

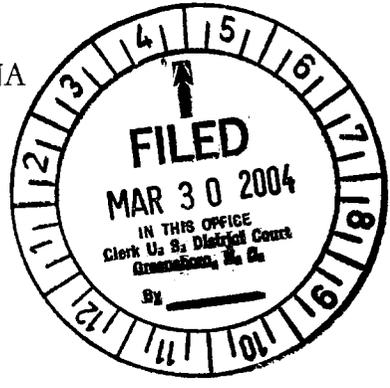
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D/LS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LINWOOD MOSLEY, JR.,)
)
Plaintiff,)
)
v.)
)
BOJANGLES' RESTAURANTS, INC.)
)
Defendant.)

1:03CV00050



MEMORANDUM OPINION

BEATY, District Judge.

This matter is presently before the Court on Defendant Bojangles' Restaurants, Inc.'s ("Bojangles' " or "Defendant") Motion for Summary Judgment [Document #11] on Plaintiff Linwood Mosley, Jr.'s, ("Mosley" or "Plaintiff") claims of racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, and wrongful discharge on the basis of race in violation of the public policy of North Carolina as stated in the North Carolina Equal Employment Practices Act, North Carolina General Statutes sections 143-422.1 to -422.3. Construed in the light most favorable to Plaintiff, Plaintiff brings three distinct claims under Title VII: discrimination on the basis of race, retaliation for engaging in protected activity, and hostile work environment, as well as a separate state-law claim for wrongful discharge.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Viewing the evidence in the light most favorable to Plaintiff, as this Court must do when ruling on a motion for summary judgment,¹ Plaintiff is an African-American male who was hired

¹ In its Brief in Support of Motion for Summary Judgment [Document #12], Defendant discusses at length Plaintiff's prior criminal history and his previously poor record of employment at other jobs. (Def.'s Br. Supp. Mot. Summ. J. at 1-2.) Plaintiff contends that such discussion is

into Bojangles' management training program on July 5, 2001. However, because Plaintiff had driving restrictions that prevented him from traveling to the Harrisburg location where he would receive his training, Bojangles' Area Director Ken Conner ("Conner") allowed Plaintiff to begin working at the Concord location as a crew person until he could get his driving restrictions modified by the Department of Motor Vehicles. On approximately August 20, 2001, Plaintiff's driving restrictions were modified and Plaintiff was promoted to the position of manager trainee and was transferred to the Harrisburg location to begin his training with other manager trainees. Plaintiff's promotion to manager trainee entailed a pay increase from \$7.25/hour to \$7.76/hour. As part of their training, Plaintiff and other trainees were expected to learn how to perform all of the job duties of the crew employees, including working the cash register, cleaning the common areas and parking lot, and making biscuits and chicken. Thus, manager trainees would basically rotate through all of the different restaurant job duties and positions.

During this time period, Plaintiff contends that Defendant engaged in numerous discriminatory acts against him.² Sometime during the period from approximately August 2001 to

irrelevant and improper and requests this Court to strike these references from Defendant's brief. (Pl.'s Mem. Opp. Def.'s Mot. Summ. J. [Doc. #19] at 1–2.) Plaintiff, however, has failed to file a motion to strike in conformity with the local rules of this district; therefore, the Court will not strike these portions of Defendant's brief. See Local Rule 7.3(a). The Court, however, will disregard Plaintiff's prior criminal and work history, as these facts do not bear on the question before the Court, that is, whether Plaintiff has demonstrated a genuine issue of material fact that he is entitled to relief under either Title VII or North Carolina law.

² The Court notes that Plaintiff also contends that, both prior to and during the course of his employment, he unsuccessfully asked for franchise applications but was not provided one, and that such refusal was because of his race. Plaintiff, however, has failed to offer any evidence whatsoever that Bojangles' alleged refusal to provide him a franchise application was racially motivated in any way. Furthermore, Bojangles' alleged failure to provide Plaintiff a franchise application is irrelevant to Plaintiff's claims of employment discrimination. Therefore, the Court finds it unnecessary to further address Plaintiff's claims that Bojangles' refused to provide him a

September 2001, Plaintiff complained to Conner that Randy Meadows (“Meadows”), Bojangles’ Training Unit Investigator, was discriminating against him on the basis of race. (Pl.’s Mem. Opp. Def.’s Mot. Summ. J. at 4–5.) Specifically, Plaintiff alleged that Meadows told him that “my cash register does not like black people.” (Id. at 3 (internal quotation marks omitted).) Further, Plaintiff alleges that Meadows did not allow black manager trainees “to take breaks on an equal basis and footing with white manager trainees.” (Id.) In addition, Plaintiff alleges that he and the other African-American manager trainee were required to perform menial tasks, such as cleanup of the parking lot, that white manager trainees were not required to perform. (Id. at 5.)

Plaintiff also alleges that during early September 2001, two employees supervised by Plaintiff lodged sexual harassment complaints against Plaintiff with Bojangles’ management. Bojangles’ conducted an investigation and concluded that Plaintiff had engaged in inappropriate conduct. Plaintiff disagreed and contended (and still contends) that he did not engage in sexual harassment. On September 13, 2001, Defendant prepared a written Work Incident Report documenting Plaintiff’s inappropriate conduct, reviewed its harassment policies with Plaintiff, and transferred Plaintiff to the Kannapolis restaurant. According to Defendant, while Conner was counseling Plaintiff on Bojangles’ harassment policies, it was at this time that Plaintiff first alleged that Training Unit Director Randy Meadows had discriminated against him on the basis of his race. According to Defendant, it “promptly and thoroughly investigated plaintiff’s complaints and found no evidence to substantiate his allegations of race discrimination.” (Def.’s Br. Supp. Mot. Summ. J. at 5.) According to Plaintiff, however, Defendant transferred him to the Kannapolis store in retaliation for reporting Meadows’ discrimination. (Pl.’s Mem. Opp. Mot. Summ. J. at 5.) Plaintiff thereafter

franchise application.

completed his management training at the Kannapolis restaurant. On approximately October 8, 2001, Plaintiff was promoted to comanager and was therefore reclassified as an hourly employee making an annual salary of \$25,200. On approximately November 19, 2001, Defendant reassigned Plaintiff to the Concord location.

While at the Concord location, Plaintiff alleges that another employee was selling Confederate-flag memorabilia in the workplace and that this activity was “racially offensive” to him. (Pl.’s Mem. Opp. Def.’s Mot. Summ. J. at 5.) Plaintiff alleges that although he complained about these sales to Bojangles’ management, no action was taken against the person selling the flags, even though such sales are prohibited by Bojangles’ policy. (Id.) Plaintiff alleges that after making these complaints, he was disciplined three times by Bojangles’ management. Plaintiff contends that he was disciplined either because of his race or in retaliation for complaining to Bojangles’ management about racial discrimination. The first disciplinary action at the Concord location occurred on December 18, 2001, when Bojangles’ Area Director Mike Reen issued Plaintiff a written “Work Incident Report” for violating Bojangles’ cash-handling policies. At this time, Ken Conner was serving as Unit Director of the Concord restaurant and was therefore Plaintiff’s direct supervisor. The second disciplinary action took place on January 18, 2002, when Ken Conner gave Plaintiff a Work Incident Report for failing to complete restaurant inventory at closing. According to Plaintiff, Ken Conner, who is white, was not written up when he failed to complete an inventory, the same violation for which Plaintiff was written up. (Pl.’s Mem. Opp. Mot. Summ. J. at 5–6, 8.) Finally, on February 1, 2002, Plaintiff was orally counseled for leaving work early and leaving the restaurant in a dirty condition. Plaintiff contends, however, that he had permission to leave early and Defendant was aware that he had permission. (Id. at 6.)

After receiving the verbal counseling on February 1, 2002, on February 2, 2002, Plaintiff gave his two-week written notice resigning his employment, effective February 17, 2002. Plaintiff's notice of resignation made no reference to any race discrimination, retaliation, hostile work environment, or wrongful discharge. On April 1, 2002, Plaintiff contacted Bojangles' Human Resources to discuss alleged discrimination that had occurred while he was in training at the Harrisburg location. On May 16, 2002, Plaintiff filed a charge of discrimination with the EEOC. (Mosley Dep. [Doc. #13] at 327.) After receiving a right-to-sue letter from the EEOC, (see Compl. ¶ 16 [Doc. #1]), Plaintiff then filed a civil suit in the Superior Court of Cabarrus County, North Carolina, on December 6, 2002. (Compl.) Bojangles' removed the action to this Court on January 10, 2003. (Notice Removal [Doc. #1].) This Court has jurisdiction over Plaintiff's Title VII claims pursuant to 28 U.S.C. § 1331 and Plaintiff's state-law claim pursuant to 28 U.S.C. § 1367.

II. Motion for Summary Judgment

A. Summary Judgment Standard

Summary judgment is appropriate when “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact is considered “material” if it “might affect the outcome of the suit under the governing law” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Under this standard, a genuine issue of material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id. As a result, the Court will only enter summary judgment in favor of the moving party when “the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the [nonmoving] party cannot prevail under any circumstances.” Campbell v. Hewitt, Coleman &

Assocs., 21 F.3d 52, 55 (4th Cir. 1994) (quoting Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co., 381 F.2d 245, 249 (4th Cir. 1967)).

When ruling on a summary judgment motion, the Court “view[s] the evidence in the light most favorable to the non-moving party, granting that party the benefit of all reasonable inferences.” Bailey v. Blue Cross & Blue Shield of Va., 67 F.3d 53, 56 (4th Cir. 1995). The moving party bears the initial “burden of establishing that there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law.” Catawba Indian Tribe of S.C. v. South Carolina, 978 F.2d 1334, 1339 (4th Cir. 1992). Once the moving party has met this burden, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. Id. In so doing, the adverse party may not rest on mere allegations, denials, or unsupported assertions, but must, through affidavits or otherwise, provide evidence of a genuine dispute. Anderson, 477 U.S. at 248–49, 106 S. Ct. at 2510; Catawba Indian Tribe, 978 F.2d at 1339. In other words, the nonmoving party must show “more than . . . some metaphysical doubt as to the material facts,” for the mere existence of a scintilla of evidence in support of its position is insufficient to survive summary judgment. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986); Catawba Indian Tribe, 978 F.2d at 1339.

B. Title VII Claims

As discussed above, viewed in the light most favorable to Plaintiff, it appears that Plaintiff brings three distinct claims under Title VII: discrimination on the basis of race, retaliation for engaging in protected activity, and hostile work environment. Because Plaintiff’s claims of racial discrimination and retaliation for engaging in protected activity are based in large part on the same underlying conduct, the Court will address them together.

1. Administrative Exhaustion

As an initial matter, the Court notes that before a plaintiff may file suit under Title VII, he must exhaust his administrative remedies by first filing a charge with the Equal Employment Opportunity Commission (“EEOC”). Smith v. First Union Nat’l Bank, 202 F.3d 234, 247 (4th Cir. 2000). The EEOC charge must be filed within 180 days of the occurrence of the allegedly discriminatory conduct. 42 U.S.C. § 2000e-5(e)(1) (stating that “[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred”). As discussed above, Plaintiff did not file a charge until May 16, 2002. Therefore, Defendant contends that Plaintiff’s claims for alleged discrimination and retaliation that occurred prior to November 17, 2001, are time barred. The Court agrees with Defendant that Plaintiff’s discrimination claims are timely only as to alleged unlawful employment practices that occurred on or after November 17, 2001. In National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), the Supreme Court clarified how 42 U.S.C. § 2000e-5(e)(1) applies in situations in which a plaintiff alleges discriminatory acts that occurred both inside and outside the 180-day limitations period. In National Railroad, as in the present case, the plaintiff alleged discrimination on the basis of race, retaliation, and a racially hostile work environment. In determining whether the plaintiff’s claims were time barred, the Supreme Court differentiated between “discrete discriminatory acts and hostile work environment claims.” Id. at 110, 122 S. Ct. at 2070. The Supreme Court defined discrete discriminatory acts as individual incidents of discrimination or retaliation, “such as termination, failure to promote, denial of transfer, or refusal to hire.” Id. at 114, 122 S. Ct. at 2073. “Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable ‘unlawful employment practice.’ ”

Id. Therefore, “discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act.” Id. at 113, 122 S. Ct. at 2072. Therefore, if the plaintiff fails to file a charge with the EEOC within 180 days after the discrete discriminatory act occurs, his claim is time barred.

The Supreme Court, however, noted that claims of hostile work environment must be treated differently than claims involving discrete discriminatory acts. Id. at 115, 122 S. Ct. at 2073. “A hostile work environment claim is comprised of a series of separate acts that collectively constitute one ‘unlawful employment practice.’” Id. at 117, 122 S. Ct. at 2074 (quoting 42 U.S.C. § 2000e-5(e)(1)). Because hostile-work-environment claims by “[t]heir very nature involve[] repeated conduct, . . . [t]he ‘unlawful employment practice’ therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in contrast to discrete acts, a single act of harassment may not be actionable on its own.” Id. at 115, 122 S. Ct. at 2073 (citation omitted). Therefore, so long as at least one act forming the basis of the hostile-work-environment claim occurs within the filing period, the plaintiff’s entire hostile-work-environment claim is considered to be timely filed. See id. at 117, 122 S. Ct. at 2074.

In the present case, Plaintiff claims that he was subjected to multiple, discrete incidents of discrimination and/or retaliation. He also claims that these incidents, as well as other incidents, subjected him to a racially hostile work environment. Therefore, under National Passenger Railroad Corp., because Plaintiff has alleged that at least one incident of harassment occurred on or after November 17, 2001, Plaintiff’s hostile work environment claim was timely filed with the EEOC. However, any discrete acts of discrimination and/or retaliation Plaintiff alleges occurred prior to

November 17, 2001, are time barred. Therefore, with respect to Plaintiff's race discrimination and retaliation claims, the Court must determine which incidents occurred prior to November 17, 2001, and which incidents occurred on or after November 17, 2001.

Plaintiff contends that the following pre-November 17, 2001, comments or actions constitute either racial discrimination, retaliation, or both: (1) disparate treatment Plaintiff and the other black manager trainee received at the Harrisburg location and (2) Plaintiff's discipline for sexual harassment, including his transfer to the Kannapolis store. Therefore, notwithstanding Plaintiff's arguments to the contrary, Plaintiff's discrete claims of discrimination and retaliation based on these incidents are time barred. However, these incidents are not time barred with respect to Plaintiff's claim that these incidents comprise a racially hostile work environment.

2. Discrimination on the Basis of Race and Retaliation for Engaging in Protected Activity

Therefore, having addressed the threshold issue of administrative exhaustion, the Court will now evaluate the merits of Plaintiff's claims of racial discrimination, retaliation, and hostile work environment. As discussed above, with respect to Plaintiff's claims of racial discrimination and retaliation, the Court will only consider those incidents that Plaintiff alleges occurred on or after November 17, 2001. Because Plaintiff's claims of racial discrimination and retaliation on the basis of engaging in protected activity are intertwined, the Court will consider these claims together.

As an initial matter, however, the Court notes that to make out a prima facie case of racial discrimination, Mosley must demonstrate that (1) he is a member of a protected class, (2) he was qualified for his job and his job performance was satisfactory, (3) he suffered an adverse employment action, and (4) similarly situated employees outside of his protected class received more favorable treatment. See Dean v. Phillip Morris USA, Inc., No. 1:02CV149, 2003 WL 21754998,

at *6 (M.D.N.C. July 29, 2003) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973)).³ To make out a prima facie case of retaliation, Plaintiff must show (1) that he engaged in protected activity; (2) that Bojangles' took an adverse employment action against him; and (3) that a causal connection existed between his protected activity and the adverse action. See Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 242 (4th Cir. 1997). Therefore, in order for Plaintiff to establish either his discrimination or his retaliation claim under Title VII, he must show that he suffered an adverse employment action because "[t]he employment discrimination laws require as an absolute precondition to suit that some adverse employment action have occurred." Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985). The Supreme Court has defined an adverse employment action as "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." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761, 118 S. Ct. 2257, 2268, 141 L. Ed. 2d 633 (1998). "In determining what constitutes an adverse employment action for Title VII purposes, the Fourth Circuit consistently has focused on 'whether there has been discrimination in what could be characterized as ultimate employment

³ The Court notes that the elements of the prima facie case may be framed differently depending on the circumstances of the particular case. As discussed more fully below, Plaintiff's primary allegations of racial discrimination relate to the discipline he received while working at the Concord location. As another court in this district has recently held, "to establish a prima facie case of racial discrimination in the enforcement of disciplinary measures, . . . Plaintiff must show (1) [he] is a member of a protected class, (2) the prohibited conduct [he] engaged in was comparable to the misconduct of employees outside the protected class, and (3) the disciplinary measures enforced against [him] were more severe than those enforced against employees outside the protected class." Disher v. Weaver, No. 1:02CV00529, 2004 WL 473649, at *4 (M.D.N.C. Feb. 26, 2004) (citing Cook v. CSX Transp. Corp., 988 F.2d 507, 511 (4th Cir. 1993)). However, as discussed more fully below, it is axiomatic that a disciplinary measure must constitute an adverse employment action to give rise to a claim under Title VII.

decisions such as hiring, granting leave, discharging, promoting, and compensating.’” Wagstaff v. City of Durham, 233 F. Supp. 2d 739, 744 (M.D.N.C. 2002) (quoting Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981)), aff’d per curiam, 70 Fed. Appx. 725 (4th Cir. 2003). However, an employment action need not be “ultimate” to be “adverse.” Id. (citing Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001) (internal quotation marks omitted) (stating that “conduct short of ‘ultimate employment decisions’ can constitute adverse employment action”). As the Fourth Circuit Court of Appeals held in Von Gunten, an “[a]dverse employment action includes any retaliatory act or harassment if, but only if, that act or harassment results in an adverse effect on the terms, conditions, or benefits of employment.” Id. at 866 (internal quotations omitted). Thus, the critical inquiry for this Court is whether Plaintiff has demonstrated a genuine issue of material fact that the incidents he alleges Bojangles subjected him to “‘had some significant detrimental effect’” on his employment, Wagstaff, 233 F. Supp. 2d at 744 (quoting Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999)), that is, whether these actions adversely affected the terms, conditions, or benefits of his employment. See Von Gunten, 243 F.3d at 866. In this case, Plaintiff claims the following employment actions against him on or after November 17, 2001, meet this standard: (a) a white employee selling Confederate-flag memorabilia in violation of Bojangles’ policy; (b) Work Incident Reports Plaintiff received on December 18, 2001, and January 18, 2002, and a verbal counseling Plaintiff received on or about February 1, 2002; and (c) Plaintiff’s alleged constructive discharge on or about February 2, 2002. Each of these claims will be considered in turn.

a. Sales of Confederate Flags on the Premises

Plaintiff first claims that a white employee was selling Confederate-flag memorabilia in violation of Bojangles’ policy against soliciting. Plaintiff claims that he found the sale of the flags

to be “racially offensive” and that Bojangles’ failed to discipline the employee. (Pl.’s Mem. Opp. Def.’s Mot. Summ. J. at 5.) Plaintiff fails to show, however, how Bojangles’ alleged refusal to stop or discipline this employee adversely affected the “terms, conditions, or benefits” of Plaintiff’s employment. Therefore, this employee’s sales of Confederate-flag memorabilia and Defendant’s allegedly deficient response do not constitute an adverse employment action. Cf. Flenaugh v. Airborne Express, Inc., No. 03 C 3687, 2004 WL 407009, at *10 (N.D. Ill. Mar. 1, 2004) (finding that a manager’s display of a Confederate-flag tattoo was insufficient to create a hostile work environment).

b. Disciplinary Actions Against Plaintiff

Plaintiff further contends that the multiple disciplinary actions he received constitute adverse employment actions. As discussed above, the specific incidents Plaintiff refers to that occurred on or after November 17, 2001, are the following: On December 18, 2001, Plaintiff received a Work Incident Report for violating Bojangles’ cash-handling policies. Then, on January 18, 2002, Plaintiff received another Work Incident Report for failing to complete the restaurant inventory at closing. Finally, on February 1, 2002, Plaintiff was verbally counseled for leaving work early and leaving the restaurant in a dirty condition. Plaintiff contends that these disciplinary actions constitute adverse employment actions because “a jury could find that plaintiff’s . . . being written up and informed that such write ups were the next step to termination, and the long term consequences such an action would have on the plaintiff’s future employability and career . . . directly affected the plaintiff’s promoteability.” (Pl.’s Mem. Opp. Def.’s Mot. Summ. J. at 8–9.)

In Thompson v. Potomac Electric Power Co., 312 F.3d 645 (4th Cir. 2002), the Fourth Circuit Court of Appeals discussed whether disciplinary actions constitute adverse employment

actions under Title VII. In Thompson, the Court held that in order to constitute an adverse employment action, the plaintiff must demonstrate that the disciplinary action “affected the terms, conditions, or benefits of [the plaintiff’s] employment.” Id. at 651–52. In Thompson, the court of appeals found that the disciplinary actions at issue did not constitute adverse employment actions where the plaintiff “lost no pay and maintained the same position in the wake of [the] disciplinary actions, both of which were later expunged from his record.” Id. at 651. In Allen v. Rumsfeld, 273 F. Supp. 2d 695 (D. Md. 2003), the district court, citing Thompson, held that reprimands and counseling an employee received did not constitute adverse employment actions because the “[p]laintiff lost no pay and maintained the same position” Id. at 706.

In his brief, however, Plaintiff contends that he was told that the disciplinary actions he received “were the next step to termination” (Pl.’s Mem. Opp. Def.’s Mot. Summ. J. at 9.) Viewing the evidence in the light most favorable to Plaintiff, Plaintiff’s contention is supported by the notations Mike Reen made on the written Work Incident Report Plaintiff received on December 18, 2001. (Mosley Dep. Ex. 19.) On the Work Incident Report there is a section entitled “Consequence of Repeat Violation,” in which the supervisor filling out the report can describe what he believes would be the appropriate next disciplinary step if the employee were to violate the same company policy in the future. (See id.) On this particular Work Incident Report, Mike Reen wrote that a further violation of Bojangles’ cash-handling policies “could result in further action up to and including termination.” (Id.) This evidence, however, is insufficient to demonstrate a genuine issue of material fact that the discipline Plaintiff received adversely affected the “terms, conditions, or privileges” of his employment. Plaintiff was not suspended, demoted, or transferred due to receiving this discipline, nor was his pay reduced. There is also no evidence that any of these

disciplinary actions against Plaintiff caused him to miss an opportunity for promotion. Cf. Allen, 273 F. Supp. 2d at 706 (citing Jackson v. Maryland, 171 F. Supp. 2d 532, 545 (D. Md. 2001), for the proposition “that a poor evaluation by itself is not an adverse action . . . , especially where there is no evidence linking it to a missed opportunity for promotion”). For the foregoing reasons, therefore, Plaintiff has failed to show the disciplinary actions taken against him were adverse employment actions under Title VII.

c. Constructive Discharge

Plaintiff finally alleges that he was constructively discharged from Bojangles’. The Court notes that constructive discharge can constitute an adverse employment action for purposes of Title VII. To show constructive discharge, however, Plaintiff must prove that Bojangles’ “deliberately made [his] working conditions intolerable in an effort to induce [him] to quit.” Taylor v. Va. Union Univ., 193 F.3d 219, 237 (4th Cir. 1999) (internal quotations omitted). Thus, Mosley must demonstrate a genuine issue of material fact that (1) the actions of which he complains were done deliberately; and (2) his working conditions were intolerable. See id. “Deliberateness exists only if the actions complained of were intended by the employer as an effort to force the plaintiff to quit.” Id. “Whether [Mosley’s] working conditions were intolerable is assessed by the objective standard of whether a reasonable person in [his] position would have felt compelled to resign.” Id. (citing Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985)). The Fourth Circuit Court of Appeals in Taylor reiterated, however, that “[d]issatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign.” Id. (alteration in original) (quoting Carter v. Ball, 33 F.3d 450, 459 (4th Cir. 1994)).

In the present case, Plaintiff fails to demonstrate genuine issues of material fact with respect to either element of constructive discharge. In fact, in Plaintiff's Memorandum in Opposition to the Defendant's Motion for Summary Judgment, Plaintiff offers no argument that Defendant deliberately made Plaintiff's working conditions intolerable in order to force him to resign. Notwithstanding Plaintiff's apparent abandonment of this claim, the Court has searched the record for evidence of constructive discharge but can still find none. It appears that Plaintiff bases his claim of constructive discharge on (1) Bojangles' failure to halt the sales of Confederate-flag memorabilia and (2) the three disciplinary actions he received from December 2001 through February 2002. In his brief, Plaintiff stated that he was told that the disciplinary actions he received "were the next step to termination" (Pl.'s Mem. Opp. Def's Mot. Summ. J. at 9.) On the Work Incident Report Plaintiff received on December 18, 2001, Mike Reen noted that the consequence of a repeat violation would be termination. (Mosley Dep. Ex. 19.) Plaintiff's evidence, however, is still insufficient to demonstrate a genuine issue of material fact that Bojangles' deliberately engaged in conduct calculated to force Plaintiff to resign. With respect to the sales of Confederate-flag memorabilia, Plaintiff offers no evidence that Bojangles' condoned this activity in order to force Plaintiff out of his job. With respect to the discipline Plaintiff received, as the district court held in Rankin v. Greater Media, Inc., 28 F. Supp. 2d 331 (D. Md. 1997), a plaintiff cannot establish deliberateness where "[t]he record reveals nothing more than typical inter-office disputes, such as mild reprimands and performance evaluations about which employer and employee disagree, and performance expectations about which employer and employee disagree." Id. at 342.

Furthermore, the undisputed evidence actually demonstrates that Bojangles' Area Director Ken Conner had stopped Plaintiff from resigning in December and tried to stop him from resigning

in February. After Plaintiff received his Work Incident Report on December 18, 2001, Plaintiff became extremely angry and actually quit his job. (Mosley Dep. at 203 (stating that “I had quit and Ken Conner talked me into coming back”).) In addition, after Plaintiff received a verbal counseling from Mike Reen on February 1, 2002, Plaintiff voluntarily resigned his employment the following day by submitting a written, two-week notice of resignation. (Id. at 286–87.) Plaintiff stated in his deposition, however, that after he turned in his notice Mike Reen “was just nice every time [I] came in the door.” (Id. at 292.) Further, Plaintiff also stated in his deposition that “Ken Conner, he was nice. He asked me would I consider staying because he said I was a heck of a manager.” (Id.) This evidence contradicts Plaintiff’s assertions that Bojangles’ deliberately made his employment conditions intolerable in an effort to force him to resign, and Plaintiff fails to rebut this evidence with any evidence showing deliberateness on the part of Bojangles’. Therefore, viewing all the evidence in the light most favorable to Plaintiff, the Court finds that Plaintiff has failed to demonstrate a genuine issue of material fact that Bojangles’ deliberately tried to force Plaintiff to resign his employment.

Plaintiff has also failed to demonstrate a genuine issue of material fact with respect to the second prong of the constructive discharge test, that is, Plaintiff has failed to offer sufficient evidence that his working conditions were intolerable.⁴ With respect to the sales of Confederate-flag

⁴ Even if Plaintiff is contending that his constructive discharge arose not only from incidents that occurred after he was transferred back to the Concord location on November 19, 2001 (i.e., the sales of Confederate-flag memorabilia and the discipline he received from December 2001 to February 2002), but also from earlier incidents (e.g., Meadows’ comment that “my cash register does not like black people”), the result would be the same. Based on the Court’s disposition of Plaintiff’s hostile-work-environment claim (discussed in Section II.B.3 below), even taking as true all of Plaintiff’s evidence of harassment throughout his tenure at Bojangles’, that evidence would still fail to demonstrate that Plaintiff’s working conditions were intolerable. See English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833, (E.D. Va. 2002) (citing Taylor, 193 F.3d at 237) (holding that

memorabilia, although Plaintiff may have subjectively found these sales “racially offensive” and while he may have been angered at Bojangles’ alleged failure to discipline the employee selling these flags, Plaintiff’s evidence of the sales of Confederate-flag memorabilia and Bojangles’ allegedly deficient response fails to meet the objective standard for establishing intolerable work conditions. With respect to Plaintiff’s evidence regarding the discipline he received from December 2001 through February 2002, this evidence also fails to demonstrate a genuine issue of material fact that these disciplinary actions made Plaintiff’s work environment intolerable. As discussed above, during the months leading up to Plaintiff’s resignation, Plaintiff received two Work Incident Reports and a verbal counseling. With respect to the December 18, 2001, Work Incident Report, Plaintiff testified at his deposition that “[Mike Reen] was disrespectful to me He said . . . I stole.” (Id. at 204–05.) With respect to the verbal counseling, Plaintiff testified that “[Mike Reen] yelled at me in front of people Mike called me a liar. He was all in my face, hollering and putting his finger in my face, and I about had enough, about all I could hear between Rebel flag, racial issues” (Id. at 284–85.) Plaintiff characterized the verbal counseling as “rude, embarrassing.” (Id. at 285.)

Even viewed in the light most favorable to Plaintiff, however, Plaintiff’s evidence does not show that his working conditions were intolerable. While Plaintiff may have felt that he should not have been disciplined or yelled at, the standard for finding intolerability is an objective standard, that is, “whether a reasonable person in [Plaintiff’s] position would have felt compelled to resign.” Taylor, 193 F.3d at 237. Plaintiff’s allegations of being unfairly disciplined, even combined with Plaintiff’s other allegations of harassment, still fail to show that his working conditions were

because the plaintiff’s hostile-work-environment claim failed, the plaintiff “*a fortiori* [could not] show that his working conditions were of such an intolerable nature that they constituted a constructive discharge under Title VII”).

objectively intolerable. See, e.g., Gilliam v. Principi, No. 1:01CV00939, 2003 WL 2006844, at *11 (M.D.N.C. Apr. 28, 2003) (finding that the plaintiff had failed to demonstrate a genuine issue of material fact that his working conditions were intolerable where he alleged mere workplace strife that did not result in a demotion, unfavorable evaluation, or loss of his job title, benefits, or responsibilities); Laprise v. Arrow Int'l, Inc., 178 F. Supp. 2d 597, 609 (M.D.N.C. 2001) (finding the “[p]laintiff’s allegations of sabotage and intimidation [to] constitute nothing more than typical workplace conflicts”). In summary, therefore, Plaintiff’s evidence shows nothing more than “ [d]issatisfaction with work assignments, a feeling of being unfairly criticized, [and] difficult or unpleasant working conditions, ’” and such evidence is insufficient as a matter of law to demonstrate objectively intolerable work conditions. Taylor, 193 F.3d at 237 (first alteration in original) (quoting Carter v. Ball, 33 F.3d 450, 459 (4th Cir. 1994)).

d. Conclusion

For the foregoing reasons, the Court finds that Plaintiff has failed to demonstrate a genuine issue of material fact that he was subjected to any adverse employment action on or after November 17, 2001, that is, Plaintiff’s allegations regarding the sales of Confederate-flag memorabilia, the discipline he received from December 2001 through February 2002, and his alleged constructive discharge, do not support his claims of racial discrimination and retaliation for engaging in protected activity. Therefore, Plaintiff’s claims of racial discrimination and retaliation fail as a matter of law.

3. Racially Hostile Work Environment

Having considered Plaintiff’s racial discrimination and retaliation claims, the Court must now consider Plaintiff’s hostile-work-environment claim. Title VII prohibits “an employer . . . [from] discriminat[ing] against any individual with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's race" 42 U.S.C. § 2000e-2(a)(1). Title VII thus protects employees from harassment that is so severe or pervasive as to create a hostile work environment. See Hartsell v. Duplex Prods., Inc., 123 F.3d 766, 772 (4th Cir. 1997) (citing Meritor Sav. Bank, v. Vinson, 477 U.S. 57, 64–67, 106 S. Ct. 2399, 2403–05, 81 L. Ed. 2d 49 (1986)). To establish a prima facie case of hostile work environment discrimination, the "plaintiff must prove that the offending conduct (1) was unwelcome, (2) was based on [his race], (3) was sufficiently severe or pervasive to alter the terms and conditions of [his] employment and create an abusive work environment, and (4) was imputable to [his] employer." Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 331 (4th Cir. 2003) (en banc), cert denied, 124 S. Ct. 1406, and cert denied, 124 S. Ct. 1411 (2004); accord Smith v. First Union Nat'l Bank, 202 F.3d 234, 241 (4th Cir. 2000); Hartsell, 123 F.3d at 772.

Plaintiff contends that the following conduct by Bojangles' was so severe or pervasive as to alter the conditions of his employment: (1) Meadows' statement that "my cash register does not like black people"; (2) Meadows' refusal to allow African-American employees to take breaks on an equal basis with white employees; (3) Meadows' requirement that black employees perform menial tasks that white employees did not have to perform; (4) the sexual harassment complaints against Plaintiff and his subsequent transfer to Kannapolis; (5) Bojangles' failure to discipline a white employee who was selling Confederate-flag memorabilia on the premises; and (6) the disciplinary actions taken against Plaintiff.

Defendant nevertheless argues that Plaintiff's claim must fail because the evidence cannot show that the alleged harassment Plaintiff endured was based on his race or that it was so severe or pervasive as to have altered the terms and conditions of Plaintiff's employment. The Court finds

that, even assuming that Plaintiff could satisfy elements one, two, and four of his prima facie case for hostile-work environment, Plaintiff has failed to demonstrate a genuine issue of material fact that the conduct of which he complains was so severe or pervasive as to alter the terms or conditions of his employment. In making this determination, the Court must look at the totality of the circumstances. See Smith, 202 F.3d at 242. “These circumstances include: (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee’s work performance.” Id. The Supreme Court has held that “in order to be actionable under [Title VII], [an] objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.” Faragher v. City of Boca Raton, 524 U.S. 775, 787, 118 S. Ct. 2275, 2283, 141 L. Ed. 2d 662 (1998) (citing Harris v. Forklift Sys., 510 U.S. 17, 21–22, 114 S. Ct. 367, 370–71, 126 L. Ed. 2d 295 (1993)).

As discussed above, Plaintiff alleges that Meadows’ racially discriminatory cash-register statement, Meadows’ disparate treatment of African-American employees with respect to breaks and the performance of menial job duties, Bojangles’ handling of the sexual harassment complaints against Plaintiff, Bojangles’ handling of the employee who was selling Confederate-flag memorabilia, and the disciplinary actions taken against Plaintiff demonstrate a genuine issue of material fact that Plaintiff experienced severe and pervasive harassment. Looking at the totality of the circumstances in the light most favorable to Plaintiff, however, the Court finds that Plaintiff has failed to show that the harassment he allegedly received was so severe or pervasive as to alter the terms and conditions of his employment. With respect to the frequency of this alleged conduct, viewed in the light most

favorable to Plaintiff, this conduct, while allegedly occurring throughout his employment at Bojangles', was sporadic, that is, Plaintiff has failed to show that he was consistently subjected to harassment. In addition, while Plaintiff may subjectively view this conduct as severe, the Court must evaluate whether Plaintiff has demonstrated a genuine issue of material fact that it was objectively severe, that is, whether a reasonable person would find it severe. This alleged conduct falls far short of this objective standard. In addition, there are no allegations whatsoever that Plaintiff was physically threatened in any way. Furthermore, the only time Plaintiff contends he was humiliated was when Mike Reen yelled at him in front of customers. Finally, none of the conduct Plaintiff alleges to have occurred unreasonably interfered with his work performance. While Plaintiff may have been offended by this alleged conduct, he proffers no evidence that it unreasonably interfered with his ability to do his job. In fact, Plaintiff contends that even after he put in his two-week notice, he stated that "[I] never missed a day, like my whole—never left early, done my job completed [sic], and even my last day I stayed over a little length of time." (Mosley Dep. at 293.)

For the foregoing reasons, therefore, the Court finds that Plaintiff has failed to demonstrate a genuine issue of material fact that the conduct of which he complains was so severe and pervasive as to alter the terms and conditions of his employment. Accordingly, Plaintiff's claim of racially hostile work environment is dismissed.

C. Wrongful Discharge in Violation of the Public Policy of North Carolina

Plaintiff finally contends that he was constructively discharged on the basis of race in violation of the public policy of North Carolina as articulated in the North Carolina Equal Employment Practices Act ("NCEEPA"), North Carolina General Statutes sections 143-422.1 to -422.3. (Compl. ¶¶ 17–22.) Section 143-422.2 of that Act states that "[i]t is the public policy of this

State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race . . . by employers which regularly employ 15 or more employees.” Thus, although North Carolina follows the employment-at-will doctrine, North Carolina courts have recognized a limited exception to this doctrine for terminations that violate public policy. Defendant contends, however, that Plaintiff’s claim for constructive discharge in violation of the public policy of North Carolina fails as a matter of law because North Carolina only recognizes the public-policy exception to the employment-at-will doctrine in cases of actual, as opposed to constructive, discharge. The Court notes that, in his Memorandum in Opposition to the Defendant’s Motion for Summary Judgment, Plaintiff appears to have abandoned this claim. Regardless of whether Plaintiff believes this claim is still before the Court, the Court holds, as it did in Gallimore v. Newman Machine Co., No. 1:02CV00122, 2004 WL 226045 (M.D.N.C. Jan. 15, 2004), that North Carolina courts have declined to recognize a public-policy exception to the employment-at-will doctrine for constructive, as opposed to actual, discharges. See id. at 20. As the North Carolina Court of Appeals stated in Graham v. Hardee’s Food Systems, Inc., 121 N.C. App. 382, 465 S.E.2d 558 (1996), “North Carolina courts have yet to adopt the employment tort of constructive discharge.” Id. at 385, 465 S.E.2d at 560. Furthermore, in Beck v. City of Durham, 154 N.C. App. 221, 573 S.E.2d 183 (2002), the North Carolina Court of Appeals, citing Graham, affirmed the dismissal of the plaintiff’s claim for wrongful constructive discharge, holding that “North Carolina courts have yet to adopt [the] tort [of wrongful constructive discharge].” Id. at 231, 573 S.E.2d at 190 (citing Graham, 121 N.C. App. at 385, 465 S.E.2d at 560). The Court also notes that the decisions from this district have uniformly held that North Carolina does not recognize a wrongful-constructive-discharge claim. See, e.g., Faircloth v. Duke Univ., 267

F. Supp. 2d 470, 475–76 (M.D.N.C. 2003) (citing Graham) (holding that North Carolina does not recognize constructive-discharge claims and therefore dismissing the plaintiff's claim for constructive discharge); Helmstetler v. Borden Chem., Inc., No. 1:02CV00121, 2002 WL 1602432, at *2 (M.D.N.C. June 13, 2002) (citing Graham) (same). Therefore, as in Gallimore, this Court also declines to recognize such a claim. Plaintiff's claim for wrongful constructive discharge in violation of the public policy of North Carolina is therefore dismissed with prejudice.

For the foregoing reasons, therefore, Defendant's Motion for Summary Judgment [Document #11] is granted in all respects. An Order and Judgment consistent with this Memorandum Opinion shall be filed contemporaneously herewith.

This, the 30 day of March, 2004.


United States District Judge