

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-1104-CIV-GOLD  
U.S. Magistrate Judge Brown

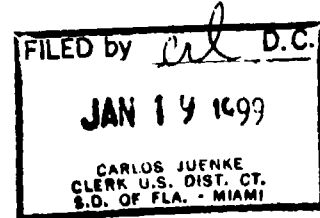
DOBSON COLLINS,

Plaintiff,

vs.

FLAGSHIP AIRLINES, INC.,  
a Delaware corporation,

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**ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

THIS CAUSE is before the Court upon the Defendant's Motion for Summary Judgment [D.E. #45]. Plaintiff, Dobson Collins ("Plaintiff"), brought this suit alleging racial discrimination and retaliation in violation of Title VII, codified as amended at 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981. Defendant, Flagship Airlines, Inc. ("Defendant"), has moved for summary judgment on all claims alleged by Plaintiff in his Complaint. Defendant's motion is predicated on grounds that: (1) Plaintiff has not established *prima facie* cases of race discrimination, hostile work environment, and retaliation under Title VII and § 1981; (2) even assuming Plaintiff can establish *prima facie* cases of discrimination, Defendant has successfully rebutted with legitimate, non-discriminatory reasons for its actions; and (3) Plaintiff failed to avail himself of Defendant's grievance procedure for investigating and eradicating incidents of discriminatory conduct.

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1331, as all claims herein arise under federal law. After careful consideration of the parties' arguments, the relevant case law, and

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the record as a whole, this Court concludes that Defendant's Motion for Summary Judgment should be denied.

### **I. Factual and Procedural Background**

Plaintiff's claims arise out of his employment with Defendant as a mechanic and avionics technician. The present action was initiated by filing a three-count Complaint on April 25, 1996. Count I alleges racial discrimination, including the creation of a hostile work environment, and retaliation in violation of Title VII. Count II alleges the same unlawful conduct in violation of 42 U.S.C. § 1981. In Count III, Plaintiff attempted to assert class-wide discrimination in violation of these statutes, and to litigate this case as a class action. Defendant's motion to dismiss Count III was granted.<sup>1</sup> Therefore, the inferences raised only by the facts set forth in Counts I and II, viewed in the light favorable to the Plaintiff, are considered relevant for purposes of summary judgment. Those pertinent facts reveal the following.

Plaintiff, a black male, was employed by Defendant, Flagship Airlines, Inc., from December 1989 until his termination in December 1994.<sup>2</sup> Plaintiff was initially hired as a mechanic to perform maintenance work on Defendant's aircraft.

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<sup>1</sup> Originally, Executive Airlines, Inc. was named as a defendant. However, because Plaintiff was never employed by this entity, it was voluntarily dismissed from the case.

<sup>2</sup> On June 1, 1998, Flagship Airlines, Inc. merged into American Eagle Airlines, Inc. a wholly-owned subsidiary of AMR Eagle Holding Corporation. On that date, Flagship Airlines, Inc. ceased to exist. As part of the merger, American Eagle Airlines, Inc. assumed all of the debts, liabilities, and obligations of Flagship Airlines. However, since Plaintiff worked for Flagship Airlines during all times relevant to the events referred to herein, and the parties have identified Flagship Airlines in their motion and memoranda, and to provide continuity, "Defendant," as used by the Court in addressing this matter, shall mean Flagship Airlines, Inc.

Although Plaintiff's job performance was satisfactory, he did not receive promotions he believed were commensurate with this performance and seniority. Interpreting Defendant's conduct towards his promotional opportunities as racially motivated, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission (the "EEOC"). The 1991 Charge alleged racial discrimination in Defendant's failure to promote Plaintiff.

In July 1992, the parties entered into a negotiated settlement of Plaintiff's charges of discrimination. As a result, Plaintiff was promoted to the position of Tech Level (I), effective as of June 1991, upgraded Plaintiff's rate of pay accordingly, and awarded Plaintiff back pay. Additionally, Defendant agreed not to discriminate against Plaintiff concerning consideration for future transfers and promotions, to refrain from retaliating against Plaintiff for his opposition to Defendant's discriminatory practices, and to re-emphasize Defendant's policy against discrimination. Consequently, Plaintiff agreed to withdraw his EEOC Charge.

Subsequently, in April 1993, Defendant reprimanded Plaintiff for insubordination and failure to comply with company policies. Plaintiff, unwilling to accept a work assignment in the Bahamas, was commanded to either report or be terminated for refusing to follow his supervisor's directive. Although Plaintiff finally acquiesced and accepted the assignment, his behavior and violations of company policy and federal laws governing international travel caused the departing passenger airplane to be delayed. Additionally, Plaintiff exhibited unprofessional and hostile behavior to his fellow workers, who were merely abiding by the prescribed rules and laws, and to the passengers on board the airplane.

Pursuant to Defendant's policies, Plaintiff was given three choices: (1) sign a Letter of Commitment in which he would acknowledge his performance problem and agree to correct it or face termination; (2) agree not to exercise his grievance rights, and resign with certain extended benefits; or (3) terminate his employment and reserve his option to grieve. Plaintiff chose to sign the Letter of Commitment. However, he did so under protest, stating that he was signing out of fear of termination and retaliation.<sup>3</sup>

Based on this incident, on May 13, 1993, the same date that he signed the Letter of Commitment, Plaintiff filed another Charge with the EEOC, alleging race discrimination and retaliation. This Charge was resolved and withdrawn in March 1994.

In April 1994, another incident objectionable to Plaintiff occurred. Plaintiff, as well as other workers, were docked an hour of pay for reporting to work prior to the permitted time.<sup>4</sup> Because several employees were clocking in an hour early, but were not actually working that hour and were expecting to receive overtime pay therefor, Defendant enforced its policy of denying compensation for any hours purportedly worked prior to 7:00 a.m.

The following month, due to a series of events, several technicians, including Plaintiff,

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<sup>3</sup> Interestingly, the Letter of Commitment includes a clause which declares the document, once signed, to be "final and binding" and "irrevocable and shall not be the basis of any grievance or claim of any kind against the Company." It would appear that, by Plaintiff signing the Letter of Commitment under protest, this clause was rendered moot, as Defendant continued to employ Plaintiff even though Plaintiff did not "waive any present and[/]or future rights."

<sup>4</sup> Plaintiff contends that he was the only employee docked for this hour, and that this adverse decision was motivated by discrimination toward Plaintiff. However, Defendant has presented evidence that tends to show other employees, not members of Plaintiff's protected class, who deviated from Defendant's policy were also denied pay. This is but one of the many disputed issues that exist to preclude judgment as a matter of law.

received "Quality Assurance, Notifications of Non-Compliance" for failure to enter required information in the computer before ending their respective shifts. When the technicians complained that the inability to enter the data at the designated time was caused by events other than the technicians' delinquency, their supervisor, Noel Franz ("Franz") removed the notifications from their personnel files. However, Franz did not remove the notification placed in Plaintiff's personnel file.

Shortly thereafter, on May 12, 1994, Plaintiff, who had requested overtime, reported for work. Upon his arrival, Franz assigned Plaintiff to a task which Plaintiff claimed was impossible to execute. Plaintiff protested that no other employee had been given such an assignment and asked Franz why it had been assigned to him. In response, Franz cited the non-compliance notifications that remained in Plaintiff's personnel file. When Plaintiff again protested and accused Franz of unfairly singling him out and punishing him, Franz told Plaintiff to do the assignment or leave. Franz then told Plaintiff to go home, since Plaintiff complained too much to the EEOC.

Upon his departure on that date, Plaintiff filed another Charge with the EEOC, alleging retaliation. That Charge, and the amendment thereto of December 1994, underlie Plaintiff's Complaint. In the Amended Charge, Plaintiff refers to the docking of his overtime, the non-compliance notifications, the incident when Franz sent Plaintiff home for protesting the overtime assignment, and the incident which resulted in his termination, as the adverse employment actions that he suffered as a result of Defendant's discriminatory conduct.

Plaintiff's Charge is conspicuously silent as to three incidents highly relevant to the issue of discrimination and hostile work environment. Plaintiff claims that, on October 15, 1994, he found

a noose hanging from the mechanics' trailer. Written on the noose were the words "To Hang Dobson." Sometime thereafter, a black co-worker found an overexposed Polaroid photograph. The photograph was completely black with what appeared to be eyes and smiles drawn in with white-out correcting fluid. Written on the bottom of the photograph were the words "In the ramp at 10 PM, Dobson and Ozzy."

The other relevant incident alluded to, but not fully described in the Charge, occurred on November 30, 1994. On that date, Plaintiff went to review his personnel file in Franz's office. While watching Plaintiff review the file, Franz observed a document in Plaintiff's possession that Franz believed Plaintiff removed from the file. Since removal of documents from personnel files without permission was a violation of Defendant's policy, Franz requested that Plaintiff show him the document to confirm Plaintiff's assertion that it was personal and not a part of his file. When Plaintiff refused to do so, a verbal altercation ensued between Plaintiff and Franz. Plaintiff then walked away and left the premises.<sup>5</sup>

Consequently, on December 3, 1994, Plaintiff was informed that he was being withheld from service pending an investigation of the November 30, 1994 incident. On December 5, 1994, Defendant directed Plaintiff to surrender his company identification and travel cards. Plaintiff refused to surrender Defendant's property and remained uncooperative throughout the pendency of the investigation. As a result, Plaintiff was handed an advisory of termination on December 12,

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<sup>5</sup> Plaintiff claims that Franz pushed him down the steps from behind, resulting in injuries to his left hip and a Workers' Compensation claim. The record contains no evidence of these allegations. However, this discrepancy, creating a genuine issue material to this case, provides another reason for denying Defendant's motion for summary judgment.

1994. The stated reasons for Plaintiff's termination were insubordination and failure to adhere to the provisions of the Letter of Commitment.

Upon the expiration of the statutory administrative investigation period, the EEOC issued a Notice of Right to Sue on January 26, 1996. Plaintiff filed his civil Complaint in federal court within Title VII's ninety-day limitations period.

Defendant requests dismissal urging that Plaintiff has failed to meet his burden of establishing prima facie cases of race discrimination, hostile work environment, and retaliation under Title VII and § 1981. Defendant further argues that it had legitimate, nondiscriminatory reasons for terminating Plaintiff. The Court concludes that Plaintiff has raised sufficient factual issues to preclude judgment as a matter of law, and therefore, declines to grant summary judgment in favor of Defendant.

## **II. Standard for Summary Judgment**

Rule 56(c) of the Federal Rules of Civil Procedure authorizes entry of summary judgment where the pleadings and supporting materials demonstrate there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). An issue of fact is "material" if it is a legal element of a claim under the applicable substantive law and one which might *affect* the outcome of the suit under the governing law. Id. A material fact is "genuine" if "the record taken as a whole could lead a rational trier of fact to find for the non-moving party." Id.

A plaintiff cannot defeat a defendant's properly supported motion for summary judgment

without an affirmative presentation of specific facts showing a genuine issue, and may not merely rely on the general allegations of the pleadings. Id. A mere scintilla of evidence is insufficient to defeat a motion for summary judgment:

[I]n every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

Id. at 251, 106 S. Ct. at 2511. In reviewing a motion for summary judgment the court focuses on “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.” Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11<sup>th</sup> Cir. 1997) (quoting Anderson, supra).

In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986), the Supreme Court established a two-prong framework of shifting burdens which must be employed by federal courts in determining whether there exists a genuine issue precluding summary judgment. This framework places the initial burden on the moving party to establish the absence of a genuine issue as to any material fact. Tyson Foods, Inc., 121 F.3d at 646 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970)). The moving party may discharge this burden by “‘showing’ — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party’s case.” Celotex, 477 U.S. at 325, 106 S. Ct. at 2554. In deciding whether the burden has been satisfied, the Court must view the evidence and all reasonable inferences arising from it in the light most favorable to the nonmoving party. Tyson Foods, Inc., 121 F.3d at 646 (citing Adickes, 398 U.S. at 157, 90 S. Ct. at 1608).



Once the movant has satisfied its burden, the burden shifts to the nonmoving party to present evidence sufficient to make a "showing that the jury could reasonably find for that party." Allen, 121 F.3d at 646 (citations omitted). Facts asserted by the party opposing a summary judgment must be regarded as true if supported by affidavit or other evidentiary material. Coke v. General Adjustment Bureau, Inc., 640 F.2d 584, 595 (5<sup>th</sup> Cir. 1981). However, where the nonmoving party bears the burden of proving an element essential to that party's case, summary judgment is warranted when the party fails to make a showing sufficient to establish the essential element. Celotex, 477 U.S. at 323, 106 S. Ct. at 2552. "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. The Eleventh Circuit commented on the nonmovant's burden:

For issues on which the non-movant would bear the burden of proof at trial, the means of rebuttal available to the non-movant vary depending on whether the movant put on evidence affirmatively negating the material fact or instead demonstrating an absence of evidence on the issue. Where the movant did the former, then the non-movant must respond with evidence sufficient to withstand a directed verdict motion at trial on the material fact sought to be negated. Where the movant did the latter, the non-movant must respond in one of two ways. First, he or she may show that the record in fact contains supporting evidence, sufficient to withstand a directed verdict motion, which was "overlooked or ignored" by the moving party, who has thus failed to meet the initial burden of showing an absence of evidence. Celotex, 477 U.S. at 332, 106 S. Ct. at 2557 (Brennan, J., dissenting). Second, he or she may come forward with additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency.

Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1116-17 (11<sup>th</sup> Cir. 1993).

The mere establishment of a prima facie case of discrimination does not foreclose the

possibility of summary judgment in favor of the employer. See Young v. General Foods Corp., 840 F.2d 825, 828 (11<sup>th</sup> Cir. 1988). Presentation of a prima facie case creates a rebuttable presumption of discrimination, but does not alone establish a genuine issue of material fact sufficient to go to the jury. See id. at 829. Since it is Plaintiff's burden to establish pretext, he "must present 'significantly probative' evidence on the issue to avoid summary judgment." Id.

### **III. Discussion and Analysis**

Plaintiff's claims of race discrimination, hostile environment, and retaliation pursuant to Title VII and § 1981 primarily derive from allegedly disparate treatment he received from his immediate supervisor, Franz. Plaintiff alleges that other employees, outside of Plaintiff's protected class, did not receive reprimands and non-compliance notifications for conduct similar to that for which Plaintiff was reprimanded and notified of non-compliance. Plaintiff contends that when he exercised his statutory right to file charges of discrimination with the EEOC, Franz further discriminated by retaliating against Plaintiff. Additionally, Plaintiff claims that a hostile work environment was created that was so severe and pervasive as to intimidate Plaintiff and to cause him pecuniary losses and emotional distress, for which he seeks compensatory and punitive damages.

Defendant counters that nothing occurred which rose to a level of creating a hostile environment. Defendant further avers that it had a grievance procedure in place of which Plaintiff failed to avail himself. Moreover, Defendant contends that it took steps to mediate and correct Plaintiff's complaints of objectionable behavior and treatment, and had legitimate, non-discriminatory reasons for its decisions and ultimate termination of Plaintiff. Although Defendant

has articulated non-discriminatory bases for terminating Plaintiff, the Court is not persuaded that no genuine issue of material fact exists to abrogate Plaintiff's right to trial.

#### **A. Plaintiff's Claims Under Title VII**

Title VII prohibits discrimination in hiring, discharge, and promotion in employment on the basis of race, religion, sex, or national origin. 42 U.S.C. Sec. 2000e-2(a)(1). Title VII is intended to eradicate not only economic and tangible discrimination, but the entire spectrum of disparate treatment. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S. Ct. 367, 370 (1993); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64, 106 S. Ct. 2399, 2404 (1986). This includes more than " 'terms' and 'conditions' in the narrow contractual sense." Id.

It is clear, however, that not all employment actions are actionable under Title VII. The demanding standards for judging discriminatory working environments were designed to prevent Title VII from becoming a "general civility code." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 118 S. Ct. 998, 1003 (1998). Applied judiciously, these standards "filter out complaints attacking 'ordinary tribulations of the workplace.'" Faragher v. City of Boca Raton, -- U.S. --, 118 S. Ct. 2275, 2284 (1998) (quoting source omitted). Thus, the "mere utterance of [an insult] which engenders offensive feelings in an employee" is insufficient to support a violation of Title VII. Rogers v. EEOC, 454 F.2d 234, 238 (5<sup>th</sup> Cir. 1971).

#### **1. Plaintiff's Claim of Race Discrimination**

Count I of the Complaint alleges that Plaintiff, one of only a few black employees in his department, was subjected to disparate treatment and a hostile work environment. Plaintiff contends

that the hostility was instigated by his supervisor, Franz, with whom Plaintiff had daily interaction. Plaintiff claims that Franz assigned Plaintiff to tasks which were impossible to complete and to which Plaintiff's white co-workers were not assigned, papered Plaintiff's personnel file with unsubstantiated non-compliance notifications, and solicited statements unfavorable to Plaintiff from his co-workers. Plaintiff also alleges that Defendant denied him promotion opportunities. According to Plaintiff, he was subjected to this abusive treatment on account of his race.

Defendant challenges Plaintiff's allegations. Defendant contends that Plaintiff has not established a prima facie case of race discrimination or hostile environment, nor successfully rebutted Defendant's non-discriminatory reasons by proving pretext.

***a. Establishing a Prima Facie Case of Discrimination Under Title VII***

Discrimination claims brought pursuant to Title VII place the initial burden on Plaintiff to prove that Defendant discriminated against him on the basis of his race. This burden requires Plaintiff to establish a prima facie case of discrimination. Carter v. Three Springs Residential Treatment, 132 F.3d 635, 643 (11<sup>th</sup> Cir. 1998). A prima facie case of race discrimination is established by showing that: (1) Plaintiff belongs to a racial minority; (2) he was subjected to an adverse employment action; (3) Plaintiff was treated less favorably than similarly situated employees who were not members of the minority class; and (4) that Plaintiff was otherwise qualified for the position. See Holifield v. Reno, 115 F.3d 1555, 1562 (11<sup>th</sup> Cir. 1997).

The elements necessary to establish a prima facie case are dictated by the employment practice at issue. Here, to prevail on his Title VII claim, Plaintiff must not only show membership

in a protected class, which membership was a motivating factor in the employment practice applied, he must also show that Defendant treated similarly situated employees outside of the protected class more favorably. See Coutu v. Martin County Bd. of Comm'rs, 47 F.3d 1068, 1073 (11<sup>th</sup> Cir. 1995).

A crucial ingredient in actions alleging discriminatory treatment by an employer based on conduct proscribed by Title VII, is proof of discriminatory motive. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 325 n.5, 97 S. Ct. 1843, 1854 n.5 (1977). In establishing unlawful motive under Title VII, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093 (1981). In this case, the issue is whether Defendant *intentionally* discriminated against Plaintiff on the basis of his race.

To establish a prima facie case of intentional discrimination, a plaintiff may rely on direct or circumstantial evidence. Therefore, for purposes of this motion, the Court must make a threshold determination whether the evidence produced by Plaintiff is direct or circumstantial evidence of discrimination.

The type of evidence before this Court, direct or circumstantial, dramatically affects the allocation of evidentiary burdens. If Plaintiff produces competent evidence of discriminatory intent, Defendant must prove by a preponderance of the evidence that the same employment decision would have been reached even absent the discriminatory motive. See Price Waterhouse v. Hopkins, 490 U.S. 228, 258, 109 S. Ct. 1775, 1795 (1989); Smith v. Homer, 839 F.2d 1530, 1536 (11<sup>th</sup> Cir. 1988).

If the evidence relied upon by Plaintiff is circumstantial, Defendant's burden on rebuttal is to produce a legitimate, nondiscriminatory reason for the challenged employment decision. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973). This burden is merely one of production, not persuasion. See Burdine, 450 U.S. at 254, 101 S. Ct. at 1094; Lee v. Russell County Bd. of Educ., 684 F.2d 769, 773 (11<sup>th</sup> Cir. 1982).

***i. Direct Evidence of Discriminatory Intent***

Direct evidence is that which, if believed, proves the existence of a fact in issue without inference or presumption. See Burrell v. Board of Trustees of the Ga. Military College, 125 F.3d 1390, 1393-94 (11<sup>th</sup> Cir. 1997); Carter v. Three Springs Residential Treatment, 132 F.3d 635, 643 (11<sup>th</sup> Cir. 1998) (citing Merritt v. Dillard Paper Co., 120 F.3d 1181, 1189 (11<sup>th</sup> Cir. 1997)). Generally, direct evidence relates to the actions, statements, or biases of the person making the challenged employment decision. See Trotter v. Board of Trustees of the Univ. of Ala., 91 F.3d 1449, 1453-54 (11<sup>th</sup> Cir. 1996). If, however, the evidence presented is, by inference, subject to more than one possible meaning, it is not direct evidence and must be considered circumstantial evidence. Carter, 132 F.3d at 643 (citing Harris v. Shelby County Bd. of Educ., 99 F.3d 1078, 1082-83 n.2 (11<sup>th</sup> Cir. 1996)).

***ii. Circumstantial Evidence of Discriminatory Intent***

For cases alleging discriminatory intent based upon circumstantial evidence, courts adhere to the Supreme Court's burden-shifting analysis set forth in McDonnell Douglas, *supra*. Pursuant to this framework, once a plaintiff establishes a prima facie case of discrimination, it is incumbent

upon the defendant to rebut the plaintiff's claims of discrimination by articulating a legitimate, nondiscriminatory reason for the adverse employment action of which the plaintiff complains--a reason worthy of credence. Carter, 132 F.3d at 643. The defendant has the burden of production, and thus, does not have to persuade a court that it was actually motivated by the reason advanced. Id. Once Defendant satisfies this burden of production, in order to prevail upon his claims, Plaintiff must establish *both* that the proffered reason for the employment decision was false *and* that the real reason for the action was discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515-17, 113 S. Ct. 2742, 2751-52 (1993); Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436, 441 (11<sup>th</sup> Cir. 1996). By so persuading the Court, Plaintiff satisfies the required burden of demonstrating by a preponderance of the evidence that he has been the victim of intentional discrimination. Carter, 132 F.3d at 643. Applying these principles, the Court must initially examine the evidence in the record to determine whether it is direct or circumstantial.

***b. Plaintiff's Evidence of Discriminatory Motive***

The record does not contain any direct evidence of race-based disparate treatment or hostile work environment. Although Plaintiff has identified specific comments and incidents which he considers to be examples of discrimination, these examples do not constitute direct evidence. For instance, Plaintiff has submitted statements of co-workers that they perceived Franz's conduct toward Plaintiff as motivated by discrimination. Additionally, Plaintiff would argue that the noose and overexposed photograph incidents constitute direct evidence of race discrimination and hostile work environment. However, because there are no connections between these perceptions and

incidents, and any adverse employment decision alleged by Plaintiff to have taken place, these incidents do not rise to the level necessary for direct evidence. See Evans v. McClain of Georgia, Inc., 131 F.3d 957, 962 (11<sup>th</sup> Cir. 1997).

Absent direct evidence of discrimination, the Court must examine Plaintiff's race-based discrimination claims under the McDonnell Douglas framework. This analysis requires Plaintiff to have established a prima facie case of discrimination.

***c. Plaintiff Has Established an Unrebutted Prima Facie Case of Discrimination***

Plaintiff has satisfied the conjunctive elements of race-based discrimination under a disparate treatment theory. As an African-American, Plaintiff belongs to a recognized racial minority. Defendant's termination of Plaintiff supports a showing of an adverse employment action. Having received unique and difficult assignments, and by Franz's failure to remove the non-compliance notification from Plaintiff's personnel file while having removed the notifications from the files of Plaintiff's white co-workers, Plaintiff was treated less favorably than similarly situated employees who are not members of the minority class. And finally, it is undisputed that Plaintiff was qualified for the position he held upon termination. Having met his burden of establishing a prima facie case, the burden shifted to Defendant to articulate legitimate, nondiscriminatory reasons for their decision to treat Plaintiff disparately and to ultimately terminate Plaintiff.

Defendant argues that, even assuming Plaintiff has established a prima facie case of race discrimination, Defendant has proffered legitimate nondiscriminatory reasons for its actions. Defendant seeks to discharge its burden by identifying situations in which Plaintiff deviated from



company rules and policies and acted insubordinately. Thus, according to Defendant, the burden shifted back to Plaintiff to prove Defendant's proffered reasons are mere pretext.

Defendant's main contention is that Plaintiff has failed to raise triable issues of material fact with respect to the pretext element of proof. Therefore, according to Defendant, Plaintiff has not satisfied the third prong of the McDonnell Douglas test. The Court disagrees.

Defendant has proffered incidents of Plaintiff's insubordination as justification for Plaintiff's admonishments and termination. The main basis for this justification are the averments of Franz. His testimony, however, is denied and refuted by Plaintiff, who also testified and filed an affidavit. With the exception of Franz's testimony, the record is virtually devoid of examples of Plaintiff's insubordination rising to the level of termination. Consequently, the evidence presented is insufficient to establish that Defendant's asserted reasons for Plaintiff's treatment and termination were those reasons actually relied upon. See Lee v. Russell County Bd. of Educ., 684 F.2d 769, 775 (11<sup>th</sup> Cir. 1982).

Moreover, the state of mind and intent of Defendant is very much in dispute. Evidence submitted by both parties presents two differing accounts of the relevant events. Thus, the outcome depends on whose version of the facts is to be believed--a determination of credibility. However, on summary judgment, the Court may not weigh the credibility of the parties. See Rollins v. TechSouth, Inc., 833 F.2d 1525, 1531 (11<sup>th</sup> Cir. 1987). If the determination of the case rests on which competing version of the facts or events is true, the case must be presented to the trier of fact. See id. Under such circumstances, summary judgment is inappropriate.

**d. *Plaintiff's Claim of Hostile Environment***

Establishing a claim for a racially hostile work environment requires Plaintiff to “demonstrate that the actions of [Defendant] altered the condition of the workplace, creating an objectively abusive and hostile atmosphere.” Edwards v. Wallace Community College, 49 F.3d 1517, 1521 (11<sup>th</sup> Cir. 1995). A hostile environment occurs when an employer’s conduct “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive environment.” Meritor Savings Bank, 477 U.S. at 65, 106 S. Ct. at 2405. To be actionable, an objectionable environment must be both objectively offensive--one that a reasonable person would find hostile or abusive--and subjectively offensive--one that the victim in fact did perceive to be so. See Harris, 510 U.S. at 21-22, 114 S. Ct. at 370-71. Whether a reasonable person would find the challenged conduct has interfered with an employee’s working conditions is determined in light of the record as a whole and the totality of the circumstances. See id. at 23, 114 S. Ct. at 371; see also Edwards, 49 F.3d at 1521. It must be determined whether a reasonable person, in Plaintiff’s position, would perceive his environment as abusive.

**1. *Plaintiff Has Established an Unrebutted Claim of Hostile Environment***

Plaintiff has proffered sufficient evidence of objective racial hostility which permeated Defendant’s workplace. Defendant tries to minimize the effect of this damaging evidence. Defendant argues that, even assuming all the incidents occurred, in the aggregate they do not amount to a hostile environment so severe and pervasive as to affect the terms and conditions of Plaintiff’s employment. Defendant avers that Plaintiff’s subjective perception of these incidents as offensive

is insufficient to substantiate his hostile environment claim; rather, the conduct must also be objectively offensive. Although Defendant has identified the correct standard, it has misapplied it to the totality of the circumstances encompassed by the record.

Ample evidence exists to satisfy the severe or pervasive standard under both the subjective and objective prongs of the Harris test. Clearly, Plaintiff subjectively perceived the environment as hostile. Subjected to constant harassment, he filed numerous EEOC charges to alleviate Defendant's abusive treatment.

As to the objective part of the test, Plaintiff has set forth facts which infer that a reasonable person would find the environment racially abusive. Applying the factors enumerated in Harris, the harassment, as alleged, was frequent, severe, and intimidating. While under the direct supervision of Franz, Plaintiff recounted numerous instances verbal abuse, during which Franz lost his temper and threatened to terminate Plaintiff. Moreover, Franz solicited adverse statements from Plaintiff's co-workers to support Franz's behavior. By these acts, Franz actually caused the hostility to permeate throughout the work environment.

These incidents, coupled with evidence of the noose and overexposed photograph, provide a significant basis for inferring that Plaintiff's work environment was objectively hostile. Accordingly, the Court concludes that a material issue of fact has been raised that requires resolution by a jury.

## ***2. Corporate Liability and Exculpating Effect of Grievance Procedures***

Two recent Supreme Court pronouncements clarify the standards for courts to determine the

extent to which employers are liable for the harassment perpetrated by supervisory personnel. See Faragher v. City of Boca Raton, -- U.S. --, 118 S. Ct. 2275 (1998); Burlington Industries, Inc. v. Ellerth, --U.S. --, 118 S. Ct. 2257 (1998). In revisiting the question of employer liability as it relates to harassment by supervisors, the Court reiterated that agency principles control the issue, and distinguished supervisor harassment that results in a tangible employment action from that which does not. See Faragher, 118 S. Ct. at 2292-93; Burlington, 118 S. Ct. at 2266-67. A tangible employment action is one which “constitutes a significant change in employment status, such as hiring, different responsibilities, or a decision causing a significant change in benefits.” Burlington, 118 S. Ct. at 2266-67. They are “the means by which the supervisor brings official power of the enterprise to bear on subordinates.” Id. at 2269.

When a tangible employment action is taken, vicarious liability is always appropriate. See Faragher, 118 S. Ct. at 2291-92; Burlington, 118 S. Ct. at 2266-67. When no tangible adverse employment action is evident, the Court implemented a test:

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, subject to proof by a preponderance of the evidence. . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any [racially] . . . 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.

See Faragher, 118 S. Ct. at 2292-93; Burlington, 118 S. Ct. at 2271.

The Eleventh Circuit has taken a strong stance on an employer’s power to influence the

working atmosphere of its employees. See Coates v. Sundor Brands, Inc., 160 F.3d 688, 692 (11<sup>th</sup> Cir. 1998). “When an employee’s ability to perform his or her job is compromised by discriminatory acts . . . and the employer knows it, it is the employer that has the ability, and therefore the responsibility, to address the problem, whether the harasser is a supervisor, a co-worker, a client, or a subordinate.” Id. (citing Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1515 (11<sup>th</sup> Cir. 1989)). Here, a tangible employment action was taken when, pursuant to the November 30, 1994 altercation, Plaintiff was terminated. Applying the Faragher/Burlington standard, Defendant is liable for Franz’s conduct.

Even assuming no tangible employment action against the employee can be found, an employer may still be vicariously liable if it cannot prove the affirmative defense required under Faragher and Burlington. See Booker v. Budget Rent-A-Car Sys., 17 F. Supp. 2d 735, 747 (M.D. Tenn. 1998). Although Defendant may argue that it exercised reasonable care to correct and prevent racial harassment by implementing an anti-discrimination policy and grievance process, Defendant has not proved by a preponderance of evidence that it exercised reasonable care to prevent the racial harassment of its agent. In fact, Defendant has not met its burden of proving that it reasonably and promptly corrected any of Plaintiff’s complaints and concerns of racially-motivated harassment.

To the contrary, Plaintiff’s participation in the EEOC process and the prior negotiated settlement placed Defendant on notice that extensive racial harassment was present. Thus, the Court finds that Defendant’s failure to take prompt remedial action prevents it from avoiding vicarious liability. See id. Based on this record, the Court is compelled to find the existence of significant

jury issues as to whether Defendant's conduct amounted to an unlawful employment practice prohibited by Title VII.

In sum, the frequency and severity of the harassment is extensive enough to support a claim for hostile environment, and to establish that the harassment was severe and humiliating. Thus, the Court concludes that Plaintiff has made an actionable claim for racial discrimination and hostile environment under Title VII. Defendant's contention that some of the adverse conduct claimed by Plaintiff was justified, is merely relevant to determining whether race was a motivating factor in Franz's treatment of Plaintiff. This, however, is a question of fact for the jury.

***2. Plaintiff Has Established an Unrebutted Claim of Retaliation***

Count I of the Complaint also alleges that Defendant retaliated against Plaintiff for filing charges of discrimination with the EEOC. Plaintiff contends that when he filed his charges, Defendant retaliated by subjecting Plaintiff to heightened scrutiny, assigned Plaintiff to unfavorable and difficult assignments, unfairly reprimanded Plaintiff and injected unsubstantiated non-compliance notifications in his personnel file, and acted in an overall abrasive, abrupt manner toward Plaintiff. Specifically, he claims that he was terminated because he filed charges with the EEOC, and that the reasons Defendant gave for terminating him--taking proprietary documents and insubordination--were pretextual.

Defendant argues that Plaintiff has not established a prima facie case of retaliation and suffered no adverse employment action. Defendant further contends that it had legitimate, nondiscriminatory reasons for terminating Plaintiff, and that it was for these lawful reasons, and not

out of retaliation, that Plaintiff was terminated. Again, the Court disagrees with Defendant's characterization of the evidence.

Under Title VII, employers may not discriminate or retaliate against any employee who has either: (1) opposed an employment practice made unlawful under Title VII; or (2) made a charge, or participated in any manner in an investigation, proceeding, or hearing under Title VII. See 42 U.S.C. § 2000e-3(a).<sup>6</sup> Establishing a prima facie retaliation claim requires a showing that: (1) the Plaintiff engaged in protected opposition to Title VII discrimination; (2) an adverse employment action occurred; and (3) the adverse action was causally related to Plaintiff's protected activities. See Little v. United Tech., Carrier Transicold Div., 103 F.3d 956, 959 (11<sup>th</sup> Cir. 1997); Coutu v. Martin County Bd. of County Comm'rs, 47 F.3d 1068, 1074 (11<sup>th</sup> Cir. 1995); Hairston v. Gainesville Sun Publ'g Co., 9 F.3d 913, 920 (11<sup>th</sup> Cir. 1993).

In this case, Plaintiff has submitted "direct" evidence of retaliation. By presenting direct evidence of retaliation, Plaintiff may avoid the McDonnell Douglas burden-shifting analysis. See Holifield, 115 F.3d at 1561-62. "Where the non-movant presents direct evidence that, if believed by a jury, would be sufficient to win at trial, summary judgment is not appropriate *even where the movant presents conflicting evidence.*" Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742 (11<sup>th</sup> Cir. 1996) (emphasis added). Here, this type of evidence would relate to Franz's statement, which

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<sup>6</sup> Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), provides that: "It shall be an unlawful employment practice for an employer to discriminate against any of its employees or applicants for employment . . . because he has opposed any practice made unlawful by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

reflects a discriminatory attitude correlating to the retaliation of which Plaintiff complains.<sup>7</sup> See Carter, 132 F.3d at 641 (quoting source omitted).

***a. Plaintiff Engaged in Activity Protected by Title VII***

Plaintiff alleges that his EEOC charges of race discrimination and retaliation constitute protected expression. By seeking relief through statutorily prescribed procedures, Plaintiff has satisfied the first element of his prima facie case of retaliation.

***b. Plaintiff Suffered an Adverse Employment Action***

As evidence of adverse employment action, in satisfaction of the second element of his retaliation claim, Plaintiff points to several actions which occurred after he filed his EEOC charges: Plaintiff was more closely scrutinized; Plaintiff received written reprimands and unfavorable job assignments; Plaintiff was threatened with termination for expressing his opposition to disparate treatment; Plaintiff received a non-compliance notification for the same conduct engaged in by other employees whose notifications were withdrawn; and Franz began soliciting employees for negative statements concerning Plaintiff.

In response, Defendant contends that Plaintiff's allegations are insufficient to constitute adverse employment action in support of a retaliation claim. Defendant points to evidence which infers that Plaintiff was terminated for violations of Defendant's policies and for insubordination,

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<sup>7</sup> Specifically, Franz told Plaintiff that he was being prematurely dismissed from an overtime shift because Plaintiff complained too much about the company to the EEOC. This is a classic remark directly evidencing retaliatory motive in support of Plaintiff's claim. Moreover, Plaintiff presented direct evidence elicited from his co-workers who personally witnessed Defendant's abusive conduct toward Plaintiff, and who were approached by Franz to submit negative comments about Plaintiff.



rather than in response to his protected activity. Specifically, Defendant cites to the November 30, 1994 incident, wherein Plaintiff was observed removing documentation from his personnel file. When confronted, Plaintiff refused to relinquish the document or permit Franz to confirm Plaintiff's representation of its content.<sup>8</sup> Defendant argues that the conduct for which Plaintiff was terminated is not protected, and that Title VII does not restrict an employer from terminating an employee for blatantly disregarding an employer's policies. Indeed, there is ample evidence in the record that Plaintiff did not endear himself to his supervisor. He challenged Franz's authority on several occasions. However, this disputed evidence requires resolution by the trier of fact.

***c. Plaintiff Has Established the Causal Relation Element***

To establish the causal relation element of a prima facie case of retaliation, Plaintiff must merely show "that the protected activity and the adverse action are not completely unrelated." Meeks v. Computer Assoc. Int'l, 15 F.3d 1013, 1021 (11<sup>th</sup> Cir. 1994). Plaintiff has done so by presenting evidence that Defendant, including Franz, knew of his EEOC charges, and that the series of adverse employment actions commenced shortly thereafter. See Donnellon v. Fruehauf Corp., 794 F.2d 598, 601 (11<sup>th</sup> Cir. 1986) ("The short period of time between the filing of the discrimination complaint and the [adverse employment action] belies any assertion by the defendant that the plaintiff failed to prove causation.").<sup>9</sup>

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<sup>8</sup> The Court does not determine whether Plaintiff's conduct during this incident substantiates termination. Rather, the Court recognizes this as a question of fact, outside the scope of a summary judgment determination.

<sup>9</sup> As discussed above, Franz's statement that his actions on May 12, 1993 were predicated on Plaintiff's complaints to the EEOC further establishes the causal connection element of a retaliation claim. Although

From his submissions, Plaintiff has adduced direct evidence that he opposed a practice made unlawful under Title VII, that he was subjected to adverse employment action, and that the adverse action was causally related to Plaintiff's protected opposition activities. Thus, Plaintiff has met his burden of persuading the Court that Defendant engaged in retaliatory conduct in violation of Title VII, precluding summary judgment in favor of Defendant on this issue.

Moreover, resolution of Plaintiff's retaliation claim, like the hostile environment claim, will turn, in part, on the credibility of the testimony. "Credibility determinations, the weighing of evidence and the drawing of legitimate inferences from the facts are jury functions." Anderson, 477 U.S. at 255, 106 S. Ct. at 2513. Based on the disputed evidence, the Court finds Plaintiff's allegations of retaliation sufficient to survive Defendant's Motion for Summary Judgment on Count I of the Complaint.

#### **B. Plaintiff's Claims Under 42 U.S.C. § 1981**

Count II of the Complaint alleges that the same facts that form the bases of Plaintiff's Title VII claims give rise to a violation of § 1981.<sup>10</sup> Section 1981 covers claims for intentional racial

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Franz denies making the statement, this dispute necessarily involves a credibility issue. On this basis, summary judgment is inappropriate. Moreover, Defendant points out that the Court's prior order precluded Plaintiff from suing on claims based upon incidents included in Plaintiff's May 1993 EEOC Charge. However, actions occurring before that period may be used as background *information* to explain Defendant's later motives and actions. See EEOC v. Reichhold Chemicals, Inc., 988 F.2d 564, 1571 n.6 (11<sup>th</sup> Cir. 1993) (citation omitted).

<sup>10</sup> Defendant does not specifically argue for dismissal of the § 1981 claims encompassed by Count II of the Complaint. However, since Defendant moved to dismiss the entire Complaint "on the merits," the Court assumes Defendant's arguments refer to both the Title VII and § 1981 claims, as these claims are predicated on the same objectionable acts.

discrimination in “the making, performance, modification, and termination of [employment] contracts.” 42 U.S.C. § 1981(b).<sup>11</sup> Like Title VII claims, a successful § 1981 claim requires proof of intentional discrimination. See Brown v. American Honda Motor Co., Inc., 939 F.2d 946, 949 (11<sup>th</sup> Cir. 1991).

The legal elements of a § 1981 claim are identical to those of a Title VII disparate treatment claim. See id. Those elements are: (1) membership in a racial minority; (2) an intent to discriminate on the basis of race; and (3) discrimination concerning an activity enumerated in the statute. See Baker v. McDonald’s Corp., 686 F. Supp. 1474, 1481 (S.D. Fla. 1987), aff’d, 865 F.2d 1272 (11<sup>th</sup> Cir. 1988).

It is generally recognized that proof sufficient to sustain a claim under Title VII will also support a claim under § 1981 and vice versa. See, e.g., General Bldg. Contractors Ass’n v. Pennsylvania, 458 U.S. 375, 391, 102 S. Ct. 3141, 3150 (1982); Standard v. A.B.E.L. Services, Inc., 161 F.3d 1318, 1330 (11<sup>th</sup> Cir. 1998) (claims brought under Title VII and § 1981 require the same proof and use the same analytical framework); Brown, 939 F.2d at 949; Crawford v. Western Electric Co., Inc., 745 F.2d 1373, 1376 (11<sup>th</sup> Cir. 1984). Therefore, analysis under one theory is usually determinative of the other claim. See Stallworth v. Shuler, 777 F.2d 1431, 1433 (11<sup>th</sup> Cir.

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<sup>11</sup> Specifically, 42 U.S.C. § 1981 provides, in pertinent part, that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, liens, and exactions of every kind, and to no other.

1985). Accordingly, for the reasons set forth with respect to Plaintiff's claims in violation of Title VII, summary judgment in favor of Defendant on Plaintiff's parallel § 1981 claims is denied.

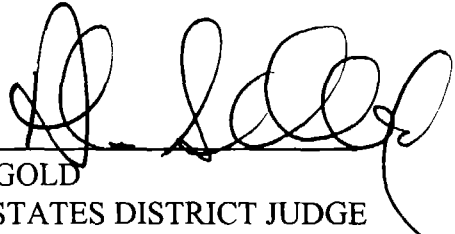
#### **IV. Conclusion**

The Court's decision that Defendant cannot prevail as a matter of law at this stage of the proceedings does not mean that Plaintiff has proven his case. Plaintiff has made out a prima facie case as to all of his claims and is, therefore, entitled to attempt to prove by a preponderance of the evidence that the justifications proffered by Defendant are pretextual. The proof submitted by Defendant with respect to these justifications is not so clear and undisputed as to warrant summary judgment.

Based on the foregoing, it is accordingly

**ORDERED AND ADJUDGED** that Defendant's Motion for Summary Judgment [D.E. #45] is DENIED.

DONE and ORDERED in Chambers at Miami, Florida, this 19 day of January, 1999.



ALAN S. GOLD  
UNITED STATES DISTRICT JUDGE

copies furnished:

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