

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

---

|                               |   |              |
|-------------------------------|---|--------------|
| CRAIG PHILLIPS,               | : | CIVIL ACTION |
|                               | : |              |
| Plaintiff,                    | : |              |
| v.                            | : | NO. 97-0033  |
|                               | : |              |
| TILLEY FIRE EQUIPMENT COMPANY | : |              |
| and MICHAEL TILLEY,           | : |              |
|                               | : |              |
| Defendants.                   | : |              |

---

MEMORANDUM

ROBERT F. KELLY, J.

NOVEMBER 23, 1998

The Plaintiff brought this action alleging violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq., violations of 42 U.S.C. § 1981 ("section 1981"), and state law claims for emotional distress. After an eight day trial, the jury returned a verdict in favor of the Defendants as to all claims.<sup>1</sup> Presently before the Court is the Plaintiff's Motion for a New Trial.<sup>2</sup> For the reasons that

---

<sup>1</sup>The Plaintiff originally filed this Motion on February 27. The Plaintiff then filed a Motion to proceed in forma pauperis so that he would not have to pay for a copy of the transcript of the trial. This Court denied the Motion, and the Plaintiff subsequently ordered a transcript. There was further delay due to an apparent error in transcribing portions of the testimony. The Plaintiff filed a Revised Motion on September 18, 1998.

<sup>2</sup>This Motion is actually titled "Plaintiff's Motion for Judgment as a Matter of Law, Motion for New Trial, and Motion to Alter or Amend Judgment." But the Plaintiff failed to make a Motion for Judgment as a Matter of Law at the close of all evidence at trial. The Plaintiff is, therefore, not permitted to make a Motion for Judgment as a Matter of Law at this time. See FED. R. CIV. P. 50; Markovich v. Bell Helicopter Textron, Inc., 805 F. Supp. 1231, 1234 (E.D. Pa. 1992), aff'd, 977 F.2d 568 (3d Cir. 1992). This Court will treat the Plaintiff's Motion as a

follow, the Plaintiff's Motion will be denied.

### **I. Background**

A brief summary of the facts that are relevant to this Motion is necessary in order to place this case in perspective. The Plaintiff began working as an alarm technician for Defendant Tilley Fire Equipment Co. ("TFE") in 1989. He was TFE's first African American employee. Throughout his employment, his supervisor was Defendant Michael Tilley. The Plaintiff claims that during his employment at TFE, he was referred to by Michael Tilley and others as "Super Nigger" or "SN" and as "Head Nigger in Charge" or "HNC." The Defendants do not claim that the Plaintiff was never referred to in this manner. Rather, they contend that it was the Plaintiff who bestowed these names upon himself in a joking manner, and that they were only following his lead. The Defendants claim that whenever these words were used in the Plaintiff's presence, it was in jest and was clearly not offensive to the Plaintiff.

It is uncontroverted that the Plaintiff received numerous raises in pay during his employment. Further, neither party disputes that, with the exception of Michael Tilley, the Plaintiff was the most senior employee in the TFE alarm department, and that the Plaintiff trained other alarm technicians. In addition, the Plaintiff supervised the

---

Motion for a New Trial pursuant to Rule 59.

department during an extended absence by Michael Tilley.

The Plaintiff also testified at trial that, on one occasion, Michael Tilley drove him past a property in rural Bucks County on which there were pyramids. The Plaintiff claimed that Michael Tilley told him that the property was a meeting site for a white supremacist group and that the Plaintiff could be "shot or harmed" if he entered the property. (N.T. 2/10/98 at p. 27.) Michael Tilley denied that this event ever occurred.

The parties agree that the Plaintiff was terminated in January of 1996. The Plaintiff contends that his termination was racially motivated, while the Defendants maintain that it was because of the Plaintiff's poor job performance. The Plaintiff brought Title VII claims for disparate treatment and hostile work environment, and these claims are the subject of this Motion.<sup>3</sup>

## II. Discussion

The Plaintiff argues that a new trial should be granted because certain of the Court's evidentiary rulings were erroneous, because of errors in the Court's jury charge, and because the verdict was against the weight of the evidence. The

---

<sup>3</sup>The legal analysis for section 1981 claims is generally the same as that for Title VII claims. Lewis v. Univ. of Pittsburgh, 725 F.2d 910, 915 n.5 (3d Cir. 1983), cert. denied, 469 U.S. 892 (1984); Mason v. Assoc. for Indep. Growth, 817 F. Supp. 550, 554 n.5 (E.D. Pa. 1993). Thus, there is no need to address the Plaintiff's section 1981 claims separately. There are no issues raised in this Motion directly relating to the Plaintiff's emotional distress claims.

Plaintiff also includes in this Motion a request that I recuse myself from further proceedings in this case. This Court will address, in turn, each of the Plaintiff's contentions, as well as the request for recusal.

In evaluating a motion for a new trial on the basis of trial error, the Court must first determine whether an error was made in the course of trial, and then must determine "whether that error was so prejudicial that refusal to grant a new trial would be inconsistent with substantial justice." Farra v. Stanley-Bostitch, Inc., 838 F. Supp. 1021, 1026 (E.D. Pa. 1993). The trial court has broad discretion in determining the admissibility of evidence and whether a new trial should be granted based on an erroneous evidentiary ruling. Threadgill v. Armstrong World Indus., Inc., 928 F.2d 1366, 1370 (3d Cir. 1991).

A. Evidence Related to the Pyramids

The Plaintiff argues that this Court's exclusion of what the Plaintiff describes as "racism linked to the pyramids" was error. Included within this evidence are photographs of a plaque on one of the pyramids, the testimony of Ann Van Dyke and Floyd Cochran of the Pennsylvania Human Relations Commission ("PHRC"), the testimony of Charles Sulzbach, the Plaintiff's private investigator, and the testimony of Karen Kearns, who apparently had personal knowledge of a racist leader in Bucks County.

The Plaintiff contends that all of this evidence was relevant to his Title VII hostile environment claim. In order to be actionable under Title VII, racial harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" West v. Philadelphia Elec. Co., 45 F.3d 744, 753 (3d Cir. 1995) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)). The elements necessary to establish a hostile work environment claim are:

(1) the plaintiff suffered intentional discrimination because of his or her membership in the protected class;

(2) the discrimination was pervasive and regular;

(3) the discrimination detrimentally affected the plaintiff;

(4) the discrimination would have detrimentally affected a reasonable person of the same protected class in that position; and

(5) the existence of respondeat superior liability.

West, 45 F.3d at 753 (citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990)). The existence of a hostile environment is determined by examining the totality of the circumstances. Andrews, 895 F.2d at 1482.

The pyramid site in fact belongs to an organization known as the Rosicrucians. The Plaintiff attempted to introduce photographs of a plaque at the pyramid site containing the words "Dedicated to the Supreme Grand Masters, Councillors and Sublime

Instructors of the August Fraternity Who Have Entered the Realm of the Great White Brotherhood."<sup>4</sup> (See Pl.'s Brief Opposing Defs.' Mot. for Summ. J. Ex. C.) The Plaintiff testified that he did not see the plaque at the time of the alleged incident with Michael Tilley. (Dep. of Craig Phillips at p. 139.) Indeed, it was not until after this litigation commenced, when the Plaintiff's counsel showed the Plaintiff pictures of the plaque, that he could read the words on it. (N.T. 2/10/98 at pp. 91-94.) Because the Plaintiff never saw the words on the plaque while he was employed by TFE, a picture of the plaque cannot be relevant to any element of his hostile environment claim. See FED. R. EVID. 401. Therefore, the photographs of the plaque were properly excluded by this Court.

Similarly, the other evidence the Plaintiff wished to introduce was also irrelevant. The Plaintiff argues that Van Dyke would have testified as to the pyramids' "connection with

---

<sup>4</sup>This quotation from the plaque was misstated several times by the Plaintiff's counsel, both in open court and in the Plaintiff's post-trial motion. (See N.T. 2/2/98 at p. 4; Pl.'s Mot. for New Trial at p. 6.) Although not relevant to this case, it should be noted that the plaque includes the names of Abraham Lincoln and Benjamin Franklin. (See Pl.'s Brief Opposing Defs.' Mot. for Summ. J. Ex. C.) While there is no need for this Court to make a finding as to the meaning of the plaque, it is doubtful that a plaque that appears to be dedicated to Lincoln and Franklin would be "racist" as the Plaintiff contends. (Pl.'s Mot. for New Trial at pp. 5, 7.) This fact also makes all the more inflammatory and offensive the statement of the Plaintiff's attorney that driving the Plaintiff past the pyramids was "akin to taking a Jew passed [sic] Auschwitz." (N.T. 2/18/98 at p. 83.)

known racist symbols, and confirmed the existence of white supremacist groups in the vicinity." (Pl.'s Mot. for New Trial at pp. 7-8.) Cochran would have "explained the racial significance of the pyramids." (Id. at p. 8.) Sulzbach, the Plaintiff's private investigator, would have testified to the "rural isolation" of the pyramids, the photographs of the plaque, his investigation of the property, and his observations of the Plaintiff's "fearful conduct in refusing to accompany him there." (Id.) Kearns would have testified "to her personal knowledge of an Aryan Nations racist leader['s] familiarity with the Bucks County Pyramids site, his knowledge of the 'Rosicrucian' cult group there, and his use of" a racist symbol "graphically linked to the Bucks County Pyramids site." (Id.) All of these witnesses would have testified to things of which the Plaintiff was not aware during his employment. The evidence provided by these witnesses could have no bearing on the ultimate issue in this case, which is whether the Plaintiff suffered discrimination in violation of Title VII.

#### B. Plaintiff's Motion for Mistrial

The Plaintiff contends that the Court's denial of his motion for a mistrial was error. During the Plaintiff's closing argument, the Defendants objected to the Plaintiff's counsel referring to the words on the plaque at the pyramid site. (N.T. 2/18/98 at pp. 128-29.) This objection was based upon the

Defendants' claim that there was no testimony in the record as to the plaque. The Court sustained the Defendants' objection, believing that the Plaintiff was never permitted to testify as to the words on the plaque. The Plaintiff moved for a mistrial prior to the jury charge, arguing that the Plaintiff had been permitted to testify as to the plaque. The Court, believing the testimony had not been admitted, denied the Plaintiff's motion. In fact, the Plaintiff had testified as to his memory of the words on the plaque, but the testimony was only admitted to show the Plaintiff's reason for moving to Georgia several months after his employment was terminated. (N.T. 2/10/98 at pp. 91-95.) Thus, this testimony was relevant only to the issue of damages. Because the jury found in favor of the Defendants on the issue of liability, and therefore never reached the issue of damages, this cannot be the basis for granting a new trial. See Farra, 838 F. Supp. at 1027.

#### C. Plaintiff's 1983 Discharge

The Plaintiff contends that the admission of evidence of his 1983 discharge from the United States Army was error. The Plaintiff stated on his application for employment with TFE that he served in the Army from June, 1978 until May, 1981, and that he received an Honorable Discharge. (Dep. of Craig Phillips Ex. 1.) He also stated on the application that he began working as a machine operator upon his discharge in 1981. (Id.) As revealed

in his deposition and later at trial, the Plaintiff actually did not begin working as a machine operator in May of 1981. Rather, he re-enlisted in the Army immediately following his Honorable Discharge, and eventually received a General Discharge Under Other Than Honorable Conditions in 1983. The Defendants obtained the Plaintiff's military records and used them at trial for purposes of impeachment.

The Plaintiff place this evidence at issue by his own conflicting testimony in this case. During his deposition, he gave an account of his military service that differed substantially from his application for employment with TFE. (See Dep. of Craig Phillips at pp. 6-7.) He then filed two separate affidavits regarding his discharge. (See Aff. of Craig Phillips Regarding Military Records; Aff. of Craig Phillips in Opp'n to Mot. for Summ. J.) Further, at the pretrial conference, the Plaintiff's counsel stated to the Court: "The fact is that everything he put down on his job application in 1988 is true." (N.T. 2/2/98 at p. 71.) Thus, the Plaintiff put his military service and discharge at issue in this case, and the Defendants' were entitled to impeach him with evidence that he was not truthful on his application for employment or in his testimony.<sup>5</sup>

---

<sup>5</sup>The Court also instructed the jury that evidence of the Plaintiff's 1983 discharge was only for the purpose of showing the contradiction in the Plaintiff's testimony. (N.T 2/19/98 at p. 30-31.)

D. Comments Against Evidence

Next, the Plaintiff argues that what he describes as "Comments Against Plaintiff's Factual Evidence" unfairly prejudiced the Plaintiff and require a new trial. During the Plaintiff's closing argument, the following exchange took place:

[MS. ALBERTS:] My client was taunted. You heard Joseph Weber testify that there were conversations about lynching in the upper parts of Bucks County, in his presence, in the alarm department.

MR. DALTON: Your Honor, I object again. There -- Mr. Weber never, ever said words to that effect.

MS. ALBERTS: We have --

MR. DALTON: I apologize for the interruption, but this has happened repeatedly.

THE COURT: I don't recall it either, but please.

MS. ALBERTS: We have a transcript, Your Honor.

THE COURT: You have a transcript?

MS. ALBERTS: Well, we will have a transcript.

THE COURT: Well, we don't have one and --

MS. ALBERTS: No, not now.

THE COURT: -- if we had one, I probably wouldn't stop this trial long enough to read it anyway. But we do not have one available to us.

MS. ALBERTS: You have to go by your own recollections, not mine. That's what I remember. I could be wrong.

(N.T. 2/18/98 at pp. 123-24.) The Plaintiff argues that this statement demonstrates "the Court's disdain of Plaintiff's evidence to the jury, and showed the Judge had already made its

[sic] own credibility finding, against Plaintiff. This also negated Weber's testimony, which was central to Plaintiff's case in chief. The Judge told the jury he considered Weber's testimony trivial, not even worth reading." (Pl.'s Mot. for New Trial at p. 14.) The Court's statement was simply an indication that the Plaintiff's closing should not be interrupted to examine the transcript (had one existed at that time), as the jury could rely upon its own recollection of the testimony.<sup>6</sup> How this statement shows that the Court had made a credibility determination or considered the testimony trivial is unclear. Needless to say, there is no error in the statement be sufficient to justify a new trial.

E. Expert Witnesses and Dictionary Definition

The Plaintiff contends that the Court's exclusion of Howard Winant, Ph.D., a sociologist, and Donald Jennings, Ed.D., a vocational psychologist, was error. The Plaintiff claims Dr. Winant would have "explained racial 'joking' by whites as a

---

<sup>6</sup>Although the Plaintiff did not provide a cite, there is some relevant testimony by Weber on this matter. On cross-examination, the witness testified: "[A coworker] was calling him names, whether he was joking or not, but he would always say things like, if you went up above Quakertown you're in trouble up there because blacks don't belong there. They lynch you up there in that part of the county." (N.T. 2/11/98 at p. 50.) This appears to be the testimony to which the Plaintiff referred in the closing argument. But it is unclear how testimony could be "central to Plaintiff's case in chief" when it was actually elicited by the Defendants' counsel on cross-examination of the Plaintiff's witness.

ritualized form of harassment, and would have seriously discussed the Plaintiff's claim of direct threat of racially motivated harm at 'The Pyramids,' as a traditional form of intimidation."

(Pl.'s Mot. for New Trial at p. 15.) Dr. Jennings would have testified to "the Plaintiff's perceived necessity to return to Georgia for safety of himself and his family, and the need for psychological care should he ever attempt to return North." (Id. at p. 17.)

Federal Rule of Evidence 702 has three major requirements governing the admissibility of expert testimony: (1) the proffered witness must be an expert; (2) the expert must testify about matters requiring scientific, technical, or specialized knowledge; and (3) the expert's testimony must assist the trier of fact. Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 806 (3d Cir. 1997). It is the third requirement that is at issue here. This condition goes primarily to relevance. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 591 (1993). "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." Id. (citations omitted).

The proposed testimony of Dr. Winant clearly does not meet the requirement that it must assist the trier of fact. As articulated by the Plaintiff's counsel at the pretrial conference, Dr. Winant was to rebut the defense that "racial

jokes don't mean anything, that they are benign, that the word nigger is okay and that it's not racist." (N.T. 2/2/98 at p. 46.) But the Defendants did not raise such a defense at trial. Their defense was based upon testimony that it was the Plaintiff who first referred to himself as "Super Nigger" and "Head Nigger in Charge," and that this conduct was not unwelcome but, rather, was workplace joking that the Plaintiff encouraged. Dr. Winant's testimony as to racial joking and intimidation was not relevant where the defense was that the Plaintiff initiated the use of these words and they were, therefore, not unwelcome.<sup>7</sup>

Dr. Jennings would have testified regarding the

---

<sup>7</sup>It should also be noted that Dr. Winant's report would not assist the trier of fact even if it were relevant to an issue in this case. The report states, for example:

In this case plaintiff Craig Phillips was taken by defendant Michael Tilley to a putative meeting place of the Ku Klux Klan and told that he could be 'strung up' if he was not careful. This seems to be a clear instance of racial threat, in line with a long tradition of threatening or actually carried out threats of lynching of black people.

(Pl.'s Mot. for New Trial Ex. A.) If the Plaintiff had testified as Dr. Winant stated in his report, and if the jury had believed the testimony, there would be no need for an expert to help the jury understand that this would be a racial threat.

Further, the Plaintiff argues that Dr. Winant would have been able to assist the jury in understanding that a dead crow found in the Plaintiff's back yard was a racial threat. (Pl.'s Mot. for New Trial at p. 15.) This Court notes that there is nothing in Dr. Winant's expert report that even remotely addresses the subject of dead birds. (See Pl.'s Mot. for New Trial Ex. A.)

Plaintiff's damages. Because the jury found in favor of the Defendants on the issue of liability, it never reached the issue of damages. A motion for a new trial cannot be based upon issues that a jury did not reach. Farra, 838 F. Supp. at 1027.

Therefore, any error relating to the preclusion of Dr. Jennings would be harmless. Markovich v. Bell Helicopter Textron, Inc., 805 F. Supp. 1231, 1241 (E.D. Pa. 1992), aff'd, 977 F.2d 568 (3d Cir. 1992). Moreover, it is unclear from the expert report what opinions Dr. Jennings would render. The report essentially recites what the Plaintiff told Dr. Jennings at their meeting. It provides no information that would have been helpful to the finder of fact in this case. (See Pl.'s Mot. for New Trial Ex. B.)

The Plaintiff also argues that the Court's denial of the Plaintiff's motion to take judicial notice of the definition of the word "nigger" in Webster's Dictionary was error. The Court has the power to take judicial notice of dictionary definitions. See FED. R. EVID. 201. But, as with the testimony of Dr. Winant, this evidence would have attributed to the Defendants a defense position that they never raised, specifically, that the word "nigger" is an appropriate word and is not offensive. Admission of this would have been unfair to the Defendants who in actuality defended this case based in part on the fact that the Plaintiff himself initiated use of the word

"nigger" in the workplace, and that, despite society's general view of the word, he did not find it offensive when used by his friends and coworkers.<sup>8</sup>

F. Disrespect and Defendants' Emotional Distress

Next, the Plaintiff argues that permitting Michael Tilley and Nancy Tilley to testify as to the effect this litigation had on them was error. On direct examination, Michael Tilley testified (over the Plaintiff's objection) as follows:

MS. SOMMER: Describe how [this case] has impacted you personally.

A: On me, personally, it has been a very stressful situation. It has made everything at my job tougher. It has hurt morale which affects me at the work place. It has been terrible. It has really been an ongoing piece of hell.

(N.T. 2/13/98 at p. 58.) This testimony was probative of Michael Tilley's state of mind and his response to allegations of discrimination in the workplace. Similarly, Nancy Tilley was asked how this lawsuit had affected her personally. But the Plaintiff did not object to this question (or move to strike the answer) at trial, and cannot raise objections to the question at this time. See FED. R. EVID. 103(a)(1); New Market Inv. Corp. v. Fireman's Fund Ins. Co., 774 F. Supp. 909, 917-18 (E.D. Pa. 1991). Even had the Plaintiff objected, Nancy Tilley's testimony

---

<sup>8</sup>It is also important to note that the dictionary definition of the word "nigger" has itself been the subject of recent controversy. See Michael A. Fletcher, Offensive Words May Get Less-Offending Definitions, WASH. POST, March 13, 1998.

was relevant for the same reason that Michael Tilley's was: to show the Defendants' state of mind and response to allegations of discrimination. Further, even if the admission of this testimony from either witness was error, it was harmless because it is not at all probable that such an error contributed to the judgment. See Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777, 787 (3d Cir. 1996).

The Plaintiff also argues that the following alleged errors require a new trial: (1) Nancy Tilley held her grandchild in the courtroom; (2) counsel for the Defendants objected during the Plaintiff's closing argument;<sup>9</sup> (3) several TFE employees entered and exited the courtroom during the Plaintiff's closing argument; and (4) counsel for the Defendants threw or shoved papers at the Plaintiff on the stand. (Pl.'s Mot. for New Trial at pp. 19-20.) The Court need not spend time discussing each of these issues other than to say that these incidents do not constitute error by the Court.

#### G. Improper Character Evidence

The Plaintiff next argues that the Court erred in permitting the Defendants' witness Bruce Wilson to testify. Wilson testified that Michael Tilley had a good reputation in the

---

<sup>9</sup>Regarding the Defendants' objections during the Plaintiff's closing, the Plaintiff's counsel stated to the jury: "I will try not to interrupt opposing counsel during his closing, even if I disagree with him." (N.T. 2/18/98 at p. 122.)

community for honesty. (N.T. 2/18/98 at p. 8.) But the Plaintiff failed to object at the time this testimony was offered, and has therefore waived any objections. New Market, 774 F. Supp. at 917-18.

The Plaintiff argues that Craig Drexler and Richard Munger should not have been permitted to testify.<sup>10</sup> Drexler, an employee of a roofing company who knew the Tilley family as well as the Plaintiff and his family, testified that he had seen the Plaintiff socially on several occasions, and that the Plaintiff had referred to himself as "Super Nigger" or "nigger." (N.T. 2/18/98 at pp. 10-12.) Munger, a Doylestown Police Officer and former TFE employee, testified that while playing softball he heard the Plaintiff refer to himself as "Super Nigger." (Id. at 36-39.) This testimony was relevant to rebut the Plaintiff's testimony that he had never referred to himself using those words, and was, therefore, properly admitted at trial.

#### H. Jury Instructions

---

<sup>10</sup>It should be noted that the Plaintiff describes this testimony in exceedingly inflammatory and offensive ways. The Plaintiff states that Drexler and Munger were permitted to testify "despite the prior cumulative and repetitive testimony of numerous TFE employees, all claiming the same thing, as if all the white people in Doylestown should come to court and testify against a man they hardly knew." (Pl.'s Mot for New Trial at p. 21.) Further, the Plaintiff states that the testimony of these witnesses "blam[ed] [the Plaintiff] for being called 'suppennigger' [sic] at work, pitting blacks against whites, not only in the workplace but, for good measure, in the community." (Id.)

The Plaintiff also argues that the Court's jury instructions were prejudicial and require a new trial. In order to preserve objections to the jury charge for post-trial motions or appeal, parties are required to object before the jury retires to consider its verdict, "stating distinctly the matter objected to and the grounds of the objection." FED. R. CIV. P. 51. Where the objection is properly preserved, the Court's inquiry is whether the charge, "taken as a whole, properly apprises the jury of the issues and the applicable law." Smith v. Borough of Wilkinsburg, 147 F.3d 272, 275 (3d Cir. 1998) (quoting Limbach Co. v. Sheet Metal Workers Int'l Ass'n, 949 F.2d 1241, 1259 n.15 (3d Cir. 1990)). When a party fails to preserve an assigned error for review, the standard for reversal is plain error. Horowitz v. Federal Kemper Life Assurance Co., 946 F. Supp. 384, 391 (E.D. Pa. 1996). Under this standard, the Court will only notice the error where it is "fundamental and highly prejudicial or if the instructions are such that the jury is without adequate guidance on a fundamental question and . . . failure to consider the error would result in a miscarriage of justice." Fashauer v. New Jersey Rail Operations, 57 F.3d 1269, 1289 (3d Cir. 1995) (citations omitted).

The Plaintiff first argues that it was error for the Court to refuse to instruct the jury as requested by the Plaintiff that:

(a) whether or not Plaintiff participated in racial namecalling, this could not justify the use of racial epithets by white superiors and coworkers; (b) Defendants cannot justify racial denigration by claiming "supernigger" was a term of "pride;" [and] (c) there must be proof by the employer of prompt effective remedial action for the employer to be exonerated.

(Pl.'s Mot. for New Trial at p. 22.) The Plaintiff does not provide the wording of the actual proposed charge, nor does the Plaintiff provide the cite to an objection in the trial transcript addressing these points, making it difficult for the Court to address this issue in detail. Further, the Plaintiff has provided no case law to support the propositions quoted above. It appears that the Plaintiff is arguing that Title VII provides a form of strict liability, in which it is irrelevant whether conduct was unwelcome or subjectively offensive to the Plaintiff. In fact, Title VII requires that a plaintiff subjectively perceive the environment to be abusive. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993). This Court's refusal to instruct the jury as quoted above was not error.

The Plaintiff argues that the Court committed error in instructing the jury that the parties are equal before the Court. The portion of the charge to which the Plaintiff refers is: "Tilley Fire Equipment Company is a corporation. All people who come before the Court, whether they be corporations, individuals, large or small, are equal before, in the eyes of the Court. They

are entitled to the fair trial at your hands as a private individual."<sup>11</sup> (N.T. 2/19/98 at pp. 9-10.) The Plaintiff contends that "[i]nherent inequality exists in any employment case." (Pl.'s Mot. for New Trial at p. 22.) The Plaintiff did not object to this portion of the charge at trial, and it may only be reviewed for plain error at this time. Regardless of the standard of review, the Plaintiff's argument is entirely without merit.

Next, the Plaintiff argues that the Court's definition of a racially hostile work environment in the jury charge was plain error. The Plaintiff first contends that the charge "eliminated the existence of racial hostility if plaintiff felt forced to participate in racial 'joking,' accepting racial denigration as a condition of employment." (Pl.'s Mot. for New Trial at p. 22.) The Plaintiff does not discuss this issue in his Memorandum of Law, nor does he provide any case law supporting this contention. Thus, it is difficult to address this argument more fully. This Court's definition of a hostile work environment in the charge was correct, and did not constitute plain error.

Second, the Plaintiff argues that this Court "committed reversible error in telling the Jury that if they concluded

---

<sup>11</sup>See EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 71.04 (4th ed. 1992).

Plaintiff participated in the racial conduct or did not complain that the racial conduct of the workplace was hostile until he was discharged, then defendants could not be held liable." (Pl.'s Mot. for New Trial at pp. 22-23.) The Court did not instruct the jury as the Plaintiff alleges. The Court correctly instructed the jury that the Plaintiff was required to prove that the alleged hostile environment detrimentally affected him. (N.T. 1/19/98 at pp. 17-18.) "This includes a determination of whether the conduct in question is unwelcome or whether plaintiff participated in or encouraged the conduct." (Id. at p. 18.) Further, the Court instructed the jury as follows:

If you find that plaintiff referred to himself as SN or super nigger, you may conclude that plaintiff participated in the conduct that he now claims was hostile.

If you find that the plaintiff did not perceive his environment as being a hostile work environment until after he was discharged from employment, then the defendants cannot be liable.

(Id. at pp. 19-20.) The Court properly instructed the jury that, when determining whether the conduct of which the Plaintiff was complaining was unwelcome, the jury could consider whether the Plaintiff himself participated in or encouraged the conduct. If the conduct was not subjectively offensive to the Plaintiff, then there was no hostile environment. See Harris, 510 U.S. at 21-22. Similarly, the alleged discrimination could not have detrimentally affected the Plaintiff if he did not perceive the workplace as a hostile environment during his employment. See

Andrews, 895 F.2d at 1482. Therefore, the Court did not err in these portions of the jury charge.

Next, the Plaintiff contends that the Court "committed reversible error in failing to instruct the jury that the 'weight' of the evidence means the quality of the evidence, and not the quantity of evidence or number of witnesses, which is important where half of Plaintiff's witnesses were excluded." (Pl.'s Mot. for New Trial at p. 22.) The Plaintiff neither provides discussion nor cites authority for this contention. Further, the Plaintiff did not object to this portion of the charge at trial. The Court's decision not to give such an instruction to the jury was not plain error.

The Plaintiff also argues that the Court's instruction that the Plaintiff was required to prove intentional discrimination was error. (Pl.'s Mot. for New Trial at p. 23.) Once again, the Plaintiff cites no authority and provides no discussion in support of this contention.<sup>12</sup> The issue in a Title VII case is "whether the employer intentionally discriminated against the employee." Josey v. John R. Hollingsworth Corp., 996

---

<sup>12</sup>Although it is not cited in the instant Motion, at trial the Plaintiff's counsel did attempt to argue that Title VII does not require intentional discrimination and offered as an example the theory of disparate impact. (N.T. 2/18/98 at p. 99.) This Court need not discuss the theory of disparate impact at this time, except to note that the Plaintiff neither pleaded nor proved a disparate impact claim. See Newark Branch, NAACP v. Town of Harrison, New Jersey, 940 F.2d 792, 798 (3d Cir. 1991) (discussing elements of disparate impact theory).

F.2d 632, 637 (3d Cir. 1993) (citations omitted). Not only is this a requirement for a disparate treatment claim, but it is also the first element of a hostile environment claim. See Andrews, 895 F.2d at 1482. Therefore, this argument by the Plaintiff is entirely without merit.

I. Against the Great Weight of Evidence

The Plaintiff also argues that the Court should grant the Plaintiff's Motion because the jury's verdict was against the great weight of the evidence. The court shall grant a motion for a new trial when the jury's verdict is against the great weight of the evidence, such that a miscarriage of justice will result if the verdict is allowed to stand. Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1353 (3d Cir. 1991); Whitted v. City of Philadelphia, 744 F. Supp. 649, 653 (E.D. Pa. 1990). It is not a proper basis to grant a new trial merely because the court would have reached a different verdict, but rather a new trial should be granted "only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks [the court's] conscience." Williamson, 926 F.2d at 1353.

The jury in this case listened to testimony from numerous witnesses, and it is far too lengthy to be detailed here. There was substantial evidence indicating that the Plaintiff initiated the conduct of which he complained in this

case. Of particular note was the testimony of Michelle Carey. Carey testified that she had worked for TFE during much of the same time period that the Plaintiff did. (N.T. 2/18/98 at p. 14.) She had socialized with the Plaintiff outside of work on several occasions and testified that she remained friendly with him. (Id. at 18-20.) Carey also testified that she heard the Plaintiff refer to himself as "super nigger" in the workplace. (Id. at 17-18.) This witness, who apparently was friendly with both the Plaintiff and the Tilley family, provided evidence that supported the Defendants' version of the facts. The jury's verdict was supported by the testimony of Carey and numerous other witnesses, and was not against the great weight of the evidence.

J. Motion for Recusal

The Plaintiff argues that the Court's denial of his motion to proceed in forma pauperis demonstrates bias against the Plaintiff "because of his race and indigency."<sup>13</sup> (Pl.'s Mot. for New Trial at pp. 24-25.) In support of this claim of bias, the Plaintiff cites statements by the Court at a hearing on the Plaintiff's petition. The Court in that hearing expressed concern that "the plaintiff hasn't any money riding on this. I

---

<sup>13</sup>The Plaintiff's in forma pauperis petition was actually part of a motion to be excused from ordering a copy of the trial transcript for post-trial motions as required by Local Rule 7.1(e).

mean . . . it's counsel and obviously the defendants have been put to great expense in defending this case." (N.T. 3/27/98 at p. 13.) In this statement, the Court was merely noting the fact that, while the Defendants had been put to enormous expense, the Plaintiff's case had been financed by counsel and the Plaintiff himself had not been forced to invest any money in it. This is by no means an indication of bias against the Defendant because of his race or alleged indigence.<sup>14</sup>

Based upon this alleged bias, the Plaintiff requests that I recuse myself from any further proceedings in this case. (See Pl.'s Mot. for New Trial at p. 27.) "The standard for recusal is whether an objective observer reasonably might question the judge's impartiality." Massachusetts Sch. of Law at Andover, Inc. v. Am. Bar Assoc., 107 F.3d 1026, 1042 (3d Cir. 1997), cert. denied, \_\_U.S.\_\_, 118 S.Ct. 264 (1997). Judicial rulings almost never constitute a valid basis for recusal, nor do remarks that are critical or disapproving of counsel, the parties, or their cases. Liteky v. United States, 510 U.S. 540, 555 (1994); Mass. Sch. of Law, 107 F.3d at 1043. In this case,

---

<sup>14</sup>It is also important to note that the only reason that a hearing was necessary on the Plaintiff's motion was that both the Plaintiff and his counsel represented to the Court that the Plaintiff was the sole support of his wife and children. (See Pl.'s App. to Proceed In Forma Pauperis.) At the hearing, the Plaintiff's counsel revealed that in actuality, the Plaintiff's wife receives \$1,000.00 per month from a disability insurance policy. (N.T. 3/27/98 at p. 5.) This false statement to the Court was in itself reason enough to deny the Plaintiff's motion.

there is no basis for an objective observer to question this Court's impartiality. The Plaintiff's request that I recuse myself is denied.

### **III. Conclusion**

In summary, the Plaintiff has cited no rulings by this Court that require a new trial. Any rulings that were in error were harmless. Further, the jury's verdict was not against the weight of the evidence. Therefore, the Plaintiff's Motion for a New Trial is denied.

