2015 IL App (2d) 140282-U
No. 2-14-0282
Order filed February 25, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

TYRONE TAYLOR,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 12-L-360
	)	
CDW LOGISTICS, INC.,	)	Honorable
	)	Christopher C. Stack,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court entered summary judgment for defendant on plaintiff's employment discrimination claims that included a demotion, a constructive discharge, and retaliation, all based on race. Because plaintiff did not provide sufficient evidence that a constructive discharge occurred or that he was demoted or retaliated against because of his race to survive summary judgment, we affirmed.

¶ 2 Plaintiff, Tyrone Taylor, was an employee at defendant CDW Logistics, Inc. (CDW), from 1993 until October 2010. In October 2010, plaintiff met with his immediate supervisor, Troy Appel, who informed him he would be transferring within CDW's distribution center from his position as outbound operations manager to internal operations manager, a newly created

position. Plaintiff left the meeting and did not return to work at CDW. He later filed suit against CDW under the Illinois Human Rights Act (IHRA) (775 ILCS 5/1-101 *et seq.* (West 2010)), alleging that CDW had intentionally discriminated against him and retaliated against him on the basis of his race. The case proceeded to CDW's motion for summary judgment, and the trial court granted summary judgment in favor of CDW. Plaintiff appeals, and we affirm.

¶ 3 I. BACKGROUND

¶ 4 CDW hired plaintiff, a black man, as a receiver at its distribution center in 1993. His first supervisor at CDW was Lisa Tegtmeyer. CDW promoted plaintiff to receiving supervisor in 1994 and then promoted him to receiving manager in 1997, and Tegtmeyer remained his supervisor through both promotions. By 2002 his job position with CDW was outbound operations manager. By 2006, plaintiff was still an outbound operations manager, but his direct supervisor became Troy Appel. From 1993 through 2006, plaintiff received only satisfactory or better performance reviews from CDW.

¶ 5 In 2006, Doug Eckrote, the then-Vice President of CDW Operations, discussed hiring for the position of "Senior Manager of Warehouse Operations" with Tegtmeyer. The position would provide leadership for three departments: inbound operations, outbound operations, and return operations. The two decided they were looking for "outside eyes" with outside experience because nobody at CDW at the time had the skill set they sought for the position. Accordingly, CDW did not make the position available to internal candidates, nor did it consider internal candidates. Plaintiff only became aware of the opening when he viewed the position for "senior operations manager" at CDW online at www.Monster.com.

¶ 6 CDW interviewed and hired Troy Appel, a white male, for the senior manager position. Appel was an external candidate, and he became plaintiff's new direct supervisor. Plaintiff

believed that he should have been given an opportunity to apply for the position in 2006 but was denied the opportunity to do so because of his race.

¶ 7 Tegtmeyer left CDW of her own accord in 2009. Appel replaced her, becoming "Director of Operations." Plaintiff continued to report to Appel. Again, plaintiff believed he should have been considered for the opening but was denied an opportunity to be considered for the position because of his race. Plaintiff continued working for Appel until October 19, 2010, after Appel presented him with an action plan to improve his performance and informed him he would be transferring managerial positions. Plaintiff left the meeting and never returned to CDW.

¶ 8 On May 9, 2012, plaintiff filed a complaint against CDW under the IHRA (775 ILCS 5/1-101 *et seq.* (West 2010)). He claimed racial discrimination in the form of harassment, demotion, failure to promote, and constructive discharge, and retaliation based on his complaints of racial discrimination.

¶ 9 After discovery was completed, CDW moved for summary judgment on plaintiff's complaint. On March 11, 2014, the trial court granted summary judgment for CDW and against plaintiff.[1] On March 26, plaintiff filed his notice of appeal for the March 11 order. To review the order, we set forth both parties' versions of plaintiff's work experience at CDW below. The following is from the parties' pleadings, depositions, responses, and exhibits.

¶ 10 1. Plaintiff's Facts

¶ 11 On July 16, 2009, Eckrote received an email update on a potential NBC Today Show opportunity for CDW on an upcoming workplace safety segment. The update stated that "[t]oo

[1] The order also granted CDW's agreed motion to file a reply, and denied as moot plaintiff's motion to strike portions of CDW's exhibit E and statement of material facts.

many staff members and assets are pinned on the ongoing Michael Jackson story at the moment." Eckrote responded to the update by emailing plaintiff and three other CDW managers:

> "Wow!! Coming in second to Michael Jackson isn't a bad place to be. We have arrived!! If Tyrone dresses up like MJ and does a dance during the interview will that move us up the list?"

Plaintiff stated that this email offended him because he was compared to Michael Jackson on the basis that he is black.

¶ 12 Immediately afterwards, plaintiff complained about the racially insensitive email to Tegtmeyer. He told her that he did not appreciate the email that Eckrote sent. Tegtmeyer listened to his complaint but did not say anything in response that plaintiff could recall. Plaintiff did not complain to anyone else, did not complain to coworker services, and did not file an "Ethics Point complaint." He said he did not file a written complaint or tell coworker services because he believed that when a CDW employee complained about a manager, the complaint would get back to that manager and "repercussions happen," that is, "retaliation." For instance, according to plaintiff, after he complained to Appel about his general treatment of him, Appel retaliated against him by saying he was "going to get him." Plaintiff said he heard Appel was out to get him from Tegtmeyer, who heard it from Eckrote, who was the person Appel made the retaliatory statement to. This statement was a basis for plaintiff's belief that Appel discriminated and retaliated against him on the basis of his race.

¶ 13 In response to plaintiff's belief that Appel was out to get him, Appel contacted plaintiff and asked to talk with him. The two men talked alone, and Appel denied to plaintiff that he ever told Eckrote he was out to get him. Despite the meeting, plaintiff claimed that Appel's actions spoke for themselves: plaintiff said he was harassed because of his race in such ways as Appel

questioned his intelligence, his grammar, and repeated questions to other staff that plaintiff had already answered. He claimed that Appel harassed him by not liking the ideas or projects he put together but instead questioned and discredited them, such as tearing up a written submission or writing "This is wrong. Wouldn't do this," on one of his plans. Plaintiff claimed that Appel did not treat other coworkers like this, and this indicated his treatment was based on his race because most of his counterparts were white, like Appel.

¶ 14 On July 29, 2010, a former CDW employee left a written message inside a FedEx trailer at CDW that said: "CDW Tyrone Taylor, When I See U I will Murder U." Plaintiff was informed of the message when he got to work the next day, and he went to meet with Tim Schwalm of CDW security about it. They talked about who could have left the message, and plaintiff suggested James Starks, a former employee whom plaintiff fired in 2001. It was later confirmed that Starks was responsible for the message and his employment with FedEx terminated. Schwalm and plaintiff talked about obtaining a possible order of protection, Schwalm offered help to obtain one, and plaintiff said he would think about it. Plaintiff eventually went to file a complaint at the police department alone but chose not to seek an order of protection. Plaintiff did not reach out to CDW's employee assistance program after the threat, but he did install a security system at his home.

¶ 15 When Appel found out about the threat on July 30, he went to plaintiff's office where plaintiff said he made light of the threat, saying "huh, wanted dead or alive." Plaintiff responded, "that's not funny." Plaintiff also said that Appel repeated the phrase "wanted dead or alive" to him at subsequent times. Plaintiff found Appel's comments racially insensitive.

¶ 16 Plaintiff stated that Tammy Irwin, a white woman and another CDW employee, received better treatment from the company after she was threatened by a driver. CDW provided her

security and let her park by the west entrance to the facility, and they also called the carrier that employed the driver to tell them the driver would not be allowed to deliver to CDW in the future. Plaintiff heard about this through coworkers; it was a topic of conversation among employees at CDW.

¶ 17 Additionally, plaintiff was offended by Appel's comment to him to "keep blacks in line." When CDW was performing surveys of employees, Appel asked plaintiff, "Why are the African-American engagement surveys so low?" Plaintiff responded, "How do I know?" Appel replied, "You should know." And plaintiff rejoined, "Are you for real?" and "Just because I'm African-American and I'm a leader doesn't mean I know what every black individual is thinking. They're individuals, so I don't know." In a meeting with plaintiff and other CDW employees to discuss the engagement surveys, Appel told plaintiff to "keep blacks in line." Plaintiff found this offensive and did not believe Appel would have said this to him but for his being black.

¶ 18 Plaintiff was not aware of any other comments by Appel that he found racially offensive. However, plaintiff did feel that Appel singled him out. For instance, at the end of a meeting with CDW managers in 2010, Appel asked if there were any questions. After nobody spoke up, Appel directed himself to plaintiff, asking, "[plaintiff], don't you have something to say? You always have something to say." Plaintiff also claimed to have told Appel that he was treating him the way he was because of racial discrimination and retaliation, although it is not clear from the record when or how many times plaintiff said this to Appel. Appel ate lunch with white managers weekly but not with plaintiff or black employees, and he did not often engage in events with plaintiff or blacks, and when he did it was brief.

¶ 19 In 2009 and 2010, plaintiff, Scott Kisten, Cindy Juiris, Delfin Martinez, and Paula Fendius all reported to Appel. Martinez was Filipino; Kisten, Fendius, and Juiris were white. In

March 2010, the five employees received performance reviews from Appel. Plaintiff's overall review rated ahead of two of the reviewed employees and behind the other two. None of the other four reviewed employees were demoted, removed, or given a performance improvement plan or action plan.

¶ 20 Appel drafted an action plan for plaintiff (the "Action Plan") in preparation for an October 19, 2010, meeting. It stated that "over the last 12 months, your performance has not been meeting the expectations of your position as an Outbound Operations Manager." The Action Plan further stated: "Improvement in all areas needs to occur immediately and maintained [*sic*]. If significant improvement is not achieved by December 20, 2010, formal disciplinary [*sic*] will occur." This was the first action plan that Appel had given to any of the employees that reported directly to him. Appel provided an action plan for another employee reporting directly to him after he provided one to plaintiff: he gave one to Alfred Brown, a Hispanic man, who no longer worked at CDW by the time of Appel's deposition.

¶ 21 Appel gave the Action Plan to plaintiff at the October 19, 2010, meeting with plaintiff and Michelle Gust. Appel told plaintiff that he was moving from his role as outbound operations manager to internal operations manager, effective immediately. Then he handed plaintiff a copy of the Action Plan. Appel told plaintiff that he would still be reporting directly to him. Plaintiff's compensation was not discussed, and he would have less employees reporting to him than he had had in outbound operations.

¶ 22 At this meeting, plaintiff was "in complete awe and shock." He referred to the Action Plan as a demotion, called it a performance improvement plan (PIP), and disagreed with all of it. Appel denied that it was a PIP. Plaintiff characterized the move as a demotion because outbound operations entailed more responsibility and internal operations manager was a "dead-end

position," oversaw less people, and no one had held it before. Only a few weeks earlier, Appel had told plaintiff that he was doing a good job as outbound operations manager.

¶ 23 Plaintiff did not hear what Appel said in response to claiming that this was a demotion. He was too upset. He told Appel and Gust to just "go ahead and fire me." He stated that his performance had been excellent and for him to receive the Action Plan was "utterly shocking." At this point, plaintiff stood up and left the meeting. He did not speak with anyone at CDW after this occurred. Appel understood that plaintiff had resigned at the point that he walked out of the meeting, and Appel said, based on how he exited, "he did not want him back." Appel replaced the outbound operations manager position with Martinez, who had been the inbound operations manager. Tammy Irwin took over as the inbound operations manager. Neither Martinez nor Irwin are black.

¶ 24 After plaintiff left CDW, John Smith, a CDW employee, called him and left a couple of voicemails. Plaintiff and Smith were in touch multiple times, but did not discuss whether plaintiff had quit, whether his job was still available, or anything of the like. Nobody asked plaintiff to return to work, and plaintiff never returned, ending his 17-plus year tenure with CDW.

¶ 25 2. CDW's Facts

¶ 26 Appel gave plaintiff his annual performance review for 2009 in early 2010. Plaintiff's 2009 performance review incorporated ratings, on a scale of 1 to 5, 5 being the best and 1 being the worst, for different categories and objectives. For instance, plaintiff scored a 3 on building "an inclusive and diverse work environment," meaning he achieved the objective; a 4 for "resolves conflict directly"; and a 5 under "increase productivity," the highest possible score.

¶ 27 Appel's overall performance score for plaintiff was a 3: Achieved the objective as measured. Appel highlighted three areas in particular where plaintiff needed to improve. Appel's comments were:

> "[Plaintiff] had a good year with successes in leading his team to productivity, quality and safety improvement. However, there are several areas [plaintiff] needs to work to improve. First, [plaintiff] needs to take steps to develop his analytical skills to progress further in his career and cannot always rely on others to [do] that for him. Secondly, he needs to improve the timely turnaround when we are working on internal projects and 1st time quality has to improve. *** Finally, [plaintiff] has to be more willing to show thought leadership as required at a senior manager level including a willingness to support both his and others' development by participating in rotations. At his level and with his career aspirations, [plaintiff] needs to show he can be successful in an expanded inbound role while developing the analytical skills to manage using metrics."

¶ 28 Under the category entitled "CDW Way," Appel provided comments that plaintiff "shows passion and integrity for the business. He handles confidential information in an ethical and responsible manner," but also that, "[o]ne area [plaintiff] should work to develop is in providing complete and accurate information as we make business decisions. [Plaintiff] is not being misleading, but rather his presentation of information can at times be incomplete or unclear which requires further follow up on my part." Appel then noted that plaintiff "willingly admits mistakes and refocuses efforts when needed." The rest of Appel's comments were largely positive with occasional constructive criticism.

¶ 29 Appel met with plaintiff to discuss his performance review in March 2010. He informed him that he needed to develop his analytical skills, such as using metrics in Microsoft Excel. Appel followed up with plaintiff about his performance throughout 2010.

¶ 30 Plaintiff took a class in Excel, and Appel followed up with Excel exercises. For instance, in July 2010, he sent plaintiff excel sheets with costs, asking him to create formulas and generate answers to five attached questions. He asked that the two of them review the answers together when he was finished. Appel ended the email, stating, "[j]ust like in sports training, repetition is what builds the skill."

¶ 31 Also consistent with his performance review comments, Appel forwarded plaintiff an invitation to a metrics seminar. On January 28, 2010, he emailed plaintiff to say, "Did you want to attend the metrics seminar? It's expensive but fits with what we are working on next year. We would only send one person at this price so let me know." The seminar was entitled, "Using Metrics to Achieve Results."

¶ 32 By August 2010, Appel had become frustrated with plaintiff's lack of progress. He therefore scheduled a meeting with plaintiff in August 2010 for a "performance discussion," the purpose of which was "to clarify the role expectations of the outbound operations manager and continue previous discussion regarding 'knowing the details of your operation.' " In an outline for the discussion that Appel created, he stated in bullet point what plaintiff needed to do, including: "lose negativity, complaints, eye rolling, and actively support what is asked of you"; "demonstrate you really know the details of shipping—participation in system changes, OpX projects, identifying opportunities for the achieving of productivity gains"; "work the hours of your team and set a good example *** you should not be at your desk more than a few hours a day"; and "[be] a role model for how your team should perform *** [drive] positive change."

¶ 33 At a meeting with plaintiff, Appel brought up the possibility of switching plaintiff's work hours. Plaintiff normally worked from 7:30 a.m. until around 4:00 p.m., but his outbound operations team did not begin their shift until 2:00 p.m. The switch would allow plaintiff to spend more time with the team he managed.

¶ 34 Over the course of 2010, Appel decided, after input from CDW's Coworker Services and other management, to reorganize CDW's management structure for its distribution center. The change was set to occur in October 2010. The reorganization included splitting two managerial positions into three: creating an internal operations manager in addition to the already-in-place inbound and outbound operations managers. The creation of the new position was an "attempt to develop a more streamlined management structure in the Distribution Center with clear ownership of operating areas to support long-term productivity and quality improvement." Many of the employees that previously reported to the inbound or outbound operations managers would then report to the internal operations manager.

¶ 35 Appel intended to move plaintiff to the new position of internal operations manager and Delfin Martinez to outbound operations manager. Tammy Irwin would move to inbound operations manager. Because functions that had previously reported to the inbound and outbound operations managers would start reporting to the internal operations manager, both plaintiff and Martinez would have less CDW employees reporting to them than they had previously, and fewer people would report to Irwin as the new inbound operations manager than had reported to Martinez when he was holding the position. Both plaintiff and Martinez would continue reporting directly to Appel and would maintain their previous salaries.

¶ 36 Prior to this proposed reorganization, Appel had spoken with plaintiff about switching roles with Delfin Martinez, the then-inbound operations manager, over the past several years.

He thought a rotation of positions would "bring a fresh perspective to the operations department, which would improve processes and productivity." Appel had authority to make such a switch, although, at least when he first started at CDW, he thought it would be prudent to first seek approval from upper management for a switch. Plaintiff was not interested in the switch. He saw it as a lateral move, not an advancement in his career, which is what he desired.

¶ 37 Appel reasoned that moving plaintiff to internal operations manager would achieve a dual purpose of providing plaintiff with the opportunity to focus on areas of improvement before he would be considered to move up to a more senior leadership position while also helping Martinez in his progression as a manager. The reorganization would provide employees with more exposure to different experiences in the distribution center, in turn improving productivity and quality.

¶ 38 The Action Plan that Appel prepared for plaintiff for October 19, 2010, noted that plaintiff was "valued as a coworker and the purpose of this plan is to help you achieve success in your role by clearly identifying your areas of opportunity and what is expected of you as a manager." The Action Plan stated that Appel would be reviewing plaintiff's progress over the next 60 days, that the two would meet weekly to discuss improvements, and that plaintiff should prepare a status report for the weekly meetings. Plaintiff's success under the plan would determine whether the Action Plan needed to be converted to a "formal Performance Improvement Plan."

¶ 39 The Action Plan outlined seven areas for plaintiff's development: communication, developing and leading direct reports, adapting to change and innovation, delegation, quality of work product, meetings deadlines and responsiveness, and accepting feedback. Under each of

the seven areas, Appel listed various goals, objectives and criticisms, tailored to plaintiff.[2] At the end of the Action Plan, Appel stated that "[improvement] in all areas needs to occur immediately and maintained [*sic*]. If significant improvement is not achieved by December 20, 2010, formal disciplinary action will occur. If you are able to meet the expectations outlined above, you will be required to sustain that level of performance for the term of your employment with CDW."

¶ 40 After plaintiff left CDW on October 19, 2010, and did not return, no suitable candidate was available to fulfill the new position of internal operations manager. When plaintiff did not respond to CDW's multiple attempts to contact him, he was deemed to have resigned. The internal operations manager position remained unfilled.

¶ 41 Regarding plaintiff's alleged comments that Appel was "going to get him" once Tegtmeyer left CDW, Appel stated that he had had a general discussion with Eckrote about Tegtmeyer and plaintiff. In their discussion, he described Tegtmeyer as protective of plaintiff; she did not like to hear negative feedback about his performance. Now that she was no longer with CDW, "she was no longer there to protect him *** performance management would be a greater focus and that we would clarify expectations and hold people accountable to those expectations so that they performed the roles that they were in."

[2] For instance, under "communication," Appel admonished plaintiff for eye rolling, heavy sighs, and head shaking that would hinder effective communication with coworkers. Under "adapting change and innovation," Appel noted that the company has changed and evolved greatly since plaintiff started there almost 18 years ago, and plaintiff must embrace the changes. Also, plaintiff needed to be willing to listen to and assimilate the counsel of others, not ignore feedback.

¶ 42 Regarding the death threat that plaintiff received, written in a FedEx trailer, Appel stated as follows. He first found out about the threat around 10 p.m. that night via an email. The next morning he went to security to talk to Tim Schwalm about it. Then he visited plaintiff at his office. He did not recall making the statement, "wanted dead or alive." He did not recall plaintiff being angry or worried; he described plaintiff as almost laughing about the situation, not taking it seriously.

¶ 43 Appel admitted that he called out plaintiff during a managerial work meeting to ask him if he had a question when nobody asked one. He stated that plaintiff "often did ask questions," and it was the first meeting with Jon Stevens, a new CDW executive, attending. He called on plaintiff "to break the ice and get one question," which likely would have led to more questions by others. When Stevens asked for questions, it was quiet. Therefore, he called on plaintiff because he was usually reliable and unafraid to ask questions. Appel remembered plaintiff shrugged and had no questions. Nobody asked a question at that meeting.

¶ 44 3. Summary Judgment

¶ 45 CDW filed its motion for summary judgment on December 3, 2013. It argued that plaintiff's 2006 and 2009 failure to promote claims were untimely because he did not file a charge of discrimination within 180 days, as required by the IHRA; that plaintiff was not constructively discharged because there was no evidence that he had no choice but to resign due to racial discrimination or otherwise; and that the conduct plaintiff complained of was not actionable harassment or retaliation.

¶ 46 Plaintiff filed a motion to strike portions of CDW's motion for summary judgment, portions of its statement of material facts, and one of its exhibits. The motion claimed that

portions of CDW's material facts were supported by inadmissible hearsay evidence, were irrelevant, or were otherwise inadmissible. Plaintiff also filed his additional statement of facts.

¶ 47 On May 11, 2014, the trial court entered a one page order denying plaintiff's motion to strike as moot and granting CDW's motion for summary judgment. It did not provide a memorandum order laying out its reasoning.

¶ 48 Plaintiff timely appealed.

¶ 49 II. ANALYSIS

¶ 50 This is an appeal from an order of summary judgment, and our review is therefore *de novo*. *Chatham Foot Specialists, P.C. v. Health Care Service Corp.*, 216 Ill. 2d 366, 376 (2005). When ruling on a motion for summary judgment, we consider the pleadings, depositions, admissions, and affidavits in the light most favorable to the nonmoving party, here, the plaintiff. *Bohner v. Ace American Insurance Co.*, 359 Ill. App. 3d 621, 622 (2005). Summary judgment is appropriate when those pleadings, affidavits, depositions, and admissions show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Evans v. Godinez*, 2014 IL App (4th) 130686, ¶ 25.

¶ 51 A. Timeliness of Failure to Promote Claims

¶ 52 We first address CDW's argument that plaintiff's failure to promote claims are untimely as a matter of law under the IHRA. We need not reach the merits of this argument because on appeal, plaintiff has only challenged the entry of summary judgment as to racially motivated demotion, constructive discharge, and retaliation. Accordingly, those are the only issues we address in this disposition.

¶ 53 B. Admissible Evidence on Summary Judgment

¶ 54 Plaintiff argues that CDW's motion for summary judgment was not based on admissible evidence and therefore was improper. The trial court, in ruling on CDW's motion for summary judgment, denied plaintiff's motion to strike exhibits and portions of CDW's memorandum of uncontested facts, stating that it did not consider the items sought to be struck. However, it also did not state its reasons for granting summary judgment and what it did consider. While we think it best for a trial court to lay out its reasoning in a memorandum explaining why it grants or denies summary judgment, we review any grant or denial of summary judgment *de novo* and may affirm a grant or denial on any grounds that properly appear in the record, regardless of whether the trial court relied on them. *Sullivan v. Board of Commissioners of Oak Law Park District*, 318 Ill. App. 3d 1067, 1071 (2001). For the reasons set forth herein, we find that CDW's evidence in support of summary judgment was proper for the trial court to consider, whether it chose to consider it or not.

¶ 55 Plaintiff attacks CDW's evidence as follows: that CDW failed to support numerous paragraphs in its statement of uncontested facts with cites to the record and often relied on impermissible hearsay; that CDW's exhibit E, Appel's affidavit, was based on inadmissible hearsay, lacked foundation, and attempted to change admissions made in his deposition, in particular paragraphs 11, 12, and 13, by stating impermissible factual conclusions; that paragraphs 26 and 27 of Appel's affidavit were irrelevant hearsay conclusions; that paragraph 30 of his affidavit was irrelevant hearsay; that paragraph 31 of his affidavit was irrelevant and inadmissible as subjective thoughts or feelings; that CDW fabricated that it ever considered switching plaintiff's position prior to October 19, 2010; that CDW introduced testimony of an irrelevant witness, John Smith; and that hearsay violations occurred throughout CDW's uncontested facts.

¶ 56 We begin by noting that, like the trial court before us, there is much that plaintiff contests that we do not rely on in reaching our decision. We do not rely on CDW's statement of uncontested facts but rather the depositions, pleadings, and affidavits which the statement of facts cited to. We also do not consider any of the evidence put forth by CDW about John Smith as it was unnecessary to our disposition. Furthermore, plaintiff's arguments that he was performing his job well and that CDW had never discussed switching his position prior to October 19, 2010, do not go toward whether CDW presented admissible evidence sufficient to support summary judgment. Rather, he is arguing that there is no issue of material fact as to substantive elements of his racial discrimination claims. This is inappropriate for a motion to strike facts and exhibits, and these arguments are addressed, *infra*, in our review of the grant of summary judgment.

¶ 57 Thus, we are left with reviewing Appel's affidavit, also known as Exhibit E of the record. Plaintiff specifically attacks paragraphs 11, 12, 13, 26, 27, 30, and 31 of the affidavit. In particular, plaintiff asserts that these paragraphs violate Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013) because they contain impermissible conclusions of fact and/or contain inadmissible hearsay evidence. Paragraphs 11, 12, and 13 state:

> "11. In August 2010, after becoming concerned about [plaintiff's] lack of progress in his role and what appeared to be a lack of clarity in the expectations of [plaintiff's] role, I met with [plaintiff].
>
> 12. In preparation for that meeting I prepared an outline of topics I would cover with him, including a review of the aspects of [plaintiff's] job description and the areas in which he needed to focus. A true and correct copy of the outline *** is included ***.

> 13. During that meeting I also discussed with [plaintiff] my desire that he modify his work hours so that he would work the hours of his team on some days. [Plaintiff] typically worked 7:30am-3:30 or 4 p.m. [Plaintiff's] outbound operations teams, however, did not begin their shift until 2:00 p.m. and I wanted [plaintiff] to spend more time with them."

¶ 58 We did not consider paragraphs 11 and 12 because they are not material to our disposition. We did consider paragraph 13, but that paragraph does not contain impermissible conclusions of fact or hearsay (and neither do paragraphs 11 or 12). Rather, it contains assertions based on personal knowledge that Appel would be competent to testify to at trial if this were to proceed to one. See *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 755-56 (2009) (an affidavit was not "conclusory" under Rule 191 when conclusions were supported by facts from which the conclusions were drawn and it was part of the affiant's job to make such conclusions).

¶ 59 Paragraphs 26 and 27 read:

> "26. As part of the reorganization process, I prepared, with the assistance of Coworker Services, documentation detailing the changes to the structure of the Distribution Center. A true and accurate copy of that document is included with this declaration as Attachment No. 2.
>
> 27. Additionally, I prepared with the assistance of Coworker Services, an action plan for [plaintiff] to assist [plaintiff] in transitioning into his new role and with his overall development. The action plan was created to specifically identify the expectations of [plaintiff] in his new role. A true and correct copy of that action plan is included with this declaration as Attachment No. 3."

¶ 60 Again, these paragraphs do not contain inappropriate factual conclusions or inadmissible hearsay but are relevant events that Appel would testify to at trial if need be, and these paragraphs reference relevant documentation that CDW would seek to admit at trial to explain the actions it took. These paragraphs present facts *from which* a fact finder could draw conclusions, not mere conclusions of material fact.

¶ 61 Finally, paragraphs 30 and 31 read:

> "30. On October 22, 2010, I received via email a copy of a letter addressed to [plaintiff] and prepared by Sande Sherman. Sherman advised me she had sent the letter to [plaintiff] advising him of his employment status. The letter confirmed that CDW was accepting [plaintiff's] resignation effective October 19, 2010 after attempt to reach him did not result in his return. A true and correct copy of the email and letter are included with this declaration as Attachment No. 4.
>
> 31. Losing a longtime member of my management team resulted in a reevaluation of the structural changes to the Distribution Center after [plaintiff's] resignation."

¶ 62 Again, there is no impermissible conclusion of fact in paragraph 30. Additionally, there is no reason to believe this is (1) necessarily being asserted for the truth of the matter or (2) that there is no viable hearsay exception available if it were, such as effect on the listener. See *People v. Dunmore*, 389 Ill. App. 3d 1095, 1106 (2009) (hearsay is testimony of out-of-court statement offered to established the truth of the matter asserted; if a statement is offered to prove its effect on the listener's state of mind or show why the listener acted as he did, that statement is not hearsay). As for paragraph 31, we did not consider this paragraph and it has no bearing on this disposition.

¶ 63 Accordingly, we find that CDW's motion for summary judgment was properly supported by the record and was based on admissible evidence.

¶ 64 C. The Analytical Frameworks for Employment Discrimination and Retaliation

¶ 65 In order to analyze intentional employment discrimination actions brought under the IHRA, our supreme court has adopted the United States Supreme Court frameworks under the Civil Rights Act of 1964 (42 U.S.C. § 2000(e) *et seq.*) and the Age Discrimination in Employment Act (ADEA) (29 U.S.C. § 621 *et seq.*). *Zaderaka v. Illinois Human Rights Comm'n*, 131 Ill. 2d 172, 178 (1989); see also *Stone v. Department of Human Rights*, 299 Ill. App. 3d 306, 316 (1998). Moreover, this court has found it appropriate to use federal case law analyzing discrimination cases under the IHRA. See *Motley v. Illinois Human Rights Comm'n*, 263 Ill. App. 3d 367, 373 (1994) (constructive discharge); see also *Robinson v. Village of Oak Park*, 2013 IL App (1st) 121220, ¶ 19 (it is appropriate to rely on federal cases interpreting Title VII because the IHRA is similar in intent). A plaintiff under the IHRA may prove intentional employment discrimination in one of two ways: the direct method of proof, with evidence that race was a determining factor in the adverse employment decision; or the indirect method of proof, with the shifting burdens framework first laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Lalvani v. Illinois Human Rights Comm'n*, 324 Ill. App. 3d 774, 790 (2001). Plaintiff asserts both theories on appeal.

¶ 66 Under the direct method for proving intentional employment discrimination, plaintiff must provide either direct or circumstantial evidence[3] that the adverse employment action was

[3] Courts have recognized that the "terminology in this area of the law can be a bit confusing as 'direct' is used both for the 'direct method' and 'direct evidence.' " *Lewis v. City of Chicago*, 496 F.3d 645, 650-51 (7th Cir. 2007). Thus, courts and litigants must keep in mind

taken because of his race. *Collins v. American Red Cross*, 715 F.3d 994, 1000 (7th Cir. 2013); see *Sola v. Illinois Human Rights Comm'n*, 316 Ill. App. 3d 528, 537-38 (2000). Direct evidence would require evidence akin to an admission from the employer that it terminated the plaintiff because of race. *Collins*, 715 F.3d at 1000. Direct evidence, if believed by a trier of fact, would prove the fact question of discriminatory intent " 'without reliance on inference or presumption.' " *Venturelli v. ARC Community Services, Inc.*, 350 F.3d 592, 599 (7th Cir. 2003).

¶ 67 Circumstantial evidence is evidence that would allow a jury to infer intentional discrimination (*id.*) and includes:

> " '(1) suspicious timing, ambiguous oral or written statements, or behavior toward or comments directed at other employees in the protected group; (2) evidence, whether or not rigorously statistical, that similarly situated employees outside the protected class received systematically better treatment; and (3) evidence that the employee was qualified for the job in question but was passed over in favor of a person outside the protected class and the employer's reason is a pretext for discrimination.' " *Lewis*, 496 F. at 652.

A plaintiff may combine these various types of circumstantial evidence—creating a "convincing mosaic"—from which a trier of fact can make a reasonable inference of discriminatory intent. *Hutt v. AbbVie Products LLC*, 757 F.3d 687, 691 (7th Cir. 2014).

¶ 68 It matters not whether the plaintiff uses direct or indirect evidence under the direct method of proof; what matters is that he ultimately shows he suffered a materially adverse

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that the "focus of the direct method of proof *** is not whether the evidence offered is 'direct' or 'circumstantial' but rather whether the evidence 'points directly' to a discriminatory reason for the employer's action." *Atanus v. Perry*, 520 F.3d 662, 671 (7th Cir. 2008).

employment action because of his race. *Nichols v. Southern Illinois University*, 510 F.3d 772, 779 (7th Cir. 2007).

¶ 69 Alternatively, a plaintiff may proceed in proving intentional employment discrimination under the indirect method of proof, utilizing the shifting burdens framework of *McDonnell Douglas*. See *Rhodes v. Illinois Department of Transportation*, 359 F.3d 498, 504 (7th Cir. 2004) ("If a plaintiff cannot prevail under the direct method of proof, he must proceed under the indirect method, *i.e.*, the familiar *McDonnell Douglas* framework."). Under the indirect method of proof, a plaintiff has the initial burden of establishing a *prima facie* case of discrimination by showing four elements: (1) he is a member of a protected class; (2) he performed his job in accordance with the employer's legitimate business expectations; (3) he was subjected to an adverse employment action; and (4) similarly situated employees outside of his protected class were treated more favorably by the employer. *Andrews v. DBOCS West, Inc.*, 743 F.3d 230, 234 (7th Cir. 2014). If the plaintiff establishes a *prima facie* case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* Once an employer articulates at least one reason for the adverse employment action, the burden shifts back to the plaintiff to demonstrate that the proffered reason is pretext for discrimination. *Id.* The ultimate burden of persuasion always rests with the plaintiff; only the burden of production shifts between the plaintiff and employer. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510 (1993).

¶ 70 Retaliation claims may also proceed under either the direct or indirect methods of proof. *Andrews*, 743 F.3d at 234. The difference is that rather than proving the plaintiff was a member of a protected class, he must prove that he engaged in a statutorily protected activity. *Id.*[4]

[4] Therefore, under the direct method of proof, the plaintiff must show that he: (1)

Moreover, the categories of circumstantial evidence recognized in discrimination claims are also recognized in retaliation claims (*Coleman v. Donahoe*, 667 F.3d 835, 860 (7th Cir. 2012)), and likewise, direct evidence is defined the same in retaliation claims as in discrimination ones (*Davis v. Con-Way Transportation Central Express, Inc.*, 368 F.3d 776, 786 (7th Cir. 2004)).

¶ 71 D. Demotion

¶ 72 We first address plaintiff's claim that he was demoted from outbound operations manager to internal operations manager because of racial discrimination, looking at plaintiff's evidence under both the direct and indirect methods of proof.

¶ 73 Under either the direct or indirect methods of proof, plaintiff must show an adverse employment action, that is, that CDW demoted him. He argues he was demoted as follows. Moving from outbound operations manager to internal operations manager constituted a demotion because the move to internal operations manager left him with a less distinguished title, less supervisory authority, and diminished responsibilities. Each of these changes alone constituted adverse employment actions in the form of a demotion. "Adverse employment action" is defined broadly, and a loss in pay is not a necessary prerequisite for the court to find a demotion occurred.

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engaged in a statutorily protected activity, (2) suffered an adverse employment action, and (3) there is a casual connection between the two. *Lewis* 496 F.3d at 655. Under the indirect method of proof, the plaintiff presents a *prima facie* case of retaliation by showing he: (1) engaged in a statutorily protected activity, (2) performed his job according to the employer's legitimate business expectations, (3) suffered an adverse employment action, and (4) was treated less favorably than similarly situated employees who did not engage in a statutorily protected activity. *Rhodes*, 359 F.3d at 508.

¶ 74 Plaintiff relies on *Mohr v. Chicago Board of Education*, 99 F. Supp. 2d 934 (N.D. Ill. 2000), to support that his change from outbound operations manager to internal operations manager constituted a demotion. In *Mohr*, the plaintiff was a white woman who had been a tenured art teacher at a school in Chicago. *Id.* at 935. In 1995, as part of a large "remediation" of the school, she lost her position as chairperson of the art department that she had held since 1988 and was reassigned from service as a regular teacher to that of a substitute. *Id.* The *Mohr* court found that either the reassignment to substitute teaching or the deprivation of position as department chairperson constituted an adverse employment action. *Id.* at 938.

¶ 75 Moreover, plaintiff argues that "[t]ransfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment actions.' " *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987). Plaintiff further argues that a transfer to a job with the same pay, as was the case here, may constitute an adverse employment action when the new position has a less distinguished title or diminished responsibilities. See *St. John Employment Development Dept.*, 642 F.2d 273, 274 (9th Cir. 1981) (transfer to job with same pay constituted adverse employment action for retaliation claim).

¶ 76 CDW responds as follows. *Mohr* is not comparable to plaintiff's situation. In *Mohr*, there was a dramatic shift in the responsibilities of the plaintiff, outright losing her chair position and going from a regular to substitute teacher. Plaintiff, on the other hand, remained a manager at CDW, retained his salary, and retained most of his responsibilities.

¶ 77 While we agree with CDW that *Mohr* does not aid plaintiff, we nonetheless find there was a genuine issue of material fact whether plaintiff's transfer from outbound operations manager to internal operations manager constituted an adverse employment action. A demotion is an adverse employment action, and may be evidenced by a decrease in wages, a less-

distinguished title, or a significant decrease in material responsibilities (*Crady v. Liberty National Bank & Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993)), although lateral transfers, without evidence that the transfer decreased an employee's responsibilities or benefits, do not constitute actionable adverse employment actions. (*Stulter v. Illinois Deptartment of Corrections*, 263 F.3d 698, 702-03 (7th Cir. 2001)). However, a nominally lateral transfer may be an adverse employment action where the transfer reduced the employee's career prospects by preventing the use of certain skills and experience. See *O'Neal v. City of Chicago*, 392 F.3d 909, 911 (7th Cir. 2004).

¶ 78 While the abundant federal law—there is sparse Illinois law on point—strictly interprets what constitutes an adverse employment action as a matter of law, we find that plaintiff's transfer created a genuine issue of material fact as to whether he was demoted. There is no evidence that he would lose pay, and to the contrary, there was evidence his pay would remain the same. Nonetheless, CDW admits that plaintiff would have less supervisory authority (or at least supervision over less employees) and different responsibilities as internal operations manager than he had as outbound operations manager. The transfer was accompanied by the Action Plan, which set improvement goals for plaintiff and regular status reports, with the lingering possibility of formal discipline. Plaintiff also characterized the move as hindering his career progression at CDW, where he had been for almost two decades. Taking the facts in the light most favorable to the plaintiff, the coinciding of the Action Plan with plaintiff's transfer to a new position with less supervision is enough that we cannot say, as a matter of law, whether plaintiff was demoted.

¶ 79 However, an adverse employment action is only one essential step in surviving summary judgment on intentional discrimination. Plaintiff must also establish a question of fact that the

alleged adverse employment action was motivated by racial discrimination. To do this, he may proceed under the direct method, utilizing direct and/or circumstantial evidence; or under the shifting burdens of the indirect method. He argues both, and we first analyze the direct method.

¶ 80 Plaintiff proffers indirect/circumstantial evidence of discrimination to support his direct method, arguing that similarly situated employees outside his protected group were treated better, and that a mosaic of evidence infers discriminatory intent. Plaintiff argues as follows. He was the only one of Appel's five direct reports—three of which were white, one was Filipino, and he was the only black—who was demoted or received an action plan despite that he scored higher on his March 2010 evaluation than two of the other four employees. When an employer takes action against an employee in a protected class but not against similarly situated employees outside the class, this is evidence of discriminatory intent.

¶ 81 However, plaintiff fails to identify who is similarly situated to him and why. Of the five direct reports to Appel, only Delfin Martinez was identified as a manager in the distribution center like plaintiff. Plaintiff has not stated whether Martinez scored higher or lower on his evaluation than him, but this fact is not ultimately important. Martinez had been the inbound operations manager at the distribution center. In the reorganization of management structure by Appel in October 2010, Martinez moved to outbound operations manager, although with less supervisory duty than plaintiff had had in that position. This is because the management structure went from two managers in the distribution center to three, inferring that each manager had less responsibility and supervisory duties. Although it is conceivable that one position would take on a larger slice of the supervisory pie while the other two were further diminished, CDW presented uncontroverted evidence that every position would have less responsibility associated with it in an effort to create clear parameters of responsibility and increase the

distribution center's quality and productivity. Plaintiff admitted that Martinez's move between outbound and inbound operations was a lateral one, and Martinez would likewise retain the same salary upon his reassignment. In many ways, Martinez was not treated dissimilarly from plaintiff but rather similarly: he was transferred to a position with less supervision than before at the same pay.

¶ 82 However, Martinez did not receive an action plan. That said, plaintiff did not present evidence of Martinez's employee evaluations, whether positive or negative. The Action Plan plaintiff received was the first that Appel had given to a direct report, although Appel subsequently gave an action plan to a Hispanic direct report. The Action Plan was not a formal PIP, and although it could convert to a PIP, the Action Plan did not carry with it the direct threat of formal discipline. Rather, the Action Plan aimed at addressing concerns Appel had expressed in comments on plaintiff's prior evaluations, such as bringing plaintiff up to speed in an evolving industry with training in analytics and Microsoft Excel. The Action Plan, the overall goal of which was to improve an employee's performance, cannot stand alone as sufficient evidence of discriminatory intent to survive summary judgment. *Cf. Davis v. Time Warner Cable of Southeastern Wisconsin, L.P.*, 651 F.3d 664, 677 (7th Cir. 2011) ("Performance improvement plans, particularly minimally onerous ones *** , are not, without more, adverse employment actions."); *Cooksey v. Board of Education of City of Chicago*, 17 F. Supp. 3d 772, 792 (N.D. Ill. 2014) (an improvement plan is not an adverse employment action merely because it adds to an employee's workload; rather, submission of daily or weekly schedules to supervisors can be constructive and improve an employee's performance). Accordingly, we find this evidence on its own insufficient, especially where the record shows that the Action Plan was consistent with CDW's concerns about plaintiff's work since Appel took over as plaintiff's direct supervisor.

¶ 83 As for Tammy Irwin, who took over as inbound operations manager, plaintiff did not present evidence of her as a comparator—*e.g.*, what her salary was or her evaluations relative to him—and she was taking over a position that plaintiff had repeatedly expressed his desire not to inhabit.

¶ 84 Plaintiff also offers a "mosaic" of evidence from which to infer discriminatory intent. He points to Eckrote's email comparing him to Michael Jackson, Eckrote choosing to hire an outside employee to replace Tegtmeyer, Appel telling him to "keep blacks in line," Appel calling on him in a meeting asking if he had a question because he "always had questions," Appel repeating that plaintiff was wanted "dead or alive," and Appel not eating with black employees. We assume for purposes of this review that the comments and occurrences alleged actually took place.

¶ 85 Eckrote's email and his decision to hire Appel are irrelevant to whether plaintiff was demoted because of his race. If plaintiff were still pursuing a failure to promote claim, they may be relevant to that. But the decision to reassign plaintiff was made by Appel years after Eckrote's email or his decision to hire from outside the company. There is simply no connection presented between Eckrote and Appel's decision to transfer plaintiff to internal operations.

¶ 86 Appel telling plaintiff to "keep blacks in line," if true, is lacking tact but not indicative of racial discrimination with regards to plaintiff's alleged demotion. Plaintiff was a manager, and if Appel was sensing trouble with black workers reporting to plaintiff, then it would fall to plaintiff to take charge as their manager. While it would have been better to say "keep Tom and Jerry in line"[5] than "keep blacks in line," the statement to keep blacks in line is not itself discriminatory or indicative of a discriminatory intent to demote plaintiff. See *Jones v. National Council of*

[5] These are not real CDW employees (to the court's knowledge). The court has chosen these names as an example of a duo that often causes trouble.

Young Men's Christian Ass'ns of the United States of America, 2014 WL 2781579, at *32 (N.D. Ill. 2014) (under the direct method of proving discrimination, even if comments reflect a racial bias, there must be a connection between the comments and the adverse employment decision). The comment was not even about plaintiff being black but about the performance of other black employees.

¶ 87 Appel making light of the death threat against plaintiff by repeating that he was wanted "dead or alive" is another example of a lack of tact that is unrelated to plaintiff's race. The only causal connection offered by plaintiff is his feeling that it was racial discrimination, but neutral teasing without more, even if inappropriate for the circumstances, cannot support an inference of intentional race discrimination. See *Porter v. City of Chicago*, 700 F.3d 944, 956 (7th Cir. 2012) (quoting *Scruggs v. Garst Seed Co.*, 587 F.3d 832, 840-41 (7th Cir. 2009)) (sporadic and rude comments by supervisors were insufficient to support employment discrimination claim; "offhand comments, isolated incidents and simple teasing do not rise to the level of conduct that alters the terms and conditions of employment in discrimination case").

¶ 88 Likewise, Appel calling on plaintiff in a meeting to ask if he had a question because he "always had questions," did not have anything to do with race. While the crickets in the business meeting may have been awkward for all, this is not evidence of racial discrimination sufficient to survive summary judgment.

¶ 89 Finally, Appel not eating lunch with black employees is not evidence of racial discrimination. There are many reasons why people may or may not sit together at lunch, and we will not infer race discrimination based on choice of lunch partners. See *Sands v. Runyon*, 28 F.3d 1323, 1331 (2d Cir. 1994) (courts do not possess the power to compel co-workers to like

each other); *Goswami v. DePaul University*, (the anti-discrimination laws in this country are not a code of civility and do not seek to enact a law requiring people to like each other).

¶ 90 Taking all of plaintiff's evidence together we have a picture of human beings at a business—prone to miscommunications, occasionally lacking tact, and sometimes embarrassing themselves or others—but we do not have a mosaic of evidence sufficient to infer a discriminatory intent to demote plaintiff necessary to survive summary judgment under the direct method of proof.

¶ 91 Plaintiff, having failed under the direct method, may still survive summary judgment under the indirect method of proof. First, he must establish a *prima facie* case of discrimination. Plaintiff satisfied the first and third prongs: respectively, that he is a member of a protected class because he is black (*Blise v. Antaramian*, 409 F.3d 861, 866 (7th Cir. 2005)); and that he suffered an adverse employment action in the form of a demotion, for the reasons stated *supra*.

¶ 92 The remaining prongs are that plaintiff performed his job in line with CDW's legitimate business expectations and that CDW treated similarly situated, non-black employees more favorably than plaintiff. *Collins*, 715 F. 3d at 999. Plaintiff proffers evidence that he was performing his role up to CDW's legitimate business expectations in the form of successful annual performance reviews, including a satisfactory review in 2010, and CDW does not contest that plaintiff was meeting its legitimate business expectations. Thus, this prong is satisfied.

¶ 93 Finally, plaintiff offers sufficient evidence that CDW treated similarly situated, non-black employees better than him. As discussed *supra*, the only possible comparator was Martinez, who likewise was laterally reassigned to a position with less supervision but the same pay. However, Martinez did not receive an Action Plan from Appel when he was transferred within the distribution center; only plaintiff did. This is enough to survive the low burden of the initial

prima facie case, noting that the evidence plaintiff presents in making a *prima facie* case need not be overwhelming nor destined to prevail, but only that he offer some evidence from which a fact finder could infer that the employer took an adverse employment action against him on the basis of race. *Bellaver v. Quanex Corp.*, 200 F. 3d 485, 493 (7th Cir. 2000).

¶ 94 Carrying the burden of establishing a *prima facie* case, however, only shifts the burden of production to CDW to articulate a legitimate reason for its treatment of plaintiff, after which it is up to plaintiff to show that any reason articulated is pretext for discrimination. This plaintiff cannot do. CDW moved plaintiff to internal operations manager as part of a distribution center reorganization, in which three managerial positions were created where two existed before, but the managers, including plaintiff, were to retain their former pay. The purpose of the reorganization was to increase the productivity and quality of the distribution center. This was within CDW's business discretion, and we do not sit as a "super-personnel department" to reexamine business decisions. See *Janiuk v. TcG/Trump Co.*, 157 F.3d 504, 510-11 (7th Cir. 1998). Moreover, the Action Plan did not come out of the blue as plaintiff suggests; Appel had been commenting on areas that plaintiff needed to improve on for at least the year before he decided to transfer plaintiff, and he had been trying to help plaintiff improve his skills with Excel and have him become more engaged with his outbound team. These actions were consistent with the Action Plan and Appel's desire for plaintiff to improve his skills as part of his transfer to internal operations manager. The burden therefore shifts back to plaintiff to show pretext. *Bellaver*, 200 F.3d at 493. Plaintiff points to his "stellar" performance reviews, but he looks only at his overall scores (satisfactory) on his prior reviews and ignores the comments on areas needed for improvement. He points again to his dissimilar treatment from other employers insofar as only he received an Action Plan. However, his lone comparator, Martinez, was also

laterally transferred within the distribution center to a position with less supervisory authority but the same pay.

¶ 95 Plaintiff's evidence was enough to show a *prima facie* case, but most of plaintiff's evidence, as discussed under the direct method analysis (*e.g.*, Eckrote's email or Appel telling him to "keep blacks in line"), is not sufficiently related to the alleged demotion to aid his case. The record does not support that plaintiff's move was motivated by any reason other than as part of a business decision to restructure the distribution center and improve the efficiency of the center and its managers. With nothing more, he cannot show pretext here.

¶ 96 Because plaintiff cannot show that CDW's reasons for his transfer were pretext for discrimination, he cannot show his alleged demotion was motivated by discrimination under the indirect method.

¶ 97 E. Constructive Discharge

¶ 98 Plaintiff next argues that he suffered a constructive discharge because of intentional discrimination. As with his charge of an improper demotion, we first examine whether, in fact, he was constructively discharged. See *Hallmon v. School District 89, Cook County, IL*, 911 F. Supp. 2d 690, 699 (N.D. Ill. 2012) (employment discrimination claim failed because none of three incidents underlying the claim qualified as materially adverse employment actions).

¶ 99 Plaintiff argues that he was constructively discharged as follows. The transfer to internal operations manager was a "dead-end path" for his career at CDW. A dead-end position may constitute a constructive discharge. See *Hopkins v. Price Waterhouse*, 825 F. 2d 458 (D.C. Cir. 1987), *rev'd other grounds*, 490 U.S. 228 (1989). In conjunction with the Action Plan, a reasonable juror could determine that termination would occur at some point in the near future. After plaintiff left CDW on October 19, 2010, no person at CDW contacted him about returning

to CDW. Under *Board of Directors, Green Hills Country Club v. Human Rights Comm'n*, 162 Ill. App. 3d 216, 221 (1987), an employee experiencing violations of his civil rights need not tolerate such violations as a condition of employment, and thus illegal discrimination constitutes intolerable work conditions sufficient for a constructive discharge. Plaintiff experienced the following discrimination: Appel's mocking of plaintiff regarding the credible death threat against him, especially when compared to CDW rallying around Irwin, a white woman, after she was threatened by a driver; CDW preventing him from competing for promotions and reassigning him from his outbound manager position; and Appel giving him an Action Plan but not giving any other employee a similar plan—despite his consistently good performance reviews over 17 years. Other incidents that rendered his position intolerable were: Appel's questioning of his grammar and ideas; his comment to "keep blacks in line"; and Eckrote's email comparing him to Michael Jackson. A reasonable person in plaintiff's shoes would not have stayed at CDW under the existing conditions of racial harassment, and at the very least, whether a reasonable person would have done so is a fact question for a jury.

¶ 100 CDW responds that, even taking all of plaintiff's allegations as true, plaintiff cannot demonstrate his working conditions were so intolerable because of unlawful discrimination that a reasonable person would have felt compelled to resign, and summary judgment was appropriate. We agree.

¶ 101 "It is difficult for a plaintiff to show a constructive discharge." *Cooper-Schut v. Visteon Automotive Systems*, 361 F.3d 421, 428 (7th Cir. 2004). Constructive discharge occurs when an employee is so mistreated at work or the working conditions are so intolerable that a reasonable person in that employee's position would be forced to quit. *Steele v. Illinois Human Rights Comm'n*, 160 Ill. App. 3d 577, 581 (1987); see *Jordan v. City of Gary, Indiana*, 396 F.3d 825,

836 (7th Cir. 2005). An employee "may not be unreasonably sensitive to his working environment and *** he must seek redress while still on the job unless confronted with an aggravating situation beyond ordinary discrimination." *Rabinovitz v. Pena*, 89 F.3d 482, 489 (7th Cir. 1996). Once the employee shows that a constructive discharge occurred, then he must show that the discharge was because of his race. See *Vitug v. Multistate Tax Comm'n*, 88 F.3d 506, 517 (7th Cir. 1996).

¶ 102 First, the Action Plan did not make plaintiff's job intolerable, nor did it necessarily foreshadow his termination. The Action Plan was for 60 days, and if plaintiff did not make improvements over these two months, then the Action Plan would convert to a PIP. Termination was never mentioned or alluded to, and even if it were, working conditions do not automatically become intolerable because the "prospect of discharge lurks in the background." See *Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 679 (7th Cir 2010) (quoting *Cigan v. Chippewa Fall School Dist.*, 388 F.3d 331, 333 (7th Cir. 2004)). Plaintiff offers no facts from which a reasonable juror could determine that his termination was a foregone conclusion, nor does the record support such a finding. Rather, the Action Plan itself acknowledged plaintiff was a valued employee and purported to help him perform his job better.

¶ 103 Next, plaintiff's reassignment to internal operations manager was not intolerable. The distribution center was being reorganized, going from two managers to three, and each of the three would have less employees to supervise than each of the two had supervised previously. Plaintiff's pay would remain the same, and he would remain a manager. Moreover, plaintiff left the October 19, 2010, meeting before hearing the duties and responsibilities of his new position. By his own admission, he was in "awe and shock," and after telling Appel that this was a demotion and he should "just go ahead and fire me," he did not even hear his response. He

assumed it was a dead-end position in part because nobody had held the position before, but it was a new position and his old position was having its supervisory role reduced as well. An employee cannot be unreasonably sensitive to his working environment. See *Locke v. Gas Research Institute*, 935 F. Supp. 994 (N.D. Ill. 1996) (plaintiff not constructively discharged on account of filing formal complaint when the conditions she cited were that the atmosphere was stressful and difficult after the filing, and the only specifics were that her boss was "checking up" on her and she was reprimanded for harsh treatment of her secretary). And moreover, absent extraordinary conditions, an employee must seek redress while remaining on the job. *Cooper-Schut*, 361 F.3d at 428. Plaintiff did not do so here; he stood up, left the meeting, and never returned to work. A reasonable jury could not find this transfer created an intolerable work condition.

¶ 104 Likewise, plaintiff not receiving promotions in 2006 and 2009 when CDW hired Appel and when Appel replaced Tegtmeyer, respectively, do not demonstrate an intolerable workplace. For instance, white police sergeants who sued when a black officer was promoted ahead of them, and when the chief told them they were the "wrong color" for promotions and recommended they seek employment elsewhere, were not constructively discharged because they could continue being sergeants and these comments were not made by someone in authority to promote but rather were the comments of a frustrated colleague. *Garofalo v. Village of Hazel Crest*, 754 F.3d 428, 437 (7th Cir. 2014). Plaintiff here would remain a manager at the same pay, and in fact, Appel stated the Action Plan was, in part, to help plaintiff progress at CDW. His working conditions were not intolerable based on a lack of promotion.

¶ 105 As for CDW's disparate handling of a threat against plaintiff compared to a threat against Irwin, plaintiff mischaracterizes the facts here. CDW did not aid Irwin and ignore

plaintiff. Rather, it investigated the threat against him and offered to help him obtain an order of protection, which plaintiff declined to obtain. Appel's comments that plaintiff was wanted "dead or alive," also do not render his working conditions intolerable. Working conditions for a constructive discharge must be more egregious than the high standard for a hostile work environment, and an isolated outburst by a single employee, even one laced in profanity and racially charged, is not enough to support a constructive discharge. See *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1046, 1050 (7th Cir. 2000) (no intolerable working conditions present when sportscaster told black plaintiff-cameraman to "get the f*** out of the office before I pop a cap in your ass" and asked him if he had seen the movie *Niggers with Hats*"[6]). Moreover, even if plaintiff received a credible death threat, he did not receive the death threat from Appel or any other CDW employee, nor were Appel's comments vicious or repetitive. See *id.* at 1050 (credible death threat can serve as grounds for constructive discharge, but isolated instance of harassment did not).

¶ 106 If reassignment and mocking are insufficient grounds for constructive discharge, then, *a fortiori*, Appel not eating lunch with black employees, Eckrote's email comparing him to Michael Jackson, and Appel telling him to keep blacks in line are insufficient grounds. It is debatable whether a reasonable employee would even be offended by any of these, much less find them intolerable. Again, a plaintiff cannot be overly sensitive to his working environment. See *Filipovic v. K & R Exp Systems, Inc.*, 176 F.3d 390, 398 (7th Cir. 1999) (four national origin related comments made over the course of more than a year insufficient to support a hostile work environment).

[6] The plaintiff responded that the correct phrase was "bust a cap," not "pop a cap."

¶ 107 Nor does taking all these alleged incidents together make plaintiff's working conditions intolerable. The incidents alleged are few, spaced out in time, and largely unrelated; no discriminatory pattern emerges. See *Collins v. Argonne National Laboratory*, 757 F. Supp. 934, 937 (N.D. Ill. 1991) (no constructive discharge where employee alleged three isolated incidents of discrimination and those incidents, taken together, were not intolerable); *cf. Thames v. Maurice Sporting Goods, Inc.*, 686 F. Supp 208, 215 (N.D. Ill. 1988) (in race and age discrimination case, alleged pattern of discriminatory conduct, in the form of repeated enforced subordination to a series of younger more inexperienced employees, was enough for trier of fact to decide whether constructive discharge occurred).

¶ 108 Accordingly, plaintiff's constructive discharge claim fails under either the direct or indirect methods because there was no issue of fact as to whether a constructive discharge occurred.

¶ 109 F. Retaliation

¶ 110 Plaintiff further charges that he suffered a demotion and/or a constructive discharge in retaliation for making complaints to Tegtmeyer and Appel of race discrimination. Because we have found that plaintiff was not constructively discharged, we only examine whether CDW retaliated against him when it allegedly demoted him.

¶ 111 Whether plaintiff proceeds under the direct method of showing retaliation or the indirect method, he must show that he engaged in a statutorily protected activity. See *Andrews*, 743 F.3d at 234. Plaintiff asserts that his complaints of race based behavior to his immediate supervisors, Appel and Tegtmeyer, constituted a protected activity supporting a retaliation claim under the IHRA. Plaintiff identifies his complaint to Tegtmeyer about Eckrote's Michael Jackson email

that he found offensive, and he also complained at various times to Appel that he was uncomfortable with his comments because they were racially charged.

¶ 112 A formal or informal complaint of discrimination to a supervisor is a protected activity for purposes of a retaliation claim. *Garza v. Wautoma Area School District*, 984 F. Supp. 2d 932, 942 (E.D. Wis. 2013); see *Davis v. Time Warner Cable of Southeastern Wisconsin, L.P.*, 651 F.3d 664, 674 (7th Cir. 2011) (private comments by employee to supervisor that supervisor was unfair in treating white subordinates more favorably than blacks was a protected activity). Accordingly, plaintiff's identified complaints to Tegtmeyer and Appel may constitute protected activities for surviving summary judgment.

¶ 113 Under the direct method, then, plaintiff can show that he engaged in a protected activity and that he suffered an adverse employment action (demotion but not constructive discharge). See *Brown v. Advocate South Suburban Hospital*, 700 F.3d 1101, 1106 (7th Cir. 2012) (to establish retaliation under the direct method, plaintiff must show he: (1) engaged in protected activity, (2) suffered an adverse employment action, and (3) that there was a causal link between the protected activity and the adverse employment action). However, for much the same reasons that his direct method fails in surviving summary judgment on his intentional discrimination action because he could not demonstrate causation, his retaliation claim fails here.

¶ 114 Plaintiff's arguments are mostly the same: that after plaintiff complained to Appel about racial harassment, Appel continued to harass him with threats to "keep blacks in line" and mocking him that he was wanted "dead or alive." Plaintiff also asserts that Appel changed his work hours, that his new position was one that no employee had ever held before, and that he was the first employee to receive an action plan from Appel, and no white employee received one.

¶ 115 Nonetheless, plaintiff presents no causal connection between these activities and Appel's decision to move plaintiff from outbound operations manager to internal operations manager. Appel made the move as part of a reorganizing of the distribution center, and plaintiff was not the only manager who moved positions. He retained his salary. The possibility of a move within the distribution center had been on the table for years, and contrary to plaintiff's assertions, not all of his prior reviews had been Appel praising him—there were multiple comments that highlighted areas for improvement. Throughout 2010, Appel was working to help plaintiff become better at using Microsoft Excel and handle shipping analytics in an increasingly computerized world. The change in plaintiff's work schedule was only to align his working hours with that of his team; it did not include an expansion of hours, nor was there any indication that the change was punitive. Plaintiff's new position was never held by anyone before because it was new, and at the time that plaintiff left CDW, he was unaware of its duties and responsibilities because he left the meeting before he could hear them. Moreover, as we discussed *supra*, Appel's comments to "keep blacks in line" and that plaintiff was wanted "dead or alive" may have been insensitive, but they bore no relationship to plaintiff's complaints or the decision to transfer him to internal operations manager. Plaintiff's characterization of a pattern of harassment is not supported by the record.

¶ 116 Likewise, plaintiff's claim that he can show retaliation under the indirect method fails. Under the indirect method for retaliation, a plaintiff establishes a *prima facie* case of retaliation by showing that he: (1) engaged in a protected activity; (2) met his employer's legitimate business expectations; (3) suffered a materially adverse employment action; and (4) was treated less favorably than a similarly situated employee who did not engage in a protected activity. *Hobgood v. Illinois Gaming Board*, 731 F.3d 635, 641 (7th Cir. 2013). If the plaintiff

demonstrates a *prima facie* case of retaliation, then the burden shifts to the employer to articulate a legitimate reason for the adverse action; and if the employer articulates at least one reason, the plaintiff must demonstrate that the reason is false. *Id.* at 641-42.

¶ 117 For the reasons discussed under our direct method of showing retaliation, plaintiff engaged in a protected activity; and for the reasons discussed in our analysis of his alleged demotion, plaintiff has sufficiently shown that he was meeting his employer's expectations, that he suffered a materially adverse employment action (demotion), and that he was treated less favorably than a similarly situated employee (he received an Action Plan, whereas Martinez did not).

¶ 118 However, CDW articulates the same reason for transferring plaintiff as we analyzed under his claim of an intentionally discriminatory demotion, and just as plaintiff fails to show CDW's reasons for his demotion were pretext for racial discrimination, so too he cannot show its reasons were pretext for a retaliatory demotion. There is simply no evidence that shows CDW's decision to restructure the distribution center was false and actually in response to his complaints of racial discrimination. Instead, as discussed *supra*, the record supports that Appel sought to increase the productivity of the entire distribution center through the reorganization, and the Action Plan was in line with his efforts to improve plaintiff's performance as a manager in an evolving field. Accordingly, plaintiff's indirect method of showing retaliation fails as a matter of law.

¶ 119 III. CONCLUSION

¶ 120 Plaintiff did not present sufficient evidence to survive summary judgment on his claims of intentional discrimination or retaliation. He did not present sufficient evidence that he was constructively discharged, and despite a genuine issue of material fact over whether he was

demoted, he could not show that CDW transferred his position because of discrimination or retaliation. Therefore, the order of the Lake County circuit court is affirmed.

¶ 121 Affirmed.