

NA 04-0191-C H/H Malone v IN/KY Electric
Judge David F. Hamilton

Signed on 8/17/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

WILL C. MALONE,)	
)	
Plaintiff,)	
vs.)	NO. 4:04-cv-00191-DFH-WGH
)	
INDIANA-KENTUCKY ELECTRIC)	
CORPORATION,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

WILL C. MALONE,)
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 Plaintiff,)
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 v.) CASE NO. 4:04-cv-191-DFH-WGH
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 INDIANA-KENTUCKY ELECTRIC CORP.,)
)
 Defendant.)

ENTRY ON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

Plaintiff Will C. Malone has brought this action against his employer, Indiana-Kentucky Electric Corporation (“IKE”), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981. Malone claims that the defendant unlawfully discriminated against him because of his race, subjected him to a racially hostile work environment, and retaliated against him for reporting what he believed to be race discrimination. IKE denies Malone’s allegations and has filed a motion for summary judgment on each claim. For the reasons explained below, IKE’s motion for summary judgment is granted in part and denied in part. A few claims are barred by time limits and the Title VII requirement that charges be presented first to the EEOC. On most of his other claims, Malone has come forward with enough evidence to allow a reasonable jury

to infer racial and retaliatory motives on the part of the relevant IKE decision-makers.

Summary Judgment Standard

Summary judgment must be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The motion should be granted so long as no rational fact finder could return a verdict in favor of the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Thus, a court’s ruling on a motion for summary judgment is akin to that of a directed verdict, as the question essentially for the court in both is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at 251-52. When ruling on the motion, the court must construe the evidence in the light most favorable to the non-moving party and draw all reasonable inferences therefrom in that party’s favor. *Id.* at 255. If the non-moving party bears the burden of proof on an issue at trial, that party “must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); see also *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). The moving party need not positively disprove the opponent’s case; rather, it may prevail by establishing the lack of evidentiary support for that case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In light of the summary judgment standard, the following facts are not necessarily true, but they reflect the current record of evidence in the light

reasonably most favorable to plaintiff Malone, giving him the benefit of conflicts in the evidence and favorable inferences from the evidence.

Facts for Summary Judgment

Defendant Indiana-Kentucky Electric Corporation (“IKE”) is an electric utility company, owns and operates a power plant located in Madison, Indiana. In 1975, Ray Wilson, IKE’s current Plant Manager, hired plaintiff Will Malone as a laborer. Malone is African American. He currently holds the position of Maintenance Mechanic A and works as a master welder. Several of Malone’s co-workers describe him in testimony as being a conscientious, punctual, compliant, and hard worker. IKE employs three other African American employees in the Maintenance Mechanic A classification, all of whom work in other maintenance specialty areas.

Malone works in the welding group in a crew with eight other welders. Malone claims that he was the only person of African American descent assigned to the Welding Department. He reports to supervisor Robert “Buddy” Rohrer. Rohrer reports to Superintendent Coordinator B.G. Wigham and Maintenance Superintendent Greg Muncie.

IKE’s established policy specifically prohibits discrimination and harassment on the basis of race and provides a procedure for reporting harassment. IKE also maintains an internal grievance procedure. Malone

received IKE's employee handbook, which explains these policies, and attended harassment seminars at IKE.

IKE's employee handbook also includes a progressive discipline policy. Pl. Dep. Ex. 2. The policy provides that IKE may suspend or discharge an employee depending on the severity of the offense and/or the employee's record. *Id.* IKE's disciplinary policy is therefore "discretionary." Muncie Dep. 25.

Past Incidents: In February 1997, Malone and co-worker Brenda Meier had a disagreement at work, which Meier reported to supervisor Joe Reed. When Reed went to speak to Malone, he witnessed Malone leaving the sump area without wearing his hard hat or safety glasses in violation of IKE safety rules. Reed admonished Malone for the safety violation and instructed Malone to remain outside the Assistant Shift Operating Engineer's office. He later observed Malone walking around the welding shop. Malone received disciplinary notices for failure to follow Reed's order and failure to comply with safety rules. Pl. Dep. 46-47, 55-56; Pl. Dep. Exs. 15, 16. Malone admitted committing these acts, but he claims that he was following the same procedures and practices as did all other welders when he was issued the second disciplinary action by Reed. Malone received a third safety-related disciplinary notice on February 13, 1997. Pl. Dep. 63, Ex. 17.

Malone filed a grievance as to the disciplinary notices. He also complained that Reed "harassed" him in response to Meier's complaints. After no action was

taken in response to the grievance at the third step of the process, Malone did not appeal to the next step. Malone moved to day shift in the welding shop, where he reported to a different supervisor.

On or about March 17, 1997, Malone filed a charge of race discrimination with the Equal Employment Opportunity Commission (“EEOC”) regarding the February 1997 disciplinary notices and Reed’s alleged failure to provide him with assistance. Pl. Dep. 74-75, Ex. 18. The EEOC withdrew Malone’s charge at his request after he left the group. Pl. Dep. 79-80, Ex. 19.

After the 1997 incidents, Malone alleges, he began to have problems with other IKE employees as well. Specifically, he argues that he had problems with Robert Rohrer. Before Rohrer became a supervisor in 1998, Malone and Rohrer worked together as welders for approximately eight years. Malone alleges that during this time period, Rohrer took some money that Malone had placed in an envelope inside his hard hat on his tool box, though Malone has no evidence Rohrer stole the money and Rohrer denies the allegations. Malone also asserts that on one occasion, Rohrer took his keys and some cigarettes before later returning them, stating that “he was playing.”

Harassment and Horseplay: Turning to events that are closer in time to this lawsuit, in 2002 Rohrer assumed supervisory responsibility over the Welding Department, including Malone. Malone alleges that Rohrer mistreated him in the

following ways: (1) for a period of time, until Malone said something to him, Rohrer would not assign him to a job; (2) on one occasion in 2004, someone passed gas during a safety meeting and Rohrer talked to Malone about it; (3) Rohrer spoke to Malone about going to break too early or taking too long, though Malone believed he was always timely in taking breaks; (4) Rohrer called Malone to work overtime with another employee, but he instructed the other employee to perform the work and to let Malone “sit outside and pass rods to them.” Pl. Dep. 114-17. Malone was paid for the overtime work.

Malone also asserts that, when he made a weld that leaked, Rohrer took pictures of the weld and made him practice his welding, but did not take this corrective action with other employees. Rohrer testified that the same week he corrected Malone, he took pictures of an improper welding job by IKE welder Steve Turner, and that he provided both Malone and Turner with additional training. Turner testified that he was not asked to practice his welding.

In addition, Malone asserts that Rohrer gave the people he did not like, including Malone, the dirtiest jobs. Turner testified Rohrer assigned Malone “lesser” jobs. Turner Dep. at 10. Malone testified that he often worked with welders Frank Pennington and Bobby Garrett, both Caucasian.

Malone also testified that Rohrer once hit or poked him in the ribs. Malone did not report the incident to anyone because he did not want to complain and he

felt that Rohrer was just playing with him. He also stated that, on one occasion, he was sitting on a bench and Rohrer told a woman named Devon who was painting nearby to paint his neck and “to hit me up side the head.” Pl. Dep. 154-57. Again, he stated that Rohrer said he was just playing. *Id.* at 157. Malone testified that he never heard Rohrer make any racial comments. *Id.* at 118-19. Malone testified that Wigham, who was Rohrer’s supervisor, also poked him in the ribs and that when Malone asked him not to “play” with Malone in that way, Wigham cursed at him in response.¹

Malone and fellow employee Steve Buchanan also allegedly had problems. They worked together as welders in the welding group when Buchanan was assigned to the group, from January 11, 2002 until July 8, 2003. At the time, Rohrer supervised the welding group. Malone began having problems when Buchanan moved into the group. On one occasion, Malone was working when Buchanan started grinding nearby, causing sparks to fly up from his welding tool and to come dangerously close to Malone’s eyes. Garrett testified that he and Malone were both working at the table when Buchanan began his grinding and that after words were exchanged, he and Malone walked off. According to Malone, Buchanan reported the incident to Rohrer, who questioned Malone. Malone also testified to an incident in which Buchanan threatened him with a hammer, but

¹During Malone’s testimony on this point, he referred to the man who poked him as “B.G. Williams,” but the similarity in the names and Malone’s description of this man as Rohrer’s supervisor indicate he was actually referring to Wigham. See Pl. Dep. 159-59.

then reported to Rohrer that Malone had made such a threat. Malone told Rohrer his side of the story, and no action was taken against Malone.

Additionally, Malone claims that Buchanan took several actions against him, including putting dirt or water in Malone's break room chair, breaking into his toolbox and placing items inside, placing "Titelock" in his lock, and cutting the cord on his trouble light, which Malone testified could have caused him serious harm. Malone admits that Buchanan's alleged actions with his chair did not bother him, because the chair did not belong to him. Malone testified that, other than the grinder incident, he never witnessed Buchanan do any of these things, and no one told him that they saw Buchanan cut the cord, break into his toolbox, cut his lock, or put "Titelock" in his lock. Malone testified that when he complained to Buchanan of his pranks, Buchanan said he would "drop" Malone. Pl. Dep. 101. Malone testified that he reported these "pranks" to Rohrer when Rohrer approached him after Buchanan complained about Malone.

Buchanan denies playing pranks on Malone. With regard to the cord incident, welder Frank Pennington testified that he observed that Malone's cord had been deliberately cut and concealed. He testified that "if someone would have plugged it in they would have gotten a rude awakening." Pennington Dep. 6. Pennington testified that he "had things done" to him, such as someone cutting his tail hose. *Id.* at 7. Likewise, welder Chris Higgins, also Caucasian, discovered

a severed cord on a piece of equipment he was using but did not know how it was severed. He also testified that he had also seen cords accidentally severed.

Rohrer claims that Malone complained in December 2003 about a broken lock, but Rohrer examined the lock and claims that it was worn out, not broken. Rohrer claims Malone never accused Buchanan of breaking the lock, that he offered to replace any missing tools, and that he provided Malone with a new lock. Although Malone believes that Buchanan took these alleged actions against him because of his race and has come forward with evidence to support that belief, as set forth below, Malone also testified that he never personally heard Buchanan call him racial names. Pl. Dep. 101-02. He testified that Buchanan engaged in horseplay and “messed around” with other people. *Id.* at 109. Malone acknowledges that Buchanan is the type of person who, if he thought someone did not like his joking, would joke with them even more. “I noticed him playing with everybody. He played with all of them like that. It’s just I’m not a person that plays, and he was trying to do things to me.” *Id.*

Malone never made a complaint under the company’s harassment policy. Malone testified that he never went to the Human Resources Department to complain about anything.

Malone also claims that there is evidence that both Rohrer and Buchanan, who testified they were friends, demonstrated hostility toward him because of his

race. Specifically, fellow IKE employee John Davis claims he has heard Buchanan refer to Malone with the “N word,” curse words, and other racial slurs concerning Malone’s color. Davis Dep. 19. During the time Buchanan worked in the welding group, it was common for Buchanan to use the “N word” in reference to Malone. *Id.* at 28. Other racial slurs used by Buchanan included, “black beauty, blacky,” and the use of “a curse word in front or behind the N word.” *Id.* at 31.

Davis also testified that he heard Rohrer make racial comments about Malone frequently when Rohrer worked as an hourly employee and twice when Rohrer worked as a supervisor. *Id.* at 20, 32. Rohrer used the “N word” in reference to Malone and other racial slurs in reference to Malone’s color. *Id.* at 20, 21. Like Buchanan, Rohrer would also use a curse word in front of or behind the “N word” in reference to Malone. Davis Dep. at 32. Davis also recalls that Rohrer mentioned on several occasions about Malone complaining about things being done to him, and that Rohrer’s reaction one time was to refer to Malone with racial slurs. *Id.* at 22, 23. Malone also testified that when he reported the “pranks” that he believed were Buchanan’s doing, Rohrer told him to “keep [his] mouth shut” and threatened his job. Pl. Dep. 110-12. He testified that another IKE supervisor, Graham Lohrig, made the same threats. Davis testified that when he worked with both Malone and Rohrer at the time Rohrer was a welder, Rohrer did not want to work with or be around Malone. Malone testified he never heard a supervisor or co-worker make any racist slurs during the period at issue. Pl. Dep. 145.

Pennington testified that at some point in 2004 he heard another co-worker call Malone a “boy” in Rohrer’s presence, and that when Pennington looked at Rohrer, Rohrer stated “I didn’t hear anything.” Pennington Dep. at 12.

Malone argues that other IKE employees harassed him as well. Malone complains that two welders, Gerald Risk and Mike Scott, played games with Malone over his chair. At one point, Malone referred to the game as a “racial game,” but during his deposition, Malone could not recall any specific events relating to the incident. Pl. Dep. 121-23, 126-27. Malone also stated that Risk would walk up behind him and touch him in the side to make him jump. Malone told Risk to stop because he had a bad back. When asked if Scott and Risk “goofed around and engaged in horseplay” with others, he first answered that they had only done it to him, and then answered that they also directed such acts at others as well. *Id.* at 124.

Three-Day Suspension – The PA Fan: The next incident that took place occurred on October 27, 2003. On that date, temporary maintenance supervisor Loren Konkle asked Rohrer if he could assign a welder to assist on a project involving the number 12 PA fan. The repair of the PA fan was important because it affected IKE’s ability to produce power. Rohrer agreed to assign Malone to perform the welding work. Rohrer instructed Malone to go to the PA fan and to contact Konkle; if Konkle was not there, Rohrer instructed, Malone should take orders from whoever was on the scene regarding what welding needed to be completed.

According to Konkle, he ran into Malone in the morning and provided him with instructions as to how to complete the PA fan repair. Konkle also told Malone that Buchanan and another individual were going to be around, and that they would help Malone if he needed it. However, Konkle did not believe that Malone required any further instructions or assistance to perform the welding job. Konkle then left to perform other work.

Malone testified that he spoke to Konkle and stated that he would be there after lunch, and Konkle responded “that’d be fine,” and that he would “have somebody down there for you to do the job.” Pl. Dep. 84, 88-89. Malone took his tools to the area prior to lunch. When Malone arrived, he saw Buchanan. Buchanan and a helper were assigned to remove the shaft once the fan was secured. According to Malone, the bell rang to signal the beginning of the lunch period, and Buchanan “grabbed” Malone by the shirt, and told him he had some welding for Malone to perform. Pl. Dep. 85-86. Malone testified that Buchanan wanted him to perform the job at that time, that he told Buchanan that he would take care of it after lunch, and that he then proceeded to go to lunch. Buchanan testified that when Malone arrived on the job, Buchanan attempted to provide Malone with instructions for performing the job, but that Malone walked away without saying anything. On summary judgment, of course, the court must accept the evidence most favorable to plaintiff Malone.

According to Malone, he returned after lunch, and waited for 45 minutes. When no one arrived, Malone reported back to Konkle, who instructed him to return to the area and wait, stating that he would send someone down. When no one arrived again, Malone reported back to Rohrer that no one had shown up on the job. Rohrer assigned Malone to another job.

Konkle claims that after lunch, he visited the area and noticed that the PA fan job had not been completed. Konkle found Malone working on another job. When Konkle asked Malone why he failed to perform the welding, Malone responded by stating that nobody was down in the area. However, Konkle believed that, regardless of whether anyone else was in the area, Malone should have performed the job because he knew what to do. Konkle went back to the area to work on the PA fan job, which Buchanan then finished. Toward the end of the work day, around 3:15 p.m., Rohrer ran into Konkle and Buchanan; they reported to him that although Malone reported to the job, when Buchanan instructed Malone on the work that needed to be completed, Malone ignored him and walked away.

The incident came to the attention of Jerry Young, Plant Engineer of the Maintenance Department. Young questioned Konkle, Rohrer, and Buchanan's supervisor about the incident and asked them to investigate. Rohrer asked Malone if Buchanan told Malone what needed to be done. Rohrer testified that Malone acknowledged that he ignored Buchanan when he tried to explain the job.

Rohrer and the other supervisors reported their findings to Young. Young then reported the result of his investigation to Muncie. Muncie then met with members of management, including Young and the Human Resources supervisor William Hart, to review the incident.

Malone was issued a three-day suspension for ignoring the lead mechanic and failing to perform the welding assignment on the PA fan. Pl. Dep. Ex. 20. Rohrer claims that Muncie made the decision to issue the suspension, though he issued the citation notifying Malone of the violation and discipline. Rohrer Dep. 19; Pl. Dep. Ex. 20. Young testified he was not aware of who had made the suspension decision. This was the first discipline Malone had received since his February 1997 disciplinary notices. In the week immediately prior to the incident involving Malone, IKE disciplined three Caucasian Maintenance Mechanics for similar offenses. Like Malone, all three employees, Ronald Cull, James Benham and Ronald Scott, received 3-day suspensions for insubordination and failure to carry out a reasonable work order. Hart Aff. ¶ 12. Malone claims the incident was a “set up.” Pl. Dep. 206, 100. Malone did not file a grievance over the suspension.²

²Malone testified that he knew he was able to file a grievance at IKE, but that he had no confidence in the procedure and believed IKE would not pay attention to such an act. Pl. Dep. 18, 242. Several of Malone’s co-workers also testified that they did not have confidence in the procedure. See Garrett Dep. 14, Higgins Dep. 13; Turner Dep. 11-12; Pennington Dep. 24.

Plaintiff's EEOC Charge: In April 2004, Malone filed a charge of race discrimination with the EEOC. Pl. Dep. 137, Ex. 25. In his charge, Malone complained of the October 2003 incident resulting in his three-day suspension:

I currently work for Indiana and Kentucky Electric as a Certified Master Welder. I was asked to report for a job to weld with another co-worker. I first went to lunch and I told my co-worker that I would report after lunch. I waited for my co-worker after lunch, and my co-worker never showed up. I reported to my supervisor and told him that I waited for my co-worker (who was a no-show) and my supervisor, Mr. Rohrer sent me to another job.

Shortly thereafter, my co-worker reported me to my supervisor, Mr. Buddy Rohrer, and told Mr. Rohrer that the job remained incomplete because I didn't assist him. I was given a three day suspension by my supervisor. I am one of twelve (12) welders and the only Black welder amongst them. No other welders (white) have been given disciplinary action, for above similar incidents, except myself.

I believe that I have been discriminated against because of my Race, Black, and suspended in violation of Title VII of the Civil Rights Act of 1967, as amended.

Pl. Dep. Ex. 25.

Ten-Day Suspension and Retaliation: Malone claims that the filing of his EEOC charge led to retaliatory action on the part of IKE in the form of a 10-day suspension. In July 2004, Malone received the suspension with IKE's stated reason being failure to report to his assigned shift on June 28 and June 29, 2004. Pl. Dep. 102-03, Exs. 21, 22. According to Malone, he had scheduled a vacation for the week prior to June 28 and 29, 2004. Malone then asked for time off the week of June 28th for a family reunion. Rohrer told him he needed to work a Saturday and Sunday in order to trade, but that he could have the extra days off.

Rohrer testified that he informed Malone that he could not have the week of June 28th off because other employees had scheduled their vacations that week. Rohrer testified that he told Malone that he would allow Malone to trade his schedule; Malone could work Saturday and Sunday June 26th and 27th, and take off on Wednesday, June 30th, and Thursday, July 1st.³ Rohrer also told Malone that he could take eight hours of PAD (paid absence day) on Friday, July 2nd. Rohrer testified that he did not give Malone permission to take off June 28th and 29th. Rohrer Aff. ¶¶ 14-19, Ex. A. Garrett, who was present during the discussion between Rohrer and Malone, testified that he heard Rohrer say that Malone could have two days off, but he did not describe the specific days involved. Garrett Dep. 11.

Rohrer was on vacation the week of June 28th. Rohrer testified that after he returned from his vacation, he discovered that Malone did not report to work on June 28th and 29th and reported the incident to Greg Muncie. Muncie discussed the situation with the Human Resources Department, as well as Wilson and Assistant Plant Manager Cliff Carnes. Muncie testified that, since Malone previously had a three-day suspension in his file, IKE management made the decision to issue Malone a 10-day suspension. Muncie testified that he, Hart, and Wilson determined that the 10-day suspension would be an appropriate response

³Malone testified that he traded workdays for June 28th and 29th; however, IKE argues that the paperwork he completed does not support this assertion. Pl. Dep. 180. Instead, the paperwork shows that he traded the workdays (June 26th and 27th) to receive time off on June 30th and July 1st. See Rohrer Aff. ¶ 17.

to Malone's actions, though the notices informing Malone of the violation and the discipline were issued by Rohrer. Muncie Dep. 25-26; Pl. Dep. Ex. 21, 22.

Malone claims that his suspension was inconsistent with other IKE discipline. Malone complains that Caucasian coworker Judith Grant failed to report to work and only received a three-day suspension. Pl. Dep. at 170-72. Hart testified that, while Grant received a three-day suspension for failing to report to work, she had never been previously suspended. Hart Aff. ¶ 14, Ex. D.⁴ Malone testified that Ronald Cull (Caucasian) received only a three-day suspension for the same offense, and that he had a prior suspension in his file. IKE claims that Cull received a three-day suspension in 2003 for leaving the plant without reporting to operations as instructed and failing to finish an overtime assignment. Hart Aff. ¶¶ 16-17, Ex. A. Cull also received a three-day suspension in 2004 for leaving his assigned work area 15 minutes early before a meal period. See Malone Record M.

Malone has received no discipline since the July 2004 suspension and has not been fired. He did not file a grievance or a charge of discrimination regarding the 10-day suspension and testified he believed the procedure did not work.

⁴In addition, after Grant's three-day suspension, IKE indefinitely suspended and ultimately terminated her for a subsequent offense. Unlike Malone, Grant was never given a ten-day suspension. Hart Aff. ¶ 15.

Malone filed his complaint in court in this case on September 10, 2004, asserting that he had been “subjected to a continuous pattern of prejudice and discrimination relative to wages, terms, conditions and privileges of employment based on his race,” and that he was the victim of “retaliation after he verbally and formally complained about prejudice and discriminatory treatment in the workplace.” Compl. ¶ 9.

With regard to his retaliation claim, Malone testified that he complained of prejudice and discrimination when he complained of the games and pranks that were being played on him, such as the incidents involving his toolbox, his light cord, and the grinding incident. As a result of the complaints, Malone states that he was “harassed.” Pl. Dep. 134-35. Malone also complains that, after he filed this action, supervisor Graham Lohrig called him back to work on one occasion after he had finished a full day’s shift, and Young called him back on approximately two occasions. *Id.* at 198-200. Malone testified that on the occasion in which he was called back while Lohrig was working, Buchanan informed Malone that he would be supervising him during this additional shift. Malone testified about Buchanan: “He had been threatening my life several times, so I saw the boss, Graham Lohrig. He told me that he couldn’t get nobody [sic] else to work.” Pl. Dep. 200.⁵

⁵When later questioned about Buchanan’s threats to his life, Malone explained that the only such threats he could recall were Buchanan’s threats to “drop” him. Pl. Dep. 237.

Malone testified that it was common for the company to call maintenance employees back to work and that, prior to filing his EEOC charge or his lawsuit, the company called him back to work after a shift. He also testified that when he has been called back to work, he has observed other maintenance employees working a double shift. Rohrer testified that, as a maintenance employee, IKE called him back to work after he finished a shift and that he has also called back employees. Rohrer testified that the maintenance welders are aware that their job requires them to be available to work when needed. Additional facts are noted below as needed, keeping in mind the standard applicable to a motion for summary judgment.

Discussion

Malone asserts claims of discrimination, harassment, and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as well as 42 U.S.C. § 1981. IKE seeks summary judgment on all of Malone's claims. IKE argues that most of Malone's Title VII claims should be dismissed because they were not properly set out in his EEOC charge. IKE also argues that many of Malone's claims, both under Title VII and § 1981, were not timely filed. IKE argues that it is entitled to summary judgment on Malone's other claims because he does not have evidence sufficient to show violations of law by IKE.

I. *Plaintiff's Title VII Claims*

A. *Scope of the EEOC Charge*

Title VII makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his 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 Title VII plaintiff must “file a timely charge with the EEOC encompassing the acts complained of as a prerequisite to filing suit in federal court.” *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 863 (7th Cir. 1985); 42 U.S.C. § 2000e-5(b) & (f). A Title VII plaintiff may not bring claims in a lawsuit that exceed the scope of the plaintiff’s EEOC charge. *E.g.*, *Cheek v. Peabody Coal Co.*, 97 F.3d 200, 202 (7th Cir. 1996). Hence, a plaintiff attempting to bring a claim of discrimination cannot bring such a claim if it was not included in his EEOC charge. *Cheek v. Western and Southern Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994). Put another way, an aggrieved employee “may not complain to the EEOC of only certain instances of discrimination, and then seek judicial relief for different instances of discrimination.” *Rush v. McDonald’s Corp.*, 966 F.2d 1104, 1110 (7th Cir. 1992). The purpose of this requirement is two-fold: it gives the EEOC and the employer an opportunity to settle the dispute, and it puts the employer on notice of any charges against it. *Id.*

Allegations in a complaint are permissible so long as they are “like or reasonably related to the allegations of the [EEOC] charge and growing out of such allegations.” *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 167 (7th

Cir. 1976) (*en banc*), quoting *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 162 (5th Cir. 1971). To satisfy this requirement, the complaint and the EEOC charge “must, at minimum, describe the *same conduct* and implicate the *same individuals*.” *Cheek*, 31 F.3d at 501 (emphasis in original). Hence, the Seventh Circuit has concluded: “Normally, retaliation . . . discrimination, and . . . harassment charges are not like or reasonably related to one another to permit an EEOC charge of one type of wrong to support a subsequent civil suit for another.” *Sitar v. Indiana Dep’t of Transportation*, 344 F.3d 720, 726 (7th Cir. 2003) (internal quotations omitted). One exception to this rule is that retaliation claims based on events following the filing of an EEOC charge are generally considered sufficiently related to the charge to warrant consideration. See *McKenzie v. Illinois Dep’t of Transportation*, 92 F.3d 473, 482-83 (7th Cir. 1996). Only where the claims are “so related and intertwined in time, people, and substance that to ignore that relationship for a strict and technical application of the rule would subvert the liberal remedial purposes of the Act,” will instances not described in the EEOC charge be considered. *Kristufek v. Hussmann Foodservice Co., Toastmaster Div.*, 985 F.2d 364, 368 (7th Cir. 1993).

Malone’s EEOC charge was limited to his claim that the three-day suspension based on the PA fan repair incident in October 2003 was racially motivated. Malone has asserted numerous other claims in his complaint. In his response to summary judgment, Malone has narrowed the field to disparate treatment claims based on both his 2003 and 2004 suspensions, a harassment

claim, and retaliation claims based on events in 1997, the 2003 and 2004 suspensions, and instances of being called back into work after filing his complaint.

The court concludes that the Title VII claims of retaliation that occurred before the filing of the 2004 EEOC charge, disparate treatment in the 10-day 2004 suspension, and harassment are outside the scope of the EEOC charge. The 2003 instance of discriminatory suspension is the only act mentioned in Malone's EEOC charge. According to Malone, Rohrer both had no basis to suspend him at all, and had not suspended white individuals for similar incidents. Some of Malone's claims that are not listed in the EEOC charge involve other actions taken by Rohrer, but the allegations include many other IKE employees, involve actions far removed from the 2003 suspension (including actions taking place as far back as 1997), and allege different types of improper behavior including retaliation, harassment, and disparate treatment that have nothing to do with the 2003 suspension. Those claims not addressed in the EEOC charge are simply not "so related and intertwined in time, people, and substance" as to permit them to be brought in this case. See *Kristufek*, 985 F.2d at 368. Hence, Malone's Title VII hostile environment claim and his disparate treatment claim based on the 2004 suspension must be dismissed. To the extent that Malone claims retaliation based on events other than the 2003 suspension that occurred before he filed his 2004 EEOC charge, those claims must also be also dismissed as outside the scope of the charge.

B. *The Merits of Plaintiff's Remaining Title VII Claims*

Malone's remaining Title VII claims are: (1) a claim that his three-day suspension in October 2003 was discriminatory; (2) claims that his three-day and 10-day suspensions were retaliatory; and (3) a claim that after he filed this action he was retaliated against by being "called back" to work after shifts.

A plaintiff may prove discrimination by the direct or indirect method. *Vakharia v. Swedish Covenant Hosp.*, 190 F.3d 799, 806 (7th Cir. 1999). Malone does not offer direct evidence of race discrimination and seeks to prove his claims using the indirect burden-shifting method set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See Pl. Br. at 20-21. Under the *McDonnell Douglas* framework, an employee must first establish his prima facie case. *Pafford v. Herman*, 148 F.3d 658, 665 (7th Cir. 1998). If the employee carries his burden of demonstrating a prima facie case, there is a presumption of discrimination and the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the action. *Id.* If the employer provides such a reason, the burden then shifts back to the employee to prove that the employer's stated reason is a mere pretext, or a lie, from which a jury might infer that the real reason was unlawful discrimination. *Vakharia*, 190 F.3d at 806-07; *Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 983 (7th Cir. 1999).

As useful as the dichotomy between direct and indirect proof can be in analyzing employment discrimination cases, there is a danger of losing sight of the

forest for the trees. That risk is substantial in this case. The number of incidents and the amount of time involved mean that if the court focuses too tightly on one particular incident or issue, it can lose sight of other related evidence that sheds light on that incident or issue and on the motives of the key actors. Thus, where a plaintiff cannot satisfy each step of the indirect proof method, he may still come forward with sufficient evidence of a combination or “mosaic” of circumstantial evidence to support his claim. See, e.g., *Troupe v. May Department Stores Co.*, 20 F.3d 734, 736-37 (7th Cir. 1994) (describing this “mosaic” form of proof as including comments by supervisors, suspicious timing, inconsistent explanations of behavior, and the like). Where the plaintiff does not have evidence that amounts to a virtual admission of unlawful intent, rigid reliance on the indirect method of proof can lead the court to reject claims even where there is significant circumstantial evidence of discrimination. That’s the point of *Troupe* and the other cases applying the mosaic approach. See, e.g., *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir. 1997) (reversing summary judgment for employer; “remarks and other evidence that reflect a propensity by the decisionmaker to evaluate employees based on illegal criteria will suffice as direct evidence of discrimination even if the evidence stops short of a virtual admission of illegality”); *Ballard v. Potter*, 2002 WL 31045359, *3 (S.D. Ind. Aug. 28, 2002) (denying summary judgment where plaintiff came forward with evidence that supervisors took actions regarding plaintiff that were inconsistent with the applicable collective bargaining agreement and inconsistent with their treatment of other employees).

1. *Three-Day Suspension*

To show a prima facie case of discrimination, Malone must show that: (1) he belongs to a protected class; (2) he performed his job satisfactorily; (3) he suffered a materially adverse employment action; and (4) his employer treated similarly situated employees outside the protected class more favorably. *Lenoir v. Roll Coater, Inc.*, 13 F.3d 1130, 1132 (7th Cir. 1994). Malone cannot make such a showing.

Malone argues that he was the victim of discrimination because he was given the three-day suspension for failing to perform a weld during the PA fan incident. Whether or not Malone can meet all the elements of a prima facie case, he has come forward with sufficient circumstantial evidence to allow a reasonable jury to find that the suspension was racially motivated. Viewing the evidence in the light most favorable to Malone, he did nothing wrong at all, and he was set up by a racially hostile and biased supervisor and co-worker. To show racial motivation or bias, Malone is not required to show that his supervisor expressed racial hostility directly to him. He has come forward with evidence from co-workers showing that Rohrer and Buchanan both repeatedly expressed racial hostility toward him. If a jury credits Malone's evidence, it would not be a great leap to infer that the three-day suspension was based on false grounds and was racially motivated.

2. *Retaliation Claims*

Malone claims that IKE, in the person of Rohrer, retaliated against him for engaging in protected activities by (1) setting him up by assigning him the PA fan welding task and making it impossible for him to complete the task, leading to his three-day suspension in 2003, (2) granting him two vacation days and then punishing him for taking those days with a 10-day suspension in 2004, and (3) calling him back into work after finishing a shift on three occasions.

Malone advances his retaliation claims using the direct method of proof. A plaintiff establishes his case under the direct method where he shows (1) a protected activity, (2) an adverse act by the employer, and (3) a causal connection between the two. *Sitar v. Indiana Dep't of Transportation*, 344 F.3d 720, 728 (7th Cir. 2003); *Stone v. City of Indianapolis Public Utilities Div.*, 281 F.3d 640, 644 (7th Cir. 2002).

Malone testified that he complained of prejudice and discrimination when he complained of the games and pranks that were being played on him, such as the incidents involving his toolbox, his light cord, and the grinding incident. It is undisputed that Malone was subjected to the adverse employment action of a three-day suspension after he reportedly failed to complete the PA fan task as ordered. Malone has also come forward with evidence that he engaged in protected activity by complaining about what he believed had been earlier racially-motivated harassment. Davis testified that he heard Rohrer complain about, and

use racial epithets when talking about, Malone's complaints regarding the pranks and other behavior that bothered him at work. See Davis Dep. 21-23. Viewing the evidence in the light reasonably most favorable to Malone, he did nothing wrong regarding the PA fan job and was set up by Rohrer and Buchanan. Again, a jury could reasonably infer from this evidence that the set-up and resulting discipline were motivated by a desire on the part of Rohrer and Buchanan to retaliate against Malone for his earlier complaints.

The court reaches the same conclusion regarding the 10-day suspension based on the vacation days incident at the end of June 2004. Viewing the evidence in a light most favorable to Malone, he did nothing wrong and got Rohrer's prior approval to miss those days. Rohrer then turned on him and disciplined him for absences Rohrer had approved. This event occurred about two months after Malone filed his EEOC charge that targeted Rohrer's earlier actions. Malone has also offered evidence that Rohrer made comments relating to Malone's race after he complained of the pranks in the department.

The court does not choose between conflicting evidence when deciding a motion for summary judgment. Malone's evidence indicates, if believed, that Rohrer and Buchanan often expressed to other employees racial hostility toward Malone, that they set Malone up for discipline in the PA fan incident, and that Rohrer set Malone up for more discipline by giving him permission to take time off and then falsely denying having done so about two months after Malone filed the

EEOC charge directed at Rohrer. Again, a jury that believes Malone's evidence would not be taking an unreasonable leap in concluding it was more likely than not that Rohrer acted with a motive to punish Malone for his complaints about earlier discrimination and harassment. See *Sitar*, 344 F.3d at 728-29 (7th Cir. 2003) (reversing district court grant of summary judgment on plaintiff's retaliation claim; plaintiff presented evidence that supervisor was angry in response to her protected activity and decided almost immediately upon learning of her report of discrimination that she should be terminated).

Malone also claims he was repeatedly called back to work after shifts in retaliation for complaining of discrimination. The evidence demonstrates that Malone was also "called back" before he engaged in the protected activities in this case and that other employees were also routinely "called back" to work when necessary. It is far from clear that such calls for additional work would amount to a materially adverse action sufficient to support a retaliation claim. See generally *Burlington Northern & Santa Fe Ry. v. White*, — U.S. —, 126 S. Ct. 2405, 2415 (2006) (rejecting requirement that adverse action be employment action and requiring plaintiff to show that reasonable employee would have found challenged action sufficient to dissuade a reasonable worker from making or supporting a charge of discrimination); *Tomanovich v. City of Indianapolis*, — F.3d —, 2006 WL 2256922, *5 (7th Cir. Aug. 8, 2006). The court need not decide that question. Malone has shown no evidence that being called back to work was even unusual, let alone that it was caused by his protected activities, and he has shown no other

similarly situated individual who did not engage in a protected activity who was treated more favorably than Malone with respect to this claim. To the extent that Malone advances such a claim, it cannot survive summary judgment.

The Title VII claims that survive, then, are the claims of racial discrimination and retaliation regarding the three-day suspension and the claim of retaliation regarding the ten-day suspension.

II. *Section 1981 Claims*

Malone has also raised claims of disparate treatment, harassment, and retaliation under 42 U.S.C. § 1981. Section 1981 provides: “All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . includ[ing] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” 42 U.S.C. § 1981(a) & (b). In most relevant aspects, a Title VII claim and a § 1981 claim are analyzed in the same manner. *Bratton v. Roadway Package System, Inc.*, 77 F.3d 168, 176 (7th Cir. 1996). Based on the analysis of Malone’s Title VII claims, Malone’s § 1981 disparate treatment claim also survives summary judgment to the extent it is based on the three-day suspension based on the PA fan job. The same evidence also would allow a jury to find that the 10-day suspension based on the vacation days dispute in 2004 was racially motivated, in violation of § 1981.

Yet there are some important differences between § 1981 claims and Title VII claims. First, the Seventh Circuit has determined that § 1981 “encompasses only racial discrimination on account of the plaintiff’s race and does not include a prohibition against retaliation for opposing racial discrimination.” *Hart v. Transit Management of Racine, Inc.*, 426 F.3d 863, 866 (7th Cir. 2005). None of Malone’s claims alleging retaliation are actionable under § 1981, including the retaliation claim based on the 10-day suspension in 2004.

Second, § 1981 is governed by the four-year statute of limitations contained in 28 U.S.C. § 1658. *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004). Plaintiff filed his complaint in this case on September 10, 2004. Plaintiff’s claims arising out of incidents that took place prior to September 10, 2000 are barred by that time limit, including plaintiff’s claims about his supervisor Reed and the 1997 incidents. Also, as noted above, § 1981 claims need not be presented first in an EEOC charge, so Malone can pursue his claim of a racially hostile environment under § 1981, even though he cannot pursue it under Title VII.

Malone argues that he was the victim of harassment by IKE employees, including Rohrer, Buchanan, Risk, and Scott. To prove a case of harassment, Malone must show that: (1) he was the victim of unwelcome harassment; (2) the harassment was based on his race; (3) the harassment was sufficiently severe or pervasive so as to alter the conditions of his employment and create a hostile or abusive atmosphere; and (4) there is a basis for employer liability. *Luckie v.*

Ameritech Corp., 389 F.3d 708, 713 (7th Cir. 2004). When determining whether alleged harassment is objectively offensive, the court considers (1) the frequency of the harassing conduct, (2) the severity of the conduct, (3) whether the conduct at issue is “physically threatening or humiliating, or a mere offensive utterance,” and (4) the extent to which the conduct unreasonably interferes with the plaintiff’s ability to perform his job. *Dandy v. United Parcel Service, Inc.*, 388 F.3d 263, 271 (7th Cir. 2004).

Malone has offered evidence that he experienced harassment at IKE that was objectively and subjectively hostile. Most striking is the evidence that a cord for his light was deliberately cut and concealed, which could have caused injury if not noticed, and that Buchanan threatened him and engaged in “grinding” near Malone in a manner that could also have caused serious injury. Malone’s complaints were either ignored by Rohrer or were met with commands to keep his mouth shut and threats to his job. The court must consider Malone’s harassment claim in the context of the totality of the circumstances presented. *Cerros v. Steel Technologies, Inc.*, 288 F.3d 1040, 1046 (7th Cir. 2002) (court considering objective severity of harassment must consider the totality of the circumstances at issue). In light of the relatively high standard that applies, the question is at best close. Nevertheless, construing Malone’s complaint in light of all the evidence, the court finds he has offered evidence sufficient to create a genuine issue of fact as to whether he was subjected to a subjectively and objectively hostile work environment. Cf. *Henderson v. Irving Materials, Inc.*, 329 F. Supp. 2d

1002, 1011-12 (S.D. Ind. 2004) (denying summary judgment in racial hostile environment case involving more frequent, more severe, and more racially explicit abuse of plaintiff).⁶

To succeed on a harassment claim, Malone must show that these incidents had a racial character or purpose. *Luckie*, 389 F.3d at 713. Again, Malone has offered evidence from other employees that both Rohrer and Buchanan repeatedly made racist remarks regarding Malone, though not in Malone's presence. This evidence, when viewed in a light most reasonably favorable to Malone and in light of the evidence of Buchanan's actions and Rohrer's response to Malone's complaints, is sufficient to create an issue of fact as to whether the harassing treatment had a racial purpose.⁷

⁶Malone's harassment claim is limited to the actions allegedly taken by Buchanan while he worked in Malone's department under Rohrer in 2003. The evidence reflects that all other actions upon which Malone seeks to base this claim do not rise to the level of creating an objectively hostile environment and were also often directed at non-African American workers as well.

⁷"The use of racial epithets is deplorable," and the Seventh Circuit has recognized the truism that use of the word "nigger" can be highly disturbing. *Dandy v. United Parcel Service, Inc.*, 388 F.3d 263, 271 (7th Cir. 2004). Additionally, "a supervisor's use of the term impacts the work environment far more severely than use by co-equals." *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993), quoted in *Dandy*, 388 F.3d at 271. Evidence that other IKE employees overheard Rohrer and Buchanan making racist remarks about Malone could not, without additional evidence, give rise to a finding of racial harassment directed against Malone. The combination in this case, however, of evidence of repeated racial remarks regarding Malone and evidence of threats and perhaps even an attempt to injure Malone, all of which went unremedied when Malone reported them, warrant a different outcome here, at least at the summary judgment stage.

IKE also argues that even if Malone can show harassment, his failure to file a grievance or report the incidents to a member of the Human Resources Department precludes employer liability on the part of IKE. An employer cannot be held liable for such harassment, IKE argues, unless the employee reports the harassment through the process designated by the employer, citing *Durkin v. City of Chicago*, 341 F.3d 606, 612-13 (7th Cir. 2003). The record does not support IKE's characterization of its own policy, however. IKE's employee handbook includes a policy on harassment that states in relevant part:

If you believe that you have been subjected to harassment of any kind, promptly report the incident to either your immediate supervisor or to your Human Resources Department. Management will then thoroughly and impartially investigate the complaint.

Malone Dep. Ex. 2 at 5. Malone testified that he reported what he believed to be harassing activity to his immediate supervisor. That supervisor not only failed to address the conduct, but threatened Malone's job, as did that supervisor's supervisor, at least if Malone's evidence is credited. Accordingly, Malone's racially hostile environment claim must survive summary judgment.

Conclusion

For the reasons outlined above, defendant's motion for summary judgment is denied as to Malone's § 1981 claims of disparate treatment and his hostile environment claim, as well as his Title VII claims for retaliation based on his three-day and 10-day suspensions and his claim of disparate treatment based on

the three-day suspension. Defendant's motion for summary judgment is granted as to any claims based on being called back to work, Malone's § 1981 claims of retaliation, his Title VII hostile environment claim and disparate treatment claim based on the 10-day suspension, his Title VII claims of retaliation based on events before the PA fan incident, as well as the claims identified above as time-barred.

So ordered.

Date: August 17, 2006

DAVID F. HAMILTON, JUDGE
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