[Cite as *Tanner v. Ohio Dept. of Rehab. & Corr.*, 2024-Ohio-1485.]

IN THE COURT OF CLAIMS OF OHIO

BARRY TANNER Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2023-00034JD Judge Lisa L. Sadler Magistrate Gary Peterson DECISION

{¶1} Pursuant to L.C.C.R. 4(D), Defendant's December 12, 2023 motion for summary judgment is now fully briefed and before the Court for a non-oral hearing.

{¶2} Plaintiff brings claims of employment discrimination based on race in violation of R.C. 4112.02 after Defendant placed him on administrative leave pending an investigation into his involvement in allowing a fight to occur between two inmates and thereafter terminated his employment as a result of the investigation but failed to terminate or otherwise discipline a non-protected, similarly-situated employee. Defendant moved for summary judgment on the grounds that Plaintiff can neither establish a prima facie case nor show that Defendant's legitimate reasons for its employment decisions were pretext for racial discrimination. In support, Defendant submitted: (1) a copy of Barry Tanner's deposition; and (2) the affidavit of Kenneth Farrar, including the exhibits referenced therein.

{¶3} In response, Plaintiff argues genuine issues of material fact remain for trial. In support, Plaintiff submitted: (1) the affidavit of Barry Tanner; (2) a copy of Eric Graves's deposition, including Exhibits A and B referenced therein; (3) a copy of James Skaggs's deposition, including Exhibit A referenced therein; (4) the Ohio State Highway Patrol Report of Investigation; and (5) the Office of the Chief Inspector Investigative Report.

{¶4} Having considered the evidence in a light most favorable to Plaintiff, the Court finds that Defendant is entitled to judgment as a matter of law for the reasons stated below.

Standard of Review

{¶5} 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.

"[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.

{¶6} If the moving party meets its initial burden, the nonmoving party bears a reciprocal burden outlined in Civ.R. 56(E), which provides that "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." It is well-established that it is not appropriate to grant summary judgment unless,

> construing the evidence most strongly in favor of the nonmoving party: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party.

Robinette v. Orthopedics, Inc., 10th Dist. Franklin No. 97AP-1299, 1999 Ohio App. LEXIS 2038, 7 (May 4, 1999).

Relevant Background

{¶7} Plaintiff, an African American formerly employed by Defendant, began working as a Corrections Officer (CO) at Ross Correctional Institution (RCI) in April 2017. Tanner Depo., p. 15, 28. As a CO, Plaintiff received the standard training, including Defensive Tactics and Subject Control. *Id.* at 30. Specifically, Plaintiff learned about "things to expect" and how to respond in various situations with inmates, including where inmates were allowed to be at certain times, how to respond to inmate medical conditions, how to write incident reports, and "how to be aware of your surroundings and not be too complacent." *Id.* at 33-35, 39-41. In addition to the standard training, Plaintiff also completed specialized training for crisis intervention. *Id.* at 30-31.

{¶8} When Plaintiff was uncertain about how to handle a particular situation, he would seek assistance from a more knowledgeable senior officer or contact a supervisor. *Id.* at 34-25. Although either Lieutenant Sexton or Lieutenant Evans handled Plaintiff's yearly evaluations, COs generally reported to various higher-ranking superiors while performing their duties. *Id.* at 14, 15, 28. Nevertheless, Plaintiff had a clean disciplinary record prior to April 2020. *Id.* at 28-29. Plaintiff neither had any grievances filed against him, been disciplined for any misconduct, nor participated as a witness in any disciplinary investigations. *Id.*

{¶9} In April 2020, Plaintiff reported to work as a first-shift relief CO where he was not assigned a permanent post, but he picked a post based on seniority and preference. *Id.* at 51-52. Depending on the remaining posts, Plaintiff would choose to post at Housing Unit 4A (4A) once or twice a week. *Id.* at 59. The post orders state that COs assigned to a housing unit "will work in unison to ensure that the unit rules are enforced. Thus, each officer is responsible for catching any lapse in performance to ensure that the institutional rules and procedures are followed, and they share the burden of liability for the results of such lapse." Farrar Aff., ¶ 6, Exh. E.

{¶10} Upon reporting to work on April 4, 2020, Plaintiff picked 4A out of the remaining posts. *Id.* at 52, 57. On that day, Plaintiff worked with CO Scott Ahart who was a regularly assigned housing unit officer in 4A. *Id.* at 58. Whenever posted on 4A, Plaintiff would work with Ahart or one other regularly assigned housing unit officer. *Id.* at

59. According to Plaintiff, he was not aware of anything out of the ordinary occurring during his shift on April 4, 2020. *Id.* at 51, 61-72, 89.

{¶11} Sometime after April 4, 2020, CO Marsha Strickland heard inmates discussing a fight that occurred between Inmate Davis, a resident of 4A, and Inmate Hamilton, a resident of Housing Unit 4B (4B). Plaintiff's Memorandum Contra, Exh. B. Strickland and her partner reviewed the security footage to determine when the alleged fight occurred. *Id.* On April 21, 2020, Strickland informed 4A's Unit Manager Clyde Spencer of her discovery. *Id.*; Farrar Aff., ¶ 3, Exh. B. Thereafter, Spencer completed an incident report regarding a fight between Inmates Davis and Hamilton that was facilitated by Inmate Fisher, a resident of 4A, as well as CO Ahart and Plaintiff. Farrar Aff., ¶ 3, Exh. B. Institutional Inspector Doug DeBord was assigned to handle the internal investigation of this report. Plaintiff's Memorandum Contra, Exh. B; Farrar Aff., ¶ 3, Exh. B.

{¶12} That same day, CO James Skaggs, a relief officer not assigned to a regular post, was separately informed that two inmates—one from 4A and one from 4B—needed to be "cuff[ed] up" and escorted to "the hole" for being under investigation for a fight that occurred on April 4, 2020. Skaggs Depo., p. 11-12, 17-18, Exh. A. Although Skaggs had heard rumors of the fight taking place, he was not aware of which inmates were involved and he did not know whether it took place in 4A or 4B. *Id.* at 12-16, Exh. A. Upon arrival, Skaggs saw that Inmate Davis needed to be escorted from 4A. *Id.* at 17, Exh. A. After realizing that he was being written up for the April 4, 2020 fight, Inmate Davis became very upset during the escort, demanded to speak to Eric Graves—a white, superior officer at RCI who, at the time, was the Security Threat Group (STG) Correction Warden Analyst[1]—and stated that Graves set up the April 4, 2020 fight to occur. *Id. at* 18, Exh. A; *see* Graves Depo, p. 18-19, 53; Tanner Depo., p. 105-109.

{¶13} Sometime afterward while Inmates Davis, Hamilton, and Fisher were all in "the hole" because of the fight, Inmate Fisher told Skaggs that Graves asked him for help with "settling a beef" between two prison gangs. Skaggs Depo., p. 31-33, Exh. A. According to Inmate Fisher, the respective gangs selected Inmates Davis and Hamilton

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[1] In September 2021, RCI promoted Graves to Correction Warden Assistant. Graves Depo., p. 20.

to fight, and Inmate Davis went to Graves's office beforehand to coordinate how the fight would occur. *Id.* at 20-23, Exh. A. Skaggs reviewed security footage and confirmed that Inmate Davis did go up to Graves's office before the fight. *Id.* at 22-23, Exh. A. Inmate Fisher also claimed that on the day of the fight, he told Ahart and Plaintiff that Inmates Hamilton and Davis would be fighting so that Plaintiff and Ahart would go to "C section" during the fight. *Id.* at 58, Exh. A.

{¶14} Skaggs did not immediately report what he heard from Inmates Davis or Fisher. *Id.* at 22, 57-58, Exh. A. Skaggs related that his knowledge had come from what inmates told him and he never personally saw any involvement of Graves, Ahart, or Plaintiff. *Id.* at 58-59. Because inmates are frequently untruthful, Skaggs stated that he did not react to what he was being told until hearing it from various sources. *Id.* at 13, 19, 46, 57-59. Additionally, Skaggs did not want to get involved and did not feel comfortable going to the Warden's office given the severity of the allegations and Graves's position within RCI. *Id.* at 18, 37, 59, 62-63.

{¶15} Then on April 23, 2020, Plaintiff reported to work in the normal course but was instructed to remain in the captain's office to speak with investigators instead of picking a post. Tanner Depo, p. 51, 90-91. Thereafter, DeBord met with Plaintiff and Ahart in the captain's office and placed them both on administrative leave. *Id.* at 90-91; Graves Depo, p. 59-61. Being initially assigned to handle the investigation, DeBord made the decision to place Plaintiff on administrative leave pending his investigation. Graves Depo., p. 62; *see* Farrar Aff., ¶ 2, Exh A. Because DeBord had never placed anyone on administrative leave before, he asked Graves to sit in on the interview. Graves Depo., p. 59-61. At the time that DeBord placed Plaintiff on administrative leave, the allegations implicating Graves had not surfaced in the internal investigation into Ahart and Plaintiff. *Id.* at 35, 59-61; Skaggs Depo., Exh. A. While Graves was not Plaintiff's direct supervisor, he would be considered one of the various superior officers who Plaintiff considered a supervisor. Tanner Depo., p. 100-101; *see also* Skaggs Depo., p. 49.

{¶16} Once Skaggs heard that Ahart and Plaintiff were on "the hook" for letting the fight happen, Skaggs went to the union office because he believed Graves should be held responsible as well. Skaggs Depo., p. 57-60, Exh. A. Skaggs believed it was more likely that Graves, given his position, had the power and sway with the gangs to be able to

organize the fight instead of two newer COs. *Id.* at 61-62, Exh. A. Because Skaggs wanted the report to be anonymous, he provided a handwritten report to Union representative Josh Melott instead of submitting anything directly; however, Skaggs wrote his name on the handwritten report preventing it from being anonymous. *Id.* at 57.

{¶17} Once DeBord connected the allegations against Graves to his investigation into the April 4, 2020 fight, the Warden contacted the Office of the Chief Inspector (CIG) for the investigation to be handled externally. Graves Depo., p. 61; Farrar Aff., ¶ 3, Exh. B. From there, the CIG took over the investigation. Farrar Aff., ¶ 3, Exh. B. While it appears that Graves was not immediately placed on leave, Assistant Inspectors General Antonio Lee and Marc Bratton informed Graves during his investigatory interview that disciplinary action, including termination, could result depending on the outcome of the investigation. Graves Depo., Exh. B.

{¶18} Moreover, the investigation did not reveal any evidence to substantiate the allegation that Graves authorized the altercation. Farrar Aff., ¶ 3, Exh. B; Plaintiff's Memorandum Contra, Exh. C. While Graves agreed that he met with Inmate Davis, Graves explained that Inmate Davis was a known member of the Konvicted Felons and he met with him to seek a resolution of a larger ongoing issue between the Konvicted Felons and the Hispanics after an earlier fight had occurred between those two gangs. Graves Depo., p. 22-26; Farrar Aff., ¶ 3, Exh. B; Plaintiff's Memorandum Contra, Exh. C. Although Graves denied ever approving or condoning any inmate to fight, Graves acknowledged that RCI has a high number of gang members who are going to fight and that he has informed various inmates that one-on-one fights are preferred over multiple inmates fighting in order to protect staff from having to break up a gang fight. Farrar Aff., ¶ 3, Exh. B; Plaintiff's Memorandum Contra, Exh. B; *see also* Graves Depo., p. 29-30, 56-57, Exh. A.

{¶19} Plaintiff does not dispute that Graves's position as an STG analyst included gang surveillance and investigating gang activity. Tanner Depo., p. 55; Graves Depo., p. 13-19. Regarding gang activity, Plaintiff stated that COs only have a general understanding of the existence of gangs because they make up a large majority of the population at RCI, but a CO is not knowledgeable unless one has specifically studied the gang-related activity. *Id.* at 54, 56. While Plaintiff was aware that Graves primarily

focused on gang activity, he acknowledged that he never specifically studied gang activity, and he was only vaguely aware of Graves's job duties. *Id.* at 53-57.

{¶20} Furthermore, neither Plaintiff, Ahart, nor Inmates Davis or Hamilton stated that Graves had approved the fight or otherwise implicated him in the April 4, 2020 fight during their CIG interviews. Farrar Aff., ¶ 3, Exh. B; Plaintiff's Memorandum Contra, Exh. C. Instead, the evidence gathered during the investigation indicated that "the fight between Inmate[s] Davis and Hamilton was a mutual agreement between both parties" and that the altercation was choreographed by Inmates Fisher, Davis, and Hamilton. *Id.* Specifically, the investigation revealed that Inmates Hamilton and Davis were hoping that the video recording of their fight would be enough to obtain a civil attorney and win a lawsuit against Defendant. Farrar Aff., ¶ 3, Exh. B; Plaintiff's Memorandum Contra, Exh. C.

{¶21} Additionally, the evidence supported that "Ahart allowed the fight to happen and Officer Tanner had full knowledge of what was transpiring." *Id.* Specifically, "[a] polygraph test conducted on and passed by Inmate Hamilton confirmed the allegation to be true that Officer Ahart allowed the fight to occur * * *." *Id.* Moreover, video surveillance of the incident[2] shows that Ahart and Plaintiff allowed Inmate Hamilton to enter 4A during a time when the dayroom was closed to inmates and the only inmates that should have been allowed were the unit porters[3], but Hamilton was not a porter in 4A. *Id.* The investigative report states both Ahart and Plaintiff related that Inmate Hamilton was allowed in 4A because Inmate Hamilton asked to talk with Inmate Davis. *Id.* However, Plaintiff deponed that Ahart gave Inmate Hamilton permission to enter 4A because Inmate Hamilton was a porter in 4B and needed to borrow cleaning supplies from 4A to take back to 4B. Tanner Depo, p. 60-63. While Inmate Hamilton was still in 4A, Plaintiff left the unit to get things from the supply closet with Case Manager Erving. *Id.* at 72, 80; Farrar Aff., ¶ 3, Exh. B; Plaintiff's Memorandum Contra, Exh. C.

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[2] While a copy of the video was not submitted for review, Plaintiff acknowledged that he has seen the video and does not contest the investigation's description of what the video surveillance depicted during the incident. Tanner Depo., p. 42, 86, 96.

[3] A porter is an inmate tasked with cleaning duties in his housing unit. Tanner Depo., p. 63.

{¶22} Meanwhile, video surveillance depicted Inmate Davis waiting in a vacant cell[4] and Inmate Fisher escorting Inmate Hamilton to the vacant cell. Farrar Aff., ¶ 6, Exh. E. Inmate Hamilton enters that cell and movement consistent with a fight is captured. Farrar Aff., ¶ 3, Exh. B; Plaintiff's Memorandum Contra, Exh. C; *see* Tanner Depo., p. 42, 86, 96. During the fight, Inmate Fisher is pacing back and forth in front of the cell, but then he is depicted walking off and shortly thereafter reemerging with Plaintiff. Farrar Aff., ¶ 3, Exh. B; Plaintiff's Memorandum Contra, Exh. C; *see* Tanner Depo., p. 85-86, 96. Video surveillance also showed that Plaintiff opened the door to the vacant cell upon returning to 4A. Farrar Aff., ¶ 3, Exh. B; Plaintiff's Memorandum Contra, Exh. C; *see* Tanner Depo., p. 85-86, 96. Afterward, Inmate Hamilton is depicted leaving the cell and exiting 4A, and Plaintiff confirmed he saw Inmate Hamilton walk toward the door to leave. Farrar Aff., ¶ 3, Exh. B; Plaintiff's Memorandum Contra, Exh. C; Tanner Depo., p. 85.

{¶23} Plaintiff clarified that he opened the cell at issue because Ahart had instructed Inmates Fisher and Franklin to clean the cell. *Id.* at 86. While Plaintiff deponed that he was not sure why the cell at issue was locked to begin with, testimony during the investigation indicated that a vacant cell should always remain locked to prevent other inmates from entering it. *Id.* at 72, 81-83; Farrar Aff., ¶ 3, Exh. B; Plaintiff's Memorandum Contra, Exh. C.

{¶24} Following the investigation, Plaintiff attended a pre-disciplinary meeting during which the hearing officer found that it was evident that Plaintiff "was aware of the fight taking place and allowed it to occur." Farrar Aff., ¶ 6, Exh. E. Specifically, Plaintiff "ensured that neither of he, nor the assigned Case Manager, were in the area when the fight occurred so they would not witness the incident. This was achieved by having the Case Manager go to C section to retrieve supplies." *Id.* Thereafter, Plaintiff "returned to the unit area and accessed the door to the cell electronically to allow the two fighters to exit the cell and return to their assigned cells." *Id.* As a result, the hearing officer found just cause for the following rule violations: (1) Rule 7: "Failure to follow post orders, administrative regulations, policies, or written or verbal directives"; (2) Rule 8: "Failure to

[4] For purposes of this decision, a cell is "vacant" when no inmate is assigned as a resident of the cell. Vacant cells are usually locked and it was not common practice to leave a vacant cell unlocked. Tanner Depo., p. 81-83.

carry out a work assignment or the exercise of poor judgment in carrying out an assignment"; (3) Rule 38: "An act, or failure to act, or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervision of the Department, or a member of the general public"; (4) Rule 39: "Any act that would bring discredit to the employer"; and (5) Rule 50: "Any violation of ORC 124.34-…and for incompetency, inefficiency, unsatisfactory performance, dishonesty, * * * neglect of duty, * * * or any failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office." *Id.*

{¶25} In addition to the CIG's investigation, the April 4, 2020 fight also received news coverage, which characterized the incident as a part of a larger prison-wide "fight club" that was occurring at RCI. Tanner Depo, p. 48. However, Plaintiff states that "[t]he story was completely false" and "[n]othing was accurate." *Id.* at 49. Plaintiff specifically deponed that it was a daily occurrence for inmates to say untruthful things and that inmates would tell falsehoods about COs or anyone else if it benefitted them to do so. *Id.* Plaintiff maintains that he neither violated any policy or otherwise acted inappropriately in any way during his shift, nor is he aware of any policy violations occurring in 4A that day. *Id.* at 43-44, 72-73. While Plaintiff acknowledged that he reviewed the security footage of the incident after the fact and there were movements consistent with a fight, he also maintains that he had no knowledge of a fight, and he still is not sure whether a fight occurred. *Id.* at 42. Plaintiff believes he was terminated "to protect a superior white officer * * *." *Id.* at 105, 109. Plaintiff is not aware of who, if anyone, Defendant may have hired to fill his position. Tanner Depo., p. 101-102.

{¶26} Following termination, Plaintiff filed a charge of discrimination with the Ohio Civil Rights Commission (OCRC). Farrar Aff., ¶ 7, Exh. F. After the investigation, OCRC determined that Defendant terminated Plaintiff's employment because he allowed inmates to fight and that it was "not probable" that Defendant engaged in discriminatory practice in violation of R.C. 4112. *Id.* Thereafter, Plaintiff filed a timely complaint in the Court of Claims.

Discussion

{¶27} Pursuant to R.C. 4112.02, Plaintiff alleges experiencing disparate treatment for the following adverse employment actions: (1) Defendant disciplined and placed Plaintiff on administrative leave based on an uncorroborated suspicion that he allowed inmates to fight but it did not discipline or place Graves on administrative leave after inmates reported Graves's direct involvement in sanctioning the fight; and (2) Defendant terminated Plaintiff's employment despite the investigation not revealing any corroborating evidence against him but it did not terminate Graves's employment despite the investigation revealing credible evidence of his involvement. Defendant argues that it is entitled to judgment as a matter of law as to both claims because (1) Graves is neither similarly situated to Plaintiff nor was the evidence against Graves substantially similar to the evidence against Plaintiff; and (2) Plaintiff cannot present evidence that Defendant's reasons for termination were merely a pretext for race discrimination.

{¶28} 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 * * * or otherwise to discriminate against that person with respect to * * * any other matter directly or indirectly related to employment." It is well-established that "discrimination actions under federal and state law each require the same analysis." *See Ray v. Ohio Dept. of Health*, 2018-Ohio-2163, 114 N.E.3d 297, ¶ 22 (10th Dist.), citing *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.*, 66 Ohio St.2d 192, 196, 421 N.E.2d 128 (1981); *Little Forest Med. Ctr. v. Ohio Civ. Rights Comm.*, 61 Ohio St.3d 607, 609-610, 575 N.E.2d 1164 (1991). Accordingly, "Ohio courts may look to both federal and state courts' statutory interpretations of both federal and state statutes when determining the rights of litigants under state discrimination laws." *Id.*

{¶29} To prevail on either or both claims, Plaintiff must "present[] evidence, of any nature, to show that an employer more likely than not was motivated by discriminatory intent." *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 664 N.E.2d 1272 (1996), paragraph one of the syllabus; *see also Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 348-349 (6th Cir.1997) ("The direct evidence and circumstantial evidence paths are mutually exclusive; a plaintiff need only prove one or the other, not both. If a plaintiff can produce direct evidence of discrimination, then the *McDonnell Douglas-Burdine* paradigm

is of no consequence. Similarly, if a plaintiff attempts to prove its case using the *McDonnell Douglas-Burdine* paradigm, then the party is not required to introduce direct evidence of discrimination.").

{¶30} Plaintiff does not present any direct evidence of discriminatory intent. *See Smith v. Superior Prod., LLC*, 2014-Ohio-1961, 13 N.E.3d 664, ¶ 16 (10th Dist.) ("Direct evidence of discrimination is evidence of any nature, which if believed, is sufficient by itself to show the employer more likely than not was motivated by discriminatory animus in its action."). Absent direct evidence, Plaintiff bears the initial burden of establishing a prima facie case of racial discrimination. *Hall v. Ohio State Univ. College of Med.,* 10th Dist. Franklin No. 11AP-1068, 2012-Ohio-5036, ¶ 13-14. In order to establish a prima facie case under the disparate treatment theory, Plaintiff must show that "(1) he or she is 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) the employer treated a non-protected, similarly-situated person more favorably." *Id.* at ¶ 13-15.

{¶31} It is not disputed that Plaintiff meets the first three elements of the *prima facie* case. However, Defendant argues that it is entitled to summary judgment because Graves was not similarly situated to Plaintiff. To show that Graves is a similarly-situated employee, Plaintiff has the burden to demonstrate that "all the relevant aspects" of his employment are "nearly identical" to Graves's employment. *Tilley v. City of Dublin*, 10th Dist. Franklin No. 12AP-998, 2013-Ohio-4930, ¶ 34. Specifically, Plaintiff must show that he and Graves "dealt with the same supervisor, have been subjected to the same standards and have 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." *Brehm v. Macintosh Co.,* 10th Dist. Franklin No. 19AP-19, 2019-Ohio-5322, ¶ 39 (citations omitted); *Osborn v. Ohio Reformatory for Women*, 10th Dist. Franklin No. 20AP-45, 2021-Ohio-1036, ¶ 23. Put simply, "'two employees are not similarly situated in all relevant aspects if there is a meaningful distinction between them that explains their employer's different treatment of them[.]'" *Pohmer v. JPMorgan Chase Bank, N.A.*, 10th Dist. Franklin No. 14AP-429, 2015-Ohio-1229, ¶ 37, quoting *Koski v. Willowwood Care Ctr. Of Brunswick, Inc.*, 158 Ohio App.3d 248, 2004-Ohio-2668, 814 N.E.2d 1235, ¶ 17-18 (9th Dist.).

{¶32} At the outset, the Court notes that the parties agree that Graves and Plaintiff hold different rank and titles, have different job duties, and report to different direct supervisors. However, Plaintiff argues that they need not have the same rank or title, job duties, or direct supervisors because they both answer to the Warden and are both subject to the same policies and procedures to promote a safe environment. Plaintiff further contends that there are no mitigating facts or circumstantial differences that would remove Graves from being similarly situated. Upon review, the Court disagrees.

{¶33} Initially, the Court is not persuaded by Plaintiff's argument that Graves and Plaintiff need not have similar rank and duties. *See, e.g., Pohmer* at ¶ 37-38, 42 (the court held that summary judgment was appropriate after finding, in part, that a supervisor is not similarly situated to a subordinate employee because "a supervisor's 'position of authority within the company create[s] a meaningful distinction' that 'explains [the employer's] different treatment of the two.'"). While both Graves and Plaintiff may answer to the Warden and be subjected to the same policy to promote a safe environment, the differences in their regular duties and functions prevent Graves from being "nearly identical" to Plaintiff. By Plaintiff's own account, Graves is a superior officer who specializes in gang surveillance, not a fellow CO holding an equal position within the housing units. Moreover, Plaintiff is directly responsible for ensuring the unit rules are enforced according to the post orders. Instead, Plaintiff is depicted on video violating such orders. Even if the evidence supported the conclusion that Graves sanctioned the fight, Plaintiff still had a responsibility to maintain control and proper observation of 4A and he failed to do so. Whether Graves instructed inmates to fight, he was not in a position that made him directly responsible for monitoring the minute-by-minute activities taking place in the housing unit to prevent any nefarious behavior therein.

{¶34} While the fact that Graves was a superior officer with specialized duties is enough to conclude that the two were not similarly situated, the Court finds that other mitigating circumstances also exist that distinguish Defendant's treatment of Graves from its treatment of Plaintiff. *See e.g., Pohmer* at ¶ 37-38. Importantly, Plaintiff's involvement was discovered by a fellow CO who heard about the fight, reviewed security footage to confirm a fight occurred, and reported the findings to a superior officer who made a formal

report. In contrast, the allegations against Graves were made by an inmate involved in the fight to an uninvolved CO who made a separate report.

{¶35} As a result of the allegations surfacing separately, the initial investigation into Plaintiff's conduct began as an internal investigation and DeBord made the decision to place Plaintiff on administrative leave pending the investigation. Once the allegations against Graves necessitated an external investigation, the CIG similarly subjected Graves to an investigatory interview regarding his involvement and gave Graves notice about the risk of termination pending the investigation's outcome. While the CIG may not have immediately placed Graves on administrative leave, the Court finds that the difference in initial reporting and the difference in investigators constitutes a material distinction that explains the difference in initial treatment between the two.

{¶36} Following the investigation, the findings implicating Plaintiff are not similar to those implicating Graves. While the Court acknowledges that the initial allegations against both Graves and Plaintiff have comparable seriousness, the nature of the evidence differed between the two. Specifically, the inmate allegations against Graves were not substantiated by security footage or any other meaningful evidence. By Plaintiff's own account, it is common for inmates to be untruthful if they think it will benefit them in some way. Moreover, the evidence obtained during the investigation suggested that the inmates wanted it to appear as though the fighting was sanctioned by superior officers to get paid in a civil suit.

{¶37} Conversely, Plaintiff's suspected involvement was supported by video footage of him allowing an inmate to be out of place, opening cell doors that should have remained locked, and leaving inmates unsupervised during inappropriate times. While Plaintiff attempts to justify his actions because Ahart was authorizing them, the post orders task Plaintiff with catching any lapse in Ahart's ability to ensure that the institutional rules and procedures are followed, which Plaintiff failed to do. After construing the evidence in a light most favorable to Plaintiff, the Court concludes that Graves is not similarly situated to Plaintiff because Graves's conduct is not "nearly identical" to Plaintiff's conduct in "all relevant aspects" of neither their employment nor in the evidence regarding either's alleged involvement. Therefore, the Court finds that Defendant is entitled to

summary judgment because Plaintiff has failed to meet his burden to establish a prima facie case of employment discrimination based on race.

{¶38} Assuming arguendo that Plaintiff could establish his prima facie case, he has failed to refute Defendant's legitimate explanation for its employment decisions. *See Hall* at ¶ 15 ("Once a plaintiff demonstrates a prima facie case, the employer is required to set forth some legitimate, non-discriminatory basis for its action. If the employer meets its burden, a plaintiff must be afforded an opportunity to prove by a preponderance of the evidence that the legitimate reasons the employer offered were not its true reasons for its actions but were a pretext for discrimination."). Defendant proffers that Plaintiff was terminated because he violated Defendant's policies when allowing inmates to fight. The "[v]iolation of a company policy * * * constitutes a legitimate, non-discriminatory rationale for terminating an employee." *See Morrissette v. DFS Servs., LLC,* 10th Dist. Franklin No. 12AP-611, 2013-Ohio-4336, ¶36.

{¶39} While Defendant met its burden to articulate a legitimate, non-discriminatory basis for its action, the Court finds that the Plaintiff has not "produced evidence from which a jury could reasonably doubt the employer's explanation." *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400, fn.4 (6th Cir.2009). To prevail, Plaintiff must show that Defendant's "proffered reason (1) had no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Hall* at ¶ 27. Plaintiff retains the ultimate burden to produce evidence sufficient for the Court to conclude that both Defendant's justification was false, and that discrimination was the real reason. *See id.* at ¶ 35, quoting *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515 (1993).

{¶40} To this end, Plaintiff argues he was the scapegoat terminated to cover up Graves's involvement in orchestrating the fight. However, statements that are nothing more than rumors, conclusory allegations, or subjective opinions are insufficient evidence on which the Court can conclude that Defendant's legitimate explanation is pretext for racial discrimination. *See Mitchell v. Toledo Hosp.*, 964 F.2d 577, 585 (6th Cir.1992). While Plaintiff would not acknowledge in his deposition that a fight occurred, he did concede that there were "movements consistent" with a fight. Additionally, Plaintiff submitted the Ohio State Highway Patrol Report of Investigation and the Office of the

Chief Inspector Investigative Report as evidence both of which support a conclusion that some altercation occurred. Regardless, the Court finds that Plaintiff's evidence is not sufficient for the Court to conclude that Defendant's justification for its employment decision was false and that racial discrimination was the real reason for its decision.

{¶41} Likewise, the Court is not persuaded by Plaintiff's subjective belief that his conduct did not violate a policy or that any arguable policy violation is not relevant to the termination of his employment. *See Morrissette* at ¶40 ("It is also insufficient for [Plaintiff] to merely dispute that his conduct did not constitute a violation of company policy, or that [Defendant] was mistaken in finding a violation under the facts."). Whether Plaintiff subjectively believed he was not violating a policy, Plaintiff does not dispute that he allowed an inmate from a different housing unit to enter 4A during his shift or that he opened the door to the vacant cell where the inmates fought. Even viewing the evidence in Plaintiff's favor, Plaintiff's contention that he was a scapegoat to cover up Graves's involvement does not refute that Plaintiff violated Defendant's policies. As stated above, Defendant terminating Plaintiff for violating its policies is a race-neutral reason for its employment decision. *See Morrissette* ¶36.

{¶42} Furthermore, the evidence from the investigation shows that Graves, at most, had a meeting with one of the three inmates involved and this meeting appears to have occurred in the normal course of Graves's job duties surveilling the STGs. Aside from disputed inmate accounts, there is no other evidence of Graves's involvement in the April 4, 2020 fight. Additionally, Plaintiff has no personal knowledge that Graves orchestrated or otherwise condoned this fight, and the only evidence Plaintiff provides of Graves's potential involvement comes through layers of hearsay. Plaintiff merely concludes that the termination of his employment was racially motivated solely because Graves was white—an opinion that Plaintiff did not form until learning about the investigation into Graves after the fact.

{¶43} In short, the Court finds that Plaintiff has failed to meet his reciprocal burden outlined in Civ.R. 56(E). It is not the Court's job to "'second guess the business judgments of an employer making personnel decisions'" absent evidence of illegal discrimination. *Morrissette* at ¶ 40, citing *Brown v. Renter's Choice, Inc.*, 55 F.Supp.2d 788, 795 (N.D.Ohio 1999), quoting *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181,

1187 (11th Cir.1984) ("An employer may make employment decisions 'for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.'"). Furthermore, it is not for the Court to judge whether an employer made the best or fairest decision, but only to determine whether the decision would not have been made but for racial discrimination. *See Mittler v. Ohiohealth Corp.*, 10th Dist. Franklin No. 12AP-119, 2013-Ohio-1634, ¶ 52, citing *Knepper v. Ohio State Univ.*, 10th Dist. Franklin No. 10AP-1155, 2011-Ohio-6054, ¶ 23. Plaintiff's conclusory, subjective belief is not sufficient evidence for this Court to conclude that Defendant's real reason for terminating Plaintiff was because of his race. *See Mitchell* at 585. Therefore, the Court finds that Defendant is entitled to judgment as a matter of law.

Conclusion

{¶44} Having reviewed all the evidence in a light most favorable to Plaintiff, the Court finds no genuine issues of material fact remain for trial in this case. *See Mitchell v. Mid-Ohio Emergency Servs., LLC,* 10th Dist. Franklin No. 03AP-981, 2004-Ohio-5264, ¶ 12, citing *Turner v. Turner*, 67 Ohio St.3d 337, 340, 617 N.E.2d 1123 ("In the summary judgment context, a 'material' fact is one that might affect the outcome of the suit under the applicable substantive law."). For the reasons stated above, the Court finds that Plaintiff failed to establish a prima facie case of employment discrimination based on race in violation of R.C. 4112.02. Assuming arguendo that Plaintiff established a prima facie case, the Court further finds that Plaintiff did not demonstrate that Defendant's legitimate reasons for disciplining and terminating Plaintiff's employment were pretext for racial discrimination. Consequently, the Court GRANTS Defendant's motion for summary judgment pursuant to Civ.R. 56.

LISA L. SADLER
Judge

[Cite as *Tanner v. Ohio Dept. of Rehab. & Corr.*, 2024-Ohio-1485.]

BARRY TANNER Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2023-00034JD Judge Lisa L. Sadler Magistrate Gary Peterson <u>JUDGMENT ENTRY</u>

IN THE COURT OF CLAIMS OF OHIO

{¶45} For the reasons set forth in the decision filed concurrently herewith, the Court GRANTS Defendant's motion for summary judgment. 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.

LISA L. SADLER
Judge

Filed March 1, 2024
Sent to S.C. Reporter 4/18/24