IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IVY BLOUNT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 02-2813 V
	)	
D. CANALE BEVERAGES, INC., CHRIS CANALE, Owner, ROGER TAYLOR, Supervisor, RICHARD CARUSO, District Manager, TOM WOODS, Vice President, and D. CANALE,	)	
	)	
Defendants.	)	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Ivy Blount, an African-American male, sued his employer, D. Canale Beverages, Inc. ("D. Canale") and individual defendants, Chris Canale, Roger Taylor, Richard Caruso, and Tom Woods ("defendants"), alleging that D. Canale discriminated against him on the basis of his race and disability in violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII") and the Americans with Disabilities Act ("ADA"); that D. Canale retaliated against him in violation of Title VII; and that defendants terminated his employment in violation of 42 U.S.C. § 1981.[1] The parties have consented to

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[1] Blount originally filed this action pro se alleging racial discrimination and retaliation pursuant to Title VII, 42 U.S.C. § 2000e of the Civil Rights Act of 1964 as amended. In addition, he alleged conspiracy, defamation, equal rights violations, and unlawful employment practices in violation of the Equal Pay provision of the Fair Labor Standards Act, the ADA, and 42 U.S.C. §§ 1981, 1985, 1986. By order of the court, however,

trial before the United States Magistrate Judge, pursuant to 28 U.S.C. § 636(c). Now before the court is a motion for summary judgment filed by D. Canale and the individual defendants. For the reasons that follow, D. Canale's and the individual defendants' motion for summary judgment is granted.

BACKGROUND AND UNDISPUTED FACTS

At the outset, the court must address three issues concerning Blount's Response to the Defendant's Motion for Summary Judgment and his accompanying affidavit. First, the court notes that the Affidavit of Ivy Blount contains many statements that contradict Blount's prior sworn testimony given at his deposition on August 7, 2003. "[A] party cannot create a genuine issue of material fact by filing an affidavit, after a motion for summary judgment has been made, that essentially contradicts his earlier deposition testimony." *Penny v. United Parcel Serv.*, 128 F.3d 408, 415 (6th Cir. 1997) (citing *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986)); *see also Davidson & Jones Dev. Co.*, 921 F.2d 1343, 1352 (6th Cir. 1991) ("[I]t is 'accepted precedent' that after a motion for summary judgment has been filed . . . a factual issue may not be created by filing an affidavit contradicting earlier deposition testimony."). Accordingly, the court will not reject Blount's entire affidavit but will disregard any portions

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his claims for relief under the Fair Labor Standards Act were dismissed. Furthermore, the court dismissed all claims that the defendants acted under color of state law; all claims asserted under 42 U.S.C. § 1981 except for termination of employment; all claims asserted under 42 U.S.C. §§ 1985 and 1986; all claims for defamation; all claims for religious discrimination; all claims associated with "redlining;" and all claims asserted under Title VII and the ADA against Canale, Wood, Caruso, and Taylor in their individual capacities.

thereof that are inconsistent with his sworn deposition testimony. Second, any of Blount's responses to D. Canale's Statement of Undisputed Material Facts that are incomplete or non-responsive to the actual undisputed fact alleged will be deemed undisputed for purposes of this motion.[2] Finally, Blount's affidavit contains several statements that are inadmissible hearsay. When deciding motions for summary judgments, courts should not consider affidavits "composed of hearsay and opinion evidence" because they do not satisfy the "personal knowledge" requirement set forth in Rule 56(e) of the Federal Rules of Civil Procedure. *State Mutual Life Assurance v. Deer Creek Park*, 612 F.2d 259, 264 (6th Cir. 1979) (citing FED. R. CIV. P. 56(e)). In keeping with precedent, this court will not consider any inadmissible hearsay contained in the Affidavit of Ivy Blount.

With the foregoing principles in mind, the court finds that the following facts are undisputed for the purposes of this motion. D. Canale is a private corporation that distributes and markets beverages, including Anheuser-Busch beverage products, in and around the Memphis area. (Defs.' Statement of Undisputed Material Facts at ¶¶ 1, 2.) In 1987, D. Canale hired Blount as a night warehouse worker to load trucks. (*Id.* at ¶ 10.) After working as a warehouse worker for approximately two and a half years, Blount transferred to a day-shift forklift driver position. (*Id.*) Blount

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[2] Blount did not respond to the following paragraphs included in D. Canale's Statement of Undisputed Material Facts: 1-4, 7-11, 13-15, 17-20, 25-30, 32-37, 39-41, 43, 45-47, 51-54, 57-68, 70, 72-74, 76-78, 82-84, 87, 89, 92-93, 96-102, 106, 111-12. Additionally, Blount lists paragraphs 75, 80, and 103 of D. Canale's Statement of Undisputed Material Facts as disputed but does not actually respond to explain why they are undisputed.

worked as a forklift driver until he was promoted to a merchandiser position in 1995 or 1996. (*Id.*) In 1999, Blount became a route sales person. (*Id.* at ¶ 11.)

As a route sales person, Blount's duties entailed selling beverage products to retail clients such as gas stations, restaurants, grocery stores, and convenience stores from a stocked truck along assigned routes. (*Id.* at ¶ 15.) Subject to a supervisor's inventory check, Blount was also responsible for determining the products and quantity of products that were to be loaded onto his truck. (*Id.*) When servicing a client's store, Blount's duties included meeting with the client's management to sell beverage products; maintaining promotional displays; inventorying and replenishing the client's beverage stocks; and rotating the client's beverage stock to ensure that beverage products with the shortest remaining shelf life remain in the front and are removed and replaced if not sold before the product's expiration date. (*Id.* ¶ 17.) As a route sales person, Blount used the knowledge he obtained as a merchandiser to emphasize the use of point-of-purchase and other promotional practices to increase product sales. (Pl.'s Mem. of Law in Supp. of Resp. to Defs.' Mot. for Summ. J. at 2.) Blount was paid on a commission basis only. (Defs.' Statement of Undisputed Material Facts, Ex. 3 at ¶ 12.)

Blount claims that as a route sales person he was discriminated against, retaliated against, harassed, and eventually terminated on the basis of his race and disability. Blount filed his first charge of discrimination and harassment with the EEOC and Tennessee Human Rights Commission on August 22, 2001, alleging that he had first informed the management of D. Canale that his

supervisor had discriminated against him and harassed him in October of 1999[3] and that he was subsequently placed under a different supervisor in August, 2000. (*Id.*, Ex. Blount 3 at 1.)

Blount asserts that beginning in 1999 two Caucasians, Victor Null and Andy Anderson[4], harassed him because he was selling too much beer, knew better ways to increase the sale of beer, sold eighteen packs of beer in predominantly African-American areas, confronted them about not doing their job, and questioned them about placement of point-of-sale marketing items in predominantly African-American stores. (Defs.' Statement of Undisputed Material Facts at ¶ 98; Blount Dep. at 153-55.) Blount claims that animosity developed between him and the other employees that he worked with on his first route because Blount would "chastise[] them about not doing their job" and because he knew "the things that help sell beer." (Blount Dep. at 153, 166.) Additionally, Blount claims that Null and Anderson would "play games" with him by pulling him out of one store to make unnecessary deliveries to other stores. (*Id.* at 157.) As a result of the alleged harassment that Blount claims he experienced while he worked under Null and Anderson's supervision, Blount accused Null of being a racist and asked him if he "ha[d] something against blacks" or against Blount.

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[3] Blount's charge of discrimination was conclusory and failed to state specific acts of discriminatory behavior that occurred before October, 1999. Furthermore, in Blount's deposition, he failed to reveal any specific instance of discrimination occurring prior to that date. (*See* Blount Dep. at 147-48.)

[4] Null and Anderson were Blount's team leader and assistant team leader, respectively, before Blount's route changed. (Defs.' Statement of Undisputed Material Facts at ¶ 14.)

(Blount Dep. at 160.) The exchange led to intervention by D. Canale management and the alleged harassment became less frequent but did not cease. (*Id.* at 161-62.)

Blount's route changed in August of 2000 because he bid for and was awarded a different route. (Defs.' Statement of Undisputed Material Facts at ¶ 28.) Blount's new route had different supervisors. Thus, Richard Caruso, a Caucasian, became Blount's new district manager; Roger Taylor, an African-American, became Blount's new team leader; Derrick Mister, an African-American, became Blount's new assistant team leader; and Norman Smith, an African-American, eventually became Blount's helper. (*Id.* at ¶ 29.) Blount claims that he was labeled as a troublemaker on the new team because of his complaints to D. Canale management about harassment. (Blount Dep. at 163.)

Blount claims that he was discriminated against in August, 2000 when D. Canale required immediate reimbursement from him for a payroll overpayment of $400 that it did not require from other employees. (Defs.' Statement of Undisputed Material Facts at ¶¶ 21-26.) Although Blount acknowledged that he was unaware of any other employee mistakenly overpaid wages who was permitted to repay the extra amount in installments, he claims that D. Canale was retaliating against him and "tricking" him by making him repay the $400 immediately before the Labor Day holiday weekend. (*Id.* at ¶ 22; Pl.'s Resp. to Defs.' Statement of Undisputed Material Facts at ¶ 22.) He claimed that it was a trick because Wood told him that he earned the money by working twenty one days straight when he was a merchandiser. (Pl.'s Resp. to Defs.' Statement of Undisputed Material Facts at ¶ 21.) Caruso, Blount's district manager,

however, authorized a $200 loan for him that same week, and D. Canale loaned Blount $1000 in November, 2000. (Defs.' Statement of Undisputed Material Facts at ¶¶ 26-27.)

Blount also alleged in his first EEOC charge that Roger Taylor, his African-American supervisor on the second route, repeatedly called him a "field nigger" from March 19, 2001 until July 26, 2001." (*Id.*, Ex. Blount 3 at 1.) Although it is unclear when D. Canale first became aware of Blount's allegation that Taylor was making inappropriate racial remarks,[5] Tom Woods, Vice-President of D. Canale, met with Blount and his clinical psychologist Linda Shissler on August 31, 2001 to discuss the alleged harassment that Blount was experiencing.[6] (*Id.* at ¶ 50.) During the meeting, Blount complained that Taylor had called him a "nigger" on four occasions, that he felt pressured on the job, and that co-workers were jealous of him because of sales. (*Id.* ¶ 51.) However, Blount admitted that he had also used the word "nigger" and admitted calling Taylor a "nigger" after Taylor said he was a "house nigga." (*Id.* at ¶¶ 103, 104.) Blount also acknowledged that Taylor referred to himself as a "house nigga." (*Id.* at ¶ 102.) Moreover, Blount stated that he did not immediately tell Taylor to stop, nor did he contact management regarding Taylor's use of the word "nigger" prior to filing his first EEOC charge; however, he claims that the harassment was common knowledge. (*Id.*

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[5] Blount alleged that he had complained about the harassment for months before Woods arranged to meet with him. (Aff. of Blount at ¶ 25.)

[6] The meeting also addressed threats of violence that Blount had allegedly made to other employees at D. Canale. (Defs.' Statement of Undisputed Material Facts at ¶ 50.)

at ¶ 105; *id.*, Ex. 1 at 187.)

When Woods interviewed Taylor concerning Blount's allegations, Taylor denied calling Blount a "field nigger," but admitted that he had made a comment in June of 2001 to a group of African-American employees, including Blount, that unloading cases of beverages was the work of "field niggers" and "house niggers."[7] (*Id.* at ¶ 54.) Taylor was subsequently given a formal letter of reprimand and warned that any "such unprofessional behavior in the future would result in further disciplinary action including possible termination of his employment." (*Id.* ¶ 56.) Blount claims that he was never informed that Woods had taken any corrective measures after the meeting and that the harassment continued. (Blount Aff. at ¶¶ 5, 6, 7.)

During the period of March 19, 2001 and July 26, 2001, Blount alleged that he experienced other forms of discrimination in addition to Taylor's racial slurs. Blount claims that D. Canale questioned his beverage delivery volume and refused to provide relief labor on his delivery routes, particularly on one occasion when the temperature was ninety-five degrees. (Defs.' Statement of Undisputed Material Facts at ¶¶ 31, 99; Blount Dep. at 240.) Blount, however, could not identify any other similarly-situated Caucasian who received help. (*Id.* at ¶ 32.) In August of 2001, Blount claimed that when he asked Caruso to provide assistance with his route because he had additional stops to make, Caruso threatened to cut his route short. (Pl.'s First Amended Complaint

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[7] On July 26, 2001, Taylor told Blount that he would stop calling him "field nigga" because he "might take offense to it." (Defs.' Statement of Undisputed Material Facts at ¶ 106.)

at ¶ 14.) Blount claimed that Taylor also harassed him on his second route, as Null and Anderson had done on the first, because he was selling too much beer, which, consequently, would require Taylor and others to work past 4:00 PM. (Defs.' Statement of Undisputed Material Facts at ¶ 101.)

Blount asserts that D. Canale removed the water jug from his truck at a time when the temperature was between 90 to 100 degrees. (Blount Aff. ¶ 23(e).) He claims his supervisors would write his name on returned products. (*Id.* at ¶ 23(f0.) He claims that his supervisors secretly kept beer in their offices until it became outdated in an effort to get him terminated. (*Id.* at ¶ 23(g).) Finally, Blount claims that he was discriminated against in retaliation for accusing his first supervisor of racial discrimination. (*Id.*, Ex. Blount 3 at 1.)

Although Blount claims that he knew how to increase the sales of D. Canale's products and would win prizes for selling the most beer, his performance of other duties as a route sales person was not always satisfactory. (Blount Dep. at 175-76.) Between the period of March 19, 2001 and July 26, 2001, D. Canale issued several warnings to Blount regarding his practices as a route sales person. Sales manager Chris Williams issued a warning letter on October 6, 1999 for Blount's refusal to pick up out-of-date products at a client's store and indicated that Blount would be subject to disciplinary action if he committed "any further acts of insubordination or refusal to carry out a direct order." (Defs.' Statement of Undisputed Material Facts, Ex. Blount 12 at 1.) A January 28, 2000 warning letter addressed deficiencies in Blount's display tracking. (*Id.*, Ex. 11 at 1.) On May 30, 2001, Blount

received a formal written warning for failing to follow D. Canale's rotation policy. (*Id.* at ¶ 30.)

Before Blount filed his first charge of discrimination with the EEOC, D. Canale asserts that on August 6, 2001 its management received a message from Blount asking to speak with the president about harassment and discrimination. (Defs.' Statement of Undisputed Material Facts at ¶ 33.) The president, Chris Canale, was out of town and Wood responded to Blount's complaint on his behalf. (*Id.* at ¶¶ 34-35.) Wood began to investigate Blount's allegations by contacting him and requesting a meeting at the end of the day to address Blount's concerns. (*Id.* at 36.) Although Blount agreed to meet with Wood, Blount made no effort to talk with Wood at the end of the workday and claimed that he could not talk with Wood because "the tricks and harassment eventually took its toll" on him. (Pl.'s Resp. to Defs.' Statement of Undisputed Material Facts at ¶ 38.)

The next day, on August 7, 2001, Blount contacted Wood and informed him that he was sick and would not be coming into work because he was going to see a doctor. (*Id.* at ¶ 39.) After Wood expressed his desire to meet with Blount to discuss his concerns, the two agreed to meet when Blount returned to work. (*Id.*) Blount did not return to work that day or the next. (*Id.* at ¶ 40.) Instead, on August 8, 2001, Blount's clinical psychologist, Linda Shissler, faxed Wood a message requesting that Blount be placed on medical leave because she was "concerned for [Blount's] safety and for the safety of other employees of D. Canale" and was going to refer him for evaluation for hospitalization. (*Id.*, Ex. 3D at 3.) Dr. Shissler's message also indicated that Blount's condition was

temporary and that she expected him to return to "full capacity in the future." (*Id.* at ¶ 41.) Subsequently, Dr. Shissler called Wood to inform him that Blount had "homicidal tendencies" toward his team leader, Roger Taylor. (*Id.* at ¶ 42.)

As a result of Dr. Shissler's telephone call and facsimile and rumors at D. Canale, Wood and Caruso began to investigate whether Blount actually had threatened any of D. Canale's employees with violence. (*Id.* at ¶ 43.) Caruso and Wood received reports from several of its employees that Blount had made threats of violence, including the threat "I'm going to kill the mother fuckers," which was made while Blount was holding a gun. (Defs.' Statement of Undisputed Material Facts at ¶ 44.) As a result of their investigation, Wood notified Blount by a letter dated August 22, 2001 that he was placing Blount on suspension pending further investigation. (*Id.* at ¶ 45.)

Wood suspended Blount on the same day that Blount filed his first Charge of Discrimination with the EEOC. Blount claims that Wood suspended him in retaliation for filing charges of discrimination. However, Wood denies that he knew that Blount was going to file charges that day or that he intended to file charges at all. (*Id.* at ¶ 47.) At the August 31, 2001 meeting of Wood, Blount, and Dr. Shissler, Wood discussed Blount's threats of violence in addition to his claims of discrimination. (*Id.* at 50.) Blount denied that he ever threatened to kill anyone or threatened his co-workers and claims that Wood indicated no concern for his safety at the meeting. (*Id.* at ¶ 52; Aff. of Blount at ¶ 1, 25.) As a result of Blount's denial, Wood re-interviewed the employees that reported threats of violence, and they confirmed their earlier

reports. (Defs.' Statement of Undisputed Material Facts at ¶ 53.) Blount remained on medical leave of absence and on suspension from D. Canale after the August 31, 2001 meeting, and Wood ceased investigating Blount's alleged threats of violence. (*Id.* at ¶ 57.)

From the period of October 31, 2001 to December 31, 2001, Blount was on medical leave and under the psychiatric care of Dr. Tejinder Sanai at Charter Lakeside Behavioral Health Hospital for treatment of major depression. (Defs.' Statement of Undisputed Material Facts, Ex. 2D at 1.) Blount claims that during that time he was not able to handle "any personal business whatsoever" because he was stressed out and not functioning properly. (Blount Dep. at 247.) Blount was also under medication. (*Id.*) Although he asserts that he could not handle his own affairs during this period, he attempted to obtain workers compensation through a woman named Leann[8] who worked for D. Canale's workers' compensation carrier. (*Id.* at ¶ 58.) Blount asserts that Leann denied his workers' compensation claim based on statements Wood made to her concerning the uncertainty of Blount's employment status. (*Id.* at ¶¶ 58, 59, 60.) Blount claims that the denial was made in retaliation because Leann would not discuss the reasons for the denial and would not review Blount's medical records upon his request. (*Id.* at ¶ 63.)

While Blount was suspended and on medical leave in November of 2001, the management at D. Canale discovered some irregularities in the accounting practices of route sales persons and began an audit to determine the source of the irregularities. (Defs.' Statement

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[8] **Leann's last name is not provided in the record.**

of Undisputed Material Facts at ¶ 64.) The audit revealed that two route sales persons and a team leader had manipulated their route documentation in order to pocket overcharges billed to the customer; accordingly, D. Canale terminated those employees. (*Id.* at ¶¶ 65, 66.) In December of 2001, D. Canale launched a more extensive audit of route accounting by its sales staff and discovered several sales employees with irregularities in their route accounting and settlement of accounts.[9] (*Id.* at ¶ 68.) D. Canale discovered that Blount's accounts were amongst those showing irregularities. (*Id.* at 69.)

On January 2, 2002, Blount returned to D. Canale and wanted to speak with the president because he had been released to return to work. (*Id.* at ¶ 73.) Wood arranged for Blount to come back and meet with the president the next day because the president was out of the office. (*Id.*) On January 3, 2002, Blount met with the Wood and the president and presented two letters to them concerning his release to return to work. (*Id.* ¶ 4.) The first letter was from his psychiatrist, Dr. Sanai, releasing him to return to work without restriction effective January 1, 2002. (*Id.*) Although the letter was dated October 31, 2001, Blount had not previously provided the note to D. Canale. (*Id.* at ¶ 75.) The second letter was dated January 2, 2002 and written by Blount's psychologist, Dr. Shissler. (*Id.* at ¶ 74.) Dr. Shissler's letter contained four

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[9] D. Canale discovered that some employees were posting unsigned tickets for overages (product that was paid for but not delivered) at the end of the day to correct the overage on their truck and reduce the total dollar amount in receipts accountable during settlement, and pocketing the difference. (Defs.' Statement of Undisputed Material Facts at ¶ 68.)

recommendations regarding Blount's return to work: (1) that Blount should work a halftime schedule that would allow him to "rebuild his strength and allow him to readjust to the work environment;" (2) that Blount should be restricted from driving company trucks due to side effects of his medication; (3) that Blount should not return to a sales position because of his "inability to tolerate the whims, moods, or negative feelings of others;" and (4) that Blount's immediate supervisor should serve as an intermediary for any communications between Taylor or Caruso and Blount. (*Id.* at ¶ 76; *Id.*, Ex. 2E at 1.)

During the meeting, Blount informed the president that he had not received his long-term disability check. (*Id.* at ¶ 78.) The president instructed Wood to look into the matter and informed Blount that he would need a few days to consider the information that he had provided during the meeting and would contact him at a later date. (*Id.* at ¶ 77.) Wood responded by calling UNUM Provident ("UNUM"), the disability insurer, and requesting that the checks be issued to Blount. (*Id.* at ¶ 79.) Blount subsequently received long-term disability insurance benefits for part of the months of November and December of 2001, even though he had been working during those months at a Goldsmith's department store without informing D. Canale or UNUM. (*Id.* at ¶ 80; *id.*, Ex. Blount 22.) Blount asserts that Wood must have been the original cause of the delay of receipt of long-term disability benefits because the check was issued shortly after Wood placed a call to UNUM. (*Id.* at ¶ 81.)

After Blount began to receive his check for long-term disability, the management of D. Canale attempted to contact him on

January 17, 2002 to schedule a meeting to discuss discrepancies in his route accounting. (*Id.* at ¶ 82.) Shortly thereafter, Dr. Shissler sent Wood a facsimile suggesting jobs Blount felt he could perform pending his return to his sales position; however, it was several days before Blount responded to D. Canale management's efforts to contact him. (*Id.* at ¶¶ 83, 84, 85.) On January 23, 2002, Wood met with Blount to discuss the irregularities in his route accounting.[10] (*Id.* at ¶ 86.) Wood reminded Blount that he was still suspended, proceeded to show Blount the questionable invoices, and asked him to explain the discrepancies. (*Id.* at ¶ 87; Blount Dep. at 283.) In response, Blount told Wood that if there was a problem with his route accounting, Wood should "get with whoever settled [him] up." (Defs.' Statement of Undisputed Material Facts at ¶ 88; Blount Dep. at 277.) Blount refused to discuss the invoices any further, walked out of the meeting, and left the premises without explanation. (Defs.' Statement of Undisputed Material Facts at ¶ 88.)

After the meeting, Wood contacted the night computer manager concerning Blount's route accounting and reviewed the policies and practices addressing the adjustment of daily product and receipt

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[10] **In his affidavit, Blount asserted that he was not informed of any irregularities in his route accounting. He claimed that Wood merely asked him questions about old records and old transactions. He asserts that in response, he politely responded to his questions and immediately left the premises because he was on suspension. (Aff. of Blount at ¶ 13.) Blount's deposition, however, contradicts the assertions made in his affidavit; therefore, paragraph 13 of Blount's affidavit will be disregarded by the court for purposes of this motion.**

accounting for route sales persons.[11] (*Id.* at ¶ 90.) He determined that Blount was the source of the improper accounting. (*Id.*) On January 26, 2002, Wood notified Blount by letter that the decision had been made to terminate his employment effective January 25, 2002 for accounting irregularities and for making threats of violence against D. Canale and its employees. (*Id.* at ¶ 91; *id.*, Ex. 3G at 1.)

As a result of improper accounting practices, D. Canale terminated a total of eight Caucasian employees and five African-American employees during the period of November 2001 through January 2002. (*Id.* at ¶ 70.) Other persons, including those who are not members of a protected class, were terminated prior and subsequent to Blount's termination for their involvement in accounting irregularities. (*Id.* at ¶ 72.) Furthermore, none of the terminated individuals, except for Blount, claimed to have a disability or had previously filed a charge of discrimination. (*Id.* at 93.)

Blount denies that he ever stole any money from D. Canale. (Aff. of Blount at ¶¶ 8-9.) On February 11, 2002, he filed a second Charge of Discrimination with the EEOC and the Tennessee Human Rights Commission alleging that he was discriminated against in retaliation for filing a prior charge of discrimination against his employer and discriminated against on the basis of his

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[11] Blount asserted in his affidavit that the policies at D. Canale kept changing and cites his own deposition at 105, line 15 to support his assertion. That page, however, only refers to how the policy at D. Canale had always been to get trucks off the road by 6:00 PM and does not address how systems at D. Canale kept changing over time.

disability, major depression, in violation of the ADA. (*Id.*, Ex. Blount 4.) Since working for D. Canale, Blount has been taking anti-depressant medication to control his alleged major depression and to help him cope with day-to-day living. (*Id.* at ¶ 108.) He has lived independently in his small home prior to and after working for D. Canale. (*Id.* at ¶ 109; Aff. of Blount at ¶ 109.) He can feed himself and wash his own laundry. (*Id.* at 110.) Blount asserts that he is too fatigued to mow the lawn. (Blount Dep. at 145.) Blount worked for Waste Management eight to ten hours per day, five days a week driving a garbage truck until he recently had to stop driving a commercial vehicle. (Blount Dep. at 144-46; Aff. of Blount at ¶ 21.) He claims that his medicine makes him sleepy, and it caused him to run a red light. (Aff. of Blount at ¶ 21.) Blount currently works at a Family Dollar Store stocking shelves and is able to interact with others on a social level. (*Id.*; Defs.' Statement of Undisputed Material Facts at ¶ 95.)

Blount received his Right to Sue letter from the EEOC on July 30, 2002. Blount filed suit against D. Canale and the individual defendants on October 23, 2002. D. Canale and the defendants filed this motion for summary judgment in response.

ANALYSIS

In support of its motion for summary judgment, D. Canale and the individual defendants argue seven primary grounds: (1) that Blount cannot establish a prima facie Title VII case; (2) that D. Canale had legitimate and non-discriminatory reasons for suspending and terminating Blount's employment; (3) that Blount cannot show that D. Canale's reasons for suspending and terminating Blount were pretextual; (4) that Blount cannot establish a prima facie case of

retaliation under Title VII; (5) that Blount cannot establish a hostile work environment under Title VII; (6) that Blount has abandoned his discrimination claim under the ADA; and (7) that Blount cannot show that he is disabled within the meaning of the ADA or that his depression substantially limits a major life activity.

In response, Blount insists that a genuine issue of material fact exists concerning his ability to establish a prima facie case of racial discrimination, retaliation, and hostile work environment under Title VII and termination of employment under 42 U.S.C. § 1981. Furthermore, Blount argues that any evidence that D. Canale and the individual defendants offer to establish that his suspension and termination were legitimate and non-discriminatory is pretextual. Blount, however, failed to respond to D. Canale's arguments concerning his inability to establish a claim for disability discrimination under the ADA.

A. Summary Judgment Standard

Summary judgment "shall be rendered forthwith" if the pleadings, discovery materials, and affidavits on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter, but only to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. . . . If the evidence is merely colorable,

or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (internal citations omitted). All evidence, facts, and "any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party." *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 882 (6th Cir. 1996) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Furthermore, entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

B. Title VII Race Discrimination

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ." 42 U.S.C. § 2000e-2(a)(1). In the Sixth Circuit, courts follow the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), burden-shifting analysis when analyzing a Title VII claim when there is no direct evidence of discrimination. *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 538 (6th Cir. 2002); *see Hollins v. Atlantic Co.*, 188 F.3d 652, 658 (6th Cir. 1999). To prove a prima facie case of racial discrimination, the plaintiff must establish the following four elements: (1) that he is a member of a protected class, (2) that he was qualified for the position, (3) that he suffered an adverse employment action, and (4) that he was replaced

by a member outside the protected class or was treated less favorably than a similarly situated individual outside his protected class. *See St. Mary's Honor Ctr. V. Hicks*, 509 U.S. 502, 506 (1993); *Johnson v. Univ. of Cincinnati*, 215 F3d 561, 572-73 (6th Cir. 2000). Once the plaintiff has established his prima facie case, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for its actions. *McDonnell Douglas*, 411 U.S. at 802; *Hollins*, 188 F.3d at 658 (citation omitted); *see also Lynch v. Freeman*, 817 F.2d 380, 388 (6th Cir. 1987). In turn, the plaintiff must then prove "by a preponderance of the evidence" that the employer's proffered reasons were a pretext for its discriminatory conduct. *Kocsis*, 97 F.3d at 883 (quoting *Burdine*, 450 U.S. at 252-253). However, the plaintiff has the ultimate burden of "persuading the trier of fact that the defendant intentionally discriminated" against him and that burden remains with the plaintiff at "all times." *Burdine*, 450 U.S. at 252-253.

_____1. <u>Title VII Prima Facie Case</u>

_____In the present case, Blount claims that he experienced discrimination at D. Canale on the basis of his race in the following respects: (1) he was questioned about his sales; (2) he was threatened with a shorter route; (3) he was denied additional help when requested; (4) his claim for workers' compensation and long-term disability payments were interfered with; (5) his return-to-work notices were not honored; (6) he was suspended; and (7) he was eventually terminated. Blount bears the burden of showing evidence sufficient to establish the elements of a prima facie case of racial discrimination under Title VII for each of the alleged

discriminatory acts listed above. At issue in the present case is whether Blount suffered adverse employment action for the acts of discrimination alleged, not including his suspension and termination, and whether Blount was treated less favorably than other similarly situated employees outside of his protected class.

a. Workers' Compensation and Long-Term Disablity Benefits

First, Blount asserts that D. Canale discriminated against him by delaying the receipt of his long-term disability benefits. Blount, however, has the burden of demonstrating to the court that the alleged delay was an "adverse employment action" under the third prong of his prima facie case. To establish the materially adverse employment action requirement of a prima facie case of discrimination, "a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities" and "might be indicated by a . . . material loss of benefits." *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir. 1999) (quoting *Crady v. Liberty Nat'l Bank & Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993)). Blount would possibly have an argument that he suffered adverse employment action if his long-term disability benefits had been denied; however, his receipt of the disability check was only delayed by one month. The court does not find that such a small delay is equivalent to a materially adverse change in the terms and conditions of employment. Blount has failed to establish that he suffered a material delay in benefits, much less a "material loss of benefits" because he was suspended and working at Goldsmith's department stores during the period that he claims his disability check was delayed. Moreover, Blount has shown no

evidence to support his assertion that the delay was based on a racially discriminatory motive.

As for the denial of Blount's workers' compensation benefits, Blount's claim that Wood interfered with those benefits is based on alleged double hearsay coupled with Blount's conjecture and personal beliefs. Blount has offered no evidence to support his claim except for the statements Leann, who worked for D. Canale's workers' compensation carrier, made to him concerning what Tom Wood told her. As the court noted above in the section addressing the undisputed material facts in this case, the court will not consider statements that do not satisfy the "personal knowledge" requirement set forth in Rule 56(e) of the Federal Rules of Civil Procedure. Accordingly, Blount has not presented sufficient evidence to establish a genuine issue of material fact as to whether D. Canale interfered with his long-term disability payments or his claim for workers' compensation.

b. Return-to-Work Notices

Blount claims that the management at D. Canale discriminated against him because they would not honor his return-to-work notices. To carry his prima facie burden, Blount must show that other similarly-situated employees outside his protected class were treated more favorably. Blount does not dispute that when he met with Wood and Canale to discuss his return to work that he was still on suspension pending completion of D. Canale's investigation into his threats of violence. He also does not dispute that during the meeting, he presented two conflicting return-to-work notices, one from his treating psychologist dated January 2, 2002 and one from his psychiatrist dated October 31, 2001. Blount, however, has

not presented any evidence that *any* other similarly situated employee at D. Canale was treated any differently than he was, much less a similarly-situated employee outside of his protected class. Furthermore, Blount has not set forth any facts indicating that D. Canale's alleged refusal to return him immediately to work was based on a racially discriminatory motive. Accordingly, Blount has failed to establish the fourth element of his prima facie case as to D. Canale's failure to reinstate him immediately upon the presentation of the conflicting return-to-work notices.

c. Blount's Suspension and Termination

With respect to Blount's termination and suspension, D. Canale argues that Blount cannot demonstrate that other similarly-situated employees outside his protected class were treated more favorably.[12] The court agrees. D. Canale terminated not only Blount and four other African-Americans but also eight Caucasians for the improper

[12] D. Canale also argued in its Memorandum of Law in Support of Its Motion for Summary Judgment that Blount could not demonstrate that he could satisfy the second element of his prima facie case because he was not "performing at a level that met the employer's legitimate expectations" and was therefore not qualified for the position. (Defs.' Mem. of Law in Support of Mot. for Summ. J. at 7.) D. Canale relied on the Sixth Circuit decision, *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1160 (6th Cir. 1990), to support its argument. The *McDonald* case, however, has received criticism outside of the Sixth Circuit and has been cited with caution in the Sixth Circuit because it allows courts to "conflate the distinct stages of the *McDonell Douglas* test." *See Cicero v. Borg-Warner Auto., Inc.*, 280 F.3d 579, 585 (6th Cir. 2002); *Boyce v. Newman Mem'l County Hosp.*, No. 91-4034-C, 1992 WL 123692, at *3-4 (D. Kan. May 6, 1992). Having found that Blount cannot establish the fourth element of his prima facie case as to his suspension and termination, the court need not determine whether Blount could establish that he continued to possess the objective qualifications he held when he was hired at the time of his suspension and termination.

route accounting D. Canale discovered through its audit. Furthermore, Blount failed to identify any other similarly-situated employees outside his protected class that had allegedly made threats to others at D. Canale and were not suspended pending an investigation. Accordingly, Blount has failed to establish the fourth element of his prima facie case as to his suspension and termination.

d. Remaining Allegations of Discrimination

Finally, D. Canale asserts two grounds on which Blount cannot establish race discrimination with respect to the alleged questioning about his sales, the alleged threat to shorten his route, or the alleged failure to send him additional help. First, D. Canale claims that Blount cannot demonstrate that he suffered a materially adverse change in the terms or conditions of employment as a result of his employer's actions. As noted above in the court's analysis of Blount's allegations of interference with his long-term disability benefits,

> **a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.**

***Hollins*, 188 F.3d at 662. The court finds that Blount's allegations that D. Canale discriminated against him by questioning him about his sales, threatening to shorten his delivery route, or failing to send him additional help on one occasion do not establish that he suffered a materially adverse change in the terms**

and conditions of his employment. As the defendants illustrated to the court, every action taken by an employer that makes an employee "unhappy or resentful" is not an adverse employment action and does not trigger Title VII protection. *See Primes v. Reno*, 190 F.3d 765, 767 (6th Cir. 1999). Otherwise, "[p]aranoia in the workplace would replace the prima facie case as the basis for a Title VII cause of action." *Id.*

Second, D. Canale argues that Blount cannot establish that other similarly-situated employees outside his protected class were treated more favorably with respect to the remaining allegations of discrimination. To "make a comparison of a discrimination plaintiff's treatment to that of non-minority employees, the plaintiff must show that the 'comparables' are similarly-situated *in all respects*." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992) (quoting *Stotts v. Memphis Fire Dep't*, 858 F.2d 289 (6th Cir. 1988)) (emphasis in original); *but see Noble v. Int'l Brinker, Inc.*, 175 F. Supp. 2d 1027, 1037 (S.D. Ohio 2001) (limiting *Mitchell* and saying that a plaintiff must show that a "comparable" is similarly situated in "all *relevant* respects"). Accordingly, the individuals with whom the "plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell*, 964 F.2d at 583.

Blount claims that Caucasian employees were not questioned about their sales by Caruso and that Williams sent help to Caucasian sales persons when they requested assistance. However,

he has not identified one Caucasian employee who dealt with the same supervisor, was subject to the same standards, and engaged in the same conduct he did without differentiating or mitigating circumstances that would distinguish the Caucasian employee's conduct or the employer's treatment of that employee for such conduct. Furthermore, when Blount was questioned specifically about Williams sending additional help to Caucasian drivers, Blount responded that both Caucasian and African-American employees received additional help. The court finds that Blount has failed to show that the "comparables" were similarly situated to him in all relevant respects.

Having found insufficient evidence of an adverse employment action taken on behalf of D. Canale or that Blount was treated less favorably than similarly-situated employees outside of his protected class, the court concludes that Blount has failed to establish two of the essential elements of a prima facie case of racial discrimination for which he has the burden. Having determined that Blount has not established a prima facie case of race discrimination in this action, the court finds it unnecessary to determine whether D. Canale had a legitimate, nondiscriminatory reason for Blount's suspension and termination and whether D. Canale's reason was pretextual.

C. Termination of Employment Under 42 U.S.C. § 1981

Blount also argues that D. Canale and the individual defendants terminated him in violation of 42 U.S.C. § 1981. A claim of racial discrimination brought under 42 U.S.C. § 1981 is analyzed under the same framework and burden shifting analysis as a Title VII racial discrimination claim. *Alexander v. Local 496,*

Laborers' Int'l. Union of N. Am., 177 F.3d 394, 418 (6th Cir. 1999) (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989)); Mitchell *v. Toledo Hosp.*, 963 F.2d 577, 582 (6th Cir. 1992) ("The *McDonnell Douglas/Burdine* formula is the evidentiary framework applicable not only to claims brought under Title VII, but also to claims under . . . 42 U.S.C. § 1981."); *Brack v. Shoney's Inc.*, 249 F. Supp. 2d 938, 946 (W.D. Tenn. 2003). For the reasons stated in the previous section, the court finds that Blount has failed to establish a prima facie case of racial discrimination under 42 U.S.C. § 1981.

D. Title VII Retaliation

Title VII prohibits discrimination against any applicant or employee "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). To establish a prima facie case of retaliation, the plaintiff must show: (1) that he engaged in protected activity; (2) that the defendant knew of the exercise of the protected activity; (3) that the defendant took an employment action that was adverse to the plaintiff, or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) that a causal connection existed between the protected activity and the adverse employment action. *Morris v. Oldham County Fiscal* Court, 201 F.3d 784, 792 (6th Cir. 2000); *see E.E.O.C. v. Avery Denison Corp.*, 104 F.3d 858, 860 (6th Cir. 1997) (citing *Wren v. Gould*, 808 F.2d 493, 500 (6th Cir. 1997)). Clearly, Blount engaged in a protected activity when he filed his first charge of racial discrimination with the EEOC and Tennessee Human Rights Commission. It is also clear that D.

Canale took an employment action that was adverse to Blount when they suspended him and terminated his employment. Thus, at issue in the present case in determining whether plaintiff has met his prima facie burden is whether D. Canale knew that Blount had filed a charge of discrimination with the EEOC on the date that it suspended him and whether Blount's suspension and termination were causally connected to Blount's filing of a charge of discrimination.

1. <u>The Suspension of Blount Employment</u>

D. Canale sent Blount a notice of his suspension by mail on August 22, 2001. Blount filed his first discrimination charge on the same day. Blount has failed to set forth any facts indicating that D. Canale knew that he was filing a charge of discrimination on August 22, 2001. In fact, Wood testified in his deposition that he placed Blount on suspension before learning that Blount had filed a charge of discrimination. Thus, Blount has failed to demonstrate sufficient evidence to meet the second element of his prima facie case of retaliation with respect to his suspension.

2. <u>The Termination of Blount's Employment</u>

Blount's employment with D. Canale was terminated on January 25, 2002, five months after Blount filed his first charge of discrimination. Blount has the burden of showing that his termination was causally related to his filing of charges. The Sixth Circuit has indicated in an unpublished opinion that in order for a plaintiff to demonstrate a causal connection between the adverse employment action and the protected activity, he "must provide sufficient evidence for a . . . court to infer that an employer would not have taken the adverse employment action had the

plaintiff not filed a discrimination claim." *Stein v. Kent State Univ.*, 181 F.3d 103, 1999 WL 357752, at *7 (6th Cir. 1999) (citing *Avery Denison Corp.*, 104 F.3d at 861 and *Zanders v. Nat'l R.R. Passenger Corp.*, 898 F.2d 1127, 1135 (6th Cir. 1990)). Although closeness in time may demonstrate a causal connection, "temporal proximity alone will not support an inference of retaliatory discrimination when there is no other compelling evidence." *Nguyen v. City of Cleveland*, 229 F.3d 559, 566 (6th Cir. 2000) (quoting *Parnell v. West*, 114 F.3d 1188, 1997 WL 271751, at *2 (6th Cir. May 21, 1997); *see Cooper v. City of N. Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986) (finding four month period between date of filing a discrimination claim and date of discharge insufficient to support an inference of retaliation). The only evidence that Blount has offered to establish a causal connection for retaliation is his own allegation that his suspension and ultimate discharge were a result of the filing of his discrimination charge. Blount's statements, however, are insufficient to meet the fourth element of his prima facie case. *See Flannery v. Trans World Airlines, Inc.*, 160 F.3d 425, 428 (8th Cir. 1998) (finding that the filing of plaintiff's own conclusory affidavit without specific factual allegations could not support a casual connection). It is difficult to conclude that D. Canale retaliated against Blount for his filing when it retained the same attitude, albeit a negative one, toward Blount that it had prior to his filing. Blount was suspended for allegedly making threats of violence to the management of D. Canale and other employees on the same day that he filed his charge. Furthermore, Blount's psychologist had contacted D. Canale management to inform them Blount should be hospitalized

because he harbored homicidal feelings toward his co-workers. Additionally, D. Canale obtained information that Blount, among others, had irregularities in his route accounting. Even assuming that a temporal proximity of five months is sufficient to demonstrate a causal connection, temporal proximity without additional evidence is not sufficient for a court to infer that an employer would not have taken the adverse employment action had the plaintiff not filed a discrimination claim. Accordingly, Blount has not presented any evidence that could reasonably support an inference that his termination was in retaliation for his filing charges with the EEOC.

3. Repayment of Overpaid Wages

Blount alleges in his first EEOC charge of discrimination that D. Canale retaliated against him for accusing his former supervisor, Null, of race discrimination. He asserts that he was forced to repay $400 of overpaid wages in a lump sum immediately before Labor Day weekend in August 2000. An employer cannot retaliate "against any of his employees . . . because he has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. 2000e-3(a). To obtain relief under Title VII, a plaintiff must file a charge of discrimination with the EEOC within 180 days of the alleged discrimination or file a charge with a state or local agency within 300 days 42 U.S.C. § 2000e-5(e)(1). Blount does not identify a specific date in August of 2000 when this discrete act of retaliation occurred. However, the defendants' counsel has drawn the court's attention to the fact that even if the retaliation took place on the very last day of August 2000, Blount failed to file his charge of discrimination

until August 22, 2001, approximately two months after the 300-day time limit had expired. (*See* Defs.'s Mem. of Law in Supp. of Mot. for Summ. J. at 12.) Accordingly, Blount's claim of retaliation as to the repayment of overpaid wages is time-barred and dismissed as such.

4. Blount's Remaining Allegations of Retaliation

Blount also claims that D. Canale retaliated against him by interfering with his timely receipt of disability benefits, interfering with his workers' compensation claim, and failing to recognize his return-to work notices. These issues have been addressed above in the courts Title VII racial discrimination analysis and will not be repeated in this section.

F. Hostile Work Environment

Blount asserts that D. Canale subjected him to a hostile work environment when he was harassed because of his race. A hostile work environment claim is comprised of a series of separate acts that collectively constitute one "unlawful employment practice." 42 U.S.C. § 2000e-5(e)(1). In *Harris v. Forklift Systems, Inc.*, the Supreme Court recognized that a hostile work environment occurs "[w]hen 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." 510 U.S. 17, 21 (1993) (internal brackets, quotation marks, and citations omitted); *see also Burlington Indus. v. Ellerth*, 524 U.S. 742, 754 (1998) (reaffirming the "severe and pervasive" test); *Faragher v. Boca Raton*, 524 U.S. 775, 786 (1998) (same). In determining whether harassment is sufficiently severe and pervasive, a court must

consider the "totality of the circumstances." *Williams v. General Motors Corp.*, 187 F.3d 553, 562 (6th Cir. 1999).

To prove a prima facie case of a hostile work environment based on race, the plaintiff must establish the following five elements: (1) he is a member of a protected class; (2) he was subject to unwelcome harassment; (3) the harassment was based on his race; (4) the harassment created a hostile work environment; and (5) the existence of employer liability. *See Williams*, 187 F.3d at 560; *Hafford v. Seidner*, 183 F.3d 506, 512 (6th Cir. 1999). A hostile work environment plaintiff must also meet both a subjective and an objective test. He must show that the environment "was objectively hostile, and also that [he] subjectively perceived it to be hostile." *Williams*, 187 F.3d at 564 (citing *Harris*, 510 U.S. at 21 and *Faragher*, 524 U.S. at 787). In the present case, D. Canale attacks the third and fourth elements of Blount's prima facie case.

1. Harassment Based on Race

Blount bears the burden of showing that the conduct he complains of occurred on account of his race because Title VII was not intended to serve as a "general civility code." *Faragher*, 524 U.S. at 2283-84; *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) ("Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discriminat[ion] . . . because of . . . [race].") Furthermore, "personal conflict does not equate with discriminatory animus." *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 791 (6th Cir. 2000). D. Canale has identified several undisputed facts that support its argument that any harassment Blount suffered was not

based on his race. For instance, when Blount was questioned in his deposition about the alleged harassment he experienced at the hands of Null and Anderson while working on his first route and the harassment experienced at the hands of Taylor on the second route, he repeatedly attributed the harassment to the jealousy of his co-workers and supervisors. He claimed that they harassed him because he knew how to sell more beer than they did and because he was willing to work harder than they were. Blount did not specify any events of harassment that occurred due to his race except for the comments made by Taylor referring to Blount as a "field nigger" and "house nigger." Moreover, Blount did not identify any other incidences of harassment suffered by other African-American employees at D. Canale to support his hostile work environment claim. *See, e.g., Jackson v. Quanex Corp.*, 191 F.3d 647, 660 (6th Cir. 1999) ("The notion that courts should deem probative the conduct of an employer towards an entire minority group–even when an individual, and not a group, brings the complaint–is not new to [a hostile work environment analysis]."). Although Blount claims that he suffered harassment at D. Canale on a "daily basis," he has failed to provide specific factual information to support his claim. As the defendants have indicated correctly to the court, merely alleging numerous instances of harassment in conclusory terms with no names, times, or occasions to support the allegations will not satisfy the plaintiff's prima facie burden of establishing that the plaintiff was harassed on the basis of his race. *See Wixson v. Dowagiac Nursing Home*, 87 F.3d 164, 171 (6th Cir. 1996).

2. The Hostile Work Environment

Next, D. Canale argues that the only incidents "that arguably

relate to [Blount's] race are the four alleged comments" that were made by Blount's African-American supervisor, Roger Taylor. In determining whether harassment is sufficiently severe and pervasive, a court must consider the "totality of the circumstances." *Williams v. General Motors Corp.*, 187 F.3d 553, 562 (6th Cir. 1999). These factors may include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. The "mere utterance of an . . . epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII." *Id.* at 21. Additionally, "'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment' and that 'conduct must be extreme to amount to a change in the terms and conditions of employment.'" *Hafford*, 183 F.3d at 512-13 (quoting *Faragher*, 524 U.S. at 788.

The court is not persuaded that a trier fact could reasonably conclude that the comments made by Taylor amount to severe and pervasive conduct constituting a hostile work environment. Blount claims that he found Taylor's use of the word "nigger" offensive. It is undisputed, however, that Blount also used the word "nigger" and had even referred to his supervisor as a "nigger." Blount also stated that Taylor referred to himself on one occasion as a "house nigger" and referred to Blount as a "field nigger." Additionally, Blount stated in his deposition that he had so frequently used the term "nigger" that he could not determine the number of times he

had used the term, including at work. (*See* Blount Dep. at 181.) Blount did note that he tried to refrain from using the term while he was in the process of becoming a Jehovah's Witness. (*Id.*)

As D. Canale has indicated, Blount's "own conduct defeats any claim that he subjectively found the work environment hostile based on the four alleged comments." (Defs.' Mem. of Law in Supp. of Mot. for Summ. J. at 15.) D. Canale has also provided the court with two cases from the Eighth Circuit to support their position that a plaintiff cannot claim harassment based on an offensive term he uses himself. In *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 967 (8th Cir. 1999), the court found that the plaintiff's claim of hostile work environment "[fell] flat in light of the fact that she engaged in the very type of conduct about which she now complains, a fact that she does not attempt to refute." Another case reaffirmed the *Scusa* decision court and held that a "plaintiff cannot create a genuine issue of material fact with regard to unwelcome behavior when she engages in the conduct complained about." *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721, 736 (8th Cir. 2000) (Beam, J., and Gibbons, J., concurring). Although the cases D. Canale presented dealt with sexual harassment, the court finds that the reasoning in those cases applies equally to the case at hand. Accordingly, the court is not persuaded that Blount found Taylor's remarks subjectively offensive because he frequently used the same terms himself.

Furthermore, looking at the totality of the circumstances, Taylor's comments did not occur frequently, were not particularly severe, nor were they physically threatening. Although Blount subjectively asserted in his affidavit that he found Taylor's

comments offensive, Taylor's four, isolated comments would not unreasonably interfere with Blount's ability to perform his job when using an objective standard. *Compare Burnett v. Tyco Corp.*, 203 F.3d 980, 984 (6th Cir. 2000) (holding that three sexually offensive remarks by plaintiff's personnel manager spread out at beginning and end of six-month period were not commonplace, ongoing, or continuing, and therefore were not pervasive discriminatory conduct), *with Jackson*, 191 F.3d at 658-60 (finding racially hostile work environment where plaintiff established persistent racial slurs and graffiti as "conventional conditions on the factory floor"). Consequently, Blount fails to demonstrate an objectively or subjectively abusive or hostile work environment. Even though Taylor's comments were inappropriate and should not be condoned, they do not rise to the level of severity that Title VII seeks to prevent.

G. Discrimination on the Basis of Disability Under the ADA

In his final claim of discrimination, Blount asserts that D. Canale discriminated against him on the basis his disability, which is depression. The ADA prohibits discrimination in employment on the basis of an actual or perceived disability or the record of having had a disability. *See* 42 U.S.C § 12101. A disability under the ADA is defined as (1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual;" (2) "a record of such an impairment;" or (3) "being regarded as having such an impairment." 42 U.S.C. § 12102(2).

In the present case, D. Canale only attacks Blount's claim that his depression qualifies as a disability under the ADA because

Blount has not alleged in his First Amended Complaint that D. Canale regarded him as "having such an impairment" or that he has a "record of such impairment." For the purposes of this motion, D. Canale does not dispute that Blount was diagnosed with and treated for depression. However, D. Canale claims that Blount's depression does not make his disabled under the ADA and that he cannot demonstrate that his impairment substantially limits a major life activity.

_____The EEOC has promulgated regulations defining "major life activities" to include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, and working; however, the list is not exhaustive. 29 C.F.R. § 1630.2(i); *Penny v. United Parcel Servs.*, 128 F.3d 408, 414 (6th Cir. 1997). A person is "substantially limited" if the individual "is unable to perform a major life activity that the average person in the general population can perform" or is "significantly restricted as to the condition, manner, or duration" under which the average person in the general population can perform that same major life activity. *See* 29 C.F.R. § 1630.2(j)(1). The regulations go on to say that the following factors should be considered in determining whether an individual is substantially limited in a major life activity: (1) "[t]he nature and severity of the impairment;" (2) "[t]he duration or expected duration of the impairment;" and (3) "t[]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Id.* at § 1630.2(j)(2). Furthermore, in the major life activity of working, the inability to perform a "single, particular job does not constitute a substantial limitation." *Id.*

§ 1630.2(j)(3).

Although the court recognizes that the determination of whether Blount is disabled requires an "individualized inquiry," the "burden remains with the plaintiff to point to some credible evidence that [he] is significantly restricted in [his] ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." *Cutler v. Hamden Bd. Of Educ.*, 150 F. Supp. 2d 356, 360 (D. Conn. 2001) (quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999)) (citing 29 C.F.R. § 1630.2(f)(3)(i). Blount has come forward with nothing to refute D. Canale's argument that his depression does not qualify as a disability under the ADA or that his depression does not substantially limit a major life activity. In Blount's response to D. Canale's motion for summary judgment, he only addresses his ADA claim and D. Canale's argument in two paragraphs of his response. Paragraph eighteen states in its entirety the following: "Plaintiff was under doctor's care for depression and Defendants knew plaintiff was under doctor's care. Defendants have personal contact with plaintiff [sic] doctor. There was communication between defendants and plaintiff [sic] physician." (Pl.'s Mem. of Law in Supp. of Resp. to Defs.' Mot. for Summ. J. at 4.) Paragraph nineteen goes onto state in its entirety that "[i]n fact, Tom Wood, a Vice President, actually visited the doctor and plaintiff while plaintiff was in the hospital being treated for depression." (*Id.*) In the affidavit Blount filed with his response, he only briefly addressed his depression. He noted that he was being treated for it, that he was tired and exhausted, that he "believe[d] a certain

amount of social interaction" helped his condition; that he did not have "alleged" depression; and that his medicine made him sleepy and tired. (Blount Aff. at ¶¶ 12, 18, 20, 22.) Additionally, he noted that at times he does nothing but sleep because his medicine makes it almost impossible for him to do anything; however, he claims that without the medication his condition was much worse. (*Id.* ¶ 22.) In his affidavit, he claims that he had to stop driving a commercial vehicle when he was working for Waste Management because the medicine he takes for his depression made him drowsy and he ran a red light while driving. (*Id.* ¶ 21.) Blount notes that after that incident, he found a job at the Family Dollar Store stocking shelves and currently works in that position. (*Id.*)

The court finds that none of the evidence presented by Blount refutes D. Canale's argument that his ADA claim should be disposed of on its motion for summary judgment, much less establishes that he was disabled within the meaning of the ADA. Blount has not identified a single major life activity that has been limited, much less "substantially" limited. Blount has failed to clear the first "hurdle" of any ADA claim. *See Penny*, 128 F.3d at 414-15 (affirming grant of summary judgment on ADA claim where plaintiff failed to create a triable issue regarding whether he was substantially limited in major life activity of walking). Accordingly, D. Canale's motion for summary judgment is granted as to Blount's claim of disability discrimination under the ADA.

CONCLUSION

For the reasons stated above, this court finds that Blount has failed to establish a prima facie case of racial discrimination

under Title VII or 42 U.S.C. § 1981. Blount's failure to establish a prima facie case makes it unnecessary for the court to reach the questions of whether D. Canale had a legitimate, nondiscriminatory reason for the reassignment and whether that reason was actually a pretext. The court also finds that Blount failed to establish a prima facie case of retaliation and hostile work environment. Finally the court finds that Blount is not disabled within the meaning of the ADA and that his depression does not substantially limit a major life activity. Accordingly, D. Canale's motion for summary judgment is granted.

IT IS SO ORDERED this * day of November, 2003.**

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE