

Memo

To: Desmon Martin, Director of Enforcement & Compliance

From: Denise M. Johnson, Chief Administrative Law Judge

Date: 1/28/2013

Re: Marcus Walker v. Best Buy Stores, L.P.

(TOL) 72 (31828) 12032007 22A-2008-02391- C Complaint No.

08-EMP-TOL-31828

**CONSIDERATION OF
ADMINISTRATIVE LAW JUDGE'S REPORT**

ALJ RECOMMENDS DISMISSAL ORDER

Report Issued: January 25, 2013

Report Mailed: January 28, 2013

***** Objections due: February 19, 2013**

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

MARCUS WALKER

Complainant

Complaint No. 08-EMP-TOL-31828

v.

BEST BUY STORES, INC.

Respondent

CHIEF ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT,

CONCLUSIONS OF LAW, AND RECOMMENDATIONS

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Respondent

ALJ'S REPORT BY:

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INTRODUCTION AND PROCEDURAL HISTORY

Marcus Walker (Complainant) filed sworn charge affidavits with the Ohio Civil Rights Commission (Commission) on November 14, 2007 and December 3, 2007.

The Commission investigated the charges and found probable cause that Best Buy Stores, L.P. (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve these matters by informal methods of conciliation. The Commission subsequently issued Complaint No. 08-EMP-TOL-31785 and Complaint No. 08-EMP-TOL-31828 on October 23, 2008.

The Complaints alleged, because of his race (African American), Complainant was suspended on November 14, 2007 pending an investigation of theft and shrinkage, and on November 28, 2007 Complainant was terminated.

Respondent filed Answers to the Complaints on March 16, 2009 and July 7, 2011. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

A public hearing was held on January 25th and January 26th, 2012 at the One Government Center, Room 12-C, in Toledo, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing (507 pages), exhibits admitted into evidence during the hearing, post-hearing briefs filed by the Commission on June 8, 2012 and July 11, 2012, and by the Respondent on June 29, 2012.

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the Administrative Law Judge's (ALJ) credibility assessment of the witnesses who testified before her in this matter. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. For example, she considered each witness's appearance and demeanor while testifying. She considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. She further considered the opportunity each witness had to observe and know the things discussed, each witness's strength of memory, frankness or lack of frankness, and the bias, prejudice, and interest of each witness. Finally, the ALJ considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed sworn charge affidavits with the Commission on November 14, 2007 and December 3, 2007.
2. The Commission determined on October 2, 2008 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).
3. The Commission attempted to resolve these matters by informal methods of conciliation. The Commission issued the Complaints and the Notice of Hearing on October 23, 2008, after conciliation failed.
4. Respondent is an employer as defined by R.C. 4112.01(A) (2). Respondent's Store #243 (Monroe Street) is located in Toledo, Ohio. (Tr. 34, 221).
5. Complainant was hired by Respondent in November 2001 as a seasonal part-time media employee at the Monroe Street location. (Tr. 33-34).

6. Complainant earned a full-time position and received several promotions. Complainant's final position with Respondent was as the Customer Experience Manager (CEM), which he held for six years until December 2007. (Tr. 34-35).

7. The employee hierarchy at Monroe Street consisted of the General Manager; four assistant managers (Operations Manager, CEM, Services Manager, and Warehouse Manager); six or seven supervisors; assistant supervisors; full-time workers; and part-time workers. (Tr. 36-37).

8. In 2007, Jason Carpenter (Carpenter) was the General Manager. Laura Stout (Stout) was the Operations Manager. Complainant was the CEM. Byran Ragsdale (Ragsdale) was the Services Manager. And, Keith Van Sant (Van Sant) was the Warehouse Manager. (Tr. 37-38).

9. All four assistant managers reported directly to the Carpenter. (Tr. 36-37).

10. In addition, Ronald Folds (Folds) and Andrea Martin were managers-in-training who had privileges similar to the assistant managers. (Tr. 132, 330-331).

11. Assistant Managers Stout, Ragsdale and Van Sant were Caucasian. (Tr. 37-38). Complainant and Manager-in-Training Folds were African American. (Tr. 38, 132).

12. Complainant's CEM duties included customer assistance, supervising subordinates, and maximizing profits through sales. (Tr. 36).

13. While each assistant manager had primary duties, there were some overlapping responsibilities and shared tasks such as opening and closing the store. (Tr. 132).

14. Due to high levels of shrink¹, Respondent's loss prevention team conducted an audit of Monroe Street beginning in the summer of 2006. (Tr. 15, 355-356, 407).

¹"Shrink" is the loss of product or the loss of money due to internal errors, internal theft, external theft, or other accounting issues. (Tr. 38-39).

15. The investigation was led by Avni Elezi (Elezi), Regional Asset Protection Market Manager, and Terry Stein (Stein), District Support Field Manager. (Tr. 39, 347, 353).

16. Throughout the audit, Elezi conducted informational and investigatory interviews, and reviewed documents, reports, and video of Monroe Street's leadership team. (Tr. 363-364, 236, 371, 373). Stein also reviewed audit video and documents. (Tr. 459-460).

17. On November 14, 2007, Complainant was questioned by Elezi and Stein about alleged violations of Respondent's policies. At the conclusion of this investigation meeting, Elezi and Stein suspended Complainant from work. (Tr. 39-40, 43).

18. A few weeks later, on December 3, 2007, General Manager Carpenter terminated Complainant's employment. (Tr. 285).

CONCLUSIONS OF LAW AND DISCUSSION²

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited.

² Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

1. The Commission alleged in the Complaints that Complainant was subject to different terms, conditions and privileges of employment and terminated by Respondent because of his race.

2. These allegations, if proven, would constitute a violation of R.C. 4112.02 which provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, (...) of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any other matter directly or indirectly related to employment.

3. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d. 569. Thus, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Under Title VII, the Commission is normally required to first establish a prima facie case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas v. Greene*, 411 U.S. 792 (1973). The proof required to establish a prima facie case may vary on a case-by-case basis. *Id.*, at 802.

6. The establishment of a prima facie case creates a rebuttable presumption of unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

7. Once the Commission establishes a prima facie case, the burden of production shifts to Respondent to “articulate some legitimate, nondiscriminatory reason” for the employment action.³ *McDonnell Douglas, supra* at 802.

8. To meet this burden of production, Respondent must:

...“clearly set forth, through the introduction of admissible evidence,” reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action.

St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 507 (1993), quoting *Burdine, supra* at 254-55.

³ Although the burden of production shifts to Respondent at this point, the Commission retains the burden of persuasion throughout the proceeding. *Burdine, supra* at 254.

The defendant’s burden is merely to articulate through some proof a facially nondiscriminatory reason for the termination. The defendant does not at this stage of the proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reason was applied in a nondiscriminatory fashion.

EEOC v. Flasher Co., 986 F.2d 1312, 1316 (10th Cir. 1992) (citations and footnote omitted).

9. The presumption of discrimination created by the establishment of the prima facie case “drops out of the picture” when the employer articulates a legitimate, nondiscriminatory reason for the employment action. *Hicks, supra* at 511.

10. In this case, it is not necessary to determine whether the Commission established a prima facie case. Respondent’s articulation of legitimate, nondiscriminatory reasons for its decision to terminate Complainant removes any need to determine whether the Commission proved a prima facie case, and the “factual inquiry proceeds to a new level of specificity.” *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) quoting *Burdine, supra* at 255.

Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. *Aikens, supra* at 715.

11. Respondent provided three reasons for its termination decision: (1) Complainant violated the Key Holder Policy regarding leaving keys unattended with unauthorized employees (Tr. 325-326); (2) Complainant violated the Time Record Policy by allowing hourly employees to remain inside the store “off the clock” (Tr. 47-48, 125) (Exhibit C); and (3) Complainant violated the Closing Policy by inspecting the store alone/unaccompanied by another employee, and failing to have his coat and bag checked prior to exiting the building (Tr. 379-381, 461).

12. Respondent having met its burden of production, the Commission must prove that Respondent unlawfully discriminated against Complainant because of his race. *Hicks, supra* at 511.

13. The Commission must show by a preponderance of the evidence that Respondent’s articulated reasons for discharging Complainant were not the true reasons, but were “a pretext for discrimination.” *Id.*, at 515, quoting *Burdine, supra* at 253.

[A] reason cannot be proved to be a “pretext for discrimination” unless it is shown both that the reason [is] false, and that discrimination [is] the real reason. *Hicks, supra* at 515.

14. Thus, even if the Commission proves that Respondent's articulated reasons are false, the Commission will not automatically prevail in establishing its burden of persuasion:

That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the [Commission's] proffered reason of race is correct. That remains a question for the factfinder to answer... *Id.*, *supra*, at 524.

15. The Commission must ultimately provide sufficient evidence to allow the factfinder to infer that Complainant was, more likely than not, the victim of racial discrimination. *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d. 578, 586-587.

16. In this case, the Commission attempted to show pretext by alleging disparate treatment. Specifically, the Commission alleged that similarly-situated Caucasian employees were treated more favorably. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992).

To be deemed “similarly situated”, the individuals with whom ... the [Complainant] seeks to compare ... [his] treatment must have dealt with the same supervisor, have been subject 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. *Id.* at 583

17. The Commission attempted to compare the Complainant to several Caucasian employees in Respondent’s management/supervisor hierarchy. However, none of these employees engaged in misconduct of “comparable seriousness” to that of Complainant.

18. The Commission failed to show that two unnamed warehouse employees, who were placed on 90-day written suspension plans (action plans), were similarly situated to Complainant. (Tr. 424, 427).

19. Unable to determine who created a hole in its warehouse wall, Respondent decided to hold an unnamed inventory manager and inventory supervisor accountable for their failure to properly execute warehouse procedures. (Tr. 424).

20. These two employees were not comparable to Complainant because, unlike Complainant's affirmative conduct, neither employee directly violated Respondent's policies.

21. The Commission also failed to show that assistant managers, Dan Walter (Walter) and Van Sant, were similarly situated to Complainant because neither employee engaged in affirmative misconduct.

22. Following the discovery of several stolen televisions and missing inventory, former operations manager Walter was given a written warning to fix operation procedures. (Tr. 273, 276-277). Although Walter was disciplined, the thefts were determined to be a result of the misconduct of Walter's subordinates and not Walter's own wrongdoing.

23. Additionally, Van Sant, inventory manager, was not disciplined by Respondent when his subordinate turned off a store surveillance camera because Van Sant did not engage in the misconduct. (Tr. 266-67).

24. Likewise, the Commission failed to show that any other assistant manager or manager-in-training violated Respondent's revised Key Holder Policy. (Tr. 37-38, 374).

25. Complainant was aware of Respondent's revised Key Holder Policy weeks before his termination. (Tr. 157-158).

26. In November 2007, Respondent revised its Key Holder Policy by removing access to key from supervisors and limiting key possession to managers and the two managers-in-training. (Tr. 149, 153-154, 330-331).

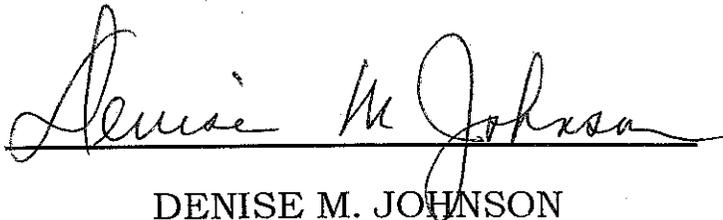
27. The revised policy strictly prohibited managers and managers-in-training from entrusting their keys to unsupervised subordinate employees. (Tr. 480-481).

27. Nevertheless, Complainant admitted to entrusting his keys to unsupervised employees after the policy change. (Tr. 176).

28. The Commission failed to present evidence which would tend to show that Respondent's decisions were motivated by illegal discriminatory animus.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaints No. 08-EMP-TOL-31785 and 08-EMP-TOL-31828.

A handwritten signature in cursive script, reading "Denise M. Johnson", is written over a horizontal line.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

DATE MAILED:

January 28, 2013

Complainant's
Statement
of
Objections



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February 15, 2013

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OHIO CIVIL RIGHTS COMMISSION
COMPLIANCE DEPARTMENT

Re: Marcus Walker vs. Best Buy Stores, L. P.
Complaint No. 08EMPTOL31785 & 08EMPTOL31787

Dear Mr. Martin:

Enclosed please find an original copy of Complainants Statement of Objections to the ALJ's Findings of Fact, Conclusions of Law and Recommendations to be filed with respect to the above captioned matter. Copies have also been served on Judge Denise M. Johnson and on Counsel for Respondent.

If you should have any questions or require any additional information in order to process this request, please give me a call. Otherwise I thank you in advance for your attention to this matter.

Sincerely,

Paul T. Belazis

PTB/aks
encl.

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FEB 19 2008

STATE OF OHIO CIVIL RIGHTS COMMISSION

OHIO CIVIL RIGHTS COMMISSION
COMPLAINT REPLY

MARCUS WALKER,

COMPLAINT NOS. 08EMPTOL31785 &
08EMPTOL 31787

Complainant,

vs.

BEST BUY STORES, L.P.,

Respondent.

COMPLAINANT'S STATEMENT OF OBJECTIONS TO THE ALJ'S FINDINGS OF
FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

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I. STATEMENT OF THE CASE

The instant case commenced when Marcus Walker filed two charges with the Ohio Civil Rights Commission. The first was filed on November 14, 2007 and alleged

that Mr. Walker had been suspended from work at Best Buy LP (“Best Buy”) because of his race. T. 33-34, *Commission Exhibit 1*. The Second charge was filed on December 3, 2007 and alleged that Mr. Walker’s employment had been terminated based upon his race. T. 92. (*Commission Exhibit 2*.) After conciliation was unsuccessful, the Commission issued two separate Complaints, Case No. 08-EMP-TOL-31785 and Case No. 08-EMP-TOL-31828. Respondent filed Answers in both cases.

The two cases were consolidated per order of the Administrative Law Judge and both proceeded to hearing on January 25 and 26, 2012 in Toledo, Lucas County, Ohio. In a decision dated January 28, 2013, the ALJ, Hon. Denise M. Johnson, issued Findings of Fact, Conclusions of Law, and Recommendation that the complaints be dismissed. Complainant respectfully objections to the ALJ’s determination and urges reversal.

II. STATEMENT OF THE FACTS

Marcus Walker began his career with Respondent Best Buy as a seasonal, part-time Media Specialist on December 8, 2001. T. 191. During his tenure at Respondent’s Store #243, however, Mr. Walker earned regular promotions and pay raises. T. 34-35. Eventually Mr. Walker achieved promotion to the position of Customer Experience Manager (“CEM”) T. 34. At the time of his suspension and termination, Mr. Walker was the sole African-American manager at Store #243. T. 92.

The General Manager of the store was Jason Carpenter. T. 37. At the time of Mr. Walkers’ suspension and termination, the management personnel at the store included General Manager Jason Carpenter as well as four assistant managers: Operations Manager Laura Stout, Services Manager Bryan Ragsdale, Warehouse Manager Keith Van

Sant, and Mr. Walker. With the exception of Walker, all of these individuals are Caucasian. T. 92, 226, 37- 38

Store #243 had a problem with high shrink, or loss of product through theft or employee error T. 15. Because of the high levels of shrink, Best Buy conducted an investigation of the store beginning in the summer of 2006. T. 406-407. This investigation was led by Avni Elezi, the Area Asset Protection Market Manager for Best Buy. T. 347. During his investigation, Mr. Elezi discovered that there was a hole in the wall of the warehouse, which is attached to the store. T. 356-357. It was possible to use the hole to steal merchandise from the store. *id.* The two Caucasian individuals in charge of the warehouse were placed on a performance improvement plan and given 90 days to comply but were not immediately suspended or fired. T. pp. 424, 427.

General Manager Jason Carpenter began working at store #243 in April or May of 2007, after Mr. Elezi had begun the initial investigation. T. 222. Soon after his arrival, Mr. Carpenter asked Mr. Elezi to conduct an audit of the store. T. 359-360. The audit confirmed that the store had many issues, from shrink to customer related issues. T. 360.

During the audit, Mr. Elezi questioned Mr. Walker about possible violations of loss prevention policies T. 399. Specifically, Mr. Elezi questioned Mr. Walker regarding violations of the key-holder policy, time-records policies and for failing to have his belongings searched by the Loss Prevention team upon leaving the store T. 43-46, 399-402.

The key-holder policy made store keys the responsibility of the person to whom they had been assigned T. 126, 158. The policy prohibited key-holders from giving keys to unsupervised subordinates. T.126.

The time-records Policy prohibited off-the-clock work, and required hourly employees to leave the building immediately after clocking out T. 125, 484.

A third policy mandates that every employee leaving the building must have their bags and coat checked. T. 54, 213, 242.

When questioned about the key-holder policy, Mr. Walker advised Mr. Elezi that he had given his keys to other employees, but that other managers regularly engaged in the same practice. T. 43-46, 401.

As to the time-records policy, Mr. Walker explained that he was not, in fact, alone in the store on those occasions, but rather was accompanied by hourly employees waiting for rides or searching for personal items they had lost or misplaced in the store T. 47, 53. Mr. Walker denied failing to have his coat or bag checked prior to exiting the building. T. 175.

On November 14, 2007 Mr. Elezi suspended Mr. Walker. T. 401. Soon after his suspension, Mr. Walker filed an internal complaint. T. 56. He also filed a charge of discrimination with the Commission. *Id.* (*Commission Exhibit 1.*) Two weeks later, Mr. Walker's employment was terminated and he filed a second charge with the Commission. T. 57. (*Commission Exhibit 2.*)

After Mr. Walker's discharge, Ronald Folds, who is African-American, replaced Mr. Walker as Customer Experience Manager. T. 257.

III. LAW AND ARGUMENT

A. The Commission established a prima facie case.

The issue in this case is whether Best Buy suspended and then terminated

Mr. Walker's employment because of his race. R.C. 4112.02(A) provides that it is an unlawful discriminatory practice:

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 hire, tenure, terms, conditions, or privileges of employment ***.

In proving a violation under Chapter 4112, federal case law may be used because the analytical framework is the same as Title VII. *Plumbers & Steamfitters v. OCRC* (1981), 66 Ohio St.2d 192.

Absent direct evidence of discrimination, Ohio courts utilize the evidentiary framework established in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S. Ct. 1817. (See: *Kohmescher v. Kroger Co.* (1991), 61 Ohio St. 3d 501, 504, 575 N.E.2d 439).

Under that framework, a complainant must show that the employee is: (1) a member of a protected class; (2) suffered an adverse employment action; (3) was qualified for the position in question; and (4) either was replaced by someone outside the protected class or a similarly-situated, non-protected person was treated better. *McDonnell-Douglas, supra*, 411 U.S. at 802, 93 S.Ct. at 1824; see also *Kohmescher v. Kroger Co., supra*, 61 Ohio St. 3d at 506, 575 N.E.2d at 443.

At the time of his suspension and ultimate termination, Marcus Walker was the only African-American Manager at store #243. T. 92. All other managers at the time of his suspension and subsequent termination were Caucasian. T. 38. Therefore, Mr. Walker belongs to a protected class in relation to similarly situated co-workers. *McKenzie v. Wright State Univ.* (1996), 114 Ohio App. 3d 437, 683 N.E. 2d 381, 383. Mr. Walker's suspension and eventually termination rises to the level of an adverse employment action.

Hollins v. Atl. Co., Inc., 188 F3d 652, 662. (6th Cir. 1999). Mr. Walker was also qualified for the position that he held, having worked his way up through the ranks. T. 34-36. Jason Carpenter, the General Manager of the Store, testified that he believed Mr. Walker did a good job. T. 256-257. *No one* believed that Mr. Walker was guilty of theft or directly responsible for shrink. T. 287, 405.

1. The Evidence demonstrated that Mr. Walker was treated differently than employees not in the protected class.

Avni Elezi testified that shrink at store #243 had been of concern to the company for some time. T. 354-355. As a result, he conducted an investigation beginning in the summer of 2006. T. 355. This investigation revealed that there was a hole in the wall of the store's warehouse. The hole was large enough to allow removal of merchandize and could be directly accessed from the outside of the building. T. 356-357, 408.

Two Caucasian managers were responsible for oversight of the warehouse area with this large hole in the wall. Furthermore, Best Buy concluded following an investigation that these two Caucasian managers "knew or should have know" about the hole in the wall. Instead of being fired, however, the Caucasian managers who were in charge of the warehouse and who should have seen the hole, were merely placed on an action plan:

THE COURT: I guess I'm a little confused.
We're not talking about a
hypothetical here. We're
talking about two individuals
who actually were employed
by –

THE WITNESS: Best Buy.

THE COURT: -- Best Buy. These individuals who Best Buy determined may have had some level of responsibility or should have known, you know, knew or should have known –

THE WITNESS: Right.

THE COURT: -- because they had control over the area, they were then put on a 90-day action plan, correct?

THE WITNESS: Correct.

T. 428

THE COURT: What was the race of the individuals who were put on a 90- day performance plan and then eventually terminated by Best Buy?

THE WITNESS: They were white.

T. 446.

In contrast, Mr. Walker was not placed on a 90-day performance plan. He was immediately suspended, then fired. Furthermore, unlike the two Caucasian managers, there was never any determination made by anyone at Best Buy that the actions of Mr. Walker resulted in theft, or that Mr. Walker had been in any way involved in any theft.

Mr. Carpenter also testified about a scam involving the theft of over a dozen television sets. T. pp. 273-275. He stated that the problem was “rampant.” T. 274. He indicated that he held the Caucasian Operations Manager, Dan Walter, responsible. T.

276. Incredibly, Mr. Carpenter testified that he believed Walter may have received a written warning. *Id.* In contrast, Marcus Walker was suspended, and then terminated. *Id.*

Heather Salva, a former Best Buy employee, testified that all of the managers violated the key-holder policy and the policy regarding employees remaining in the building after clocking out. T. 299-301, 319. She stated that when Mr. Walker was fired, she sent an email to Ron Folds in support of Mr. Walker. *Id.* (*Commission Exhibit 4*). In the email, she also confirmed that all managers violated the key-holder policy and also routinely allowed employees to stay in the building to await rides after clocking out. *Id.*

Similarly, Mr. Folds, who was hired to replace as assistant manager, testified that, prior to becoming a manager, all of the managers left keys with him and walked away. T. 257, 328. Mr. Carpenter likewise acknowledged that sometimes employees are permitted to wait inside the building for rides or escorts to their cars after clocking out. T. pp. 260. Yet, no one but Mr. Walker was suspended or fired for allowing employees to wait after clocking out.

While shrink was a major problem at the store, affecting virtually every department under the eyes of several department managers, no Caucasian manager received discipline beyond a performance improvement plan. Only Marcus Walker was held accountable by being suspended or losing their job.

2. Respondent's Reason for Mr. Walker's discharge is pretext for discrimination.

Although the Commission proved its *prima facie* case, when a Respondent articulates a legitimate, nondiscriminatory reason for its adverse action the burden shifts back to the Commission to demonstrate that the articulated reason was pretext. Here, Respondent asserts that it terminated Mr. Walker's employment because he violated three

company policies. This would be a legitimate, non-discriminatory reason. *St. Mary's Honor Ctr. v. Hicks* (1993), 509 U.S. 502, 510-11, 516; *USPS Bd. of Governors v. Aikens* (1983), 460 U.S. 711, 714-15. The burden is with the Commission to show by a preponderance of reliable, probative, and substantial evidence that Respondent's articulated reason for terminating Mr. Walker was a pretext for discrimination.

There are essentially three ways to show pretext: 1) the proffered reason had no basis in fact; 2) the proffered reason did not actually motivate the discharge; or 3) the reason was insufficient to motivate the discharge. See, e.g. *Jenkins v. Nashville Pub. Radio* (6th Cir. 2004), 106 Fed. Appx. 991, 993 and *Allen v. Highlands Hosp. Corp.* (6th Cir. 2008), 545 F.3d 387, 396. Also, a fact finder should "consider the reasonableness of the decision as it illuminates the employer's motivations." *In re Lewis v. Sears, Roebuck & Co.* (6th Cir.1998), 845 F.2d 624, 633.

a. **The legitimate non-discriminatory reason offered was insufficient to motivate the discharge.**

The Commission showed with reliable, probative, and substantial evidence that Respondent's purported nondiscriminatory reason for the suspension and termination of Mr. Walker's employment was insufficient to motivate the discharge.

It cannot be emphasized enough that Mr. Walker was never found to be directly or indirectly responsible for any loss, theft or shrink. Mr. Elezi testified as follows:

Q. And let me just, as a final piece, your investigation did not reveal any theft by Mr. Walker, did it?

A. No, it didn't.

T. 405.

Likewise, the General Manager, Jason Carpenter, reiterated this belief:

Q. Okay. You also said that Marcus, you did not think that Marcus was responsible physically for the shrinkage, correct?

A. I do not.

T. 287.

As noted above, several managers were found to be ultimately responsible for theft incidents occurring within their departments. Those whose job it was to oversee the warehouse did not lose their jobs even though there was a hole in the wall big enough to allow product to exit the building. T. 357. Apparently, this was not considered serious enough to result in termination of employment. The two Caucasian individuals who were held responsible were placed on performance improvement plans. T. 426-427.

Likewise, Best Buy did not deem it necessary to fire the manager who oversaw the loss of over a dozen television sets because of employee theft. T. pp. 273-274. At best, that manager may have received a written warning. T. 277.

There was testimony regarding problems with delivery trucks and problems with employees stealing gift cards. T. 409-410. There is no indication that any manager was suspended or lost their job because of this. Keith Van Sant was in charge of the delivery trucks, yet no disciplinary action was taken against him. T. 409-411.

There was testimony that people were removing shopping carts of stolen items through the front door. T. 414. No manager was suspended or lost a job over that.

There was testimony regarding an employee's purposely shutting off the surveillance video and allowing product out the front door. T. 266-267. No manager lost a job over that.

As noted, Respondent also conducted an investigation surrounding Mr. Walker of violating the time-records policy. (*Respondent's Exhibits J, K, L-1 through L-15*). Yet

there was no similar investigation involving any other manager, even though records confirmed that they regularly worked late. For example, Respondent did not investigate whether anyone worked with Keith Van Sant until 1:20 am on August 14, 2007, or when that employee clocked out. T. 432-433, (*Respondent's exhibit L1, L2*). There was no investigation of who worked with Brian Ragsdale until 2:28 am on August 17, 2007 or when that person clocked out. *Id.* There is no record of who worked with Keith Van Sant until 12:45 am on August 21, 2007 or when he or she clocked out. *Id.* There is no record of who worked with Mr. Van Sant until 12:06 am on August 21, 2007 or when they clocked out. *Id.* Again, there is no record of who worked with Mr. Van Sant until 2:17 am on August 31 2007 or when they clocked out. *Id.* In contrast, Mr. Elezi investigated and created a record of all of the employees whom he believed were present in the store when Mr. Walker was closing. (*Respondent's Exhibit J*). When asked, he admitted that he never prepared such information with respect to any other manager:

THE COURT: Did you also make the same sort of notes that we see in Respondent's Exhibit J for other managers that you –

THE WITNESS: No, I didn't.

T. 398.

Thus, Respondent singled out the only African-American manager at store #243, even though he was not to be responsible for any “shrink,” and terminated his employment, while affording similarly situated Caucasian employees, who were determined to be responsible for actual shrink, the opportunity to correct errant behavior.

It is simply not reasonable to accept that the reasons proffered are sufficient to justify Mr. Walker's termination. Other Caucasian managers engaged in far more serious

misconduct without facing termination. A Caucasian warehouse manager was not terminated even though he was believed to have been aware that there was a hole in the exterior wall of the warehouse that he supervised, which was used to move stolen merchandise out of the store. Yet, at the same time, the sole African-American manager was suspended and then fired even though he was never found to be responsible for any shrink, loss or theft at any time, and for conduct that was routine among all managers. Furthermore, there was a clear absence of parity in the investigation that Best Buy carried out. Best Buys investigation was focused entirely on its only African American manager, despite evidence that the violations of which he was accused were also routinely engaged in by Caucasian managers.

b. Respondent acted without a reasonably formed Business Judgment.

A purported nondiscriminatory reason for a termination is pretextual when the “business judgment was so riddled with error that [the employer] could not honestly have relied upon it.” *In re Lewis*, 845 F.2d at 633. In assessing whether the nondiscriminatory reason proffered by the employer is “honest,” a fact finder must look at whether the employer “made a reasonably informed and considered decision before taking the complained-of action.” *Allen v. Highlands Hospital Corp.* (6th Cir. 2008), 545 F3d 387, 398 (quoting *Michael v. Caterpillar Fin. Servs. Corp.* (6th Cir. 2007), 496 F.3d 585, 598-99).

According to Mr. Elezi, no other store manager was found to have violated the key-holder policy. T. p 374. However, Mr. Elezi could not identify anyone with whom he had spoken, produced no notes of his investigation, and could offer no information that would identify or confirm that he interviewed any other individual as part of his

investigation. T. 417. Although Mr. Elezi claimed to have carried out an investigation, not a single shred of evidence was produced to confirm that he had done so. At the same time, the testimony of two employees, Ms. Salva and Mr. Folds, confirmed that every manager gave out keys regularly. T. 299, 326.

As noted above, Ms. Salva testified that all managers engaged in violations of the key-holder policy as well as allowing employees to wait inside the store after clocking out. T. pp. 299-301. Jason Carpenter (the store manager) echoed the fact that employees would wait in the store after clocking out. T. 260-261. Mr. Walker told Mr. Elezi, during the initial interview, that violations of the key-holder policy were ongoing at that very moment, but Mr. Elezi saw no reason to look further. He declined to follow-up on Mr. Walker's allegations because he had already concluded his investigation:

Q. Okay. So to catch up, tell us the investigation, what he said about the gap and what he said during the interview.

A. He had -- he had indicated -- and I'm trying to -- and I know for a fact he had indicated that there was other managers that were doing that as well.

T. 400. Rather than investigating the information provided, Mr. Elezi took the position that his investigation was already complete. *Id.*

Had Mr. Elezi elected to follow-up on what Mr. Walker was telling him, he inevitably would have discovered facts about which Folds and Salva testified. In fact, the ALJ refused to allow as evidence the introduction of correspondence forward by approximately nine *additional* co-workers at the time of these events attesting that all

managers (i.e. the other four Caucasian managers) routinely did the same thing that Mr. Walker was accused of doing.¹ It is difficult to believe that Mr. Elezi conducted an investigation, but encountered none of these co-workers.²

In sum, the evidence confirmed disparate treatment in the investigation that was carried out, and in the discipline that was imposed on Mr. Walker, who was never believed by anyone to have engaged in or caused any theft of product. The actions for which he was disciplined were routine among Caucasian manager, yet Best Buy focused its investigation on Walker alone. More important, Walker's alleged policy violations pale in comparison with Best Buys own testimony that Caucasian warehouse managers did nothing in response to a large hole in the warehouse wall that was used to steal merchandise. The ALJ's findings of fact and conclusions of law with regard to these issues were in error and should be reversed. Complainant respectfully urges the Commission to make a determination that Mr. Walker's suspension and termination were discriminatory and he is entitled to back pay less interim earnings.

Respectfully submitted,



Paul T. Belazis (0030356)
Counsel for Complainant

¹ Complainant believes this evidentiary ruling was error, in as much as the correspondence is probative of the adequacy and legitimacy of Best Buy's investigation.

² Best Buy also alleged that Mr. Walker one some occasion left the store without having his bag or coat checked. T. 422 Best Buy asserted that it was shown on video tape, but the tape never materialized. T 415 Mr. Walker adamantly denied it. T. 175. Even if this allegation were correct, however, it pales in comparison with the actions of those of the Caucasian managers who did nothing about a hole in the warehouse wall with direct access to the outside. T. 414.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by ordinary U.S. Mail, postage prepaid, the 15th day of Feb, 2012 to the following:

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Gregory C. Scheiderer, Esq.
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Attorneys for Respondent

Hon. Denise Johnson,
Chief Administrative Law Judge
Ohio Civil Rights Commission
State Office Tower, 5th Floor
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Paul T. Belazis

Respondent's
Response
To
Objections

VORYS

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RECEIVED

MAR 04 2013

March 4, 2013

OHIO CIVIL RIGHTS COMMISSION
COMPLIANCE DEPARTMENT

VIA MESSENGER DELIVERY

Desmon Martin, Director of Enforcement and Compliance
Ohio Civil Rights Commission
State Office Tower, 5th Floor
30 East Broad Street
Columbus, Ohio 43215-3414

Re: *Marcus Walker v. Best Buy Stores, L.P.*
Complaint Nos. 08 - EMP - TOL - 31785 and 31828

Dear Mr. Martin:

Please accept for filing the enclosed *Respondent's Response to Complainant's Statement of Objections to the Chief Administrative Law Judge's Findings of Fact, Conclusions of Law and Recommendations* relative to the above matter.

Sincerely,



Gregory C. Scheiderer

GCS/hr
Enclosure

cc: Susan A. Sharkey, Esq., Assistant Attorney General (w/encl.)
Paul Belazis, Esq. (w/encl.)
Marcus Walker (w/encl.)

The Commission, after reviewing the ALJ's Report, has elected not to file objections. However, Complainant Marcus Walker ("Complainant") has filed a Statement of Objections ("Statement of Objections" or "Brief") to the ALJ's Report. Complainant's Brief, however, does not identify which facts or conclusions are challenged. Rather, the Brief presents a near verbatim copy of the Post-Hearing Brief filed by the Attorney General's office on behalf of the Commission ("Post-Hearing Brief").¹

The ALJ fully reviewed the Post-Hearing Brief prior to issuing the ALJ's Report. As Complainant reiterates the same arguments already considered by the ALJ and presents only a generalized argument for reversal of the ALJ's Report, Respondent's Response will highlight the facts and arguments seen by the ALJ as justifying a Dismissal Order for the captioned-complaints.

The ALJ appropriately concluded that the Commission failed to meet its burden of proving that Respondent suspended and discharged Complainant because of his race. Complainant was employed at Respondent's Toledo, Ohio store location, which had experienced significant product loss and theft ("shrink") problems. Best Buy conducted an extensive investigation into the shrink. One of the two investigators responsible for the shrink investigation is African-American. The shrink investigation resulted in significant turnover, including the discharge of several Caucasian Best Buy managers. Complainant's discharge resulted from the review of video tape, Best Buy records, and an interview of Complainant. Based on Complainant's admissions and Best Buy's good faith investigation, the ALJ properly concluded that Complainant's race played no role in Complainant's discharge and recommended the dismissal of the charges. This recommendation should be adopted by the Commission.

¹ The Post-Hearing Brief filed on behalf of the Ohio Civil Rights Commission on June 8, 2012 is attached as Exhibit A.

II. RELEVANT FACTS

Complainant's Statement of Objections does not raise any specific issues with the ALJ's factual summary. For purposes of this Opposition, Best Buy will highlight the material facts and the ALJ's proper reliance on the record.

A. Complainant's Employment History

The Statement of Objections readily admits that Complainant had a successful career at Best Buy. Complainant worked at Best Buy since 2001. (Tr. at 33, 35); (ALJ's Report at 5). Complainant received several promotions before moving into his final position, Customer Experience Manager ("CEM") at Best Buy's store located on Monroe Street in Toledo, Ohio ("Store 243"). (Tr. at 33, 35; ALJ's Report at Finding ¶ 6).

Complainant held the CEM position for six years. (ALJ's Report at ¶ 6). Complainant was discharged on December 3, 2007 for the violation of several Best Buy's policies. (ALJ's Report at Finding ¶ 18; Tr. at 251-252).

B. The Shrink Issues At Store 243

Leading up to Complainant's 2007 discharge, Store 243 had significant issues with "shrink," a term used by Respondent to refer to product loss, whether through theft, error, or failure to follow procedures. (Tr. at 228, 142). The Statement of Objections admits that Store 243 "had a problem with high shrink." (Statement of Objections at 3). Consistent with the Statement of Objections and the hearing transcript, the ALJ concluded that Store 243 had "high levels of shrink." (ALJ's Report at Finding ¶ 14).

Avni Elezi ("Elezi"), Respondent's Area Asset Protection Manager, is in charge of addressing shrink issues for a thirty-six store district including Store 243. (Tr. at 350). Elezi led the investigation into Store 243's shrink issues. (Tr. at 359-360; ALJ's Report at Finding ¶ 15).

Terry Stein (“Stein”), an African-American, is a District Support Field Manager who also works to address shrink issues in Store 243’s district, assisted Elezi. (Tr. at 353; ALJ’s Report at Finding ¶ 15). Although the Statement of Objections admits that Elezi was investigating the shrink issues, it fails to identify Stein’s role in the investigation and ultimate decision to discharge Complainant. (Statement of Objections at 3).

Additionally, although the Statement of Objections attempts to limit the reach of the shrink investigation to one hole in a wall (Statement of Objections at 3), the ALJ correctly concluded the shrink investigation was lengthy and it included many Best Buy employees. (ALJ’s Report at ¶ 15-16). In fact, the shrink investigation led to 65% store turnover. (Tr. at 427). This turnover included the discharge of several Caucasian Best Buy managers. (Tr. at 137-38, 144, 227-28).

C. Store 243’s Management Team

The hierarchy of Store 243 was comprised of a General Manager (“GM”) at the highest level, four assistant managers, and two managers-in-training that had many of the same duties as assistant managers. (Tr. at 36, 12, 330-31; ALJ Report at Finding ¶¶ 7, 9-10). The CEM was one of the four assistant managers. (Tr. at 36; ALJ Report at Finding ¶ 7). In addition to Complainant, one of the managers-in-training, Ronald Folds, is African-American. (ALJ’s Report at Finding ¶ 11; Tr. at 132).

Jason Carpenter (“Carpenter”) was the GM at the time of Complainant’s discharge. (Tr. at 222, 228; ALJ’s Report at Finding ¶ 8). Carpenter was hired because the prior GM was discharged as part of the shrink investigation. (Tr. at 407-08). At Store 243, Carpenter implemented weekly meetings and strict loss prevention rules to address shrink issues. (Tr. at

233-34, 305). Complainant received pay increases totaling \$7,000 during Carpenter's tenure as GM of Store 243. (Tr. at 109, 256).

D. Complainant's Discharge

The shrink investigation conducted by Elezi and Stein revealed that Complainant was in violation of multiple of Respondent's policies. Complainant violated the Key Holder Policy, Time Records Policy, and the Closing Policy.

1. Key Holder Policy

Two months prior to Complainant's termination, the Key Holder Policy was made more strict so that only seven employees could be in possession of keys: the GM, four assistant managers, and the two managers-in-training. (148-49, 245, 330-31; see also ALJ Report at Conclusion ¶ 26). The managers-in-training at the time were Ronald Folds, an African-American, and Andrea Martin. (Tr. 330-31, 245; ALJ Report at Finding ¶¶ 10-11). Those authorized key holders were not allowed to give their keys to an unauthorized employee and walk away. (Tr. at 325-26, 481; ALJ Report at Conclusion ¶ 27). Complainant was in the meetings where the Key Holder Policy implementations were discussed. (Tr. at 216, 233-34). Complainant signed the Key Holder agreement acknowledging that he was subject to the Key Holder Policy. (Tr. at 183-84, Hearing Ex. F; ALJ Report at Conclusion ¶ 25).

The investigatory interviews conducted during the audit revealed Complainant repeatedly violated the Key Holder Policy, a policy violation to which he admits. (Tr. at 43, 126, 176, 405, 374, 464). No other key holders were identified throughout the entire investigatory audit as having violated the Key Holder agreement. (Tr. at 363-64, 374, 405). Outside of Complainant, Ronald Folds knows of no other examples of violations of the policy. (Tr. at 329). Heather Salva identified managers as handing out keys in an email, but her email

identification refers to situations occurring prior to 2007, prior to Complainant being the CEM, prior to Jason Carpenter assuming the GM position of Store 243, and prior to the implementation of the strict Key Holder Policy at issue. (Tr. at 317, 321).

2. Time Records Policy

Respondent's Time Records Policy requires that hourly employees remain on the clock when working in the store. (Tr. at 125, Hearing Exhibit C). During the store closing process, after all other employees have left, the manager and one employee remaining on the clock are to do a perimeter check of the store, check each other for product, and leave the store together. (Tr. at 167-68, 243-44, 334-35, 483). The manager on closing duty is not allowed to stay in the store alone after closing. (Tr. at 127, 129, 334-35).

During the audit, all time records were examined for all managers closing during a period of sixty days. (Tr. at 378, 284). The time records indicate that, when Complainant was closing the store, there are multiple occasions when the last employee clocked out in excess of fifteen to thirty minutes prior to Complainant setting the alarm and leaving. (Tr. at 377; Hearing Exhibits D, J). An investigation of all managers revealed that Complainant was the only one in violation of the Time Records Policy. (Tr. at 254, 284, 366, 373-74, 378, 395-97, 400, 405). Any employee violating the Time Records policy would have been discharged. (Tr. at 254). In Jason Carpenter's experience as a manager, he has only had one other employee violate the Time Records Policy. (Tr. at 255). That employee, Matt Crystal, was Caucasian and terminated for his violation. (Tr. at 255 ("The same exact position in my previous store, and I had the same situation and the same outcome.")).

3. Closing Policy

Respondent has a Closing Policy that requires the store doors are locked during the store closing procedure. (Tr. at 242). After the doors are locked, employees walk through and inspect their departments with the manager responsible for closing, then the employees are checked by a manager or loss prevention person and let out of the store. (Tr. at 162-63, 334, 242). As discussed above, the last employee and manager on closing duty that evening walk the perimeter of the store together to ensure everything is in order and secure. (Tr. at 243, 334, 462).

When Complainant was responsible for closing, numerous employees stayed in the store after finishing up the inspection of their departments and clocking out. (Tr. at 47, 378-81, 447). Review of store video reveals that, while other employees stayed off the clock in view of the camera at the front of the store, Complainant would then leave the other employees and walk into the store by himself. (Tr. at 378-81). Complainant would be unaccompanied by other employees and out of view of the cameras on multiple occasions. (Tr. at 379-81, 461). Those employees at the front of the store during Complainant's closing duties would then exit the store area without being checked. (Tr. at 462-63). Further, Complainant was videotaped leaving the store without being checked, after having been off camera and alone in the store. (Tr. at 379-81). During the audit of Store 243, fifty to sixty interviews were conducted and video review was conducted for all closing managers, but Complainant was the only manager in violations of the Closing Policy. (Tr. at 464, 366, 373-74, 400). Complainant admits that his procedural violations can reasonably be seen as responsible for the store shrink. (Tr. at 192-93). Complainant's violations are a terminable offense. (Tr. at 465-66).

E. Suspension and Discharge of Complainant

Elezi, Stein, the district human resources manager, and the district manager, all reviewed the evidence collected during the audit regarding Complainant, and all four thought it was appropriate to proceed with an investigatory interview of Complainant. (Tr. at 370-71). Accordingly, Stein and Elezi interviewed Complainant about the violations and suspended Complainant at the conclusion of the interview. (Tr. at 40-41, 401). Subsequently, a third party HR group, Accenture, reviewed all investigatory documents relating to Complainant and the case study. (Tr. at 251, 402-03; Hearing Exhibit I). Complainant admits the third party reviewed all relevant evidence. (Tr. at 179). Accenture, Stein, Elezi, the district manager, and the district human resources manager all recommended that Complainant be discharged. (Tr. at 251-52, 402-04, Hearing Exhibit I). Following the reviews and recommendations, Jason Carpenter discharged Complainant in December of 2007. (Tr. at 252).

F. Ronald Folds Replaced Complainant as CEM

Following Complainant's termination, the vacant CEM position was posted. (Tr. at 332) Ronald Folds applied, was interviewed, and subsequently replaced Complainant as the CEM for Store 243. (Tr. at 332-33). Ronald Folds is African-American. (Tr. at 132). Ronald Folds continues to work at Respondent, (Tr. at 324), and throughout his employment has never witnessed or experienced discrimination at Respondent. (Tr. at 336).

III. ARGUMENT

A. Response to Complainant's Assertion that a *Prima Facie* Case of Discrimination was Established

The ALJ's Report concluded that it was unnecessary to determine whether a *prima facie* case had been established because Respondent articulated a legitimate, nondiscriminatory reason for the decision to discharge Complainant. (ALJ Report at Conclusion ¶ 10). Still, in his

Statement of Objections, Complainant argues that a *prima facie* case was established. (Brief at 4). Accordingly, this Response sets forth reasons that a *prima facie* case of discrimination could not be established for Complainant.

Under the burden shifting framework, Complainant bears the initial burden of proving the *prima facie* case of discrimination by showing: (1) Complainant is a member of a protected class; (2) he was qualified for the position held; (3) he suffered an adverse employment action; and (4) he was replaced by someone outside the protected class or similarly-situated employees outside the protected class were treated more favorably than he was. Mitchell v. Toledo Hosp., 964 F.2d 577, 582-83 (6th Cir. 1992). To be similarly-situated, employees "must have dealt with the same supervisor, have been subject 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." Valentine v. Westshore Primary Care Assoc., 8th Dist. No. 89999, 2008-Ohio-4450, at ¶89; Atkinson v. Akron Bd. of Edn., 9th Dist. No. 22805, 2006-Ohio-1032, at ¶28.

Here, it is undisputed that Complainant was replaced by an African-American. Further, Complainant was discharged for his direct violation of three of Respondent's policies that no similarly-situated employees violated. Accordingly, the Commission cannot establish the *prima facie* case of discrimination. The ALJ came to a similar conclusion, stating that other employees did not engage in "misconduct of 'comparable seriousness' to that of Complainant." (ALJ Report at Conclusion ¶ 17).

First, Complainant admitted to violations of the Key Holder Policy when questioned during the investigatory interviews in the audit of Store 243. (Tr. at 43, 126, 176, 464). During the audit and investigation of all managers, which included fifty to sixty interviews, there was no

indication that any key holders other than Complainant had violated the policy. (Tr. at 363-64, 374, 405, 464). Ronald Folds knows of no other key holders that were in violation, (Tr. at 326, 330-31), and former employee Heather Salva only points to incidents occurring in 2006, prior to implementation of the strict policy violated by Complainant. (Tr. at 317, 321). Other than Complainant, no other key holder violated the Key Holder Policy. (ALJ Report at Conclusion ¶ 24). Second, Complainant violated the Time Records Policy. (Tr. at 377; Hearing Exhibits C, D, J). No other employee violated this policy at Store 243. (Tr. at 254, 284, 366, 373-74, 378, 395-97, 400, 405). Third, Complainant engaged in significant violations of the Closing Policy. (Tr. at 192-93). The complete audit of the store and managers revealed that no other manager engaged in any of the violations engaged in by Complainant. (Tr. at 464, 366, 373-74, 400, 405).

For the time Carpenter was the GM of Store 243, Complainant was the only manager in violation of any of the above mentioned policies, let alone in violation of all three policies. This entire record of Complainant's violations was considered by Respondent's leadership and the third-party HR vendor in determining that Complainant should be discharged. (Tr. at 251-52, 402-04, 466). No similarly-situated employee had Complainant's record of violations, and no similarly-situated employees found in direct violation of any of Respondent's policies were treated more favorably than Complainant. Accordingly, Complainant is unable to show the *prima facie* case of discrimination. See Valentine, 2008-Ohio-4450, at ¶89; Atkinson, 2006-Ohio-1032, at ¶28 (to be similarly situated, employees must have the "same supervisor, have been subject to the same standards and have engaged in the same conduct.").

The ALJ's conclusions support the Commission's failure to present a *prima facie* case, for the ALJ concluded that the employees who the Commission argued engaged in misconduct were not similarly-situated to Complainant. (ALJ Report at Conclusion ¶¶ 17-24).

B. There is No Evidence of Pretext

Complainant admits that Respondent had a legitimate, non-discriminatory reason for its discharge decision. (Statement of Objections at 8-9; see also ALJ Report at Conclusion ¶¶ 11-12 (Respondent met its burden of production)). However, without objecting to any specific conclusions of the ALJ's Report, Complainant argues that Respondent's discharge of Complainant was a pretext for discrimination. (Statement of Objections at 8).

To establish pretext, it must be established that Respondent's proffered reason for Complainant's discharge: (1) had no basis in fact; (2) did not actually motivate the adverse action; or (3) was insufficient to motivate the adverse action. Smith v. Leggett Wire Co., 220 F.3d 752, 758-59 (6th Cir. 2000). The Commission "must allege more than a dispute over the facts upon which [the] discharge was based. [It] must put forth evidence which demonstrates that the employer did not 'honestly believe' in the proffered non-discriminatory reason for its adverse employment action." Braithwaite v. Timken Co., 258 F.3d 488, 493-94 (6th Cir. 2001).

Here, the Commission was unable to meet any of the elements required to show pretext. First, the determination that Complainant had multiple policy violations was based on a complete investigation entailing fifty to sixty interviews, video review, and Complainant's own admissions. (Tr. at 43, 176, 254, 284, 366, 373-74, 395-97, 400, 405, 464). Plaintiff's admission verify the accuracy of Best Buy's discharge reasons and preclude a finding of pretext. Dautartas v. Abbott Laboratories, 10th Dist. No. 11AP-706, 2012-Ohio-1709, ¶ 28 (the plaintiff must prove the reason for his discharge was "false").

Second, Respondent discovered the facts leading to Complainant's discharge in a widespread investigation of all managers at Store 243, and reviewed those facts and the decision to discharge Complainant with multiple individuals and entities, including a third party HR

specialist. (Tr. at 251, 370-71, 402-03). All involved viewed discharge as the appropriate action. (Tr. at 251-52, 402-04, Hearing Ex. I). No evidence was presented or exists showing that those recommending discharge were motivated by race rather than a review of the violations uncovered during the complete investigation of all managers. Best Buy's investigation firmly supports Best Buy's "honest belief" in the grounds for Complainant's discharge and precludes a finding of pretext. Tingle v. Arbors at Hilliard, Case No. 11-3494, 2012 U.S. App. LEXIS 18315, *15-16 (6th Cir. Aug. 29, 2012) ("[i]f an employer has an 'honest belief' in the nondiscriminatory basis upon which it has made its employment decision (i.e. the adverse action), then the employee will not be able to establish pretext") (citing Majewski v. ADP, 274 F.3d 1106, 1117 (6th Cir. 2001)).

Finally, as the ALJ properly concluded, Complainant was unable to prove that any similarly-situated employees were treated differently. The Statement of Objections attempts to prove pretext by making factual assertions implying that other managers or employees were similarly-situated to Complainant, but were not discharged for similar offenses. Complainant repeats many of the misleading and incomplete assertions that were originally presented to and reviewed by the ALJ. A complete review of the evidence shows that no other manager, let alone the managers during Jason Carpenter's tenure as GM, directly violated any policies and was not discharged.

Complainant repeatedly points to the assertion that two Caucasian employees were placed on ninety day action plans because of a hole found in the warehouse wall in the summer of 2006. (Statement of Objections at 3, 10). Complainant's assertion is irrelevant. (See ALJ Report at Conclusion ¶¶ 18-20 (the warehouse employees were not similarly-situated to Complainant)). First, the hole was discovered and remedied in 2006, prior to Jason Carpenter

being hired as GM of Store 243. (Tr. at 230-31, 408). Second, Elezi could not determine who was directly responsible for the hole in the wall. (Tr. at 408, 424-28). Thus, a manager and supervisor were placed on action plans, the violation of which became the basis for their discharge. (Tr. at 408, 424-28).

Complainant implies that Van Sant is similarly-situated to Complainant and should have been discharged for an employee, Lamonte Hobbs, turning off surveillance video. (Brief at 10). However, during the investigation of Lamonte Hobbs' suspected activity, it was Complainant who was on closing duty in the store, not Van Sant. (Tr. at 390). Complainant was not discharged for Lamonte Hobbs' action because Complainant was not in direct violation of Respondent's policies. Similarly, Van Sant was not in direct violation of Respondent's policies. Additionally, Van Sant is the manager, along with Avni Elezi, that was able to uncover and alert Jason Carpenter to the video problem. (Tr. at 268). Van Sant is not comparable to Complainant. (ALJ Report at Conclusion at ¶ 21).

Complainant asserts that Dan Walter was a manager responsible for stolen television sets who was not discharged. (Brief at 7-8, 10). However, no manager was found to be directly responsible for this suspected activity or in direct violation of a related procedure, (Tr. at 275-76), and the suspected activity itself was just an unconfirmed "theory." (Tr. at 274; see also ALJ Report at Conclusion ¶ 21 (Dan Walter is not comparable to Complainant)). Even if the suspected activity was proven to be more than a theory, it could have been a floor leader, not a manager, who was responsible. (Tr. at 275). Under the procedures then in place, both managers and floor leaders had the authority to close out television pick-ups. (Tr. at 275). Accordingly, the GM, Carpenter, fixed the procedure. (Tr. at 275). Finally, there is no indication as to when

Dan Walter was a manager for Store 243, for the managers in place at the time of Complainant's discharge were Laura Stout, Bryan Ragsdale, Van Sant, and Complainant. (Tr. at 37-38).

The Complainant asserts that Ronald Folds said that, prior to his becoming a manager, all managers left keys with him and walked away. (Statement of Objections at 8). However, Complainant does not acknowledge that Ronald Folds, as manager-in-training along with Andrea Martin at the time, was a key holder with the authority to possess keys. (Tr. at 326, 330-31). The managers-in-training were two of the seven authorized key holders. (Tr. at 326, 330-31).

Complainant asserts that no action was taken against Van Sant for issues with delivery trucks and gift cards. (Statement of Objections at 10). However, these issues that were uncovered during the audit investigations occurred prior to Van Sant arriving at Store 243, who was new in his position at the time of the audit. (Tr. at 411-412). Further, Elezi testified that the operations manager at the time of the gift card issues had been found responsible, and that he had been fired "right away." (Tr. at 412).

Finally, Complainant asserts that no manager was discharged for people removing shopping carts of stolen merchandise from the store. (Brief at 10). The review of video tape during the audit investigation revealed tapes of employees including Lamonte Hobbs, not managers, turning their heads as product was stolen. (Tr. at 413-14). As with the delivery trucks and gift cards, this behavior was uncovered in the audit and would have occurred prior to the arrival of Van Sant. (Tr. at 414).

The ALJ properly concluded that "[t]he Commission failed to present evidence which would tend to show that Respondent's decisions were motivated by illegal discriminatory animus." (ALJ Report at Conclusion ¶ 28). Accordingly, the ALJ's recommendation should be adopted and this matter terminated.

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Chief Administrative Law Judge's Recommendations be accepted and the Complaints be dismissed.

Respectfully submitted,

VORYS, SATER, SEYMOUR AND PEASE LLP

s/ Gregory C. Scheiderer
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CERTIFICATE OF SERVICE

A copy of the foregoing was sent by ordinary U.S. Mail this 4th day of March 2013, to
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Complainant

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Exhibit A

STATE OF OHIO CIVIL RIGHTS COMMISSION

MARCUS WALKER,

COMPLAINT NOs. 08EMPTOL31785 &
08EMPTOL 31787

Complainant,

DENISE M. JOHNSON
Administrative Law Judge

vs.

BEST BUY STORES, L.P.,

Respondent.

BRIEF OF THE OHIO CIVIL RIGHTS COMMISSION

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Marcus Walker
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Complainant

I. STATEMENT OF THE CASE

The instant case commenced when Marcus Walker filed two charges with the Ohio Civil Rights Commission. The first was filed on November 14, 2007 and alleged that Mr. Walker had been suspended from work at Best Buy LP (“Best Buy”) because of his race. T. 33-34, *Commission Exhibit 1*. The Second charge was filed on December 3, 2007 and alleged that Mr. Walker’s employment had been terminated based upon his race. T. 92. (*Commission Exhibit 2*.) After conciliation was unsuccessful, the Commission issued two separate Complaints, Case No. 08-EMP-TOL-31785 and Case No. 08-EMP-TOL-31828. Respondent filed Answers in both cases.

The two cases were consolidated per order of the Administrative Law Judge and both proceeded to hearing on January 25 and 26, 2012 in Toledo, Lucas County, Ohio.

II. STATEMENT OF THE FACTS

Marcus Walker began his career with Respondent as a seasonal, part-time Media Specialist on December 8, 2001. T. 191. During his tenure at Respondent’s Store #243, Mr. Walker earned regular promotions and pay raises. T. 34-35. His latest position was Customer Experience Manager (“CEM”) T. 34. At the time of his suspension and termination, Mr. Walker was the sole African-American manager at Store #243. T. 92.

The General Manager of the store was Jason Carpenter. T. 37. At the time of Mr. Walkers’ suspension and termination, there were four assistant managers. T. 92, 226. The Operations Manager was Laura Stout. T. 37. The Services Manager was Bryan Ragsdale. *id.* The Warehouse Manager was Keith Van Sant. T. pp. 37-38. Each of those individuals are Caucasian. T. 38.

Store #243 had a problem with high shrink, or loss of product through theft or employee error T. 15. Because of the high levels of shrink, Best Buy conducted an investigation of the store beginning in the summer of 2006. T. 406-407. This investigation was led by Avni Elezi, the Area Asset Protection Market Manager for Best Buy. T. 347. During his investigation, Mr. Elezi discovered that there was a hole in the wall of the warehouse, which is attached to the store. T. 356-357. It was possible to use the hole to steal merchandise from the store. *id.* The two Caucasian individuals in charge of the warehouse were placed on a performance improvement plan and given 90 days to comply but were not immediately suspended or fired. T. pp. 424, 427.

General Manager Jason Carpenter began working at store #243 in April or May of 2007, after Mr. Elezi had begun the initial investigation. T. 222. Soon after his arrival, Mr. Carpenter asked Mr. Elezi to conduct an audit of the store. T. 359-360. The audit confirmed that the store had many issues, from shrink to customer related issues. T. 360.

During the audit, Mr. Elezi questioned Mr. Walker about possible violations of loss prevention policies T. 399. Specifically, Mr. Elezi questioned Mr. Walker regarding violations of the key-holder policy, time-records policies and for failing to have his belongings searched by the Loss Prevention team upon leaving the store T. 43-46, 399-402.

The key-holder policy made store keys the responsibility of the person to whom they had been assigned T. 126, 158. The policy prohibited key-holders from giving keys to unsupervised subordinates. T.126.

The time-records Policy prohibited off-the-clock work, and required hourly employees to leave the building immediately after clocking out T. 125, 484.

A third policy mandates that every employee leaving the building must have their bags and coat checked. T. 54, 213, 242.

When questioned about the key-holder policy, Mr. Walker advised Mr. Elezi that he had given his keys to other employees, but that other managers regularly engaged in the same practice. T. 43-46, 401.

As to the time-records policy, Mr. Walker explained that he was not, in fact, alone in the store on those occasions, but rather was accompanied by hourly employees waiting for rides or searching for personal items they had lost or misplaced in the store T. 47, 53. Mr. Walker denied failing to have his coat or bag checked prior to exiting the building. T. 175.

On November 14, 2007 Mr. Elezi suspended Mr. Walker. T. 401. Soon after his suspension, Mr. Walker filed an internal complaint. T. 56. He also filed a charge of discrimination with the Commission. *Id.* (*Commission Exhibit 1.*) Two weeks later, Mr. Walker's employment was terminated and he filed a second charge with the Commission. T. 57. (*Commission Exhibit 2.*)

After Mr. Walker's discharge, Ronald Folds, who is African-American, replaced Mr. Walker as Customer Experience Manager. T. 257.

III. LAW AND ARGUMENT

A. The Commission established a prima facie case.

The issue in this case is whether Best Buy suspended and then terminated Mr. Walker's employment because of his race. R.C. 4112.02(A) provides that it is an unlawful discriminatory practice:

For any employer, because of the race *** of any person,
*** to discharge without just cause *** or otherwise to dis-

criminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment ***.

In proving a violation under Chapter 4112, federal case law may be used because the analytical framework is the same as Title VII. *Plumbers & Steamfitters v. OCRC* (1981), 66 Ohio St.2d 192.

Absent direct evidence of discrimination, Ohio courts utilize the evidentiary framework established in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S. Ct. 1817. (See: *Kohmescher v. Kroger Co.* (1991), 61 Ohio St. 3d 501, 504, 575 N.E.2d 439).

Under that framework, a complainant must show that the employee is: (1) a member of a protected class; (2) suffered an adverse employment action; (3) was qualified for the position in question; and (4) either was replaced by someone outside the protected class or a similarly-situated, non-protected person was treated better. *McDonnell-Douglas, supra*, 411 U.S. at 802, 93 S.Ct. at 1824; see also *Kohmescher v. Kroger Co., supra*, 61 Ohio St. 3d at 506, 575 N.E.2d at 443.

At the time of his suspension and ultimate termination, Marcus Walker was the only African-American Manager at store #243. T. 92. All other managers at the time his employment was suspended then terminated and at other relevant times, were Caucasian. T. 38. Therefore, Mr. Walker belongs to a protected class in relation to similarly situated co-workers. *McKenzie v. Wright State Univ.* (1996), 114 Ohio App. 3d 437, 683 N.E. 2d 381, 383. Mr. Walker's employment was initially suspended and eventually terminated which rises to the level of an adverse employment action. *Hollins v. Atl. Co., Inc.*, 188 F3d 652, 662. (6th Cir. 1999). Mr. Walker was qualified for the job, having worked his way up through the ranks. T. 34-36. Jason Carpenter, the General Manager of the Store,

testified that he believed Mr. Walker did a good job. T. 256-257. No one believed that Mr. Walker was guilty of theft or directly responsible for shrink. T. 287, 405.

1. The Commission proved that Mr. Walker was treated differently than employees not in the protected class.

Avni Elezi testified that shrink at store #243 had been of concern to the company for some time. T. 354-355. As a result, he conducted an investigation beginning in the summer of 2006. T. 355. This investigation revealed that there was a hole in the wall of the store's warehouse and could be accessed from the outside of the building. T. 356-357, 408. Instead of being fired, the Caucasian managers who were in charge of the warehouse and who should have seen the hole, were merely placed on an action plan:

THE COURT: I guess I'm a little confused. We're not talking about a hypothetical here. We're talking about two individuals who actually were employed by –

THE WITNESS: Best Buy.

THE COURT: -- Best Buy. These individuals who Best Buy determined may have had some level of responsibility or should have known, you know, knew or should have known –

THE WITNESS: Right.

THE COURT: -- because they had control over the area, they were then put on a 90-day action plan, correct?

THE WITNESS: Correct.

T. 428

THE COURT: What was the race of the individuals who were put on a 90- day performance plan and then eventually terminated by Best Buy?

THE WITNESS: They were white.

T. 446.

Mr. Walker was not placed on a 90-day performance plan. He was immediately suspended, then fired.

An employee who reported to Keith Van Sant, the Product Process Manager who is Caucasian, was responsible for significant theft of product because he turned off the surveillance video. Mr. Van Sant was not suspended nor was he fired. T. 266-267.

Mr. Carpenter also testified about a scam involving the theft of over a dozen television sets. T. pp. 273-275. He stated that the problem was "rampant." T. 274. He indicated that he held the Caucasian Operations Manager, Dan Walter, responsible. T. 276. Mr. Carpenter was not even sure what the punishment for allowing over a dozen televisions to be stolen from the store was, but believes Walter may have received a written warning. *Id.* Unlike Marcus Walker, he was not suspended. Certainly, he did not lose his job. *Id.*

Heather Salva, a former Best Buy employee, testified that all of the managers violated the key-holder policy and the policy regarding employees remaining in the building after clocking out. T. 299-301, 319. She stated that when Mr. Walker was fired,

she sent an email to Ron Folds in support of Mr. Walker. *Id.* (Commission Exhibit 4). In the email, she also stated that all managers violated the key-holder policy and allowed employees to stay in the building to await rides after clocking out. *Id.*

Ron Folds was hired to replace Mr. Walker. T. 257. Mr. Folds testified that, prior to becoming a manager, all of the managers left keys with him and walked away. T. 328.

Mr. Carpenter acknowledged that sometimes employees did wait inside the building for rides or escorts to their cars after clocking out. T. pp. 260. He further acknowledged that this is not considered keeping people against their will. T. 261. He also stated that these people were not being forced to work without pay. *Id.* No one but Mr. Walker was suspended or fired for allowing employees to wait after clocking out.

While shrink was a major problem at the store, affecting virtually every department and under the eyes of several department managers, there is no evidence that any manager other than Marcus Walker was held accountable by being suspended or losing their job.

2. Respondent's Reason for Mr. Walker's discharge is pretext for discrimination.

Notwithstanding that the Commission has proved its *prima facie* case, when a Respondent articulates a legitimate, nondiscriminatory reason for its adverse action, there is no need to focus on whether the Commission proved a *prima facie* case. Here, Respondent asserts that it terminated Mr. Walker's employment because he violated three company policies. This would be a legitimate, non-discriminatory reason. Therefore, the presumption created by the establishment of a *prima facie* case "drops out of the picture" and the "factual inquiry proceeds to a new level of specificity." *St. Mary's Honor Ctr. v.*

Hicks (1993), 509 U.S. 502, 510-11, 516; *USPS Bd. of Governors v. Aikens* (1983), 460 U.S. 711, 714-15. The burden is with the Commission to show by a preponderance of reliable, probative, and substantial evidence that Respondent's articulated reason for terminating Mr. Walker was a pretext for discrimination.

There are essentially three ways to show pretext: 1) the proffered reason had no basis in fact; 2) the proffered reason did not actually motivate the discharge; or 3) the reason was insufficient to motivate the discharge. See, e.g. *Jenkins v. Nashville Pub. Radio* (6th Cir. 2004), 106 Fed. Appx. 991, 993 and *Allen v. Highlands Hosp. Corp.* (6th Cir. 2008), 545 F.3d 387, 396. Also, a fact finder should "consider the reasonableness of the decision as it illuminates the employer's motivations." *In re Lewis v. Sears, Roebuck & Co.* (6th Cir.1998), 845 F.2d 624, 633.

a. **The legitimate non-discriminatory reason offered was insufficient to motivate the discharge.**

The Commission showed with reliable, probative, and substantial evidence that Respondent's purported nondiscriminatory reason for the suspension and termination of Mr. Walker's employment was insufficient to motivate the discharge.

It cannot be emphasized enough that Mr. Walker was never found to be directly or indirectly responsible for any loss, theft or shrink. Mr. Elezi testified as follows:

Q. And let me just, as a final piece, your investigation did not reveal any theft by Mr. Walker, did it?

A. No, it didn't.

T. 405.

Likewise, the General Manager, Jason Carpenter, reiterated this belief:

Q. Okay. You also said that Marcus, you did not think that Marcus was responsible physically for the shrinkage, correct?

A. I do not.

T. 287.

As noted above, several managers were found to be ultimately responsible for incidents occurring within their departments.

Those whose job it was to oversee the warehouse did not lose their jobs even though there was a hole in the wall big enough to allow product to exit the building. T. 357. Apparently, this was not considered serious enough to result in termination of employment. The two Caucasian individuals who were held responsible were placed on performance improvement plans. T. 426-427.

It was not deemed necessary to fire the manager who oversaw the loss of over a dozen television sets because of employee theft. T. pp. 273-274. At best, that manager may have received a warning. T. 277. Again, he did not lose his job. *id.*

There was testimony regarding problems with delivery trucks and problems with employees stealing gift cards. T. 409-410. There is no indication that any manager was suspended or lost their job because of this. Keith Van Sant was in charge of the delivery trucks, yet no disciplinary action was taken against him. T. 409-411.

There was testimony that people were removing shopping carts of stolen items right out the front door. T. 414. No manager was suspended or lost a job over that.

There was testimony regarding an employee's purposely shutting off the surveillance video and allowing product out the front door. T. 266-267. No manager lost a job over that.

Respondent accused Mr. Walker of violating the time-records policy. Mr. Elezi presented evidence of Mr. Walker's alleged transgressions. (*Respondent's Exhibits J, K, L-1 through L-15*). Other managers also worked late but there was no indication regarding whether they were alone or accompanied by an employee. For example, Respondent produced no record of who worked with Keith Van Sant until 1:20 am on August 14, 2007, or when that employee clocked out. T. 432-433, (*Respondent's exhibit L1, L2*). There is no record of who worked with Brian Ragsdale until 2:28 am on August 17, 2007 or when that person clocked out. *Id.* There is no record of who worked with Keith Van Sant until 12:45 am on August 21, 2007 or when he or she clocked out. *Id.* There is no record of who worked with Mr. Van Sant until 12:06 am on August 21, 2007 or when they clocked out. *Id.* Again, there is no record of who worked with Mr. Van Sant until 2:17 am on August 31 2007 or when they clocked out. *Id.* Yet, Mr. Elezi presented documentation he created regarding all of the employees whom he believed were present in the store when Mr. Walker was closing. (*Respondent's Exhibit J*). When asked, he admitted that he never prepared such information with respect to any other manager:

THE COURT: Did you also make the same sort of notes that we see in Respondent's Exhibit J for other managers that you –

THE WITNESS: No, I didn't.

T. 398.

Thus, Respondent singled out the only African-American manager at store #243, who was deemed not to be responsible for shrink, and labeled him as a shrink threat

worthy of discharge while affording similarly situated Caucasian employees, who were held responsible for actual shrink, the opportunity to correct errant behavior.

It is simply not reasonable to accept that the legitimate non-discriminatory reasons proffered are sufficient to justify Mr. Walker's termination. The other managers, all of whom are Caucasian, were allowed action plans or other opportunities to correct behavior but the sole African-American manager was suspended and then fired even though he was never found to be responsible for any shrink, loss or theft at any time.

b. Respondent acted without a reasonably formed Business Judgment.

A purported nondiscriminatory reason for a termination is pretextual when the "business judgment was so 'ridden with error that [the employer] could not honestly have relied upon it.'" *In re Lewis*, 845 F.2d at 633. In assessing whether the nondiscriminatory reason proffered by the employer is "honest," a fact finder must look at whether the employer "made a reasonably informed and considered decision before taking the complained-of action." *Allen v. Highlands Hospital Corp.* (6th Cir. 2008), 545 F.3d 387, 398 (quoting *Michael v. Caterpillar Fin. Servs. Corp.* (6th Cir. 2007), 496 F.3d 585, 598-99).

Mr. Elezi stated that he'd spent about 45 days and interviewed about 10-15 employees. T. 363-364. He found that no other store manager was found to have violated the key-holder policy. T. p 374. If that is, indeed, the case, then it is only because Respondent failed to properly investigate. Elezi stated that he interviewed other employees but never indicated whom he interviewed nor what questions were asked. He never indicated whether he asked employees specifically about the key-holder policy, the

time-records policy or the coat-check policy. He could not remember the name of any employees with whom he spoke. T. 417. Yet, there is testimony by two named employees, Ms. Salva and Mr. Folds, that every manager gave out keys regularly. T. 299, 326.

As noted above, Heather Salva testified that the all managers engaged in violations of the key-holder policy as well as allowing employees to wait inside the store after clocking out. T. pp. 299-301. Jason Carpenter echoed the fact that employees would wait in the store after clocking out. T. 260-261. Mr. Walker told Mr. Elezi, point blank, that violations of the key-holder policy were ongoing but Mr. Elezi decided that his previous investigation was sufficient. He declined to follow-up on Mr. Walker's allegations because he had already concluded his investigation:

Q. Okay. So I catch up, tell us the investigation, what he said about the gap and what he said during the interview.

A. He had -- he had indicated -- and I'm trying to -- and I know for a fact he had indicated that there was other managers that were doing that as well.

Q. Okay.

A. Which there wasn't. There was a complete investigation and there wasn't.

T. 400.

Had Mr. Elezi elected to follow-up on what Mr. Walker was telling him, he would inevitably have discovered that to which Ron Folds and Heather Salva testified.

Also, Mr. Walker was accused of violating policies in part, based upon alleged videotapes. T. 422, 468. Mr. Walker denies ever seeing a videotape. T. 175. Mr. Elezi testified that these tapes still exist but they were never offered as evidence. T. 415. Particularly significant here is the allegation that Mr. Walker left the store without having his bag or coat checked. Mr. Walker adamantly denied this. T. 175. This is the only allegation which Mr. Walker denied. Perhaps it was not necessary to show the video of the employees in the store after clocking out. Mr. Walker acknowledged this. One wonders why it wouldn't be shown during the public hearing then, if proof exists that Mr. Walker violated this policy, and Mr. Walker had steadfastly maintained his innocence.

Notwithstanding, even if Mr. Elezi's recitation of what was on the videotape was accurate, Mr. Walker's actions could not rise to a level higher than those of the Caucasian managers who sat idly by while items were being stolen by the shopping cart-load or through a hole in the wall. T. 414.

Taking all of this into consideration as well as the disparate treatment of Mr. Walker as compared to the Caucasian store managers, it can easily be said that Mr. Walker's suspension and termination are not supported by the evidence.

IV. Conclusion

Mr. Walker was the only African-American manager at store #243. Between Mr. Elezi's first venture into the store and Mr. Walker's termination, all of the other managers were Caucasian. The evidence presented at hearing indicates that the store was fraught with a multitude of problems. Shopping carts full of merchandise were leaving the store openly without having been paid for. Televisions were being stolen with the aid of employees. Employees were converting returns into gift cards for themselves. There was

a hole in the warehouse wall large enough for merchandise to be passed through for purposes of theft. Through all of this, only one manager lost his job and that was Marcus Walker. No other managers were suspended. Caucasian managers received warnings and action plans. Mr. Walker received no such opportunities.

For the foregoing reasons it should be found that Mr. Walker's suspension and termination were discriminatory and he should be entitled to back pay less interim earnings.

Respectfully submitted,

OHIO ATTORNEY GENERAL
MICHAEL DEWINE



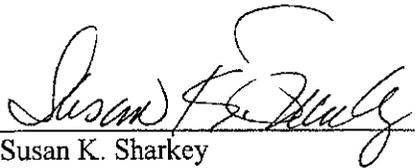
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This is to certify that an electronic copy of the hearing transcript in this matter, Volumes I and II, was forwarded to David A. Campbell, Esq. at DA Campbell @vorys.com and further, that a copy of the foregoing Brief of Ohio Civil Rights Commission was sent, via ordinary U.S. Mail, postage prepaid, the 8th day of June, 2012 to the following:

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Exhibit B



CAROLE A. TINGLE, Plaintiff-Appellant, v. ARBORS AT HILLIARD; HILLIARD CARE, LLC; and EXTENDICARE HEALTH SERVICES, INC., Defendants-Appellees.

No. 11-3494

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

12a0291p.06; 692 F.3d 523; 2012 U.S. App. LEXIS 18315; 2012 FED App. 0291P (6th Cir.); 115 Fair Empl. Prac. Cas. (BNA) 1680; 34 I.E.R. Cas. (BNA) 469

**August 29, 2012, Decided
August 29, 2012, Filed**

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Southern District of Ohio at Columbus. No. 2:09-cv-1159--Gregory L. Frost, District Judge. *Tingle v. Arbors at Hilliard*, 2011 U.S. Dist. LEXIS 43281 (S.D. Ohio, Apr. 21, 2011)

COUNSEL: ON BRIEF: Phillip L. Harmon, Worthington, Ohio, for Appellant.

Brian J. Kelly, FRANTZ WARD LLP, Cleveland, Ohio, for Appellees.

JUDGES: Before: COOK and STRANCH, Circuit Judges; LAWSON District Judge.*

* The Honorable David M. Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION BY: DAVID M. LAWSON

OPINION

[**1] [*526] DAVID M. LAWSON, District Judge. Plaintiff Carole Tingle alleged in a complaint that she was disciplined and ultimately terminated from employment by defendant Arbors at Hilliard, a nursing home in Hilliard, Ohio, in retaliation for speaking with investigators from the Ohio Department of Health following the death of a nursing-home resident. She brought her claim under *Ohio Revised Code* § 3721.24(A), which prohibits retaliation for participating in a Department of

Health investigation, and *Title VII of the Civil Rights Act of 1964*. [***2] Arbors at Hilliard denied any retaliatory motive and contended that the termination was justified by the company's progressive discipline policy. The district court granted summary judgment [**2] to the defendants on both counts, and the plaintiff timely appealed the decision on the state law claim only. We affirm.

I.

The dispute in this appeal focuses mainly on the "pretext" element of the familiar *McDonnell Douglas* evidentiary framework for assessing the adequacy of circumstantial evidence of an employer's illegal motive for taking adverse employment action. The defendants contended in the district court that they fired the plaintiff for conduct that violated work rules, as prescribed by their written discipline policy. The plaintiff argues that factual disputes exist over whether she actually engaged in the conduct that subjected her to discipline under the defendants' policy.

The Arbors organization published an employment manual that set out a five-step progressive discipline policy, which calls for a disciplinary action report (DAR) whenever an employee violates a work rule. The policy classifies offenses at three levels. A "Class I" violation will result in a DAR; a "Class II" violation is more serious and an employee can be discharged for committing three "Class II" violations within twelve months. A "Class III" violation justifies immediate termination regardless of the [**3] lack of prior discipline.

692 F.3d 523, *; 2012 U.S. App. LEXIS 18315, **;
2012 FED App. 0291P (6th Cir.), ***; 115 Fair Empl. Prac. Cas. (BNA) 1680

The basic facts of the case were ably summarized by the district court as follows:

Plaintiff, Carol Tingle, was formerly employed as a registered nurse with Defendant Arbors at Hilliard, a nursing home located in Hilliard, Ohio. Arbors at Hilliard is a registered trade name of Defendant Hilliard Care, LLC, a subsidiary of Defendant Extendicare Health Services, Inc., the [latter] of which are headquartered in Milwaukee, Wisconsin. This Court will refer to Defendants as "Arbors."

On June 27, 2008, a resident passed away at Arbors during Tingle's shift. The parties dispute the events that led to the Hilliard Police Department arriving to assess the resident's death. As a result of the circumstances surrounding the death, Arbors reported that Tingle's actions constituted a Class II violation in a Disciplinary Action Report ("DAR") dated June [***3] 27, 2008 ("6-27-08 DAR"). In the 6-27-08 DAR, Arbors indicated that Tingle failed to instruct another employee to conduct CPR on the resident and that Tingle had failed to notify the resident's physician.

In July 2008, the Ohio Department of Health ("ODH") investigated the June 2008 incident. ODH met with numerous Arbors employees, [**4] including Tingle, to discuss the incident. During this investigation, a question arose as to whether the expiration date on Tingle's CPR certification card had been altered. Arbors suspended Tingle pending further investigation. [*527] Arbors concluded its investigation and subsequently reinstated Tingle with back pay for the days missed during her suspension. As a result of the suspension, however, Arbors had issued Tingle a DAR on July 24, 2008 ("7-24-08 DAR"), for a Class II violation for violating a rule in the employee handbook. Tingle retained an attorney, who contacted Arbors to remove the 7-24-08 DAR from Tingle's employment file and Arbors agreed to remove that DAR from her file, not count it as progressive disciplinary action, and place the DAR in a sealed file.

On October 23, 2008, Arbors issued Tingle another DAR ("10-23-08 DAR") because she failed to follow a direct order from a supervisor, which is a Class III violation. Arbors indicated in the DAR that Unit 2 Manager Deanna Collins had told Tingle to return an orientee at a certain point in time, but that Tingle had failed to direct the orientee properly. Tingle asserted that Liessen Davis, Director of Nursing, permitted Tingle [**5] to keep the orientee. According to Arbors Administrator Tammy Meyers, Arbors reduced the 10-23-08 DAR from a Class III violation to a Class II violation.

On March 31, 2009, Arbors issued Tingle her final DAR ("3-31-09 DAR"), which resulted from Tingle's improper documentation of information in a patient's medical record and a violation of a safety rule, both of which are Class II violations. Arbors noted in the DAR that Tingle had falsely indicated in a patient's treatment record that she had changed the patient's dressing, that she had left a syringe by a patient's bedside during her shift, and that she had left the medical cart unlocked. As a result of the 3-31-09 DAR, Meyers and Arbors Staff Development Coordinator Shauna Arnold met with Tingle to present her with the final DAR and to terminate her employment. Tingle argues that the 3-31-09 DAR was unwarranted and contained incorrect information. She contends that the time the syringe was found and who found it are questionable, that the medical cart involved was not under her control, and that she did not falsify the treatment records.

*Tingle v. Arbors at Hilliard, Case No. 09-cv-01159, 2011 U.S. Dist. LEXIS 43281, *4 (footnote omitted).*

[**4] The parties [**6] do not dispute the district court's basic outline of the facts. However, Tingle points to some more specific facts in making her argument, beginning with the June 27, 2008 DAR. That report states that Tingle was acting as a supervising nurse when a death was reported to her, that she failed to instruct a nurse to perform CPR, and that she failed to notify the patient's physician immediately of the patient's death—all facts that are disputed. Tingle testified at her deposition that she performed CPR on the patient. Medical records reflect that Tingle called the patient's sister,

who requested that the police be called. And after the police assessed the patient and called the patient's sister to inform her that the death was not suspicious, Tingle called the patient's physician.

The Ohio Department of Health investigated the incident on July 17 and 18, 2008. In an affidavit, Tammy Meyers, an administrator at the Arbors facility, stated that during the course of the investigation, a state surveyor reviewed the CPR cards of employees and reported to Meyers that the expiration date on the Tingle's card appeared to have been altered. Meyers stated that she found the expiration date suspicious [*7] because it made the card valid for four years, but when she and the Staff Development Coordinator contacted the American Heart Association, they were told that the normal certification period was two years. That suspicion resulted in [*528] Tingle's suspension between July 18, 2008 and July 23, 2008. The suspension was documented in a DAR issued on July 24, 2008. Tingle was later paid for the days of work that she missed, and the defendants agreed to remove the DAR from Tingle's file.

The October 23, 2008 DAR states that Tingle committed a Class III dischargeable offense by refusing to follow a direct order from a supervisor to send an orientee to Unit 2. Tingle insists that she had been given permission to keep the orientee in Unit 1 by Liessen Davis. She also states that the individual who gave the order to return the orientee, Deanna Collins, was not her supervisor because she was the Unit 2 Unit Manager and Tingle worked in Unit 1, where she was supervised by Christopher Barrows. Tingle points to a note and testimony from Liessen Davis, who wrote the [*5] DAR, in which Davis states that she did not give Tingle permission to retain the orientee in Unit 1 and that she honestly believed that [*8] Tingle violated a work rule.

As to the March 31, 2009 DAR, Tingle delves into more detail about the three alleged violations stated therein. She identifies five statements in the DAR that she contends are factually false. First, the DAR states that a syringe was found at 7:30 a.m., but an email from Unit 1 Manager Barrows states that the used syringe was reported to him at 8:00 a.m. Second, the DAR states that the syringe was found before the registered nurse for the day shift assumed the keys, but in the same email, Barrows states that the lost syringe was found after Ameenah Abdullah relieved Tingle; and there was deposition testimony from Abdullah in which she states that she found the syringe after receiving the keys to the medication cart from Tingle. Third, the DAR states that the syringe was found by the Unit Manager, but the evidence cited above suggests that Abdullah, rather than Barrows, found the syringe. Fourth, the DAR states that the medication cart was unlocked and Davis testified that Barrows found both a syringe and an unlocked medication

cart before the day shift nurse assumed the keys from Tingle. However, Tingle states that Barrows's shift did not overlap with hers, [*9] as she finished working at 7:00 a.m. and Barrows began work at 8:00 a.m.

Fifth, and most extensively, Tingle points out what she characterizes as inconsistent facts surrounding the missing-heel-dressing incident. The DAR states that Tingle had documented a treatment as having been done when in fact she had not done the treatment. A note memorializing Tingle's termination meeting states that she had signed off as having checked a patient's dressing on March 26, 2009, but that it was discovered subsequently that the dressing was not in place. In a note dated March 27, 2009, Barrows stated that on that date, he had discovered that a patient's right heel dressing was not in place, despite Tingle's note that she had checked the dressing. Barrows observed that it was highly unlikely that the dressing had fallen off by itself given the nature of the dressing and the patient. The DAR states that the unit manager changed the dressing; Barrows testified in his deposition that to change the dressing meant the same thing as to reapply it. Davis testified that when Barrows changed the [*6] dressings, one heel dressing was in place and the other was not, although she identified the missing dressing as [*10] the left heel dressing. The patient's care chart indicates that the last person to change the heel dressings was Tingle on March 24, 2009.

The district court concluded that the plaintiff established a *prima facie* case for retaliation based on adverse employment actions consisting of the plaintiff's suspension, [*529] the July 24, 2008 DAR, the October 24, 2008 DAR, and her termination. The court also found that the plaintiff had received three Class II or higher offenses in the twelve months before her termination, excluding the expunged discipline, which justified termination under the progressive-discipline policy, and therefore the defendants presented evidence of a legitimate, non-retaliatory reason for firing the plaintiff. The district court then found that the plaintiff failed to present evidence that the defendants did not honestly believe in the facts underlying her disciplines and eventual termination. Noting that a mere dispute as to the facts upon which the adverse action is based is insufficient to establish pretext, the district court found the plaintiff's factual disputes as to the underlying allegations to be "ultimately irrelevant." The district court held that "[t]he uncontroverted [*11] evidence . . . indicates that [the defendants], reasonably relying on the numerous particularized facts that were available, made informed and considered decisions that lack any discriminatory or retaliatory animus."

The plaintiff filed a timely appeal from the order granting the defendants summary judgment.

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2012 FED App. 0291P (6th Cir.), ***; 115 Fair Empl. Prac. Cas. (BNA) 1680

II.

This court reviews a district court's grant of summary judgment *de novo*. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 521 (6th Cir. 2012). Courts may grant summary judgment only where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. When analyzing a motion for summary judgment, we draw all reasonable inferences in favor of the non-moving party and construe all evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). However, a mere "scintilla" of evidence in [***7] support of the non-moving party's position is insufficient to defeat summary judgment; rather, the non-moving party must present evidence upon which a reasonable jury could find in her favor. *Ander-son v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Ohio Revised Code section 3721.24(A) [**12] provides that:

No person or government entity shall retaliate against an employee . . . who, in good faith, makes a report of suspected abuse or neglect of a resident . . . ; indicates an intention to make such a report; [or] provides information during an investigation of suspected abuse, neglect, or misappropriation conducted by the director of health For purposes of this division, retaliatory actions include discharging, demoting, or transferring the employee or other person, preparing a negative work performance evaluation of the employee or other person, reducing the benefits, pay, or work privileges of the employee or other person, and any other action intended to retaliate against the employee or other person.

Ohio Rev. Code § 3721.24(A).

The plaintiff did not offer any direct evidence of retaliation. Therefore, to succeed on her claim, she must construct a circumstantial case, which invokes the three-part protocol described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), used in most other employment discrimination cases. *Donald v. Sybra, Inc.*, 667 F.3d 757, 761 (6th Cir. 2012); see also *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 544 (6th Cir. 2008) [**13] ("When a plaintiff presents only circumstantial evidence,

we examine [*530] Title VII, ADEA, and Ohio state-law retaliation claims under the same *McDonnell Douglas/Burdine* evidentiary framework that is used to assess claims of discrimination."); *Amini v. Oberlin Coll.*, 440 F.3d 350, 358 (6th Cir. 2006) (noting that "federal courts follow the burden-shifting framework that the Supreme Court has prescribed for analogous civil rights cases described in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)"). Under the *McDonnell Douglas* analysis, a plaintiff must first make out a prima facie case of retaliation under the Ohio statute. See *Skrjanc v. Great Lakes Power Serv. Co.*, 272 F.3d 309, 315 (6th Cir. 2001). "The burden then shifts to [the defendant] to articulate a legitimate, nondiscriminatory reason for [the adverse action]." *Ibid*. If the [***8] defendant states such a reason, the plaintiff then has the burden of showing that the defendant's articulated reason is a pretext for retaliation. *Ibid*.

The defendants argue on appeal that the plaintiff's proof of a *prima facie* case is wanting. But because we agree with the district court [**14] that the plaintiff has not shown pretext, we need not address the defendants' argument on that point.

"Under the law of our circuit, a plaintiff can show pretext in three interrelated ways: (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the employer's action, or (3) that they were insufficient to motivate the employer's action." *Romans v. Mich. Dep't of Human Servs.*, 668 F.3d 826, 839 (6th Cir. 2012) (quoting *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 (6th Cir. 2009)); see also *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994), overruled on other grounds by *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 179, 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009). We have acknowledged the criticism that has been leveled at the practice of segmenting the pretext inquiry into those three categories. See *Chen*, 580 F.3d at 400 n.4. But we have never regarded those categories as anything more than a convenient way of marshaling evidence and focusing it on the ultimate inquiry: "did the employer fire the employee for the stated reason or not?" *Ibid*. As we have stated, "at bottom the question is always whether the employer made up its stated reason to conceal intentional [**15] [retaliation]." *Ibid*.

The plaintiff says that she was not guilty of the conduct that led to the DARs and her ultimate termination, and she says that the factual dispute over the propriety of her discipline makes summary judgment improper. But a case alleging unlawful retaliation is not a vehicle for litigating the accuracy of the employer's grounds for termination. Instead, the employee also must

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offer some evidence that not only were the employer's reasons false, but that retaliation was the real reason for the adverse action. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) (stating that "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"). Therefore, the plaintiff was required to offer evidence from which a jury could reasonably reject the defendants' stated reason for [***9] disciplining--and ultimately firing--her, and that it used those reasons to mask its retaliation against her for speaking to the Ohio investigators. See *Surry v. Cuyahoga County Cmty. College*, 149 Ohio App. 3d 528, 2002 Ohio 5356, 778 N.E.2d 91, 97-98 (Ohio Ct. App. 2002).

If an employer has an "honest belief" in the nondiscriminatory basis [**16] upon which it has made its employment decision [*531] (i.e. the adverse action), then the employee will not be able to establish pretext. *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001) (stating that "as long as an employer has an honest belief in its proffered nondiscriminatory reason for discharging an employee, the employee cannot establish that the reason was pretextual simply because it is ultimately shown to be incorrect"). As we have stated, "[w]hen an employer reasonably and honestly relies on particularized facts in making an employment decision, it is entitled to summary judgment on pretext even if its conclusion is later shown to be 'mistaken, foolish, trivial, or baseless.'" *Chen*, 580 F.3d at 401 (quoting *Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 713-15 (6th Cir. 2007)).

The employer's claim of honest belief is necessarily tied to the nature of its investigation and disciplinary decision process. We have noted that the "key inquiry . . . is 'whether the employer made a reasonably informed and considered decision before taking' the complained-of action." *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 598-99 (6th Cir. 2007) (quoting [**17] *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998)). The employer certainly must point to particularized facts upon which it reasonably relied. But "we do not require that the decisional process used by the employer be optimal or that it left no stone unturned." *Smith*, 155 F.3d at 807; see also *Allen v. Highlands Hosp. Corp.*, 545 F.3d 387, 398 (6th Cir. 2008).

To defeat a summary judgment motion in such circumstances, the "plaintiff must produce sufficient evidence from which the jury could reasonably reject [the defendants'] explanation and infer that the defendants . . . did not honestly believe in the proffered nondiscriminatory reason for its adverse employment action." *Braithwaite v. Timken Co.*, 258 F.3d 488, 493-94 (6th Cir. 2001) (internal citations, quotation marks, and brackets

omitted) (alteration in original). For example, the plaintiff may produce [***10] evidence that an error by the employer was "too obvious to be unintentional." *Smith*, 155 F.3d at 807 (citation omitted). However, "[a]n employee's bare assertion that the employer's proffered reason has no basis in fact is insufficient to call an employer's honest belief into question, and fails to create a genuine issue [**18] of material fact." *Seeger v. Cincinnati Bell Tel. Co.*, 681 F.3d 274, 285 (6th Cir. 2012) (quoting *Joostberns v. United Parcel Servs., Inc.*, 166 F. App'x 783, 791 (6th Cir. 2006)).

Tingle argues that the inconsistencies among the disciplinary reports, contemporaneous or near-contemporaneous statements by the defendants' other employees, and deposition testimony by the supervisor who wrote the reports would permit a reasonable jury to infer that the defendants did not actually have an honest belief in their rationale for terminating her. We disagree.

Tingle argues in her reply brief that the June 2008 DAR was not justified, which demonstrates that the defendants were biased against her. However, she offers no evidence, beyond her own assertions, that her conduct did not merit a DAR; indeed, she admits in her brief to the conduct that formed the basis of the DAR. Tingle also posits that the accusations in the June 2008 DAR "illustrates why Arbors dealt so harshly with her on July 18, 2008." That theory has little to do with retaliation, however. Although the June 2008 incident was serious enough to prompt an investigation by the Ohio Department of Health, it predated the protected conduct. [**19] Intensified scrutiny in the wake of protected activity may support a claim of retaliation, *Upshaw v. Ford Motor Co.*, 576 F.3d 576, 589 (6th Cir. 2009), but [*532] the anti-retaliation statute does not protect the plaintiff from heightened scrutiny prompted by prior misconduct on the job rather than the protected activity.

Tingle also argues that the July 2008 suspension and DAR over her CPR card demonstrate that the defendants did not have honest belief in their proffered reason for terminating her. She contends that because the July 24, 2008 DAR was given after the suspension was lifted, the DAR must have been retaliatory, since it was issued after the defendants had determined that the CPR card was not altered. However, the record evidence includes an unrebuted affidavit from Tammy Meyers stating that she received [***11] notice from an Ohio Department of Health investigator that Tingle's CPR card appeared to have been altered. She then contacted the American Heart Association and found that although the Tingle's card indicated that she was certified for four years, the certification generally was for only two years. Although Tingle asserts that this evidence is not objective because it comes [**20] from an employee of the defendants,

she has offered no evidence to counter it that would suggest that the defendants' investigation was inadequate. Finally, it is uncontroverted that Tingle was paid later for the days of her suspension and the DAR was placed in a sealed file. But those facts are insufficient to suggest that the defendants lacked an honest belief in their proffered reasons for their actions.

Tingle also attacks the October 2008 DAR, arguing that there is no proof that she was issued an order not to keep the orientee on her unit. However, just as with the July 2008 suspension and DAR, the record reflects that the defendants undertook a reasonable investigation and made a decision based on the facts before them at the time. The DAR reflects that the Unit Manager spoke to witnesses, including the orientee in question, before issuing the DAR. The Unit Manager also had personal knowledge of the events in question, as she had spoken with Tingle and discussed the orientee's assignment. This court has found far less robust investigations sufficient to substantiate an honest belief entitling an employer to summary judgment. See *Seeger*, 681 F.3d at 286-87. Tingle also points to [**21] the defendants' downgrade of that violation from a Class III to a Class II offense, insisting that it establishes that the defendants did not have an honest belief that she violated a work rule. However, the inference actually cuts the other way: if the defendants did not have an honest belief in the basis for the DAR and their purpose was purely retaliatory, they could have terminated the plaintiff. Downgrading the offense level was the more lenient option.

Tingle's most extensive challenge--to the March 2009 DAR--consists of highlighting several inconsistencies between various witness statements and testimony. Most of those inconsistencies, however, are entirely irrelevant. Whether the syringe was found at 7:30 or at approximately 8:00; whether the syringe was found before or after [***12] Abdullah assumed the keys; whether the syringe was found by Abdullah or Barrows--none of those inconsistencies undermine the central finding in the DAR, which was that Tingle left a syringe and needle by a patient's bedside. The record reflects that the defendants based the DAR on reports from both Barrows and Abdullah, who also provided corroborating statements. That those statements varied in some small [**22] details does not demonstrate that they are unworthy of credence or that the defendants could not have an honest belief that Tingle violated a work rule.

In her challenge to the falsification-of-records charge, Tingle appears to suggest [*533] that the DAR was issued on the basis that Tingle did not *change* the heel dressing. But all the evidence in the record, including the DAR and statements and deposition testimony from Barrows and Davis, is consistent in demonstrating that Tingle's violation consisted of falsely reporting that

she *checked* the dressing when in fact she did not. The record states that Tingle wrote on a patient's chart that she checked the patient's heel dressings; the patient's right heel dressing was later found to be missing; the right heel dressing could not have fallen off on its own; Tingle could not actually have checked the patient's heel dressings, because if she had, she would have observed that the right heel dressing was missing; and therefore, her statement on the patient's chart that she checked the heel dressings was false. Tingle's extensive discussion about the left heel dressing misses the point. The defendants never alleged that there was ever a problem with [**23] that dressing.

Tingle also argues that although the DAR states that Barrows found a medical cart unlocked at 7:30 a.m. while it was under Tingle's control, Barrows testified at deposition that he generally arrived at work at 8 a.m., when the medication cart would be under the control of Abdullah. Viewing the evidence in the light most favorable to the plaintiff, that discrepancy, combined with a lack of any other evidence in the record that a medication cart actually was found unlocked or that Barrows arrived at work earlier than usual on the day in question, could suggest that the violation has no basis in fact. But the DAR reported multiple violations, and the syringe and false-reporting [***13] incidents themselves supported work-rule violations. Tingle has not shown that the defendants lacked an honest belief in those violations.

Tingle criticizes the defendants' reliance on the testimony and statements of managers and employees who "had an ax to grind against" her. But she has not offered any evidence that the individuals involved in disciplining and terminating her had personal animus against her. Even if she had, that alone would not be enough to demonstrate retaliatory motive or demonstrate [**24] that the defendants lacked an honest belief in their stated motive. See *Seeger*, 681 F.3d at 278 n.2, 287 (finding no genuine issue of material fact as to whether an employer had an honest belief in its non-retaliatory reason for terminating a plaintiff even where the employer's decision rested on statements from other employees with known animus against the plaintiff). Moreover, once a defendant has advanced a non-retaliatory reason for terminating an employee, it is the plaintiff's burden to come forward with evidence that would tend to undermine the legitimacy of that reason. *Dolan v. St. Mary's Mem'l Hosp.*, 153 Ohio App. 3d 441, 2003 Ohio 3383, 794 N.E.2d 716, 721 (Ohio Ct. App. 2003). A plaintiff facing a summary judgment motion cannot "rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact" but must make an affirmative showing with proper evidence in order to defeat the motion. *Street v. J.C.*

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Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989).
Tingle has failed to make such a showing in this case.

For the reasons stated above, we **AFFIRM** the
judgment of the district court.

III.



Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners

Leonard J. Hubert, Chair
Stephanie M. Mercado, Esq.
William Patmon, III
Tom Roberts
Rashmi N. Yajnik
April 29, 2013

G. Michael Payton, Executive Director

Paul Belazis, Esq.
Malone, Ault & Farell
7654 W. Bancroft Street
Toledo, OH 43617-1604

Re: Marcus Walker v. Best Buy Stores, LP.
TOL72(31785)11142007
22A-2008-02473C
Complaint No. 08-EMP-TOL-31785

The enclosed Order dismissing Complaint No. 08-EMP-TOL-31785 the above captioned matter was issued by the Ohio Civil Rights Commission at its meeting of April 25, 2013.

This case is closed.

FOR THE COMMISSION

Desmon Martin

Desmon Martin
Director of Enforcement and Compliance

DM:cjs
Enclosure

cc: Lori A. Anthony, Chief – Civil Rights Section
Denise M. Johnson, ALJ – Division of Hearings
Compliance [Martin – Kanney – Woods]
David A. Campbell, Esq.



John Kasich, Governor

IN THE MATTER OF:)	
)	
MARCUS WALKER,)	Complaint No. 08-EMP-TOL-31785
)	
Complainant,)	
)	
vs.)	
)	
BEST BUY STORES, L.P.,)	
)	
Respondent.)	

FINAL ORDER

This matter comes before the Commission upon the Complaint and Notice of Hearing No. 08-EMP-TOL-31785; the official record of the public hearing held on January 25 and 26, 2012, before Denise M. Johnson, a duly appointed Administrative Law Judge; the post-hearing briefs filed by the Commission and Respondent; the Administrative Law Judge's Report and Recommendation dated January 28, 2013; and the Complainant's Objections to the Administrative Law Judge's Report and Recommendation.

The complaint alleges that the Complainant was discriminated against because of race. After a public hearing, the Administrative Law Judge recommended that the Commission dismiss Complaint No. 08-EMP-TOL-31785. After careful consideration of the entire record, the Commission adopted the Administrative Law Judge's report at its public meeting on March

14, 2013. Therefore, the Commission incorporates the findings of fact, conclusions of law, and the recommendations contained in the Administrative Law Judge's report, as if fully rewritten herein, and dismisses the complaint against Respondent.

This ORDER issued by the Ohio Civil Rights Commission this 25th day of April, 2013.

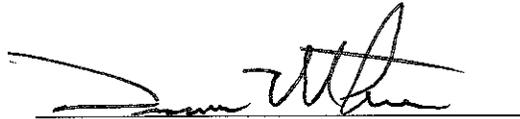
Tom Roberts
Commissioner, Ohio Civil Rights Commission

NOTICE OF RIGHT TO JUDICIAL REVIEW

Notice is hereby given to all parties herein that Revised Code Section 4112.06 sets forth the right to obtain judicial review of this Order and the mode and procedure thereof.

CERTIFICATE

I, Desmon Martin, Director of Enforcement and Compliance of the Ohio Civil Rights Commission, do hereby certify that the foregoing is a true and accurate copy of the Final Order issued in the above-captioned matter and filed with the Commission at its Central Office in Columbus, Ohio.

A handwritten signature in black ink, appearing to read 'Desmon Martin', is written over a horizontal line.

Desmon Martin
Director of Enforcement and Compliance
Ohio Civil Rights Commission