[Cite as *Osborne v. Ohio Reformatory for Women*, 2019-Ohio-5467.]

SHIRLEY OSBORNE Plaintiff v. OHIO REFORMATORY FOR WOMEN Defendant	Case No. 2018-01314JD Judge Patrick M. McGrath Magistrate Robert Van Schoyck ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On October 21, 2019, defendant filed a motion for summary judgment pursuant to Civ.R. 56. With leave of court, plaintiff filed a response on November 19, 2019. Defendant filed a reply on November 25, 2019. The motion is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, 821 N.E.2d 564, ¶ 6, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 364 N.E.2d 267 (1977).

{¶4} Plaintiff brings this action for reverse race discrimination in violation of R.C. Chapter 4112. (The complaint also raised a claim for intentional interference with

an employment relationship, as to which the court granted judgment on the pleadings in favor of defendant pursuant to Civ.R. 12(C) on December 21, 2018.) Plaintiff, relating that she is Caucasian, alleges that in 2006 she became employed with defendant at the Ohio Reformatory for Women (ORW). (Complaint, ¶ 1, 4.) The complaint provides that on June 12, 2017, plaintiff began serving in a new role as a Classification Specialist as the result of a promotion. (Id., ¶ 15.) According to the complaint, the person who supervised plaintiff in this new role, "Obianuju Anunike, an African-American, * * * consistently treated Plaintiff differently than other minority employees * * *." (Id., ¶ 3.) Plaintiff alleges that defendant ultimately terminated her employment on charges of not filling out log books, not timely completing paperwork, and leaving the unit in which she worked without permission, even though other staff were not disciplined for similar conduct. (Id., ¶ 38-39.)

{¶5} R.C. 4112.02 states, in part:

> It shall be an unlawful discriminatory practice:
>
> (A) For any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry 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 matter directly or indirectly related to employment.

"Because R.C. Chapter 4112 is Ohio's counterpart to Title VII of the Civil Rights Act of 1964, Section 2000e et seq., Title 42, U.S.Code ('Title VII'), the Supreme Court of Ohio has acknowledged that federal authority interpreting Title VII is generally applicable to cases alleging violations of R.C. Chapter 4112." *Mowery v. Columbus*, 10th Dist. Franklin No. 05AP-266, 2006-Ohio-1153, ¶ 41.

{¶6} "'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, 729 N.E.2d 1202 (10th Dist.1998). In this case plaintiff attempts to show discriminatory intent through the indirect method of proof, which is subject to the burden shifting analysis adopted by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (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 jury 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. Under this approach, "a plaintiff must prove by a preponderance of the evidence that (1) he or she was a member of a protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified for the position in question; and (4) comparable, non-protected persons were treated more favorably." *Refaei v. Ohio State Univ. Hosp.*, 10th Dist. Franklin No. 10AP-1193, 2011-Ohio-6727, ¶ 12.

{¶7} "Once a plaintiff establishes a prima facie case, the employer is required to set forth some legitimate, non-discriminatory basis or bases for its action." *Bogdas v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-466, 2009-Ohio-6327, ¶ 9. "If the employer is able to meet this burden, the plaintiff is then afforded an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination." *Id.* "The ultimate burden of persuasion always remains with the plaintiff. * * * In order to show pretext, a plaintiff must show both that the reason was false, and that discrimination was the real reason." *Ames v. Ohio Dept. of Rehab. & Corr.*, 2014-Ohio-4774, 23 N.E.3d 162, ¶ 27 (10th Dist.).

{¶8} "In claims of reverse discrimination, the plaintiff bears the burden of demonstrating that his or her employer intentionally discriminated against him or her

despite his or her majority status, and courts have altered the elements of the prima facie case of discrimination to reflect the unique nature of the claim." *Pohmer v. JPMorgan Chase Bank, N.A.*, 10th Dist. Franklin No. 14AP-429, 2015-Ohio-1229, ¶ 32. Therefore, in order to establish a prima facie case of reverse race discrimination, plaintiff must show (1) background circumstances supporting the inference that defendant was the unusual employer who discriminated against non-minority employees, (2) that defendant took an action adverse to plaintiff's employment, (3) that plaintiff was qualified for the position, and (4) that defendant treated plaintiff disparately from similarly situated minority employees. *Id.* at ¶ 32.

{¶9} Defendant argues that plaintiff cannot establish the first and fourth elements of her prima facie case, i.e. that it was the unusual employer who discriminated against non-minority employees, and that it treated plaintiff disparately from similarly situated minority employees. There is no dispute, at least as far as summary judgment purposes are concerned, as to the second and third elements of the prima facie case, i.e. that plaintiff suffered an adverse employment action through her employment being terminated, and that she was qualified for her position as a Classification Specialist.

{¶10} With regard to the first element, the requirement to show that defendant is the unusual employer who discriminated against non-minority employees "is not onerous, and can be met through a variety of means, such as statistical evidence; employment policies demonstrating a history of unlawful racial considerations; evidence that the person responsible for the employment decision was a minority; or general evidence of ongoing racial tension in the workplace." *Johnson v. Metro. Govt. of Nashville & Davidson Cty.*, 502 Fed.Appx. 523, 536 (6th Cir.2012), citing *Treadwell v. Am. Airlines, Inc.*, 447 Fed.Appx. 676, 678 (6th Cir.2011). It is undisputed that plaintiff's supervisor, Anunike, and the person ultimately responsible for deciding to terminate plaintiff's employment, former Warden Ronette Burkes, were African-American. There

is additionally some evidence from which one might reasonably infer that racial tension existed in the workplace, insofar as one of plaintiff's co-workers, Darcy Hawke, testified in her deposition that Anunike once told her: "Ms. Osborne does not like me. She doesn't get along with me, and I believe it's a racial issue." (Hawke Depo., p. 18.) Plaintiff, in her deposition, testified that Anunike referred to Caucasian inmates at ORW as "white trash" and that in 2015, prior to the events directly at issue in this case, Anunike commented that "she was a princess in Africa, and in America she expected to be treated as such." (Plaintiff Depo., pp. 155, 157.) Making all reasonable inferences in plaintiff's favor, there is sufficient evidence to satisfy the "background circumstances" prong of her prima facie case.

{¶11} As to the fourth element, requiring that plaintiff show defendant treated her disparately from similarly situated minority employees, "[t]o make a comparison between the plaintiff's treatment and the treatment of non-protected employees, 'the plaintiff must show that the "comparables" are similarly-situated in all respects.'" *Tilley v. Dublin*, 10th Dist. Franklin No. 12AP-998, 2013-Ohio-4930, ¶ 34, quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir.1992). "Courts evaluate whether the proffered individual dealt with the same supervisor, were subject to the same standards, and engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Kenner v. Grant/Riverside Med. Care Found.*, 2017-Ohio-1349, 88 N.E.3d 664, ¶ 33 (10th Dist.); *see also O'Donnell v. Cleveland*, 838 F.3d 718, 727 (6th Cir.2016). "A person is not similarly situated unless the conduct engaged by the proffered individual is of 'comparable seriousness' to the conduct that predicted the employee/plaintiff's termination." *Id.*

{¶12} Regarding the charges that defendant cited as the basis for terminating plaintiff's employment, Burkes, the former Warden of ORW who is now employed by defendant as Deputy Director of Reentry and Enterprise Development, avers in an

affidavit that she decided to terminate plaintiff's employment based upon the recommendation of a hearing officer who conducted a pre-disciplinary hearing into charges that plaintiff "had been away from her job location for several hours and failed to complete a work assignment." (Burkes Affidavit, ¶ 4-5.) Plaintiff, in her deposition testimony, agreed that these were the charges upon which she was terminated. (Plaintiff Depo., p. 136.) As plaintiff acknowledged, the charges relate to her conduct on Saturday, August 5, 2017, when, while Anunike was out for the day, she left the unit where she worked to socialize with former co-workers in another area of the compound, and she failed to record her absence in a log book in which employees were required to document when they entered or left the unit. (Id., pp. 103; 110-111.)

{¶13} When asked during her deposition if there were instances when other employees who worked under Anunike left the unit in similar fashion to her own conduct on August 5, 2017, plaintiff identified Marcus Stewart as one who did so on multiple occasions to socialize with former co-workers in another area of ORW, or to get a haircut in ORW's cosmetology school. (Id., pp. 142-145.) According to plaintiff, however, Stewart was Caucasian. (Id., p. 62.) Plaintiff's complaint includes allegations of other employees, including Deric Arnett, Brian Reames, Hannah Sexton, and Kimberly Smith, also having improper absences from the unit and not being disciplined for that, but in her deposition plaintiff stated that Arnett, Sexton, and Smith are Caucasian, and while she did not know Reames' race, she admittedly does not know whether he ever left the area without Anunike's permission. (Id., pp. 161-162.) When asked about the several employees who worked under Anunike's supervision, plaintiff identified only one of them as non-Caucasian: Case Manager Maria Jones, whom plaintiff identified as African-American. (Id., p. 44.) There is no evidence that Jones ever left the unit where they worked during a shift for any purpose, let alone that she did so improperly, whether by failing to record her movements in the log book or otherwise.

{¶14} Plaintiff cannot be considered "similarly situated" to Jones if Jones did not engage in the same type of conduct as plaintiff. *See Adams v. Tenn. Dept. of Fin. & Admin.*, 179 Fed.Appx. 266, 273 (6th Cir.2006), citing *Mitchell*, 964 F.2d at 583. "The absence of discipline, alone, is insufficient to show a prima facie case." *Allen v. Ohio Dept. of Job & Family Servs*, 697 F.Supp.2d 854, 887 (S.D.Ohio 2010). "Rather, Plaintiff must show that a minority [employee] engaged in similarly-sanctionable conduct, but received a less severe sanction." *Arendale v. Memphis*, 519 F.3d 587, 604 (6th Cir.2008); *see also Goller v. Ohio Dept. of Rehab. & Corr.*, 285 Fed.Appx. 250, 256 (6th Cir.2008). The record is devoid of any evidence that Jones engaged in conduct similar to the conduct by plaintiff that led to her termination.

{¶15} Moreover, as plaintiff acknowledged in her deposition, when she started in the role of Classification Specialist she was required to serve a standard probationary period, and she was still in her probationary period when defendant terminated her employment. (Plaintiff Depo., pp. 23, 136.) Burkes, in her affidavit, also notes that plaintiff was a probationary employee and was therefore not subject to the progressive discipline system that applies to defendant's non-probationary employees. (Burkes Affidavit, ¶ 5.) "Federal courts have frequently noted that probationary employees are not similarly situated to their non-probationary co-workers * * *." *Mowery*, 2006-Ohio-1153, at ¶ 46, citing *White v. Ohio*, 2 Fed.Appx. 453, 457 (6th Cir.2001). There is no suggestion that Jones, or any other employee to whom plaintiff compares herself for that matter, was a probationary employee.

{¶16} Because plaintiff has not presented evidence that defendant treated her disparately from similarly situated minority employees, she has not established a prima facie case of reverse race discrimination under R.C. 4112.02.

{¶17} Defendant further argues that even if plaintiff were able to establish a prima facie case of reverse race discrimination, there were legitimate reasons for the termination of her employment and she cannot show that those reasons were pretext for

discrimination. But because plaintiff is unable to establish a prima facie case of reverse race discrimination, the court need not consider whether defendant's proffered reasons for terminating plaintiff's employment were pretext for discrimination. *See Alexander v. Columbus State Community College*, 2015-Ohio-2170, 35 N.E.3d 949, ¶ 46 (10th Dist.).

{¶18} Based upon the foregoing, the court concludes that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. As a result, defendant's motion for summary judgment is GRANTED and judgment is hereby rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

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Sent to S.C. Reporter 1/24/20