Guster -Hines et al v. McDonald's USA, LLC

2021 | Cited 0 times | N.D. Illinois | June 25, 2021

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION VICTORIA GUSTER-HINES and DOMINECA NEAL, Plaintiffs, v. CORPORATION, STEVEN EASTERBROOK, CHRISTOPHER KEMPCZINSKI, and CHARLES STRONG, Defendants.

Case No. 20-cv-00117 Judge Mary M. Rowland

MEMORANDUM OPINION AND ORDER Plaintiffs Victoria Guster-- filed a fourteen-count, ninety-nine page, Second Amended Complaint (Dkt. 51) against their employer and its parent company, the popular burger

chain McDonald s, as well as several of its top executives. They allege disparate treatment on the basis of race (Counts I and II), creation of a hostile work environment (Counts III and IV) and retaliation (Counts V and VI) in violation of 42 U.S.C. § 1981, as well as discrimination based on disparate impact and disparate treatment (Counts VII, VIII, IX, and X), creation of a hostile work environment (Counts XI and XII), and retaliation (Counts XIII and XIV) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq. entirety. Kempczinski, and Strong have jointly filed a motion to strike certain allegations in

the Complaint, (Dkt. 64), and Easterbrook has filed a separate motion to strike. (Dkt. 70). These motions are granted in part and denied in part.

I. Background The following factual allegations are taken from the Complaint (Dkt. 51) and are accepted as true for purposes of these motions. See W. Bend Mut. Ins. Co. v. Schumacher, 844 F.3d 670, 675 (7th Cir. 2016). Plaintiffs Guster-Hines and Neal are or were company, restaurants are operated by private franchisees. Defendant Easterbrook is the

company. He led the parent company from 2015 through 2019, when his employment was terminated. a position he held from 2015 through 2019. He having been hired to fill the vacancy left by Easterbrook in 2019. Defendant Strong ffs until he was promoted to Chief Field Officer in 2019.

Plaintiffs claim that Defendants discriminated against African Americans at every level of the operation: private franchisees, employees, and executives. For instance, white executives were promoted ahead of more qualified African American

colleagues. Less-qualified white colleagues were promoted ahead of Plaintiffs. 1 white employees with only high school diplomas attained Vice President-level positions while African American employees needed college degrees. And while

franchises (as individuals not representatives of the corporation), African American executives were not offered this benefit on equal terms.

In addition, Defendants eliminated corporate policies that supported African American employees and replaced them with policies that prioritized a gender- balanced workforce. Kempczinski told a meeting of African American executives, for example, that the And d African American Council, a group that had previously enjoyed a budget for activities, went dormant.

During the same time period one third of its African American franchisees, an attrition rate far above that of non-African American franchisees, because of its corporate policies. First, the loss of revenue from African American consumers in the wake of advertising cuts in that community both coincided with this loss of African American franchisees, and either intentionally or

1 These include Doug Lorimer, Charles Newburger, Kristy Cunningham, Allyson Peck, Skye Anderson, Harish Ramalingam, Bill Garrett, Paulo Pena, Luis Quintiliano, Michelle Borninkhof, Karen Garcia, Medy Valenzuela, Gianfranco Cuneo, Jeff Wilfong, Scott Rockwell, and Gregg Erieo. individuals.

foreseeably caused that loss. 2

Second, required capital expenditures fell disproportionately on African American franchisees. Third, Defendants graded restaurants owned by African American franchisees unfairly. Plaintiffs voiced the concerns of African American franchise operators to Strong and other executives.

Finally, Easterbrook and Kempczinski are alleged to have purge[d] African

unnecessary (since Black customers and Black franchisees), and because African American employees were resistant to Between 2014 and 2019, McDonalds USA terminated 30 African American executives (Vice Presidents or higher) and demoted 6 more (including Guster-Hines and Neal) to Director positions. This USA down from 42 to 7, 3

a decrease of about 83%. (Dkt. 51, ¶ 21). White executives were not terminated or demoted at this rate. Many of these demotions and terminations were , the Field First Restructure . While Guster-Hines and Neal were both demoted during that reorganization, comparable white employees were not. (Dkt. 51, ¶¶ 84 88). Neal, Guster-Hines, and other African American executives brought these racial

2 Defendants decreased advertising directed towards African Americans causing revenue from

African American consumers to fall from 20% to 14% of total revenue. 3 The Court notes that if there were 42 African American executives and 36 were terminated or demoted, there would be 6 remaining, not 7. Elsewhere in the Complaint, Plaintiffs allege that, between 2015 and 2018, 31 of the 37 African American officers of the company were fired or demoted. (Dkt. 51, ¶ 83).

disparities to the attention of Defendants Easterbrook and Kempczinski in 2018 and 2019. A. Victoria Guster-Hines Guster- USA in 1987 after receiving her MBA and holding various other positions in the business world. She rose through the ranks, but not as quickly as many less-qualified white colleagues. For example, Guster- (a term of art within the tion) in 2009 while she was a Director-level employee. All President when they held that position, but she was not granted a similar title. In

2013, Guster-Hines was belatedly promoted to Vice President during the tenure of American). She was not promoted beyond this position, however, while less

qualified white men and women were. During her tenure at McDona USA Guster-Hines witnessed and experience numerous acts of overt racism. In 2005 she and another African American employee were told by a white Vice President, Marty Ranft, that what also told her -

Director Laura Granger, told Guster-Hines that she had taken her daughter out of a

class at school because there were too many Black students. 4

When Guster-Hines about this comment, she was ignored. Guster- Hines later learned Granger had made false and disparaging statements about an African American colleague to block him from a promotion. Sometime later Guster- Hines asked Granger to admonish a white franchise operator for making lewd and racist comments to another African American employee, but Granger did nothing. Granger would eventually be one of the decisionmakers who demoted both Guster- Hines and Neal in 2018, along with other African American executives.

Guster-Hines alleges that when a white franchise operator threatened her, she alerted white executives, including Strong, who did nothing to protect her. Strong separately told Guster-Hines that several of her African American

something. He asked her to explain what was making them angry on many occasions, once in the presence of another employee, Vice President Francisco Gonzalez. This treatment put Guster-Hines under stress and required her to take a prolonged medical leave.

She was demoted during the July 2018 reorganization from Vice President to Senior Director, but her responsibilities were not reduced. After that demotion Guster-Hines was also removed from two national teams, Franchising and Restaurant Improvement Process. Guster-Hines alleges that this demotion was because of her race, and as retaliation for her advocacy on behalf of herself, other

African American employees, and African American franchise operators. 4 Granger is a white South African.

B. Domineca Neal Neal joined working as a certified public accountant, marketing executive, consultant, and

moted to Director of Operations for the Indianapolis Region, and in 2017 to Vice President of Franchising and Operations. D . Neal alleges that Strong told her not to work with two African

of those women and to have forced one to transfer to another office. Another white

statements about Neal because of racial animus that negatively affected her

opportunities for advancement. When she asked her (non-African American) supervisor Luis Quintiliano for a raise he falsely accused her of yelling at him. He and Strong offered her a professional coach, which she accepted so as not to appear noncompliant. Strong later elicited negative feedback about Neal from the coach in order to drive her out of the corporation. Neal was demoted in July of 2018 to Senior Director, but her responsibilities were not reduced. Quintiliano told her colleagues that she would be gone by 2019, even though op performer. 2019 nationwide meeting of executives, w Case: 1:20-cv-00117 Document #: 90 Filed: 06/25/21 Page 7 of 37 PageID #:1398 acknowledged, but Neal was not. After Guster-Hines and Neal initiated litigation were instructed not to communicate with them, making it difficult for either to be

effective.

II. Standard

A motion to dismiss tests the sufficiency of a complaint, not the merits of the case. See Gibson v. City of Chi., motion to dismiss under Rule 12(b)(6), the complaint must provide enough factual

information to state a claim to relief that is plausible on its face and raise a right to relief abo Haywood v. Massage Envy Franchising, LLC, 887 F.3d 329, 333 (7th Cir. 2018) (quotations and citation omitted). See also Fed. R. Civ. the claim showing -pleaded factual allegations as true and draws See Fortres Grand Corp. v. Warner Bros. Entm t Inc., 763 F.3d 696, 700 (7th Cir. 2014). A plaintiff need not plead , conclusions or a formulaic recitation of the elements of a cause of action for her

complaint to be considered ad Bell v. City of Chi., 835 F.3d 736, 738 (7th Cir. 2016) (citation and internal quotation marks omitted).

complaint, however true, c Bell Atl.

Corp. v. Twombly, 550 U.S. 544, 558, 127 S. Ct. 1955, 1966 (2007). Deciding the -specific task that requires the reviewing court to draw on its judicial expe McCauley v. City of Chi., 671 F.3d 611, 616 (7th Cir. 2011) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009)).

A motion to strike pursuant to Rule 12(f) may be granted if the complaint when ruling on a Rule

12(f) motion to strike. Delta Consulting Grp., Inc. v. R. Randle Constr., Inc., 554 F.3d 1133, 1141 (7th Cir. 2009). Motions to strike are generally disfavored because of the risk that they will merely cause delay. See, e.g., Brady for Smith v. SSC Westchester Operating Co. LLC, No. 20 CV 4500, 2021 WL 1340806, at *6 (N.D. Ill. Apr. 9, 2021) (citing Olson v. McGinnis, 986 F.2d 1424 (7th Cir. 1993)). The bears the burden of demonstrating that the challenged allegations are so unrelated

to plaintiff's claim as to be devoid of merit, unworthy of consideration, and unduly Vakharia v. Little Co. of Mary Hosp. & Health Care Centers, 2 F. Supp. 2d 1028, 1033 (N.D. Ill. 1998) (citing Talbot v. Robert Matthews Distrib. Co., 961 F.2d 654, 664 (7th Cir. 1992)).

III. Analysis A. Motions to Strike

motions to strike are considered together. Defendants ask the Court to strike allegations about the treatment of African American franchisees and customers (Dkt. 51, 12 20, 42); allegations about the racial climate at and the attrition of African American executives (Dkt. 51, 4 7, 11, 20 25, 43, 59, 61, 118 124); allegations outside of the relevant statute of limitations (Dkt. 51, 47 49, 51 52, 55, 59 66, 68, 82 83); and allegations that may embarrass or humiliate the individual Defendants. (Dkt. 51, 9 10, 19, 20, 38, 43 (b, c, and d), 78(c)). Each of these allegations are considered in turn.

Plaintiffs include allegations about African American franchisees and customers for two reasons. First, they say the poor treatment of those groups was

In that way, the allegations support Plaintiffs hostile work environment claims. Second, they say that the loss of African American customers and the resulting loss of African American franchisees made African American executives who liaised with Id. at ¶ 20). Plaintiffs say that this indirectly led their discriminatory demotion and termination. These allegations make the treatment of

African American customers and franchisees relevant to the claims. 5

The Court will not strike these allegations under Rule 12(f).

Next, Defendants object to allegations describing a failure to promote African Americans, disproportionate demotions and terminations of African Americans, and a corporate culture that undervalued African Americans. Defendants say that beca vindicate the rights of non-plaintiffs a remedy reserved for class actions or actions

brought by the EEOC. The Complaint is not the picture of clarity, but in the paragraphs in question Neal describes how she was demoted and terminated, and Guster-Hines describes how she was passed over for promotions and demoted. Moreover, Plaintiffs respond that allegations about a pattern of mistreating African American employees support the inference that Defendants intentionally discriminated against them, and will, after discovery, be introduced as Rule 404(b) framed as a . 6

The Complaint also contains certain allegations that fall outside of the four- year statute of limitations of a § 1981 claim. Plaintiffs argue that these allegations were part of a hostile work environment (Dkt. 77 at 9 12). 5

Plaintiffs also argue that when intent to discriminate is an element, acts of racism directed at others are relevant. They rely on cases concerning admissibility of evidence at trial. See Betts v. Costco Wholesale Corp. -than- Barber v. Cty. of Ventura . The Court need not consider admissibility decisions. 6 The Court makes no determination about the admissibility of any alleged Rule 404(b) evidence.

Corp. v. Morgan, 536 U.S. 101, 122 (2002) A charge alleging a hostile work environment claim, however, will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period. Whether or not allegations will be admissible, the Court is unwilling to strike them at this time.

Finally, the Defendants argue that certain allegations were included only to embarrass or humiliate them. The paragraphs they point to are, by and large, generalized assertions that the individual Defendants intentionally discriminated on the basis of race. For example Id. at ¶ 9); and the firings and demotions of

Id. at ¶ 20), and as Id. at ¶ 19). The Court questions the benefit of such evocative descriptions, but they are not part. The only inappropriate allegation is that Ea Id Bd. of Educ. of Thornton

Twp. High Sch. Dist. 205 v. Bd. of Educ. of Argo Cmty. High Sch. Dist. 217, No. 06 CV 2005, 2006 WL 1896068, at *3 (N.D. Ill. Jul. 10, 2006). That portion of ¶ 38 is otherwise denied.

following: (1) Title VII claims that arose prior to March 5, 2019; (2) Title VII

disparate impact claims; and (3) Title VII and § 1981 claims insofar as they depend on respondeat superior liability for the actions of Easterbrook, Kempczinski, or Strong.

1. Time-barred Title VII Claims McDonals USA argues that Plaintiffs raise some of their claims too late. (Dkt. 59 at 5). Title VII requires a plaintiff to exhaust her administrative remedies by filing a charge with the EEOC no more than 300 days after the alleged unlawful employment practice. 42

U.S.C. § 2000e-5(e)(1). Plaintiffs filed their original EEOC charges on December 30, 2019. (Dkt. 59, Ex. A), making March 5, 2019, the three- hundred-day cut-off.

a. Hostile Work Environment Claims Plaintiffs misconstrue the continuing violation doctrine when they rely on Natl. R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 118 (2002). Morgan, where the Court held that [i]t does not matter, for purposes of [Title VII], that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire period of the hostile environment may be considered by a court for (emphasis added), saves only

hostile work environment claims. 7

See Watkins v. Chicago Housing Auth., 527 F. App discrete injuries falling outside of the limitations period, such as the discrimination

[plaintiff] broadly describes throughout his complai .

b. Discrimination and Retaliation Claims Plaintiffs seem to argue that conduct that took place before March 5, 2019 is timely allegations in their EEOC charges. (Dkt. 75 at 4). They cite Cheek v. W. & S. Life Ins. Co., 31 F.3d 497, 501 (7th Cir. 1994) for this proposition. This misses the mark. There is no question that like or reasonably related to the allegations of the EEOC charge and growing out of

Arce v. Chicago Transit Auth., No. 14 C 102, 2015 WL 3504860, at *3 (N.D. Ill. June 2, 2015), aff d, 738 F. App x 355 (7th Cir. 2018) (citations omitted). otherwise timely allegations; [d]iscrete discriminatory acts are not actionable if time barred, even when they are related to Id. (citations omitted). See also National Railroad Passenger Corp. v. Morgan discriminatory acts are not actionable if time barred, even when they are related to

7 -barred incident viewed alone Flowers v. City of Chicago, No. 18 CV 7003, 2019 WL 1932587, at *3 (N.D. Ill. May 1, 2019) (quotations and citations omitted). None of the early incidents alleged here (use of racial slurs or racial stereotypes), when viewed alone, rose to the level of a hostile work environment. See, e.g., Harris v. Forklift Systems, Inc., . .] epithet which engenders offensive feelings in a[n] employee does [. . .] not sufficiently affect the conditions of employment to implicate

acts alleged in timely filed charges. [. . .] [E]ach discrete act starts a new clock for filing charges alleging that act. [. . .] The charge must be filed within the 180 or 300 day time p ; Pruitt v. City of Chicago actions [. . .] must be made within 300 days under Title VII or four years under § 1981 [. . .] [t]hat discrete acts may have been mixed with a hostile environment does not extend the time . Plaintiffs have failed to exhaust claims of discrimination or retaliation that took place prior to March 5, 2019. 8

c. Disparate Impact Claims Plaintiffs filed two sets of charges with the EEOC, one on December 30, 2019 and one on July 6, 2020. Mc argues that the later EEOC charges the phrase appeared only in the second EEOC charges. (Dkt. 59

at 7). The Court is not convinced. See, e.g., Lucas v. Gold Standard Baking, Inc., No. 13 C 1524, 2014 WL 518000, at

charges could be read to encompass both disparate treatment and disparate

The earlier EEOC charges include allegations that are later raised by the Plaintiffs in support of their disparate impact claims, such as the demotion of African American executives, the decision to stop promoting racial diversity in the 8 This has little impact on the retaliation claims since all allegedly retaliatory conduct took place after March 2019. (Dkt. 51, ¶¶ 189, 203, 204).

workplace, and the mistreatment of African American franchisees and customers. (Dkt. 59, Ex. A). Therefore, December 30, 2019 EEOC charges preserved their disparate impact claims, and their administrative remedies were properly exhausted with respect to allegations of disparate impact from March 5, 2019 onwards.

2. Title VII Disparate Impact Claims Puffer v. Allstate Ins. Co., 675 F.3d 709, 717 (7th Cir. 2012). Disparate impact

claims involve emplo

of discriminatory motive or intent. Id. at 716. McDonalds USA asserts Plaintiffs fail

Plaintiffs allege that between 2015 and December 2019 various employment practices disparately impacted African American employees. First, they say that acial equality in employment [. . .] instead making gender the exclusive focus of its efforts to achieve diversity and

sent the message that the dream of racial (Dkt. 51, ¶ 7, 9). The alleged impact of this policy shift was psychological; it did not change the terms or conditions of the Plaintiffs employment. They have therefore failed to state that the policy constituted an

adverse employment action as required under Title VII. See Chicago Teachers Union, Loc. 1 v. Bd. of Educ. of City of Chicago, 419 F. Supp. 3d 1038, 1046 (N.D. Ill. 2020) (court considering disparate impact claims had to determine whether layoff notice impacted terms and conditions of employment enough to rise to the level of an adverse employment action and fall within the scope of Title VII); Watkins v. City of Chicago, No. 17 C 2028, 2018 WL 2689537, at *8 9 (N.D. Ill. Jun. the discrimination operates in practice, or even give anecdotal examples of the

; Davis v. Precoat Metals, 328 F. Supp. 2d 847, 855 that the challenged employment practice has a significantly adverse impact on a .

Plaintiffs also rely on the treatment of African American franchisees (who were forced to make greater capital expenditures than their white counterparts, denied the benefits of advertising dollars, and graded unfairly) and African American customers (who received fewer advertising dollars). These are not employment practices cognizable under Title VII. , 609 suita

rather business decisions and judgments which went into the reorganization of Title VII disparate impact claims based on these theories (shift is focus for diversity purposes; treatment of African American customers and African American franchisees) are dismissed with prejudice.

. This properly alleges an employment practice resulting in adverse employment actions that fell disproportionately on African American executives. However, to the extent that this claim relies on the reorganization that took place in the summer of 2018, prior to March 5, 2019, it is barred for purposes of Title VII based on failure to timely exhaust administrative remedies.

3. Title VII and § 1981 Respondeat Superior Claims discrimination, retaliation and hostile work environment claims under Title VII and § 1981 should be dismissed because the Complaint does not allege that its two employees, Kempczinski or Strong, engaged in any discriminatory, retaliatory, or harassing conduct with the requisite intent. 9

argument, which does not cite any relevant case law, is unpersuasive. First, as described below, the Complaint does allege that Kempczinski and Strong intentionally discriminated against Plaintiffs, and that Strong created a hostile work environment. 9

they have waived any argument to the contrary. See, e.g., Odeluga v. PCC Cmty. Wellness Ctr., No. 12 CV 07388, 2013 WL 4552688, at *5 (N.D. Ill. Aug. 27, 2013) (absent an agency relationship, a defendant cannot be liable for the acts engaged in by other parties).

incorrectly assumes that its liability is limited to the liability of the named Defendants. Plaintiffs claim that various specified and supervisory employees, in addition to Strong and Kempczinski, intentionally discriminated against them, retaliated against them, and subjected them to a hostile work environment. The fact that allegations like these are not attributed to named of its agents. 10

Finally, as Plaintiffs point out James v. Get Fresh Produce, Inc., 18 C 4788, 2018 WL 6199003, at *4 (N.D. Ill. Nov. 28, 2018) ( ); Tamayo

v. Blagojevich, 526 F.3d 1074, 1084 (7th Cir. 2008) (describing the minimal pleading standard for simple claims of race or sex discrimination); Luevano v. Wal Mart Stores, Inc., 722 F.3d 1014, 1028 (7th Cir.2013) (observing that the pleading standard for race discrimination cases in Swierkiewicz v.

Sorema N.A., 534 U.S. 506, 514 (2002) survived Twombly and Iqbal). The Court will not dismiss claims on this basis.

I and II), created a hostile work environment (Counts III and IV) and retaliated

against them (Counts V and VI) in violation of § 1981. Strong moves to dismiss each of these allegations.

10 rgument in its reply brief, so the issue is waived.

1. § 1981 Discrimination (Counts I and II) To state a claim of racial discrimination under § 1981, Plaintiffs need allege Trent v. D.T. Chicagoland Express, Inc., No.

18 CV 5090, 2019 WL 498943, at *2 (N.D. Ill. Feb. 7, 2019) (citing Tamayo v. Blagojevich, 526 F.3d 1074, 1084 (7th Cir. 2008)). A supervisor such as Strong may Holmes v. Hous. Auth. of Joliet, No. 14 CV 3132, 2014 WL 6564949, at *6 (N.D. Ill.

Nov. 20, 2014) (citing Smith v. Bray, 681 F.3d 888, 889 (7th Cir. 2012)). The individual defendant must in some demonstrable way to the alleged constitutional deprivation;

McQueen v. City of Chicago, 803 F. Supp. 2d 892, 901

(N.D. Ill. 2011) (citations omitted). Strong asserts he did not personally cause, participate in, or acquiesce in any adverse employment actions against the Plaintiffs based on their race, but this is termination. (Dkt. 51, ¶ 64). He also assigned a

coach to Neal to both humiliate her and use against her professionally. (Id. at ¶¶ 95, 105). The Complaint also alleges Strong helped orchestrate the 2018 reorganization which resulted in the demotion of both Plaintiffs. (Id. at ¶ 85). The Complaint further states that Strong

advancement, Id. at ¶ employees during that reorganization (Id. at ¶ 85c). The Complaint states that, with

respect to Counts I and II, Strong Id. at

¶¶ 135, 150). Plaintiffs need not allege anything further, though comments about their race, discussed at length below, lend unequivocal support to

this allegation. ismiss Counts I and II is denied.

2. § 1981 Hostile Work Environment (Counts III and IV) A hostile work environment claim requires

that the harassment Plaintiffs experience Ezell v. Potter, 400 F.3d 1041, 1047 (7th Cir. 2005); see also Little v. JB Pritzker for Governor, No. 18 CV 6954, 2019 WL 1505408, at *4 (N.D. Ill. Apr. 5, 2019). In assessing whether a hostile work conduct; (2) the objective offensiveness of the conduct; (3) whether the offenses were

physical rather than verbal; (4) the degree of work interference; and (5) whether the Salgado v. Graham Enter. Inc., No. 18 CV 8119, 2019 WL 3555001, at *2 (N.D. Ill. Au assertions, a workplace need not environment. Compare Boniface v. Westminster Place, No. 18 CV 4596, 2019 WL

479995, at *3 (N.D. Ill. Feb. 7, 2019) (citing Whittaker v. Northern Ill. Univ., 424 work environment) with Gates v. Bd. of Educ. of Chicago, 916 F.3d 631, 637 (7th le work environment claims) and Salgado v. Graham Enter. Inc., No. 18 CV 8119, 2019 WL 3555001, at *3 (N.D. Ill. Aug. 1, 2019) (cited by Defendants, holding the same).

severe, but they have plausibly alleged that his harassment was pervasive. To paraphrase the five relevant factors, it was frequent, objectively and subjectively offensive, interfered substantially with their work, and was directed towards them. The Complaint alleges t by other managers, (Id. at ¶ 100), and allowed a white franchisee to threaten and

harass Guster-Hines, (Id. at ¶ Little v. JB Pritzker for Governor, No. 18 C 6954, 2019 WL 1505408, at *3 (N.D. Ill. Apr. 5, 2019) (citing Nanda v. Moss, 412 F.3d 836, 843 (7th Cir. 2005)). He also told Neal not to collaborate with other black colleagues that were racially charged, insulting, and arguably made it more difficult for

Plaintiffs to do their jobs. (Id. at ¶ 69b). Later, he assigned Neal a professional coach in an effort to stigmatize her and gather information to be used against her. (Id. at ¶ om March of 2018 onwards (Id. at

¶ 69d f). This is the kind of conduct which, according to several cases cited by Strong, alleges a hostile work environment. See, e.g., Easley v. Iberia Airlines, No.

05 C 3760, 2007 WL 625515, at *5 (N.D. Ill. Feb. 23, 200

harassment under § 1981 so hostile work environment claims were not dismissed); Little v. JB Pritzker for Governor, No. 18 C 6954, 2019 WL 1505408, at *4 (N.D. Ill. Apr. 5, 2019) (hostile work environment claims not dismissed where supervisor told

complaints about discrimination were dismissed by a supervisor, and plaintiff was denied opportunity to ask questions). The remaining cases cited by Strong are easily distinguishable as they describe less severe and less pervasive conduct or insufficiently specific allegations. See Boniface v. Westminster Place, No. 18-CV- 4596, 201 voodoo bag being used to intimidate plaintiff one a single

occasion was not severe or

pervasive, or even clearly race-related); Salgado v. Graham Enter. Inc., No. 18 C 8119, 2019 W which they were used, were too vague to be actionable); Peters v. Renaissance Hotel

Operating Co., 307 F.3d 535, 552 (7th Cir. 2002) (one-time use of racial epithet not - pervasive enough to survive summary judgment motion); and see Triplett v.

Starbucks Coffee, No. 10-C-5215, 2011 WL 3165576, at *4-5 (N.D. Ill. July 26, 2011) (dismissing a hostile work environment claim involving a single racially insensitive

comment and two disciplinary actions). Counts III and IV is denied.

3. § 1981 Retaliation (Counts V and VI) To adequately plead a claim of retaliation under § 1981, Plaintiffs must

Garza v. Ill. Inst. of Tech., No. 17-C-6334, 2018 WL 264198, at *3 (N.D. Ill. Jan. 2, 2018). Retaliation claims must involve personal participation in the retaliatory conduct by the individual defendant. Nieman v. Nationwide Mut. Ins. Co., 706 F. Supp. 2d 897, 909 (C.D. Ill. 2010). Strong concedes that the Plaintiffs engaged in some protected activity but argues that the Complaint fails to allege (a) that he was aware of the protected activity and (b) that he participated in any materially adverse employment actions they suffered.

a. Protected Activity Both Guster-Hines and Neal advocated on behalf of other African Americans. They supported the African American franchisees in NBMOA, and also American Counsel. But this advocacy was not protected activity, because protected

activity must be undertaken in opposition to an unlawful employment practice prohibited by Title VII or § 1981. 11

See Nolan v. City of Chicago, No. 15 CV 11645,

11 Plaintiffs also argue, creatively, that by complaining about policies that affected African American franchisees and customers they were in fact complaining about a hostile work environment, because

2017 WL 569154, at *3 (N.D. Ill. Feb. 13, 2017); Hall v. Forest River, Inc., 536 F.3d 615, 619 (7th Cir. 2008) (noting that a retaliation claim asserted under either Title VII or Section 1981 requires that a plaintiff first show that he or she engaged in a protected activity). By contrast, the 2018 reorganization disproportionately targeted African Americans and their lawsuit (filed in October of 2019) were protected activity. 12

b. Knowledge It is not clear from the Complaint that Strong knew of protests against the reorganization. Neal and Guster- Kempczinski the disproportionate reduction of African American senior executives

Strong. (Dkt. 51 at ¶ 92). Neal also was involved in these conversations. (Id. at ¶ 99). He cannot be said to have

retaliated against the Plaintiffs because of their protests against the restructuring if among others, retaliated against [Neal and Guster-Hines] when [their] counsel

those policies created that hostile work environment. This argument fails because while Plaintiffs complained about the treatment of franchisees and customers, they do not allege they complained about how the treatment of those franchisees and customers affected them. Because they did not allege that the polices created a hostile environment, they did not allege a protected activity. 12 Plaintiffs also allege that they complained about Laura Granger, an HR Director, who allegedly discriminated against African American employees, and that they complained when an unnamed female African American employee was being sexually harassed by a franchisee because of her race and gender. The Plaintiffs do not, however, argue that these complaints (which were arguably protected activity) caused retaliation. (Dkt. 75 at 12).

Id. at ¶¶ 189, 203, 296, 310). This clearly implies knowledge of the lawsuit.

c. Personal Participation in Retaliation After filing suit African American Counsel. Assuming without deciding that this could constitute an adverse employment action, the Complaint does not suggest Strong was personally involved in that exclusion. Plaintiffs job duties were also decreased as colleagues Id It is not clear to what extent Strong was involved in these adverse employment

actions.

humiliation and expulsion of highly qualified African Americans including [Guster-

appears to refer to their demotions during the reorganization, which were allegedly discriminatory but not retaliatory. (Id. at ¶ 10). Counts V and VI are therefore dismissed without prejudice as to Strong.

did not employ the Plaintiffs. Easterbrook, however, frican American Counsel to become inactive; (4) excluded African Americans from his inner circle of trusted advisors; (5) decreased advertising targeting African American consumers; (6) thereby reducing the profitability of African American-owned franchises and decreasing their overall number; and (7) refused to allow Human Resources employees to track the progress of African American women separately from the progress of all women. The Complaint also alleges that Easterbrook purged African American executives (including

Plaintiffs) from the reorganization, while ignoring entreaties by the Plaintiffs describing the

disproportionate effects this reorganization had on African American executives. It is not clear whether the executives in question were, like the Plaintiffs, employees Nor is it clear precisely how Easterbrook was involved in these employment

decisions. Easterbrook moves to dismiss these claims.

1. § 1981 Disparate Treatment (Counts I and II) The vast majority of the allegations against Easterbrook were simply not adverse employment actions against the Plaintiffs, and therefore are not actionable. Plaintiffs have plausibly alleged, however, that Easterbrook was involved in their demotions during the 2018 reorganization. It is plausible that the CEO of -level reorganization at Compare Rainey v. Lipari Foods, Inc., No. 12 CV 9561, 2014 WL

4182662, at *2 (N.D. Ill. Aug. 20, 2014) (cited by Defendants, granting motion to dismiss § 1981 claim against CEO because it was not plausible to suggest he had been involved in hiring of a limousine driver). Moreover, Plaintiffs allege that they themselves told Easterbrook the reorganization was disproportionately impacting African American employees, so unlike in Rainey, the Complaint alleges that Easterbrook knew or knew of the Plaintiffs and was aware of their race and the races of the other employees being downsized. Plaintiffs have sufficiently pled that Easterbrook engaged in an adverse employment action against them.

The Complaint also pleads that Easterbrook intended to discriminate against the Plaintiffs on the basis of race. To begin with, they make the general claim that conduct against African Americans or in the alternative, he ratified that pattern

dismiss stage it is sufficient. See Tate v. SCR Med. Transp., 809 F.3d 343, 346 (7th

Cir. 2015); see also Tamayo v. Blagojevich, 526 F.3d 1074, 1084 (7th Cir. 2008). Moreover, Plaintiffs allege both Easterbrook and Kempczinski thought mid-level African American executives were no longer necessary given the demonstrable decrease in African American customers and franchisees. (Dkt. 51, ¶ 20). The fact negatively impacted during the reorganization compared to the impact on non-

African American employees, there is circumstantial evidence that race was at least

one of the motivating factors behind this reorganization. These allegations of intent meet the minimal pleading requirements of a discrimination claim.

But, as the Defendants note, race must also be alleged as the but-for cause of an adverse employment action in order to qualify as an act of discrimination under § 1981. Comcast Corp., 140 S. Ct. at 1014.

The Complaint acknowledges the stated reducing the number of field executives supervising

the July 2018 [reorganization] had been free from racial bias, [Guster-Hines] and

[Neal] would not have been demoted [and] the disparity in the percentage of African American Officers at the level of Vice President or higher that were terminated and demoted as opposed to the percentage of White Officers at those levels terminated 89). This alleges but-for causation.

2. § 1981 Hostile Work Environment (Counts III and IV) Easterbrook next argues that Counts III and IV should be dismiss both because Plaintiffs have failed to allege that they were subjected to conduct severe and pervasive enough to constitute a hostile work environment under § 1981, and because Easterbrook did not engage in any of the misconduct. For the reasons set forth above, the Plaintiffs have adequately plead that they experienced harassment amounting to a hostile work environment. But § 1981 countenances individual liability only where the individual was personally involved in the acts of

discrimination. See, e.g., Smith v. Bray, 681 F.3d 888, 896 (7th Cir. 2012) (partially overruled on other grounds); Garner V. N.E.W. Indus., Inc., No. 13-C-0569, 2013 WL 6806186, at *1 (E.D. Wis. Dec. 19, 2013).

order to focus on gender, reduced advertising directed towards African American

consumers, and allowed a working group dedicated to increasing racial diversity, constitute harassment. See, e.g., Triplett v. Starbucks Coffee, No. 10-C-5215, 2011

WL 3165576, at *4-5 (N.D. Ill. July 26, 2011) (dismissing a hostile work environment claim based on one racially insensitive comment made by her manager, a store policy requiring employees to buy goods before being permitted to use the restroom, and two racially based disciplinary actions). Moreover, nothing in the Complaint suggests Easterbrook was personally aware of or condoned the harassment Plaintiffs experienced. Counts III and IV are dismissed with prejudice as to Easterbrook.

3. § 1981 Retaliation (Counts V and VI) Easterbrook argues that the Complaint fails to allege (a) that Plaintiffs engaged in protected activity, (b) that he was aware of any protected activity, or (c) that he participated in any materially adverse employment action in response to protected activity.

The Complaint alleges that the Plaintiffs engaged in protected activity. specifically, their opposition to the reorganization they believed was racially motivated. But there are no allegations that Easterbrook was aware of their lawsuit or of any of the alleged retaliatory actions that followed, much less that he condoned them or directed them. Therefore, Counts V and VI are dismissed with prejudice as to Easterbrook. E. McD

1. Employer Relationship under Title VII argues that all claims against it should be dismissed because it did not employ the Plaintiffs. The Corporation may still be liable, for three reasons. First, a

EEOC v. Illinois, 69 F.3d 167, 169 (7th Cir. 1995); see also, e.g., Betts v. Options Care Enters., Inc., No. 18 CV 4023, 2019 WL 193914, at *5 6 (N.D. Ill. Jan. 15, 2019). This depends on (1) the extent of the purported ccupation and nature of skill required; (3) the employer s responsibility for the costs of operation; (4) the method and form of payment and benefits; and (5) the length of the job commitment. See Love v. JP Cullen & Sons, Inc., 779 F.3d 697, 702 (7th Cir. 2015). Plaintiffs have not adequately alleged any of these facts.

Second, a defendant may be an employer solely for purposes of Title VII of which the employee is c See, e.g., Betts v. Option Care Enterprises,

Inc., No. 18 CV 4023, 2019 WL 193914, at *5 (N.D. Ill. Jan. 15, 2019) (citing Tamayo v. Blagojevich, 526 F.3d 1074, 1088 (7th Cir. 2008) and Worth v. Tyer, 276 F.3d 249, 260 (7th Cir. 2001)). Plaint actionable under Title VII. To the extent the Complaint states a claim that

liable under Title VII for conduct that occurred after March 5, 2019. Because

Easterbrook was not involved in any alleged retaliation or in the creation of a those actions for purposes of Title VII. 13

Therefore, Counts XI and XII (alleging a hostile work environment under Title VII) and Counts XIII and XIV (retaliation under Title VII) are dismissed with prejudice against McDonald s Corporation. Counts VII and IX (alleging discrimination under Title VII) remain, to the extent that they are not time-barred. Counts VIII and X (disparate impact) are dismissed to the extent described above: Plaintiffs have plausibly alleged a policy of racially discriminatory promotion, demotion, and termination (and Easterbrook was allegedly involved in it), but time-barred conduct prior to March 5, 2019 (such as the 2018 reorganization) cannot support their claims. actions under § 1981 on a respondeat superior theory, because they were his

13 whose conduct is described in the Complaint but who are not named as Defendants, Corporation employees other than Easterbrook are mentioned in the Complaint.

employer until his termination in November of 2019. See Odeluga v. PCC Cmty. Wellness Ctr., No. 12 CV 07388, 2013 WL 4552688, at *5 (N.D. Ill. Aug. 27, 2013) A § 1981 plaintiff may pursue a defendant for the civil rights liabilities of its agents under a respondeat superior, or vicarious liability, theory.). Section 1981 claims against are dismissed to the same extent they were dismissed as to Easterbrook: Counts I and II (discrimination under § 1981) remain, Counts III and IV (hostile work environment under § 1981) are dismissed with prejudice, and Counts V and VI (§ 1981 retaliation) are dismissed with prejudice.

until November 3, 2019 when he replaced Easterbrook as President and CEO of

(Counts I and II), creation of a hostile work environment (Counts III and IV) and

retaliation (Counts V and VI) in violation of § 1981. The Complaint alleges that Kempczinski ucing its budget and programming for developing

talent, (Id. at ¶ 9) and excluded African Americans from his inner circle of trusted advisors. (Id. at ¶ 10). Moreover, he allegedly decreased advertising targeting African American consumers and thereby injured African American-owned franchises. (Id. at ¶ 18). Most relevant for purposes of this suit, Kempczinski

purged executive level by demoting or firing them. (Id. at ¶ 20).

white (Id. at ¶ 69). Although it is not clear to what extent Kempczinski was aware of these

incidents, he knew that the 2018 reorganization was opposed by the Plaintiffs and other African American executives, because they lodged their complaints with Kempczinski and Easterbrook directly. (Id. at ¶ 92). Guster-Hines also met with Kempczinski and another executive, Melissa Kersey, to discuss the effects of the reorganization in February of 2019. (Id. at ¶ 98). Kersey agreed to track the success of African American women separately from the success of white women but told the Plaintiffs that Kempczinski would not give her permission to do so. (Id. at ¶ 99).

1. § 1981 Discrimination (Counts I and II) Kempczinski is accused of essentially the same acts of discrimination as Easterbrook; namely, instituting the 2018 reorganization with the purpose of demoting and terminating African American executives (including the Plaintiffs). His motion to dismiss Count I and II is denied for the reasons enumerated above. action since it resulted in their demotions. Kempczinski is alleged to have

on. (Dkt. 51, ¶ 123). Moreover, the intended Case: 1:20-cv-00117 Document #: 90 Filed: 06/25/21 Page 34 of 37 PageID #:1425 Id. at ¶ 122). The Complaint alleges , [they] would not Id. at ¶ 88). They also allege more specifically that

-documented decisions to deprioritize advertising to African American customers and thereby reduce the number of African American franchisees, African American executives had become less necessary to the operations of the company. (Id. at 20).

2. § 1981 Hostile Work Environment (Counts III and IV) Kempczinski next argues that the Plaintiffs have not adequately alleged harassment that is severe or pervasive enough to constitute a hostile work environment. Plaintiffs largely fail to respond to this argument, although given the number of redundant motions filed by the Defendants this is perhaps not surprising. For the reasons described

elsewhere in this order they have plausibly alleged a hostile work environment.

Kempczinski is not, however, personally liable under § 1981 for the hostile work envir

White perpetrators suffered no consequence, increased in both frequency and o indication that he caused this trend or knew of those incidents. (Id. at ¶ 69). Setting aside his participation in the reorganization, he is only alleged to have made one race-related comment: that the number of African American

creation of a hostile work environment is not enough to give rise to personal

liability. See Smith v. Bray, 681 F.3d 888, 896 (7th Cir. 2012). Counts III and IV are dismissed with prejudice as to Kempczinski. 3. § 1981 Retaliation (Counts V and VI)

Finally, Counts V and VI are dismissed as to Kempczinski. The Plaintiffs have plausibly alleged that he was aware of their protected activity; both Plaintiffs complained to him about the racial impact of the reorganization, (Id. at ¶ 92), and Guster-Hines even met with him in person. (Id. at ¶ 98). But there is no indication that Kempczinski knew of or authorized any retaliatory actions in response to this lawsuit, their other protected act. The

are dismissed without prejudice.

IV. Conclusion

motions to dismiss (Dkts. 56, 58, 60, 62, and 68) are granted in part as follows. Counts I and II alleging disparate treatment on the basis of race in violation of § 1981 may proceed against all Defendants. Counts III and IV alleging hostile work environment in violation of § 1981 Counts are dismissed with prejudice as to the remaining Defendants. Counts V and VI

alleging retaliation under § 1981 . These Counts are dismissed without prejudice against Strong and Kempczinski. They are dismissed with prejudice against the remaining defendants.

As to the Title VII allegations, Counts VIII and X are limited to a theory of disparate impact based on firings and demotions after March 5, 2019 against both against both defendants based on conduct after March 5, 2019. Counts XI and XII

alleging hostile work environment are dismissed with prejudice against McDonald s XIV alleging retaliation are dism

March 5, 2019.

Dated: June 25, 2021

E N T E R:

MARY M. ROWLAND

United States District Judge