

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

Case No. 22-C-1149

LAKESIDE PLASTICS INC.,

Defendant.

DECISION AND ORDER

Plaintiff Equal Employment Opportunity Commission (EEOC) brought this action against Defendant Lakeside Plastics Inc. on behalf of Brian Turner, who was terminated from his position of Production Technician I at Lakeside on July 1, 2019, less than four weeks after he began his employment. The EEOC alleges that Lakeside violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, when it discriminated against Turner subjecting him to a hostile work environment and terminated his employment based upon his race. Alternatively, the EEOC asserts that Lakeside terminated Turner's employment in retaliation for engaging in protected activity or due to the intersection of his race and engaging in protected activity. On February 1, 2024, Lakeside filed a motion for summary judgment on all of the EEOC's claims. The EEOC also filed a motion for partial summary judgment as to Lakeside's affirmative defense that Turner failed to mitigate damages.

PRELIMINARY MATTERS

Before turning to the substance of the parties' arguments, the court notes that, in responding to Lakeside's motion for summary judgment, the EEOC failed to comply with the court's summary judgment procedures. The local rules require that each party opposing a

motion for summary judgment must submit a concise response to the moving party's statement of facts. The non-moving party may also file

a statement, consisting of short numbered paragraphs of any additional facts that require the denial of summary judgment, including references to the affidavits, declarations, parts of the record, and other supporting materials relied upon to support the facts described in that paragraph. A non-moving party may not file more than 100 separately-numbered statements of additional facts. Each separately-numbered paragraph shall be limited to one material fact.

Civil L.R. 56(b)(2)(B)(ii).

In response to Lakeside's motion for summary judgment, the EEOC filed 100 additional proposed findings of fact. But the EEOC inappropriately combined multiple factual propositions into a single numbered paragraph, which violates the local rule's requirement that "[e]ach separately-numbered paragraph shall be limited to one material fact." Civil L.R. 56(b)(2)(B)(ii).

For example, the EEOC's first two proposed additional statements of fact state:

1. Brian Turner ("Turner") was employed with the temporary staffing firm QPS Employment Group ("QPS") which placed him to work at Lakeside Plastics on or about June 6, 2019. Turner worked at Lakeside from June 6 to June 30, 2019. (Burnside Decl., Ex. 12; Ex. 1, Turner Dep. 169:8-17) Turner worked as a Production Technician in the Cones department on the first shift, weekends, Thursday – Sunday, from 7 am to 3 pm. (Burnside Decl., Ex., 12 and 13) The position was temporary-to-hire and Turner could be hired permanently after 60 days (Burnside Decl., Ex. 1, Turner Dep. 124:1-8; Ex. 5, Leith Dep. 69:18-22)
2. Turner was supervised by Leads Max Berndt and Japan Lor. (Burnside Decl., Ex. 12; Ex. 1, Turner Dep. 69:8-25, 70:1-6) Scott Scholl was the supervisor in the safety division and did not work directly with the production technicians. (Burnside Decl., Ex. 6, Scholl Dep. 8:23-24, 9:1-3, 10:19-21) Leads supervised the production technicians. (Burnside Decl., Ex. 8, Lor Dep. 11:20-24, 12:1-2; Ex. 7, Berndt Dep. 15:4-17; Ex. 6, Scholl Dep. 10:19-24, 11:1-2) Scholl supervised the Leads. (Burnside Decl., Ex. 6, Scholl Dep. 13:16-21) If a production employee has an issue, he should report it to his Lead. (Id., Scholl Dep. 14:5-13)

Pl.'s Statement of Additional Fact ¶¶ 1–2, Dkt. No. 30. Nearly every one of the EEOC's additional proposed findings of fact is compound in this fashion. If each of the proposed facts

were separated into one material fact per paragraph, the EEOC's additional statements of fact would significantly exceed the limit of 100 set by the local rule. Based on the EEOC's failure to comply with Civil L.R. 56(b), the court will not consider the EEOC's proposed statement of additional fact in deciding the motions for summary judgment. *See Cichon v. Exelon Generation Co., L.L.C.*, 401 F.3d 803, 809–10 (7th Cir. 2005) (“A district court does not abuse its discretion when, in imposing a penalty for a litigant’s non-compliance with [the local rules], the court chooses to ignore and not consider the additional facts that a litigant has proposed.”).

BACKGROUND

Turner, who is African American, was employed by the temporary staffing firm QPS Employment Group. Def.’s Proposed Findings of Fact (DPFOF) ¶ 2, Dkt. No. 24; Pl.’s Proposed Findings of Fact (PPFOF) ¶ 1, Dkt. No. 20. On June 6, 2019, Turner began his assignment as a temporary employee at Lakeside as a Production Technician I in the Cones department. DPFOF ¶¶ 1–2; PPFOF ¶ 2. His schedule was First Shift Week (Thursday through Sunday) from 7:00 a.m. to 3:00 p.m. DPFOF ¶ 3. Turner’s last day of work at Lakeside was Sunday, June 30, 2019. *Id.* ¶ 4. He was terminated from his Lakeside assignment on July 1, 2019. PPFOF ¶ 4.

On June 5, 2019, Turner signed a QPS Assignment Document regarding his placement at Lakeside. Dkt. No. 26-1. By signing the agreement, he acknowledged:

Attendance is an essential function of the job. In the rare event you will be late, need to leave work early, or will miss your shift entirely for any reason, **you must call QPS Employment Group 920-798-2100 and Lakeside Plastics at 920-235-3620. If it is during business hours – the receptionist will answer and get you to the supervisor. If it is after business hours – hit 0 to speak with a production foreman or leave a message if no one answers. You must call at least one (1) hour prior to the start of your shift.** If you will be unable to report, failing to call QPS prior to your shift will result in a voluntary quit of your employment. Poor attendance will be considered a voluntary quit. You are not under Lakeside Plastic’s attendance policy, as you are a QPS employee.

Id. at 1. The EEOC asserts that Lakeside’s progressive discipline policy, including its attendance policy, also applied to temporary workers, like Turner. Pl.’s Resp. to DPFOF ¶ 6, Dkt. No. 33.

Turner understood that he needed to follow QPS and Lakeside’s attendance requirements.

DPFOF ¶ 17. The Assignment Document also contained a harassment policy:

All employees are responsible for helping to assure that harassment isn’t present at the workplace. Neither QPS Staff, nor Lakeside Plastics, can respond to your concerns about harassment in the workplace unless we are aware it’s happening. We’ve established the following procedures for reporting and investigating allegations of harassment:

- ✓ Any employee who believes they have been harassed should immediately report the behavior to a supervisor, a manager of Human Resources, or to a QPS consultant.
- ✓ Any employee who is aware of or has witnessed harassing behavior directed toward another employee should immediately report the behavior to a supervisor, a manager of Human Resources, or to a QPS consultant.
- ✓ All complaints will be investigated promptly and thoroughly.
- ✓ Any violation of this harassment policy, including the failure to report harassment, may subject an employee to disciplinary proceedings, leading up to and including termination.
- ✓ To the fullest extent possible, we will maintain confidentiality.
- ✓ Both QPS and Lakeside Plastics forbid and will not tolerate retaliation, intimidation, coercion, threats, or harassment of an employee who has filed a complaint under this procedure.
- ✓ Any questions or concerns about this policy should be directed to a QPS representative.

Dkt. No. 26-1 at 2. QPS encouraged temporary employees to contact QPS if they were having a problem at the job site so that QPS could follow up on it and document it. DPFOF ¶ 10. Turner understood that he should report any concerns of harassment in the workplace immediately. *Id.*

¶ 11. Lakeside also maintains an Employee Handbook, including policies on Equal Opportunity Employer, Unlawful Harassment & Discrimination, and Workplace Violence. *Id.* ¶ 20. Turner received a copy of the handbook on June 5, 2019. *Id.* ¶ 24.

In the role of Production Technician I, Turner was to “ensure that the products meet quality control standards,” “place SKU stickers on cones according to specifications,” “follow

direction of leads and division supervisor and perform work as assigned,” “work as part of a team,” and have “excellent attendance.” *Id.* ¶¶ 12–16. Turner reported to Leads Japan Lor or Max Berndt. *Id.* ¶ 5.

During his employment at Lakeside, Turner met Curt Moraski, another production technician. Moraski offered to give Turner rides home, which Turner accepted. *Id.* ¶ 73. A couple of days after Turner began working at Lakeside, Moraski and Turner had a discussion about being from Milwaukee, and Turner felt that Moraski was trying to get a feel for who he was. *Id.* ¶ 75. According to Turner, Moraski commented, “While I was there, I used to knock n*****s out on the south side.” *Id.* ¶ 76. After Turner told Moraski that he did not care about that type of conversation, Moraski said “we can go out and talk in the parking lot.” *Id.* ¶ 77. Turner ended the conversation, and Moraski walked away. *Id.* ¶ 79.

In his deposition, Turner initially stated that he did not report the conversation to any of his Leads. *Id.* ¶ 80. However, he later stated that he reported to Lor that he had been threatened to go outside to the parking lot to fight and about the racial slur. *Id.* Lor told Turner he “did a good job” and to “keep focused” on his work. *Id.* ¶ 81.

In a separate incident, Turner took a different way home from work on his bike, and Moraski pulled up to him in his truck and followed him. *Id.* ¶ 82. According to Turner, this incident occurred on a Friday or Saturday in the winter season when it was snowing, which was impossible, given the short period time in June during which Turner was employed at Lakeside. Turner later stated that it occurred during the June he worked at Lakeside. *Id.* ¶ 83. In any event, Turner asserts that Moraski told him to get off his bike and fight, stated he would “knock [Turner’s] n*****r ass out,” and said “I’m gonna hang your n*****r ass.” *Id.* ¶ 84. Turner told Moraski he did not have time for it, and Moraski drove off. *Id.* ¶ 85. Turner crossed the street, but Moraski came back and made the same statements. *Id.* ¶ 86. After Turner got home, he

called the non-emergency line of the Oshkosh Police Department and reported to a female officer that a co-worker followed him home, threatened to hit him off his bike, and used racial slurs. *Id.* ¶ 87. Turner tried to follow up with the Oshkosh Police Department for a case number but was not able to obtain it, and the Oshkosh Police Department did not have a record of it. *Id.* ¶¶ 88–89.

The next day, Turner talked to his co-worker Keith Moore, who is African American, about the incident. *Id.* ¶¶ 90, 130. Moore has been employed as a Machine Operator at Lakeside since 2014 and trains temporary employees, including Turner. *Id.* ¶¶ 129, 131. Moore told Turner to tell Berndt, his Lead, about the incident. *Id.* ¶ 90. Turner then reported to Berndt, “On my way home, Curt [Moraski] pulled up beside me, and he started telling me how he gonna hang my n****r ass, knock my n****r ass out, and how he gonna hit me with his truck.” *Id.* ¶ 91. Turner told Berndt that he did not feel safe or comfortable working around Moraski, but Turner did not tell Berndt he did not want to work around Moraski that day because Turner normally did not work with Moraski. Pl.’s Resp. to DPFOF ¶ 93; DPFOF ¶ 93. This was the first time Berndt was Turner’s Lead. DPFOF ¶ 92. Berndt did not ask any questions and did not respond to Turner’s comments but assigned Turner to where he was going to be for the day. *Id.* ¶ 94. Moore told Turner he would be working in an area putting labels on boxes, and Moore showed Turner what to do. *Id.* ¶ 95.

Later that day, Moraski came over and tried to show Turner how to put the labels on the boxes. *Id.* ¶ 96. Turner felt Moraski was overstepping and showing him a different way to do the job from what Turner had been trained to do. *Id.* ¶ 97. Turner does not state that Moraski made any racial slurs at that time, however. *Id.* ¶ 98. Turner told Berndt about Moraski trying to show him how to do the job, and Berndt told him to go back and do his job. *Id.* ¶ 99. Turner responded that he was “around somebody” that made him feel unsafe and had threatened his life.

Id. ¶ 100. He stated to Berndt, “I feel like you’re all trying to play me like a fucking idiot, and I’m about to call QPS.” *Id.* ¶ 101. Berndt told Turner he did not have to do that and moved Turner back by shipping and receiving to stack cones and put them in boxes. *Id.* Moraski stayed away from Turner after that, and there were no further interactions between them. *Id.* ¶ 102. Turner did not report the incidents to QPS when they occurred. *Id.* ¶ 103.

Turner was terminated on July 1, 2019. PPFOF ¶ 4. Lakeside asserts that it decided to end Turner’s assignment based on the holistic consideration of his performance, where he demonstrated poor attendance, an inability to take direction, and an inability to get along with others. DPFOF ¶ 43. Lakeside Human Resources Director Kelly Leith reviewed Turner’s attendance records as part of the decision to terminate Turner. *Id.* ¶ 45. In the approximately three weeks Turner worked at Lakeside, he was late or absent on three days. *Id.* ¶ 46. On June 7, 2019, Turner’s second day of work, Turner was five minutes late. *Id.* ¶ 58. Two days later, on June 9, 2019, Turner punched in late at 7:02 a.m. and left work at 7:12 a.m. *Id.* ¶ 59. The EEOC contends that Turner left early because he got splashed by a car on his way to work and was soaking wet. Pl.’s Resp. to DPFOF ¶ 59. He spoke with a Lakeside employee about his soaked clothing and received permission to leave work early. *Id.* On June 28, 2019, Turner did not show up for work at Lakeside. DPFOF ¶ 60. Even though he reported the absence to QPS, he did not report it to Lakeside in accordance with the attendance policy. *Id.*

Leith also relied in part on a note from Berndt in making the termination decision. *Id.* ¶ 48. On June 30, 2019, Berndt wrote a note to Division Supervisor Scott Scholl:

Temp Brian Turner is having a lot of trouble getting along with people. He and Curt [Moraski] had issues Saturday because Brian was stickering incorrectly and went off on Curt when Curt tried to show him the right way. Curt came to get me and when I tried to separate them from working together Brian gave me attitude and told me sarcastically “I love it when people treat me like a fucking idiot” and said he was going to walk out. I calmed him down and he finished Saturday without another issue. On Sunday Brian was telling Curt how he was gonna meet

him outside so I had to keep them in different parts of the building. You may want to replace him, I don't think he's gonna be able to get along with some of the guys around here.

Id. ¶ 51. Scholl emailed the note to Leith and stated that he wanted Turner replaced. *Id.* ¶¶ 49–50. The EEOC disputes that Turner had poor performance, poor attendance, an inability to take direction, or an inability to get along with others. Pl.'s Resp. to DPFOF ¶ 43.

After QPS informed Turner of the termination of his assignment at Lakeside on July 1, 2019, Turner informed QPS that he was treated unfairly, summarized his interactions with Moraski, and indicated that he planned to get a lawyer involved. DPFOF ¶ 107. Turner told QPS that he was going to contact Lakeside, but QPS told him that he is not to contact Lakeside, as this was a situation QPS would deal with. *Id.*

On July 16, 2019, Moraski reported to Lakeside representatives that Turner's demeanor changed, that Turner did not want to listen to Moraski on how to perform tasks, and that Turner stated to Moraski, "you on the rag your [sic] acting like a bitch." *Id.* ¶ 108. Moraski indicated that Turner started in on him every time they were alone, stating that he was not going to listen to Moraski because Moraski was not a trainer. *Id.* ¶ 109. Berndt told Moraski to avoid Turner and stated he would talk to Turner about it. *Id.* ¶ 110.

On July 31, 2019, Leith and Scholl met with Lor regarding a complaint Alex Adams, a white employee, made about Moraski. *Id.* ¶¶ 111, 118. Lor indicated that Adams informed him that Moraski was threatening him, that Adams was uncomfortable working with Moraski, and that Moraski threatened Adams in the parking lot. *Id.* ¶¶ 112, 114. Lor also stated that other employees informed him that they did not want to work with Moraski due to his intimidating behavior. *Id.* ¶ 113. Moraski was very loud and agitated towards Leith and Scholl during the investigation into these complaints. *Id.* ¶ 115.

Leith and Scholl also met with Adams on July 31, 2019. *Id.* ¶ 116. Adams stated that last week Moraski stated that he “can kick everyone’s ass,” that he was going to follow Adams “out to the car and kick his ass when off work property,” and that “he should be training everyone as everyone is a dumbass in the facility.” *Id.* Adams requested not to work with Moraski.

On August 1, 2019, Leith and Scholl met with Moore. *Id.* ¶ 119. Moore reported that, on July 25, 2019, Moraski stated, “I’ll kick your mother fucking ass” and that he was “sick of [Adams’] mouth, I’m not scared of nobody.” *Id.* ¶ 120. Moore also stated that he remembered seeing and hearing Moraski verbally threaten Turner and follow Turner in his car as Turner was biking home. *Id.* ¶ 121.

That same day, Leith and Scholl met with Moraski. *Id.* ¶ 122. Moraski denied threatening anyone. *Id.* He described himself as intense and that he comes across as intimidating because he is passionate. *Id.* Leith and Scholl terminated Moraski’s employment on August 1, 2019, due to his violation of Lakeside’s workplace violence policy. *Id.* ¶ 123. Lakeside had previously addressed Moraski’s communication with other coworkers in his June 27, 2019, annual review. *Id.* In the review, it was noted that Moraski “Has a tendency to make others feel hesitant asking him/her for help as they do not know the reaction they will get. Needs to work on effective communication by speaking to others in a respectful manner. Needs to improve communication skills by being more positive when speaking to others and provide encouragement.” *Id.* ¶ 124.

On August 1, 2019, Leith advised a QPS representative that there were reports that the person Turner was talking about threatened other individuals at Lakeside as well, and that one of the employees stated he saw Moraski following Turner one day and threatening Turner. *Id.* ¶ 125. Leith apologized and stated Moraski was no longer with Lakeside. *Id.* ¶ 126. A QPS

representative asked if Turner could return to work at Lakeside, and Leith stated to let her know if Turner wanted to return and she would follow-up with the supervisor. PPFOF ¶ 16. Leith believed that she asked Lakeside’s supervisor if Turner could return to work, but she could not recall if she did. *Id.* ¶ 18. Turner did not have any conversations with QPS about returning to work at Lakeside, and Lakeside did not reach out to him or QPS to advise that Lakeside wanted him back. *Id.* ¶ 19.

LEGAL STANDARD

Summary judgment is proper where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). An issue is genuine if a reasonable trier of fact could find in favor of the nonmoving party. *Wollenburg v. Comtech Mfg. Co.*, 201 F.3d 973, 975 (7th Cir. 2000). A fact is material only if it might affect the outcome of the case under governing law. *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 990 (7th Cir. 1993). The ordinary standards for summary judgment remain unchanged on cross-motions for summary judgment: a court construes facts and inferences arising from them in favor of the party against whom the motion under consideration is made. *Blow v. Bijora, Inc.*, 855 F.3d 793, 797 (7th Cir. 2017). Summary judgment is properly entered against a party “who fails to make a showing to establish the existence of an element essential to the party’s case, and on which that party will bear the burden of proof at trial.” *Austin v. Walgreen Co.*, 885 F.3d 1085, 1087–88 (7th Cir. 2018) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

ANALYSIS

A. Hostile Work Environment Claim

The EEOC asserts that Lakeside discriminated against Turner by subjecting him to a hostile work environment based on his race. “An employer creates a hostile work environment when ‘the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is

sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Hambrick v. Kijakazi*, 79 F.4th 835, 842 (7th Cir. 2023) (quoting *Alexander v. Casino Queen, Inc.*, 739 F.3d 972, 982 (7th Cir. 2014)). To prove a hostile work environment based on race, an employee must show “(1) he or she was subject to unwelcome harassment; (2) the harassment was based on his or her race; (3) the harassment was severe or pervasive so as to alter the conditions of the employee’s work environment by creating a hostile or abusive situation; and (4) there is a basis for employer liability.” *Paschall v. Tube Processing Corp.*, 28 F.4th 805, 813–14 (7th Cir. 2022) (cleaned up).

Courts assess the totality of the circumstances when determining whether conduct is severe or pervasive and consider the following factors: “(1) the frequency of the discriminatory conduct; (2) how offensive a reasonable person would deem it to be; (3) whether it is physically threatening or humiliating conduct as opposed to verbal abuse; (4) whether it unreasonably interferes with an employee’s work performance; and (5) whether it is directed at the victim.” *Scaife v. United States Dep’t of Veterans Affairs*, 49 F.4th 1109, 1116 (7th Cir. 2022) (citation omitted). “What matters is whether the conduct became so severe or pervasive that ‘a reasonable person would find [it] hostile or abusive.’” *Hambrick*, 79 F.4th at 843 (quoting *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993)).

The EEOC asserts that Moraski created a hostile work environment when he (1) commented to Turner that, while he was in Milwaukee, he “used to knock n*****s out on the south side” and told Turner they can “go out and talk in the parking lot” after Turner told him he did not care about that type of conversation; (2) Moraski followed Turner home and told Turner to get off his bike and fight, stated he would “knock [Turner’s] n****r ass out,” and said “I’m gonna hang your n****r ass;” and (3) the following day, Turner felt Moraski was overstepping by showing Turner how to put the labels on the boxes.

The EEOC asserts that “harassment involving the N-word is sufficiently severe to create a hostile work environment.” Pl.’s Resp. Br. at 16, Dkt. No. 31. A single, isolated event can be found to create a hostile work environment. *See Scaife*, 49 F.4th at 1116 (“Because the N-word is egregious, we are not concerned with the number of times the epithet is used. A one-time use of the epithet can in some circumstances warrant Title VII liability.” (citations omitted)). But the plaintiff must present sufficient evidence from which a factfinder could reasonably conclude that the harassing conduct was severe or pervasive. *Id.* at 1116–17; *Paschall*, 28 F.4th at 813–14. Moreover, “[i]n analyzing whether the use of racial epithets creates a hostile work environment, our case law has distinguished between supervisors and coworkers.” *Paschall*, 28 F.4th at 814 (citing cases). “[A] supervisor’s use of a racial slur impacts the work environment far more severely than a coequal’s use.” *Scaife*, 49 F.4th at 1116–17. Here, there is no dispute that Moraski was Turner’s coworker. When considering the totality of the circumstances, the EEOC has not shown that Moraski’s use of the racial slur was sufficiently severe or pervasive.

Only the first incident alleged by Turner involving the racial slur occurred at work. At that time, according to Turner, Moraski and Turner were discussing how they were both from Milwaukee. Moraski commented to Turner, “While I was there, I used to knock n*****s out on the south side.” DPF0F ¶ 76. After Turner told Moraski that he did not care about that type of conversation, Moraski said “we can go out and talk in the parking lot.” *Id.* ¶ 77. Moraski did not direct the slur at Turner during the incident, and once Turner ended the conversation, Moraski walked away.

As to the second incident alleged, while Turner was biking home from work, Moraski pulled up to him in his truck and followed him. Moraski told Turner to get off his bike and fight, stated he would “knock [Turner’s] n*****r ass out,” and said “I’m gonna hang your n*****r ass.” *Id.* ¶ 84. Moraski drove off after Turner responded that he did not have time for it but came back

and made the same statements. Although Moraski directed the racial slur at Turner, this incident occurred offsite. The day after the incident, Turner reported the encounter to his Lead, who reassigned Turner to a different department. In other words, once the Lead became aware of the allegations of harassment, he took preventative action. *See Paschall*, 28 F.4th at 813.

With respect to the third incident, Moraski went over to Turner to show him how to put labels on boxes. Turner felt that Moraski was overstepping. Turner complained to his Lead, who reassigned him to the shipping and receiving department. Moraski stayed away from Turner after that, and there were no further interactions between them. To the extent the EEOC argues that Moraski was hostile during this encounter, the record does not support a reasonable inference that any hostility Turner encountered was connected to his race. *See Cole v. Bd. of Tr. of N. Ill. Univ.*, 838 F.3d 888, 897 (7th Cir. 2016). Moraski did not make any racial slurs at that time. The EEOC has not provided evidence that this conduct occurred because Turner was African American.

The EEOC has not identified any other incidents during Turner's employment at Lakeside with Moraski connected to race. Moraski's conduct was undoubtedly offensive and inappropriate, and he was ultimately terminated by Lakeside based on complaints of similar behavior he engaged in with other co-workers, but with no racially derogatory component. Given the totality of the circumstances, Moraski's conduct was not severe or pervasive such that a jury could reasonably conclude that Lakeside's work environment was "permeated with discriminatory intimidation, ridicule, and insult." *Hambrick*, 79 F.4th at 842. Because no reasonable jury could conclude that Turner experienced a hostile work environment based on race, Lakeside's motion for summary judgment as to the EEOC's hostile work environment claim will be granted.

B. Termination Claim

The EEOC also asserts that Lakeside terminated Turner because of his race. Title VII prohibits employers from firing employees on account of their membership in a protected class. In the Seventh Circuit, “plaintiffs can rely on two frameworks to show discrimination.” *Vichio v. US Foods, Inc.*, 88 F.4th 687, 691 (7th Cir. 2023). Under the “holistic approach” established in *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760, 765 (7th Cir. 2016), courts look at evidence in the aggregate to determine whether it allows an inference of prohibited discrimination. Under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden-shifting framework, the plaintiff has the initial burden to establish a *prima facie* case of discrimination, then the burden shifts to the defendant to provide a legitimate, non-discriminatory reason for the employment decision, and finally, the burden shifts back to the plaintiff to establish that such justification was pretextual.

In this case, the EEOC relies on the *Ortiz* “holistic approach.” The inquiry before the court is whether, based on the record as a whole, “a reasonable jury could conclude that the plaintiff suffered the adverse employment action because of his membership in a protected class.” *Ortiz*, 834 F.3d at 764–65. Turner was terminated in July 2019 based on poor attendance, an inability to take direction, and an inability to get along with others.

The EEOC has not created a genuine dispute of material fact over whether Turner met Lakeside’s legitimate expectations at the time of his termination. The EEOC asserts that Turner had good performance and cites evidence that Moore, who trained Turner, and Lor, one of Turner’s Leads, indicated that he was a good worker. The EEOC argues that Berndt’s note about Turner’s inability to get along with others did not contain the entire interaction and that Turner’s comment to Berndt that “I love it when people treat me like a fucking idiot” was taken out of context. It contends that Turner did not make the comment because he did not want to be trained

but because he was frustrated that Berndt ignored his complaints about Moraski. But there is no dispute that Turner made the comment to his Lead. Even if Scholl and Leith relied upon incomplete information in Berndt's note regarding Turner's performance, Lakeside also terminated Turner for poor attendance. The EEOC asserts that Turner was on time eleven of the days he worked at Lakeside, but there is no dispute that Turner was late for work twice or that he was absent from work one day without properly notifying Lakeside. Although the EEOC argues that neither Berndt nor Scholl recommended that Turner be terminated for attendance, Leith looked at Turner's attendance records as part of the holistic consideration of his performance. The fact that no one recommended to human resources that Turner be terminated based on his attendance does not make Lakeside's assertion that it terminated Turner in part due to poor performance untrue.

In an effort to show pretext, the EEOC argues that Turner was treated differently than a similarly situated comparator. It asserts that Berndt, a white employee, was treated more favorably than Turner because Berndt had only received a verbal warning after accruing three unscheduled absences. "Employees typically are similarly situated if they had the same supervisor, were subject to the same employment standards, and engaged in similar conduct." *Majors v. Gen. Elec. Co.*, 714 F.3d 527, 538 (7th Cir. 2013). The EEOC asserts that Turner and Berndt dealt with the same supervisor (Division Supervisor Scholl); were subject to the same standards in that attendance was a requirement of the job; and engaged in similar conduct. Berndt is not a meaningful comparison in this case because, as Lead, Berndt was Turner's supervisor. "[O]rdinarily it will not be the case that a plaintiff is similarly situated to another employee when the plaintiff is subordinate to that employee." *Burks v. Wis. Dep't of Transp.*, 464 F.3d 744, 751 (7th Cir. 2006) (citation omitted). Thus, a jury could not infer race discrimination based on differing treatment.

Turner had certain expectations for the performance of his job as a temporary employee. He appears to have failed to fulfill those expectations and was terminated. “[I]t is not the court’s concern that an employer may be wrong about its employee’s performance, or be too hard on its employee.” *Ineichen v. Ameritech*, 410 F.3d 956, 961 (7th Cir. 2005) (cleaned up). The evidence, viewed as a whole, would not permit a factfinder to conclude that Turner’s race was the cause of his termination. Accordingly, Lakeside’s motion for summary judgment on the EEOC’s wrongful termination claim is granted.

C. Retaliation Claim

The EEOC alternatively asserts that Lakeside retaliated against and terminated Turner in response to his complaints about harassment. Title VII protects an employee who has acted to oppose an unlawful employment practice from retaliation by his employer. *Lewis v. City of Chicago*, 496 F.3d 645, 654–55 (7th Cir. 2007). To prevail on a retaliation claim, the plaintiff must show that “(1) she engaged in statutorily protected activity; (2) she suffered an adverse action taken by the employer; and (3) there was a causal connection between the two.” *Id.* at 655. “As with discrimination claims, the question for a retaliation claim should always be: ‘Does the record contain sufficient evidence to permit a reasonable fact finder to conclude that retaliatory motive caused the discharge?’” *Igasaki v. Ill. Dep’t of Fin. & Prof. Reg.*, 988 F.3d 948, 959 (7th Cir. 2021) (quoting *Lord v. High Voltage Software, Inc.*, 839 F.3d 556, 563 (7th Cir. 2016)).

The EEOC contends that Turner engaged in statutorily protected activity when he complained to Lor and Berndt about Moraski’s conduct. Lakeside maintains that the EEOC has not established that the timing of Turner’s termination was suspicious because neither Scholl nor Leith knew of Turner’s protected activity at the time of his termination. The EEOC concedes that Scholl and Leith did not have knowledge of Turner’s reports at the time of his termination.

It nevertheless argues that Lakeside is liable under a “cat’s paw” theory of liability because Scholl and Leith “rubber stamped” Berndt’s recommendation to terminate Turner. Pl.’s Resp. Br. at 29.

The cat’s paw theory applies “when a biased supervisor who lacks decisionmaking power uses the formal decision maker as a dupe in a deliberate scheme to trigger a discriminatory employment action.” *Vesey v. Envoy Air, Inc.*, 999 F.3d 456, 461 (7th Cir. 2021) (internal quotation marks and citation omitted). The EEOC argues that Berndt exhibited animus when he ignored Turner’s complaints of harassment and recommended that Turner be terminated instead of Moraski. But the EEOC has not established that Berndt wrote the note as part of a “deliberate scheme to trigger a discriminatory employment action.” *Id.*

Even if Berndt had a retaliatory motive, “the mere fact that an employee’s wrongdoing was reported by a biased supervisor with a retaliatory or discriminatory motive does not establish liability under a cat’s paw theory.” *Id.* at 462. Stated differently, it is not enough to show that the supervisor acted with bias; a plaintiff “must show that the biased supervisor’s actions were a proximate cause of the adverse employment action.” *Id.* Proximate cause does not exist when there are “independently sufficient reasons” for the formal decisionmaker to take the adverse action. *Id.* (citation omitted). In this case, Lakeside terminated Turner based, in part, on his poor attendance. In the less-than-four-weeks he worked at Lakeside, Turner had violations of the attendance policy on three days. This was an independently sufficient reason to terminate Turner’s assignment at Lakeside. Moreover, the EEOC has offered no evidence that Berndt was racially biased against Turner. Accordingly, the EEOC has not presented evidence creating a genuine dispute that would allow a reasonable jury to conclude that Turner was terminated in retaliation for his complaints.

The EEOC also asserts that a jury could find that Lakeside refused to rehire Turner in retaliation for his discrimination complaints. However, Lakeside did not refuse to rehire Turner. A QPS representative asked if Turner could return to work at Lakeside, and Leith stated to let her know if Turner wanted to return and she would follow-up with the supervisor. No further conversations about Turner returning to Lakeside occurred. In short, the EEOC has not established retaliation on this basis.

Finally, the EEOC argues that a jury could find that Lakeside discriminated against Turner because of his race and complaints under a “race plus” theory. Pl.’s Resp. Br. at 30. The EEOC acknowledges that the Seventh Circuit has not recognized this theory, and its argument is too undeveloped to compel a finding in its favor on this basis. For these reasons, Lakeside’s motion for summary judgment on the EEOC’s retaliation claim is granted.

CONCLUSION

For these reasons, Lakeside’s motion for summary judgment (Dkt. No. 22) is **GRANTED**. The EEOC’s motion for partial summary judgment (Dkt. No. 18) is **DENIED**. The case is dismissed. The Clerk is directed to enter judgment accordingly.

SO ORDERED at Green Bay, Wisconsin this 3rd day of June, 2024.

s/ William C. Griesbach

William C. Griesbach
United States District Judge