[Cite as *Moody v. Ohio Dept. of Mental Health & Addiction Servs.*, 2021-Ohio-1525.]

TONY MOODY Plaintiff v. OHIO DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES Defendant	Case No. 2019-01146JD Judge Patrick E. Sheeran Magistrate Holly True Shaver DECISION

{¶1} On November 30, 2020, Defendant filed a motion for summary judgment pursuant to Civ.R. 56. On December 23, 2020, Plaintiff filed a response. Pursuant to L.C.C.R. 4(D), the motion is now before the Court for a non-oral hearing. For the reasons stated below, Defendant's motion is GRANTED.

Standard of Review

{¶2} Motions for summary judgment are reviewed under the standard set forth in Civ.R. 56(C), which states, in part:

> 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 summary 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.

"[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of material fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). To meet this initial burden, the moving party must be able to point to evidentiary materials of the type listed in Civ.R. 56(C). *Id*. at 292-293.

{¶3} If the moving party meets its initial burden, the nonmoving party bears a reciprocal burden outlined in Civ.R. 56(E), which states, in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

Facts

{¶4} On June 13, 2013, Plaintiff began his employment as a Therapeutic Program Worker (TPW) for Defendant at Twin Valley Behavioral Healthcare facility. (Complaint, ¶ 1,2.) Plaintiff's initial rate of pay was $14.85 per hour. (Defendant's Exhibit A-1.) Plaintiff, a Black male, was born in Sierra Leone, in Western Africa, immigrated to the U.S. in 2003, and became a naturalized U.S. citizen in May 2017. (Complaint, ¶ 4.)

{¶5} Plaintiff was initially supervised by Tony LeMaster, a white male, who conducted Plaintiff's annual review for the period of July 6, 2014 through July 5, 2015. (Defendant's Exhibit A-2; Plaintiff's Exhibit 2, Bates No. 000023-27; see also,

Defendant's Exhibit A, ¶ 5.)[1] In the annual review, Plaintiff was rated "does not meet" expectations in the categories of "communication with peers, supervisors, and staff," and "teamwork/communication." (Defendant's Exhibit A-2.) LeMaster wrote: "There have been several instances during the evaluation period where Tony has been disrespectful when communicating with peers and supervisors. Tony has been made aware that a change in work behavior is expected. He has also been made aware of the specific behaviors he needs to modify." *Id.* In the teamwork/communication category, LeMaster wrote: "This is an area that Tony needs to improve. He does at times operate very well in the team environment. There have been reports from multiple coworkers that he attempts to give them direction on their job duties. Also that he becomes agitated when they do not follow his direction. Tony has been made aware that he is not in a position to make assignments for his coworkers. He has also been made aware that this is a work behavior that needs to be modified." *Id.* Plaintiff was rated "meets expectations" in all other areas in this review. *Id.*

{¶6} On April 6, 2015, Plaintiff was issued a verbal reprimand for engaging in horseplay with a coworker. (Defendant's Exhibit A-3.) On May 5, 2015, Plaintiff was issued a written reprimand for failing to complete an assignment as communicated. (Defendant's Exhibit A-4.) LeMaster also issued a letter to Plaintiff describing the basis for the written reprimand. *Id.* On September 17, 2015, Plaintiff was issued a one-day working suspension for refusing to follow the chain of command and disrespecting coworkers. (Defendant's Exhibit A-5.) The paperwork for the working suspension stated: "A copy of this letter is being placed in your file for 36 months unless subsequent disciplinary action occurs." *Id.*

{¶7} In annual reviews after July 2015, Iya Ngalla was Plaintiff's supervisor. (Plaintiff's Exhibit 2.) Ngalla rated Plaintiff as "meets" or "exceeds" expectations for his

[1]Defendant submitted the affidavit of Daniel Dawkins, Labor Relations Officer, who authenticated Defendant's Exhibits A-1 through A-12 as Plaintiff's employment records. (Defendant's Exhibit A.)

subsequent evaluations through June 2018. (Plaintiff's Exhibit 2, Bates Nos. 000086-000101.) In 2017, Plaintiff sustained an injury at work and received 32 hours of occupational injury leave, paid at his hourly rate, which was $17.61 at the time. (Defendant's Exhibit A-6; Defendant's Exhibit A, ¶ 9.)

{¶8} On June 21, 2018, Plaintiff believed he was not scheduled to work, so he took his partner and her nieces and nephews to the Columbus Zoo. (Plaintiff's Exhibit 1, ¶ 6.) Plaintiff relied on a unit schedule dated April 27, 2018 for his belief that he was not scheduled to work. *Id.*, ¶ 4. However, on May 30, 2018, another unit schedule was released which showed that Plaintiff was scheduled to work on June 21, 2018. *Id.* Plaintiff was not aware of the revised schedule. *Id.* While at the zoo, Plaintiff received a phone call from his employer inquiring about his whereabouts. *Id.*, ¶ 6. After a discussion, Plaintiff left the zoo and reported to work. *Id.* An investigation was conducted, and on August 8, 2018, Plaintiff was issued corrective action in the form of a three-day working suspension for being absent without leave for sixteen hours or less, because he was 2 hours and 46 minutes late to work on June 21, 2018. (Defendant's Exhibit A-7.) In September 2018, Plaintiff filed a charge of discrimination with the Ohio Civil Rights Commission (OCRC) and Equal Employment Opportunity Commission, asserting that the three-day suspension was unduly harsh for being late to work, and that the suspension was based upon racial and national origin discrimination. (Complaint, ¶ 11; Plaintiff's Exhibit 1, ¶ 22; Defendant's Exhibit A-8.)

{¶9} On November 27, 2018, Plaintiff filed an incident report wherein he accused coworker Anthony James of calling a patient a "motherfucker." (Defendant's Exhibit A-9, p. 97-104.) An investigation was conducted, including interviews of Plaintiff, James, the patient in question, and another employee. *Id.* At the conclusion of the investigation, the investigator found that while James may have uttered the word, it was not clear whether it was directed toward the patient or toward Plaintiff. *Id.* The incident was closed as "unfounded." *Id.*

{¶10} On December 25, 2018, both Plaintiff and coworker, Paige Sherman, filed incident reports regarding each other's behavior. (Defendant's Exhibit A-9, p. 69-96.) Plaintiff accused Sherman of patient abuse and neglect, of being rude to patients, showing favoritism with patients, and creating a hostile work environment. *Id.* Plaintiff also accused Sherman of referring to him as "Tony the African." *Id.*, p. 73. Sherman accused Plaintiff of breaking rules by bringing in personal items, such as movies from home that she deemed inappropriate, and causing a "staff split" that placed other staff members in danger by Plaintiff winning over patients' trust and using that trust to work against staff members. *Id.*, p. 70-96. In addition to complaining about movies, which Plaintiff had permission from his supervisor to provide, Sherman accused Plaintiff of talking to patients about bringing them homemade Christmas cookies, which resulted in behavior problems from the patients when the cookies were not provided. *Id.* After an investigation was conducted, including interviews with Plaintiff, Sherman, and other employees, Plaintiff's complaints about Sherman, specifically, abuse/neglect/mistreatment of patients and creating a hostile work environment were found to be unsubstantiated. *Id.*, p. 95. However, Plaintiff's failure to document incidents of alleged abuse, neglect, or mistreatment of patients was substantiated. *Id.*, p. 95-96. It was concluded that Plaintiff's belief that he should complain to his supervisors, without documenting allegations of patient abuse and neglect in an incident report, was erroneous, and prevented proper and timely reporting. *Id.*

{¶11} As a result of the investigations, on January 18, 2019, a Notice of Pre-Disciplinary Conference was issued to address the accusation that Plaintiff had failed to immediately report a violation of any departmental work rule, policy or procedure. (Defendant's Exhibit A-9, p. 67; Dawkins' affidavit, ¶ 12.) A Pre-Disciplinary Conference was conducted on January 25, 2019, and just cause to recommend discipline was found. (Plaintiff's Exhibit 6.) According to the progressive discipline grid, the next step for discipline would have been a "five-day suspension/fine to removal." (Defendant's

Exhibit A-12.) Before any further disciplinary action was issued, on April 1, 2019, Plaintiff resigned from Defendant's employment. (Exhibit 1 to Plaintiff's deposition.) Plaintiff stated that he was resigning based upon the harassment, discrimination, and retaliation that he encountered during his employment. *Id.* On May 10, 2019, Plaintiff was issued his final paycheck, where he was paid for his unused vacation, personal, and sick leave pursuant to Defendant's policies. (Defendant's Exhibit A-10.) Plaintiff's final hourly rate of pay was $18.58. *Id.* On July 18, 2019, the OCRC issued a letter of determination stating that a three-day working suspension (from the zoo incident) was warranted pursuant to the disciplinary grid applicable to Plaintiff, and that it was not probable that Defendant had engaged in discrimination. (Defendant's Exhibit A-8; see also, Defendant's Exhibit A-12.) The OCRC stated that Plaintiff was correct in his contention that the verbal and written reprimands from 2015 should not have been considered when issuing discipline for being absent without leave because the timeframe on their effectiveness had lapsed. (Defendant's Exhibit A-8.) However, the OCRC further found that Plaintiff had a one-day working suspension on record that was still effective, and that Defendant had followed the disciplinary grid by issuing a three-day suspension. *Id.*

{¶12} Plaintiff asserts that he was treated less favorably than both white coworkers and non-white but native-born coworkers. (Complaint, ¶ 5.) Specifically, Plaintiff asserts he received more frequent and severe discipline, was subject to investigations, and was harassed based upon his race and national origin. *Id.* Plaintiff alleges that the three-day suspension for being late to work was unreasonable and is an example of disparate treatment. *Id.* ¶ 6-8. Plaintiff alleges that after he filed his charge with the OCRC, Defendant engaged in retaliation by investigating him for trivial matters, none of which resulted in discipline. *Id.*, ¶ 12-13. As a result of constant harassment and investigations, Plaintiff felt compelled to resign. *Id.*, ¶ 14. Plaintiff asserts claims of

discrimination based upon his race and natural origin pursuant to state and federal law, and a claim of retaliation based upon state law. *Id.*, ¶ 15-22.

{¶13} In its motion, Defendant asserts that Plaintiff has failed to state a prima facie case of discrimination or retaliation because he did not suffer any adverse employment action. In the alternative, Defendant argues that Plaintiff has failed to produce evidence of pretext to overcome Defendant's legitimate non-discriminatory reasons for imposing discipline.

Law and Analysis

I. Discrimination

{¶14} R.C. 4112.02 provides, in pertinent part, that: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the race * * * [or] national origin * * * 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 [his] 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.

{¶15} "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 him. *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).

{¶16} Plaintiff is African American and was qualified for his position. In addition, Plaintiff has provided evidence, through affidavits of other employees, who are either white or native-born, or both, who did not receive formal discipline for being late to work.

(See, Plaintiff's Exhibit 4, affidavits of Melissa Hyde and Kelly Suszczynski; Plaintiff's Exhibit 1, ¶ 8). Therefore, Plaintiff has met three of the four elements of his prima facie case. However, Defendant argues that neither Plaintiff's voluntary resignation, nor any of the discipline that Plaintiff received, constitutes an adverse employment action. 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. The Court shall first address whether Plaintiff suffered an adverse employment action to support his discrimination claim.

II. Adverse Employment Action: Discrimination

{¶17} 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). "Not everything that makes an employee unhappy or resentful is an actionable adverse action." *Canady v. Rekau & Rekau, Inc.*, 10th Dist. Franklin No. 09AP-32, 2009-Ohio-4974, ¶ 25.

{¶18} The employer's action must impact the "terms, conditions, or privileges" of the Plaintiff's job in a "real and demonstrable way," and the asserted impact cannot be speculative and must at least have a "tangible adverse effect" on the Plaintiff's employment. *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239 (11th Cir.2001). "The employee's subjective view of the significance and adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances." *Id*. at 1239. The limitation is consistent with

the basic principle that "Title VII is neither a general civility code nor a statute making actionable the 'ordinary tribulations of the workplace.'" *Id*. (quoting *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 587 (11th Cir.2000)).

{¶19} While working for Defendant, Plaintiff was subjected to the following potential adverse employment actions: 1) April 16, 2015 verbal reprimand; 2) May 5, 2015 written reprimand; 3) September 17, 2015 one-day working suspension; 4) August 9, 2018 three-day working suspension; 5) investigations beginning in November 2018 which resulted in the January 18, 2019 notice of pre-disciplinary conference and finding of just cause to recommend discipline; and 6) Plaintiff's resignation.

{¶20} The Sixth Circuit Court of Appeals has stated that "a written reprimand, without evidence that it led to a materially adverse consequence such as lowered pay, demotion, suspension, or the like, is not a materially adverse employment action." *Creggett v. Jefferson County Bd. of Educ.*, 491 Fed. Appx. 561, 566 (6th Cir.2012). The Sixth Circuit Court of Appeals has also 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); see also *Sensabaugh v. Halliburton*, 937 F.3d 621, 629 (6th Cir.2019) ("Several panels of this Court have determined that a suspension with pay does not constitute an adverse action."). In addition, a threat of discharge alone is not an adverse employment action. *Plautz v. Potter*, 156 Fed. Appx. 812, 817 (6th Cir.2005); *Thomas v. Potter*, 93 Fed. Appx. 686, 688 (6th Cir.2004). Lastly, "employer investigations into suspected wrongdoing by employees, standing alone, generally do not constitute adverse employment actions." *Arnold v. Columbus*, 515 Fed. Appx. 524, 531 (6th Cir.2013).

{¶21} Plaintiff's initial hourly rate was $14.85, which had increased to $18.58 at the time of his resignation. It is undisputed that Plaintiff was compensated at his regular rate of pay throughout the duration of his employment. None of the discipline that was

imposed on Plaintiff resulted in any change in title, decrease in salary, reassignment with significantly different responsibilities, or a significant change in benefits. Both the one and three-day working suspensions resulted in Plaintiff earning his usual hourly rate of pay.

{¶22} In response to Defendant's contention that Plaintiff suffered no adverse employment action, Plaintiff argues that the three-day suspension for being absent without leave was too harsh, because that was Plaintiff's first time being late to work, and other employees received less severe or no discipline for being late. Plaintiff also argues that the investigation after filing incident reports against Sherman and James and the recommendation to impose discipline at the Pre-Disciplinary meeting must be viewed as adverse, because a five-day suspension, fine, or removal would have been issued pursuant to the progressive discipline grid.

{¶23} Upon review, the Court finds that the verbal reprimand, written reprimand, one-day and three-day paid suspensions do not constitute materially adverse employment actions in a discrimination case as a matter of law. Turning to the investigations in 2018, it is undisputed that the next step in the disciplinary grid would have been a five-day working suspension/fine/removal. Construing the evidence most strongly in Plaintiff's favor, a five-day paid suspension would not have been an adverse employment action as a matter of law, but removal clearly would have constituted an adverse employment action. However, no discipline was issued because Plaintiff resigned. Plaintiff argues that he felt compelled to resign, based upon his treatment at work, the mental stress it caused him, and his belief that he would be removed from employment based upon the next step in the progressive discipline grid. Plaintiff argues that the investigation in 2018 and 2019 led to his constructive discharge, which was an adverse employment action.

{¶24} "Constructive discharge is not itself a cause of action, but rather a means of proving the element of an adverse employment action where the employee resigns

instead of being fired." *Fernandez v. City of Pataskala*, S.D.Ohio No. 2:05-CV-75, 2006 U.S. Dist. LEXIS 82136 (Nov. 9, 2006). "The test for determining whether an employee was constructively discharged is whether the employer's actions made working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign." *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 1996-Ohio-265, paragraph four of the syllabus. "In applying this test, courts seek to determine whether the cumulative effect of the employer's actions would make a reasonable person believe that termination was imminent. They recognize that there is no sound reason to compel an employee to struggle with the inevitable simply to attain the 'discharge' label." *Id*. at 589. Conversely, "[a]n employee has an obligation not to jump to conclusions and assume that every conflict with an employer evidences a hidden intent by the employer to terminate the employment relationship." *Simpson v. Ohio Reformatory for Women*, 10th Dist. No. 02AP-588, 2003-Ohio-988, ¶ 25, citing *Jackson v. Champaign Natl. Bank & Trust Co.*, 10th Dist. No. 00AP-170 (Sept. 26, 2000).

{¶25} "To constitute constructive discharge, the employer must deliberately create intolerable working conditions, as perceived by a reasonable person, with the intention of forcing the employee to quit and the employee must actually quit." *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1080 (6th Cir.1999).

{¶26} Courts assess seven factors in considering whether working conditions are objectively intolerable: "(1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement or continued employment on terms less favorable than the employee's former status." *Presley v. Ohio Dept. of Rehab. & Correction*, 675 F.App'x 507, 515 (6th Cir.2017.)

{¶27} Making all reasonable inferences in Plaintiff's favor, the Court finds that Plaintiff has failed to present evidence to support that he was constructively discharged.

Although Plaintiff complained that Sherman referred to him as "Tony the African," that claim was not substantiated after an investigation. Furthermore, although Plaintiff's feelings are that he was disciplined more harshly than others because of his race and national origin, it is undisputed that Defendant followed the progressive discipline grid when it issued him corrective action. None of the discipline imposed on Plaintiff resulted in a demotion, reduction in salary, reduction in job responsibilities, reassignment to menial or degrading work, reassignment to work under a younger supervisor, badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation, or offers of early retirement or continued employment on terms less favorable than the employee's former status. Therefore, the Court finds that the only reasonable conclusion is that Plaintiff has failed to present evidence that Defendant created intolerable working conditions with the intention of forcing Plaintiff to quit. Since Plaintiff has failed to present evidence that he was constructively discharged, his resignation does not constitute an adverse employment action as a matter of law. Therefore, Plaintiff has failed to establish that he suffered an adverse employment action, and, accordingly, his claims of discrimination based upon race and national origin fail as a matter of law.

{¶28} Assuming, arguendo, that Plaintiff had stated a prima facie case of racial and national origin discrimination, the burden would shift to Defendant to offer evidence of a legitimate, nondiscriminatory reason for the adverse action. Defendant offers the affidavit of Daniel Dawkins, Labor Relations Officer, who avers that Plaintiff was subject to progressive discipline during his employment, that "adjusts based on any prior discipline the employee has received and the severity of the current offense." (Defendant's Exhibit A, ¶ 14, citing Defendant's Exhibits A-11, A-12.) Dawkins also avers that Defendant followed all proper policies and procedures regarding the discipline Plaintiff received. (Defendant's Exhibit A, ¶ 15.) Upon review, the Court finds

that Defendant has articulated a legitimate, nondiscriminatory reason for imposing discipline on Plaintiff.

{¶29} The burden shifts back to Plaintiff to demonstrate that Defendant's proffered reason for discipline was a pretext for unlawful discrimination. In support of his argument that the discipline imposed was a pretext for discrimination, Plaintiff argues that the three-day working suspension was unduly harsh for being late to work. Plaintiff also asserts that the previous, one-day suspension should not have counted as active discipline, because it should have only stayed active for two years according to the Collective Bargaining Agreement in place at the time. However, the one-day working suspension letter states: "A copy of this letter is being placed in your file for 36 months unless subsequent disciplinary action occurs." (Defendant's Exhibit A-5.) In addition, the OCRC held that the one-day suspension was properly considered as active discipline, which meant that the next step in the grid was appropriately a three-day working suspension. (Defendant's Exhibits A-8; A-12.) Even construing the evidence most strongly in favor of Plaintiff, the only reasonable conclusion is that the one-day working suspension was appropriately considered pursuant to the disciplinary grid when Plaintiff was issued a three-day working suspension. Plaintiff has not submitted evidence, if believed, that would show that either the three-day suspension or the recommended discipline in 2019 had no basis in fact, did not actually motivate the employer's conduct, or was insufficient to warrant the challenged conduct. Although it is clear that Plaintiff disagrees with the imposition of discipline and Defendant's decision making, he has not produced sufficient evidence from which the trier of fact could reasonably reject the employer's explanation and infer that the employer intentionally discriminated against him. The only reasonable conclusion is that Defendant followed the progressive discipline grid when it issued discipline on Plaintiff, and that the discipline was not a pretext for racial or national origin discrimination. Therefore,

Defendant is entitled to summary judgment as a matter of law on Plaintiff's discrimination claims.

III. Retaliation

{¶30} R.C. 4112.02(I) states that it shall be an unlawful discriminatory practice: "For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code." An investigation contemplated under 4112.01 to 4112.07 of the Revised Code pertains to proceedings or hearings with the Ohio Civil Rights Commission (OCRC). "Absent direct evidence of retaliatory intent, Ohio Courts analyze retaliation claims using the evidentiary framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 * * *." *Veal v. Upreach LLC*, 10th Dist. Franklin No. 11AP-192, 2011-Ohio-5406, at ¶ 16. Indirect proof of retaliation is thus examined via a similar burden-shifting analysis to discrimination. The only difference is the elements of the prima facie case that Plaintiff must establish: "Specifically, the Plaintiff must establish that (1) [he] engaged in a protected activity, (2) the defending party was aware that the claimant had engaged in that activity, (3) the defending party took an adverse employment action against the employee, and (4) there is a causal connection between the protected activity and adverse action." *Id.* at ¶ 16.

{¶31} Protected activity involves either the "opposition clause," when an employee has opposed any unlawful discriminatory practice, or the "participation clause," when an employee has made a charge, testified, assisted or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code. *See Motley v. Ohio Civ. Rights Comm'n,* 10th Dist. Franklin No.

07AP-923, 2008-Ohio-2306, citing *Coch v. GEM Indus., Inc.*, Lucas App. No. L-04-1357, 2005-Ohio-3045, ¶ 29.

{¶32} It is undisputed that Plaintiff engaged in protected activity when he filed his OCRC complaint in September 2018. Plaintiff asserts that Defendant took an adverse employment action against him that was causally related to his filing of the OCRC complaint when Defendant conducted the investigations in November and December 2018 and recommended discipline in 2019.

{¶33} "Plaintiff's burden of establishing a materially adverse employment action is 'less onerous in the retaliation context than in the anti-discrimination context.'" *Laster v. Kalamazoo*, 746 F.3d 714, 731 (6th Cir.2014), quoting *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 595-596 (6th Cir.2007). In contrast to a discrimination claim, "the 'adverse employment action' requirement in the retaliation context is not limited to an employer's actions that affect the terms, conditions, or status of employment, or those acts that occur in the workplace." *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 720 (6th Cir.2008), citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 2412-14, 165 L.Ed.2d 345 (2006). "The retaliation provision instead protects employees from conduct that would have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.*, quoting *Burlington* at 2415. Defendant argues, as it did above, that Plaintiff cannot support his claim with an adverse employment action. Plaintiff asserts that Defendant's investigation of him in November 2018 was in retaliation for him having filed his OCRC complaint in September 2018. "'[I]n an appropriate case, a gap of three months between the time the employer learns of the protected activity and the adverse employment action may permit a jury to draw a causal-connection inference.'" *Hartman v. Ohio Dept. of Transp.*, 2016-Ohio-5208, 68 N.E.3d 1266, ¶ 31 (10th Dist.), quoting *Haji v. Columbus City Schools*, 621 F.Appx 309, 313 (6th Cir.2015). Viewing the facts in a light most favorable to Plaintiff, the Court finds that the length of time between Plaintiff's filing of his OCRC complaint and the

investigation of Plaintiff's conduct with James and Sherman could support a causal connection, and that an investigation shortly after the filing of an OCRC complaint could dissuade a reasonable worker from making another charge of discrimination. Therefore, for purposes of summary judgment, the Court finds that Plaintiff has stated a prima facie case of retaliation.

{¶34} After a Plaintiff has established a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. *Veal*, *supra*, at ¶ 17. Defendant argues that because Plaintiff filed incident reports about James and Sherman, it was obligated to investigate Plaintiff's complaints, and that after the incidents were investigated, Defendant found good cause to recommend discipline to Plaintiff for his failure to follow its policies. Therefore, Defendant has articulated a legitimate, non-discriminatory reason for its investigation and recommendation of discipline.

{¶35} The burden then shifts to Plaintiff to show that the investigation and finding of good cause to recommend discipline was a pretext for retaliation. In his memorandum contra, Plaintiff asserts that the investigation "screams" of pretext. However, Plaintiff has not presented evidence from which a reasonable fact finder could find that Defendant's investigation was a pretext for retaliation. On the contrary, the evidence shows that the investigation was initiated based upon Plaintiff's complaints that he filed regarding his coworkers. Although Plaintiff asserts that the allegations against him were baseless, it is undisputed that after an investigation initiated by Plaintiff's complaints, it was found that Plaintiff had failed to follow Defendant's reporting policies. Plaintiff has not presented evidence that the investigation and finding of good cause to recommend discipline had no basis in fact, did not actually motivate the employer's conduct, or was insufficient to warrant the challenged conduct. 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 his

conduct and recommending discipline. Indeed, conclusory allegations and subjective beliefs are insufficient to establish a claim of retaliation. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 585 (6th Cir.1992).

{¶36} Construing all reasonable inferences in Plaintiff's favor, the only reasonable conclusion is that Plaintiff has failed to present evidence that Defendant's actions were a pretext for retaliation. Accordingly, Defendant's motion for summary judgment is GRANTED.

PATRICK E. SHEERAN
Judge

[Cite as *Moody v. Ohio Dept. of Mental Health & Addiction Servs.*, 2021-Ohio-1525.]

TONY MOODY Plaintiff v. OHIO DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES Defendant	Case No. 2019-01146JD Judge Patrick E. Sheeran Magistrate Holly True Shaver JUDGMENT ENTRY

{¶37} A non-oral hearing was conducted in this case upon Defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, Defendant's motion for summary judgment is GRANTED and judgment is 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 E. SHEERAN
Judge

Filed March 15, 2021
Sent to S.C. Reporter 4/30/21