STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON

SIMEON ANDERSON,

Plaintiff,

v.

File No. 12-2235-CD

Hon. Richard N. LaFlamme

CONSUMERS ENERGY COMPANY,
a Michigan corporation for profit,
STEVE STUBLESKI in his individual and official capacity, and **MICHAEL TORREY**, in his individual and official capacity,
Jointly and Severally,

Defendants, and

CONSUMERS ENERGY COMPANY,

Counter-Plaintiff,

v.

SIMEON ANDERSON,

Counter-Defendant.
_____/

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

Brief Procedural History

Plaintiff Simeon Anderson ("Anderson") initiated this action as a result of a series of alleged acts relating to his treatment by Defendant Consumers Energy Company ("Consumers") and its employees, Steve Stubleski ("Stubleski") and Michael Torrey ("Torrey"), while Plaintiff was employed by Consumers under the supervision of Stubleski and Torrey. Anderson's allegations include: hostile work environment by reason of pervasive race discrimination, in violation of the Michigan Elliott-Larsen Civil Rights Act ("ELCRA"), MCL 37.2103 *et seq*; unlawful retaliation, in violation of

ELCRA, MCL 37.2701; conspiracy and concert of actions by Defendants, in violation of ELCRA, MCL 37.2701; violation of the Michigan Whistle-Blower Protection Act ("WPA"), MCL 15.361 *et seq*; and, intentional infliction of emotional distress.

On September 9, 2016, Defendants filed a Motion for Summary Disposition against all of Plaintiff's claims. On October 3, 2016, Plaintiff filed a Response. On October 4, 2016, a Motion Hearing was held regarding this matter and this Court granted Defendants' Motion for Summary Disposition as to Plaintiff's WPA claim and took the other claims under advisement.

Facts

Anderson was hired as an at-will employee by Consumers on July 18, 2011, as a Rate Analyst in the Department of Rates and Regulatory Affairs. Immediately after his hire, Anderson requested formal training in Statistical Analysis System ("SAS"), a computer program of which he claimed to have knowledge in his interview for the position. Defendant Stubleski, Anderson's supervisor, explained that the majority of training for the position was on-the-job training and that no formal training was offered. Anderson suggested to Stubleski that he could take a course in SAS at Michigan State University ("MSU"), if Consumers would pay for it, in order to bring his SAS skills up to speed. Stubleski approved Anderson's taking the course, which met once a week during regular business hours, from 12:40 p.m. to 2:40 p.m., and obtained funding approval from Consumers for the class and mileage. Shortly after the class began, Anderson emailed Stubleski stating that he would have to cut back on his work at Consumers in order to do well in the class. Stubleski agreed that Anderson should devote enough time to his class but that he should prioritize and balance his work obligations. Contrary to Stubeleski's direction, Anderson began taking additional time off without permission throughout the week for this class.

According to Anderson, Consumers appointed him to a supervisory position of load researcher within two weeks of his start date and required him to take this class at MSU. Anderson later stated the class was actually an epidemiology class which was irrelevant to his job. Additionally, Anderson would sign his emails as "Cost-of-Service Trainee", despite being directed to stop doing so by Stubleski, because no such title existed at Consumers. Moreover, Anderson contacted Pam Bolden from Human Resources regarding his training and problems adjusting to working in a big company, but then changed his mind, asking her not to take any action. Additionally, Anderson alleges that Consumers "set him up for failure" through inadequate training and then lied about the training which he received by falsifying and/or backdating documents.

According to Consumers, Anderson also sent, inappropriately, customer account data which mistakenly included a few commercial accounts, to an outside contractor that was working with residential customer accounts only. Anderson claims Eric Keaton, another of Anderson's supervisors, sent the incorrect information. Consumers had to remove the commercial data previously supplied to the contractor in order to have proper data for the residential customer survey. Anderson believed this inclusion and then removal of data was part of a conspiracy to overcharge residential customers. (However, the removal of the commercial data would actually ensure that residential customers were paying an appropriate amount rather than being overcharged, a fact apparently overlooked by Anderson).

After the removal of the commercial data from the report to the contractor, Anderson began trying to gather evidence to prove a conspiracy through secretly taping the conversations of his supervisors and co-workers, including at team meetings. He also secretly took trips to some of addresses listed for the commercial data which was removed to verify that the property was commercial in nature. Anderson also began downloading and taking home confidential data from Consumers.

During the last week that he worked, Anderson improperly downloaded over a terabyte of confidential information from Consumers. According to Anderson, he took that information in order to work with it from home. In actuality, the entirety of the information taken was submitted by Anderson to the Michigan Public Service Commission, several governmental departments, and a "consumer watch dog" group whose name he could not recall.

Anderson, who is African-American, also claims that he was being harassed based on his race while working at Consumers. Anderson's allegations of racial discrimination include the following acts: a white male employee took Anderson's bottle of water from his hand to look at it and then put it down on the table; a white male employee holding a training session told Anderson and a white female employee that they would not have any homework because they had been a good boy and a good girl; and, at another time, he claims he heard a white male employee say, "White guys can't afford to give work away." Anderson spoke with a Greg Ward, an African-American man on the Consumers' Minority Advisory Panel about his concerns, but never filed a report regarding any incident. According to Anderson, he also spoke with Stubleski about being harassed due to his race and Stubleski improperly failed to investigate these claims. Anderson claims that Stubleski, and his supervisor, Michael Torrey, conspired to discriminate against Anderson and create a hostile work environment based on his race. Anderson claims to have suffered severe emotional distress as a result of treatment by Stubleski and Torrey and his alleged wrongful discharge.

In February 2012, Stubleski gave Anderson a performance evaluation about which he testified he had never given so many checks in the "development" area. After the evaluation, Stubleski set Anderson's employee objectives and Anderson refused those objectives and changed them all to more limited objectives, as set by himself. Stubleski was frustrated with Anderson because, as stated in his

email to Eric Wojciechowski on April 17, 2012, “I can’t have an employee who doesn’t want to accept responsibility for carrying his share of the assignments.”

That night, Anderson sent Stubleski an email stating that he planned “to tell the truth” if he ever provided testimony to the Michigan Public Service Commission (“MPSC”) in a rate case. Stubleski, confused, replied to Anderson asking what he was talking about and that to his knowledge, no one on their team had ever violated the company’s Ethics policy. Stubleski asked Anderson if he was aware of anyone who had not provided truthful answers in testimony or exhibits regarding load or cost studies but Anderson did not provide any names.

At this point, Stubleski was having weekly meetings with Anderson to discuss his job performance and training, and Keaton was having training sessions with Anderson almost every day. On April 18, 2012, Anderson got into an argument with Keaton regarding his training and Keaton reported the argument to Stubleski. Anderson also made it clear that he did not want any further training from Keaton, even though he was the only employee at Consumers who was able to conduct that type of training.

On Sunday, April 23, 2012, Anderson emailed Stubleski that he would not be at work the next day due to a family emergency and might be out for several days. Stubleski tried to call Anderson but had no response. Anderson was absent the entire work week from April 23-27. Anderson showed up for work on Monday, April 30, but sent Stubleski an email that night stating that he would be absent from work again until noon due to the previous family emergency. Anderson did not show up for work at all on Tuesday, May 1. Anderson later testified that his family emergency was that his father was out of town when a vehicle collided with the corner of his church and he felt that he needed to be at the church in case the accident was a part of a plan to break into the church.

Defendant Consumers terminated Plaintiff/Counter-Defendant's employment on May 2, 2012. According to Plaintiff/Counter Defendant Anderson, he was terminated in retaliation for filing, or being about to file, a Michigan Whistle-Blower Protection Act claim against Defendant/Counter-Plaintiff Consumers. According to Defendant/Counter-Plaintiff Consumers, Anderson was terminated for poor job performance and/or poor job fit.

Anderson filed, and then later attempted to withdraw, a Complaint regarding Consumers to the MPSC. Instead, the MPSC dismissed Anderson's Complaint with prejudice.

Analysis

I. Summary Disposition Standard

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Dressel v. Ameribank*, 468 Mich. 557, 561, 664 NW2d 151 (2003). Where the proffered evidence establishes that no genuine issue of material fact exists between parties, excluding damages, the moving party is entitled to judgement as a matter of law. *Miller v. Purcell*, 246 Mich. App. 244, 246, 631 NW2d 760 (2001). The moving party has the burden of supporting its position through affidavits, depositions, admissions, or other documentary evidence. *Neubacher v. Globe Furniture Rentals*, 205 Mich. App. 418, 420, 522 NW2d 335 (1994). The burden then shifts to the nonmoving party to establish through documentary evidence that a genuine issue of material fact exists. *Id.* The non-moving party may not rest upon mere allegations, but must set forth specific facts showing there is a genuine issue for trial. *Quinto v. Cross & Peters Co.*, 451 Mich 358, 362, 547 NW2d 314 (1996).

In evaluating a motion brought under MCR 2.116(C)(10), the court considers the record in the light most favorable to the nonmoving party. *Ritchie-Gamester v. City of Berkley*, 461 Mich. 73, 76, 597 NW2d 517 (1999). A genuine issue of material fact exists where the record, viewed in the light

most favorable to the nonmoving party, leaves open an issue upon which reasonable minds may differ. *West v. GMC*, 469 Mich.177, 183, 665 NW2d 468 (2003).

II. ELCRA Race Discrimination Claim

A plaintiff must establish "a causal link between the discriminatory animus and the adverse employment decision" through either direct or indirect evidence. *Gibbs v Voith Indus Services, Inc*, 60 F Supp 3d 780, 791 (ED Mich 2014), quoting *Sniecinski v Blue Cross & Blue Shield of Mich.*, 469 Mich. 124, 666 N.W.2d 186, 193 (2003). "[A] plaintiff must present direct proof that the discriminatory animus was causally related to the adverse employment decision." *Sniecinski*, 666 N.W.2d at 193.

For purposes of establishing a prima facie case through indirect evidence, "similarly situated" employees must be similarly-situated in all respects. "Thus, to be deemed "similarly-situated," the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Gibbs v Voith Indus Services, Inc*, 60 F Supp 3d 780, 791, citing *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir.1992). "[A] successful prima facie case raises an inference of discrimination only because the court presumes these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Gibbs v Voith Indus Services, Inc*, 60 F Supp 3d at 791, quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

Plaintiff/Counter-Defendant Anderson alleges that: a white male employee took Anderson's bottle of water from his hand to look at it and then put it down on the table; a white male employee holding a training session told Anderson and a white female employee that they would not have any homework because they had been a good boy and a good girl; and, at another time, he had heard a

white male employee say, “White guys can’t afford to give work away.” Anderson spoke with a Greg Ward, an African-American man on the Consumers’ Minority Advisory Panel about his concerns, but never filed a report regarding any incident with his employer. Anderson also alleged that he did not receive the same training as other employees while his employer alleges he received more training than any previous employee in his position. Anderson alleges his termination was an adverse employment action resulting from racial discrimination.

Under the direct evidence test, Anderson’s claims of racial discrimination resulting in his termination fail because he presents no direct evidence which links his termination to an act or acts of racial discrimination. The acts Anderson refers to as racially discriminatory were unrelated, isolated incidents regarding vague acts and statements, and further, did not involve any of his supervisors who would have had any authority regarding his termination. *See, e.g., Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1025–26 (6th Cir.1993) (holding that the defendant's comment that the plaintiff's upcoming 55th birthday was a “cause for concern” was too ambiguous to give rise to an inference of age discrimination and therefore was not direct evidence); *see also Wilson v. Chipotle Mexican Grill, Inc.*, 580 Fed.Appx. 395, 399 (6th Cir.2014) (an isolated or “stray remark does not suffice by itself to show the differential treatment required to establish a prima facie case” of discrimination); *Wolfgang v. Dixie Cut Stone & Marble, Inc.*, No. 285001, 2010 WL 199595, at *2, 2010 Mich.App. LEXIS 130, at *2 (Mich.Ct.App. Jan. 21, 2010) (unpublished decision) (“[A] stray remark that is outside the context of the termination decision is not necessarily probative of an employer's discriminatory intent.”). Moreover, Anderson has presented no proof that his employer was aware of his claims of racial discrimination prior to his termination. Thus, there is no direct evidence linking Anderson’s termination with a racially discriminatory animus.

Under the *McDonnell Douglas* test for indirect evidence, Anderson's claims that racial discrimination led to his termination also fail under the law. The acts of racial discrimination alleged by Anderson, as described above, bear no causal connection to his termination; neither do the acts "raise an inference of discrimination" because Anderson's termination may be otherwise explained by non-pretextual business reasons, such as Anderson's poor job performance, poor job fit, and failure to gain permission from his employer before unexpectedly taking a week off. Further, Anderson identified no similarly situated employees who received different treatment, and the evidence demonstrates that Consumers provided him with regular one-on-one job training for almost the entire tenure of his employment, which was more training than any other employee received who had held his position.

Therefore, even when viewed in the light most favorable, Anderson's factual claims fail to rise to the level of disparate treatment based on race discrimination under the ELCRA because Anderson has failed to prove a causal connection between the racially discriminatory acts alleged and his termination. Therefore, Defendants/Counter-Plaintiffs are entitled to judgment as a matter of law.

III. ELCRA Hostile Work Environment Claim

A prima facie case of ELCRA discrimination based on hostile work environment under the ELCRA must show:

> (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of the protected status; (3) the employee was subjected to unwelcome conduct or communication on the basis of the protected status; (4) the unwelcome conduct or communication was intended to, or in fact did, interfere substantially with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior.

Gibbs v Voith Indus Services, Inc, 60 F Supp 3d 780, 795–96 (ED Mich 2014) (internal citations omitted). In determining whether a hostile work environment exists, the standard is "whether a reasonable person, in the totality of circumstances, would have perceived the conduct at issue as

substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Gibbs v. Voith Industrial Services, Inc.*, 60 F Supp 3d at 791. To show a hostile work environment under the ELCRA, evidence must show a workplace "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." *Gold v. FedEx Freight E., Inc. (In re Rodriguez)*, 487 F.3d 1001, 1010 (6th Cir.2007) (internal citations omitted). Mere simple teasing, offhand comments, and isolated incidents will not amount to discriminatory changes in the terms and conditions of employment. *Id.*

Anderson alleges three isolated incidents, described in the above section, which, when viewed in the light most favorable, constitute at most mere insults or annoyances. *Id.* These isolated incidents do not rise to the level of creating a workplace "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." *Id.*

The Court finds that no genuine issue of material fact exists as to whether the facts alleged constitute a hostile work environment based on race discrimination because the claims, even if true, do not rise to a level sufficient to constitute a hostile work environment under the ELCRA. Accordingly, Defendants/Counter-Plaintiffs are entitled to summary judgment as a matter of law.

IV. ELCRA Unlawful Retaliation Claim

The ELCRA prohibits retaliation against any person "because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." MCL 37.2701. To make out a prima facie case of retaliation under the ELCRA, the plaintiff must establish a causal link between participation in the protected activity and the adverse employment treatment complained of. *Kocenda v Detroit Edison Co*, 139 Mich App 721, 363 NW2d 20 (1984). The

plaintiff's prima facie case must include evidence that he or she engaged in protected activity, the employer knew about the activity, the employer took action that was adverse to the plaintiff, and there was a causal connection between the protected activity and the adverse employment action. *See Polk v Yellow Freight System, Inc*, 876 F2d 527 (6th Cir 1989). Federal courts have held that the shifting burden approach must be employed. After the plaintiff proves a prima facie case, the employer must advance a legitimate, nondiscriminatory reason for the adverse action. The plaintiff must then prove that the employer's reason was a pretext for retaliation. *Id.*

Anderson alleges that his termination was retaliatory. Anderson offers as proof of his protected activity that he spoke with a Greg Ward, an African-American man on the Consumers' Minority Advisory Panel about his concerns regarding race discrimination, but never filed a report or complaint regarding any incidence of discrimination with his employer. Therefore, Anderson has failed to prove that he engaged in protected activity, such as making a "charge, fil[ing] a complaint, testify[ing], assist[ing], or participat[ing] in an investigation, proceeding, or hearing" against his employer. MCL 37.2701. Further, Anderson has failed to prove that his employer was aware of any protected activity in which he might have engaged prior to his termination. Thus, Anderson has failed to prove that he was engaged in any protected activity under the ELCRA at the time of his discharge – a requisite element of a retaliation claim. Additionally, Defendants/Counter-Plaintiffs have provided substantial evidence showing a legitimate, nondiscriminatory reason for Anderson's termination based on his unsatisfactory job performance, job fit, and unexcused absences.

As a matter of law, and in viewing the facts in the light most favorable, Plaintiff/Counter-Defendant Anderson has not alleged sufficient facts, which, if true, would prove that his termination was a result of his being engaged in protected activity under the ELCRA. Therefore, Defendants/Counter-Plaintiffs are entitled to summary disposition as a matter of law.

V. ELCRA Conspiracy and Concert of Actions Claim

Given that the Court has determined that Plaintiff/Counter-Defendant Anderson did not allege sufficient facts to prove racial discrimination, a hostile work environment, or retaliatory discharge claim under ELCRA, it follows that there can be no conspiracy between Torrey and Stubleski to discriminate or retaliate against Anderson. Further, Anderson points to no specific direct or indirect acts of racial discrimination suffered at the hands of either Torrey or Stubleski. Testimony even shows evidence to contrary, with Stubleski making repeated efforts to afford Anderson with the additional training he requested, even at company expense, and more training than any other employee. Moreover, no specific allegations were made against Torrey, other than that he supervised Stubleski and "his decisions."

Therefore, no genuine issue of material fact remains and Defendants/Counter-Plaintiffs are entitled to judgment as a matter of law as to Plaintiff/Counter-Defendant's conspiracy and concert of action claim.

VI. Michigan Whistle-Blower Protection Act Claim

Plaintiff/Counter-Defendant's Michigan Whistle-Blower Protection Act ("WPA") Claim against Defendants/Counter-Plaintiffs was dismissed after a hearing, on October 4, 2016, by Order of this Court GRANTING Defendants/Counter-Plaintiffs' Motion for Summary Judgement, filed October 13, 2016, based on Plaintiff/Counter-Defendant's failure to allege sufficient facts to show that he had reported or was about to report Defendants/Counter-Plaintiffs' violation of any law, regulation, or rule to a public body. *See Chandler v Dowell Schlumberger Inc.*, 456 Mich. 395, 399 (1998); *Pace v. Edel-Harrelson, et al*, 499 Mich. 1 (2016) (there is no recourse under the WPA for future, planned, or anticipated acts which would constitute a violation).

VII. Intentional Infliction of Emotional Distress

In order to establish a claim for intentional infliction of emotional distress ("IIED") under Michigan law, Anderson must demonstrate "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Lewis v. LeGrow,* 258 Mich.App. 175, 670 N.W.2d 675, 689 (2003) (citations omitted). Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Doe v. Mills*, 212 Mich.App. 73, 91, 536 N.W.2d 824 (1995). Accordingly, "liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Lucas v Awaad*, 299 Mich App 345 (2013), quoting *Doe v. Mills*, 212 Mich. App. 91.

Anderson alleges that Defendant Consumers and its employees engaged in conduct which includes: a white male employee took Anderson's bottle of water from his hand to look at it and then put it down on the table; a white male employee holding a training session told Anderson and a white female employee that they would not have any homework because they had been a good boy and a good girl; and, at another time, he had heard a white male employee say, "White guys can't afford to give work away."

The two comments and one action complained of by Anderson, viewed in the light most favorable to Plaintiff, do not amount to more than mere insults, annoyances, or petty trivialities. *Lucas v Awaad*, 299 Mich App 345; *see Warren v. June's Mobile Home Vill. & Sales, Inc.*, 66 Mich.App. 386, 392, 239 N.W.2d 380 (Mich.Ct.App.1976) ("It is not clear that an unfriendly attitude and name-calling constitute extremely outrageous conduct."). Even repeated incidents of foul language and name-calling in the workplace have been insufficient to state a claim for intentional infliction of emotional distress.

See, e.g., *McKee v. RAM Prods., Inc.*, No. 92–481, 1993 U.S. Dist. LEXIS 7346, at *1, 17 (W.D.Mich. Apr. 23, 1993) (Use of "foul language on a regular basis with respect to both men and women, calling women 'bitches' and using 'F' words and references to body parts to describe men, including his boss... fail to establish either extreme and outrageous conduct or severe emotional distress."). Thus, even when viewed in the most favorable light, Plaintiff/Counter-Defendant Anderson has not alleged sufficient facts, which if true, would prove that Defendants/Counter-Plaintiffs engaged in any conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Doe v. Mills*, 212 Mich.App. 73, 91, 536 N.W.2d 824 (1995).

Therefore, as a matter of law, Defendants/Counter-Plaintiffs are entitled to summary disposition. Thus, Defendants/Counter-Plaintiffs' Motion for Summary Disposition is GRANTED as to Plaintiff/Counter-Defendant's intentional infliction of emotional distress claim.

IT IS SO ORDERED.

This is a final order which disposes of all remaining claims and closes the file.

Dated: December 6, 2016

/s/ Richard N. LaFlamme
Richard N. LaFlamme, Circuit Court Judge

The undersigned certifies that a copy of the above document was served upon attorneys of record by first class mail.

Dated: December 6, 2016

/s/Jenna Furman
Jenna Furman, Judicial Attorney