IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

FREDRICK THOMAS, Plaintiff, vs. PERFORMANCE CONTRACTORS, INC., Defendant.	No. C17-4058-LTS **ORDER**

I. INTRODUCTION

Plaintiff Fredrick Thomas has sued the defendant, Performance Contractors, Inc. (PCI), alleging that he was subjected to unlawful retaliation, racial discrimination and a hostile work environment while employed at a PCI construction site in Sergeant Bluff, Iowa. This case was originally filed in the District Court for Woodbury County on August 16, 2017, and was removed to this court on September 22, 2017, on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332. In his state court petition, Thomas alleged three violations of Iowa Code Chapter 216 (the Iowa Civil Rights Act) (ICRA): (1) discrimination on the basis of race and retaliation; (2) unequal pay based on race; and (3) harassment based on race. Doc. No. 3.

Thomas filed an amended complaint (Doc. No. 15) on February 21, 2018, in which he added six more counts that mirror the original three. Counts 4 through 6 allege race discrimination and retaliation, unequal pay based on race and harassment based on race in violation of Title VII of the Civil Rights Act of 1964. *Id.* Counts 7 through 9 make the same allegation in alleging violations of 42 U.S.C. § 1981. *Id.* Thomas requests punitive damages with regard to Counts 4 through 9. *Id.*

The case is now before me on PCI's motion (Doc. No. 36) for summary judgment. Thomas has filed a resistance (Doc. No. 49) and PCI has filed a reply (Doc. No. 54). PCI has also filed a motion (Doc. No. 56) in limine to which Thomas has not yet responded. The motion for summary judgment is fully submitted and ready for decision. The parties have not requested oral argument and, in any event, I find argument to be unnecessary in light of the parties' extensive briefing of the issues. Trial is scheduled to begin on January 28, 2019.

II. RELEVANT FACTS

The following facts are undisputed, except where noted otherwise.

PCI is a private industrial construction contractor, headquartered in Baton Rouge, Louisiana. PCI engages in industrial construction throughout the United States. From 2014 to 2016,[1] PCI operated a project at the CF Industries Port Neal plant near Sergeant Bluff, Iowa. The company employed over 2,000 workers on this project. Thomas began his employment with PCI at the Port Neal project in September 2014.[2] He was initially hired as a laborer, as he had no previous industrial construction experience and no skilled trade certifications.[3] While disagreeing as to the precise sequence of events, the parties

[1] Thomas denies this date range for lack of knowledge and claims the citation does not support the alleged dates. Doc. No. 49-2 at 1. The parties have not provided specific page citations, which is a consistent issue throughout PCI's statement of facts. However, Andy Morel's deposition indicated that he was the Field Human Resources (HR) Manager for the Port Neal project from January 2014 until July 2016. Doc. No. 49-4 at 18–19. Thomas began his employment in 2014.

[2] The parties dispute Thomas' exact start date in September. Doc. No. 49-2 at 2. PCI alleges that the start date was September 29, 2014, which is supported by Thomas' deposition. Doc. No. 36-3 at 5. In his response to PCI's statement of facts, Thomas alleges that he was hired on September 26, 2014, which is supported by a W-4 form. Doc. No. 51-2 at 72. Either way, it is clear Thomas began his employment in September.

[3] The parties dispute the duties of a laborer as well as the standard pay rate for laborers compared to Thomas' actual starting wage. Doc. No. 49-2 at 2.

agree that by no later than March 9, 2015, Thomas had been promoted to the position of foreman and had received a pay increase from $25 per hour to $34 per hour.

Thomas claims he faced racial discrimination and harassment during the course of his employment, as shown by unequal pay raises and promotions,[4] use of derogatory terms and phrases by supervisors, unequal access to training, and unequal access to vehicles on the job site. Specifically, he claims he was subjected to racial harassment and discrimination from two PCI employees: Victor Matteson and Leroy Courville. Matteson was a foreman on the job site and performed work as a General Foreman for several months before he received the corresponding pay rate. Courville was Thomas' Area General Foreman. Thomas claims that at various times during the course of his employment, Matteson called him "Willie."[5] Thomas also claims that Matteson called him "boy" during an eight-week period between October 1, 2014, and the end of November 2014. Thomas states he complained about Matteson's behavior to both Courville and to Andy Morel in HR, which PCI disputes.

Thomas also claims that he attempted to obtain a truck for himself and his crew multiple times but was never given one.[6] According to Thomas, he first approached Matteson for a vehicle, but Matteson told him there were not any available. Thomas then

---

[4] With respect to pay, Thomas claims he was promoted to foreman on December 20, 2014, but did not receive the standard foreman pay rate until March 2015. Doc. No. 49-2 at 3–4. PCI claims he was not promoted to a foreman position until March 2015. *Id.* The details of this dispute will be discussed further below.

[5] The parties dispute that Matteson called Thomas "Willie" and PCI states that even if he did, it was not to be disrespectful. Doc. No. 49-2 at 7.

[6] PCI disputes that anyone intentionally refused to provide Thomas with a truck and Courville states that he obtained a truck for Thomas within a week to a week and half of Thomas asking for one. Doc. No. 41-1 at 29. For purposes of understanding the dispute, I have described the circumstances based on Thomas' deposition testimony. Doc. No. 49-4 at 155–57. It is unclear when these conversations allegedly happened.

talked to Courville, who said he would get a truck for Thomas but never did. Thomas then complained to Jimmy Kern, the Project Manager. Kern indicated that he acquired a vehicle and gave the keys to Courville to give to Thomas. Thomas believes Courville gave the vehicle to a white employee instead. Thomas went to Kern a second time. Kern ordered another vehicle but Courville did not deliver it. Kern then promised to provide Thomas a truck for the third time. Thomas alleges that Courville gave that new truck to another employee, Mona Nobles, and gave Nobles' old truck to Thomas.

Thomas alleges that in late October or November 2014, he went to Andy Morel, the on-site HR representative, to complain about harassment, work assignments and pay issues.[7] Thomas also alleges he made a second complaint to HR at some point afterwards, but it is unclear on what date that occurred.[8] On March 13, 2015, Thomas was involved in an accident between a buggy and forklift. Thomas was the driver of the buggy. He was suspended for three days due to that accident.[9] On September 28, 2015, Thomas had a third meeting with Morel to complain about discriminatory conduct by Courville.[10] Thomas submitted a written statement to Morel.

In October 2015, Jeremy Sharp, a General Foreman, directed Thomas and his crew to install heater hoses underneath boilers. The boilers were draped with tarps,

[7] PCI denies that he spoke to Morel. Doc. No. 54-1 at 6.

[8] There is no record other than Thomas' deposition testimony of the first and second complaints to HR. *See* Doc. No. 49-4 at 147–48.

[9] Thomas disputes that he was responsible for the accident and briefly argues that he was suspended in retaliation for his previous complaints of race discrimination and harassment. Doc. No. 49-2 at 12.

[10] The parties dispute the specifics of the complaints and how many issues Thomas discussed with Morel during that meeting. Doc. No. 49-2 at 13. This complaint is allegedly the third time Thomas went to HR, but this is the only complaint with a corresponding document in the record. *See* Doc. No. 36-3 at 35–36. Morel does not recall any other complaints and does not have record of any other complaints.

which PCI contends created a "confined space" as defined by OSHA.[11] Sharp instructed Thomas to roll up and secure the tarps in order to eliminate the confined space. Instead, Thomas lifted the tarps and threw the hoses underneath without rolling them up and securing them, which PCI alleges constituted unapproved entry into the confined space.[12] Thomas had received training on September 29, 2014, and was aware that employees could not enter a confined space without following proper guidelines and receiving approval.[13] Other employees have been discharged for breaking the plane of a confined space.

Thomas' crew complained to Sharp that Thomas was directing them to violate confined space safety rules. PCI also contends the crew complained that Thomas cussed at them and used offensive language when they tried to explain Sharp's instructions to him.[14] Thomas knew he should not yell at his crew.[15] The crew members provided

---

[11] A "confined space" is an area that is (1) large enough for workers to enter and perform work, (2) has limited or restricted means for entry or exit and (3) is not designed for continuous occupancy. Occupational Safety and Health Admin., *Confined Spaces*, UNITED STATES DEPT. OF LABOR, https://www.osha.gov/SLTC/confinedspaces/. (last visited Nov. 29, 2018). Examples include, but are not limited to, tanks, vessels, silos, pits, tunnels, equipment housing and pipelines. *Id.* "A space has limited or restricted means of entry or exit if an entrant's ability to escape in an emergency would be hindered." Occupational Safety and Health Admin., *Frequently Asked Questions PRCS Standard Clarification*, UNITED STATES DEPT. OF LABOR, https://www.osha.gov/html/faq-confinedspaces.html. (last visited Nov. 30, 2018). "Entry" occurs "as soon as any part of the entrant's body breaks the plane of an opening into the space." 29 C.F.R. §1910.146(b) (2018).

[12] Thomas disputes that the tarps created a confined space and that lifting the tarps violated the entry rule. Doc. No. 49-2 at 16–17.

[13] However, Thomas states that he did not receive the complete confined spaces training that was provided to other foremen. Doc. No. 49-2 at 16.

[14] Thomas contends that these complaints were made after he told his subordinate, Joe Franklin, that he was writing him up. Doc. No. 49-2 at 17–18.

[15] The parties dispute whether swearing is a per se violation of company policy. Doc. No. 49-2 at 18. It is not clear if Thomas disputes actually cussing at his crew members.

written statements, which were reviewed by the construction manager, Darrell Blanchard, who approved the termination of Thomas' employment.[16] That termination took effect on October 26, 2015.[17]

Additional facts will be discussed as necessary.

III. SUMMARY JUDGMENT STANDARDS

Any party may move for summary judgment regarding all or any part of the claims asserted in a case. Fed. R. Civ. P. 56(a). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A material fact is one that "'might affect the outcome of the suit under the governing law.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Thus, "the substantive law will identify which facts are material." *Id.* Facts that are "critical" under the substantive law are material, while facts that are "irrelevant or unnecessary" are not. *Id.*

An issue of material fact is genuine if it has a real basis in the record, *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)), or when "'a reasonable jury could return a verdict for the nonmoving party' on the question." *Woods v. DaimlerChrysler*

---

[16] Thomas claims the statements were solicited by Courville and do not show that he violated company policy but, instead, that he simply misunderstood Sharp's instructions. Doc. No. 49-2 at 18–19.

[17] The parties dispute whether Blanchard was the final decisionmaker or if he simply approved another person's request to discharge Thomas. Doc. No. 49-2 at 19. Thomas contends Courville was responsible for the discharge and that Matteson was also involved. *Id.* at 19; Doc. No. 49-1 at 19–20.

Corp., 409 F.3d 984, 990 (8th Cir. 2005) (quoting *Anderson*, 477 U.S. at 248). Evidence that only provides "some metaphysical doubt as to the material facts," *Matsushita*, 475 U.S. at 586, or evidence that is "merely colorable" or "not significantly probative," *Anderson*, 477 U.S. at 249-50, does not make an issue of material fact genuine.

As such, a genuine issue of material fact requires "sufficient evidence supporting the claimed factual dispute" so as to "require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson*, 477 U.S. at 248-49. The party moving for entry of summary judgment bears "the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue." *Hartnagel*, 953 F.2d at 395 (citing *Celotex*, 477 U.S. at 323). Once the moving party has met this burden, the nonmoving party must go beyond the pleadings and by depositions, affidavits, or otherwise, designate specific facts showing that there is a genuine issue for trial. *Mosley v. City of Northwoods*, 415 F.3d 908, 910 (8th Cir. 2005). The nonmovant must show an alleged issue of fact is genuine and material as it relates to the substantive law. If a party fails to make a sufficient showing of an essential element of a claim or defense with respect to which that party has the burden of proof, then the opposing party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 322.

In determining if a genuine issue of material fact is present, I must view the evidence in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587-88. Further, I must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the facts. *Id.* However, "because we view the facts in the light most favorable to the nonmoving party, we do not weigh the evidence or attempt to determine the credibility of the witnesses." *Kammueller v. Loomis, Fargo & Co.*, 383 F.3d 779, 784 (8th Cir. 2004). Instead, "the court's function is to determine whether a dispute about a material fact is genuine." *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996).

On cross motions for summary judgment, the "court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2720 (3d ed. 1998). Because the parties seek summary judgment on some of the same issues, I will consider all the parties' arguments as to each issue, keeping in mind the separate inferences that are to be drawn from each motion. *See Wright v. Keokuk Cnty. Health Ctr.*, 399 F. Supp. 2d 938, 946 (S.D. Iowa 2005).

IV. ANALYSIS

A. Retaliation[18]

1. Legal Standards

Title VII states it "shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3. Both Title VII and 42 U.S.C. § 1981 prohibit employers from retaliating against employees for opposing racial discrimination. *Wright v. St. Vincent Health Sys.*, 730 F.3d 732, 737 (8th Cir. 2013). The ICRA also makes it an unfair discriminatory practice for "[a]ny person to . . . retaliate against another person in any of the rights protected against discrimination by this chapter because such person has lawfully opposed any practice forbidden under this chapter." Iowa Code § 216.11(2). The ICRA retaliation provision "mirrors almost exactly" that of Title VII. *Haskenhoff v. Homeland Energy Sol. LLC*, 897 N.W.2d 553, 584 (Iowa 2017). Thus, I will analyze the state and federal retaliation

[18] In counts 1, 4 and 7 of the amended complaint, Thomas combines his retaliation claims with discrimination claims. However, as retaliation and discrimination claims have different elements, I will address them separately.

claims under the same framework with the exception, as discussed below, of the causation standards.

Where, as here, a plaintiff presents no direct evidence of retaliation, the claim is analyzed under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, the plaintiff has the initial burden of establishing a prima facie case of retaliation. *Clark v. Johanns*, 460 F.3d 1064, 1067 (8th Cir. 2006). The defendant then must offer a legitimate, non-discriminatory reason for the employment action. *Id*. The burden of production then returns to the plaintiff to show that this reason was a pretext for discrimination. *Id*.

To establish a prima facie case of retaliation, the plaintiff must present evidence that (1) he engaged in a protected activity; (2) an adverse employment action was taken against him; and (3) a causal connection exists between the two. *Barker v. Missouri Dep't of Corr.*, 513 F.3d 831, 834 (8th Cir. 2008); *Thompson v. Bi–State Dev. Agency*, 463 F.3d 821, 826 (8th Cir. 2006). The federal statutes require a higher causation standard for retaliation claims than for discriminatory discharge claims. *Haskenhoff*, 897 N.W.2d at 584. "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013). In other words, the plaintiff must show the protected conduct was a determinative, not just motivating, factor in the employer's decision. *Van Horn v. Best Buy Stores, L.P.*, 526 F.3d 1144, 1148 (8th Cir. 2008); *see also Wright*, 730 F.3d at 737. To prove causation under the ICRA, the plaintiff must show that the protected conduct was a "motivating factor" in the employer's adverse employment decision. *Haskenhoff*, 897 N.W.2d at 635–37; *see also Johnson v. Mental Health Inst.*, 912 N.W.2d 855, No. 16-1447, 2018 WL 351601, at *7–*8 (Iowa Ct. App. Jan. 10, 2018) (summarizing the multiple opinions in *Haskenhoff* and concluding that the

motivating factor standard now applies to retaliation claims just as it does to discriminatory discharge claims).[19]

An unsupported, self-serving allegation that an employer's decision was based on retaliation cannot establish a genuine issue of material fact. *Jackson v. United Parcel Serv., Inc.*, 643 F.3d 1081, 1088 (8th Cir. 2011). Timing alone may be sufficient to create an inference of retaliation, but the Eighth Circuit has typically required more than a close temporal connection to establish a retaliation claim or show that the employer's stated legitimate reason was pretext. *Wright*, 730 F.3d at 738–39. Evidence of causation may include "evidence of discriminatory or retaliatory comments" or evidence of "a pattern of adverse action or escalating adverse actions after the protected activity." *Orluske v. Mercy Med. Ctr.-N. Iowa*, 455 F. Supp. 2d 900, 922 (N.D. Iowa 2006). A causal link may be broken if the decisionmaker for the adverse action was unaware of the protected activity. *Id.* However, an employer cannot avoid liability by using a "purportedly independent person or committee as the decisionmaker where the decisionmaker merely serves as the conduit, vehicle, or rubber stamp by which another achieves his or her unlawful design." *Dedmon v. Staley*, 315 F.3d 948, 949 n.2 (8th Cir. 2003).

2. The prima facie case

The parties do not dispute that Thomas engaged in protected activity and was later subjected to adverse employment action. PCI, however, argues that as a matter of law, the third element of the prima facie case, a causal connection, is lacking. PCI contends both (1) that decision to discharge Thomas was not made by any individual with knowledge of his protected activities and, in any event, (2) that there is no evidence establishing causation. Thomas disagrees with both propositions.

[19] PCI argues that the ICRA retaliation provision requires the significant factor test for causation. Doc. No. 36-1 at 4 n.1. *Haskenhoff*'s plurality opinion overturned that standard.

a. Decisionmaker's knowledge of protected activity

Thomas alleges that he made at least three complaints of discrimination and harassment to HR. *See* Doc. No. 49-4 at 147–48. The only record of a complaint, besides Thomas' own affidavit, involves one he made to HR on September 28, 2015. Doc. No. 36-3 at 35–36. After that September 28 meeting, Morel sent Kern an email discussing the issues Thomas had raised, which involved issues with pay rate, truck assignments and rumors that he was speeding. Doc. No. 51-2 at 94. At that time, Thomas also complained that both Courville and Matteson were retaliating against him. *Id.*; Doc. No. 49-1 at 19–20.

Thomas has produced no evidence showing that Blanchard was personally aware of Thomas' complaints to HR. Blanchard states by affidavit that in late October 2015 he was informed Thomas had allegedly broken the plane of a confined space and cussed at his crew members. Doc. No. 36-3 at 79. He states that he reviewed statements of crew members, but does not identify those statements, and notes that Thomas had previously been disciplined.[20] *Id.* He states that he "signed off and gave the final approval to terminate Fred Thomas's employment." *Id.* However, there is no mention of who else was involved. By saying he "signed off and gave the final approval," Blanchard seems to suggest that one or more other employees initially proposed the discharge.

Courville states that he was not involved in the termination decision and that "it was taken care of before it got to [him]." Doc. No. 41-1 at 44. Morel also denies involvement in the termination decision and states that Blanchard did not consult with him. Doc. No. 49-4 at 56. However, Morel agrees that Courville "may have been" involved in the decision. *Id.* at 57. According to another employee, Corey Choyce, Courville approached him and Dean Leaver about the confined space incident and took statements from them about it. *Id.* at 6. An hour later Courville and another employee

[20] Blanchard is presumably referencing the buggy collision, but that is not stated in his affidavit.

escorted Thomas from the job site. *Id.* Based on this record, I find there are questions of fact about who was involved in the decision to discharge Thomas and the extent of their involvement. PCI has not shown that, as a matter of law, the decision to discharge Thomas was made solely by individuals who had no knowledge of his protected conduct.

b. Evidence of Causation

Thomas relies on the following categories of evidence to argue that there is a genuine issue of material fact as to whether his complaints to Morel about race discrimination caused his termination:

- Racist remarks from Courville and Matteson made during their depositions
- Matteson calling him "boy" and "Willie"
- His previous 3-day suspension for the buggy collision
- PCI's "refusal to pay Mr. Thomas like every other Foreman" and "disingenuous explanation[s] for the pay difference"
- Courville's "refusal to provide Mr. Thomas with the vehicles that were appropriated for him" and PCI's disingenuous explanation for not providing the vehicles
- He was fired about one month after he complained to HR about race discrimination
- Other employees have made retaliation claims

Doc. No. 49-1 at 16–18. I will address each of these in turn.

The deposition comments by Courville and Matteson do not establish that Thomas' complaint was the cause of his discharge, as they were made after he was fired and do not pertain to the complaint or his discharge. *See* Doc. No. Doc. No. 51-1 at 11 (Courville's comment about being Creole), 107 (Matteson's comment about "a black boy" on his baseball team); Doc. No. 49-4 at 212 (Courville's comment that he did not

know Thomas "wanted 20s and spinners and radios" in the truck he requested). Being disrespectful after the fact does not show that Thomas' complaints to PCI caused PCI to fire him.

Thomas alleges that during his employment, Matteson called him "boy" and "Willie." He contends that he made a complaint about these names to HR, but the only record of a complaint does not include this particular grievance. Doc. Nos. 49-4 at 152; 36-3 at 35–36. Matteson denies calling Thomas "boy" but agrees it would be disrespectful to do so. Doc. No. 51-1 at 108. Matteson also claimed "if [he] did call him Willie, it was not out of disrespect or nothing." *Id.* at 107. The record does not indicate how often these instances occurred or what the context was. *See Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (finding that evidence of a white supervisor referring to a black employee as "boy" may be evidence of racial animus depending on various factors "including context, inflection, tone of voice, local custom, and historical usage.") Thomas does admit that Matteson began using his name at some point instead of "Willie" or "boy." Doc. No. 49-4 at 153.

Thomas also cites to his previous three-day suspension that occurred after the buggy collision on March 13, 2015. Doc. No. 51-2 at 87. Thomas claims that the suspension was also in retaliation for complaints about pay and was unjustified. There is a question of fact about what happened during the collision. According to Courville's deposition and some employee statements, Thomas was on the phone while driving the buggy and thus was not aware of his surroundings when the forklift backed into him. Doc. No. 49-4 at 250; 36-3 at 71–74. Thomas claims he was not on the phone and was simply waiting for the forklift driver to finish his tasks. Doc. No. 36-3 at 69. The collision occurred because the flagger was not where he should have been and Thomas did not have time to reverse. *Id.* Thomas was found to be at fault and was suspended for three days for "not paying attention to work surroundings resulting in property damage." Doc. No. 51-2 at 87. Joshua Simmons, who is white, was the flagger for the forklift. Doc. No. 49-4 at 252. He was not disciplined for this incident but had

previously been disciplined multiple times for excessive absences. Doc. No. 50 at 61–68.

With respect to Thomas' complaints about his pay rate, Thomas alleges that he was promoted to foreman in December 2014 but was paid just $25 per hour, while similarly-situated white foremen received at least $34 per hour. Doc. No. 49-1 at 22–23. Thomas alleges that he was told, unclear by whom, that he was a foreman on December 20, 2014. Doc. No. 49-4 at 175. He states that he did two days of foreman work in 2014 and expected the foreman pay level after the Christmas break because "they" said he would have a crew. *Id.* He admits that he did not receive a crew until late February and he continued to do the same laborer job he had been doing prior to December 20, 2014, after the Christmas break. *Id.* This work included grinding pipes, filing sandbags and bracing pipes. *Id.* at 141.

Thomas alleges that in February he finally received a hard hat and radio, indicating foreman status. *Id.* He remembers receiving a pay raise in November 2014 to $23 per hour but does not remember a pay raise in February 2015. Doc. No. 36-3 at 20. He agrees that he started to receive foreman pay around March. *Id.* PCI alleges that Thomas was promoted to "Foreman B" on March 9, 2015. Doc. No. 36-1 at 10.

According to PCI's rate change request forms, Thomas' promotion history is as follows:

- On November 24, 2014, he was promoted from "skilled" to "Helper B" with a pay increase from $21/hour to $23/hour. Doc. No. 36-3 at 31.

- On February 3, 2015, he was promoted from "Helper B" to "Helper A" with a pay increase from $23/hour to $25/hour. *Id.* at 32.

- On March 9, 2015, while retaining the title of "Helper A," he received a pay rate increase from $25/hour to $34/hour. *Id.* at 33. The form indicates that the reason for this increase was that "Fredrick will oversee labor crew."

- On September 14, 2015, his title was changed to "Foreman B" and he

received a pay increase to $36/hour. *Id.* at 34.

Based on the record before me, a reasonable jury could not find that Thomas was actually promoted to a foreman position in December.

As for the vehicle issue, Thomas alleges that he attempted to get a truck for his crew multiple times but was never given one. Courville, however, states that he obtained a truck for Thomas within a week to a week and a half of Thomas asking for one. Doc. No. 41-1 at 29. As there is no other documentation about the requisitioning of vehicles, there appears to be a question of fact as to when Thomas received a vehicle and how long it took for him to get one. However, both parties agree that Thomas did at some point obtain a truck. Thomas' statements that Courville gave the first trucks to other white employees are not within his personal knowledge, as he only heard it second-hand. Doc. No. 49-4 at 156–57.

Finally, Thomas relies on "me too" evidence to show a prima facie case of retaliation. He points to three other employees who complained of discrimination: Elvira Quinonez-Castellanos, Daniel Thomas and Patrick Hafner.[21] The relevance of such "me too" evidence "depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case." *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388 (2008). Courts have allowed "me too" evidence under Rule 404(b) to prove the defendant's motive or intent. *See Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1286-87 (8th Cir. 2008); *Buckley v. Mukasey*, 538 F.3d 306, 309 (4th Cir. 2008). This evidence is typically presented in the form of testimony from other employees and is neither *per se* admissible nor *per se* inadmissible. *See Mendelsohn*, 552 U.S. at 388. Factors to consider include: "(1) whether past discriminatory or retaliatory behavior is close in time to the events at issue in the case,

[21] Thomas identifies Patrick as "Randy" Hafner as the third employee in his statement of additional material facts. Doc. No. 49-3 at 23. However, the appendices only refer to a "Patrick" Hafner. Doc. No. 50 at 81.

(2) whether the same decisionmaker was involved, (3) whether the witness and plaintiff were treated in the same manner, and (4) whether the witness and plaintiff were otherwise similarly situated." *Hayes v. Sebelius*, 806 F. Supp. 2d 141, 144-45 (D.D.C. 2011) (citing *Nuskey v. Hochberg*, 723 F. Supp. 2d 229, 233 (D.D.C. 2010)).

Thomas was discharged on October 26, 2015. Quinonez-Castellanos began her employment with PCI on May 12, 2015, and was assigned to work as a helper on the pipefitting crew.[22] Doc. No. 51-2 at 44. Daniel Thomas was discharged on April 8, 2016. Doc. No. 50 at 83. Hafner was discharged in June 2015.[23] Doc. No. 50 at 79. These employees' dates of employment are thus somewhat close in time to Thomas' firing. In addition, Morel was involved in the complaints to some extent, though from the record it is not clear how much. Doc. No. 50 at 73–73; 81–83. However, other employees involved with these three situations were not involved in Thomas' discharge. These employees include James Ehlenbach, Kendel Wood, John Boles, Josh Byrd, Dock Kendrick and Sarah Borne. Doc. No. 50 at 74, 76, 83, 118; Doc. No. 51-5 at 21. Nor has Thomas shown that Courville, Matteson or Blanchard were involved in the other three cases.

Thomas has also not shown that the three other complaining parties were similarly situated to him. Unlike in the Quinonez-Castellanos case, there is no claim that Morel did not promptly investigate Thomas' complaints. The temporal proximity between the complaint and the termination decision is longer here than it was with Quinonez-Castellanos. This case does not involve the same type of disciplinary escalation that was present in the Quinonez-Castellanos case. The record is not clear as to whether any of

[22] Thomas states she worked as a rigger from July 2015 through October 23, 2015. Doc. No. 49-3 at 22. However, he provides no citations for these dates. As such, I refer to this court's previous opinion in the Quinonez-Castellanos case.

[23] Thomas states that he was an employee at PCI's Sioux City site from May through June 2015, but he fails to provide any citations. Doc. No. 49-3 at 23.

the other employees were in the same job positions as Thomas. Therefore, I find that the "me too" evidence is not particularly helpful here.

Ultimately, however, "[t]he burden to show a *prima facie* case is not difficult." *Donathan*, 861 F.3d at 740. Based on the evidence discussed above, I find that Thomas has generated a sufficient question of fact concerning the possibility of a causal connection to establish a prima facie case of retaliation. Of course, this is not the end of the inquiry. Under the *McDonnell Douglas* framework, the next question is whether PCI has offered a legitimate, non-retaliatory reason for Thomas' discharge.[24]

3. Legitimate, Non-Retaliatory Reason

PCI states that Thomas was fired for cursing and yelling at his crew, failing to follow directions and instructing his crew to violate a cardinal safety rule by telling them to break the plane of a confined space. Doc. Nos. 36-1 at 5; 36-3 at 80. The confined space incident occurred on October 22, 2015. Doc. Nos. 49-4 at 5; 54-1 at 35–36. As explained in the facts section, Jeremy Sharp instructed Thomas and his crew to install heater hoses underneath boilers, which were draped with black tarps and thus, according to PCI, created a confined space. Doc. No. 36-3 at 77. Sharp instructed Thomas to roll up the tarps and place the hoses in a specific place in order to eliminate the confined space. *Id.* Thomas instead instructed his crew to simply lift the tarps, not roll them, and throw the hoses inside – a practice that allegedly violates the confined space rules. *Id.* When the crew members refused to follow Thomas' instructions out of concern for violating the confined space rule, Thomas allegedly cursed at them. *Id.* at 78.

An employee's violation of company policy is a legitimate reason for termination. *Johnson v. AT&T Corp.*, 422 F.3d 756, 762 (8th Cir. 2005). Thus, PCI has met its

[24] Iowa law also employs the same burden-shifting analysis. *See Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 678 (Iowa 2004); *Christie v. Crawford Cty. Mem'l Hosp.*, No. 17-0906, 2018 WL 3471835, at *3 (Iowa Ct. App. July 18, 2018).

burden of providing a legitimate, non-retaliatory reason for discharging Thomas. The burden shifts back to Thomas to put forth evidence from which a reasonable jury could conclude that the employer's articulated reason for termination was pretext. *See Donathan*, 861 F.3d at 740

4. Pretext

Pretext can be established in a number of ways. A plaintiff may demonstrate that the employer's proffered reason has no basis in fact, *see Logan v. Liberty Healthcare Corp.*, 416 F.3d 877, 881 (8th Cir. 2005), that the employer's proffered reason changed substantially over time, *see Korbrin v. Univ. of Minn.*, 34 F.3d 698, 703 (8th Cir. 1994) or that the employer varied from its normal policies and practices to address plaintiff's situation. *See Erickson v. Farmland Indus., Inc.*, 271 F.3d 718, 727 (8th Cir. 2001). "[T]he showing of pretext necessary to survive summary judgment requires more than merely discrediting an employer's asserted reasoning for terminating an employee." *Roeben v. BG Excelsior Ltd. P'ship.*, 545 F.3d 639, 643 (8th Cir. 2008) (quoting *Johnson*, 422 F.3d at 763). "A plaintiff must also demonstrate 'that the circumstances permit a reasonable inference' of discriminatory animus." *Id.*

Thomas relies on the same categories of evidence he relied on to make a prima facie showing to demonstrate a fact question on whether PCI's stated reason for terminating his employment was pretextual. Doc. No. 49-1 at 16–18. He argues that the reasons stated for his termination are inconsistent with the testimony of other PCI employees, PCI did not follow the progressive disciplinary policy with respect to his cursing and PCI had not previously disciplined employees for cursing. *Id.* at 16–17.

Part of Thomas' argument is that he did not violate the confined space rule. *Id.* However, the question is not "whether the facts actually raised proper grounds to terminate" Thomas, but rather whether PCI "honestly and reasonably believed" it had proper grounds to terminate. *Jensen v. IOC Black Hawk Cty. Inc.*, No. 15-cv-2082-LRR, 2016 WL 6080815, at *13 (N.D. Iowa Oct. 17, 2016); *see also Johnson*, 422 F.3d at 762–63 ("Thus even if AT&T had no solid proof that Johnson made the bomb threats,

and even if AT&T was mistaken in its belief that Michael Johnson had made the threats, any such mistake does not automatically prove that AT&T was instead motivated by unlawful discrimination."). Thomas does not dispute that he placed hoses under the tarps, he only disputes that such behavior violated the confined space rule.

Employee statements by Joseph Franklin and Dean Leaver indicate that Thomas told his crew members to put a heater hose on the boiler and enter a confined space. Doc. No. 36-3 at 39, 42. Jeremy Sharp, Thomas' supervisor during the incident, stated that boilers draped with black tarps created a confined space as defined by OSHA. *Id.* at 77. He specifically instructed Thomas to roll up the tarps and tie them off to eliminate the confined space, but Thomas instead told the crew to lift the tarps and throw the hoses inside. *Id.* Sharp indicated that this action violated the confined space rule. *Id.* Courville also stated that simply lifting the tarp to put the hoses inside constituted entering a confined space. Doc. No. 51-1 at 5–7. Only Matteson stated that if you can roll the tarp up, then it's not a confined space. Doc. No. 51-1 at 122.

Thomas does not dispute that entering a confined space without authorization is a violation of PCI's cardinal safety rules, for which there is zero tolerance and as such will result in immediate termination. Doc. No. 51-2 at 121. While he disputes that his directions to his crew constituted a confined space violation, he has not presented evidence refuting the fact that PCI reasonably believed that they did. Thus, even if PCI was mistaken, Thomas has not shown that PCI lacked an honest and reasonable belief that it had proper grounds to terminate his employment for violating the confined space rule.

As for swearing, PCI states that Thomas cursed at his crew when they declined to follow his instructions. It is unclear whether or not Thomas disputes that he used such language during the incident. *See* Doc. No. 49-2 at 17–18. He does argue that swearing is not an offense for which he can be fired, and that cursing was not generally disciplined at the job site. Doc. No. 49 at 17.

The Field Employee Policy & Benefit Handbook states that "inappropriate behavior towards customers, visitors, or co-workers" and "[h]arassing, discriminating against, threatening, coercing, intimidating, or fighting with another employee, customer, or manager" is conduct that will result in discipline "up to and including termination." Doc. No. 51-2 at 79. "Employees are expected to treat all customers, managers, and co-workers courteously and with respect at all times." *Id.* at 75. Travis Jones, a carpenter foreman, testified that he heard employees cursing or using foul language on a daily basis and was not aware of anyone being disciplined, unless the profanity was directed at another person, which was "a different field." Doc. No. 51-1 at 43–44. Here, there is very little evidence about the nature of Thomas' swearing other than that it was connected to the alleged confined space violation.

PCI has a progressive disciplinary system for general policy violations. Doc. No. 51-2 at 122. The first violation results in a verbal warning, the second violation results in a written warning and the third violation results in a suspension or termination. *Id.* The disciplinary policy states, however, that PCI "reserves the right to proceed directly to any stage of discipline, including termination at any time that it deems it to be necessary under the circumstances." *Id.* According to the record, Thomas had only one previous disciplinary action, which was due to the buggy collision. An employer's failure to follow its own policies can be evidence of pretext. *See Lake v. Yellow Transp., Inc.*, 596 F.3d 871, 874-75 (8th Cir. 2010). However, an employer "can certainly choose how to run its business, including not to follow its own personnel policies regarding termination of an employee or handling claims of discrimination, as long as it does not unlawfully discriminate in doing so." *Haas v. Kelly Servs., Inc.*, 409 F.3d 1030, 1036 (8th Cir. 2005).

Even viewing the evidence most favorably to Thomas, I find that he has not created a question of fact as to whether PCI's stated reasons for discharge were pretextual. Thomas has not presented evidence upon which a reasonable juror could find that PCI did not honestly and reasonably believe it had proper grounds to discharge him and,

instead, acted with a retaliatory motive. PCI is entitled to summary judgment on the retaliation claims set forth in counts 1, 4 and 7.

B. Race discrimination

To show race discrimination under the ICRA, the plaintiff must show that the adverse employment action was motivated by the employer's discriminatory animus or intent. *See Pippen v. State*, 854 N.W.2d 1, 9 (Iowa 2014) ("In a disparate treatment case, the plaintiff bears the burden of showing he or she has been harmed by discriminatory animus of the employer."). The discriminatory intent does not have to be the sole factor, only a "determining factor." *Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1, 13 (Iowa 2009).

The standard is the same for Title VII discrimination claims. Title VII prohibits employment discrimination "because of . . . race, color, religion, sex, or national origin." 42 U.S.C. §§ 2000e–2(a). The plaintiff must show that one of those factors was a motivating factor for any employment practice. *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011). To establish a prima facie case of race discrimination, the plaintiff must show that he "(1) is a member of a protected class; (2) was meeting [his] employer's legitimate job expectations; (3) suffered an adverse employment action; and (4) was treated differently than similarly situated employees who were not members of [his] protected class." *Jackman v. Fifth Judicial Dist. Dep't of Corr. Servs.*, 728 F.3d 800, 804 (8th Cir. 2013).[25]

1. Discharge

Thomas argues that his race was a motivating factor in PCI's decision to terminate his employment. Doc. No. 49-1 at 16, 18. His argument is connected to his retaliation

[25] Discrimination claims under § 1981 require the same showing as Title VII. *See Johnson*, 422 F.3d at 761.

claim and relies on the same evidence to show that "but for Mr. Thomas being African American, he would not have been fired." *Id.* at 18. For the same reasons set forth with regard to the retaliation claim, I find that Thomas has not generated a genuine of fact as to whether PCI's legitimate, nondiscriminatory reason for terminating him was pretext for racial animus. *See Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 934–36 (8th Cir. 2006) (applying the *McDonnell Douglas* framework to race discrimination via termination). In addition, I note that Thomas has not shown that similarly-situated white employees were treated less harshly with respect to confined space violations. Finally, while Thomas alleges that other employees were not disciplined for cursing, he does not provide any fact-specific examples for comparison purposes. Thomas' contention that he was discharged due to his race fails as a matter of law. As such, PCI is entitled to summary judgment on the discriminatory discharge claims set forth in counts 1, 4 and 7.

2. Unequal pay

Counts 2, 5 and 8 are based on an allegation that Thomas received unequal pay due to his race. Specifically, Thomas argues that he was promoted to foreman in December 2014 but was paid only $25 per hour, while similarly situated white foremen received at least $34 per hour. Doc. No. 49-1 at 22–23. He explains that his claim is "not that he was entitled to the promotion and didn't get it," but "that he was entitled to foreman pay and didn't get it." *Id.* at 23. Thus, Thomas' claim is conditioned upon a finding that he was promoted to foreman in December but, because of his race, was not given a corresponding pay increase.

This claim fails at the outset because, as I have already found, Thomas has not presented evidence permitting a finding that he was actually promoted to the position of foreman in December 2014. Even viewing the evidence most favorably to Thomas, he served temporary duty in foreman's role for two days in December before returning to his previous assignment for several months. In March 2015, he received a promotion

and pay raise to $34 per hour. The record simply does not support Thomas' claim that he was promoted in December but was denied a pay increase.

In addition, a claim for unequal pay based on race requires, among other things, proof "that similarly situated employees outside the protected class were treated differently." *Smith v. URS Corp.*, 803 F.3d 964, 970 (8th Cir. 2015) (quoting *Fields v. Shelter Mut. Ins. Co.*, 520 F.3d 859, 864 (8th Cir. 2008)). "[T]he test for whether employees are similarly situated is strict; the employees must be 'similarly situated in all material respects.'" *Id.* In a wage discrimination case, the plaintiff must show that the employees of different races did equal work on jobs that require equal skill, effort and responsibility and which are performed under similar working conditions." *Fair v. Norris*, 480 F.3d 865, 870 (8th Cir. 2007).

To show that there were similarly situated white employees, Thomas cites PCI's Answer to Interrogatory No. 12 and another document titled "Respondent Questions." The interrogatory answer lists employees, presumably foremen, who received between $34 and $36 per hour. Doc. No. 51-2 at 12–15. The employees' races include Caucasian, "Hispanic or Latino," "American Indian or Alaskan Native" and "Black or African American." *Id.* The "Respondent Questions" document indicates that the general foreman pay rate break down is $34/hour for "[a]ny day shift employee working onsite prior to September 14, 2015," and $36/hour for "[a]ny day shift employee working onsite and hired on or after September 14, 2015." *Id.* at 113. It also shows a list of employees in the Foreman B position who received between $34 and $38 per hour. *Id.* at 116–119. The races of those employees include Caucasian, African American, American Indian, and Hispanic. *Id.*

Thomas has not provided evidence showing whether the employees who held the Foreman B position were promoted directly from the position of Laborer or, instead, promoted in increments as he was. He has not provided job descriptions for the Helper positions or the Foreman positions. Nor has he shown how those job descriptions are somehow different from the work he was performing or how they compared to the jobs

the other employees were doing. Finally, he has provided no evidence of the typical pay rate for Helper positions. In short, Thomas has failed to produce sufficient evidence to support a finding that he was paid less than similarly situated employees of different races PCI is entitled to summary judgment on counts 2, 5 and 8.

C. Hostile work environment

Counts 3, 6 and 9 are based on an allegation that Thomas was subjected to a hostile work environment based on his race. A hostile work environment exists 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." *Jackman*, 728 F.3d at 805. Under Title VII, the plaintiff must show (1) he is a member of a protected class; (2) harassment occurred; (3) a causal nexus between the harassment and the protected status exists; (4) the harassment affected "a term, condition, or privilege" of employment; and (5) the employer knew or should have known of the harassment and did not take prompt and effective remedial action. *Id.*at 805–06. The standard is demanding, and the plaintiff must establish that the conduct was extreme. *Id.* at 806. It "does not prohibit all verbal or physical harassment and it is not a general civility code." *Id.* (quoting *Wilkie v. Dep't of Health and Human Servs.*, 638 F.3d 944, 953 (8th Cir. 2011)).

Evidence of a hostile work environment is based on a totality of the circumstances and includes objective and subjective considerations. *Madison v. IBP, Inc.*, 257 F.3d 780, 793 (8th Cir. 2001); *Clay v. Credit Bureau Enters., Inc.*, 754 F.3d 535, 540 (8th Cir. 2014). Relevant factors include frequency and severity of the conduct, if it is physically threatening or humiliating and if it unreasonably interferes with the job performance. *Wilkie*, 638 F.3d at 953. Hostile work environment claims under § 1981 are analyzed the same as under Title VII. *Soto v. John Morrell & Co.*, 285 F. Supp. 2d

1146, 1166 (N.D. Iowa 2003). The standard is also essentially the same under Iowa law.[26]

Sporadic racist comments, particularly when some of the comments are not directed at the plaintiff, do not render a work environment objectively hostile. *See Bainbridge v. Loffredo Gardens, Inc.*, 378 F.3d 756, 759–60 (8th Cir. 2004); *see also Jackman*, 728 F.3d at 806. Even with multiple instances of alleged harassment, if racial bias is based on speculation or conjecture, such allegations are not sufficient to support a hostile work environment claim. *Clay*, 754 F.3d at 537–38, 541.

Thomas argues a hostile work environment existed because he was "subjected to frequent and humiliating name-calling," was required to do unpleasant work by himself, was forced to introduce himself as a foreman and then do laborer work, was required to carry heavy loads across the jobsite, was repeatedly denied a vehicle when asked, commonly heard racist comments at the jobsite and was told by Courville that the use of the n-word was acceptable at the jobsite. Doc. No. 49-1 at 24. He again cites to the allegation that Matteson called him "Willie" and "boy." Doc. No. 49-4 at 141, 153. He claims that other co-workers told him Matteson would refer to him as "monkey," "niglet" or the "n-word" when Thomas was out of earshot. *Id.* at 149.

Thomas alleges that racist comments were common on the jobsite but does not cite any specific instance of racist comments by other co-workers. *See* Doc. No. 51-1 at 57 (Travis Jones, another PCI employee, simply stating that whether someone heard racist comments depended on who was around). As for the unpleasant jobs, Thomas states that Matteson told him to do work other white employees would not do, such as heavy lifting,

[26] Under the Iowa Civil Rights Act, the plaintiff must show he (1) belongs to a protected group; (2) was subjected to unwelcome harassment; "(3) the harassment was based on a protected characteristic; and (4) the harassment affected a term, condition, or privilege of employment." *Farmland Foods, Inc. v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733, 744 (Iowa 2003). The plaintiff must show that he subjectively perceived the conduct as abusive and that a reasonable person would objectively find the conduct abusive. *Id.* Evidence is based on a totality of the circumstances. *Id.*

pulling out pallets and going into the excavation. Doc. No. 49-4 at 142, 148. He also highlights an exchange he witnessed between Matteson and another black employee in which Matteson told the employee that he would not want to be a pipe fitter because he probably had not learned the necessary skills in school. *Id.* at 154. He claims that he and his crew had to carry heavy equipment by hand and Courville and Matteson enjoyed watching them walk because they would whisper and laugh. *Id.* at 156.

Even accepting Thomas' allegations as true, under Eighth Circuit and Iowa Supreme Court case law Thomas has failed to present sufficient evidence that any harassment was so severe or pervasive that it altered the terms or conditions of his employment. First, learning second-hand about racist comments Thomas did not actually hear is insufficient to support a hostile work environment claim, as the comments were not directed at him. *Bainbridge*, 378 F.3d at 759–60. The only alleged specific comments and instances of name-calling directed at Thomas were Matteson calling him "Willie" and "boy." However, Thomas admits Matteson began using his correct name sometime before December 20, 2014. Doc. No. 49-4 at 153. Further, there is no evidence to show that the specific tasks Thomas was required to perform were outside of his job description and were not required of other employees in his position. In any event, Thomas stated that he was never disciplined for not completing jobs and was always able to complete the jobs he was assigned. *Id.* at 155. There is also no sufficient probative evidence to show that any difficulty with obtaining vehicles was either (1) racially motivated or (2) severe and pervasive. *See Clay*, 754 F.3d at 541.

Viewing the record in the light most favorable to Thomas, I find that he has not met the demanding standard required to create a question of fact for the jury on his hostile work environment claims. PCI is entitled to summary judgment on counts 3, 6 and 9.

V. CONCLUSION

For the foregoing reasons, defendant's motion (Doc. No. 36) for summary judgment is **granted** as to all claims. As a result:

1. Judgment will enter in favor of the defendant and against the plaintiff.
2. Defendant's motion (Doc. No. 56) in limine is **denied as moot**.
3. The trial of this action, currently scheduled to begin January 28, 2019, is hereby **canceled**.
4. The Clerk shall **close this case**.

IT IS SO ORDERED.

DATED this 19th day of December, 2018.

Leonard T. Strand, Chief Judge