[Cite as *Asah v. Dept. of Rehab. & Corr.*, 2018-Ohio-5450.]

CHRISTY ASAH Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2017-00279JD Magistrate Holly True Shaver DECISION OF THE MAGISTRATE

{¶1} Plaintiff brought this action alleging a claim of racial discrimination pursuant to R.C. 4112. The issues of liability and damages were bifurcated, and the case proceeded to trial on the issue of liability.

FACTS

{¶2} In 2010, plaintiff came to reside in the United States from Cameroon via the visa lottery. Plaintiff began nursing school and obtained her Registered Nursing (RN) degree in 2015. Plaintiff became a United States citizen in 2017. Plaintiff's race is African American.

{¶3} In June 2015, plaintiff applied for a nursing position at defendant, Franklin Medical Center (FMC), a facility that provides medical care to inmates. Plaintiff was hired at FMC after being interviewed by David Pennington, a white male. Plaintiff began her employment as a Nurse 1 at FMC on September 8, 2015. Plaintiff underwent a probationary review of her first three months of employment, when she was evaluated by her supervisor, Veronica White, a white female. Plaintiff's performance was rated "meets expectations" for her overall ratings summary. However, White noted that plaintiff did not meet expectations regarding the "document/record information" category. Specifically, White noted that plaintiff needed to improve her documentation efforts by slowing down so that her nurse's assessment notes would be more legible. (Plaintiff's Exhibit 3.) In February 2016, White conducted another probationary review

of plaintiff where plaintiff's overall performance was rated "meets expectations." In addition, White noted that plaintiff had "improved tremendously in her documentation skills. Has implemented suggestions to slow down to allow for better follow through with fellow staff." (Plaintiff's Exhibit 4.) White stated that plaintiff "will make a welcomed addition to the FMC facility and department. Continues to progress in all staff nursing duties. Has picked up the ECW[1] implementation process extremely well." (*Id*.)

{¶4} On October 2-3, 2016, plaintiff was assigned to work both the second and third shifts at FMC. Plaintiff began on second shift as a floor nurse with specific patients from both side A and B assigned to her care in Unit 3 North. On third shift, plaintiff was assigned as a resource nurse, where her duties included overseeing the nursing functions in Unit 3. During third shift, at approximately 12:50 a.m., plaintiff received a call from Licensed Practical Nurse Susan Hunt, who notified her that there was a discrepancy with the narcotics count in that two Tylenol 3 pills were missing from the B-side of the cabinet. Approximately two hours later, plaintiff entered the medication room and left without speaking to LPN Hunt. Hunt then entered the medication room, recounted the Tylenol 3, and discovered that the B-side pill count had increased by two, and noticed that plaintiff had signed out two, Tylenol 3 pills from the A-side of the cabinet. Hunt wrote an incident report about plaintiff's conduct. (Defendant's Exhibit A, Bates No. 34.)

{¶5} On October 6, 2016, defendant began an investigation. Both Hunt and plaintiff were interviewed about the narcotics count. That same day, plaintiff was notified that she would be reassigned to Zone B both during her regularly scheduled shift and during any overtime opportunities. (Defendant's Exhibit A, Bates No. 42-43.) Plaintiff was prohibited from administering medication and counting narcotics, and she was prohibited from acting in a lead nursing role during an investigation. (*Id*.) On October 18, 2016, plaintiff was placed on paid administrative leave.

[1]"ECW" is an abbreviation for the electronic medical record system at FMC.

{¶6} During the investigation, the October 2-3, 2016 medical records of a patient that had been assigned to plaintiff, referred to as "Patient C," were reviewed. The records were then compared against surveillance video. Plaintiff had charted an assessment of Patient C at 6:00 p.m., although surveillance video showed that she did not assess him at that time. The surveillance video showed that Patient C was talking on the telephone in the hallway at 6:00 p.m., and although plaintiff walked past Patient C, she did not examine him at that time. As a result of the investigation, which lasted approximately three months, defendant issued a Notice of Disciplinary Action, dated January 17, 2017, and advised plaintiff that she was being immediately removed from her position for three separate rule violations: 1) failure to follow post orders, administrative regulations, policies, or written or verbal directives (Rule 7); 2) falsifying, altering, or removing any document or record (Rule 22); and, 3) failure to carry out a work assignment or the exercise of poor judgment in carrying out an assignment (Rule 8). (Defendant's Exhibit A, Bates No. 2.) Specifically, defendant stated: "Nurse Asah did fail to follow the medical policies and directives regarding the proper procedure of medication administration and control by not performing a narcotic medication count per policy. The absence of the count led to an inaccurate inventory of narcotics. Nurse Asah self-admitted that she transferred two individual narcotics from A-Hall to B-Hall in [an] attempt to correct the medication count. Nurse Asah documented that she visually observed and assessed the patient wit[h] no concerns. This documentation by Nurse Asah is found to be falsified." (*Id*., Bates No. 3.) Plaintiff's union grieved her termination and she was ultimately placed on a Last Chance Agreement (LCA), which allowed her to remain employed but subjected her to removal if she engaged in any performance track violation in the next three years. (*Id*., Bates No. 4.) Plaintiff's pay was not reduced, her title did not change, and she continues to work for defendant.

{¶7} Plaintiff asserts that defendant's treatment of her was discriminatory, based upon her race, because other white nurses at FMC have engaged in comparable

conduct, specifically, failing to sign out narcotics, but were not disciplined. Defendant asserts that the conduct that plaintiff engaged in was not comparable to that of other employees, that plaintiff has failed to prove that she suffered an adverse employment action, and that its reasons for investigating plaintiff were not a pretext for discrimination.

{¶8} Plaintiff testified that when she worked second shift, she treated patients on both A and B hall of Unit 3 North, but she had keys to the medication room for only A hall. Plaintiff testified that medications from the A or B sides of the cabinet were supposed to correspond with patients on the same hall of the unit. Plaintiff admitted that during second shift, she took two, Tylenol 3 pills from the A-side of the medicine room and administered them to Patient C, who was housed on B hall. Plaintiff testified that she documented in Patient C's chart that she had administered the pills to him, but she forgot to sign the pills out on the narcotics inventory list for side A.

{¶9} Plaintiff testified that when she finished second shift, she worked third shift as a resource nurse on Unit 3 South. While she was working on third shift, LPN Hunt called her and stated that two Tylenol 3 pills were missing on Unit 3 North, and Hunt thought that plaintiff had made a mistake with the narcotics count. Plaintiff testified that she was busy conducting a patient admission at Unit 3 South, and after she completed the admission, she went to Unit 3 North, asked for someone else's keys, and opened both the A-side and B-side medicine cabinets. Plaintiff testified that she took two Tylenol 3 pills from the B-side of the cabinet and placed them in the A-side of the cabinet. Then she signed out two Tylenol 3 pills from the A-side of the narcotics cabinet. (Defendant's Exhibit A, Bates No. 53.) Although it is difficult to read, the Controlled Substance Accountability Record reflects that plaintiff signed out two Tylenol 3 pills taking the total to 42. Plaintiff testified that she thought the medication count had been resolved then. Plaintiff admitted that she left the unit without speaking to Hunt and explained that Hunt is not her direct supervisor and that she does not "answer to" Hunt.

{¶10} Regarding her charting an examination of Patient C at 6:00 p.m., plaintiff testified that her practice is to complete all her patient assessments at once, and then enter those assessments into the electronic medical record later. Plaintiff testified that the time that appears on the electronic record is the log in time, not the time that she assessed the patient. According to plaintiff, the time on the electronic record is generated by the computer, and she cannot manually change it.

{¶11} Plaintiff testified that she felt that her race was a factor in her discipline because other white nurses were not disciplined as harshly as she was for the same conduct. For example, plaintiff was working when a Nurse Pagan was called to return to the institution with a narcotic known as Baclofen that he had mistakenly taken home with him. Although she had no direct knowledge of the incident, she testified that Nurse Pagan was not reassigned or disciplined for taking that medication home. Plaintiff opined that failing to record narcotics occurs on a regular basis at FMC but that she is the only nurse who has been disciplined for it.

{¶12} Joshua Ndematebem, RN, testified that he works at FMC and that he is a union steward. He testified that he is not aware of any nurse other than plaintiff who was formally disciplined for failure to sign out medication. Ndematebem testified that Nurse Pagan, a white male, took a muscle relaxant, Baclofen, home with him after a shift. Baclofen is a controlled substance. Ndematebem called Pagan at home and he stated that he forgot to give the medication to a patient. Pagan brought the medication back to the institution. Ndematebem testified that Pagan was not disciplined.

{¶13} Ndematebem also testified that he filed a grievance regarding Nurse White, for an incident where she wrote on the message board that African nurses should not be assigned to a specific patient because they were “arrogant.” Many nurses complained to him. Ndematebem reported Nurse White’s conduct to the warden and an investigation was conducted.

{¶14} Ndematebem also testified that he filed a grievance regarding an incident where a white nurse and a black nurse both left the institution without clocking out, and when they returned, they did not clock in. He represented both nurses as the union steward during the investigation. Only the black nurse was given a written reprimand. He filed a grievance, and the black nurse's discipline was reversed. In his opinion, he is aware of subtle examples of racial discrimination at FMC and he feels that such discrimination is difficult to prove.

{¶15} Ndematebem testified he documents patient assessments on a form known as "care notes" and then when a computer is available, he enters that information in the electronic medical record. He testified that a computer is often not available at the time that assessments are completed. He agreed that narcotics are to be recorded on the medication sheet at the time that they are removed from the medication cabinet.

{¶16} Ify Agudosi, RN, testified that she has worked at FMC for five years. Agudosi testified that she assesses a patient and then enters the care notes for that patient on the computer before she moves on to another patient. She also testified that it is important to accurately chart the times that nurses interact with patients. Agudosi testified that she had direct knowledge of the missing Baclofen incident because she was the nurse on duty who reported to Ndematebem that Baclofen was missing. Ndematebem asked her to recount the Baclofen, and the two of them counted it together. They determined that only one patient in the unit had been prescribed that medication: a patient of Nurse Pagan. Nurse Pagan had already gone home, but the narcotics sheet did not reflect that the medication had been signed out.

{¶17} Agudosi also testified that she and a Nurse Catalina were performing a count of Tylenol 3 one time when the count was off. Nurse Catalina determined that he had forgotten to record the transaction and he went back to the medication room to sign the medication out. Agudosi testified that she did not report the incident further because he had corrected his mistake during his shift, and that mistakes like that "happen all the

time." Agudosi also testified that she was not aware of any nurse other than plaintiff being disciplined for failing to sign out a narcotic.

{¶18} Jessica Rayburn (aka Farley) testified that she was a Healthcare Administrator at FMC and conducted the investigation of plaintiff. According to Rayburn, when Nurse Hunt filed the incident report, Rayburn gathered documentation, specifically, the medication count sheets. According to Rayburn, medication is to be signed out from the cabinet where it is taken, and that it is standard nursing practice that narcotics are to be counted and monitored from their source. Rayburn interviewed both plaintiff and Nurse Hunt. (Defendant's Exhibit A, Bates No. 30-39.) Rayburn testified that when she gathered the medical records to verify medication administration, she discovered discrepancies with charting in comparison to the surveillance video. Rayburn testified that plaintiff should have documented her assessments at the time that she assessed her patients, and if that time was not accurate she should have documented it as a "late entry." As a result of the investigation, Rayburn concluded that there was a discrepancy in the narcotic count and a discrepancy in plaintiff's documentation of assessing Patient C.

{¶19} David Pennington testified that he was plaintiff's supervisor at FMC at the time of the incident. Pennington testified that it is important to keep an accurate count of controlled substances in an institution because controlled substances can be abused and used as currency. Pennington testified that charting the accurate times of assessments and medication administration is important to ensure consistency in care. Pennington added that if a nurse needs to document something that occurred at an earlier time, it is permissible to write "late entry" to reflect a time that is out of sequence. He also testified that a nurse can put an addendum in the electronic medical record to show a late entry.

LAW

{¶20} R.C. 4112.02 provides, in pertinent part, that: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the race * * * of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any other matter directly or indirectly related to employment." In Ohio, "federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42, U.S.Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Little Forest Med. Ctr. v. Ohio Civil Rights* Comm., 61 Ohio St.3d 607, 609-610 (1991). "'To prevail in an employment discrimination case, a plaintiff must prove discriminatory intent' and may establish such intent through either direct or indirect methods of proof." *Dautartas v. Abbott Labs.,* 10th Dist. Franklin No. 11AP-706, 2012-Ohio-1709, ¶ 25, quoting *Ricker v. John Deere Ins.* Co., 133 Ohio App.3d 759, 766 (10th Dist.1998). In this case, plaintiff seeks to establish discriminatory intent through the indirect method, which is subject to the burden shifting analysis established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). *See Nist v. Nexeo Solutions, LLC,* 10th Dist. Franklin No. 14AP-854, 2015-Ohio-3363, ¶ 31. "Under McDonnell Douglas, a plaintiff must first present evidence from which a reasonable [trier of fact] could conclude that there exists a prima facie case of discrimination." *Turner v. Shahed Ents.,* 10th Dist. Franklin No. 10AP-892, 2011-Ohio-4654, ¶ 11-12. "In order to establish a prima facie case, a plaintiff must demonstrate that he or she: (1) was a member of the statutorily protected class, (2) suffered an adverse employment action, (3) was qualified for the position, and (4) was replaced by a person outside the protected class or that the employer treated a similarly situated, non-protected person more favorably." *Nelson v. Univ. of Cincinnati,* 10th Dist. Franklin No. 16AP-224, 2017-Ohio-514, ¶ 33. "If the plaintiff meets her initial burden, the burden then shifts to the defendant to offer 'evidence of a legitimate, nondiscriminatory reason for' the adverse action. * * * If the defendant meets its burden, the burden then shifts back to the plaintiff

to demonstrate that the defendant's proffered reason was actually a pretext for unlawful discrimination." *Turner* at ¶ 14.

{¶21} "To establish pretext, a plaintiff must demonstrate that the proffered reason (1) has no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct. *Dews v. A.B. Dick Co*., 231 F.3d 1016, 1021 (6th Cir.2000). Regardless of which option is chosen, the plaintiff must produce sufficient evidence from which the trier of fact could reasonably reject the employer's explanation and infer that the employer intentionally discriminated against her. *Johnson v. Kroger Co.*, 319 F.3d 858, 866 (6th Cir.2003). A reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515 (1993)." *Knepper v. Ohio State Univ.,* 10th Dist. Franklin No. 10AP-1155, 2011-Ohio-6054, ¶ 12. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept. of Comm. Affairs v. Burdine,* 450 U.S. 248, 253 (1981).

PRIMA FACIE CASE OF DISCRIMINATION

{¶22} The parties do not dispute that plaintiff is African American, and as an RN, she is qualified for her position. Therefore, plaintiff has proven two of the four elements of a prima facie case of race discrimination. Plaintiff also presented testimony from other witnesses and herself that defendant treated similarly-situated white nurses more favorably than it treated her, because other white nurses were not disciplined for mistakes that they had made with the handling of narcotics. Therefore, the issue becomes whether being placed on an LCA constitutes an adverse employment action in a discrimination case. The court notes that the legal standard for an adverse employment action in a discrimination claim is different from the legal standard for an adverse employment action in a retaliation claim. Plaintiff did not plead a claim of retaliation or present evidence at trial regarding retaliation.

ADVERSE EMPLOYMENT ACTION: discrimination vs. retaliation

{¶23} In the context of a Title VII discrimination claim, an adverse employment action is defined as a "materially adverse change in the terms or conditions" of employment. *Kocsis v. Multi-Care Mgmt. Inc.*, 97 F.3d 876, 885 (6th Cir.1996). An adverse employment action "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998). An adverse employment action typically "inflicts direct economic harm." *Id. Laster v. City of Kalamazoo*, 746 F.3d 714, 727 (2014).

{¶24} "[A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Hollins v. Atlantic* Co., 188 F.3d 652, 662 (6th Cir.1999). "Reassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims." *Kocsis, supra,* at 885*; see also Agnew v. BASF Corp.,* 286 F.3d 307, 310-11 (6th Cir.2002) (finding that being placed on a performance improvement plan does not constitute an adverse employment action in a discrimination claim.) In this case, plaintiff was placed on paid administrative leave, did not receive a change in title, and did not incur a change in salary. The Sixth Circuit Court of Appeals has held that placing an employee on paid administrative leave pending the conclusion of an investigation does not constitute an adverse employment action in a discrimination claim. *Peltier v. United States*, 388 F.3d 984, 998 (6th Cir. 2004.)

{¶25} However, plaintiff temporarily lost her ability to administer medications, was transferred to a different part of the facility, and is bound by an LCA which subjects her to termination for any additional performance violation over a three-year period.

{¶26} The magistrate notes that the Sixth Circuit has stated that, "a plaintiff's burden of establishing a materially adverse employment action is less onerous in the retaliation context than in the anti-discrimination context." *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 595-96 (6th Cir.2007) (citing *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006)). "A plaintiff alleging retaliation need only show that the action taken by the employer 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Parks v. Geithner*, No. 3:09-cv-141, 2011 U.S. Dist. LEXIS 142055, (S.D.Ohio Dec. 9, 2011), * 38, quoting *Burlington Northern*, *supra* at 68.

{¶27} In *McGhee v. Country Fresh, LLC*, 2011 U.S. Dist. LEXIS 29422, the United States District Court for the Eastern District of Michigan, Southern Division, discussed whether being placed on an LCA constituted an adverse employment action. Although that court found that being placed on an LCA could constitute an adverse employment action for a retaliation claim, the court further found that it may not satisfy the slightly more demanding standard required for an adverse employment action for a discrimination claim.

{¶28} Upon review of the evidence presented at trial, the magistrate finds that plaintiff has failed to prove that being placed on an LCA constitutes an adverse employment action for purposes of her racial discrimination claim. The evidence shows that being placed on the LCA did not result in a demotion, decrease in pay, work hour changes, a less distinguished title, a material loss of benefits, or significantly diminished material responsibilities. Although plaintiff was temporarily reassigned to Zone B and her ability to administer medications was suspended for twelve days, the magistrate finds that those factors do not rise to the level of a materially adverse change in the

terms and conditions of her employment. Moreover, although plaintiff argues that the three-year duration of the LCA is unreasonable, the magistrate finds that the three-year duration of the LCA has not resulted in direct economic harm to her. Thus, the magistrate finds that plaintiff has failed to prove that she suffered an adverse employment action and that she has failed to state a prima facie case of racial discrimination.

{¶29} However, assuming, arguendo, that plaintiff had set forth a prima facie case, the magistrate further finds that plaintiff's attempt to reconcile the Tylenol 3 count was contrary to defendant's policies and protocol. Thus, the magistrate finds that defendant met its burden to show a legitimate, non-discriminatory reason for its actions.

{¶30} The burden then shifts to plaintiff to show that defendant's reasons were a pretext for discrimination. Plaintiff's evidence regarding pretext consists of the testimony of witnesses who described instances of conduct with other nurses at FMC regarding mistakes made with documenting narcotics. Basically, plaintiff argues that she was subject to harsher discipline for her mistake than other white nurses were because of her race. But a close examination of the other nurses' conduct reveals that while they failed to follow defendant's policy and protocol regarding narcotics, once they were alerted to a problem, they admitted that they had made a mistake and took proper steps to correct the error. Conversely, the magistrate finds that plaintiff engaged in conduct that was deceptive. For example, plaintiff failed to document the narcotics from their source when she removed them from the medication room. Furthermore, the evidence shows that plaintiff failed to conduct an end of shift count. If she had, she would have discovered her error prior to the start of third shift. Finally, when plaintiff was alerted about a mistake, she went into the medication room alone and reconciled the pill count in a way that was not in compliance with nursing standards, and she did not inform the nurse who had alerted her to a problem on how she reconciled the count. When that nurse wrote a report, defendant was obligated to investigate it. When an

investigation was conducted, it was brought to light that plaintiff was not caring for a patient at the time that she documented that she was. Plaintiff's attempt to reconcile the Tylenol 3 count on her own did not resolve the issue, it exacerbated it.

{¶31} In the final analysis, the magistrate finds that plaintiff has failed to prove by a preponderance of the evidence that defendant's investigation of her work performance and placing her on an LCA were a pretext for racial discrimination. Plaintiff's subjective feelings about the reasons for defendant's actions do not constitute sufficient evidence to rebut defendant's legitimate, nondiscriminatory reasons for investigating her conduct and placing her on an LCA. Accordingly, judgment is recommended in favor of defendant.

{¶32} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

HOLLY TRUE SHAVER
Magistrate

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