IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

ENRIQUE VELEZ,

Plaintiff,

v.

ORIENTAL WEAVERS U.S.A., INC.,

Defendant.

CIVIL ACTION FILE NO.

4:20-CV-00208-HLM-WEJ

FINAL REPORT AND RECOMMENDATION

Plaintiff, Enrique Velez, filed this action against his former employer, Oriental Weavers U.S.A., Inc. ("OW"), alleging retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"), and 42 U.S.C. § 1981. (See Compl. [1] Counts I-II.) After a period of discovery, defendant filed a Motion for Summary Judgment [43]. For the reasons explained below, the undersigned **RECOMMENDS** that the Motion be **DENIED**.

I. STATEMENT OF FACTS

To assist with framing the undisputed material facts, Local Civil Rule 56.1 requires certain filings by the parties in conjunction with a summary judgment motion. Defendant as movant filed a Statement of Undisputed Material Facts [43-

4] ("DSUMF"), to which plaintiff responded. (See Pl.'s Resp. to DSUMF [54] ("PR-DSUMF").)[1] As allowed by the Local Civil Rules, plaintiff filed a Revised Statement of Additional Material Facts [56] ("PSAMF"). Although OW was required to file a response to each of respondent's additional material facts, see N.D. Ga. Civ. R. 56.1(B)(3), it failed to do so.[2]

The Local Civil Rules do not directly address what happens when a movant (like OW) fails to respond to the PSAMF. The Rules do, however, address what happens when a respondent ignores the movant's statement of undisputed material facts. In that situation, the Rules provide as follows:

> (2) This Court will deem each of the movant's facts as admitted unless the respondent: (i) directly refutes the movant's fact with concise responses supported by specific citations to evidence (including page or paragraph number); (ii) states a valid objection to the admissibility of the movant's fact; or (iii) points out that the movant's citation does not support the movant's fact or that the

---

[1] OW's Brief contains numerous factual assertions that are not found in DSUMF. The Local Civil Rules provide that the "Court will not consider any fact: . . . (d) set out only in the brief and not in the movant's statement of undisputed facts." N.D. Ga. Civ. R. 56.1(B)(1)(d). Thus, the Court will not include in this Statement of Facts assertions made in OW's Brief that were not included in DSUMF. Plaintiff supplied the Court with a copy of defendant's Brief which highlights those factual assertions that were not included in DSUMF. (See Pl.'s Ex. [53-17].)

[2] OW also failed to file a Reply Brief. This failure is an indication that, after seeing plaintiff's Response Brief [53], OW realized that plaintiff had created a triable issue on his retaliation claim.

> movant's fact is not material or otherwise has failed to comply with the provisions set out in LR 56.1(B)(1).
>
> (3) The Court will deem the movant's citations supportive of its facts unless the respondent specifically informs the Court to the contrary in the response.

N.D. Ga. Civ. R. 56.1(B)(2)(a)(2)-(3). The undersigned finds it appropriate to apply these standards to OW's failure to respond to the PSAMF.[3]

As for DSUMF, the Court uses defendant's proposals and plaintiff's responses in the following Statement of Facts under these conventions. When plaintiff admits a proposed fact (in whole or in part), the Court accepts that fact (or the part admitted) as undisputed for the purposes of this Report and Recommendation and cites only to the proposed fact. When plaintiff denies a proposed fact (in whole or in part), the Court reviews the record cited and determines whether that denial is supported, and if it is, whether any fact dispute is material. As noted above, the Court includes factually supported statements from PSAMF. When the parties' proposed facts are similar, the Court cites one and uses

---

[3] Although the facts proposed in PSAMF are deemed admitted, cf. Reese v. Herbert, 527 F.3d 1253, 1268 (11th Cir. 2008), this Court must still review the respondent's citations to the record to determine if there is, indeed, a genuine issue of material fact. Id. at 1269. The Court has done so and includes material facts asserted in PSAMF herein.

a "see also" signal to the other. Finally, the Court views all proposed facts in light of the standards for summary judgment set out infra Part II.

A. Plaintiff's Employment History at OW

OW hired plaintiff in March 2017 as a Finishing Supervisor. (PSAMF ¶ 1; see also DSUMF ¶¶ 1-2.) At hire, OW provided plaintiff with information regarding its policies. (DSUMF ¶ 3.) He acknowledged receipt of those policies and OW's employee handbook. (Id. ¶ 4.)[4]

OW demoted plaintiff to Inventory Control on October 16, 2017. (PSAMF ¶ 2; see also DSUMF ¶ 11.)[5] OW promoted Mr. Velez back to Finishing Supervisor on April 4, 2018. (PSAMF ¶ 3; see also DSUMF ¶ 15.) OW terminated plaintiff between June 6, 2018, and June 11, 2018, purportedly for poor job performance. (PSAMF ¶ 4; see also DSUMF ¶ 19.)

---

[4] Plaintiff's initial pay was $15.00 per hour, but he received a raise on June 3, 2017 to $15.60 per hour, which was the top pay rate for his position at the time. (DSUMF ¶ 5.)

[5] OW reduced plaintiff's pay from $15.60 per hour to $13.90 per hour upon this demotion. (DSUMF ¶ 12.) Plaintiff's former position of Finishing Supervisor remained unfilled until December 27, 2017, when Joshua Tedder assumed it. (Id. ¶ 13.) Mr. Tedder quit on April 4, 2018. (Id. ¶ 14.)

B. Other Relevant Individuals

Plaintiff's immediate supervisor was Finishing Manager Hany Arafat. (PSAMF ¶ 5; see also DSUMF ¶ 8.) As the Finishing Manager, Mr. Arafat was responsible for hiring and firing. (PSAMF ¶ 6.) Yassar Shaban was the Plant Manager and Kim Collette was the Human Resources Director during Mr. Velez's employment with OW. (Id. ¶ 7.)

C. OW's Faulty Machines and Production Capacity

OW told Mr. Velez that there was a daily rug production quota of 8,500 square meters; however, this quota was rarely met, both during and outside of Mr. Velez's time as Finishing Supervisor. (PSAMF ¶ 8; see also DSUMF ¶ 9.) For example, in the month before Mr. Velez's second stint as Finishing Supervisor – from March 4, 2018 through April 2, 2018 – OW averaged 6,647.32 square meters a day and surpassed 8,500 square meters just five times. (PSAMF ¶ 9.) Mr. Velez improved upon these numbers, averaging 7,419.17 square meters a day from the date when he was promoted back to Finishing Supervisor to his last day of work

(April 4, 2018 to June 6, 2018), and he surpassed 8,500 square meters six times. (Id. ¶ 10.)[6]

Joshua Tedder, who was the Finishing Supervisor before Mr. Velez was promoted back to that role, was not terminated for poor performance, despite repeatedly failing to meet the production quota. (PSAMF ¶ 11.) As Mr. Velez put it, "Every day was low production day," because the machines were older and broke down nearly every day, and OW did not order sufficient spare parts to fix them. (Id. ¶ 12.)

As the Finishing Manager, Mr. Arafat was responsible for ensuring that the purported production quota was met and ordering parts for the machines when needed. (PSAMF ¶ 13.) When a machine broke down, Mr. Velez would immediately contact the mechanic on staff to fix it; however, the mechanic would often be unable to do so because OW lacked the necessary spare parts. (Id. ¶ 14.) In some instances, the mechanic would have to tear down another machine to fix the broken one. (Id. ¶ 15.) Losing even fifteen minutes to a machine malfunction could significantly impact the day's production numbers. (Id. ¶ 16.)

---

[6] Defendant proposes, and plaintiff denies, that Mr. Arafat informed him daily by text and by meetings of his daily production. (Compare DSUMF ¶ 16, with PR-DSUMF ¶ 16.) Any dispute is immaterial.

D. Initial Complaints of Discrimination re: Arafat's Treatment of Hispanic Employees

From the start of Mr. Velez's employment, Hispanic employees complained to him that Mr. Arafat treated them worse than non-Hispanic employees in the way that he spoke to them and assigned them work. (PSAMF ¶ 17.)[7] Hispanic employees complained to Mr. Velez, and Mr. Velez witnessed himself, that Mr. Arafat frequently threatened to fire Hispanic employees if they asked to use their earned time off for doctors' appointments or vacation. (Id. ¶ 18.) When Hispanic employees finished their daily tasks, Mr. Arafat would have them replace non-Hispanic employees to complete the non-Hispanic employees' tasks, whereas non-Hispanic employees were never asked to replace Hispanic employees in this manner. (Id. ¶ 19.) Sometimes, Mr. Arafat allowed non-Hispanic employees to stop working altogether and replaced them with Hispanic employees, despite there being outstanding tasks to complete. (Id. ¶ 20.)

Hispanic employees were also asked to do more physically demanding labor than non-Hispanic employees, such as cutting rugs, rolling rugs by hand, putting labels on rugs, and bagging rugs, whereas non-Hispanic employees were typically

[7] Mr. Velez is a Hispanic American citizen. (DSUMF ¶ 1.)

assigned less demanding tasks, such as stacking bags on buggies or cutting the tails off the ends of the plastic bags. (PSAMF ¶ 21.) Mr. Arafat either assigned Hispanic employees these more demanding tasks to start, or he would have Hispanic employees replace non-Hispanic employees who were supposed to be completing these demanding tasks. (Id. ¶ 22.)

E. Initial Complaints of Discrimination: Discriminatory Pay Issues

Mr. Velez observed, and Hispanic employees complained to him that, OW took much longer to give Hispanic employees their raises after they had earned them than it did for non-Hispanic employees. (PSAMF ¶ 23.)[8] With regard to the issue with raises, Mr. Velez was responsible for signing off on employee raises in the Finishing Department, along with Mr. Arafat. (Id. ¶ 24.)

---

[8] OW pays its hourly employees based upon a preset wage scale which lists what every position is paid in each department. (DSUMF ¶ 6.) The wage scale had incremental pay increases for certain positions dependent upon whether an employee met their job standards after being employed for a certain period of time. (Id. ¶ 7.) The Court deems these two proposed facts admitted because plaintiff responds that he can neither admit nor deny them. (PR-DSUMF ¶¶ 6-7.) Under the Local Civil Rules, the response that a party has insufficient knowledge to admit or deny is not an acceptable response unless the party has complied with the provisions of Fed. R. Civ. P. 56(d). N.D. Ga. Civ. R. 56.1(B)(2)(a)(4). Plaintiff did not comply with Rule 56(d) here.

Mr. Velez noticed that a Hispanic employee, Dileni Fernandez, had to wait six months to get a raise after she was promoted, but a non-Hispanic employee, Lekisha Herston, received her raise the same week that she was promoted. (PSAMF ¶ 25.) Another Hispanic employee, Perla Porras, complained to Mr. Velez that it took her nearly two years to obtain the raise she was owed after 90 days of working for OW. (Id. ¶ 26.) Ms. Porras told Mr. Velez that there were other Hispanic employees who had not received their raises when they were due. (Id. ¶ 27.)

Mr. Velez observed, and Hispanic employees complained to him that, Hispanic employees in the Finishing Department were paid less than non-Hispanic employees with the same job title. (PSAMF ¶ 28.) Both Hispanic and non-Hispanic employees would show Mr. Velez their pay stubs when they believed there were issues with their recorded hours or pay, such as their hours being calculated incorrectly or their holiday pay being left out of their paychecks. (Id. ¶ 29.)

Hispanic employees in the Finishing Department complained to Mr. Velez that they were paid less than non-Hispanic employees in the Finishing Department with the same job title. (PSAMF ¶ 30.) Mr. Velez also believed from his own observations of employee pay stubs that Hispanic employees were making less than

non-Hispanic employees with the same title in the Finishing Department. (Id. ¶ 31.)[9]

F. Mr. Velez's First Complaints of Discrimination

Shortly before Mr. Velez was demoted to Inventory Control, he spoke to Ms. Collette about the complaints of discrimination he was receiving from Hispanic employees and his own observations of such discrimination. (PSAMF ¶ 32.) Mr. Velez told Ms. Collette about the way Mr. Arafat threatened employees who attempted to take their earned days off, Mr. Arafat's discriminatory assignment of work to Hispanic employees, and the discriminatory pay issues in the Finishing Department. (Id. ¶ 33.) Around the same time, Mr. Velez complained to Mr. Arafat that it was taking much longer for Hispanic employees to receive their earned raises than it took for non-Hispanic employees, and that Hispanic employees were making less than non-Hispanic employees with the same job title. (Id. ¶ 34.)

[9] The Court excludes DSUMF ¶ 10 as immaterial.

G. Mr. Velez Continued to Complain About Discrimination After He Was Reinstated As Finishing Supervisor

Shortly after Mr. Velez was reinstated as Finishing Supervisor, he repeated his same complaints to Ms. Collette about Mr. Arafat's discriminatory threats and conduct, and the discriminatory pay issues. (PSAMF ¶ 35.)

H. Mr. Velez Makes His Final Complaints About Discrimination

On Wednesday, June 6, 2018, Mr. Velez again complained to Mr. Arafat about the discriminatory pay issues, including the fact that Hispanic employees had to wait much longer for their raises than non-Hispanic employees, and that Hispanic employees were making less than non-Hispanic employees in the same position. (PSAMF ¶ 36.) Mr. Arafat told Mr. Velez that the pay issues were none of his business and to stay out of it. (Id. ¶ 37.)

Later that day, Mr. Velez met with Mr. Shaban, Mr. Arafat, and Ms. Collette and repeated what he had been told by Hispanic employees and observed with his own eyes: that Mr. Arafat threatened Hispanic employees and made them work harder than non-Hispanic employees, and that Hispanic employees experienced delays in their pay raises and lower pay rates than non-Hispanic employees in the same positions within the Finishing Department. (PSAMF ¶ 38.) In response, Ms.

Collette told Mr. Velez that Mr. Arafat would not have anything to do with the Finishing Department anymore. (Id. ¶ 39.)[10]

I. Mr. Velez Requested and Granted Time Off

Following his conversation with Mr. Arafat, Mr. Shaban, and Ms. Collette, Mr. Velez was not feeling well (headache and rising blood pressure), such that he was not physically able to continue working. (PSAMF ¶ 40.) After unsuccessfully attempting to reach Mr. Arafat, Mr. Velez instead told Mr. Arafat's and Mr. Shaban's assistants – Carla Flores and Rosa Gonzales, respectively – that he was leaving early because he did not feel well. (Id. ¶ 41.) Mr. Velez then called Ms. Collette to ask if he had any personal time, to which Ms. Collette responded that he had one week. (Id. ¶ 42.) Mr. Velez told Ms. Collette that he would be taking the next two days off – June 7, 2018 through June 8, 2018 – and she replied that this was fine. (Id. ¶ 43.)[11]

---

[10] Defendant asserts that Mr. Arafat was unaware of any complaints that plaintiff made about discrimination until after plaintiff left OW's employment. (DSUMF ¶ 21.) This is a disputed material fact. (See PR-DSUMF ¶ 21.)

[11] OW asserts that plaintiff left work early on June 6, 2018 and did not clock out or tell anyone that he was going to leave. (DSUMF ¶ 17.) Thus, OW contends that when Mr. Velez did not work as scheduled on Thursday or Friday, it was assumed that he had quit. (Id. ¶ 18.) These are disputed material facts. (PR-DSUMF ¶¶ 17-18.)

J. Mr. Velez Returns From His Time Off and is Terminated

When Mr. Velez returned to work on Monday, June 11, 2018, Mr. Arafat indicated that, if Mr. Velez asked HR rather than him for time off, then Mr. Velez should also speak to HR about whatever was happening now. (PSAMF ¶ 44.) Mr. Velez then met with Ms. Collette, who handed Mr. Velez his termination letter, and told him that he was being terminated for job performance. (Id. ¶ 45.) All of the termination documents issued by OW state that Mr. Velez was terminated for poor job performance, even though Mr. Arafat and Ms. Collette testified that Mr. Velez was terminated for failing to work on June 7, 2018, and June 8, 2018. (Id. ¶ 46.) Mr. Velez subsequently filed a charge of discrimination with the Equal Employment Opportunity Commission. (DSUMF ¶ 20.)

K. OW's Disciplinary Procedures

OW follows a progressive discipline policy whereby there is a verbal warning, a written warning, a final warning, and then termination. (PSAMF ¶ 47.) Although the policy typically involved a verbal, written, and final warning, an employee may be subject to immediate termination for issues involving "gross misconduct," such as bringing a gun to work. (Id. ¶ 48.)

L. Mr. Velez Received No Formal Disciplinary Warnings About Performance

OW issued formal warnings for employees who had attendance and/or performance issues. (PSAMF ¶ 49.) Mr. Velez never received any such formal disciplinary warnings for attendance or performance issues while he was employed by OW. (Id. ¶ 50.)

II. SUMMARY JUDGMENT STANDARD

A "court shall grant summary judgment 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." See Fed. R. Civ. P. 56(a). The party moving for summary judgment bears the initial burden of "informing the court of the basis for its motion and of identifying those materials that demonstrate the absence of a genuine issue of material fact." Rice-Lamar v. City of Fort Lauderdale, 232 F.3d 836, 840 (11th Cir. 2000) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Those materials may include "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)(A). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that

precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

The non-moving party is then required "to go beyond the pleadings" and present competent evidence "showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. Generally, "[t]he mere existence of a scintilla of evidence" supporting the non-movant's case is insufficient to defeat a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). If in response the non-moving party does not sufficiently support an essential element of his case as to which he bears the burden of proof, summary judgment is appropriate. Rice-Lamar, 232 F.3d at 840. "In determining whether genuine issues of material fact exist, [the Court] resolve[s] all ambiguities and draw[s] all justifiable inferences in favor of the non-moving party." Id. (citing Anderson, 477 U.S. at 255).

In deciding a summary judgment motion, the court's function is not to resolve issues of material fact but rather to determine whether there are any such issues to be tried. Anderson, 477 U.S. at 251. The applicable substantive law will identify those facts that are material. Id. at 248. Facts that are disputed, but which do not affect the outcome of the case, are not material and thus will not preclude the entry of summary judgment. Id. Genuine disputes are those in which "the

evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. For factual issues to be "genuine," they must have a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). When the record as a whole could not lead a rational trier of fact to find for the non-movant, there is no "genuine issue for trial." Id. at 587.

III. ANALYSIS

Plaintiff alleges retaliation under both Title VII and Section 1981.[12] Title VII makes it an unlawful employment practice 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). The first clause of the above-quoted anti-retaliation provision is known as the "opposition" clause, while the second clause is known as the "participation" clause. Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1350 (11th Cir. 1999). Because no EEOC charge or

[12] The same standards apply under both Title VII and Section 1981. See Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1277 (11th Cir. 2008).

investigation had yet occurred at the time Mr. Velez was discharged, his retaliation claim arises under the opposition clause.[13]

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), established a three-part framework to analyze retaliation claims supported by circumstantial evidence. Quigg v. Thomas Cty. Sch. Dist., 814 F.3d 1227, 1237 (11th Cir. 2016). If the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for its employment decision. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the employer meets this burden, the inference of discrimination drops out of the case, and the plaintiff has the opportunity to show by a preponderance of the evidence that the proffered reason was pretextual. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993). When "the proffered reason is one that might motivate a reasonable employer," a plaintiff "must meet that reason head on and rebut it"; the plaintiff "cannot succeed by simply quarreling with the wisdom of that reason." Chapman

---

[13] A plaintiff pursuing a claim of retaliation "need not prove the underlying discriminatory conduct that he opposed was actually unlawful in order to establish a prima facie case and overcome a motion for summary judgment." Little v. United Techs., Carrier Transicold Div., 103 F.3d 956, 960 (11th Cir. 1997) ("[A] plaintiff can establish a prima facie case of retaliation . . . if he shows that he had a good faith, reasonable belief that the employer was engaged in unlawful employment practices.").

v. AI Transport, 229 F.3d 1012, 1030 (11th Cir. 2000). To prove pretext and avoid summary judgment, the plaintiff must show the employer's proffered reason is false, and that retaliatory intent motivated the adverse action. Brooks v. Cty. Comm'n of Jefferson Cty., Ala., 446 F.3d 1160, 1163 (11th Cir. 2006).

A. Plaintiff's Prima Facie Case

Under the McDonnell-Douglas framework, Mr. Velez can establish a prima facie case of retaliation by showing that (1) he engaged in statutorily protected activity; (2) he suffered an adverse action; and (3) the adverse action was causally related to the protected activity. Gogel v. Kia Motors Mfg. of Ga., Inc., 967 F.3d 1121, 1134-35 (11th Cir. 2020).

Given the facts stated above, plaintiff engaged in statutorily protected activity when he complained on several occasions to Human Resources and to management about discrimination against Hispanic employees by Mr. Arafat.[14]

---

[14] Defendant's Brief focuses only on plaintiff's claims of pay discrimination, and asserts that his belief that OW was discriminating on the basis of pay was not objectively reasonable because OW had a set pay scale. (Def.'s Br. [43-1] 7.) However, that same Brief concedes that plaintiff was unaware of the pay scale. (Id.) If Mr. Velez did not know about the wage scale, then it could not affect whether his belief was reasonable. Clover, 176 F.3d at 1352 ("For opposition clause purposes, the relevant conduct does not include conduct that actually occurred . . . but was unknown to the person claiming protection under the clause. Instead, what counts is only the conduct that person opposed, which cannot be more

See Olmsted v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1988) (reporting race discrimination is protected activity). Thus, plaintiff established element one of his prima facie case.

As for the second factor, it is undisputed that plaintiff suffered an adverse employment action—he was discharged. See Olmsted, 141 F.3d at 1460 (termination is an adverse action).

Finally, as for the third factor, in order to raise a triable issue over the existence of a causal relationship between the protected activity and the adverse action, a plaintiff must, at a minimum, show the decisionmaker was aware of his protected conduct,[15] and the protected activity and the adverse action were not wholly unrelated. McCann v. Tillman, 526 F.3d 1370, 1376 (11th Cir. 2008). In

---

than what [he] was aware of."). More importantly, defendant's argument fails to account for Mr. Velez's objectively reasonable belief that OW was engaged in discrimination other than pay discrimination. For example, Mr. Velez also complained that Mr. Arafat assigned more and harder work to Hispanic employees and threatened to fire Hispanic employees who tried to use their earned time off.

[15] OW asserts that Mr. Arafat was unaware of plaintiff's allegations of discrimination until after he left work there. (DSUMF ¶ 21.) As shown in the above facts, plaintiff's evidence, which must be credited at this stage, is that Mr. Arafat did know of plaintiff's allegations. (PR-DSUMF ¶ 21.) See Evans v. Stephens, 407 F.3d 1272, 1278 (11th Cir. 2005) (en banc) ("[W]hen conflicts arise between the facts evidenced by the parties, we credit the nonmoving party's *version*."). Indeed, plaintiff has shown that Mr. Arafat, Ms. Collette, and Mr. Shaban all knew of his allegations of discrimination against Mr. Arafat.

order to show the two events were not wholly unrelated, courts often examine whether there is a "close temporal proximity" between the time the employer learned about the protected activity and the adverse action. Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007) (per curiam); see also Martin v. Fin. Asset Mgmt. Sys., 959 F.3d 1048, 1054 (11th Cir. 2020) ("Generally, it is true that a plaintiff can demonstrate causation 'by showing close temporal proximity between the statutorily protected activity and the adverse employment action.'") (quoting Thomas, 506 F.3d at 1364). "[M]ere temporal proximity, without more, must be very close to suggest causation. But we have explained that an employee's termination within days—or at the most within two weeks—of his protected activity can be circumstantial evidence of a causal connection between the two." Jefferson v. Sewon Am., Inc., 891 F.3d 911, 926 (11th Cir. 2018) (internal citations and quotations omitted).

Here, Mr. Velez's final complaint of discrimination came in a June 6, 2018 meeting with Mr. Shaban, Ms. Collette, and Mr. Arafat. Defendant's termination paperwork represents different dates as the termination date – either June 6 or June 11. Thus, at best, there were five days between plaintiff's final complaint and his termination. At worse, he was terminated on the very day of his final complaint. See Jefferson, 891 F.3d at 926 ("[A]n employee's termination within days . . . of

his protected activity can be circumstantial evidence of a causal connection between the two."). Plaintiff has established a prima facie retaliation claim. See Bryant v. Jones, 575 F.3d 1281, 1308 (11th Cir. 2009) (establishing three elements of prima facie case creates a presumption that the adverse action was the product of an intent to retaliate).

B. Legitimate, Non-Discriminatory Reason

Given plaintiff's establishment of a prima facie case, the burden shifts to defendant to articulate a legitimate, non-discriminatory reason for the adverse action taken against Mr. Velez (i.e., his discharge). Defendant has done so, but it has asserted contradictory reasons. Plaintiff was told that he was fired for job abandonment, but the termination paperwork lists poor job performance as the reason for the discharge.

C. Plaintiff's Pretext Burden

Given defendant's articulation of legitimate, non-retaliatory reasons for the adverse action, plaintiff must raise a triable issue over whether those reasons were pretext for unlawful retaliation in order to survive summary judgment. See Greer v. Birmingham Beverage Co., 291 F. App'x 943, 945 (11th Cir. 2008) (per curiam). To demonstrate pretext, plaintiff must do more than quarrel with defendant's business decisions or substitute his business judgment for that of defendant's.

Chapman, 229 F.3d at 1030. "If the proffered reason is one that might motivate a reasonable employer, a plaintiff cannot recast the reason but must meet it head on and rebut it." Wilson, 376 F.3d at 1088. Plaintiff may demonstrate that defendant's reason was pretextual by revealing "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [its] proffered legitimate reason[] for its action that a reasonable factfinder could find [it] unworthy of credence." Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997) (internal quotation marks and citation omitted).

With regard to defendant's assertion that plaintiff was fired for job abandonment, he has raised a triable issue on pretext. Crediting plaintiff's story, as the Court must do on summary judgment, Mr. Velez did not simply fail to show up for work for two days. Rather, he called Ms. Collette on June 6 to ask if he had any personal time (that is, earned vacation time). She responded that he had one week of personal time, and he told her that he would be taking the next two days off–June 7-8, 2018. Ms. Collette replied that this was fine. Given these facts, plaintiff did not abandon his job. Instead, he asked for–and received–permission to take vacation time. To the extent defendant's witnesses deny this fact, this simply creates a genuine dispute of material fact. Resolving that dispute requires

a credibility determination, which is the province of the jury, not a judge. See Anderson, 477 U.S. at 255.

Defendant also asserts that it terminated plaintiff for poor job performance, i.e., failure to meet production quotas. Plaintiff has also raised a triable issue over whether this reason is pretextual. First, Mr. Velez was not the only one who struggled to meet the production quota. In fact, the so-called quota was rarely met, both during and outside of Mr. Velez's time as Finishing Supervisor. For example, in the month prior to Mr. Velez's second stint as Finishing Supervisor (March 4-April 2, 2018)–when Mr. Tedder held the role–OW averaged 6,647.32 square meters of rug a day and surpassed 8,500 square meters just five times. Mr. Velez actually improved upon these numbers. OW averaged 7,419.17 square meters a day from the date when he was promoted to Finishing Supervisor to his last day of work (April 4-June 6, 2018), and he surpassed 8,500 square meters six times. Notably, Mr. Tedder was not terminated for poor performance, despite repeatedly failing to meet the production quota. A reasonable jury could conclude that failing to meet the production quota was not considered a terminable offense.[16]

---

[16] Moreover, it appears that failure to meet production quotas was caused not by an incompetent Finishing Supervisor but by the old machinery defendant used

The two reasons OW has offered for plaintiff's discharge can also create a triable issue on pretext if those reasons are fundamentally inconsistent. See Zaben v. Air Prods. & Chems., Inc., 129 F.3d 1453, 1458-59 (11th Cir. 1997) (per curiam); see also Cleveland v. Home Shopping Network, Inc., 369 F.3d 1189, 1194 (11th Cir. 2004) (inconsistencies in the reasons given for an employment action can undermine credibility of a witness to demonstrate pretext for discrimination); Henderson v. City of Grantville, Ga., 37 F. Supp. 3d 1278, 1285 (N.D. Ga. 2014) ("By offering shifting reasons for its adverse action, the City has undermined its own credibility and created a dispute as to pretext."). Because the two reasons offered by defendant for firing plaintiff—job abandonment and poor performance—are fundamentally inconsistent, plaintiff has raised a triable issue on pretext.

Finally, a lack of warnings or discipline issued to plaintiff contributes to the undersigned's report that he has established a triable issue on pretext. See Stanfield v. Answering Serv., Inc., 867 F.2d 1290, 1294 (11th Cir. 1989); see also King v. Sec'y, U.S. Dep't of the Army, 652 F. App'x 845, 847 (11th Cir. 2016) (per curiam)

---

that constantly broke down. Mr. Arafat was in charge of ordering parts to keep them running, but there were never enough spare parts.

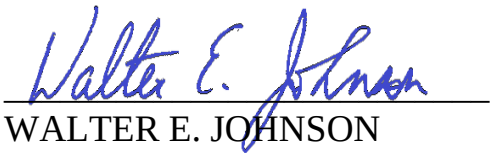
("An employer's deviation from its established policies may be evidence of pretext.") (per curiam). This is only logical; if poor performance was really the problem, a reasonable jury could conclude that the employer would warn the employee and try to fix the problem before resorting to the extreme measure of termination. Here, OW follows a progressive disciplinary policy–verbal warning, written warning, final warning, termination. It typically only skips these steps for "gross misconduct," such as bringing a gun to work. Plaintiff never received any discipline for poor job performance. In sum, there is sufficient evidence from which a reasonable jury could conclude that defendant's justifications are pretext for retaliation.

IV. CONCLUSION

For the above reasons, the undersigned **REPORTS** that there is a genuine dispute of material fact that would allow a jury to conclude that defendant discharged plaintiff in retaliation for his complaints of discrimination. Therefore, the undersigned **RECOMMENDS** that OW's Motion for Summary Judgment [43] be **DENIED**.

The Clerk is **DIRECTED** to terminate the reference to the undersigned Magistrate Judge.

SO RECOMMENDED, this 15th day of July, 2021.



WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE