IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

HERMAN QUINTANA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No.
	:	2:19-cv-224-SCJ-JCF
SMYRNA READY MIX CONCRETE, LLC	:	
	:	
	:	
Defendant.	:	

FINAL REPORT AND RECOMMENDATION

This case is before the Court on the Motion for Summary Judgment filed by Defendant Smyrna Ready Mix Concrete, LLC ("SRM" or "Defendant"). (Doc. 67). For the reasons discussed below, it is **RECOMMENDED** that Defendant's motion be **GRANTED**.

PROCEDURAL BACKGROUND

On August 26, 2019, Herman Quintana ("Plaintiff") filed a complaint against Defendant in the Superior Court of Hall County, Georgia, alleging race and national origin discrimination and retaliation under 42 U.S.C. § 1981. (Doc. 1-1). This case was then properly removed to this Court on September 30, 2019. (Doc. 1). Plaintiff filed his First Amended Complaint on September 16, 2020 alleging claims of race and national origin discrimination in violation of § 1981 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et. seq.* ("Title VII") (Counts I

and III); retaliation in violation of § 1981 and Title VII (Counts II and IV); and a hostile work environment claim under Title VII (Count V). (Doc. 54). On December 14, 2020, Defendant filed this Motion for Summary Judgment on all of Plaintiff's claims (Doc. 67), with a brief in support (Doc. 67-1), a Statement of Undisputed Material Facts (Doc. 67-2 ("Def. SMF")), and accompanying exhibits (Doc. 68-1 through 68-8). Plaintiff filed his response to Defendant's motion on February 1, 2021 (Doc. 73), with a Statement of Additional Material Facts (Doc. 73-1 ("Pl. SAMF")), a Response to Defendant's Statement of Material Facts (Doc. 73-2 ("Resp. Def. SMF")), and his own declaration (Doc. 73-3 ("Pl. Decl.")). On February 22, 2021, Defendant filed its reply brief (Doc. 75), a Response to Plaintiff's Statement of Additional Material Facts (Doc. 76), and a Reply to Plaintiff's Response to Defendant's Statement of Material Facts[1] (Doc. 77). With briefing on this motion complete, the undersigned now considers its merits.

FACTUAL BACKGROUND

The facts, for summary judgment purposes only, are derived from Defendant's SMF, Plaintiff's SAMF, Plaintiff's Response to Defendant's SMF, and uncontroverted record evidence. The undersigned has reviewed the record, including the parties' filings, to determine whether genuine issues of material fact exist to be

[1] Neither the Federal Rules of Civil Procedure nor the Local Rules allow for such a filing, so Doc. 77 is not considered. *See* FED. R. CIV. P. 56; LR 56.1, NDGa.

tried. Yet the court need not "scour the record" to make that determination. *Tomasini v. Mt. Sinai Med. Ctr. Of Fla.*, 315 F.Supp.2d. 1252, 1260 n.11 (S.D. Fla. 2004) (internal quotation omitted). In ruling on a summary judgment motion, the facts are construed in the light most favorable to the non-movant. *See Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1309 (11th Cir. 2001).

I. Background

SRM, headquartered in Nashville, Tennessee, provides ready-mix concrete and concrete pumping services across twelve states. (Def. SMF ¶ 1). A Plant Manager oversees the day-to-day operations at each SRM plant and all assigned employees, including drivers who deliver loads of concrete to customer locations. (*Id.* ¶ 2). Plant Managers do not have the authority to hire and fire employees. (*Id.* ¶ 3; Doc. 68-1 ("Frazier Depo.") at 113). Plant Managers report to a General Manager, who oversees facilities within a certain geographic region and reports directly to SRM's CEO, Jeff Hollingshead. (Def. SMF ¶ 4). All ready-mix plants are supported by Hollingshead, SRM's Chief Operating Officer Mike Zagula ("Zagula"), and SRM's Human Resources Department located in Nashville. (*Id.* ¶ 5).

In May 2018, SRM bought the assets of Candler Concrete ("Candler") in Gainesville, Georgia and hired its employees. (*Id.* ¶ 7). Willie Frazier ("Frazier"), the Plant Manager at Candler's Gainesville plant, continued in that role for SRM.

(*Id.* ¶ 8). Frazier reported to Shane Davis, General Manager for SRM's Northeast Georgia region. (*Id.* ¶ 9).

In June 2018, SRM hired Plaintiff, a Hispanic man from Chile, as a Mixer-Operator Driver. (*Id.* ¶¶ 10, 58). Upon hire, Plaintiff received a copy of SRM's employee handbook. (*Id.* ¶ 12). Plaintiff reviewed the handbook, which included SRM's equal employment opportunity ("EEO") policy, harassment policy, and open-door policy. (*Id.* ¶ 13; Doc. 68-3 ("Pl. First Depo.") at 14-16, Exs. 2-3). Plaintiff did not receive any training regarding those policies. (Pl. SAMF ¶¶ 5, 31-32). Dispatchers and other employees at SRM are not formally trained in the company's anti-discrimination policies, but they are given the employee handbook to review when hired and they are told by Zagula or another leader that discrimination is prohibited at SRM. (Doc. 68-6 ("Zagula Depo.") at 53-54). SRM disseminates its anti-discrimination policies by telling dispatchers to refer employees to the handbook containing those policies. (*Id.* at 54).

SRM's EEO policy states, "[SRM] is committed to non-discrimination policies and practices in providing equal employment opportunity (EEO) to all qualified persons regardless of race…national origin…or other legally protected status." (Def. SMF ¶ 14). The harassment policy states, "[SRM] believes that all employees have a right to work in an environment free of discrimination, which includes freedom from harassment—whether that harassment is based on…race,

national origin,…or membership in other legally protected groups." (*Id.* ¶ 15). That policy specifically prohibits harassment of SRM's employees "in any form by supervisors, co-workers, customers, or suppliers." (*Id.* ¶ 16). The harassment policy also provides that employees should utilize SRM's open-door policy to notify management (preferably in writing) of any workplace harassment. (*Id.* ¶ 17). The open-door policy creates a tiered reporting structure and states, "Employees, who feel they are the victim of harassment or discrimination, should utilize steps two or three" of that policy, which involve reporting harassment or discrimination to the head of the employee's department or "the COO/General Manager or CEO at the corporate office," respectively. (*Id.* ¶ 18).

II. Plaintiff's Truck Assignment

SRM assigns trucks to drivers based on seniority, with more senior employees receiving newer trucks. (*Id.* ¶ 38). When Plaintiff began working for SRM in June 2018, Frazier assigned him a rear-loading concrete mixer truck. (*Id.* ¶ 24). Plaintiff completed his initial training in August 2018, and because he had impressed Frazier, Shane Davis and Frazier decided to assign him to a front-loading truck, which is more difficult to drive than rear-loading trucks. (*Id.* ¶¶ 25, 28-30). Plaintiff did not object to the new assignment, as many drivers at SRM prefer front-loading trucks because they can be operated in inclement weather, permitting front-loading drivers to work more hours. (*Id.* ¶¶ 25, 27).

At that time, Plaintiff was assigned Trucks 101 and 105. (*Id.* ¶ 44). SRM's trucks are numbered in order of age (i.e. the lower the number, the older the truck). (*Id.* ¶ 43). Truck 101 was a front-loading, 2006 Oshkosh truck that had been driven by Patrick Kinder ("Kinder"), a white driver who received a newer front-loading truck. (*Id.* ¶ 39). Kinder had been working at Candler since March 2015, so he had three years of seniority over Plaintiff. (*Id.* ¶¶ 40-41). Plaintiff alleged in his deposition that when he was assigned Truck 101, white employees who were hired after him, Steve Stanley ("Stanley"), Bradley Jackson ("Jackson") and Joey Millwood ("Millwood") were assigned newer trucks.[2] (*Id.* ¶¶ 41-42). However, the evidence shows that when Plaintiff was assigned Trucks 101 and 105, Stanley was assigned Trucks 67 and 72, Jackson was assigned Truck 67, and Millwood was assigned Truck 75, all of which were older than Plaintiff's trucks.[3] (*Id.* ¶¶ 44-45). Plaintiff also identified Truck 115 as being a newer, nicer truck that he wanted to drive. (*Id.* ¶ 46). But it is undisputed that, in August 2018, Truck 115 was assigned to Efrain Camacho, a Hispanic driver who had worked for Candler since 2016 and therefore had seniority over Plaintiff. (*Id.* ¶ 47).

[2] Plaintiff did not remember Jackson or Millwood's last names, but SRM asserts that, according to its records, Plaintiff must be referring to Jackson and Millwood. (Def. SMF ¶ 42). Plaintiff does not dispute that assertion. (Resp. Def. SMF ¶ 42).
[3] Plaintiff does not dispute that evidence. (Resp. Def. SMF ¶¶ 44-45).

Once Plaintiff began driving Truck 101, he noticed that the air bellows were not working to properly level the truck. (Id. ¶ 31; Pl. First Depo. at 18-19). SRM asks its drivers to record issues with their trucks on a written form so that a mechanic can address them. (Def. SMF ¶ 32). Frazier agreed that Plaintiff should record the air bellows issue on Truck 101. (*Id.* ¶ 33). Frazier told Plaintiff not to drive Truck 101 if he felt it was unsafe to drive, but that SRM did not have any other trucks for him to drive at that time. (*Id.* ¶ 36). Later, when Plaintiff reported a hydraulic leak on another truck he was driving, Frazier told him to take it to the mechanic, who fixed the leak. (*Id.* ¶ 34). Plaintiff declares that when his regular truck was being repaired, he was assigned trucks that were not compliant with Department of Transportation ("DOT") standards. (Pl. SAMF ¶ 15; Pl. Decl. ¶ 10).

III. Harassing Comments From Coworkers And Frazier

In his first deposition, Plaintiff testified that the following comments formed the basis of his hostile work environment claim: First, early one morning as Plaintiff was coming into work, Frazier and coworker Chuck Davis joked that he looked cross-eyed and/or drunk.[4] (Def. SMF ¶ 51). Second, while discussing then-President Donald Trump's desire to build a wall at the United States-Mexico border, Frazier told Plaintiff, "Trump was going to deport Hispanics." (*Id.*). Third, in October 2018,

[4] Plaintiff admitted this comment was not made because of his race or national origin. (Def. SMF ¶ 58).

Chuck Davis asked Plaintiff "Where is your cousin that cuts grass?"[5] (*Id.* ¶¶ 51, 59). Fourth, Plaintiff says he overhead Frazier and Chuck Davis use a racial slur for black people when discussing Stacey Abrams' run for governor of Georgia in the fall of 2018, stating "we can't have these N-words taking our firearms."[6] (*Id.* ¶ 51). During his first deposition, Plaintiff testified that he could not remember being subjected to anymore unwelcome comments at SRM. (*Id.* ¶ 52; Pl. First Depo. at 30).

During his second deposition, Plaintiff testified to other offensive comments. He testified that Chuck Davis and Frazier asked him when he was going back to Mexico; a coworker named Keith, Frazier, Chuck Davis, and one of SRM's mechanics called him a "fucking spic"; and he overheard a group of coworkers saying that immigrants do not belonging in the United Stated, only come to steal and take jobs, and need to go back to their countries. (Def. SMF ¶ 53; Pl. Second. Depo. at 26-28, 36-37). Plaintiff never complained about any of those comments, and he testified that he did not include his coworkers' derogatory comments about immigrants in his interrogatory responses because they were only "somewhat bothersome." (Def. SMF ¶ 54; Pl. Second Depo. at 37).

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[5] Plaintiff does not have a cousin that cuts grass. (Doc. 68-5 ("Pl. Second Depo.") at 38).

[6] Steve Sims ("Sims"), Plaintiff's black coworker, also apparently declares that Frazier used the n-word in the workplace "more than a dozen times." (Doc. 76 ¶ 36; Sims Decl. ¶ 8). Plaintiff did not actually submit Sims' declaration, but Defendant admits that Sims did declare as much. (*Id.*).

IV. Plaintiff Complains To SRM

In December 2018, Plaintiff called SRM's corporate headquarters to complain generally about how he was being treated by Frazier and Chuck Davis, and SRM's Human Resources Department referred Plaintiff to SRM's COO Zagula, who assured Plaintiff that the conduct would be addressed. (Def. SMF ¶ 61). Plaintiff testified he complained specifically about the four comments from his first deposition – Frazier and Chuck Davis's comments about him looking cross-eyed/drunk, Frazier's comment that then-President Trump was going to deport Hispanics, Chuck Davis asking him where his cousin was that cut grass, and Frazier and Chuck Davis' use of the n-word. (Pl. First Depo. at 34-35). Zagula called Shane Davis and directed him to address Plaintiff's issues with Frazier and Chuck Davis. (Def. SMF ¶ 62).

On December 13, 2018, Shave Davis held a meeting with Plaintiff, Frazier, and Chuck Davis to discuss Plaintiff's allegations. (*Id.* ¶¶ 63-64). Plaintiff secretly recorded that meeting. (*Id.* ¶ 64; Frazier Depo., Ex. 8). During that meeting, Plaintiff asked Frazier and Chuck Davis if they recalled referring to him as cross-eyed and told them that comment had hurt his feelings. (Def. SMF ¶ 65). Neither man recalled any specific comment about Plaintiff's eyes. (*Id.* ¶ 67). Both men apologized for hurting Plaintiff's feelings. (*Id.* ¶ 66). Frazier indicated that he would cease the "horseplay" moving forward and told Plaintiff to tell him if he felt Frazier was

picking on him again. (*Id.* ¶ 68). Plaintiff continued to press the two men about why they did not remember their comments about his eyes and revealed he suffered depression because he was born with strabismus.[7] (*Id.* ¶ 69). Plaintiff chastised Frazier specifically, saying his behavior was incongruent with the values Frazier should have learned during his service in the United States military. (*Id.* ¶ 70; Frazier Depo., Ex. 8). Frazier became angry and told Shane Davis to resolve the issue by terminating him or terminating Plaintiff, but that he would not continue to be reprimanded by Plaintiff. (Def. SMF ¶ 71). Frazier then stormed out of the meeting. (*Id.* ¶ 72). After that meeting, Shane Davis assured Plaintiff that he still had a job at SRM, to report to work the next day, and that he would terminate Frazier if necessary. (*Id.* ¶ 73).

Shane Davis called Frazier shortly after that meeting and told him Plaintiff would be returning to work the next day. (*Id.*). Shane Davis instructed Frazier to "lay off" Plaintiff and to tell the other drivers not to joke with Plaintiff anymore. (*Id.* ¶ 75). Shane Davis then reported to Zagula that the meeting had been held and that Frazier and Chuck Davis had agreed to stop teasing Plaintiff. (*Id.* ¶ 76). Meanwhile, Frazier instructed the other SRM employees not to joke around with Plaintiff but to leave him alone, and the other employees agreed to do so. (*Id.* ¶ 77). Zagula then

[7] Strabismus is the medical term for crossed eyes. Whitney Seltman, OD, *What Is Strabismus?*, WebMD (Oct. 15, 2020), https://www.webmd.com/eye-health/strabismus

followed up with Frazier, instructing him to "straighten up." (*Id.* ¶ 78; Zagula Depo. at 78-79). Plaintiff does not allege that any more unwelcome comments were made to him by any SRM employees after that meeting on December 13, 2018, and he did not complain to SRM management again. (*Id.* ¶ 90). However, he did not feel his complaint had been adequately addressed. (Pl. SAMF ¶ 21; Pl. Decl. ¶ 16).

V. Plaintiff's Employment At SRM Ends

On December 19, 2018, Plaintiff asked Frazier if he could leave work early that day, and Frazier asked him where he would be going. (Def. SMF ¶¶ 80-81). Plaintiff told Frazier he was going to the Equal Employment Opportunity Commission ("EEOC") to file a complaint, and Frazier said, "Okay." (*Id.* ¶ 81). Plaintiff asked for permission to leave at 11:00 a.m. or noon, and Frazier initially granted that request. (*Id.* ¶ 82; Pl. SAMF ¶ 22; Pl. Decl. ¶ 17; Pl. First Depo. at 46). Later that same day, Frazier sent Plaintiff a text message stating that he could not let Plaintiff leave at 11:00 a.m. but could let him off at 1:00 p.m. (Def. SMF ¶ 83; Frazier Depo. at 80; Pl. Depo., Ex. 4). Plaintiff testified he never received that text message. (Def. SMF ¶ 84; Pl. SAMF ¶ 6). That morning, Frazier notified Zagula of Plaintiff's request to leave work early. (Def. SMF ¶ 85). Frazier, as a Plant Manager, has authority over the schedules of Mixer-Operators and would not normally communicate with Zagula about letting a Mixer-Operator leave work early, but he called Zagula on that occasion because of the recent issues between himself and

Plaintiff. (Def. SMF ¶ 86; Pl. Decl. ¶ 14; Zagula Depo. at 77). Zagula then called Plaintiff to ask why he was going to the EEOC, as he believed Plaintiff's harassment complaint had been addressed. (Def. SMF ¶¶ 87-88). Plaintiff explained to Zagula he was going to the EEOC because "nothing [was] being done." (*Id.* ¶ 89). Zagula told Plaintiff he could leave work that day when Frazier had no more work left for him to do. (*Id.* ¶ 91). SRM's time-keeping records show that Plaintiff left work at 10:12 a.m. (*Id.* ¶ 92).

When Plaintiff left work that day, he called his father, Herman Quintana, Sr., to tell him that his supervisor had authorized him to leave early to go to the EEOC.[8] (Pl. SAMF ¶¶ 3, 27). Plaintiff regularly spoke with his father about the perceived discrimination he faced at SRM. (Pl. SAMF ¶ 1). His father did not recall the specific details of the discrimination Plaintiff described to him, but he did recall advising Plaintiff to file a complaint with the EEOC. (*Id.* ¶ 2).

Plaintiff went to the EEOC offices on December 19, 2018 after leaving work early. (Def. SMF ¶ 95). The EEOC representative with whom he spoke told him to

[8] To support these factual statements and others regarding conversations with his father, Plaintiff cites to a declaration of Quintana, Sr., which he purportedly attached as an exhibit to his SAMF. However, that document was not attached to Plaintiff's filing. (*See* Doc. 73-1). Regardless, Defendant does not dispute that Quintana, Sr.'s declaration exists, nor that it supports Plaintiff's asserted facts. Therefore, the Court accepts these statements as fact for purposes of resolving this motion.

wait to file a charge of discrimination because he might be exaggerating his claims. (*Id.* ¶ 95). Plaintiff filed his EEOC charge on March 28, 2019. (*Id.* ¶ 94).

When Plaintiff left work on December 19, Frazier told Zagula that Plaintiff had asked to leave at 1:00 p.m. but left work earlier than that and failed to deliver his last load of concrete.[9] (Frazier Depo. at 54-55, 74; Zagula Depo. at 39-40). Zagula made the final decision to terminate Plaintiff after talking to Frazier and learning that Plaintiff left work before he was permitted and did not deliver his last load of concrete.[10] (Zagula Depo. at 24-25, 82-83). Frazier was not involved in the final termination decision, but he communicated that decision to Plaintiff via text message on December 21, 2018 after Plaintiff asked Frazier whether he should come into work that day. (Def. SMF ¶ 97; Pl. First Depo. at 64, Ex. 4; Frazier Depo. at 73). Plaintiff called Zagula later that day to discuss his termination, but he was not able to speak to Zagula for very long.[11] (Pl. First Depo. at 65). Plaintiff later told his

[9] Plaintiff declares that Frazier fabricated this report to Zagula. (Pl. SAMF ¶ 23; Pl. Decl. ¶ 18). However, Plaintiff has no basis for that statement, as he has no personal knowledge of whether Frazier told Zagula that Plaintiff had left work early that day. Therefore, Plaintiff's assertion does not create an issue of material fact.

[10] Plaintiff declares Zagula's claim that he relied on Frazier's reporting when deciding to terminate Plaintiff "is not entitled to credence." (Pl. SAMF ¶ 24; Pl. Decl. ¶ 19). However, whether Zagula's sworn statement is entitled to credence is a matter of opinion, not a statement of fact. Thus, Plaintiff's statement does not create an issue of material fact.

[11] Plaintiff produced a record of that conversation between him and Zagula during discovery, but the parties did not submit that record to the Court or establish the contents of that conversation.

father that when he attempted to return to work, SRM terminated his employment, claiming he left work without permission. (Pl. SAMF ¶ 4). SRM's business records show that Plaintiff was not actually terminated until December 27, 2018. (*Id.* ¶ 29). SRM's stated reason for Plaintiff's termination was "job abandonment." (*Id.* ¶ 30).

Based on the above facts, Plaintiff alleges claims of race and national origin discrimination under § 1981 and Title VII (Count I, III), retaliation under § 1981 and Title VII (Count II, IV), and a hostile work environment under Title VII based on "unsolicited and unwelcome comments about his physical appearance, his nationality, and comments based on racial and ethnic stereotypes." (Count V). Defendant moved for summary judgment on each of these claims.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is proper "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). "A party asserting that a fact cannot be or is genuinely disputed must support that assertion by[] . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." FED. R. CIV. P. 56(c)(1). The moving party has an initial burden of informing the court of the basis

for the motion and showing that there is no genuine issue of material fact. *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986); *see also Arnold v. Litton Loan Servicing, LP*, No. 1:08-CV-2623-WSD, 2009 WL 5200292, at *4 (N.D. Ga. Dec. 23, 2009) ("The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact.") (citing *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1246 (11th Cir. 1999)). If the non-moving party will bear the burden of proving the material issue at trial, then in order to defeat summary judgment, that party must respond by going beyond the pleadings, and by the party's own affidavits, or by the discovery on file, identify facts sufficient to establish the existence of a genuine issue for trial. *See Celotex*, 477 U.S. at 322, 324. "No genuine issue of material fact exists if a party has failed to 'make a showing sufficient to establish the existence of an element . . . on which that party will bear the burden of proof at trial.'" *AFL-CIO v. City of Miami*, 637 F.3d 1178, 1186-87 (11th Cir. 2011) (quoting *Celotex*, 477 U.S. at 322).

Furthermore, "[a] nonmoving party, opposing a motion for summary judgment supported by affidavits[,] cannot meet the burden of coming forth with relevant competent evidence by simply relying on legal conclusions or evidence which would be inadmissible at trial." *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991), *cert. denied*, 506 U.S. 952 (1992); *see also* FED. R. CIV. P. 56(c)(1)(B), (c)(4). The evidence "cannot consist of conclusory allegations or legal conclusions."

Avirgan, 932 F.2d at 1577. Unsupported self-serving statements by the party opposing summary judgment are insufficient to avoid summary judgment. *See Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 714 (11th Cir. 1984).

For a dispute about a material fact to be "genuine," the evidence must be such that "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (internal citations omitted). It is not the court's function at the summary judgment stage to determine credibility or decide the truth of the matter. *Id.* at 249, 255. Rather, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [the nonmovant's] favor." *Id.* at 255.

II. Plaintiff's Hostile Work Environment Claim (Count V)

The Court first addresses Plaintiff's hostile work environment claim under Title VII.[12] (Doc. 54 ¶¶ 62-67). Plaintiff alleges his hostile work environment consisted of "unsolicited and unwelcome comments about his physical appearance, his nationality, and comments based on racial and ethnic stereotypes." (*Id.* ¶ 63). Defendant is entitled to summary judgment on this claim.

[12] Plaintiff could have also brought such a claim under § 1981, but clearly did not do so in his Amended Complaint. (*See* Doc. 54).

A hostile work environment is created "when the workplace is permeated with discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe or pervasive to alter the conditions of the victim's employment." *Harris v. Forklift Sys.*, 510 U.S. 17, 20 (1993) (internal citations and quotations omitted). To support a hostile work environment claim, a plaintiff must show: "(1) he belongs to a protected group; (2) he was subjected to unwelcome harassment; (3) the harassment was based on his membership in the protected group; (4) it was severe or pervasive enough to alter the terms and conditions of employment and create a hostile or abusive working environment; and (5) the employer is responsible for that environment under a theory of either vicarious or direct liability." *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1300 (11th Cir. 2010) (citations omitted). Defendant moves for summary judgment on this claim, arguing that the unwelcome comments Plaintiff relies upon are not severe or pervasive enough to constitute a hostile work environment and that SRM cannot be held liable for the conduct in question. (Doc. 67-1 at 10-16). Defendant is correct.

a. <u>Some Conduct Was Not Based On Plaintiff's Race Or Nationality</u>

Plaintiff's hostile work environment claim is based on the following comments either made to him or overheard in the workplace: (1) Chuck Davis and Frazier both teased Plaintiff as he arrived at work early one morning, saying he looked cross-eyed and/or drunk (Def. SMF ¶ 51); (2) Frazier told Plaintiff that then-President Donald Trump was going to deport Hispanics (*Id.*); (3) Chuck Davis asked

Plaintiff "Where is your cousin that cuts grass?" (*Id.* ¶¶ 51, 59); (4) Plaintiff overheard Frazier and Chuck Davis say "we can't have these N-words taking our firearms" when discussing Stacey Abrams' run for the Georgia governorship in 2018 (*Id.* ¶ 51); (5) Chuck Davis and Frazier asked Plaintiff when he was going back to Mexico (*Id.* ¶ 53); (6) Frazier, Chuck Davis, and two other coworkers called Plaintiff a "fucking spic" on one occasion (*Id.*); and (7) Plaintiff overheard coworkers saying that immigrants did not belong in the United States, came to steal and take jobs, and needed to go back to their countries (*Id.*).

As an initial matter, some of those comments cannot contribute to Plaintiff's hostile work environment claim because they are not based on Plaintiff's race or national origin. Plaintiff conceded in his deposition that the comments Frazier and Chuck Davis made about him looking cross-eyed or drunk were not based on his race or nationality. (*Id.* ¶ 58). They were hurtful jokes about his physical appearance, but they were not based on his membership in a protected group. Further, Frazier and Chuck Davis' use of the n-word cannot be considered when evaluating Plaintiff's hostile work environment claim, because Plaintiff is not black. It is true that "a harasser's use of epithets associated with a different ethnic or racial minority than the plaintiff will not necessarily shield an employer from liability for a hostile work environment." *Jones v. UPS Ground Freight*, 682 F.3d 1283, 1299 (11th Cir. 2012). However, in *Jones*, the Eleventh Circuit held that a supervisor's mistaken

belief that the black plaintiff was Native American, and his harassing comments stemming from that belief, could support a hostile work environment claim because that belief was based on the plaintiff's dark complexion or some other perceived shared characteristic with Native Americans. *Id.* at 1300. Here, there is no evidence that Frazier or Chuck Davis believed Plaintiff was black. Thus, their use of the n-word, although reprehensible, cannot support Plaintiff's hostile work environment claim, as it was not directed at him and was not based on *his* protected characteristics.

b. Conduct Not Severe Or Pervasive

The rest of the comments, when looked at in their totality, do not constitute "severe or pervasive" harassment. "Establishing that harassing conduct was sufficiently severe or pervasive to alter an employee's terms or conditions of employment includes a subjective and an objective component." *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999). "[A] plaintiff must establish not only that []he subjectively perceived the environment as hostile and abusive, but also that a reasonable person would perceive the environment to be hostile and abusive." *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 583 (11th Cir. 2000), *cert. denied*, 531 U.S. 1076 (2001). When determining whether conduct was objectively severe or pervasive, courts consider four factors: : "(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably

interferes with the employee's job performance." *Mendoza*, 195 F.3d at 1246 (internal citations omitted).

The remaining comments that form the basis of Plaintiff's claim did not occur very frequently, as there were only five specific comments made over the course of Plaintiff's approximately six-month employment. "[I]t is 'repeated incidents of verbal harassment that continue despite the employee's objections [that] are indicative of a hostile work environment' and not simply some 'magic number' of racial or ethnic insults." *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1276 (11th Cir. 2002) (quoting *Shanoff v. Ill. Dep't of Human Servs.*, 258 F.3d 696, 704 (7th Cir. 2001)). "Title VII is only implicated in the case of a workplace that is 'permeated with discriminatory intimidation, ridicule and insult,' not where there is the 'mere utterance of an . . . epithet.'" *Id*. (quoting *Harris*, 510 U.S. at 21). Five comments over the course of six months does not constitute the sort of repeated, permeating harassment necessary to support a hostile work environment claim.

As for severity, Plaintiff being called a racial slur (a "fucking spic") is certainly severe. *See Cooler v. Layne Christensen Co.*, 710 Fed. App'x 842, 848 (11th Cir. 2017) ("[T]he use of the slur ['n-'] is severe.") (quoting *Adams v. Austal, U.S.A., L.L.C.*, 754 F.3d 1240, 1255 (11th Cir. 2017)). However, "in isolation, the use of a racial epithet on one occasion is not enough evidence of severe or pervasive harassment to make a hostile work environment." *Id.* (citing *Butler v. Ala. Dep't of*

Transp., 536 F.3d 1209, 1214 (11th Cir. 2008)). Other evidence of harassing conduct besides that single use of a racial slur is in the record, but that conduct, even when viewed in conjunction with the racial slur, is not objectively severe enough to have altered the terms and conditions of Plaintiff's employment at SRM. Frazier's comment that President Trump was going to "deport Hispanics" when discussing Trump's desire to build a border wall could be reasonably viewed as inflammatory and antagonistic, but it is not necessarily a derogatory comment about Hispanic people, but reflects a statement of Frazier's perception of Trump's policy intentions. An individual's statement reflecting his perception of ultimate results of a politician's desires is simply too attenuated to cause a change in the terms or conditions of employment. Chuck Davis' comment about Plaintiff's "cousin who cuts grass" is offensive in that it invokes a stereotype that many people of Hispanic descent work in the lawncare industry. Chuck Davis and Frazier asking Plaintiff when he was returning to Mexico, despite Plaintiff being Chilean, is also offensive in that it makes erroneous assumptions about Plaintiff's nationality. However, those two comments are the type of "teasing, [] offhand comments" that do "not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher v. Boca Raton*, 524 U.S. 775, 788 (1998) (stating that Title VII's "standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.'"). Moreover, comments from unidentified coworkers' that

immigrants do not belong in this country, take jobs away from citizens, and need to return to their countries, are less severe than they would be otherwise because there is no evidence they were directed toward Plaintiff. *Adams*, 754 F.3d at 1254-55 (holding a black employee was not subjected to objectively severe and pervasive harassment, despite overhearing a white coworker say the n-word several times and being subjected to other racists behavior, because the slurs were "not directed toward him or directly humiliating or threatening to him."). In fact, Plaintiff admitted this incident was only "somewhat bothersome" to him, subjectively, and was not worthy of being included in his response to an interrogatory about the comments that form the basis of this claim. (Def. SMF ¶ 54). Further, there is no evidence that the unwelcome comments Plaintiff endured unreasonably interfered with his job performance. Plaintiff testified that he "did a great job" at SRM and his performance stayed at a high level throughout the entire time he worked there. (Def. SMF ¶ 98; Pl. Second Depo. at 39).

In short, the comments that Plaintiff alleges made his work environment hostile consisted of one severely offensive use of a racial slur along with a few teasing, offhand comments invoking assumptions about Hispanic and some generalizations about immigrants that were not even directed at Plaintiff. Courts in this Circuit have held similar or even more offensive allegations than those in this case insufficient to create an actionable hostile work environment. *See, e.g.*, *Barrow*

v. Ga. Pac. Corp., 144 Fed. App'x. 54, 57-58 (11th Cir. 2005) (unpublished decision) (finding the following allegations, among others, insufficient: a superintendent called the plaintiff "n-" three times in one year, repeatedly called him "boy," and threatened to kick his "black ass" two or three times; his supervisor called him an "n-" and told the plaintiff he would cut him if he looked at "that white girl"; another superintendent called him "black boy" once; another supervisor called him "dumb ass"); *McCurdy v. Ala Disability Determination Serv.*, No. 2:13-cv-934-MHT-PWG, 2015 U.S. Dist. LEXIS 134677, at *42-44 (M.D. Ala. Aug. 13, 2015) (finding that plaintiff's allegation that "on several occasions" a supervisor called her "dumb n-" was insufficient to state a hostile work environment in the absence of additional facts "that she was subjected to a 'workplace . . . permeated with discriminatory intimidation, ridicule, and insult, that [was] sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment' as contemplated by the Eleventh Circuit") (quoting *Butler v. Ala. Dep't of Transp.*, 536 F.3d 1209, 1214 (11th Cir. 2008) and collecting cases); *Thomas v. Autauga Cnty. Bd. of Educ.*, No. 2:12-CV-971-WKW [WO], 2014 U.S. Dist. LEXIS 51572, at *9, 37-38 (M.D. Ala. Apr. 15, 2014) (recognizing that one incident where a student drew a picture of plaintiff hanging from a tree by a noose with the words "Ha, ha, ha, Ms. Thomas is pretty, but she's dead. The KKK is coming to get her" was "somewhat severe[, . . .] physically threatening and

humiliating" but finding it insufficient because "[a] single incident over a three-year span of employment is anything but 'pervasive' harassment") (collecting cases); *Mathis v. Kerry*, No. 5:12-CV-70 (CAR), 2014 U.S. Dist. LEXIS 24829, at *27-31 (M.D. Ga. Feb. 27, 2014) (finding insufficient the plaintiff's allegation that fellow managers called him a "n-" and "uppity n[-]" because their "use of racial epithets on two occasions does not constitute such 'commonplace, overt and denigrating [statements] that they create an atmosphere charged with racial hostility"); *Thompson v. City of Miami Beach*, 990 F.Supp.2d 1335, 1338, 1341 (S.D. Fla. Jan. 3, 2014) (finding insufficient allegation that supervisor called plaintiff "n-" three times in several months); *Jones v. Horizon Shipbuilding, Inc.*, No. 11-0012-WS-M, 2012 U.S. Dist. LEXIS 150567, at *33-36 (S.D. Ala. Oct. 19, 2012) (finding insufficient allegation that plaintiff's supervisor called her "stupid n-" and "stupid lesbian n[-] bitch" one day and called another employee a "stupid n-" on another day in a two-month period); *Carter v. Daehan Sols. Ala., LLC*, No. 2:07-CV-988-WKW [WO], 2010 U.S. Dist. LEXIS 8066, at *12, 18-19 (M.D. Ala. Feb. 1, 2010) (finding insufficient plaintiff's allegation that his manager called him a "n-," causing plaintiff to engage in a physical confrontation with him and leading to his termination because the manager's "single use of a racial epithet, while not condoned by the court, is not severe enough to support a hostile work environment claim" in the absence of evidence "that such epithets occurred more frequently"); *LaBeach v. Wal-Mart*

Stores, Inc., No. 5:07-CV-12(HL), 2009 U.S. Dist. LEXIS 26167, at *11-14 (M.D. Ga. Mar. 27, 2009) (finding insufficient plaintiff's allegation that over four month period store manager told plaintiff to fire all the black employees "because they were n[-]s, lazy, and too stupid to do their job"; told her that "radios were stolen by n[-]s"; and asked her "isn't your people used to dirt"); *Sobutay v. Intermet Int'l, Inc.*, No. 4:06-CV-87 (CDL), 2007 U.S. Dist. LEXIS 85862, at *15-20 (M.D. Ga. Nov. 20, 2007) (finding insufficient plaintiff's allegation that supervisor directed racial slurs at him—including "raghead," "sand n-," and "wetback"—three times over a 10 year period); *Gullatte v. WestPoint Stevens, Inc.*, 100 F.Supp.2d 1315, 1322-23 (M.D. Ala. 2000) (finding allegation that two supervisors called plaintiff "n-" three times not sufficient: "While the nature of the epithets was severe, the significant span of time between these sporadic epithets militates against a finding that these three incidents during an eight year period were sufficiently pervasive to alter Gullatte's work environment."). Therefore, Plaintiff cannot establish that the unwelcome comments he was subjected to at SRM were objectively severe or pervasive enough to support a hostile work environment claim.

c. <u>SRM's Liability</u>

Even if the above-listed conduct was objectively severe or pervasive enough to support a hostile work environment claim, Plaintiff can only prove that Defendant was directly or vicariously liable for a fraction of that conduct. In hostile work

environment cases, there are different standards of liability depending on whether the harasser was the plaintiff's coworker or supervisor. Both standards are implicated here because Plaintiff has alleged unwelcome comments from coworkers and his immediate supervisor, Frazier.

i. Liability For Actions Of Coworkers

The standard for imposing employer liability in cases of coworker harassment has been articulated by the Eleventh Circuit as follows: "When . . .the alleged harassment is committed by [a] co-worker[] . . . , a Title VII plaintiff must show that the employer either knew (actual notice) or should have known (constructive notice) of the harassment and failed to take immediate and appropriate corrective action." *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003) (*citing Breda v. Wolf Camera & Video*, 222 F.3d 886, 889 (11th Cir. 2000)). The remedial action much be "reasonably likely to prevent the misconduct from recurring." *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1305 (11th Cir.2007). "Of special importance is whether the…harassment ended after the remedial action was taken." *Munn v. Mayor and Aldermen of City of Savannah*, 906 F.Supp. 1577, 1583 (S.D. Ga. 1995). "Actual notice is established by proof that management knew of the harassment." *Watson*, 324 F.3d at 1259 (citing *Miller*, 277 F.3d at 1278). "When an employer has a clear and published policy that outlines the procedures an employee must follow to report suspected harassment and the complaining employee follows

those procedures, actual notice is established." *Id.* (citing *Breda*, 222 F.3d at 889; *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1364 (11th Cir. 1999)). To establish constructive notice, a plaintiff must show that "the harassment was so severe and pervasive that management reasonably should have known of it." *Id.* (citing *Miller*, 277 F.3d at 1278).

Defendant undoubtedly had actual notice of a portion of the harassment from Plaintiff's coworkers once he complained to Zagula around December 13, 2018 in accordance with the harassment and open-door policies in SRM's employee handbook.[13] SRM had a harassment policy in its employee handbook, which Plaintiff read when he was hired. (Def. SMF ¶¶ 12-13). That policy prohibits harassment based on protected characteristics and states that employees who feel they have been harassed should utilize the company's open-door policy to notify management. (*Id.* ¶¶ 15-17). The open-door policy requires employees who feel they have been harassed to utilize steps two and three of the tiered reporting structure laid out there, which states complainants should contact the head of their department or "the COO/General Manager or the CEO at the corporate office. (*Id.* ¶¶18). Plaintiff followed that policy when he called SRM's corporate headquarters to complain about the perceived harassment he was facing and spoke to Zagula, Defendant's

[13] Plaintiff does not argue, and the Court finds no evidence, that the unwelcome comments from his coworkers were so pervasive that SRM should have had constructive knowledge of them before he formally complained.

COO. (*Id.* ¶ 61). At that point, Defendant gained actual notice of whatever harassment Plaintiff shared with Zagula. *Watson*, 324 F.3d at 1259. Plaintiff testified that he complained to Zagula about four particular unwelcome comments: Frazier and Chuck Davis's comments about him looking cross-eyed/drunk, Frazier's comment that then-President Trump was going to deport Hispanics, Chuck Davis asking him about his cousin that cut grass, and Frazier and Chuck Davis' use of the n-word. (Pl. First Depo. at 34-35). Of those four comments, the only actionable one from a coworker is Chuck Davis' question to Plaintiff about his cousin who cut grass. Plaintiff later testified that he did not complain about being called a racial slur or his coworkers' comments that immigrants do not belong in the United States, steal jobs, and need to go back to their countries. (Pl. Second Depo. at 29, 37). There is also no evidence that he complained about Chuck Davis asking him when he was going back to Mexico.

Defendant cannot be held liable for the one actionable comment from a coworker it knew about, because it took immediate and effective action to address any unwelcome harassment directed at Plaintiff. After Plaintiff complained, Zagula directed Plaintiff's General Manager Shane Davis to meet with Frazier and Chuck Davis about Plaintiff's allegations. (Def. SMF ¶ 62). Shane Davis met with Plaintiff, Frazier, and Chuck Davis on December 13, 2018, where Plaintiff was allowed to confront Frazier and Chuck Davis about their unwelcome comments. (*Id.* ¶¶ 63-70).

Plaintiff chose to focus on their jokes about his crossed eyes. (*Id.*). Both men apologized for hurting Plaintiff's feelings and Frazier said he would cease teasing Plaintiff. (*Id.* ¶¶ 66, 68). Shane Davis called Frazier after that meeting and instructed him again to "lay off" Plaintiff and to tell other drivers not to joke around with Plaintiff anymore. (*Id.* ¶ 75). Frazier instructed other SRM employees to cease all joking with Plaintiff, and they agreed to do so. (*Id.* ¶ 77). Zagula also followed up with Frazier, instructing him to stop teasing Plaintiff. (*Id.* ¶ 78). While Plaintiff was not personally satisfied with how his complaint was handled, he admits that the unwelcome conduct ceased after the December 13, 2018 meeting. (*Id.* ¶ 90). Thus, the evidence shows that once Plaintiff notified SRM of the perceived harassment via its open-door policy, Zagula and Shane Davis took prompt and effective action to ensure the unwelcome conduct ceased. Therefore, Defendant cannot be held liable for any harassment Plaintiff faced from his coworkers.

ii. Liability For Harassment From Supervisor

Plaintiff also alleges harassing conduct from his immediate supervisor, Frazier. "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. . . . The defense comprises two necessary elements: (a) that the employer

exercised reasonable care to prevent and correct promptly any [] harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise . . . .” *Burlington Indust., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *see also Faragher*, 524 U.S. at 807-08. Defendant argues it cannot be held liable for any harassment of Plaintiff by Frazier based on the *Faragher/Ellerth* affirmative defense. (Doc. 67-1 at 14-16).

SRM can establish the first element of that defense. Although the presence of an anti-harassment policy does not automatically satisfy the first element of the *Faragher/Ellerth* defense, “the presence of such a policy is nevertheless a highly relevant factor,” and this circuit has consistently held that an employer has satisfied its burden on the prevention prong of the first element of this defense when there is evidence that the employer had a comprehensive anti-harassment policy that is effectively communicated to its employees and contains reasonable complaint procedures. *Minix v. Jeld-Wen, Inc.*, 237 Fed. App’x 578, 584 (11th Cir.2007) (unpublished opinion) (citing *Frederick*, 246 F.3d at 1315). Here, as noted above, SRM had a harassment policy that barred harassment based on any protected characteristic. (Def. SMF ¶¶ 15-16). That policy contained reasonable, simple complaint procedures (*Id.* ¶¶ 17-20) that Plaintiff used effectively. Moreover, that policy was communicated to SRM’s employees, including Plaintiff, who admitted

receiving a copy of and reviewing SRM's employee handbook containing its harassment and open-door policies. (*Id.* ¶¶ 12-13). SRM disseminates its policies by referring all of its employees to the handbook containing those policies. (Zagula Depo. at 53-54). Plaintiff argues in his brief that Defendant cannot avail itself of the *Faragher/Ellerth* defense because SRM did not formally train its employees in its discrimination and harassment policies. (Doc. 73 at 14-15). However, that argument fails. Defendant was not required to conduct formal training in that policy, but only effectively communicate it to employees. Thus, Defendant has shown the absence of a genuine issue of material fact regarding whether it exercised reasonable care to prevent harassment. Further, as explained above, Defendant acted to promptly correct harassment once Plaintiff complained to Zagula and Shane Davis via the open-door policy. After Plaintiff complained about some of the unwelcome comments from Frazier and his coworkers, Frazier was immediately reprimanded by Zagula and Shane Davis, and Plaintiff received no more unwelcome comments from Frazier.

Defendant can also establish the second element of this affirmative defense, but only as to some of the unwelcome comments from Frazier. It is undisputed that Plaintiff never complained about the most severe of Frazier's harassment, his calling Plaintiff a racial slur. (Pl. Second Depo. at 29). There is also no evidence in the record that Plaintiff ever complained about Frazier asking him when he was going

back to Mexico. Thus, SRM cannot be held liable for those two comments because Plaintiff unreasonably failed to take advantage of the preventative and corrective opportunity that was Defendant's harassment policy. However, the record shows Plaintiff complained specifically to Zagula about some of Frazier's other unwelcome comments, including his comment about President Trump's wish to deport Hispanics and his use of the n-word. (Pl. First Depo. at 34-35). Defendant does not explain how Plaintiff unreasonably failed to avoid that harm. Yet those comments alone do not come close to being objectively severe or pervasive enough to support a hostile work environment claim. *See* Discussion, Part II (a-b), *supra*.

Plaintiff argues that SRM cannot raise the *Faragher/Ellerth* defense because the harassment he faced culminated in a tangible employment action, his termination. (Doc. 73 at 14). It is true that an employer cannot assert the *Faragher/Ellerth* defense if the harassment in question culminated in a tangible adverse action against the harassed employee. *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1280-81 (11th Cir. 2003) (citing *Frederick*, 246 F.3d at 1311). However, that exception to the affirmative defense does not apply here. Plaintiff was eventually terminated, but he does not explain and the Court does not readily see how his termination was related to the allegedly harassing conduct he endured at SRM. When Plaintiff was terminated in late December 2018, the unwelcome conduct he had suffered at SRM had already ceased after his internal complaint.

Further, Zagula, who made the ultimate decision to terminate Plaintiff, played no part in Plaintiff's harassment. (Zagula Depo. at 24-25, 82-83). In fact, when he learned of Plaintiff's alleged harassment, he took prompt and effective action to put an end to the harassment. Therefore, this argument from Plaintiff fails.

In sum, Defendant cannot be held liable for any of the harassing comments made by Plaintiff's coworkers and could, at most, only potentially be held liable for one actionable comment by Frazier. That comment alone cannot support a hostile work environment claim. Therefore, Plaintiff's hostile work environment claim based on unwelcome comments from his coworkers and a supervisor cannot survive this motion.

For those reasons, it is **RECOMMENDED** that Defendant's motion for summary judgment be **GRANTED** as to Plaintiff's hostile work environment claim.

III. Plaintiff's Retaliation Claims (Counts II, IV)

Plaintiff also claims Defendant retaliated against him in violation of § 1981 and Title VII when it terminated him in December 2018. (Doc. 54, ¶¶ 32-38, 49-61). Because Defendant can show it terminated Plaintiff for a legitimate, non-retaliatory reason, it is entitled to summary judgment on these claims.

Title VII makes it unlawful for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or

participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). "Section 1981 also prohibits retaliation on the basis of race, even though the statute is silent on that cause of action." *Gant v. Kash'n Karry Food Stores, Inc.*, 390 Fed. App'x 943, 945 (11th Cir. 2010) (unpublished decision) (citing *CBOCS West v. Humphries*, 553 U.S. 442 (2008)). Title VII and § 1981 retaliation claims are both analyzed under the *McDonnell Douglas* burden-shifting framework. *See Bryant v. Jones*, 575 F.3d 1281, 1307-08 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1536 (2010); *see also Jackson v. Geo Grp., Inc.*, 312 Fed. App'x 229, 233 & n.8 (11th Cir. 2009) (unpublished decision). A plaintiff alleging a Title VII claim has the initial burden of establishing a *prima facie* case of retaliation. *See McDonnell Douglas*, 411 U.S. at 802 (1973); *see also Little v. United Tech., Carrier Transicold Div.*, 103 F.3d 956, 959 (11th Cir. 1997) (citing *Coutu v. Martin Cnty. Bd. of Cnty. Comm'rs*, 47 F.3d 1068, 1074 (11th Cir. 1995)). To demonstrate a *prima facie* case of retaliation in the absence of direct evidence, a plaintiff must show he (1) engaged in statutorily protected activity; (2) suffered an adverse employment action; and (3) there is a causal connection between the protected activity and adverse action. *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1021 (11th Cir. 1994). If the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, non-retaliatory basis for the action. *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001). If the

defendant does so, then in order to avoid summary judgment, the plaintiff must point to evidence from which reasonable jurors could conclude that the employer's proffered explanations are a pretext for retaliation. *See id*. The ultimate burden of proving pretext remains on the plaintiff. *Id*.

Here, Defendant concedes that Plaintiff can establish a *prima facie* case of retaliation, because he was terminated within just a few days of complaining to the EEOC about perceived discriminatory harassment. (Doc. 67-1 at 16). The Court agrees that Plaintiff could establish a *prima facie* case of retaliation, as a causal relationship between a protected activity and an adverse action can be inferred if the two events occurred in very close temporal proximity. *Bowers v. Bd. of Regents of the Univ. Sys. Of Ga.*, 509 Fed. App'x 906, 911 (11th Cir. 2013) ("Causation may be inferred by a close temporal proximity between the protected activity and the adverse action. But mere temporal proximity, without more, must be 'very close.'") (quoting *Thomas v. Cooper Light, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007)). Defendant then proffers a legitimate, non-retaliatory reason for terminating Plaintiff, that he left work earlier than permitted on December 19, 2018, leaving concrete undelivered. (Doc. 67-1 at 21-22). Because Defendant has articulated a legitimate, non-retaliatory reason for terminating Plaintiff, to survive summary judgment, Plaintiff must "come forward with evidence, including the previously produced evidence establishing the *prima facie* case, sufficient to permit a reasonable fact

finder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." *Chapman v. AI Transp.*, 229 F.3d 1012, 1024 (11th Cir. 2000) (en banc) (quoting *Combs v. Plantation Patterns, Meadowcraft, Inc.*, 106 F.3d 1519, 1528 (11th Cir. 1997)). The court's role at this juncture is to "evaluate whether the plaintiff has demonstrated such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F.3d at 1538 (internal quotation omitted). In making the required pretext showing, "[a] plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute his business judgment for that of the employer." *Chapman*, 229 F.3d at 1030. Rather, "[p]rovided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." *Id.*

> [t]he inquiry ... centers on the employer's beliefs, not the employee's beliefs and, to be blunt about it, not on reality as it exists outside of the decision maker's head. ... The question is whether [the] employers were dissatisfied with [the employee] for these or other non-[retaliatory] reasons, even if mistakenly or unfairly so, or instead merely used those [reasons] as cover for [retaliating] against her. ...
>
> In analyzing issues like this one, "we must be careful not to allow Title VII plaintiffs simply to litigate whether they are, in fact, good employees."

Gogel v. Kia Motors Mfg. of Ga., Inc., 967 F.3d 1121, 1148 (11th Cir. 2020) (quoting *Alvarez v. Royal Atl. Dev., Inc.*, 610 F.3d 1253, 1266 (11th Cir. 2010) (internal citations omitted)). "The relevant inquiry is therefore whether the employer in good faith believed that the employee had engaged in the conduct that led the employer to discipline the employee." *Id.* (*Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991)).

Plaintiff argues that Defendant's stated legitimate reason for terminating him is a pretext for retaliation. (Doc. 73 at 7-10). He asserts that he did not abandon his job, as Defendant claims, citing evidence that he was given permission to leave work early on December 19, 2018 to go to the EEOC, clocked out instead of simply leaving, called his father to say he had been given permission to leave work and go to the EEOC, and then texted Frazier on December 21, 2018 to determine if he needed to come into work that day. (*Id.* at 8-9). Some of that evidence, such as Plaintiff clocking out and attempting to return to work on December 21, is irrelevant, as it seems an attempt to rebut an argument that Plaintiff quit his job. Defendant does not use the term "job abandonment" to mean Plaintiff quit his job, but that he left a shift early and left tasks unperformed.

The evidence does create an issue of fact as to when exactly Plaintiff was given permission to leave work on December 19, 2018. There is evidence that Frazier sent Plaintiff a text that he could not leave until 1:00 p.m. that day. (Def.

SMF ¶ 83). But Plaintiff testified he never received that message. (*Id.* ¶ 84; Pl. SAMF ¶ 6). Plaintiff also testified that Frazier initially told him earlier that morning that he could leave at 11:00 a.m. or noon. (Def. SMF ¶ 82; Pl. SAMF ¶22). There is also evidence that when Zagula called Plaintiff that day to ask why he was going to the EEOC, Zagula told Plaintiff he could leave whenever Frazier had no more work left for him to do. (Def. SMF ¶ 91). However, that issue of fact is irrelevant to the pretext analysis, because none of it pertains to Zagula's good faith belief that Plaintiff left work earlier than permitted on December 19. Zagula's belief is the only belief that matters because he made the ultimate decision to terminate Plaintiff. (Zagula Depo. at 24-25, 82-83). The evidence shows he made that decision after being informed by Frazier that Plaintiff had been given permission to leave at 1:00pm but had left earlier than that and left a load of concrete undelivered. (Zagula Depo. at 24-25, 39-40, 82-83; Frazier Depo. at 54-55, 74). Therefore, even assuming Plaintiff genuinely believed he had permission to leave work before 1:00 p.m. on December 19, that does not contradict the evidence that Zagula reasonably believed Plaintiff had left earlier than permitted and before he had completed the work assigned to him by Frazier.

In one last effort to refute Defendant's proffered reason for his termination, Plaintiff declares that Frazier fabricated his report to Zagula about Plaintiff leaving earlier than permitted, and he declares that Zagula's testimony that he relied on

Frazier's report in good faith is not worthy of credence. (Pl. SAMF ¶¶ 23-24; Pl. Decl. ¶¶ 18-19). However, those statements by Plaintiff are unsupported by evidence, and his opinion on the trustworthiness of Zagula's reliance on Frazier's report is irrelevant to the pretext analysis. Therefore, Plaintiff cannot create an issue of fact regarding whether Zagula believed he had left work early on December 19, 2018. No reasonable jury could conclude that Defendant's legitimate, non-retaliatory reason for terminating Plaintiff was pretextual, and Plaintiff could not prove at trial that Defendant retaliated against him for complaining to the EEOC.[14]

For those reasons, it is **RECOMMENDED** that Defendant's motion for summary judgment on Plaintiff's Title VII and § 1981 retaliation claims be **GRANTED**.

IV. Section 1981 And Title VII Discrimination Claims (Counts I, III)

Lastly, Plaintiff alleges SRM discriminated against him because of his race and national origin in violation of § 1981 and Title VII on multiple grounds. (Doc. 54 ¶¶ 25-31, 39-48). Title VII makes it unlawful for an employer "to fail or refuse

[14] Putting the *McDonnell Douglas* framework aside, Plaintiff argues that his retaliation claim should survive this motion because he can create a "convincing mosaic of circumstantial evidence" supporting his retaliation claim. (Doc. 73 at 10-12). He does not put forth any new evidence or arguments to support that theory, but simply repeats that Defendant's stated legitimate reason for terminating him is pretextual. (*Id.*). The Court has already explained why no reasonable jury could conclude that Defendant's proffered reason for terminating Plaintiff is pretextual. Thus, this argument from Plaintiff fails.

to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to her compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e–2(a)(1). Section 1981 of Title 42 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enjoy contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). Courts analyze discrimination claims brought pursuant to § 1981 under the same framework as Title VII claims. *Lewis v. MARTA*, 343 Fed. App'x. 450, 453 n.4 (11th Cir. 2009) (unpublished opinion). In the absence of direct evidence of discrimination, a plaintiff may establish a circumstantial case of discrimination under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). "Under this framework, the plaintiff first has the burden of establishing a prima facie case of discrimination, which creates a rebuttable presumption that the employer acted illegally." *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1087 (11th Cir. 2004). "When proceeding under *McDonnell Douglas*, the plaintiff bears the initial burden of establishing a *prima facie* case of discrimination by showing (1) that []he belongs to a protected class, (2) that []he was subjected to an adverse employment action, (3) that []he was qualified to perform the job in question, and (4) that [his] employer treated 'similarly situated' employees outside [his] class more favorably." *Lewis v. City of Union City*, 918 F.3d 1213, 1220-21

(11th Cir. 2019). "If the plaintiff succeeds in making out a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its actions." *Id.* at 1221. "Finally, should the defendant carry its burden, the plaintiff must then demonstrate that the defendant's proffered reason was merely a pretext for unlawful discrimination, an obligation that 'merges with the [plaintiff's] ultimate burden of persuading the [factfinder] that []he has been the victim of intentional discrimination.'" *Id.* (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). Because Plaintiff cannot establish a *prima facie* case of discrimination on any grounds, Defendant is entitled to summary judgment on these claims.

a. <u>Discrimination Based On Truck Assignments</u>

Plaintiff alleges SRM discriminated against him under § 1981 by subjecting him to "different terms and conditions of employment" on the basis of his race and national origin (Doc. 54 ¶ 26) and under Title VII by "treating [him] differently than other employees outside of [his] protected race and national origin class." (*Id.* ¶ 43). Earlier in his Amended Complaint, Plaintiff alleges he was assigned a truck that was unsafe, while Caucasian or American employees were assigned better trucks. (*Id.* ¶ 11). Thus, it seems Plaintiff's Title VII and § 1981 discrimination claims are based, at least in part, on his truck assignments while at SRM. Defendant argues it is entitled to summary judgment on these claims because Plaintiff's truck assignments were

not tangible actions upon which discrimination claims can be based and Plaintiff cannot show that employees outside his protected class were assigned better trucks. (Doc. 67-1 at 4-10). In response, Plaintiff does not oppose those arguments or explain why his discrimination claims should not be dismissed to the extent they are based on truck assignments. (*See* Doc. 73; Doc. 75 at 3 n.1). Plaintiff's failure to oppose Defendant's arguments on these claims could be considered abandonment, justifying an automatic entry of summary judgment for Defendant on these claims. *Rossi v. Fulton Cnty., Ga.*, No. 1:10-cv-4254-RWS-AJB, 2013 WL 1213243, at *13 n.8 (N.D. Ga. Feb. 13, 2013) (citing *Floyd v. Home Depot U.S.A., Inc.*, 274 Fed. App'x 763, 765 (11th Cir. 2008); *Edmondson v. Bd. of Trustees of Univ. of Ala.,* 258 Fed. App'x 250, 253 (11th Cir. 2007) ("In opposing a motion for summary judgment, a party may not rely on her pleadings to avoid judgment against her. There is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment. Rather, the onus is upon the parties to formulate arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned.") (citation omitted)), *adopted by* 2013 WL 1213139 (N.D. Ga. Mar. 22, 2013). However, out of an abundance of caution, the undersigned addresses the merits of Defendant's argument for summary judgment on these claims. *U.S. v. One Piece of Real Property*, 363 F.3d 1099, 1101 (11th Cir. 2004) ("[T]he district court cannot base the entry of summary

judgment on the mere fact that the motion was unopposed, but, rather, must consider the merits of the motion."); *see also Edwards v. Shalala*, 846 F.Supp. 997, 998 n.2 (N.D. Ga. 1994) (noting this "Court's preference to resolve cases on the merits"). Defendant is entitled to summary judgment on Plaintiff's discrimination claims based on his truck assignments.

Plaintiff cannot establish a *prima facie* case of discrimination based on his truck assignments. First, Plaintiff's truck assignments were not "adverse employment actions" for purposes of Title VII or § 1981 discrimination claims. To the extent that Plaintiff's claims are based on the fact that he was not assigned newer, nicer trucks during his time at SRM, such an action is not adverse enough to support a discrimination claim. In *Rossi*, this Court granted a defendant employer's motion for summary judgment on a Title VII gender discrimination claim where the plaintiff was denied a request for new equipment necessary for her job, because the new equipment was not a primary factor inducing that plaintiff to work for the defendant and was therefore not "a term, condition, or privilege of her employment." *Rossi*, 2018 WL 1213139, at *14. Likewise, here, there is no evidence that Plaintiff's hope of receiving a newer, nicer truck assignment than the 2006 front-loading Oshkosh model he received in August 2018 was a primary factor in his decision to work at SRM. On the other hand, being forced to drive an unsafe truck, as Plaintiff alleges in his Amended Complaint, might qualify as an adverse employment action

sufficient to support a discrimination claim. However, the record does not show Plaintiff was ever forced to drive an unsafe truck. When Plaintiff noticed that Truck 101 had an issue with its air bellows, Frazier agreed that Plaintiff should record that issue so it could be addressed by a mechanic, and he told Plaintiff not to drive Truck 101 if it felt unsafe. (Def. SMF ¶¶ 31-33, 36). Later, when Plaintiff reported that another truck had a hydraulic leak, a company mechanic fixed that issue. (*Id.* ¶ 34). Thus, the evidence does not support Plaintiff's allegation that he was made to drive unsafe trucks.[15]

Even if Plaintiff could demonstrate that his truck assignments were adverse employment actions, he cannot establish that similarly situated employees outside of his race or national origin were given more favorable assignments. Trucks were assigned to drivers at SRM based on seniority, and SRM's trucks were numbered based on age (i.e., the lower the number, the older the truck). (*Id.* ¶¶ 38, 43). Plaintiff concedes that when he was assigned Trucks 101 and 105 in August 2018, several white employees who had been hired after him were given older trucks than him, in accordance with the seniority system. (*Id.* ¶¶41-45). Kinder, a white driver, was only assigned a newer truck than Plaintiff in August 2018 because he had three years of seniority over Plaintiff. (*Id.* ¶ 39). Another driver, Camacho, was assigned a newer

[15] Plaintiff does declare he was forced to drive non-DOT compliant trucks when his regular truck was being repaired, but he does not explain why they were not compliant with DOT regulations or how they were unsafe.

truck than Plaintiff, but he was Hispanic, like Plaintiff, and had two years of seniority over Plaintiff. (*Id.* ¶¶ 46-47). That evidence shows that Plaintiff' was not assigned an older, less-desirable truck than any similarly situated non-Hispanic or non-Chilean employees. Further, there is no evidence whatsoever that any truck Plaintiff drove was less safe than that of a similarly situated driver outside of his protected class. Thus, no reasonable jury could conclude that Plaintiff's truck assignments were the result of discrimination based on his race or national origin.

b. Discrimination Based On Termination

Plaintiff also claims that SRM discriminated against him under Title VII and § 1981 by terminating him because of his race and national origin.[16] (Doc. 54 ¶¶ 26, 41). Defendant moves for summary judgment on these claims (Doc. 67-1 at 23-25), and Plaintiff does not oppose those arguments or explain how he could prove these claims at trial (*See* Doc. 73; Doc. 75 at 3 n.1). Even though Plaintiff has apparently abandoned these claims, the undersigned analyzes their merits out of an abundance of caution. Plaintiff cannot prove discrimination based on his termination, because there is no evidence that he was replaced by a person outside of his protected class or treated less favorably than a similarly situated coworker outside of his protected

[16] It is not actually clear whether Plaintiff pleads discrimination under §1981 based on his termination, as he only pleads that he was subjected to "different terms and conditions of employment" in his § 1981 discrimination claim (*See* Doc. 54 ¶ 26). It is of no matter, as any such claim ultimately fails for the reasons described in this part.

class, and he could not otherwise convince a reasonable jury that he was terminated because of his race or national origin.

To establish a *prima facie* case of discrimination based on a termination under the *McDonnel Douglas* framework, a plaintiff must show that: "(1) he was a member of a protected class; (2) he was qualified for the job; (3) he suffered an adverse employment action; and (4) he was replaced by someone outside the protected class or was treated less favorably than a similarly situated individual outside of his protected class*." Ivey v. Paulson*, 222 Fed. App'x 815, 817 (11th Cir. 2007). If the plaintiff can make out a *prima facie* case, the same burden-shifting framework described above applies. *Lewis*, 918 F.3d at 1221. Alternatively, Plaintiff could survive summary judgment by demonstrating a convincing mosaic of circumstantial evidence supporting his discrimination claim. *Lewis v. City of Union City*, 877 F.3d 1000, 1018 (11th Cir. 2017).

Here, there is no evidence in the record that Plaintiff was replaced by a non-Hispanic or non-Chilean driver after he was terminated. Nor is there evidence that a similarly situated non-Hispanic or non-Chilean driver was accused of leaving a shift prematurely but was not terminated. Additionally, as discussed above, no reasonable jury could conclude that Defendant's proffered legitimate reason for terminating Plaintiff, that he left his shift early and left a load of concrete undelivered, is pretextual. *See* Discussion, Part III, *supra*. There is no other evidence that might

suggest Plaintiff's termination was discriminatory. Therefore, Defendant is entitled to summary judgment on Plaintiff's discrimination claims to the extent they are based on his termination.

Because Plaintiff cannot establish a *prima facie* case of discrimination under § 1981 or Title VII based on his truck assignments or his termination, it is **RECOMMENDED** that Defendant's motion for summary judgment regarding Plaintiff's § 1981 and Title VII discrimination claims (Counts I and III) be **GRANTED**.

SUMMARY

In sum, no reasonable jury could conclude that Defendant discriminated or retaliated against Plaintiff under Title VII or § 1981, nor could a reasonable jury conclude Plaintiff was subjected to a hostile work environment under Title VII. For those reasons, it is **RECOMMENDED** that Defendant's Motion for Summary Judgment (Doc. 67) be **GRANTED**.

The Clerk is directed to terminate the reference of this case to the undersigned Magistrate Judge.

IT IS SO REPORTED AND RECOMMENDED this 27th day of July, 2021.

/s/ J. Clay Fuller
J. Clay Fuller
United States Magistrate Judge