter issued a Report and Recommendation, in which he recommended that Defendant's motion for summary judgment be granted. See Doc. No. 60. The parties were given until February 17, 2020, to file an objection. See Docket No. 60. The Plaintiff filed an objection on February 20, 2020. See Doc. No. 62.

The Court has carefully reviewed the Report and Recommendation, the Plaintiff's objection, and the entire record, and finds the Report and Recommendation to be persuasive. Accordingly, the Court **ADOPTS** the Report and Recommendation (Docket No. 60) in its entirety and **ORDERS** Defendant's Motion for Summary Judgment (Doc. No. 37) be **GRANTED.**

Let judgment be entered accordingly.

IT IS SO ORDERED.

Dated this 25th day of February, 2020.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Flomo Tealeh, Plaintiff, vs. Ward County, Sandra Richter, Melissa Bliss, and John Does 1-200, Inclusive, Defendants.	)	**ORDER ADOPTING REPORT AND RECOMMENDATION** Case No. 1:17-cv-105

Before the Court is the Defendants' Motion for Costs, seeking to recover $1,512.80 in costs. See Doc. No. 74. The Plaintiff failed to respond to the motions. On May 15, 2020, Magistrate Judge Clare R. Hochhalter issued a Report and Recommendation, in which he recommended that the motion for costs be granted. See Doc. No. 74. Plaintiff was given until May 29, 2020, to file an objection. See Docket No. 74. No objections were received.

The Court has carefully reviewed the Report and Recommendation, and the entire record, and finds the Report and Recommendation to be persuasive. Accordingly, the Court **ADOPTS** the Report and Recommendation (Docket No. 74) in its entirety and **GRANTS** the Defendant's Motion for Costs (Doc. No. 66); awards the Defendants costs in the amount of $1,512.80; and directs the Clerk's Office to enter an amended judgment.

IT IS SO ORDERED.

Dated this 2nd day of June, 2020.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court

ADD V

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Flomo Tealeh, Plaintiff, vs. Ward County, Sandra Richter, Melissa Bliss, and John Does 1-200, Inclusive, Defendants.	)	**ORDER DENYING MOTION TO AMEND COMPLAINT AND DENYING MOTION TO COMPEL** Case No.: 1:17-cv-105

Before the Court is Plaintiff Flomo Tealeh's Motion to Amend Complaint, filed on March 11, 2019 and Request to Compel, filed on March 12, 2019. Defendants oppose the motion. (Doc. No. 50). For the reasons articulated below, these motions (Doc. No. 46, Doc. No. 47) are each **DENIED**.

I. Motion to Amend Complaint

Tealeh's motion to amend is only a paragraph in length. He gives the grounds for his request as follows:

> Plaintiff believes there is reasonable belief and/or probable cause to believe there exists reasonable basis to believe that the Defendants also retaliated against Plaintiff by terminating Plaintiff's employment because of Plaintiff's participation in a discrimination lawsuit against a former employer. Based on the aforementioned, Plaintiff respectfully requests a leave of court to amend the Complaint.

In his Complaint, Tealeh has already made at least two separate claims of retaliation. (Doc. No. 1, ¶ 58-64, ¶ 116-123). Tealeh alleges that defendants retaliated against him for "opposing Defendant Richter's unlawful act," as well as for "his opposition and complaints about the Defendant's alleged unlawful harrassments, [sic] intimidations and/or discriminatory practices and was done under the pretext of poor work performance." Id. at ¶ 117.

As such, in the Motion, it appears that Tealeh is not alleging any new act of retaliation, but simply another motivation for the previously-alleged retaliatory termination. Defendants raise several issues in their opposition to Tealeh's request, such as undue delay, unfair prejudice, futility, and failure to comply with the scheduling order.

A. Tealeh's Compliance with Rule 16(b)

In its original Scheduling Order issued in August 2017, the Court gave the parties until January 2, 2018, to amend pleadings. (Doc. No. 17). In March 2018, the Court directed that a status conference be held and suspended all pretrial deadlines "in the interim." (Doc. No. 23). After another status conference was held, the court issued an amended scheduling order revising certain deadlines; however, this order did not specifically address the deadline for amending pleadings. (Doc. No. 27). Presumably, the original January 2018 deadline to amend pleadings would have remained in effect, as it was only suspended "in the interim" before a status conference and was never revised. If this is indeed the case, then Tealeh's proposed amendment comes after the scheduling order deadline.

Rule 16(b) of the Federal Rules of Civil Procedure governs such untimely requests. When a party seeks to amend a pleading after the scheduling order deadline, "the application of Rule 16(b)'s good-cause standard is not optional." Sherman v. Winco Fireworks, Inc., 532 F.3d 709, 716 (8th Cir. 2008). And the primary measure of good cause is the moving party's diligence in attempting to comply with the order. Sherman, 532 F.3d at 716, citing Rahn v. Hawkins, 464 F.3d 813, 822 (8th Cir. 2006). A district court acts "within its discretion" when denying a motion to amend which made no attempt to show good cause. Harris v. FedEx Nat. LTL, Inc., 760 F.3d 780, 786 (8th Cir. 2014), citing Freeman v. Busch, 349 F.3d 582, 589 (8th Cir. 2003).

Tealeh's motion fails to provide any explanation as to why his allegation was not made earlier. Tealeh was fired in May 2016, three years before this motion. He filed his lawsuit in early 2017, two years before this motion. Yet Tealeh does not even acknowledge the delay. As the "primary measure" of good cause is diligence, and Tealeh has not even attempted to make a showing of diligence, this Court finds that he lacks good cause for amending his complaint after the scheduling deadline.

B. Tealeh's Compliance with Rule 15(a)

The Court will entertain the possibility that Tealeh's motion was, in fact, timely due to the alterations to the scheduling order in this case. Assuming, *arguendo*, that this is the case, Tealeh would have needed to comply with Rule 15(a) of the Federal Rules of Civil Procedure.

Rule 15(a)(2) governs amendment of pleadings after the time period for pleadings as a matter of course have expired, as they have in this case. It allows for amendment with opposing party's consent – absent here – or upon leave of court. Leave of court must be "freely given. . . when justice so requires." F.R.C.P. 15(a)(2). Yet even under this liberal standard, parties do not have an absolute right to amend their pleadings. Sherman, 532 F.3d at 715, citing United States ex rel. Lee v. Fairview Health Sys., 413 F.3d 748, 749 (8th Cir. 2005). A district court properly denies a motion to amend when "there are compelling reasons such as undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment." Id., quoting Moses.com Sec., Inc. v. Comprehensive Software Sys., Inc., 406 F.3d 1052, 1065 (8th Cir. 2005). Defendants argue that denial is proper in this instance on the grounds of undue delay, unfair prejudice, and futility.

Considering the timing of Tealeh's motion – nearly two years after his initial complaint, alleging retaliation occurring between three and four years prior – the Court agrees with the Defendants that there is no justification for the delay.

Further, Tealeh failed to comply with Civil Local Rule 5.1(C) by failing to provide his proffered amended pleading. As such, the Court cannot engage in a futility analysis. A district court does not abuse its discretion in denying leave to amend when a plaintiff has not submitted a proposed amended pleading in accord with a local procedural rule. U.S. ex rel. Raynor v. Nat'l Rural Utilities Co-op. Fin., Corp., 690 F.3d 951, 958 (8th Cir. 2012). Based on Tealeh's failure in this respect, as well as his undue delay in bringing this motion, his Motion to Amend Pleadings (Doc. No. 46) is **DENIED.**

II. Motion to Compel

In the second motion before the Court, Tealeh requests that the Court compel Defendants "to produce all documents including electronic records, files, fax, emails. . ." etc. He states that he believes the Defendants "may have" concealed, falsified, or fabricated documents.

As Defendants point out, Tealeh's request is not based on any valid discovery request and is untimely. Defendants have already exceeded their obligations in accordance with Rule 26(a) disclosures. As such, the Motion to Compel (Doc. No. 47) is **DENIED.**

IT IS SO ORDERED.

Dated this 17th day of January, 2020.

/s/ Clare R. Hochhalter
Clare R. Hochhalter
United States Magistrate Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Flomo Tealeh, Plaintiff, vs. Ward County, Sandra Richter, Melissa Bliss, and John Does 1-200, Inclusive, Defendants.	)	**REPORT AND RECOMMENDATION** Case No.: 1:17-cv-105

Before the Court is Defendants' Motion for Summary Judgment (Doc. No. 37). The presiding judge, Judge Hovland, has referred this motion to the undersigned Magistrate Judge for preliminary consideration. For the reasons given below, I recommend that the motion for summary judgment be **GRANTED**.

I. Procedural Background

Before bringing this suit, Tealeh filed a complaint with the Equal Employment Opportunity Commission. The Civil Rights Division of the Department of Justice subsequently issued Tealeh a "Notice of Right to Sue Within 90 Days" on February 24, 2017. (Doc. Nos. 1-2, 1-3). Tealeh filed the instant action on May 23, 2017. (Doc. No. 1). Defendants moved for summary judgment on February 22, 2019. (Doc. No. 37). Plaintiff filed both a response and an amended response[1], (Doc. Nos. 52, 53), and Defendants replied (Doc. No. 55).

II. Standard of Review.

Summary judgment is appropriate when the evidence, viewed in a light most favorable to the non-moving party, indicates that no genuine issues of material fact exist and that the moving

[1] The only difference between the responses appears to be the addition of several lines asking the Court to "reject the deposition" on the grounds that it was "improperly done." (Doc. No. 53, ¶ 11).

party is entitled to judgment as a matter of law. Davison v. City of Minneapolis, Minn., 490 F.3d 648, 654 (8th Cir. 2007); see Fed. R. Civ. P. 56(a). Summary judgment is not appropriate if there are factual disputes that may affect the outcome of the case under the applicable substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of material fact is genuine if the evidence would allow a reasonable jury to return a verdict for the non-moving party. Id.

The Court must inquire whether the evidence presents a sufficient disagreement to require the submission of the case to a jury or whether the evidence is so one-sided that one party must prevail as a matter of law. Diesel Mach., Inc. v. B.R. Lee Indus., Inc., 418 F.3d 820, 832 (8th Cir. 2005). The moving party bears the responsibility of informing the court of the basis for the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of material fact. Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. 2011). If the movant does so, the non-moving party must submit evidentiary materials setting out specific facts showing a genuine issue for trial. Id.; Fed. R. Civ. P. 56(c)(1). A party may not rely on mere denials or allegations in its pleadings. Lonesome Dove Petroleum, Inc. v. Holt, 889 F.3d 510, 514 (8th Cir. 2018). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Gibson v. Am. Greetings Corp., 670 F.3d 844, 853 (8th Cir. 2012), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). A district court has no obligation to "plumb the records in order to find a genuine issue of material fact." Jain v. CVS Pharmacy, Inc., 779 F.3d 753, 758 (8th Cir. 2015) (quoting Barge v. Anheuser–Busch, Inc., 87 F.3d 256, 260) (8th Cir.1996).

III. Legal Discussion

A. Parties at Issue

First, the Court must determine the proper defendants. Tealeh filed this motion against multiple defendants: Ward County, Melissa Bliss, and "John Does 1-200, inclusive." See Doc. No. 1. The first defendant, Ward County, was Tealeh's employer during his tenure as a Child Protection Service Family Services Specialist III.

The next two defendants are individual employees of Ward County: Sandra Richter was the Child Protection Services Supervisor during the first six months of Tealeh's employment, and Melissa Bliss was the Director of Ward County Social Services during the entirety of his tenure. It is unclear whether Tealeh intended to sue Bliss and Richter in their individual or official capacities.

Tealeh's complaint concerns violations of Title VII of the Civil Rights Act of 1964 (with the addition of some related state law claims, discussed below). But Title VII does not impose liability on individual supervisors. See, Van Horn v. Best Buy Stores, L.P., 526 F.3d 1144, 1147 (8th Cir. 2008) (district court properly granted summary judgment in favor of individual supervisor on Title VII claim because Title VII "does not provide for an action against an individual supervisor.") As such, any claim against Bliss or Richter, as individuals, must be dismissed.

Even if, however, Tealeh is bringing suit against Bliss or Richter in their official capacities, his claims still fail. While there is no binding law exactly on point, the Eighth Circuit has concluded generally that agency principles apply in the Title VII context, leading many district courts within the circuit to hold that Title VII claims against supervisors in their official capacity are duplicative when the same claims are pursued against the employer. See Carter v. Military Dep't of Arkansas, No. 4:18-CV-00444-KGB, 2019 WL 4741651, at *4 (E.D. Ark. Sept. 27, 2019) (reviewing the relevant law and citing seven district court decisions dismissing such

claims as duplicative). Therefore, the Court should dismiss any claims Tealeh attempts to bring against Bliss or Richter in their official capacities.

As for "John Does 1-200, inclusive," Tealeh explains in his Complaint that "[t]he true names and capacities whether individual, corporate, or associate, or otherwise of defendants named herein as John Doe 1 through 200, inclusive, are unknown to Plaintiff who therefore sues said defendants by such fictitious names and Plaintiff will ask leave of Court to amend this complaint to state the true names and capacities when the same have been ascertained." Doc. No. 1, p. 3. However, Tealeh has never requested to amend his complaint to further specify the identities of these parties, and it has been two and a half years since Tealeh brought this action. The dismissal of a fictitious party, while inappropriate at the beginning of litigation, is proper when it is apparent that "the true identity of the defendant cannot be learned through discovery or the court's intervention." Munz v. Parr, 758 F.2d 1254, 1257 (8th Cir. 1985). Here, Tealeh has made no attempts to confirm the existence of a single defendant beyond those named, let alone 200 of them, nor has he attempted in any way to prosecute these claims. As such, I recommend that the Court dismiss the claims against John Doe 1-200 on its own motion.

Thus, Ward County is the sole remaining defendant in the case. The claims themselves must now be considered.

B. Tealeh's Claims

In his Complaint, Tealeh makes a variety of claims regarding employment discrimination. The majority are brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e et seq. However, some appear to arise under the North Dakota Human Rights Act.

Tealeh's specific legal contentions are somewhat difficult to parse. The first half of Tealeh's complaint contains many factual allegations, some of which are intermingled with legal conclusions. The latter half of the complaint sets out seven sections describing various claims. They are listed below (numbering added for clarity):

1. Disparate Treatment Claim Id. at ¶ 48.
2. Act of Retaliation Id. at ¶ 58.
3. Hostile Work Environment Claim Id. at ¶ 65.
4. Harassments/Intimidations and Disparagements of Plaintiff Id. at ¶ 66.
5. Disparate Treatment of Plaintiff Id. at ¶ 76.
6. Failure to Investigate Complaints and Prevent Discrimination Claim Id. at ¶ 111.
7. Retaliatory Termination Claim Id. at ¶ 116.

As is evident from their nomenclature, some of these claims overlap. They can be roughly sorted into three broad categories: disparate treatment, retaliation, and hostile work environment.

1. Disparate Treatment Claims

Claims 1 and 5 of Tealeh's complaint ("Disparate Treatment Claim" and "Disparate Treatment of Plaintiff") are obviously similar, and are analyzed together below.

Tealeh recounts a variety of actions by Ward County and its agents that he claims were discriminatory. He claims that he was excluded from a meeting and/or meetings, that he was "forced to conceal his official name" and "pressured" to change his name, that his employer "published unsubstantiated allegations" about him, intimidated him, and fired him.

The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 153, 120 S. Ct. 2097, 2111, 147 L. Ed. 2d 105 (2000). To survive a defendant's motion for summary judgment in an employment

discrimination case, a plaintiff must either present direct evidence of unlawful discrimination, or create an inference of unlawful discrimination under the burden-shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Young v. Builders Steel Co., 754 F.3d 573, 577 (8th Cir. 2014).

Here, Tealeh does not allege direct evidence of discrimination. As such, his claim is evaluated under the burden-shifting framework of McDonnell Douglas. Under McDonnell Douglas:

> [A] presumption of discrimination is created when the plaintiff meets his burden of establishing a prima facie case of employment discrimination. . . Once a plaintiff successfully establishes a prima facie case, the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. If the employer meets its burden, the presumption of discrimination disappears, and plaintiff is required to prove the proffered justification is merely a pretext for discrimination.

Young, 754 F.3d at 577–78, citing Davis v. Jefferson Hosp. Ass'n, 685 F.3d 675, 680 (8th Cir. 2012).

In order to create the initial presumption, Tealeh must establish a prima facie case of discrimination. The burden of establishing a prima facie case of disparate treatment "is not onerous." Torgerson v. City of Rochester, 643 F.3d 1031, 1047 (8th Cir. 2011), quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 259 (1981). To fulfill the elements of a prima facie case, Tealeh must prove by a preponderance of the evidence that: 1) he is a member of a protected class; 2) he met his employer's legitimate expectations; 3) he suffered an adverse employment action; and 4) the circumstances give rise to an inference of discrimination. Guimaraes v. SuperValu, Inc., 674 F.3d 962, 973–74 (8th Cir. 2012). The second element is the object of some debate, as explained below.

Defendants argue that Tealeh fails to make a prima facie case of employment discrimination. While they concede that Tealeh has shown the first and third elements, in that he is a member of a protected class and suffered an adverse employment action, they argue that other required elements are lacking.

a. Whether Tealeh Was a Member of a Protected Class.

Protected classes under Title VII include "race, color, religion, sex, or national origin." 42 U.S.C.A. § 2000e-2 (a). Here, Tealeh alleges he is being discriminated against on account of his "national origin, gender, and skin color and/or race." Tealeh, a black male, was born in Liberia. Ward County concedes that Tealeh is a member of a protected class, and the Court agrees.

b. Whether Tealeh Met Legitimate Expectations, or, Was Qualified

The second requirement for a prima facie discrimination case is contested. One line of Eighth Circuit cases applies the requirement that a plaintiff must meet their employer's "legitimate expectations." See, e.g., Box v. Principi, 442 F.3d 692, 696 (8th Cir. 2006); Martinez v. W.W. Grainger, Inc., 664 F.3d 225, 230 (8th Cir. 2011). The other line of cases generally inquires whether "plaintiff was qualified for their position." See, e.g., Wierman v. Casey's Gen. Stores, 638 F.3d 984, 993 (8th Cir. 2011). The conflict has been acknowledged by several district courts. See, e.g., Shirrell v. Saint Francis Med. Ctr., 24 F. Supp. 3d 851, 859–60 (E.D. Mo. 2014). However, the Eighth Circuit has not yet resolved the issue. In light of these conflicting precedents, the undersigned will address both standards.

i. Whether Tealeh met the legitimate expectations of his employer.

In this motion for summary judgment, Ward County bears the burden of identifying the portions of the record demonstrating the absence of a genuine issue of material fact. Torgerson, supra, at 1042.

Ward County cites extensively to the record to show the lack of factual question regarding Tealeh's performance. The affidavits provided by Tealeh's supervisors and co-workers unanimously and specifically criticize his work. Ms. McCarty, Ms. Dyke, Ms. Jensen, and Ms. Richter all observed Tealeh performing interviews of children and caregivers, which was a substantial part of his job. Their statements detail inadequacies in Tealeh's approach, highlighting specific examples like making a child cry and introducing himself to a caregiver by accusing the caregiver of child abuse, see Doc. No. 40, ¶ 19 and Doc. No. 44., ¶ 15, as well as more persistent deficiencies such as failure to develop rapport with interviewees, failure to use appropriate tone with children, failure to exhibit empathy or sympathy, etc. See generally Doc. Nos. 40, 42, 43, 44. In addition to struggling with these "remedial" social work skills, he apparently struggled to obtain information during interviews (Doc. No. 40, ¶ 12) and with documenting the information he did obtain (Doc. No. 44, ¶ 17-18).

The evidence submitted by Ward County shows that Tealeh's supervisors and co-workers made substantial efforts to support and, later, salvage his employment, such as providing extensive training and specific instructions, bringing him along to shadow more experienced workers as they performed interviews, accompanying him as he performed interviews, and, once he was placed on a performance improvement plan, starting back at "square one" and reviewing all remedial aspects of his job, one-on-one. (Doc. No. 40, ¶ 16-17; see generally Doc. Nos. 40-45).

In addition to explaining Tealeh's job-related deficiencies, Ward County also points to complaints by female employees, who felt that comments made by Tealeh constituted harassment. See, e.g., Doc. Nos 42, ¶ 10 (Tealeh asking female co-workers if he could watch them exercise); Doc. No. 43, ¶ 7 (Tealeh suggesting that he and a female co-worker travel together and share a bed).

In addition to these affidavits from Tealeh's supervisors and co-workers, Ward County cites documentation created during his employment. The various drafts of his performance evaluation, produced over several rounds of revisions in January and February 2016, show the same concerns reflected in the affidavits, as do the emails of Director Melissa Bliss and Child Protective Services Supervisor Sandra Richter as they discuss the preparation of this document. See Doc. Nos. 44-2, 44-3, 44-5, 44-6, 44-7, 44-9, 45-11, 45-13. There are several drafts of the performance evaluation in the record. See, e.g., Doc. No. 45-13. Some of the changes between drafts appear to have worked in Tealeh's favor, such as Bliss's March 2016 revision of the document to include Tealeh's side of the story regarding the harassment allegations. (Doc. No. 45-10, pp. 6-7).

In May 2016, Ward County's concerns with Tealeh's performance are ultimately summarized in his termination letter, which Tealeh signed (although he later refused to sign a second copy). (Doc. Nos. 45-16, 45-18).

With this evidence, Defendants have successfully identified the portions of the record demonstrating the absence of genuine issues of material fact regarding Tealeh's failure to meet Ward County's expectations.

Of course, the inquiry does not end here. Tealeh still has the opportunity to submit evidentiary materials setting out specific facts showing a genuine issue for trial, Torgerson v.

City of Rochester, 643 F.3d at 1042, without merely relying on denials and allegations, Lonesome Dove, 889 F.3d at 514.

Tealeh asserts generally that summary judgment is inappropriate because genuine issues of material fact remain. While he does not respond specifically to Defendants' claims, the Court can discern the portions of his arguments that seem responsive to Defendants' claims on this issue.

Some of Tealeh's opposition to Ward County's claims comes in the form of written denials within the body of his response. For instance, apparently in response to Defendants' claims that Tealeh was unable to conduct interviews with both adults and children, he writes:

> 77. Plaintiff denies any failure to adequately engage children in the interview process and whatsoever.
> 78. Plaintiff never ordered any child to be still during any interviews and denies whatsoever.
> 79. Plaintiff denies not been able to interview any adults and denies whatsoever.

Id. at ¶ 77, 78.

However, Tealeh may not rely on "mere denials and allegations" to overcome a motion for summary judgment. Lonesome Dove, 889 F.3d at 514. These blanket assertions do little to establish the presence of a genuine issue of material fact.

Tealeh also points to the evidence of record in making his case. For instance, he cites Defendants' performance evaluations for the proposition that he was good at following instructions and treated others with care and respect, attaching as exhibits his performance evaluations. (Doc. Nos. 52-18, 52-19).

While it is indeed true that Tealeh was rated as "meets expectations" in the categories of "positive attitude with staff" and "cooperation," he received scores of "needs improvement" in many other categories, such as job knowledge, quality of work, productivity, client courtesy,

initiative, etc. Id. It is eminently clear to anyone who reads this evaluation that Tealeh's performance was *not* meeting expectations. The fact that he did not receive "needs improvement" in every category does not create a genuine issue of material fact regarding his performance. And Tealeh does not attach any of his own evidence to demonstrate otherwise.

After careful review, it is clear that no reasonable jury could find that Tealeh was meeting Ward County's legitimate expectations. Ward County entitled to summary judgment on the first element of the prima facie case when the standard is given as "meets legitimate expectations."

ii. Whether Tealeh was qualified for the position.

In contrast, when the question is whether Tealeh "was qualified," he succeeds in showing a material issue of fact for trial. According to his resume, he graduated with a bachelor's degree in social work and had several relevant positions before applying for the job at Ward County. See, e.g., Doc. No. 52-5, 52-15. Indeed, according to Tealeh's performance review from Ward County, he was "selected for the position based on citation of a Bachelor of Social Work degree and experience he stated he had in engaging families and assessing allegations of abuse or neglect while employed in New York and as a Truancy Case Manager in Pennsylvania." (Doc. No. 45-13). While it appears that certain supervisors did begin to question whether Tealeh's training was adequate, see Doc. No. 45, ¶ 25, a jury could reasonably find that he possessed the requisite qualifications.

Thus, if the second element of a prima facie case of discrimination is given as "qualified for the position," Tealeh makes the requisite showing to survive summary judgment on this particular issue.

c. Adverse employment action.

An adverse employment action means "a material employment disadvantage, such as a change in salary, benefits, or responsibilities. Mere inconvenience without any decrease in title, salary, or benefits is insufficient to show an adverse employment action." Sallis v. Univ. of Minn., 408 F.3d 470, 476 (8th Cir. 2005) (internal citations omitted).

Defendants claim that the only possible adverse employment action which Tealeh suffered was his termination. Tealeh does not directly respond to this contention. His Complaint, in the section entitled "Disparate Treatment Claim," ¶¶ 48-57, appears to allege that his exclusion from "the supervisory meeting for the County," and/or possibly several other meetings, was an adverse employment event. His response to the summary judgment motion also repeats several other incidents he felt were discriminatory, such as his difficulty signing up for child welfare training due to Defendants' alleged submission of the incorrect name.

As a matter of law, "mere inconveniences" such as exclusion from a meeting or difficulty signing up for training, do not themselves constitute adverse employment events. Tealeh suffered an adverse employment action, but only one: his termination.

d. Circumstances give rise to an inference of discrimination.

To make a prima facie case of employment retaliation, Tealeh must lastly show that the circumstances surrounding his termination give rise to an inference of discrimination.

Tealeh may show pretext, among other ways, by showing that Defendants "(1) failed to follow its own policies, (2) treated similarly-situated employees in a disparate manner, or (3) shifted its explanation of the employment decision." Young v. Builders Steel Co., 754 F.3d 573, 578 (8th Cir. 2014).

The primary way Tealeh attempts to show pretext is by alleging that similarly-situated employees were treated differently. The test for whether employees are "similarly-situated" for the purposes of establishing discrimination is as given below:

> The test to determine whether individuals are similarly situated is rigorous and requires that the other employees be similarly situated in all relevant respects before the plaintiff can introduce evidence comparing herself to the other employees." Chism v. Curtner, 619 F.3d 979, 984 (8th Cir.2010) (internal quotation omitted). In a case involving allegations of discriminatory disciplinary practices, for example, this court explained that "[t]o be similarly situated, the comparable employees must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances." Tolen v. Ashcroft, 377 F.3d 879, 882 (8th Cir.2004)

Bennett v. Nucor Corp., 656 F.3d 802, 819 (8th Cir. 2011).

In addition to arguing generally that the circumstances of Tealeh's employment do not give rise to an inference of discrimination, Ward County points specifically to the lack of evidence that any similarly-situated employee was ever treated differently.

In his complaint, Tealeh invokes the relevant language. For instance:

> Defendant Richter began to treat Plaintiff increasingly worse *then other similarly situated employees*. For examples, Defendant published unsubstantiated allegations about Plaintiff, excluded him from the Ward County Child Protection Services Workers Supervisory meetings, refused to address his concerns, forced him to conceal his official name and made him to use a different name while working for the defendant and pressured him to change his name, intimidated him, disparaged him, made him to feel fear and/ or anxiety, unsafe, alienated and terminated his employment.

(Doc. No. 1, ¶ 77).

But Tealeh alleges no facts at all about these supposedly comparable workers beyond the conclusory recitation that his treatment was "worse" than theirs. He gives no clue as to their identities, characteristics, job titles, or disciplinary histories. Tealeh does not establish whether or not these hypothetical comparators are similarly situated to him in *any* respect, let alone "all

relevant respects." Overall, Tealeh fails to even attempt to make the requisite showing regarding similarly-situated co-workers.

Without the showing that a similarly-situated employee was treated differently, Tealeh has no grounds to argue that his termination was anything other than it appears. And it appears that his termination was in response to his well-documented performance issues. His conclusory statements to the contrary fail to establish a genuine issue of material fact.

e. Conclusion on Disparate Treatment Claim

As explained above, to survive Defendant's motion for summary judgment, Tealeh needed to create an inference of unlawful discrimination under the burden-shifting analysis of McDonnell Douglas. Here, Tealeh failed to establish a prima facie case of employment discrimination, and the Defendant's motion for summary judgment should be granted as to Tealeh's disparate treatment claims.

Notable, even if Tealeh had established a prima facie case, he would have failed at the second step of the McDonnell Douglas analysis. At that step, the burden would shift back to Ward County to articulate a legitimate, non-discriminatory reason for Tealeh's termination. Without repeating the evidence discussed above (particularly in subsection b., "Whether Tealeh met the legitimate expectations of his employer"), they have done so resoundingly. The record clearly shows the well-documented reasons for Tealeh's termination, and Tealeh fails to raise a genuine issue of material fact on the issue.

2. Retaliation Claims

Tealeh includes two claims of retaliation in his complaint: "Act of Retaliation," at ¶ 58-64, and "Retaliatory termination Claim," at ¶ 116-123. In moving for summary judgment, Defendants argue that he fails to establish a prima facie case of retaliation.

A prima facie case of retaliation requires a plaintiff to show: (1) they engaged in protected activity, (2) they suffered an adverse employment action, and (3) a causal connection exists between the two. Shirrell v. St. Francis Med. Ctr., 793 F.3d 881, 888 (8th Cir. 2015), citing Brannum v. Missouri Department of Corrections, 518 F.3d 542, 547. (8th Cir. 2008). When the evidence of retaliation is indirect, as it is here, courts proceed with the burden-shifting McDonnell Douglas analysis. Shirrell, 793 F.3d at 888.

a. **Protected Activity**

"Protected activity" has two primary categories: it can mean either opposing an act of discrimination made unlawful by Title VII, or, participating in an investigation under Title VII. Hunt v. Nebraska Public Power Dist., 282 F.3d 1021, 1028 (8th Cir. 2002).

While Tealeh did eventually request an investigation under Title VII, he did not file his "Charge of Discrimination" with the Equal Employment Opportunity Commission and the North Dakota Department of Labor and Human Rights until December 2016, over seven months after he was fired. (Doc. No. 1-1, p. 6). As such, the requisite causal connection between the investigation and the termination cannot be shown.

Thus, Tealeh's only hope of establishing "protected activity" is by showing that he "opposed an act of discrimination made unlawful by Title VII."

Tealeh does make some allegations concerning his opposition to unlawful acts, writing: "Defendant Bliss retaliated against [Tealeh] because he engaged in protected activities by opposing Defendant Richter unlawful act, such as forcing Plaintiff to violate public policy by demanding him to use unofficial name for official duty." Id. at ¶ 61. The Court interprets this statement to mean that Defendant's demand that Tealeh use his unofficial name was an

"unlawful act" in violation of Title VII, and furthermore that Defendant fired Tealeh in response to his opposition to this act. As such, this Court must wade into the issue of Tealeh's name.

Tealeh was born with the first name "Chris" in 1974 (Doc. No. 52-2). In 2013, upon naturalization, he legally changed his first name to "Flomo." (Doc. No. 52-2). He applied to Ward County in 2015 with *both* names, using "Flomo" on his online application but "Chris" on his resume. (Doc. No. 38-1, 38-2).

According to Tealeh, he requested during his interview that he be addressed as "Flomo." (Doc. No. 1, ¶ 30). Tealeh states in his Complaint what happened next:

> Commencing in or about October 2015, the defendant rejected Plaintiffs request, and manufactured or printed dozens of business cards with the name "Chris" and presented them to Plaintiff and demanded him to use the cards when performing his official duty. Defendant Richter directed Plaintiff to give the cards to clients when he goes into the field. Defendant Richter essentially directed Plaintiff to reject and conceal his native name (legal name "Flomo" Tealeh) when in the field. Plaintiff immediately rejected this treatment and informed defendant Richter that he wanted his legal name printed on the cards and Plaintiff asked defendant Richter to make the correction. Defendant Richter rejected Plaintiffs request and generally stated it was better to use western name; essentially saying that it sounds better.

Id. at ¶ 31.

Later in his complaint, Tealeh writes,

> Plaintiff believes the defendant did not want him to use Flomo because it is native, foreign and does not sound good to the defendant. In addition, Plaintiff believes Defendant Richter treated him in this manner because of his national origin.

Id. at ¶ 34.

In their motion for summary judgment, Defendants vehemently deny the suggestion that their use of "Chris" was motivated by anything other than their reasonable belief that "Chris" was what Tealeh wished to be called. Defendants point initially to Tealeh's resume, which gives his name as "Chris Tealeh" (Doc. No. 38-1). According to Sandra Richter, his supervisor, Tealeh

said he wished to be called "Chris" at his interview, which she indicated in her handwritten notes by writing "(Chris)" after "Flomo" on the line for his name. (Doc. No. 44 at ¶ 7, Doc. No. 44-1). After the interview, Ward County's offer letter to Tealeh addressed him as "Chris." (Doc. No. 45-3). Richter testified that she never told Tealeh that he could not use "Flomo" on his business cards. (Doc. No. 44, ¶ 9).

Other Ward County employees state in their affidavits that Tealeh indicated he wished to be called "Chris." (Doc. No. 42, ¶ 9, Doc. No. 43, ¶ 4). The Director of Social Services, Melissa Bliss, explained that it was her understanding that "Chris" was Tealeh's preferred name. (Doc. No. 45, ¶ 17).

Defendants also include documentary evidence showing Tealeh's preference for "Chris." One exhibit consists of Tealeh's direct deposit form, setting up his paychecks when he started his employment. (Doc. No. 45-5). On it, Tealeh has written: "Connie, please deposit $500 to this account each pay period ..." and signed his note "Chris." Defendants also include an email sent by Tealeh on February 12, 2016, signed "Chris Tealeh." (Doc. No. 44-8).

Overall, Defendants argue that there is no evidence that the use of "Chris" instead of "Flomo" constituted unlawful discrimination. As such, they contend that Tealeh cannot meet the element of protected activity.

In his response to Defendants' motion for summary judgment, Tealeh writes at length regarding the name change. He specifically denies some of the claims in Defendants' affidavits. See, e.g., Doc. No. 53, ¶ 46 ("Plaintiff never told Ms. Jensen that he wanted to be called Chris or introduced himself to Ms. Jensen as 'Chris;'" and has no knowledge about been asked how he would like to be introduced to individuals.") He asserts that Sandra Richter told him "'Chris Tealeh' sounds better" and repeats his claim that she refused his request to issue new business

cards. He claims that she "forced [him] to sign a report bearing different name rather than Plaintiff's formal name, harassing Plaintiff to change his name." Tealeh also attaches copious documentary evidence, such as his driver's license, Social Security card, and background check with the name "Flomo," as well as an example of the business cards. (Doc. No. 54-3, 54-5, 54-6).

Yet despite these efforts, Tealeh fails to raise a genuine issue of material fact on the issue of protected activity.

First, despite his assertions, the fundamental facts here aren't disputed. Several of the exhibits submitted by Tealeh were already submitted by Defendants: e.g., his offer letter addressed to "Chris." These exhibits do nothing for Tealeh's case; they simply confirm the Defendants' position: they thought Tealeh went by "Chris." Similarly, other facts Tealeh so vigorously asserts – i.e., that Flomo was his legal name, and the business cards said "Chris" – are not at all incompatible with the Defendants' position, which is that they thought that Tealeh went by his birth name rather than his legal name.

There are some areas where the parties do appear to disagree – for instance, Tealeh states that Richter explicitly forbade him from putting "Flomo" on his business cards, and harassed him to change his name. Richter denies this. (Doc. No. 44, ¶ 6-10, 40-41). Tealeh also appears to argue that he never submitted the resume saying "Chris" to Defendants, but rather gave them one that said "Flomo." (Doc. No. 53 at ¶ 8).

But these disputes do not rise to the level of a genuine issue of material fact. The Court's duty is to inquire whether the evidence presents a sufficient disagreement to require submission of the case to a jury, or whether the evidence is so one-sided that one party may prevail as a matter of law. Diesel Mach., Inc. v. B.R. Lee Indus., Inc., 418 F.3d 820, 832 (8th Cir. 2005). This case falls into the latter category. Tealeh cites no evidence showing that Richter "harassed"

him to change his name, merely repeating his allegations. Yet it is not enough for him to rely on the allegations in his pleadings. Lonesome Dove, supra, at 514. And even if Tealeh originally submit a resume that said "Flomo" instead of "Chris" to apply to the job, Defendants' use of the name "Chris" was still justified as Tealeh himself continued to use the name in notes and emails.

The record firmly establishes that Tealeh used both names, leading to confusion on Defendants' part. No jury could reasonably conclude this confusion constitutes unlawful discrimination. As such, there was no "unlawful" activity for Tealeh to oppose, and he fails to meet the first element of retaliation as a matter of law.

b. Causal Connection

Even if Tealeh did establish his participation in protected activity, however, his claim for retaliation would fail on the third element, where he would have to prove that his "protected activity" had a causal connection to his termination. To show a causal connection, a plaintiff must show that her protected activity was a but-for cause of her employer's adverse action. Shirrell, 793 F.3d at 888, citing Univ. of Tex. Sw. Med Ctr. v. Nassar, 570 U.S. 338, 133 S.Ct. 2517, 2534 (2013). Tealeh has failed to point to any portions of the record which raise a genuine factual issue as to the cause of his termination. But even if Tealeh did succeed in showing a prima facie case, reaching step two of the McDonnell Douglas burden-shifting analysis, Defendants should still prevail as they have overwhelmingly established their legitimate rationale for Tealeh's termination, as detailed above.

In conclusion, even viewing this record in the light most favorable to Tealeh, I recommend that Defendants be granted summary judgment on the retaliation claims.

3. Hostile Work Environment Claims

Sections Three and Four of Tealeh's complaint, "Hostile Work Environment Claim" and "Harassments/Intimidations and Disparagements of Plaintiff," are apparently to be read together. In paragraph 65, Tealeh claims a hostile work environment in violation of Title VII, and lists various "harassments" and "intimidations" in paragraphs 66 through 75 to support this claim. The section titled "Failure to Investigate Complaints and Prevent Discrimination Claim," starting at paragraph 111, will also be analyzed here as it appears to allege Defendant's failure to prevent the existence of a hostile work environment.

The test for a hostile work environment changes depending on whether the hostility stems from a supervisor or co-worker. When a supervisor is responsible, four requirements must be met:

> (1) The plaintiff belongs to a protected group; (2) the plaintiff was subject to unwelcome harassment; (3) a causal nexus exists between the harassment and the plaintiff's protected group status; and (4) the harassment affected a term, condition, or privilege of employment. . .

Gordon v. Shafer Contracting Co., 469 F.3d 1191, 1195 (8th Cir. 2006) (internal citations omitted).

When a co-worker is responsible for the alleged conduct, all of the above requirements apply, plus one more:

> In addition, for claims of harassment by non-supervisory personnel, [plaintiff] must show that his employer knew or should have known of the harassment and failed to take proper action.

Gordon, 469 F.3d 1195.

A hostile work environment exists when "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Id. at 1194.

"For a hostile work environment claim to succeed, the alleged conduct "must be [so] extreme" that it amounts to a "change in the terms and conditions of employment." Faragher v. City of Boca Raton, 524 U.S. 775, 786–88, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). Offhand comments and isolated incidents of offensive conduct (unless extremely serious) do not constitute a hostile work environment. Id. at 788, 118 S.Ct. 2275, Burkett v. Glickman, 327 F.3d 658, 662 (8th Cir. 2003).

In his complaint and throughout the litigation, Tealeh lists a number of incidents as evidence of a hostile work environment. In their motion for summary judgment, defendants contend that Tealeh's allegations are devoid of evidentiary support.

Tealeh's claims of a hostile work environment are varied. Some of them relate to his supervisor, Sandra Richter, and her expression of negative emotions towards him. For instance, Tealeh writes, "Richter had a look of annoyance in her face whenever she encountered Plaintiff in the workplace." (Doc. No. 1, ¶ 66). and "Richter exhibited frustration and directed anger at Plaintiff for the fact that Plaintiff opposed Defendant demands to use a deferent name." (Doc. No. 1, ¶ 66, 68). Tealeh ultimately alleges:

> Defendant Richter's act of anger toward him were physically threatening, humiliating and sufficiently severe and pervasive so as to unreasonably interfere with Plaintiff's physical and emotional health, work performance, and work conditions, in violation of Title VII of the Civil Rights Act of 1964.

(Doc. No. 70, ¶ 69).

Despite Tealeh's recitation of the legal elements in his allegations, he fails to raise an issue of material fact for trial. In conclusory fashion, Tealeh describes Richter's actions as "physically threatening," yet he fails to explain how her any of her behavior merits this description. He further fails to explain how his feelings of stress and anxiety caused by his

supervisor's looks of annoyance and/or anger interfered with his job performance. Tealeh's vague allegations are insufficient to raise a genuine issue of material fact on the issue of any harassment whatsoever, let alone the severe harassment required for a prima facie case.

Tealeh also mentions Richter's "demands for plaintiff to conceal his name" as an example of workplace hostility. As concluded above, no jury could reasonably find on this record that the use of "Chris" was intended maliciously. Tealeh's claim of intimidation by "writing; printing and distributing unsubstantiated accusations against him in the workplace" appears to be an oblique reference to his negative performance review. Even imagining that a negative performance review could serve as the basis of a hostile work environment claim, Tealeh points to no evidence showing that the contents of his review were "unsubstantiated."

Tealeh cites several further grounds for claiming hostile work environment in his deposition. While the exact claim is not clear, Tealeh appears to allege that a mix-up regarding the name on his identification card and/or computer, which was connected to a delay in training registration, led to a hostile work environment. (Doc. No. 39-1 at p. 87-93). But according to his own testimony, Tealeh ultimately attended the training. (Id. at 93). Such inconveniences as those described by Tealeh rise nowhere near the level of "discriminatory intimidation, ridicule, and insult" required for a claim of hostile work environment.

Tealeh also cites an incident involving an argument with a co-worker after he received a traffic ticket in January 2016. See Doc. No. 1, ¶ 34, 36; Doc. No. 39-1, 97-100. His fullest explanation of the event is found in his Objection to Defendants' Summary Judgment Motion:

> About January 20, 2016, Plaintiff and coworkers were talking about traffic ticket at the office. Plaintiff said he got a ticket for failure to signal. . . Plaintiff showed Ms. Jensen the ticket the following day. Here is a copy of the traffic ticket that Plaintiff showed Ms Jensen, Exhibit 24. Ms. Jensen looked at the ticket and told Plaintiff the Officer who issued the ticket was her best friend. Plaintiff told her a hearing was already scheduled.

> Hear is the hearing notice Plaintiff told Brian about, Exhibit 12. She told Plaintiff to not fight the ticket. She told Plaintiff $20 is nothing and said just pay. Plaintiff told her if that how she feels then she should pay. Ms. Jensen then said she got pulled over for speeding in the past. She told Plaintiff she was crying but luckily for her the officer knew her mother. She told Plaintiff the officer let her go but told her to be careful. Plaintiff told her that he wasn't her and that he will have to look at his dash cam video to verify whether he failed to signal, copy of the dash cam videos are included, Exhibit Traffic Ticket &Videos Files, USB drive. She said that Plaintiff was playing a "race card". When Plaintiff told her to look at statistical data regarding black males been stopped by officers disproportionally, she got angry and walked out of Plaintiff's office following a few disagreements. Plaintiff noticed she was meeting Defendant Richter and she stayed in her office for a length of time. On two occasions, Plaintiff attempted to meet with Defendant Richter, but Defendant Richter told Plaintiff she was meeting with Ms. Jensen.
>
> 53. About January 29, 2016, Defendant Richter met with Plaintiff and suddenly gave him a report to sign. Plaintiff read the report and but told Defendant Richter he would not sign it because Defendant Richter falsely accused him without a chance to defend himself against his accuser. At this juncture, Plaintiff began to feel that Defendant Richter and Ms. Jensen have conspired to smear Plaintiff's reputation and terminate his employment. The report was not a draft as Defendant Bliss clamed.

(Doc. No. 52, ¶ 52-53).

Tealeh's allegations – that as a result of his argument with Jensen, Jensen and Richter conspired against him and put false statements in his performance review – do not have any basis in the record. Tealeh seems to reason that because Richter met with Jensen at some unspecified point after he and Jensen argued, Richter and Jensen must have been conspiring against him. But there are boundless reasons why two employees could meet. Furthermore, the record is clear that concerns with Tealeh's employment predated any conversation on January 20, 2016. See, e.g, Doc. No. 44 at ¶ 13, 14 (Richter accompanied Tealeh on a home visit at the end of December 2015 based upon previous reports from lead workers that he had not made any progress during initial probationary period). At any rate, the simple facts that Tealeh argued with a co-worker, that the co-worker later met with a supervisor, and Tealeh eventually received a poor performance review, do not rise to the level of a hostile work environment.

Overall, Tealeh fails to identify any portion of the record from which a jury could reasonably conclude that Defendants created an environment "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of" Tealeh's employment. See Gordon, 469 F.3d at 1194. Defendants are entitled to judgment on the hostile work environments claims.

As stated above, Tealeh also brings the claim of "Failure to Investigate Complaints and Prevent Discrimination." (Doc. No. 1 at ¶ 111). He states that "Defendant failed to fulfill their statutory duty to take all necessary steps to prevent the discrimination, harassment, intimidation and retaliation from occurring in the workplace as required by Title VII. . ." Id.

As stated above, the conduct Tealeh complains, to the extent that it occurs at all, does not rise to the level of discrimination and harassment. As such, Defendants cannot be liable for failing to prevent it. Summary judgment is warranted on the issue of hostile work environment and all related claims.

4. **Claims Under North Dakota Law**

At the outset of his Complaint, Tealeh states that these claims are being brought to Title VII of the Civil Rights Act at the outset of the case. Additionally, at several points in the body of his pleading, he alleges that the Defendants' actions violated not only Title VII but "any related claims under North Dakota law."

Tealeh did not provide further specifics as to what this North Dakota law might be. But in the words of the North Dakota Supreme Court, Title VII has "obvious parallels" with the North Dakota Human Rights Act. Opp v. Source One Mgmt., Inc., 1999 ND 52, ¶ 12 (1999). The North Dakota Supreme Court in fact looks to federal interpretations of Title VII for guidance in interpreting the N.D.H.R.A. See generally Opp, supra. Defendants raise a compelling argument

regarding the barring of Tealeh's state law claims by the applicable statute of limitations. But even if these claims are not barred, due to the parallel nature of the state and federal laws, the failure of Tealeh's claims under Title VII means that his state law assertions would also fail against all defendants and as to all claims. See generally Brown v. Flying J, Inc., No. 1:08-CV-059, 2009 WL 2516202, at *13 (D.N.D. Aug. 14, 2009).

IV. Conclusion and Recommendation

For the foregoing reasons, I recommend that Defendants' Motion for Summary Judgment (Doc. No. 37) be **GRANTED**, and that Tealeh's complaint be **DISMISSED** with prejudice as to all parties and all claims.

NOTICE OF RIGHT TO FILE OBJECTIONS

Pursuant to D.N.D. Civ. L. R. 72.1(D)(3) any party may object to this recommendation within fourteen (14) days after being served with a copy of this Report and Recommendation. Failure to file appropriate objections may result in the recommended action being taken.

Dated this 3rd day of February, 2020.

/s/ Clare R. Hochhalter
Clare R. Hochhalter
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Flomo Tealeh, Plaintiff, vs. Ward County, Sandra Richter, Melissa Bliss, and John Does 1-200, Inclusive, Defendants.	)	**REPORT AND RECOMMENDATION** Case No.: 1:17-cv-105

Before the Court is Defendants' Motion for Costs (Doc. No. 66). The presiding judge, Judge Hovland, has referred this motion to the undersigned Magistrate Judge for preliminary consideration. For the reasons given below, I recommend that the Motion for Costs be **GRANTED**.

I. Background

Plaintiff Flomo Tealeh filed the underlying employment discrimination suit on May 23, 2017. (Doc. No. 1). Defendants moved for summary judgment on February 22, 2019, and their motion was granted on February 25, 2020. (Doc. Nos. 37, 64). Judgment was entered that same day for Defendants. (Doc. No. 65).

On March 10, 2020, Defendants filed a Motion for Costs together with a statement of costs and an affidavit. (Doc. Nos. 66 and 67). Tealeh has not filed a response.

II. Analysis

Rule 54(d) of the Federal Rules of Civil Procedure allows district courts to tax costs in favor of a prevailing party. Stanley v. Cottrell, Inc., 784 F.3d 454, 464 (8th Cir. 2015). The Eighth Circuit Court of Appeals has explained Rule 54(d) "represents a codification of the

presumption that the prevailing party is entitled to costs." Greaser v. Missouri Dep't of Corrections, 145 F.3d 979, 985 (8th Cir. 1998).

28 U.S.C. § 1920 defines the expenses that may be taxed pursuant to this rule. Stanley, 784 F.3d at 464. These include:

> (1) Fees of the clerk and marshal;
>
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920.

Local Civil Rule 54.1 sets forth various requirements for a party seeking costs, including an obligation to "verify the statement of costs by affirming that the items are correct, the services were actually and necessarily performed, and the disbursement were necessarily incurred." Failure to meet the requirements of the Local Rule "may be deemed a waiver of any or all of the claim for costs." L. Civ. R. 54.1(A)(1).

Local Civil Rule 54.1 also sets forth the procedures for objecting to the claimed costs:

> Each party objecting to the claimed costs must serve and file a response within fourteen (14) days of being served that (1) sets forth specific objections to each item of cost being disputed, along with citation to any authority for not awarding the item or category of cost, and (2) has attached to it as exhibits any supporting documents that will be relied upon to contest the claim of costs. A party's failure to object to a specific item of cost may be deemed a waiver of any objection to the claimed item.

L. Civ. R. 54.1(A)(1).

The losing party bears the burden of overcoming the presumption that the prevailing party is entitled to recovery of all costs allowable under 28 U.S.C. § 1920. Stanley, 784 F.3d at 464.

In the instant motion, Defendants seek to recover $7.50 in docket fees pursuant to 28 U.S.C. § 1920(5) and 1923, $1,101.50 in court reporter fees pursuant to § 1920(2), and $412.80 in fees for copies of materials pursuant to § 1920(4). They support these amounts with several invoices and their attorney's affidavit, verifying that listed costs and disbursements correctly set forth the services that were actually and necessarily performed and the disbursements which were necessarily incurred. See Doc. Nos. 67, 67-1, and 67-2.

Tealeh, as the losing party, bears the burden of overcoming the presumption that the Defendants are entitled to these costs. However, he has failed to file any response. Defendants have complied with the requirements of Local Civil Rule 54.1 and their requested costs are allowable under 28 U.S.C. § 1920.

III. Conclusion and Recommendation

For the foregoing reasons, I recommend that Defendants' Motion for Costs (Doc. No. 66) be **GRANTED**.

NOTICE OF RIGHT TO FILE OBJECTIONS

Pursuant to D.N.D. Civ. L. R. 72.1(D)(3) any party may object to this recommendation within fourteen (14) days after being served with a copy of this Report and Recommendation. Failure to file appropriate objections may result in the recommended action being taken.

Dated this 15th day of May, 2020.

/s/ Clare R. Hochhalter
Clare R. Hochhalter
United States Magistrate Judge

Additional material from this filing is available in the Clerk's Office.