

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

May 12, 2011

No. 09-10183

Lyle W. Cayce
Clerk

RUBIN HERNANDEZ; JOHN KETTERER; ABRAM TREVINO,

Plaintiffs - Appellants

v.

YELLOW TRANSPORTATION, INCORPORATED,

Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Texas

Before CLEMENT, SOUTHWICK, and HAYNES, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

Employees at a terminal for a trucking company brought claims of race discrimination, retaliation, and hostile work environment against their employer. The district court granted summary judgment to the defendant on some plaintiffs' claims and allowed an immediate appeal. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

Rubin Hernandez, John Ketterer, and Abram Trevino ("Plaintiffs") were employed at Yellow Transportation's Dallas terminal. The evidence reveals a workplace that could be quite mean-spirited, crude, and insulting. The issue for us to decide is whether federal rights were violated.

No. 09-10183

We give an evidentiary overview at this point, relying on the facts admitted in the district court. Hernandez, who is Mexican-American, worked as a shuttle driver and hostler from 1993 until 2007. He brought claims of discrimination, retaliation, and hostile work environment. As to the discrimination claim, Hernandez had a disagreement with a coworker, threatened him, and was fired for violating workplace policy regarding such conduct. The coworker, who was not a passive victim in the altercation, exchanging derogatory remarks with Hernandez, received a lesser penalty.

To support the hostile work environment claim, Hernandez alleges he either personally experienced or witnessed race-based and non-race-based harassment while employed at Yellow Transportation. The retaliation claim seeks to connect his termination with earlier formal claims and informal complaints about discrimination.

Ketterer, who is Caucasian, has been employed as a dock worker since 1990. He claims there was a hostile work environment. He also says he suffered retaliation based in part on twice being fired and later reinstated after serving a suspension. He alleges to have engaged in protected activity by picketing against Yellow Transportation's treatment of minorities.

Ketterer's hostile work environment claim also rests upon race-based and non-race-based harassment he either witnessed or personally suffered as a result of his association with minority employees. He contends his protected status results from his association with black and Hispanic employees.

Trevino, who is Mexican-American, has worked as a dock worker since 1984. He brought only a claim of hostile work environment. He also claims to have experienced or witnessed race-based and non-race-based harassment while employed at Yellow Transportation.

Plaintiffs are members of the local chapter of the International Brotherhood of Teamsters. A collective bargaining agreement governs the terms

No. 09-10183

of their employment. Plaintiffs filed charges with and received right-to-sue letters from the Equal Employment Opportunity Commission (“EEOC”) and the Texas Commission on Human Rights.

They filed suit in the U.S. District Court for the Northern District of Texas, claiming race discrimination, retaliation, and hostile work environment. Plaintiffs’ claims were brought under 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and the Texas Commission on Human Rights Act, Tex. Labor Code Ann. §§ 21.001-21.556. The relevant claims under each of these statutes are analyzed under the same standard. *Jones v. Robinson Prop. Group, L.P.*, 427 F.3d 987, 992 (5th Cir. 2005); *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 404 n.2 (5th Cir. 1999).

Yellow Transportation was granted summary judgment on all claims brought by these Plaintiffs. Other plaintiffs remained in the suit. A determination was made by the district court that there was no just reason for delay, and the ruling on these parties and claims was made a final judgment. *See* Fed. R. Civ. P. 54(b). These three plaintiffs then filed a timely appeal.

Chief District Judge Fitzwater’s opinion granting judgment is thorough and well-reasoned. *Arrieta v. Yellow Transp., Inc.*, No. 3:05-CV-2271, 2008 WL 5220569 (N.D. Tex. Dec. 12, 2008) (unpublished). In our analysis, we will refer to that opinion for a more comprehensive explanation of some allegations.

DISCUSSION

We review a district court’s grant of summary judgment *de novo* and apply the same standards as the district court. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 163 (5th Cir. 2006). Summary judgment is proper if the pleadings and evidence show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); Fed. R. Civ. P. 56(a). “We construe all facts and inferences in the light most favorable to the nonmoving party when

No. 09-10183

reviewing grants of motions for summary judgment.” *Murray v. Earle*, 405 F.3d 278, 284 (5th Cir. 2005) (citation omitted). “If the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, then there is no genuine issue for trial.” *Harvill v. Westward Commc’ns, L.L.C.*, 433 F.3d 428, 433 (5th Cir. 2005) (quotation marks and citation omitted).

Plaintiffs group their arguments of error around four of the dismissals by the district court: (A) Hernandez and Trevino’s hostile work environment claims, (B) Ketterer’s hostile work environment claim, (C) Ketterer’s retaliation claim, and (D) Hernandez’s retaliation and race discrimination claims. In response, Yellow Transportation argues that Plaintiffs at times highlight facts from the voluminous summary judgment record that were not identified for the district court and therefore were not considered in ruling on summary judgment.

The argument that new material cannot be presented on appeal is a legally valid one, though we need to determine whether factually it is applicable here. A district court’s decision on summary judgment is largely controlled by what the parties presented. If somewhere in a record there is some evidence that might show a dispute of material fact, the district court needs to be pointed to that evidence as opposed to having to engage in an extensive search. Fed. R. Civ. P. 56(c); *Jones v. Sheehan, Young & Culp, P.C.*, 82 F.3d 1334, 1338 (5th Cir. 1996). The district court “considered all the evidence that plaintiffs’ properly cited in their summary judgment briefing, and it had no duty to comb the entire record” for other evidence. *Arrieta v. Yellow Transp., Inc.*, No. 3:05-CV-2271, 2009 WL 129731, *2 (N.D. Tex. Jan. 20, 2009) (unpublished). We agree.

A. Hernandez and Trevino’s Hostile Work Environment Claims

Hernandez and Trevino allege that as to their hostile work environment claims, the district court improperly refused to consider all the evidence of harassment, including harassment suffered by other Hispanics and African-Americans, and instances of non-race-based harassment.

No. 09-10183

Besides only being required to examine the evidence pointed out to him in the extensive record, the district judge also said he would consider admissible evidence only, thereby rejecting hearsay. That limitation also is correct. It is a proper summary judgment objection “that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.” Fed. R. Civ. P. 56(c)(2).

We start by examining what the evidence had to support. To establish a claim of hostile work environment under Title VII, a plaintiff must prove:

(1) [he] belongs to a protected group; (2) [he] was subjected to unwelcome harassment; (3) the harassment complained of was based on race; (4) the harassment complained of affected a term, condition, or privilege of employment; (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action.

Ramsey v. Henderson, 286 F.3d 264, 268 (5th Cir. 2002) (citations omitted). It is undisputed that Hernandez and Trevino belong to a protected group as Hispanics. The other factors are not so clear.

Harassment affects a “term, condition, or privilege of employment” if it is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Id.* (quotation marks and citations omitted). Workplace conduct “is not measured in isolation.” *Id.* (quotation marks and citation omitted). In order to deem a work environment sufficiently hostile, “all of the circumstances must be taken into consideration.” *Id.* This includes “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.” *Id.* (quotation marks and citations omitted). To be actionable, the work environment must be “both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact

No. 09-10183

did perceive to be so.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (citation omitted).

Both Hernandez and Trevino refer to numerous events of harassment, some directed at them and others at coworkers. The district court held there were only four incidents of harassment, two each against Hernandez and Trevino, that were severe enough to affect their employment at Yellow Transportation. We examine those first and then consider whether other relevant events were identified before the district court.

Hernandez was called a racially derogatory term on one occasion and once viewed a poster or letter also referring derogatorily to Mexicans. Trevino once heard Mexicans referred to in a derogatory manner over a company radio and had seen a discriminatory posting or drawing. The district court found these incidents were “plainly offensive to a Hispanic person,” but they could not support a hostile work environment claim because they were so few and occurred over more than a decade of employment. If in fact only two incidents such as these occurred over a ten-year period, this would not create a fact issue that the harassment was “sufficiently severe or pervasive” such that “an abusive working environment” had been shown. *See Ramsey*, 286 F.3d at 268.

The district court rejected much of Hernandez and Trevino’s evidence. Whether that rejection was proper is the key appellate issue on these claims. In the district court’s memorandum opinion, the irrelevance of one key incident was explained. Hernandez had been threatened with a knife by a coworker, Ron Green, but there was no evidence that the event had anything to do with race. Hernandez agreed that Green never used racial epithets towards him. At most, the incident revealed that Green and Hernandez had a long-running dispute that would eventually lead to both men being disciplined.

Other evidence was rejected by the district court because even if it reflected hostility towards one of the plaintiffs, there was no evidence that the

No. 09-10183

actions were based on race. A wide range of behaviors can make a workplace uncivil, but these plaintiffs must show as one of the factors for their Title VII claim that the events were based on race. *Id.*

Also rejected was proof of events that these plaintiffs had not personally experienced or that were directed to persons of a different racial background. The district court reasoned this way:

To establish a hostile work environment claim, however, a plaintiff must personally experience racial harassment. The court will therefore consider the harassment that a reasonable jury could find that plaintiffs experienced. *See, e.g., Septimus v. Univ. of Houston*, 399 F.3d 601, 612 (5th Cir. 2005) (holding that harassment experienced by other women was irrelevant when determining whether harassment that plaintiff experienced was sufficiently severe or pervasive to establish hostile work environment claim).

Arrieta, 2008 WL 5220569 at *26. We examine the case the district court cited.

In *Septimus*, the plaintiff claimed she was subjected to a hostile work environment based on her sex, relying in part on evidence regarding treatment of other women. *Septimus*, 399 F.3d at 612. We noted that the plaintiff “did not personally experience most (if not all) of the conduct complained of by the other women.” *Id.* The incidents directed at the plaintiff were “collectively insufficient” to avoid summary judgment. *Id.* “All of Septimus’s other summary judgment evidence on this claim pertained to other women in the [Office of General Counsel], not Septimus, and therefore is not relevant.” *Id.* Our opinion never identified the evidence regarding other women nor did it explain its reasoning. That makes it an uncertain precedent that evidence regarding other workers is never relevant. We at most know that the evidence was not relevant in that case. *Septimus* is a reminder, though, that the harassment must have affected “a term, condition, or privilege” of the “victim’s” employment. *Ramsey*, 286 F.3d at 268.

No. 09-10183

Hernandez and Trevino argue that the district court's conclusions resulted in the ignoring of substantial evidence of harassment. They refer us to one of our decisions in which we recognized the relevance of evidence of discrimination against other individuals in the plaintiff's protected class. *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1109-10 (5th Cir. 1995). That decision applied the Age Discrimination in Employment Act. *Id.* at 1108. We held that it was proper to exclude evidence allegedly showing discrimination on other grounds such as race or sex, but evidence of discrimination against other members of a plaintiff's protected class was admissible. *Id.* at 1109-10. Among our authorities for that holding were decisions involving age, race, and sex discrimination claims. *Id.* at 1110 n.9.

Another decision of this court from the same year held that under a state discrimination in employment statute involving workers with disabilities, evidence of the same sort of discrimination against workers other than the plaintiff was admissible. *Kelly v. Boeing Petroleum Servs., Inc.*, 61 F.3d 350, 358 & n.10 (5th Cir. 1995). That was because intentional discrimination had to be shown under the state statute, making relevant the evidence of a climate of that form of discrimination. *Id.* Conversely, anecdotes about discrimination or verbal harassment on other grounds were not relevant because there was too weak a correlation between the different forms of potential animus. *Id.* at 357-58.

We have held in the context of sex discrimination that harassment of women other than the plaintiff is relevant to a hostile work environment claim. *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 477-78 (5th Cir. 1989). In fact, we agreed that "a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive." *Id.* at 478 (quoting *Vinson v. Taylor*, 753 F.2d 141, 146 (D.C. Cir. 1985)). In *Waltman*, we also found extensive evidence of sex discrimination targeting the plaintiff, including "evidence that several different

No. 09-10183

employees touched her in a sexual manner and directed sexual comments toward her . . . [and] evidence of ongoing sexual graffiti on the walls, and in the elevator and bathroom” *Id.* at 477.

These precedents show that we have allowed evidence of similar forms of discrimination or harassment against others to be used by a plaintiff to prove the intent of certain actions against her. *E.g.*, *Kelly*, 61 F.3d at 358 & n.10. We also have allowed evidence of sexual harassment of individuals other than a plaintiff to support the existence of an atmosphere of harassment for a Title VII claim. *E.g.*, *Waltman*, 875 F.2d at 477-78.

A related but distinguishable issue is whether evidence of harassment towards black employees can help support claims of a hostile work environment towards Hispanic employees. We have addressed evidence of cross-category discrimination as being potentially relevant only when there is a sufficient correlation between the kind of discrimination claimed by a plaintiff and that directed at others. *See Kelly*, 61 F.3d at 357-58. We do not see that a specific holding is needed on this appeal regarding how evidence of the workplace environment for one category of employees can be used to support the claims under Title VII for another category. As we noted earlier, we have held that before a workplace environment may be found sufficiently hostile, a wide array of considerations are to be examined. *Ramsey*, 286 F.3d at 268. Among the facts that must be proven by the relevant evidence is that “the conditions of the victim’s employment” have been altered by the harassment. *Id.*

The district court held that the examples of harassment towards black employees could not support the claim that there was a hostile work environment for Hispanic employees. Whether that conclusion is always correct we need not decide. It does appear, though, that if the evidence of the workplace environment for the employees of a plaintiff’s race does not show frequent, severe, and pervasive hostility, then evidence of hostility towards a different

No. 09-10183

racial group is not much support for the plaintiff's claim. There at least needs to be evidence that the hostility towards a racial group different than that of a plaintiff is in some fashion probative of the claim of hostility towards the plaintiff's category of workers.

Hernandez and Trevino had evidence of specific incidences of workplace hostility towards black employees. Nonetheless, such incidents were neither "physically threatening or humiliating" towards Hernandez and Trevino, nor did the harassment "unreasonably interfere[] with [their] work performance." *Id.* We agree with the district court that the evidence that was offered of a hostile environment for black employees did not transform what was an otherwise insufficient case of a hostile work environment experienced by these two Hispanic employees into one that could survive summary judgment.

We also do not consider the various incidents of harassment not based on race. *See id.* Hernandez and Trevino argue this court has examined incidents of non-race-based harassment when determining whether the harassment experienced under a hostile work environment claim was sufficiently severe or pervasive. *See E.E.O.C. v. WC&M Enters., Inc.*, 496 F.3d 393 (5th Cir. 2007). In that decision, though, the court examined a particular perpetrator's non-national-origin-based harassment in the context of his other acts of national-origin-based harassment. *Id.* at 400. The court determined that a factfinder could reasonably conclude a coworker's frequent banging on the glass partition of the plaintiff's office was motivated by animus related to the plaintiff's national origin because that same coworker had constantly called the plaintiff "Arab" for approximately a year. *Id.* at 400-01. Hernandez and Trevino did not have evidence that the alleged non-race-based harassment was part of a pattern of race-based harassment.

We affirm the district court's grant of summary judgment as to Hernandez and Trevino's claims of hostile work environment.

No. 09-10183

B. Ketterer's Hostile Work Environment Claim

Ketterer appeals the district court's grant of summary judgment on his hostile work environment claim. Ketterer, who is Caucasian, argues that he is a member of a protected class due to his association with African-Americans and Hispanics. He claims harassment based upon that association was sufficiently severe or pervasive as to affect his employment.

The district court found that Ketterer did not establish a *prima facie* case of a hostile work environment because he did not belong to a protected group, and did "not allege[] harassment *based on his race* that was sufficiently pervasive to affect his employment." *Arrieta*, 2008 WL 5220569 at *29. Specifically, Ketterer failed to claim "an association with a protected group sufficient to bring him under the coverage of Title VII's substantive anti-discrimination provision[.]" *Id.*

This court has not ruled on the extent of association necessary between a member of one race and a member of another race against which the employer discriminates in order for the member of the former race to have an actionable hostile work environment claim.¹ We have, however, examined this question in the context of other provisions of Title VII. For example, we have held that "Title VII prohibits discrimination in employment premised on an interracial relationship." *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589

¹ After this case was argued, the Supreme Court held that a person whose employment was otherwise unaffected could bring a Title VII retaliation claim for the firing of his coworker and fiancée. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011). The retaliation allegedly was for the plaintiff's protected conduct, but the penalty was directly suffered by the fiancée. *Id.* at 867. This holding applied "zone of interests" principles to the issue of who was a "person aggrieved" under Title VII. *Id.* at 870. "Title VII's antiretaliation provision prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 868 (quoting *Burlington N. & S.F.R. Co. v. White*, 545 U.S. 53, 68 (2006)). Had there been employer retaliation for Ketterer's protected conduct, but it was some other employee who suffered the adverse employment action, *Thompson* would have more relevance to this case.

No. 09-10183

(5th Cir. 1998), *vacated in part on other grounds in Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999) (en banc). Recently, we specified that the relationship between the unprotected employee and protected employee had to be “personal.” *Floyd v. Amite Cnty. Sch. Dist.*, 581 F.3d 244, 249-50 (5th Cir. 2009) (citation omitted). Additionally, the discrimination must be “predicated on animus against the employee because of his association with persons of another race” as opposed to animus against members of the other race with whom the employee associates. *Id.* at 250.

Ketterer has not established that he had a “personal” relationship with members of a protected class. The only evidence offered before the district court on this claim is that Ketterer “associated with” minority employees. Because Ketterer did not adequately present this argument before the district court, any effort to do so now is too late. *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 339 (5th Cir. 2005).

The district court properly dismissed Ketterer’s claim because he failed to establish a *prima facie* case of a hostile work environment.

C. Ketterer’s Retaliation Claim

Ketterer argues the district court improperly held that he had not established a *prima facie* case of retaliation. According to Ketterer, he suffered various forms of retaliation for engaging in protected activity.

A plaintiff establishes a *prima facie* case of retaliation by showing (i) he engaged in a protected activity, (ii) an adverse employment action occurred, and (iii) there was a causal link between the protected activity and the adverse employment action. *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 523 (5th Cir. 2008). If the plaintiff successfully presents a *prima facie* case, the burden shifts to the employer to provide a “legitimate, non-retaliatory reason for the adverse employment action.” *Long v. Eastfield Coll.*, 88 F.3d 300, 304-05 (5th Cir. 1996) (citation omitted). Upon answering this inquiry, the burden returns

No. 09-10183

to the plaintiff to prove that the protected conduct “was a ‘but for’ cause of the adverse employment decision.” *Id.* at 305 n.4 (citation omitted).

The district court determined that Ketterer engaged in protected activity when he picketed against Yellow Transportation’s treatment of minorities. This finding is not in dispute. As to the next two elements of a *prima facie* case, the district court found that Ketterer did not suffer adverse employment actions, and that he failed to offer evidence he would not have been retaliated against “but for” his engagement in protected activity. Ketterer’s appeal focuses on these two elements of the inquiry.

An adverse employment action is one that “a reasonable employee would have found . . . [to be] materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Aryain v. Wal-Mart Stores Tex. LP*, 534 F.3d 473, 484 (5th Cir. 2008) (quotation marks and citation omitted). In determining whether an adverse employment action occurred, we focus on the final decisionmaker. *Gee v. Principi*, 289 F.3d 342, 346 (5th Cir. 2002) (citation omitted). The actions of ordinary employees are not imputable to their employer unless they are conducted “in furtherance of the employer’s business.” *Long*, 88 F.3d at 306 (citation omitted). There must, however, be “a direct relationship between the allegedly discriminatory conduct and the employer’s business.” *Id.*

On appeal, Ketterer alleges to have suffered the following adverse employment actions: (1) harassment by coworkers; (2) increased workload; and (3) reinstatement without back-pay. We examine each in turn.

1. Harassment by coworkers

Ketterer advances various incidents of coworker harassment, including name-calling, physical intimidation, false accusations, vandalization of his belongings, verbal threats, and observing violence and illegal behavior. None of these alleged incidents, however, were perpetrated by anyone other than

No. 09-10183

ordinary employees, nor was the alleged harassment committed in furtherance of Yellow Transportation's business. *See id.*

Ketterer urges us to apply caselaw from other circuits expanding Title VII's retaliation provision to protect against broader forms of coworker retaliation. We decline this invitation.

2. Increased workload

Ketterer alleges that after he began picketing, he received more work, heavier assignments, and dirtier jobs. The district court found these allegations unsupported by evidence and Ketterer had not established a causal link. Any effort to do so now is too late. *See Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994).

3. Reinstatement without back-pay

Ketterer contends that he was discharged after a physical altercation with a coworker and reinstated without back-pay, while his coworker received back-pay. The district court found that Ketterer had not establish a *prima facie* case, but even if he had, he failed to offer evidence of "but for" causation to rebut Yellow Transportation's legitimate, nondiscriminatory reason for its actions; that is, Ketterer's violation of workplace policy.

Because we can affirm a district court "on any basis established by the record," we need only look to the summary judgment evidence to confirm that, in fact, Ketterer did not demonstrate that "but for" his participation in protected activities, he would not have been reinstated without back-pay. *See Long*, 88 F.3d at 305 n.4.

We note that to defeat a motion for summary judgment, a plaintiff must demonstrate "a conflict in substantial evidence on [the] ultimate issue" of "but for" causation. *Id.* at 308 (quotation marks and citations omitted). "Evidence is 'substantial' if it is of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions."

No. 09-10183

Id. (quotation marks and citation omitted). Temporal proximity, standing alone, is not enough. *Strong v. Univ. Healthcare Sys., L.L.C.*, 482 F.3d 802, 808 (5th Cir. 2007). Ketterer has not established a conflict in substantial evidence on this issue.

The district court properly granted summary judgment.

D. Hernandez's Discrimination and Retaliation Claims

1. Discrimination

Hernandez alleges that he was fired because of his race. He argues the district court erred in granting summary judgment on his discrimination claim by failing to consider evidence of pretext.

The discrimination claim derives from an incident between Hernandez and Green that began when, during roll call, someone yelled at Hernandez, "Go with your girlfriend Ketterer." After exchanging derogatory remarks, Hernandez threatened Green. Green complained to management, and both Hernandez and Green were suspended. Yellow Transportation conducted an investigation that resulted in warning letters for the initial exchange of remarks. On addition, Hernandez was fired for threatening Green, which was a violation of workplace policy. A formal grievance committee upheld the termination.

To survive summary judgment on a claim of employment discrimination based on circumstantial evidence, the plaintiff first must establish a *prima facie* case. *Bryan v. McKinsey & Co.*, 375 F.3d 358, 360 (5th Cir. 2004) (citation omitted). Once offered, the burden shifts to the employer to provide evidence of a "legitimate, nondiscriminatory reason for the" adverse employment action. *Id.* (citation omitted). After the employer meets this burden, "the plaintiff must show that he was the victim of intentional discrimination by showing that the employer's proffered explanation is unworthy of credence." *Id.* (quotation marks and citation omitted). The plaintiff may overcome this hurdle by showing "that the legitimate reasons offered by the [employer] were not its true reasons, but

No. 09-10183

were a pretext for discrimination.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000) (quotation marks and citation omitted).

The district court assumed without deciding that a *prima facie* case was established, and that assumption is not a point of contention on appeal. Yellow Transportation’s explanation for terminating Hernandez – that he violated the workplace policy – is also not at issue. The dispute concerns the final step in the analysis.

Hernandez argues that the following evidence establishes pretext: (a) similarly-situated employees were treated more favorably; (b) harassment by coworkers; and (c) the failure of a supervisor to respond to Hernandez’s complaint against Green. We analyze each of these allegations to determine whether Hernandez has shown an issue of material fact that Yellow Transportation’s nondiscriminatory explanation for firing Hernandez is false.

a. Similarly-situated employees treated more favorably

Hernandez provides examples of employees who violated the workplace policy but were not fired, including Caucasian employees who threatened black employees, a Caucasian employee who threatened another Caucasian employee, and employees who fought in the workplace and across the street.

Hernandez has failed to make an effort to demonstrate that any of the employment actions “were taken under nearly identical circumstances[,]” including that Hernandez and the other employees shared the same job or responsibilities, reported to the same supervisor, had “essentially comparable violation histories[,]” and, most importantly, that the “conduct that drew the adverse employment decision [was] nearly identical” *Lee v. Kan. City S. Ry. Co.*, 547 F.3d 253, 260 (5th Cir. 2009) (quotation marks and citations omitted).

b. Harassment by coworkers

In addition to the incidents of harassment contained within his hostile work environment claim, Hernandez provides four additional examples of

No. 09-10183

coworker harassment. These include allegations that he was called derogatory names by Green, that a group of Caucasians interfered with his work, that his name was written on the back of a trailer, and that Caucasian coworkers distracted him while he worked.

Hernandez does not offer evidence that the individuals responsible for his termination were tainted by discriminatory animus, or that his coworkers “possessed leverage, or exerted influence, over the titular decisionmaker.” *Roberson v. Alltell Info. Servs.*, 373 F.3d 647, 653 (5th Cir. 2004) (quotation marks and citations omitted); *see also Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011). Rather, Hernandez merely states that he raised a fact issue that Yellow Transportation’s managers condoned his coworkers’ harassment. He does not cite evidence of this claim or reference the record. It is not our duty to scrutinize the record on appeal. *Jones*, 82 F.3d at 1338. Further, Hernandez does not lodge any such allegation against members of the formal grievance committee, which upheld Yellow Transportation’s decision to fire him.

c. Supervisor’s failure to respond to Hernandez’s complaint

Hernandez contends that years before he was fired, Green pulled a knife on him and said, “this is for you and your sons.” Upon complaining to management, Hernandez alleges a supervisor told him he would get in trouble if he pursued the claim. Hernandez did not present evidence linking this episode with his termination, nor has he demonstrated that race was a factor in the supervisor’s statement. A rational trier of fact would not find that race, rather than violating the workplace policy, was the actual reason for his termination. *See Patel v. Midland Mem’l Hosp. and Med. Ctr.*, 298 F.3d 333, 342-43 (5th Cir. 2002). Summary judgment on this claim was proper.

2. Retaliation

Hernandez challenges the district court’s grant of summary judgment on his retaliation claim. He argues that his discharge was retaliation for an array

No. 09-10183

of protected activities, including picketing against Yellow Transportation's treatment of minorities, filing an EEOC complaint, joining a lawsuit against Yellow Transportation, and complaints of unfair job assignments, coworker harassment, inequitable treatment, and failure to investigate prior complaints.

The district court assumed *arguendo* that Hernandez established a *prima facie* case of retaliation based upon his discharge. This is not in dispute. The legitimate, nondiscriminatory reason offered by Yellow Transportation – that Hernandez violated the workplace policy – is also not contested. The issue on appeal concerns the final burden, whether Hernandez would not have been fired “but for” his participation in protected activities.

As previously discussed, a plaintiff may avoid summary judgment on “but for” causation by demonstrating “a conflict in substantial evidence on this ultimate issue.” *Long*, 88 F.3d at 308 (quotation marks and citations omitted). “Evidence is ‘substantial’ if it is of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions.” *Id.* (quotation marks and citation omitted).

On appeal, Hernandez presents two arguments to demonstrate “but for” causation. His first argument is that his firing was in close temporal proximity to his participation in protected activities. “But for” causation, however, cannot be established by temporal proximity alone. *See Strong*, 482 F.3d at 808.

Hernandez's second argument is that he presented evidence of pretext, which in addition to temporal proximity, is sufficient to establish “but for” causation. *See Shackelford*, 190 F.3d at 408-09. According to Hernandez, the following is evidence of pretext: (a) Yellow Transportation's investigation into the incident with Green was not governed by normal procedures; (b) the post-termination grievance process was unfair; (c) Green and Hernandez were treated unequally; and (d) similarly-situated employees were treated more fairly.

a. Investigation into incident with Green

No. 09-10183

Hernandez's allegations regarding the investigation into his encounter with Green were not raised in the district court as to this claim. It is too late to identify it on appeal. *See Forsyth*, 19 F.3d at 1537.

b. Procedures governing post-termination grievance process

Hernandez's allegations regarding the procedures governing his post-termination grievance process are unsupported by evidence and merely speculative. *See Ramsey*, 286 F.3d at 269 (holding that "conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy" the nonmovant's burden in a motion for summary judgment) (citation omitted).

c. Disparity in treatment between Green and Hernandez

Hernandez alleges that following his incident with Green, he was formally removed from service pending the grievance hearing, while Green was permitted to take vacation. In addition, Green only received a warning, whereas Hernandez was fired.

Accepting these facts as true, we find that they fail to establish anything other than that Yellow Transportation treated Hernandez's threats more severely than the initial verbal exchange. They do not establish "but for" causation.

d. Similarly-situated employees treated more favorably

In evaluating this claim, we follow the district court's lead in giving considerable weight to Hernandez's admission that he committed the acts for which he was discharged, that those acts violated the workplace policy, and the formal grievance committee upheld his discharge. Nothing Hernandez presents contradicts Yellow Transportation's offered reason for firing him.

Hernandez has failed to establish that Yellow Transportation unlawfully retaliated against him. Summary judgment was proper.

AFFIRMED.