FILED
United States Court of Appeals
Tenth Circuit

August 15, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CEDRIC MACK,

Plaintiff - Appellant,

v.

J.M. SMUCKERS CO.; FOCUS WORKFORCE MANAGEMENT, INC.,

Defendants - Appellees.

No. 22-3195
(D.C. No. 5:21-CV-04038-SAC)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

Cedric Mack, proceeding pro se,[1] sued J.M. Smuckers Co. ("JMS") and Focus Workforce Management, Inc. ("FWM") for race discrimination in violation of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-2000e-17. The district court granted

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Because Mr. Mack appears pro se, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

summary judgment against Mr. Mack, and he has timely appealed. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Facts

On August 2, 2019, Mr. Mack began working for FWM in Topeka, Kansas. FWM provides direct hire, staffing, and onsite workforce management services to manufacturing companies. JMS is one of FWM's clients, and FWM assigned Mr. Mack to work at a JMS plant for 20 days over a three-month period. FWM made work assignments to the JMS plant on a first-come, first-served basis. FWM employees who were not assigned received priority for selection the following day.

Mr. Mack, who is African American, alleged the following incidents occurred during his time at the JMS plant:

- an unidentified line leader criticized him for not wearing appropriate personal protective equipment, while a white employee who also was not wearing appropriate equipment was not confronted;
- two other unidentified individuals called him an "idiot" and "boy" for walking outside yellow safety lines, and then followed him to the time clock and tried to block him from leaving;
- a white male employee knocked things off a table where Mr. Mack was having lunch;
- An employee called Mr. Mack the n-word at an FWM trailer; and
- unidentified white employees followed him around the JMS plant, apparently in an effort to intimidate Mr. Mack.

Mr. Mack alleges that he reported these incidents to supervisors but that no action was taken. Eventually, he quit his job with FWM. He alleges that even after quitting, he received phone calls from FWM about available jobs. Although FWM says these phone calls were automated, Mr. Mack contends that in one phone call he was told to get out of town, and another phone call used the n-word.

Mr. Mack filed a pro se action in federal district court in Kansas against JMS and FWM alleging race discrimination, hostile work environment, and retaliation in violation of Title VII and 42 U.S.C. § 1981; violation of the Thirteenth Amendment; and fraud. The district court granted the defendants' motion to dismiss all claims except for race discrimination and hostile work environment.[2]

The case then proceeded to discovery, and Mr. Mack filed several motions to compel. The district court denied each motion for failure to comply with the Federal Rules of Civil Procedure and the court's local rules.

After discovery was completed, the defendants filed separate motions for summary judgment. The defendants argued there were no genuine issues of material fact, and that the undisputed facts established they were entitled to judgment as a matter of law. JMS additionally argued it was not Mr. Mack's employer for Title VII purposes. After the defendants filed reply briefs, Mr. Mack filed sur-replies without first seeking leave of court. Accordingly, the district court granted the defendants'

[2] Mr. Mack does not appear to challenge the dismissal of his fraud, retaliation, and Thirteenth Amendment claims.

motions to strike the sur-replies. The district court granted the defendants' motions for summary judgment. This timely appeal followed.

II. Discussion

Mr. Mack appears to make three arguments on appeal. He argues the district court erred in denying his motions to compel discovery and in granting the defendants' motions to strike Mr. Mack's summary judgment sur-replies. He also argues the district court erred in granting summary judgment on his race discrimination claims. We address each argument in turn.

A. Denial of Mr. Mack's Discovery Motions

We review a district court's discovery rulings, including the denial of a motion to compel, for abuse of discretion. *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1300 (10th Cir. 1999). The district court denied Mr. Mack's motions because: (1) his motions failed to certify that he in good faith conferred or attempted to confer with counsel for the defendants as required by Fed. R. Civ. P. 37(a)(1); (2) Mr. Mack failed to request a discovery conference with the court, which is required of a party before filing a discovery-related motion, *see* D. Kan. R. 37.1(a); and (3) he failed to attach to his motions the discovery requests at issue, as required by local rule, *see* D. Kan. R. 37.1(b). While we are sympathetic to the challenges faced by pro se litigants, we have long held that pro se litigants "must follow the same rules of procedure that govern other litigants." *Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992). Mr. Mack appears to believe the defendants withheld evidence and speculates he would have discovered information to support his claims had the

court granted his motions. He does not, however, specify how the district court abused its discretion in denying the motions. Accordingly, we affirm.

B. Striking of Mr. Mack's Sur-replies

We likewise review a district court's grant of a motion to strike a sur-reply for an abuse of discretion. *See In re Young*, 91 F.3d 1367, 1377 (10th Cir. 1996). Here, Mr. Mack filed two sur-replies after the defendants filed replies supporting their summary judgment motions. The district court's local rules, however, do not contemplate filing sur-replies in the regular course. *See* D. Kan. R. 7.1(a), (c) (briefing on motions limited to a motion, response, and reply). Instead, sur-replies "are permitted only with leave of court and under rare circumstances after good cause is shown." *James v. Boyd Gaming Corp.*, 522 F. Supp. 3d 892, 902-03 (D. Kan. 2021) (internal quotation marks omitted). Mr. Mack did not seek or obtain leave of court to file his sur-replies, and we discern no abuse of discretion in the district court's decision to strike them.[3]

Mr. Mack seems to argue the defendants' reply briefs cited new evidence, thus warranting an opportunity to respond. Presumably he invokes the example in *James* that "when a moving party uses their reply to present new material—*i.e.*, new

[3] Mr. Mack argues he did not "receive any information from the courts explaining to him he had a deadline to reply to the motion to strike" and claims the court did not give him "proper time" to respond. Opening Br. at 6. He has not demonstrated, however, that filing a response to the motion to strike would have made any difference. *See Walter v. Morton*, 33 F.3d 1240, 1244 (10th Cir. 1994) ("We find neither prejudice to the Defendants nor an abuse of . . . discretion in ruling before the filing of a reply brief.").

evidence or new legal arguments—and . . . the court *relies* on that new material, it should give the nonmoving party an opportunity to respond." *Id.* at 903. But the "new evidence" was Mr. Mack's unemployment records, which he acknowledges the defendants *did not* cite in their summary judgment briefing. Opening Br. at 5-6 ("The evidence was [Mr.] Mack's unemployment records, which the defendants did not file with their summary judgments which they already had access to but did not want to introduce into evidence due to the fact it would help strengthen the plaintiff's case."). Nor did the district court rely on the unemployment records. We therefore reject Mr. Mack's argument that the defendants presented new evidence warranting the filing of a sur-reply.

C. Summary Judgment

Finally, Mr. Mack argues the district court erred in granting summary judgment in favor of JMS and FWM. We review summary judgment decisions de novo, "view[ing] the evidence and draw[ing] reasonable inferences therefrom in the light most favorable to the nonmoving party." *Talley v. Time, Inc.*, 923 F.3d 878, 893 (10th Cir. 2019) (internal quotation marks omitted). Summary judgment is required when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "We [also] review de novo legal questions of statutory interpretation," such as "the legal test to determine the definition of 'employee' under Title VII." *Knitter v. Corvias Mil. Living, LLC*, 758 F.3d 1214, 1225 (10th Cir. 2014).

1. JMS

The district court granted summary judgment in JMS's favor because it was not Mr. Mack's employer for purposes of Title VII. In arriving at this conclusion, the district court utilized the "joint employer" test set forth in *Knitter*. Under that test, "two entities are considered joint employers if they share or co-determine those matters governing the essential terms and conditions of employment." *Id.* at 1226 (internal quotation marks omitted). "Most important to control over the terms and conditions of an employment relationship is the right to terminate it under certain circumstances." *Id.* (internal quotation marks omitted). Additional factors include "the ability to promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; day-to-day supervision of employees, including employee discipline; and control of employee records, including payroll, insurance, taxes and the like." *Id.* (ellipses and internal quotations marks omitted). We apply the *Knitter* test here since no one disputes that FWM and JMS are separate entities and that Mr. Mack was an employee rather than an independent contractor.

The undisputed facts reveal that JMS did not have the right to terminate Mr. Mack's employment, provided him no pay or benefits, and maintained no paperwork concerning his assignment to the JMS plant. FWM kept his time records and directly supervised his work at JMS. Although JMS personnel gave Mr. Mack instructions regarding safety and job tasks, "[s]ome degree of supervision . . . is to be expected when a vendor's employee comes on another business's work site." *Id.* at

1230. Mr. Mack insists in his opening brief that JMS had the right to terminate his employment under certain circumstances, and that JMS had control over the terms and conditions of his employment. He provides no record citation to support these assertions, and we have found nothing in the record to support them. *See Ford v. West*, 222 F.3d 767, 777 (10th Cir. 2000) ("[C]onclusory statements do not suffice to create a genuine issue of material fact." (internal quotation marks omitted)). In short, we agree with the district court that no reasonable jury could find Mr. Mack was an employee of JMS. The district court therefore correctly granted summary judgment in favor of JMS.

2. FWM

Mr. Mack argues the district court erred in granting summary judgment to FWM on his race discrimination and hostile work environment claims.

a. Race Discrimination

To establish a disparate treatment claim based on race under Title VII, a plaintiff must show that (1) he belongs to a protected class; (2) he suffered an adverse employment action; and (3) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Luster v. Vilsack*, 667 F.3d 1089, 1095 (10th Cir. 2011).

The district court held Mr. Mack did not establish for summary judgment purposes that he suffered an adverse employment action. An adverse employment action is a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision

causing a significant change in benefits." *Piercy v. Maketa*, 480 F.3d 1192, 1203 (10th Cir. 2007) (internal quotation marks omitted). Mr. Mack was not fired by FWM. Rather, he voluntarily terminated his employment. He asserts he was given less desirable tasks at JMS and required to wear personal protective equipment. But these allegations amount to "mere inconvenience[s] or . . . alteration[s] of job responsibilities," which do not qualify as adverse employment actions under applicable law. *Id.* (internal quotation marks omitted).

Mr. Mack also asserts that occasionally FWM sent him home when work was not available. But even if he suffered an adverse employment action on these occasions, he has not shown it occurred under circumstances giving rise to an inference of discrimination. *Luster*, 667 F.3d at 1095. FWM's policy is to assign work on a first-come, first-served basis, and employees not selected to work received priority for selection the following day. Mr. Mack has not shown that FWM applied that policy to him differently from other FWM employees. He alleges he was called the n-word on one occasion, but he did not tie that incident to any FWM employee responsible for making work assignments.

In short, we hold that the district court correctly granted summary judgment on Mr. Mack's race discrimination claim.

b. Hostile Work Environment

A prima facie hostile work environment claim, whether brought under Title VII or § 1981, requires a plaintiff to show: (1) he is a member of a protected group; (2) he was subject to unwelcome harassment; (3) the harassment was based on

race; and (4) the harassment was so severe or pervasive that it altered a term, condition, or privilege of plaintiff's employment and created an abusive work environment. *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1222 (10th Cir. 2015); *see also id.* at 1221 (elements for Title VII and § 1981 hostile-work-environment claims are the same). In assessing the fourth requirement, we must "assess whether the work environment is both subjectively and objectively hostile or abusive." *Id.* (brackets, emphasis, and internal quotation marks omitted). "In other words, it is not enough that a particular plaintiff deems the work environment hostile; it must also be of the character that it would be deemed hostile by a reasonable employee under the same or similar circumstances." *Id.* The plaintiff must "show that a rational jury could find that the workplace is permeated with discriminatory intimidation, ridicule, and insult." *Throupe v. Univ. of Denver*, 988 F.3d 1243, 1252 (10th Cir. 2021) (internal quotation marks omitted).

Mr. Mack alleges (1) he was criticized by an unidentified line leader for not wearing appropriate personal protective equipment, while a white employee was not required to wear such equipment; (2) two unidentified white employees called him names (including "boy") for not walking within yellow safety lines, then attempted to block Mr. Mack from an exit; (3) he felt that he was followed around the plant, though he does not know by whom or how often; (4) an unidentified employee knocked some things off a table where Mr. Mack was sitting; and (5) he once heard the n-word in an FWM trailer, though he does not know who said it.

The last incident is most concerning because "[t]he n-word is a powerfully charged racial term." *Ford v. Jackson Nat'l Life Ins. Co.*, 45 F.4th 1202, 1234 (10th Cir. 2022) (internal quotation marks omitted). "Its use—even if done with benign intent and undirected at anyone specific—can contribute to a hostile work environment." *Id.* But a showing of "severe or pervasive" harassment must amount to more than "sporadic racial slurs." *Lounds*, 812 F.3d at 1223; *see Chavez v. New Mexico*, 397 F.3d 826, 832 (10th Cir. 2005) ("there must be a steady barrage of opprobrious racial comments" (internal quotation marks omitted)). "The important question is whether *the repeated utterance* of [the n-word] had the effect of contributing to the creation of a racially hostile work environment." *Lounds*, 812 F.3d at 1230 (emphasis added); *see also Savage v. Maryland*, 896 F.3d 260, 277 (4th Cir. 2018) ("[A]n employer's *repeated and continuous* use of that slur, among others, to insult African-American employees and customers, even when not directed specifically at the complaining employee, is sufficiently severe or pervasive . . . to create an unlawful hostile work environment." (emphasis added; internal quotation marks omitted)). Here, Mr. Mack has not alleged repeated and continuous utterances, nor has he alleged a supervisor used the offensive language. *See Lounds*, 812 F.3d at 1230 (single use by a supervisor might be sufficient).

The incidents Mr. Mack alleges are understandably distressing. But under our precedent and the record before us, this is not a case where "a rational jury could find that [his] workplace was permeated with discriminatory intimidation, ridicule, and insult that was sufficiently severe or pervasive to alter [his] conditions of employment."

Hernandez v. Valley View Hosp. Ass'n, 684 F.3d 950, 958 (10th Cir. 2012); *see also Herrera v. Lufkin Indus., Inc.*, 474 F.3d 675, 680 (10th Cir. 2007).

We therefore affirm the district court's grant of summary judgment in favor of FWM.

III. Conclusion

We affirm the district court's grant of summary judgment against Mr. Mack. We further direct the Clerk of Court to file on the public docket volume 3 of the record on appeal with references to Mr. Mack's social security number and birthdate redacted.

Entered for the Court

Veronica S. Rossman
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CEDRIC MACK
Plaintiff,

vs. Case No. 21-4038-SAC-ADM

J.M. SMUCKERS CO. and
FOCUS WORKFORCE MANAGEMENT,
INC.,
Defendants.

MEMORANDUM AND ORDER

This is an employment discrimination action which is before the court upon separate summary judgment motions filed by the two defendants, Focus Workforce Management (FWM) and J.M. Smucker Co. (JMS). Plaintiff proceeds pro se.

I. Summary judgment standards

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED.R.CIV.P. 56(a). Such a showing may be made with citation "to particular parts of materials in the record, including depositions, documents, . . . affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials." FED.R.CIV.P. 56(c)(1)(A). The court views the evidence and draws all reasonable inferences therefrom in a light most favorable to the nonmoving party. Spaulding v. United Transp. Union, 279 F.3d 901, 904 (10th Cir. 2002). An issue of fact is "genuine" if "there is sufficient

evidence on each side so that a rational trier of fact could resolve the issue either way." Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998). Unsupported or conclusory allegations, standing alone, do not create a genuine issue of material fact. Conaway v. Smith, 853 F.2d 789, 792 n.4 (10h Cir. 1988). The moving party may demonstrate an absence of a genuine issue of material fact by pointing out a lack of evidence for the other party on an essential element of that party's claim. Adams v. Am. Guar. & Liab. Ins. Co., 233 F.3d 1242, 1246 (10th Cir. 2000)(quoting Adler, 144 F.3d at 671).

Under the Local Rule 56.1, a brief in support of a summary judgment motion must include a section that contains a numbered statement of material facts as to which the movant contends no genuine issue exists. The facts must refer to the portions of the record upon which the movant relies. A memorandum in opposition to a motion for summary judgment must contain a section with a statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute must refer to the portions of the record upon which the opposing party relies and refer, if applicable, to the number of the movant's fact that is disputed. The party in opposition may also set forth additional facts upon which he or she relies supported by references in the record. Material facts of the movant or the opposing party may be

deemed admitted for the purpose of summary judgment unless "specifically controverted" by the other side. D.Kan.R. 56.1.

The parties have been notified of the court's summary judgment guidelines in the pretrial order (Doc. No. 87, p. 14), D.Kan.R. 56.1, and the notice to pro se litigants at Doc. No. 92.

II. Pro se pleadings

"A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). A pro se litigant, however, is not relieved from following the same rules of procedure as any other litigant. See Green v. Dorrell, 969 F.2d 915, 917 (10th Cir. 1992). In this matter, plaintiff has not followed the rules governing a response to a summary judgment motion. He has failed to properly respond to the facts asserted by defendants with properly enumerated replies that are clearly linked to portions of the record. Also, plaintiff's additional facts are not properly substantiated.

III. Plaintiff's sur-replies and defendants' motion to strike

At Doc. Nos. 101 and 102, plaintiff has improperly filed sur-replies (that is, responses to the defendants' reply briefs) without seeking leave from the court. Defendants have filed a motion to strike the sur-replies. Doc. No. 103. Sur-replies are permitted only with leave of the court which is rarely given. James v. Boyd Gaming Corporation, 522 F.Supp.3d 892, 902-03 (D.Kan.

2021); Taylor v. Sebelius, 350 F.Supp.2d 888, 900 (D.Kan. 2004). The court is unaware of any circumstances, such as new arguments or new evidence advanced by defendants in their reply briefs, that would warrant filing a sur-reply in this case. Plaintiff has not offered a justification for a sur-reply or filed a response to the motion to strike.

The court shall grant the motion to strike the sur-replies to the extent that the court shall disregard the sur-replies. Shaw v. T-Mobile USA, Inc., 2021 WL 2206541 *9-10 (D.Kan. 6/1/2021); Taylor, 350 F.Supp.2d at 900; Humphries v. Williams Nat. Gas. Co., 1998 WL 982903 *1 (D.Kan. 9/23/1998). Even if the court considered the arguments and materials presented in Doc. Nos. 101 and 102, the court would still grant defendants' motions for summary judgment for the reasons explained below.

IV. Plaintiff's claims

The pretrial order "supersedes all pleadings and controls the subsequent course of this case." Doc. No. 87, p. 1. According to the pretrial order, plaintiff's claims are that FWM and JMS "violated Mack's rights [under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981] by participating in ongoing race discrimination and harassment in that Mack was subjected to harder work than the other employees, and Mack was followed around and taken off easy jobs to be assigned to harder ones." Doc. No. 87, p. 10.

V. FWM's and JMS's motions for summary judgment shall be granted.

A. Uncontroverted facts

Upon review of defendants' briefs in support of summary judgment, plaintiff's responses thereto, and the stipulations in the pretrial order, the following facts appear to uncontroverted for purposes of this order.

FWM provides direct hire, staffing and onsite workforce management services to manufacturing and warehouse companies. Plaintiff began working for FWM in Topeka, Kansas on August 2, 2019. Plaintiff received and signed a copy of the company's Handbook and policies when he started his employment. The Handbook states "FOCUS IS YOUR EMPLOYER" on the first page.

JMS was a client of FWM. FWM assigned plaintiff to work at the JMS Topeka plant as a packer. Plaintiff's first day at the JMS plant was August 29, 2019. Plaintiff worked there a total of 20 days over approximately three months. Work assignments for FWM employees were selected on a first come, first served basis. Employees not selected to work received priority for selection the following day. The assignment of tasks was based on the specific needs of the day.

Plaintiff voluntarily terminated his employment with FWM on or about November 24, 2019. Plaintiff was fed up that he was asked to transfer to either a harder job or one that no else wanted to

do. He turned in his PPE gear and left without explaining his reasons. Plaintiff received calls from FWM for months thereafter regarding new employment opportunities. Plaintiff claims that one call used the n-word and that another call told plaintiff to get out of town.

Plaintiff did not complain to anyone at JMS about discrimination or harassment. Plaintiff did not complete a job application with JMS. He was not interviewed by JMS and never completed any paperwork for JMS. JMS did not provide pay or benefits to plaintiff and maintained no paperwork regarding plaintiff's assignment to the JMS plant.

FWM employees at JMS used separate machines to clock in and out of their shifts. Their time records were kept by FWM. FWM employees wore street clothes, not JMS shirts at the job site. They were not directly supervised by JMS employees, although JMS personnel gave instructions regarding safety, PPE and the completion of job tasks. Plaintiff was never disciplined by JMS.

B. FWM's arguments for summary judgment[1]

Both 42 U.S.C. § 1981 and Title VII (42 U.S.C. § 2000e) make it unlawful to racially discriminate against any individual with respect to his employment. Section 1981 states that all persons

[1] FWM has asserted an administrative exhaustion argument against plaintiff's Title VII claim. The court does not reach that argument in this order. The court finds that even if plaintiff properly and timely filed an administrative charge against FWM, plaintiff's claims of racial discrimination would not prevail before a reasonable factfinder following the law.

"shall have the same right to make and enforce contracts . . . as is enjoyed by white citizens." Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of an individual's race." 42 U.S.C. § 2000e-2(a)(1).

The elements of a race discrimination claim under § 1981 or Title VII are the same. Wilson v. Textron Aviation, Inc., 820 Fed.Appx. 688, 692 (10th Cir. 2020). A plaintiff must show for a prima facie case that: 1) he belongs to a protected class; 2) he suffered an adverse employment action; and 3) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. Id. An adverse employment action is a "'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" Piercy v. Maketa, 480 F.3d 1192, 1203 (10th Cir. 2007)(quoting Hillig v. Rumsfeld, 381 F.3d 1028, 1032-33 (10th Cir. 2004)). "'[A] mere inconvenience or an alteration of job responsibilities' does not qualify" as an adverse employment action. Ford v. Jackson National Life Ins. Co., 45 F.4th 1202, 1222 (10th Cir. 2022)(quoting Jones v. Okla. City Pub. Schs., 617 F.3d 1273, 1279 (10th Cir. 2010)).

The substantive standards for a § 1981 and a Title VII claim of a hostile work environment are also the same. Lounds v. Lincare, Inc., 812 F.3d 1208, 1221 (10th Cir. 2015). These standards require a plaintiff to show: 1) he is a member of a protected group; 2) he was subject to unwelcome harassment; 3) the harassment was based upon race; and 4) the harassment was so severe and pervasive that it altered a term, condition or privilege of plaintiff's employment and created an abusive work environment. Id. at 1222. To survive summary judgment, a plaintiff must show that the work environment was both objectively and subjectively hostile. Payan v. United Parcel Service, 905 F.3d 1162, 1171 (10th Cir. 2018). Courts consider such factors as frequency, severity, whether its physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interfered with an employee's work performance. Id. Run-of-the-mill boorish, juvenile or annoying behavior does not meet the standard for a hostile work environment claim. Id. at 1170-71.

Both motions for summary judgment discuss incidents of alleged discrimination which plaintiff has mentioned in his deposition. Plaintiff alleges that he was criticized by an unnamed individual for not wearing appropriate PPE and chastised and name-called by two unidentified Caucasian employees for not walking within yellow safety lines. Plaintiff has further asserted that he felt he was being followed around the plant, but he has not

stated how often this happened or who followed him. Also, plaintiff claims that an unidentified male employee, while grousing that he was "tired of this stuff," knocked some things that didn't belong to plaintiff off a table where plaintiff was sitting during a lunch period. The summary judgment record does not link any of these incidents to FWM employees or to a racial motivation.

Plaintiff has also alleged that he was sent home when work was not available. Plaintiff, however, again does not offer proof that plaintiff was denied work because of his race. Indeed, the evidence presented so far indicates that the FWM employees responsible for assigning work were African-American and Hispanic.

Plaintiff further claims that he was assigned to harder jobs than other employees and sometimes removed from an easier job and transferred to a harder job during the workday. Plaintiff has not stated how often this happened. Nor is it clear what jobs he was transferred to and from. Importantly, there is no evidence in the record that the job assignments were influenced by plaintiff's race.

Finally, plaintiff has alleged that on one occasion he was walking inside a FWM trailer and heard the n-word as well as an unidentified person say "why does he keep showing up." Plaintiff

does not claim that he had any subsequent interactions with the person or persons responsible.[2]

A reasonable jury could not find that plaintiff's allegations demonstrate racial discrimination in violation of § 1981 or Title VII for the following reasons. First, plaintiff has not shown that he was the victim of disparate treatment in job assignments because of race. "[P]ersonal belief [of discrimination] is insufficient to create an issue of material fact." Ford, 45 F.4th at 1222. Plaintiff does not compare his work frequency and physical difficulty of jobs with that of non-African-American workers. Nor does he link the persons who made the job assignments to incidents of racial bias. Aside from the phone calls which occurred sometime after plaintiff had already voluntarily left FWM's employment, there is only one example of blatant racial prejudice described by plaintiff and he does not link that to anyone who influenced plaintiff's work assignments.[3]

Second, plaintiff has not shown that he was subject to an adverse job action. Plaintiff worked 20 days at JMS for FWM over a period of about three months. That plaintiff missed some workdays because he was not given a job and that he sometimes was

[2] It is not clear whether plaintiff overheard one person or two people speak these comments in the trailer.

[3] In general, stray remarks have been considered insufficient to support an inference of discriminatory motivation. See LaChica v. Russell Stover Chocolates, LLC, 853 Fed.Appx. 283, 288 (10th Cir. 2021); Campbell v. Mart, 2000 WL 826259 *2 (10th Cir. 2000); Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 531 (10th Cir. 1994).

assigned or moved to less desirable tasks that required heavy lifting, does not establish an adverse employment action. There is no claim that his rate of pay, title, or chance for advancement was diminished because of his job assignments. In comparable situations, other courts have rejected employment discrimination claims. See Faragalla v. Douglas County School Dist., 411 Fed.Appx. 140, 155-56 (10th Cir. 1/12/2011)(being assigned excessive copying assignments and a heavier caseload as an educational assistant did not amount to an adverse employment action); Rogers v. Apria Healthcare, Inc., 2013 WL 3773838 *6 (D.Kan. 7/17/2013)(assignment of additional phone answering duties and new-hire training was not an adverse employment action); Grant v. New York State Office for People with Developmental Disabilities, 2013 WL 3973168 *7 (E.D.N.Y. 7/30/2013)(assignment to more physical tasks was not an adverse employment action where assignments did not exceed scope of job duties); Campos v. Coast Personnel Services, Inc., 2012 WL 2047605 *9 (N.D.Ala. 6/6/2012)(where work assignment is by definition temporary and does not affect employee's permanent job title or classification, there is no adverse employment action); Smith v. Century Concrete, Inc., 2006 WL 1877013 *8 (D.Kan. 7/6/2006)(plaintiff did not suffer a materially adverse employment action when he was forced to shovel rocks two times with a shoulder injury over a two to three-week period).

The court also holds that any reasonable jury would not find that the alleged harassment described by plaintiff, considering the totality of circumstances, was objectively so severe or pervasive as to amount to a hostile working environment. See Brown v. LaFerry's LP Gas Co., 708 Fed.Appx. 518, 521-23 (10th Cir. 2017)(affirming dismissal where comments were not sufficiently extreme or pervasive to constitute a hostile work environment); Brown v. Lowe's Home Centers, 627 Fed.Appx. 720, 726-27 (10th Cir. 2015)(affirming summary judgment where incidents were neither pervasive nor severe); Al-Kazaz v. Unitherm Food Systems, Inc., 594 Fed.Appx. 460, 462-63 (10th Cir. 2014)(same); Morris v. City of Colorado Springs, 666 F.3d 654, 665-67 (10th Cir. 2012)(same);

For these reasons, FWM is entitled to summary judgment on the merits of plaintiff's discrimination claims.[4]

C. JMS's arguments for summary judgment

1. JMS was not plaintiff's employer

The record upon the summary judgment motions is clear. FWM was plaintiff's employer, not JMS. Nevertheless, JMS could be found liable under § 1981 or Title VII under the "joint employer" test. Under this test,

[4] The pretrial order does not indicate that plaintiff is alleging a constructive discharge claim. Nor does the court find that the record supports such a claim. Tran v. Trustees of State Colleges in Colorado, 355 F.3d 1263, 1270 (10th Cir. 2004)(a constructive discharge occurs when a reasonable person would view his working conditions as intolerable and would feel that he had no other choice but to quit).

> two entities are considered joint employers if they share or co-determine those matters governing the essential terms and conditions of employment. Both entities are employers if they both exercise significant control over the same employees. An independent entity with sufficient control over the terms and conditions of employment of a worker formally employed by another is a joint employer...

Knitter v. Corvias Military Living, LLC, 758 F.3d 1214, 1226 (10th Cir. 2014)(interior quotations omitted). The right to terminate an employee is the most important factor to consider. Id. A court may also consider the ability to set work rules and assignments, to set conditions of employment, including compensation and hours, to conduct daily supervision, to exercise discipline, and to control employee records, including payroll, insurance and taxes. Id. In this instance, while JMS may have had the right to ask FWM to reassign plaintiff to a different client, there is no evidence that JMS had the authority to terminate plaintiff or that JMS exercised firing authority over other FWM workers. FWM hired plaintiff, not JMS. FWM controlled plaintiff's compensation, hours and employment records. JMS exercised some supervisory authority at the work site and gave instruction concerning safety and the completion of tasks, but there is no indication that JMS exercised discipline over plaintiff. Under these circumstances, the court believes a reasonable jury could only conclude that JMS was not plaintiff's employer or joint employer. Cf., Hurst v. McDonough, 2022 WL 1090913 *2-4 (10th Cir. 4/12/2022)(affirming

summary judgment order which rejected a joint employer contention); Adams v. C3 Pipeline Construction Inc., 30 F.4th 943, 962-65 (10th Cir. 2021)(same); Knitter, 758 F.3d at 1228-31 (same).

2. Race discrimination

Even if JMS was considered a joint employer, JMS would still be entitled to summary judgment for the reasons already discussed in relation to FWM's motion. There is no material issue of fact which supports plaintiff's claim that his job assignments were motivated by racial prejudice, that he suffered an adverse employment action, or that he was the victim of a hostile work environment.[5]

VI. Conclusion

For the above-stated reasons, the court grants defendants' motion to strike consistent with the above opinion. Doc. No. 103. The court further finds that summary judgment should be given against plaintiff's claims of employment discrimination and that the motions of FWM and JMS (Doc. Nos. 90 and 93) should be granted.

IT IS SO ORDERED.

Dated this 29th day of September 2022, at Topeka, Kansas.

s/Sam A. Crow
U.S. District Senior Judge

[5] The court does not reach JMS's argument that plaintiff has failed to mitigate his damages and is precluded from receiving backpay.

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