

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT
No. 2021-00129

JAIMI ROSE,
Plaintiff,

vs.

CAPE FISH & LOBSTER CO., INC.,
Defendant.

**MEMORANDUM OF DECISION AND ORDER ON
THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Jaimi Rose (“Rose”) filed a four-count complaint alleging he suffered illegal discrimination pursuant to G. L. c. 151B, §4. Specifically, he alleges his employer, Cape Fish & Lobster Co., Inc. (“Cape Fish & Lobster”), created a hostile work environment on the basis of race (Count I); a claim for disparate treatment on the basis of race (Count II); retaliation (Count III); and failure to investigate (Count IV).

Cape Fish & Lobster moves for summary judgment arguing that: (1) because the plaintiff used the same language that he complains of, and thus he cannot prove he was subjected to a hostile work environment; (2) he admits to being given favorable treatment by his manager, and thus was not subject to disparate treatment; and (3) he was terminated for legitimate, nondiscriminatory reasons. The court held a hearing on January 31, 2023, and took the matter under advisement. For the reasons discussed below, Cape Fish & Lobster’s motion for summary judgment is **DENIED**.

BACKGROUND¹

Rose began working at Cape Fish & Lobster on April 24, 2018 as a delivery driver and warehouse worker. His direct supervisor was Ed Grygent (“Grygent”), who reported to Ralph Cardarelli (“Cardarelli”), owner of Cape Fish & Lobster.

Several months after Rose started working at Cape Fish & Lobster, Grygent and Rose had verbal confrontation, after which Grygent allegedly announced to other employees, “well, boys, I think we’re going to have a lynchin’ tonight.” He later asked Rose if Rose knew where Grygent could “get some gas ... because we’re going to be burning crosses tonight. Do you want to come with us?” Rose did not report these incidents. In his deposition testimony, Grygent denies these events took place.

Rose also worked with an individual named Tony Solimini, with whom he had a contemptuous relationship. The two constantly made “comments” to one another that were antagonistic. In September 2018, Solimini began claiming that Rose was his subordinate. As a result, Solimini and Rose had a meeting with Grygent, during which Grygent confirmed that Solimini was not Rose’s superior. In April and May 2019, Solimini began dumping trash into Rose’s truck. He continued this behavior on a “daily” basis and would also “push in” Rose’s side view mirrors. Rose reported this conduct to Cardarelli, but asked Cardarelli not to follow up on the conduct so that Rose could “see if he could fix the situation.” Ultimately, Cardarelli and Grygent placed Rose and Solimini on alternate work schedules to separate them. Both men were told to stay away from each other and Rose was essentially told to ignore Solimini.²

¹ The undisputed facts, with all reasonable inferences therefrom, are taken in the light most favorable to Rose as the non-moving party. Certain facts that are in dispute are identified as such. Additional facts are reserved for discussion below.

² At one point, Grygent encouraged Rose to “keep up the good work” and “rub their shoulders as you climb over them.”

On June 19, 2019, an employee of a customer in Welfleet showed Rose a “meme” that Solimini had made. In it, Solimini referred to Rose with a racist epithet. Rose relayed a copy of the meme to Cardarelli, who replied that the conduct of creating the meme was “more than unprofessional;” it was “disgusting.” In his text to Cardarelli, Rose told Cardarelli that the meme [didn’t] bother [him].” Nonetheless, Cardarelli assured Rose that he would “take care of the situation,” however no immediate action was taken.

On June 21, 2019, Rose and Solimini engaged in a verbal altercation in the parking lot of Cape Fish & Lobster. According to Rose, Solimini instigated the altercation by calling out to Rose, “I want to f--- you up!” Rose responded by suggesting they fight after work. Solimini continued by calling Rose a racist epithet. Grygent had to interfere and restrain Solimini.

At the end of the day, Cardarelli met with Rose and asked if the incident was something Rose could “get past.” Rose stated that he could not, specifically referring to the racist epithet. Cardarelli indicated that he would have to give the situation some thought, and Grygent reiterated to Rose that Rose was a valued employee.

The next day, Cardarelli told Rose that he found Solimini’s conduct to be disgusting, but that he had made the decision to fire both Rose and Solimini. Rose was informed that he would be paid for two weeks of vacation that was owed to him and two weeks of “severance.”

DISCUSSION

Standard

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56; *Cassesso v. Commissioner of Corrections*, 390 Mass. 419, 422 (1983); *Community Nat’l Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively

demonstrating the absence of a triable issue and that the summary judgment record entitles it to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). If the moving party has met this initial burden,

“an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.”

Mass. R. Civ. P. 56(e). In employment discrimination cases, summary judgment is disfavored; motive is generally the essential issue, which is a question of fact and credibility, and ultimately for the factfinder to decide. *Blare v. Husky Injection Molding Sys. Boston, Inc.*, 419 Mass. 437, 445 (1995).

Analysis

As noted above, Cape Fish & Lobster argues that it is entitled to summary judgment because: (1) the plaintiff cannot establish that he was subjected to a hostile work environment; (2) he was not subject to disparate treatment; and (3) he was terminated for legitimate, nondiscriminatory reasons. Although the defendant's motion states that the defendant is entitled to summary judgment on “all counts,” the accompanying memorandum appears to address Counts I, II, and touches upon Count IV. However, the memorandum fails to mention retaliation, Count III, its elements, or provide an analysis of whether the summary judgment record supported those elements. As such, the court addresses Count I and Count II, briefly addresses Count IV, and does not reach Count III.

Count I: Hostile Work Environment

Cape Fish & Lobster argues that it is entitled to summary judgment on Count I because the plaintiff cannot establish that he was subjected to a hostile work environment. Specifically, it argues that, because the plaintiff used the same racially-charged language complained-of, the plaintiff cannot prove he was uncomfortable with such language. Additionally, Cape Fish & Lobster argues that Rose has failed to show that he was unable to perform his work assignments or his duties as a result of the alleged discriminatory conduct.

In addressing a claim alleging a hostile work environment, the fact finder must consider the totality of the circumstances, which may include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *15 LaGrange St. Corp. v. Massachusetts Comm'n Against Discrimination*, 99 Mass. App. Ct. 563, 572 (2021), review denied, 488 Mass. 1106 (2021). More directly stated, the determination of whether a particular work environment was “hostile” is generally fact-intensive. *Id.* This case is no exception.

Here, the undisputed facts establish an on-going feud between the plaintiff and Solimini, which began with Solimini placing trash in Rose’s truck and moving his mirrors. Further, a particular racist meme was reported to Cardarelli, but the plaintiff stated it “[didn’t] bother [him].” However, the remainder of the relationship remains disputed, including whether any recourse was taken by Cardarelli or Grygent with regard to the meme. Additionally, Solimini disputes having ever used the particular slur toward the plaintiff, and inferentially disputes having created the meme. (SOF, para. 43-44). Likewise, the additional complained-of incidents of racist conduct are disputed: the alleged incidents of Grygent referring to “lynchin” and

“burning crosses” are both denied by Grygent in his deposition testimony. (SOF, para. 23-24). Simply denying the conduct occurred is not sufficient to warrant summary judgment. See *Flesner*, 410 Mass. at 809 (burden on moving party to show affirmative evidence negating essential element). In any event, whether the tone and frequency with which racially-charged language was used, combined with other demeaning conduct, if proven, rose to the level of a hostile work environment are considerations to be weighed by the factfinder. *15 LaGrange St. Corp.*, 99 Mass. App. Ct. at 572.

Cape Fish and Lobster’s also claims that Rose insufficiently alleged that the discriminatory conduct interfered with his work assignments or duty. See *Cuddy v. Stop & Shop Supermarket Co.*, 434 Mass. 521, 532 (2001) (hostile work environment is one that is “pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization, [and that] poses a formidable barrier to the full participation of an individual in the workplace.”). However, Cardarelli states that Rose was fired largely due to his inability to work with Solimini. Likewise, the undisputed facts in the light most favorable to Rose indicate that racist conduct by Solimini contributed to their inability to work together. As a result, Cape Fish and Lobster has not submitted affirmative evidence negating an essential element of Rose’s case on this point. *Flesner*, 410 Mass. at 809.

Disparate Treatment: Count II

Cape Fish & Lobster argues that it is entitled to summary judgment on Count II because the plaintiff was not subject to disparate treatment. Specifically, Cape Fish & Lobster points to the plaintiff’s deposition testimony in which he stated that he believed Solimini was angry that the plaintiff had received better hours and a better route. As a result, Cape Fish & Lobster

argues, the plaintiff admits he was treated *better* than his white colleague and he cannot prove disparate treatment.

Summary judgment is a disfavored remedy in discrimination cases based on disparate treatment. *Blare*, 419 Mass. at 439. In such cases, the plaintiff bears the initial burden of establishing a prima facie case of racial discrimination. *Id.* at 441. To establish a prima facie case, the plaintiff must establish four elements: (1) membership in a protected class; (2) satisfactory job performance; (3) an adverse employment action; and (4) that other employees not part of the protected class were not subjected to the same adverse employment action. *Id.* at 441. Once that burden has been met, unlawful discrimination is presumed and the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its decision. *Id.* at 441–442. In doing so, the defendant must “produce credible evidence to show that the reason or reasons advanced were the real reasons.” *Id.* at 442. “Once the defendant meets its burden, the presumption of discrimination vanishes, and the burden returns to the plaintiff to persuade the court, by a fair preponderance of the evidence, that the defendant’s proffered reason for its employment decision was not the real reason, but is a pretext for discrimination.” *Matthews v. Ocean Spray Cranberries, Inc.*, 426 Mass. 122, 128 (1997). The plaintiff ultimately bears the burden of persuasion on the issue of discrimination, and thus in meeting his burden, he must produce evidence sufficient to support a jury verdict that it was more likely than not that the articulated reason was pretext for actual discrimination. *Id.*

Taking the undisputed facts in the light most favorable to Rose, Rose meets his initial burden of presenting a prima facie case: Rose is the member of a protected class, satisfactorily

performed his work,³ and he was fired. *Blare*, 419 Mass. at 441. As to the last element, Rose argues that he was fired after a white employee initiated a racially-charged disagreement, on the heels of other racially-offensive conduct. Although the white employee was also fired as a result of the argument, Rose was fired after being the *victim* of alleged racist conduct. Although a somewhat narrow distinction, the defendant does not raise the issue and the burden for making out a *prima facie* case is low.⁴ *Id.* at 442.

Thus, unlawful discrimination is presumed and the burden shifts to Cape Fish & Lobster to articulate a legitimate, nondiscriminatory reason for its decision to fire Rose, who allegedly did not antagonize the white employee or engage in racially-charged conduct.⁵ *Id.* at 441–442. Although the plaintiffs contend that Rose and the other employee were terminated because they were unable to get along, this is a disputed fact and is essentially the heart of the case. Therefore, Cape Fish and Lobster fails to meet its burden to show that there are no genuine issues of material fact, entitling it to summary judgment as a matter of law. Mass. R. Civ. P. 56; *Bulwer v. Mount Auburn Hospital*, 473 Mass. 672, 683 (2016).

Failure to Investigate: Count IV

The defendant does not directly address the elements of the plaintiff’s failure to investigate allegation or apply the summary judgment standard to the agreed-upon facts. Rather, the defendant alludes to an alleged insufficiency in Count IV by stating that the plaintiff asked

³ Although the defendant’s memorandum in support of its motion refers to the plaintiff’s work as “not always satisfactory,” the undisputed facts support that Rose was fired as a result of the incident on June 21, 2019, and not as a result of work performance. (Cardarelli Depo, Pg. 106).

⁴ The defendants’ argument simply regurgitates certain facts favorable to its position, without any analysis applying the burden-shifting procedure to the instant record.

⁵ Somolini does allege that Rose referred to him as a “wop” (Ex. 10, pg. 30). “Wop” is a derogatory slur referring to people of Italian descent. <https://www.merriam-webster.com/dictionary/wop>.

the defendant not to investigate two alleged incidents of racist conduct: (1) the trash and mirror incidents and (2) the meme.

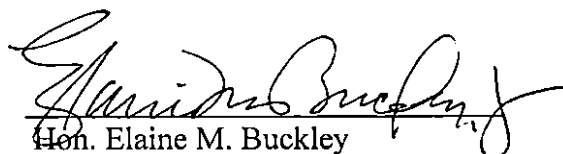
The summary judgment record indicates that Rose and Solimini would make “comments” to one another and “constantly at each other’s throats.” (Solimini Depo, pg. 29). In the light most favorable to Rose, these “comments” included racist remarks from Solimini. Cardarelli’s and Grygent were aware of the conflict between the two, and considered the actions to be “childish.” (Cardarelli Depo, pg. 106-108). Their solution to the problem was to separate Solimini and Rose; their schedules were altered to prevent overlap, (Solimini Depo, pg. 4), but nothing was done by Cardarelli or Grygent to address alleged racism. Further, it is clear that the separation was unsuccessful because Solimini and Rose engaged in the argument that led to their dismissals at work on June 21, 2019.

As discussed above, Rose has made his prima facie case of discrimination. Based on the facts set forth in the summary judgment record, a factfinder could conclude that Cardarelli’s characterization of the incidents as “childish,” Grygent’s text to Rose inferring that he should ignore Solimini, and management’s ultimate “solution” being to assign separate schedules was insufficient. However, on the summary judgment record before the court, Cape Fish & Lobster fails to meet its burden to affirmatively demonstrate the absence of a trial issue, such that it is entitled to summary judgment on Count IV as a matter of law. Pederson, 404 Mass. at 16-17.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Cape Fish & Lobster’s motion for summary judgment is **DENIED**.

May 1, 2023


Hon. Elaine M. Buckley
Justice of the Superior Court