[Cite as *Taylor-Stephens v. Rite Aid of Ohio*, 2018-Ohio-4714.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106324

WANDA TAYLOR-STEPHENS

PLAINTIFF-APPELLANT

vs.

RITE AID OF OHIO, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-17-876392

BEFORE: E.T. Gallagher, J., McCormack, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: November 21, 2018

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EILEEN T. GALLAGHER, J.:

{¶1} Plaintiff-appellant, Wanda Taylor-Stephens, appeals from the trial court's judgment, rendered after a jury verdict, in favor of defendant-appellee, Rite Aid of Ohio, Inc., on her harassment and racial discrimination claims. She raises the following six assignments of error:

> 1. The trial court erred and abused its discretion by excluding crucial, relevant, and admissible evidence at trial.
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> 2. The trial court erred by entering a directed verdict for defendant-appellee on plaintiff-appellant's retaliation claims.
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> 3. The trial court erred by giving an incorrect and prejudicial jury instruction.
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> 4. The trial court erred and abused its discretion in denying plaintiff-appellant's motion for new trial.
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> 5. The trial court erred by taxing costs against plaintiff-appellant in the amount of $7,834.00.
>
> 6. The jury's verdict was against the weight of the evidence.

{¶2} We find some merit to the appeal, affirm the trial court's judgment in part, and reverse it in part.

I. Facts and Procedural History

{¶3} Taylor-Stephens began employment with Rite Aid in March 1999 as a manager/trainee at a Rite Aid store in Beachwood, Ohio. In 2001, she was promoted to assistant store manager of Rite Aid store #3131 in Chagrin, Ohio. Taylor-Stephens later became the store manager of Rite Aid store #3367 on Harvard Avenue in Cleveland in 2005, and remained the manager of that store until she was terminated in April 2015.

{¶4} In 2017, Taylor-Stephens filed a complaint against Rite Aid, alleging three claims under R.C. Chapter 4112, to wit: hostile work environment based on race, racial discrimination, and retaliation. She also alleged a claim for wrongful termination in violation of public policy under 29 U.S.C. 151. Taylor-Stephens voluntarily dismissed her public policy claim on the fifth day of trial, and the trial court granted a directed verdict in favor of Rite Aid on Taylor-Stephens's retaliation claim. Thus, only Taylor-Stephens's harassment and discrimination claims were decided by the jury.

{¶5} Each Rite Aid store has a pharmacy manager, who manages the pharmacy, and a store manager, who manages the front end of the store. As a store manager, Taylor-Stephens was responsible for hiring and training new employees, reviewing employees' performance, opening and closing the store, maintaining proper accountability for cash handling, resolving complaints, and maintaining a safe and clean environment for customers. (Tr. 101-103.) She was also required to assist the pharmacy manager in hiring pharmacy cashiers and pharmacy technicians. (Tr. 101.)

{¶6} The complaint alleged that Taylor-Stephens had no problems with racial hostility until 2012, when Amanda Sprinkle, who is Caucasian, became the pharmacy manager of store #3367. (Complaint ¶ 14.) According to the complaint, Sprinkle "treated African American customers and employees in a hostile, rude, and disrespectful manner." (Complaint ¶ 15.) Taylor-Stephens further alleged that Sprinkle (1) referred to Taylor-Stephens as a "bitch," (2) threw a box on the floor that Taylor-Stephens placed on the pharmacy counter, (3) slammed her door shut when Taylor-Stephens was trying to discuss an incident of racial hostility, (4) refused Taylor-Stephens's request to bring the pharmacy cash drawers to the front of the store, and (5) made disparaging comments about Taylor-Stephens to Taylor-Stephens's subordinates regarding her managerial skills. (Complaint ¶ 17.)

{¶7} Taylor-Stephens reported Sprinkle's actions to her then-supervisor, Scott Bumpus, and human resource ("HR") manager, Lois Manos. Taylor-Stephens asserted that despite her repeated complaints of racial hostility, Rite Aid managers took no action to remedy the problem. (Complaint ¶ 46.) Taylor-Stephens further alleged that instead of investigating the racially hostile environment in the store, Manos investigated Taylor-Stephens for violations of the company's hour and wage policy. (Complaint ¶ 39.)

{¶8} The evidence at trial showed that in November 2013, Sprinkle filed a written complaint with Manos, alleging that Taylor-Stephens was harassing her. (Tr. 666-667, 703, 705-707, 1266-1270.) Sprinkle's complaint stated that Taylor-Stephens continued to harass her even though Bumpus and Tim Freda, the local pharmacy district manager, were aware of the conflict and had met with them to resolve their dissension. During the investigation, Taylor-Stephens reported to Manos that Sprinkle was harassing her and other African-American employees.

{¶9} Manos testified that she and Bumpus visited store #3367 and questioned Sprinkle and Taylor-Stephens separately to investigate their dueling complaints. (Tr. 703-709.) As part of her investigation, Manos took six pages of notes during her conversation with Taylor-Stephens. (Tr. 710.) Manos testified that at the end of the investigation, she and Bumpus concluded that there was no harassment. Manos testified:

> [T]here was no harassment. It was them not getting along. I mean, if you talk to the pharmacy, it was the front end, and if you talk to the front end, it was the pharmacy. It was just that they don't get along.

(Tr. 713.) Taylor-Stephens, who had started documenting employment-related incidents in a series of handwritten notes, described personality conflicts between the two departments, but made no mention of any racially motivated hostility. (Tr. 973-978.) Taylor-Stephens's notes were admitted as evidence at trial. Neither Sprinkle nor Taylor-Stephens were disciplined as a result of the harassment investigation.

{¶10} During the investigation of the Sprinkle / Taylor-Stephens conflict, Manos discovered that Taylor-Stephens worked off the clock without reporting her time in violation of Rite Aid's timekeeping policy. (Tr. 714.) According to Manos, Taylor-Stephens admitted that she worked off the clock on three occasions and failed to report her time. (Tr. 714-716.) Although Taylor-Stephens violated company policy by failing to report her time, she was not disciplined for her transgressions. Instead, Taylor-Stephens was required to complete a wage and hour investigation form in which she acknowledged the work time not previously reported and her understanding of Rite Aid's wage and hour policies. (Tr. 715.)

{¶11} In April 2013, Taylor-Stephens voiced another complaint about workplace hostility that allegedly occurred during a district-wide meeting of store managers lead by Brian Stimmel, the district asset protection manager. The meeting was called to discuss Rite Aid's biometric

transaction approval system, among other things. Stimmel reported statistical data from various stores using the system, and Taylor-Stephens commented that her store was ranked first in the district. Stimmel responded by asking: "What do you want a cookie?" Taylor-Stephens reported the comment to Bumpus, who reported it to senior HR manager Eric Hanson. Taylor-Stephens claims she also complained that Stimmel treated her worse than white store managers. Yet, Taylor-Stephens made no handwritten notes regarding this incident or any disparate treatment by Stimmel.

{¶12} Stimmel was disciplined for unprofessional conduct as a result of his "cookie comment." Stimmel testified that he called Taylor-Stephens and apologized for his rude behavior. Still, Taylor-Stephens alleged that Rite Aid management failed to investigate her claims that Stimmel treated her differently than he treated her white counterparts. But, according to Hanson, Taylor-Stephens never reported that Stimmel engaged in disparate treatment of her. (Tr. 160-161.) Moreover, Taylor-Stephens never again complained about mistreatment from Stimmel after he was disciplined for the cookie comment.

{¶13} In January 2014, Taylor-Stephens retained counsel, who sent a letter of representation to Rite Aid. (Tr. 1026.) She later filed a lawsuit against Rite Aid in November 2014, alleging racial discrimination and hostile work environment. (Tr. 1026.) In an amended complaint, Taylor-Stephens alleged that Rite Aid retaliated against her for filing the lawsuit by issuing her first unfavorable performance review in eight years. However, when confronted with copies of her performance reviews from 2013 and 2014 on cross-examination, Taylor-Stephens admitted that the reviews were practically identical. One rating went up two points in 2014 and another rating went down two points. (Tr. 1026.) And while Taylor-Stephens received a two percent increase in compensation in 2013, she received a two and one-half percent increase in compensation in 2014. (Tr. 1034.)

{¶14} Taylor-Stephens also claimed that Rite Aid retaliated against her by transferring Vickie Blue, the full-time asset protection agent who worked in store #3367, to another store, leaving store #3367 without security. As a result of the transfer, there was an increase in violence and verbal assaults, but Taylor-Stephens was never disciplined for any loss prevention issues. (Tr. 873, 1036.)

{¶15} However, Asia Grayscreetch Haddox, district manager of store #3367, testified that asset protection agents are not security guards. (Tr. 296.) Haddox explained that asset protection agents are there to secure the product, prevent theft from occurring, and to follow up on reports of theft. (Tr. 297.) And when Taylor-Stephens reported that she and her staff were physically attacked by unruly youths, Rite Aid assigned a security guard, not an asset protection agent, to the store immediately. (Tr. 299-300.) Moreover, Stimmel explained that Blue was transferred out of store #3367 so she would not be supervised by a family member when her cousin became the district supervisor. (Tr. 780-781.)

{¶16} In 2015, the United Food and Commercial Workers Union, Local 880, filed a petition with the National Labor Relations Board seeking to represent the associates in store #3367. (Tr. 891.) When Rite Aid received notice of the union campaign, members of upper management advised Taylor-Stephens and the new pharmacy manager, Steve Arnold, that they were expected to support the company's desire to remain union free. (Tr. 380, 383-384, 1037-1042) Joanne Fedder, a Rite Aid HR manager, testified that upper management wanted Taylor-Stephens to relate the company's position on unionization to store employees because they believed a message from her would carry more weight with the associates than a speech from upper management since she worked with them on a daily basis. (Tr. 591.)

{¶17} Gordon Hinkle, Rite Aid's senior manager of labor relations, prepared a list of bullet points that he wanted Taylor-Stephens to read to her subordinates at a storewide meeting. (Tr. 321.) The meeting was scheduled for March 16, 2015. Rite Aid management also wanted Taylor-Stephens to state that, as a Rite Aid manager, she wanted the store to remain union free. (Tr. 381-382; 1039-1049.) To assist Taylor-Stephens in delivering the message, Fedder prepared talking points and emailed them to Taylor-Stephens on the morning of March 16, 2015.

{¶18} Moments before the scheduled meeting, Taylor-Stephens decided she could not deliver the message, and Haddox spoke to the employees in her stead. The associates did not know Haddox because she was recently hired as the district manager. Following the meeting, Haddox met privately with Taylor-Stephens to discuss why she failed to deliver the message. Taylor-Stephens told Haddox that she "froze" and was uncomfortable "because it didn't sound like it was coming from her." (Tr. 326.) Haddox warned Taylor-Stephens that "it's not acceptable that she did not deliver those talking points." (Tr. 326, 385.) They nevertheless decided that Taylor-Stephens would address the associates at another meeting on March 30, 2015, and that she would develop her own talking points. (Tr. 327.) Taylor-Stephens admitted on cross-examination that she understood what Haddox's expectations were of her, and that her refusal to deliver the message could result in termination. (Tr. 1059-1060.)

{¶19} Meanwhile, Taylor-Stephens sent an email to HR asking to be transferred to a different store. Haddox and Fedder instructed her to complete an official transfer request form. (Tr. 368.) Haddox also informed Taylor-Stephens that the company needed her leadership at store #3367 during the union campaign and suggested that it might be better to request the transfer when the campaign was over. (Tr. 368-369.)

{¶20} Taylor-Stephens created her own speech for the March 30, 2015 meeting and emailed it to Haddox on March 24, 2015. (Tr. 387.) Haddox forwarded the speech to upper management so it could be reviewed by Rite Aid counsel to ensure compliance with the National Labor Relations Act. (Tr. 392.) The talking points were approved, and the meeting went ahead as scheduled. Although Haddox discussed the upcoming meeting with Taylor-Stephens on March 28, 2015, Taylor-Stephens never indicated she was uncomfortable delivering the message. However, approximately five minutes before the meeting was scheduled to start, Taylor-Stephens told Haddox: "I'm not going to deliver these talking points. I have been advised by counsel to not, to not do this." (Tr. 390.) Once again, Haddox delivered the message to the associates at the meeting instead of Taylor-Stephens. (Tr. 376.)

{¶21} Haddox reported to Hanson that Taylor-Stephens refused to deliver the message. Hanson concluded that Taylor-Stephens's refusal to comply with instructions throughout the union campaign constituted insubordination that warranted termination. (Tr. 1233.) Rite Aid terminated Taylor-Stephens's employment on April 2, 2015, due to her insubordination in refusing to support the company's position in the union store campaign.

{¶22} As previously stated, Taylor-Stephens voluntarily dismissed all of her claims against Stimmel and her wrongful termination in violation of public policy claim against Rite Aid during trial, and the trial court dismissed Taylor-Stephens's retaliation claim on Rite Aid's motion for directed verdict. The jury returned verdicts in favor of Rite Aid on Taylor-Stephens's hostile work environment and racial discrimination claims. Taylor-Stephens now appeals the trial court's judgment.

II. Law and Analysis

A. Excluded Evidence

{¶23} In the first assignment of error, Taylor-Stephens argues the trial court erred in excluding certain evidence of racism. She contends the court erroneously excluded evidence of racial harassment and discrimination, that the race of Rite Aid employees is stated on various Rite Aid documents not associated with Equal Employment Opportunity Commission ("EEOC") reporting, Rite Aid's failure to terminate an asset protection agent who used racial slurs, a recording that could have impeached Haddox, and "other relevant evidence of racism."

{¶24} An appellate court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *State v. Gale*, 8th Dist. Cuyahoga No. 94872, 2011-Ohio-1236, ¶ 12, citing *State v. Finnerty*, 45 Ohio St.3d 104, 107, 543 N.E.2d 1233 (1989). An abuse of discretion implies a decision that is unreasonable, arbitrary, or unconscionable. *State ex rel. DiFranco v. S. Euclid,* 144 Ohio St.3d 571, 2015-Ohio-4915, 45 N.E.3d 987, ¶ 13.

1. Proposed Exhibit No. 31

{¶25} Taylor-Stephens argues the trial court erred in excluding proposed plaintiff's exhibit No. 31. Proposed exhibit No. 31 refers to notes Fedder made as part of an investigation of a complaint by a Rite Aid associate, Reatha Hogan, against a Rite Aid asset protection agent, Andy Radak. Hogan, and an African-American pharmacist, Fien Mbah Elad, complained that Radak discriminated against African-American employees. Hogan alleged that she saw a text message from Radak to a Rite Aid store manager, Ruth Furis, instructing Furis to check Hogan's bag to make sure she did not steal anything. (Tr. 486.) Elad reported that Radak followed African-American customers around the store and checked their bags, but not the bags of white customers. (Tr. 635.) Fedder investigated these allegations and concluded that Radak did nothing wrong. Fedder testified that asset protection agents routinely check employees's bags when they leave the store as a matter of Rite Aid policy. (Tr. 603.)

{¶26} It is important to note that Taylor-Stephens did not work with either Hogan or Radak.[1] (Tr. 603.) Evidence regarding alleged discrimination of third-party employees, such as Hogan's complaint against Radak, is not relevant to a plaintiff's discrimination claim. *Thompson v. Cuyahoga Community College,* 8th Dist. Cuyahoga Nos. 72626 and 72627, 1999 Ohio App. LEXIS 2150 (May 13, 1999).

{¶27} In *Thompson*, the plaintiff alleged that Cuyahoga Community College discriminated against him and refused to renew his contract due to his advanced age. At trial, he sought to introduce evidence of discrimination against two former employees to support his age discrimination claim, but the trial court excluded it as irrelevant. In affirming the trial court's judgment, we held that evidence of discrimination against the former employees was not relevant to the plaintiff's age discrimination claim. *Id*. at 20. We also found that even if the evidence were relevant, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. *Id*.

{¶28} The trial court allowed Taylor-Stephens's lawyer to question Hogan and Fedder about Hogan's complaint against Radak. This evidence was prejudicial to Rite Aid and arguably offered no probative evidence of Taylor-Stephens's claim because Hogan's allegations had nothing to do with the work environment in Taylor-Stephens's store. Therefore, the trial court gave Taylor-Stephens wide latitude relative to the admission of this testimony, and we find no abuse of discretion in the court's decision to exclude Fedder's notes from the evidence.

2. Rite Aid Documents

{¶29} Taylor-Stephens argues the trial court also abused its discretion by excluding certain personnel documents on which Rite Aid management documented an employee's race.

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[1] Hogan and Radak worked in store #4478, and Taylor-Stephens worked in store #3367.

These documents included (1) exhibit No. 31; a list of Rite Aid associates at store #4478 that included the employees' names, job titles, hire dates and tenure, gender, ethnicity, and dates of birth, (2) exhibit No. 58, a document titled "Race Code," (3) exhibit No. 138, screen shots from payroll records pertaining to former store manager Paul Priebe that reflect his ethnicity by Rite Aid's internal code as well as other information, and (4) exhibit No. 145, a new hire form for store manager Jermale Clark that reflects, among other information, his ethnicity by Rite Aid's internal code. Taylor-Stephens argues these documents should have been admitted to prove that Rite Aid "had 'race' on its mind" when documenting performance and disciplinary issues.

{¶30} However, Taylor-Stephens's lawyer never questioned any witnesses regarding either the document titled "Race Code," or the new hire form for store manager Jermale Clark. To be admissible, documentary evidence must be authenticated by a witness with personal knowledge sufficient to verify that the document is genuine, meaning that the document is what the party claims it to be. *See* Evid.R. 901; *GMAC Bank v. Bradac*, 8th Dist. Cuyahoga No. 105242, 2017-Ohio-7888, ¶ 21. Having failed to authenticate these documents, the trial court properly excluded them under Evid.R. 901.

{¶31} Exhibit No. 31 refers to a list of Rite Aid associates at store #4478 that included the employees' names, job titles, hire dates and tenure, gender, ethnicity, and dates of birth. As previously stated, this document pertained to Fedder's investigation of Hogan's complaint against Radak. (Tr. 1113.) Because the investigation involved a complaint about employees at a different store and had nothing to do with Taylor-Stephens's work environment, the trial court properly excluded it.

{¶32} Finally, the screenshots of Paul Priebe's payroll records, which were over ten years old, were admitted into evidence over Rite Aid's objection. (Tr. 1147.) Therefore, the evidentiary issues pertaining to this evidence is moot for purposes of this appeal.

3. Asset Protection Agent Mark Costas

{¶33} Taylor-Stephens argues the trial court erred in excluding investigatory documents related to a complaint that Mark Costas, an asset protection agent in store #4788, used racial epithets when speaking with a customer in 2009. She contends this evidence would have proved that Rite Aid condoned racism by failing to enforce its antiharassment policy.

{¶34} However, Taylor-Stephens never worked with Costas. Costas allegedly used the racial slurs in 2009, and Taylor-Stephens claimed she did not experience any racial hostility until 2012. Moreover, the allegations against Costas were never substantiated, and we have no information regarding the extent of any investigation of the allegations. (Tr. 744.) "[E]vidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A). The probative value of evidence pertaining to Costas's alleged use of racial epithets was substantially outweighed by the danger of unfair prejudice under the circumstances, and the trial court properly excluded it.

4. Exclusion of Impeachment Evidence

{¶35} Taylor-Stephens argues the trial court erred in excluding an audio recording Taylor-Stephens made of the March 30, 2015 storewide meeting in which Haddox spoke to employees regarding the upcoming union vote. According to Taylor-Stephens, the recording captured Haddox, who is biracial, telling the associates of store #3367 that she is "the new ethnic face of Rite Aid."

{¶36} Taylor-Stephens claims the recording should have been admitted into evidence for impeachment purposes even though she did not produce the recording during discovery. Taylor-Stephens identified the recording during discovery but claimed the recording was protected by the attorney work product doctrine and therefore was not discoverable. Rite Aid filed a motion to compel production of the recording, and the court denied the motion on grounds that the recording was privileged. Consequently, Rite Aid filed a motion in limine to exclude the recording from being admitted as evidence at trial. The trial court granted the motion in limine and excluded the recording from the evidence at trial.

{¶37} One month before trial, Taylor-Stephens sent a copy of the recording to Rite Aid's counsel with the obvious hope of introducing it at trial. In the correspondence accompanying the recording, Taylor-Stephens's counsel stated: "We hereby waive our work-product privilege with this recording, and thus are including it as an exhibit at the upcoming trial in this case." Rite Aid filed a second motion in limine to exclude the recording at trial. Once again, the trial court granted the motion in limine.

{¶38} However, a visiting judge presided over the trial and held that the recording was admissible, but only for impeachment purposes. The trial court explained:

> I'm going to allow her to ask this question: Did you not moments ago say in front of the jury and denying saying on an earlier date you were the ethnic face of Rite Aid. And depending on her answer, I will allow her to use that particular * * * portion of the tape that reflects a statement attributable to [Haddox] relative to being the ethnic face of Rite Aid.
>
> * * *
>
> I'm going to allow her to say: Isn't it a fact that at a prior time you made this specific statement. If she says no, then I am going to let her play the whole tape, just so you know.

(Tr. 350-351.) Haddox admitted on cross-examination that she described herself as "the new ethnic face of Rite Aid." (Tr. 354.) Therefore, the recording was not needed for impeachment purposes, and Taylor-Stephens's argument on this issue is moot.

5. Jermale Clark's Personnel File

{¶39} Taylor-Stephens next argues the trial court erred by excluding exhibit No. 145, which pertained to two documents from the personnel file of Jermale Clark, a former store manager whose employment was terminated. She contends Clark and Stephens were unfairly terminated for a single offense while white store managers were afforded successive warnings before termination.

{¶40} Taylor-Stephens introduced a plethora of evidence regarding disciplinary actions imposed on white store managers. Hanson testified that Jack Wyar, a Caucasian store manager, was transferred to another store with a final warning for having a sexual relationship with a subordinate in violation of Rite Aid policy. (Tr. 202.) An investigation revealed that the sexual relationship was consensual. (Tr. 202.) Wyar was also investigated for allegedly threatening three subordinates, but the results of the investigation were not offered into evidence. (Tr. 203.)

{¶41} Hanson testified that Paul Priebe, a white store manager, was terminated following a wage and hour violation. (Tr. 203-204.) Although Hanson was not aware of any other disciplinary action taken against Priebe, he admitted on cross-examination that Priebe had been counseled about "unsatisfactory store conditions, service levels, and operational standards" and was later placed on a "Performance Action Plan." (Tr. 205-206, 211-212.)

{¶42} Hanson further testified that Jeremy Bachman, another white store manager, was given a "Final Written Warning" for "failing to keep social discussions out of the store, not

maintaining business professionalism, and not leading by example." (Tr. 220-222.) He was also admonished for lack of leadership at his store. (Tr. 218.)

{¶43} Despite counsel's extensive questions regarding the discipline of white store managers, counsel never asked Hanson or any other Rite Aid representative any questions regarding Jermale Clark. Therefore, there was no testimony offered to authenticate the documents pertaining to Jermale Clark's personnel file, and the trial court properly excluded them under Evid.R. 901.

{¶44} Moreover, Taylor-Stephens was able to introduce evidence of disciplinary actions taken against white store managers and argued that they received preferential treatment in comparison to the treatment she received. Having heard that evidence, the jury was free to decide whether Taylor-Stephens's conduct was more or less serious than that of the white store managers, and whether conduct warranted the termination of her employment.

6. Other Evidence of Racism

{¶45} Taylor-Stephens contends the trial court erred in excluding evidence of the racial composition of the neighborhoods in which relevant Rite Aid stores are located. She asserts the jury should have known that Taylor-Stephens was a store manager in an inner-city store that was predominately frequented by African-Americans and that asset protection agent Vickie Blue was transferred to Parma, which she claims is predominately frequented by Caucasians. She also asserts that had the jury known that store #3367 was located in a predominately black neighborhood, they would have inferred that upper management did not visit the store due to its African-American population. Finally, Taylor-Stephens claims her transfer request was denied because she asked to transfer to a store that was located in a predominately white neighborhood.

{¶46} Rite Aid filed a motion in limine to exclude lay testimony offered to establish the racial composition of neighborhoods in which Rite Aid stores are located, arguing such information requires statistical data that could only be provided by an expert. Rite Aid also argued that the racial composition of Rite Aid customers and neighborhoods was irrelevant to Taylor-Stephens's claims and would be unfairly prejudicial to Rite Aid. Over Taylor-Stephens's objection, the trial court granted Rite Aid's motion in limine.

{¶47} We agree that evidence of the racial composition of Rite Aid customers and neighborhoods is irrelevant to Taylor-Stephens's claims. Evid.R. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Irrelevant evidence is not admissible. Evid.R. 402.

{¶48} Even if Taylor-Stephens had competent, credible evidence regarding the racial composition of Rite Aid customers at each of its stores or the racial composition of the neighborhoods in which Rite Aid stores are located, this information would not make any determinative facts more or less probable. The issues presented at trial were whether members of Rite Aid upper management harassed or discriminated against Taylor-Stephens, and whether Rite Aid retaliated against Taylor-Stephens because she retained counsel. The predominant race of the Rite Aid customers in various stores has nothing to do with whether Rite Aid harassed or discriminated against Taylor-Stephens. Therefore, we cannot say the trial court abused its discretion by excluding this evidence.

{¶49} The first assignment of error is overruled.

B. Retaliation

{¶50} In the second assignment of error, Taylor-Stephens argues the trial court erred in granting a directed verdict in favor of Rite Aid on her retaliation claim. She contends she presented sufficient evidence to establish a genuine issue of material fact that Rite Aid retaliated against her in violation of R.C. 4112.02(I) because she engaged "in litigation over the same things for which her subordinates were seeking union representation." (Appellant's brief at 18.)

{¶51} Civ.R. 50(A)(4) governs motions for directed verdict and states:

> When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

{¶52} A motion for a directed verdict under Civ.R. 50 tests the sufficiency of the evidence, not the weight of the evidence or the credibility of witnesses. *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 119, 671 N.E.2d 252 (1996). Under Civ.R. 50(A)(4), a court may properly grant a motion for directed verdict when, after construing the evidence most strongly in favor of the party against whom the motion is directed, it finds that reasonable minds could come to but one conclusion on a determinative issue, and the conclusion is adverse to the nonmoving party.

{¶53} We review the trial court's decision on a motion for directed verdict de novo. *C4 Polymers, Inc. v. Huntington Natl. Bank*, 2015-Ohio-3475, 41 N.E.3d 788, ¶ 28 (8th Dist.), citing *Groob v. Keybank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 14.

{¶54} To establish a retaliation claim, the plaintiff must show that (1) she engaged in a protected activity, (2) she was subjected to an adverse employment action, and (3) there was a causal link between the protected activity and the adverse action. *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, 879 N.E.2d 174, ¶ 13; R.C. 4112.02(I). In presenting a prima

facie case of retaliation, "the plaintiff is not required to conclusively prove all the elements of his claim," however, "the plaintiff must ultimately prove, by a preponderance of the evidence, that the plaintiff's protected activity was the determinative factor in the employer's adverse employment action." *Wholf v. Tremco, Inc.*, 2015-Ohio-171, 26 N.E.3d 902, ¶ 43 (8th Dist.).

{¶55} An adverse employment action is any "'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Vogt v. Total Renal Care, Inc.*, 8th Dist. Cuyahoga No. 103102, 2016-Ohio-4955, ¶ 13, quoting *Tepper v. Potter*, 505 F.3d 508 (6th Cir.2007). "Changes in employment conditions that result merely in inconvenience or an alteration of job responsibilities are not disruptive enough to constitute an adverse employment action." *Eakin v. Lakeland Glass Co.*, 9th Dist. Lorain No. 04CA008492, 2005-Ohio-266, ¶ 19.

{¶56} An employee has engaged in a protected activity for purposes of R.C. 4112.02(I) if the employee has "opposed any unlawful discriminatory practice" (the "opposition clause") or "made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code" (the "participation clause"). *Veal v. Upreach L.L.C.*, 10th Dist. Franklin No. 11AP-192, 2011-Ohio-5406, ¶ 18; *Brown v. O'Reilly Automotive Stores, Inc.*, 8th Dist. Cuyahoga No. 102694, 2015-Ohio-5146, ¶ 32.

{¶57} Taylor-Stephens alleges that Rite Aid retaliated against her after she engaged the protected activity of retaining counsel and filing a lawsuit alleging racial discrimination against Rite Aid in 2014. She claims she was subjected to four adverse employment actions (1) Manos investigated her for wage and hour violations in December 2013, (2) Stimmel removed an asset

protection agent from store #3367 in April 2014, (3) Bumpus gave her a reduced performance review in 2014, and (4) Rite Aid terminated her employment in April 2015.

{¶58} Only the termination of Taylor-Stephens's employment qualifies as an adverse employment action. Taylor-Stephens was not disciplined for the wage and hour violations, and the investigation, which consisted of an interview, was not materially adverse within the meaning of R.C. Chapter 4112. *See McInnis v. Town of Weston*, 375 F.Supp.2d 70, 84-85 (D.Conn.2005) (initiation of an investigation, without more, is not an adverse employment action).[2] Moreover, the investigation occurred in 2013, and Taylor-Stephens's lawyer did not send a letter of representation or file the lawsuit until 2014. Therefore, because the investigation preceded the protected activity, it could not have been retaliatory.

{¶59} Taylor-Stephens's performance review in 2014 was also not materially adverse. Her 2014 performance review does not reflect a lower performance rating than her 2013 performance review. The scores are virtually the same except that one category went up two points in 2014 and another category went down two points. (Tr. 1026.) Indeed, Taylor-Stephens received a satisfactory performance evaluation in 2014. Moreover, she incurred neither a reduction in compensation nor demotion in employment status. (Tr. 1035.) Therefore, the 2014 performance evaluation was not a materially adverse employment action. *Hollins v. Atlantic Co. Inc.*, 188 F.3d 652, 662 (6th Cir.1999) (holding that "[s]atisfactory ratings in an overall evaluation, although lower than a previous evaluation, will not constitute an adverse employment action").

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[2] Although the court in *McInnis* considered discrimination and retaliation under Title VII, 42 U.S.C.S. 2000 et seq., Ohio courts have held that since Ohio's antidiscrimination laws contained in R.C. Chapter 4112 are modeled after Title VII, "federal case law interpreting Title VII * * * is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Greer-Burger*, 116 Ohio St.3d 324, 2007-Ohio-6442, 879 N.E.2d 174, ¶ 12.

{¶60} The removal of the asset protection agent from store #3367 in April 2014 was also not an adverse employment action. There was no evidence that the removal of the asset protection agent resulted in any significant change in Taylor-Stephens's employment status, responsibilities, or benefits. A legitimate staffing reassignment that does not impact a plaintiff's employment is not a materially adverse employment action. *See Kinamore v. EPB Elec. Util.*, 92 Fed.Appx. 197, 203 (6th Cir.2004).

{¶61} Even if there were an issue of fact as to whether the removal of the asset protection agent was materially adverse, there was no evidence of a causal link between the removal of the agent and Taylor-Stephens's protected activity. The evidence at trial showed that David Henry, the asset protection regional director, removed Vicki Blue, the asset protection agent, from store #3367 because the incoming asset protection manager was Blue's cousin, and Rite Aid did not want Blue to be supervised by a relative.

{¶62} Moreover, there was no evidence that Henry had any knowledge of Taylor-Stephens's discrimination claims when he transferred Blue. In *Fenton v. HiSAN, Inc.*, 174 F.3d 827, 832 (6th Cir.1999), the Sixth Circuit affirmed the dismissal of a retaliation claim where the plaintiff failed to present evidence to refute sworn testimony that the decisionmaker had no knowledge of the plaintiff's protected activity at the time he made his decision.

{¶63} The termination of Taylor-Stephens's employment was an adverse employment action, and Taylor-Stephens's lawsuit alleging racial discrimination against Rite Aid was a protected activity. Therefore, the issue here is whether Taylor-Stephens presented sufficient evidence of a causal link between her racial discrimination lawsuit and the termination of her employment.

{¶64} It is undisputed that Haddox, Taylor-Stephens's district manager and supervisor, ordered Taylor-Stephens to hold an employee meeting on March 16, 2015, to deliver a message regarding Rite Aid's position on unionization. (Tr. 1046-1048.) It is also undisputed that Fedder sent a list of talking points to be made at the meeting to Taylor-Stephens by email. (Tr. 1049.) Haddox testified that Taylor-Stephens refused to deliver the talking points at the March 16, 2015 meeting, and that she (Haddox) "ended up leading that meeting" instead. (Tr. 326.) Indeed, Taylor-Stephens conceded that after she praised the employees, "[Haddox] took over the meeting." (Tr. 1052.)

{¶65} Following the meeting, Haddox warned Taylor-Stephens that her lack of leadership was "unacceptable." Haddox explained:

> I sat down with [Taylor-Stephens]. * * * I told her that, you know, the way that she has been performing and her behavior and her leadership was unacceptable through this point, that it was expected of her to deliver this lawful message that the company is asking her to deliver, and that she was going to have to schedule another meeting.

{¶66} The next meeting was scheduled for March 30, 2015, and Taylor-Stephens developed her own talking points for the meeting, which were approved by corporate counsel. Taylor-Stephens testified that she knew she was expected to communicate the company's message to her associates. (Tr. 1059.) She stated: "I knew what she wanted me to do, yes." (Tr. 1059.) Taylor-Stephens also admitted that she knew she could lose her job if she failed to comply with Haddox's orders. (Tr. 1060.) Yet Taylor-Stephens informed her supervisors minutes before the scheduled meeting that, on advice of counsel, she would not deliver the message. (Tr. 1061-1064.) Her refusal to comply with direct orders of her superiors was insubordination.

{¶67} The uncontroverted evidence showed that Taylor-Stephens's employment was terminated as a result of her insubordination rather than an act of retaliation. There was no evidence of a causal link between Taylor-Stephens's protected activity and the termination of her employment because her insubordination was the proximate cause of her termination. Therefore, the trial court properly granted the directed verdict in favor of Rite Aid on Taylor-Stephens's retaliation claim.

{¶68} The second assignment of error is overruled.

C. Jury Instructions

{¶69} In the third assignment of error, Taylor-Stephens argues the trial court erred by giving inappropriate and incorrect jury instructions. She contends the trial court provided erroneous instructions by (1) providing an inaccurate statement of Rite Aid's rights under the National Labor Relations Act ("NLRA"), (2) advising the jury that Taylor-Stephens was an at-will employee, and (3) providing an inaccurate and misleading statement regarding the EEOC's reporting requirements.

{¶70} We generally review jury instructions for an abuse of discretion. *State v. Shine*, 8th Dist. Cuyahoga No. 105352, 2018-Ohio-1972, ¶ 115. However, a claim that the trial court provided an incorrect statement of law presents a question of law, which we review de novo. *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 575 N.E.2d 828 (1991).

1. The NLRA

{¶71} Taylor-Stephens first argues the trial court should have not provided the following sentence in its charge:

> Rite Aid is permitted to require its managers to outwardly support the Company's position to remain union free, so long as it did not ask managers to engage in conduct that amounts to a retaliatory threat, force, or promise for a benefit.

Taylor-Stephens argues there was no basis for this instruction because she voluntarily dismissed her public policy claim to avoid confusion of the issues and to preclude intertwining the NLRA with her discrimination claims. She also asserts that the jury instruction on the NLRA misled the jury into believing that Rite Aid had the right to require Taylor-Stephens to read prepared talking points about unionization to her subordinates.

{¶72} The NLRA, 29 U.S.C. 151, et seq., prohibits an employer from interfering with the formation of any labor organization. Specifically, 29 U.S.C. 158(a)(2) provides, in relevant part, that "[i]t shall be an unfair labor practice for an employer — * * * to dominate or interfere with the formation or administration of any labor organization * * *."

{¶73} Nevertheless, an employer has the right to communicate to employees "'any of his general views about unionism or any of his specific views about a particular union * * * so long as the communications do not contain a "threat of reprisal or force or promise of benefit."'" *Southern Bakeries, L.L.C. v. N.L.R.B.*, 871 F.3d 811, 831 (8th Cir.2017), quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969) (quoting former 29 U.S.C. 158(c)); *see also Children's Ctr. for Behavioral Dev.*, 347 N.L.R.B. (N.L.R.B. May 15, 2006) ("[A]n employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees."). Therefore, Rite Aid had the right to express its views on the union campaign occurring in store #3367.

{¶74} Moreover, Rite Aid had the right to require Taylor-Stephens, as the store manager, to communicate the company's views on the unionization of store #3367 to the employees of that store. The NLRA excludes supervisors from protections under the Act. In *Natale v. Cent. Parking Sys. of N.Y. Inc.*, 958 F.Supp.2d 407 (E.D.N.Y.2013), the court explained that

supervisors are expressly excluded from the operation of the NLRA in order "to prevent 'conflicts of interest as supervisors balanced their loyalties to the union with those to their employer.'" *Natale* at 415, quoting *N.L.R.B. v. Winnebago Television Corp.*, 75 F.3d 1208, 1213-1214 (7th Cir.1996).

{¶75} 29 U.S.C. 152(11) defines "supervisor" as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing exercise is not of a merely routine or clerical nature but requires the use of independent judgment.

{¶76} As a store manager, Taylor-Stephens was a "supervisor" as defined by 29 U.S.C. 152(11). The uncontroverted evidence showed that she was responsible for hiring and training new employees, reviewing employees' performance, and resolving complaints, among other things. (Tr. 101-103.) She was also required to assist the pharmacy manager in hiring of pharmacy cashiers and pharmacy technicians. (Tr. 101.) Therefore, Rite Aid had the right to require Taylor-Stephens to present the company's views on unionization vis-a-vis her subordinates as long as it did not require her to threaten employees or offer them any promise of benefit.

{¶77} The trial court provided the following instruction relative to the NLRA:

> There was some reference to the National Labor Relations Act, and to the extent it may have an impact on how you resolve some the evidence in this case, I'm going to read this to you. Under the National Labor Relations Act, employers like Rite Aid and their managers are permitted to express any views, argument, or opinion about a union, so long as that expression does not contain a threat of retaliation, force, or a promise of benefit. The law specifically protects the rights of Rite Aid and its managers to communicate with employees regarding what they believe are disadvantages of union membership. Rite Aid is permitted to ask its managers to outwardly support the company's position to remain union free, so long as it did not ask managers to engage in conduct that amounted to a retaliatory threat, force, or a promise for a benefit.

This instruction accurately explained the law under the NLRA. We therefore find no error with this aspect of the jury charge.

2. At-Will Employee

{¶78} Taylor-Stephens next argues the trial court provided an erroneous standard of causation by injecting language regarding her status as an "at-will" employee. She contends that she was only required to prove that unlawful discrimination was a motivating factor in the termination of her employment and that the court should not have mentioned the law regarding "at-will" employment.

{¶79} The trial court instructed the jury regarding the meaning of at-will employment as follows:

> Plaintiff's employment with Rite Aid was at will, which means * * * you can fire someone, or you could leave employment if you choose to, absent an employment contract. There are exceptions to that. One of the exceptions, of course, is race. You can't fire someone because of their race. There are other exceptions that are not applicable to this case because of agent and other things. But the bottom line is we are an at will state relative to employment, which means an employer can terminate an employee at any time for any reason, except for a discriminatory reason. It is unlawful for any employer to terminate an employee because of race.

{¶80} Jury instructions are generally appropriate if they accurately state the law, and there is sufficient evidence in the record to support the charge. *State v. Heineman*, 8th Dist. Cuyahoga No. 103184, 2016-Ohio-3058, ¶ 42; *Parma v. Treanor*, 8th Dist. Cuyahoga No. 106275, 2018-Ohio-3166, ¶ 19.

{¶81} In the context of at-will employment, either the employer or the employee may terminate the employment relationship for any reason that is not contrary to law. *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 483 N.E.2d 150 (1985), paragraph one of the syllabus.

Therefore, the jury instruction on at-will employment was justified because it was an accurate statement of the law, and there was evidence that Taylor-Stephens was an at-will employee.

{¶82} Moreover, we do not consider jury instructions in isolation; they must be reviewed within the context of the entire charge. *State v. Jackson*, 8th Dist. Cuyahoga No. 100125, 2014-Ohio-3583, ¶ 49. Taylor-Stephens argues the trial court's statement that "[i]t is unlawful for any employer to terminate an employee because of race" was an erroneous statement of the law because the correct standard only requires that race be a motivating factor in the employer's action. (Appellant's brief at 20.) Indeed, to prove discriminatory intent, a plaintiff need only prove that unlawful discrimination was at least one motivating factor in the employer's conduct. *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir.2003).

{¶83} However, immediately before explaining the law regarding at-will employment, the trial court gave the following instruction regarding causation in racial discrimination cases:

> We used the term "determining factor." Determining factor means that the plaintiff's race made a difference, meaning her race was a motivating factor, in the way she was treated with regard to any adverse employment action. There may be more than one reason for the employer's decision with regard to any adverse employment action. Plaintiff need not prove that race was the only reason. It is not a determining factor if plaintiff would have been subject to an adverse employment action regardless of her race.

(Tr. 1385.) The trial court's instruction on at-will employment was a correct statement of the law, particularly when considered in the context of the entire charge. Moreover, despite Taylor-Stephens's argument to the contrary, the trial court properly advised the jury that plaintiff was only required to prove that discrimination was at least one motivating factor in Rite's Aid's decision to terminate her employment.

3. EEOC Reporting Requirements

{¶84} Finally, Taylor-Stephens argues the trial court provided a misleading statement regarding the reporting requirements of the EEOC. She complains the following instruction was given in error:

> Rite Aid is required by federal law to keep records specified on the racial and gender composition of its workforce and report that data annually to the U.S. Equal Employment Opportunity Commission.

(Tr. 280.) Taylor-Stephens argues this statement is inaccurate because federal law only requires employers to maintain data concerning racial and gender composition of its workforce for purposes of determining whether an unlawful employment action has been, or is being, committed and that there is no provision requiring employers to keep records specifying the racial and gender composition of its workforce in personnel files and/or investigatory reports.

{¶85} Throughout this litigation, Taylor-Stephens argued that Rite Aid inappropriately tracked the race and gender of its employees for discriminatory purposes. However, 42 U.S.C. 2000e-8(c) provides, in relevant part:

> Every employer, employment agency, and labor organization subject to this title [42 USCS §§ 2000e et seq.] shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order * * *.

Thus, federal law required Rite Aid to maintain records concerning the race and gender of its workforce in order to identify unlawful employment practices, and the court's statement is an accurate reflection of 42 U.S.C. 2000e-8(c). Rite Aid was free to determine how it would comply with this federal mandate with its own internal records. Furthermore, Rite Aid was entitled to have the jury know that there existed a federal mandate requiring Rite Aid to track race and gender data.

{¶86} Therefore, the third assignment of error is overruled.

D. Motion for New Trial

{¶87} In the fourth assignment of error, Taylor-Stephens argues the trial court erred and abused its discretion in denying her motion for new trial. She contends there were numerous "irregularities" in the proceedings that prevented Taylor-Stephens from having a fair trial. She claims the following irregularities (1) the trial court interjected a biased statement into its reading of the jury instructions, (2) the trial court allowed Haddox to avoid impeachment by giving her the opportunity to correct the record after falsely denying that she had previously stated she was "the new ethnic face of Rite Aid," (3) the jury reached its verdict in 30 minutes, and (4) the trial court indicated it was precluding the jury's consideration of punitive damages even before the jury decided liability.

{¶88} Civ.R. 59(A) sets forth nine grounds under which a party may seek a new trial. As relevant here, Civ.R. 59(A) provides that a trial court may grant a new trial if there was an "[i]rregularity in the proceedings of the court * * * by which an aggrieved party was prevented from having a fair trial." Civ.R. 59(A)(1) is meant to preserve "the integrity of the judicial system when the presence of serious irregularities in a proceeding could have a material adverse effect on the character of and public confidence in judicial proceedings." *Wright v. Suzuki Motor Corp.*, 4th Dist. Meigs Nos. 03CA2, 03CA3, and 03CA4, 2005-Ohio-3494, ¶ 114. However, "'motions for new trial are not to be granted lightly.'" *Elsner v. Birchall*, 8th Dist. Cuyahoga No. 106524, 2018-Ohio-2521, ¶ 10, quoting *State v. Jerido*, 8th Dist. Cuyahoga No. 72327, 1998 Ohio App. LEXIS 730, 5 (Feb. 26, 1998).

{¶89} The standard of review we apply to a trial court's ruling on a motion for new trial filed under Civ.R. 59 depends on the grounds asserted in the motion. For example, a motion for new trial premised on an error of law occurring at trial presents a question of law that is reviewed de novo. *Austin v. Chukwuani*, 8th Dist. Cuyahoga No. 104590, 2017-Ohio-106, ¶ 40. Where

the basis for a new trial calls for the exercise of discretion, the order granting or denying a new trial will not be disturbed absent an abuse of discretion. *Harris v. Mt. Sinai Med. Ctr.,* 116 Ohio St.3d 139, 2007-Ohio-5587, 876 N.E.2d 1201, ¶ 35-36. We review a motion for new trial premised upon a procedural irregularity under Civ.R. 59(A)(1) for an abuse of discretion. *Id*.

1. Court's Personal Statement

{¶90} First, Taylor-Stephens contends the trial court made an inappropriate statement while giving jury instructions regarding direct and circumstantial evidence. She argues the trial court interjected a personal, biased statement regarding events outside the proceedings by stating "I've been doing this for 44 years and I've never seen a case that didn't have both direct and circumstantial evidence." (Tr. 1374.) Taylor-Stephens asserts this statement was prejudicial because it "revealed a high degree of favoritism" and "utterly undermined [Taylor-]Stephens's counsel's closing argument." (Appellant's brief at 23.)

{¶91} However, as previously stated, jury instructions must be reviewed in context rather than in isolation. *Jackson*, 8th Dist. Cuyahoga No. 100125, 2014-Ohio-3583, at ¶ 49. The entire comment was as follows:

> You're going to decide this case based upon evidence. Evidence, generally speaking, are of two different areas. There's direct evidence and there's circumstantial evidence. Direct evidence is sensory in nature. It's what we hear, see, smell, taste, feel. It includes stipulations, and it includes exhibits.
>
> There's a second type of evidence and it's referred to as circumstantial evidence. I've been doing this for 44 years and I've never seen a case that did not have both direct and circumstantial evidence. They are equal partners in the law. Evaluate all of the evidence and then step back, looking at all of the evidence, and decide this case and then let the chips fall where they may. I'm sure you will do that.

{¶92} The court's personal observation that direct and circumstantial evidence are found together in virtually every case did not favor one side over the other. Nor did the observation

suggest that one kind of evidence is better than another. It was a neutral statement and therefore was not an irregularity in the proceedings that would justify granting a new trial.

2. Avoiding Impeachment

{¶93} Taylor-Stephens next argues the trial court erroneously allowed Haddox to avoid impeachment by giving her the opportunity to change her testimony. She contends the court allowed her to correct the record after falsely denying that she had previously stated she was "the new ethnic face of Rite Aid."

{¶94} As previously discussed, Taylor-Stephens made an audio recording of Haddox, who allegedly claimed she was "the new ethnic face of Rite Aid." Taylor-Stephens refused to produce the recording during discovery, claiming it was privileged. Consequently, Rite Aid filed a motion in limine to exclude the recording from being introduced as evidence at trial. Although the trial court granted Rite Aid's motion in limine, it advised the parties that Taylor-Stephens could use the recording for impeachment purposes if Haddox denied that she ever claimed to be the "the new ethnic face of Rite Aid." (Tr. 350-351.)

{¶95} Haddox never denied calling herself "the new ethnic face of Rite Aid." Counsel asked Haddox on cross-examination: "Do you recall saying, so I am part of the ethnic face they are trying to impose?" (Tr. 354.) Haddox replied:

> Yes. So what I spoke to was, again, Dierdre Castle was the CEO, and myself, I mean, I'm a new district manager in that market, so I'm definitely a new ethnic face. And someone who's saying there's diversity issues, I'm kind of trying to show them that that is not true.

(Tr. 354.) Because Haddox admitted that she referred to herself as a new ethnic face of Rite Aid, Taylor-Stephens was precluded from introducing the audio recording for impeachment. And, as previously stated, the exclusion of the audio recording was not an abuse of discretion. Moreover, despite Taylor-Stephens's argument to the contrary, the court never gave Haddox an

opportunity to "correct the record." Therefore, we find no irregularities in the proceedings with respect to Haddox's testimony.

3. Short Jury Deliberations

{¶96} Taylor-Stephens argues the short period of time the jury spent deliberating was an irregularity in the proceedings that warrants a new trial. She asserts that the jury did not deliberate long enough to consider the jury instructions, particularly since the court provided a revised jury instruction to the jury during the deliberations. However, Taylor-Stephens offers no authority for the proposition that short deliberations constitute an irregularity in the proceedings. Moreover, the short deliberations indicate that Taylor-Stephens failed to prove the necessary elements of her claims, and the deficiencies in her case were obvious to the jury.

4. Refusal to Charge on Punitive Damages

{¶97} Taylor-Stephens argues the trial court erred in refusing to provide a jury instruction on punitive damages.

{¶98} R.C. 2315.21, which governs punitive damages, states that "punitive or exemplary damages are not recoverable from a defendant * * * in a tort action unless * * * [t]he actions or omissions of that defendant demonstrate malice[.]" *See also Calmes v. Goodyear Tire & Rubber Co.*, 61 Ohio St.3d 470, 473, 575 N.E.2d 416 (1991) ("Punitive damages in this state are available upon a finding of actual malice.").

{¶99} The trial court indicated that an instruction on punitive damages was not warranted because the court did not find any evidence of malice. "A trial court has the broad discretion to determine whether or not the evidence adduced at trial supports a requested jury instruction." *State v. Galvin*, 8th Dist. Cuyahoga No. 103266, 2016-Ohio-5404, ¶ 17; *see also State v. Wilson*,

4th Dist. Lawrence No. 16CA12, 2018-Ohio-2700, ¶ 46 ("A trial court has no obligation to give an instruction if the evidence does not warrant it.").

{¶100} We have reviewed the record and found no evidence of malice. Therefore, the trial court's refusal to give an instruction on punitive damages was not an abuse of discretion, was not an irregularity in the proceedings, and did not deprive Taylor-Stephens of a fair trial.

5. Biased Judge

{¶101} Taylor-Stephens argues the trial court's overall demeanor toward her and her counsel reflect an inability to be fair and impartial and thus precluded Taylor-Stephens from having a fair trial. She contends the following actions demonstrate the court's inability to be fair and impartial (1) dismissal of Taylor-Stephens's retaliation claim on directed verdict; (2) the continuous interruption of Stephens, her counsel, and her witnesses; (3) exclusion of race-based evidence; (4) allowing Haddox to change her testimony to avoid impeachment; (4) reading incorrect statements of the law to the jury; and (5) a defense verdict.

{¶102} However, as previously explained, there was insufficient evidence to support Taylor-Stephens's retaliation claim because she admitted that she refused a direct order from her supervisor to deliver talking points to her associates regarding Rite Aid's position on unionization. The evidence unequivocally demonstrated that Taylor-Stephens's employment was terminated as a proximate result of her insubordination rather than some retaliatory intent. And we have already determined that the trial court properly excluded evidence where appropriate, did not give Haddox an opportunity to change her testimony to avoid impeachment, and provided accurate jury instructions based on the law and evidence.

{¶103} With respect to alleged interruptions, the record shows that the court interjected the phrase "if you know," only when a question called for speculation or defense counsel objected. The following examples illustrate this point:

> Q: You talked about transfers of all these people supposedly that were refused the right to transfer. Have any of those documents been produced in this litigation that's been going on for more than two years?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled. If you know.
>
> A: I don't know.
>
> Q: Did you produce them?
>
> A: No.
>
> * * *
>
> Q: Let's look at [e]xhibit [No.] 42, March 11th. Is this the * * * first email that Wanda was included on?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: If you know.
>
> A: I don't know.

(Tr. 420, 608.) After reviewing the record, we find no inappropriate interruptions. The trial court's questions to witnesses were limited to evidentiary issues or requests to clarify answers. Although the trial court interrupted counsel on both sides, the interruptions were clearly intended to stop counsel from talking over a witness or the court, or to preclude counsel from belaboring an evidentiary issue that was either resolved or postponed for later discussion.

{¶104} Furthermore, we cannot say the trial court's comments and rulings evidenced a bias in favor of Rite Aid. The trial court gave Taylor-Stephens wide latitude to introduce evidence regarding alleged discrimination experienced by other African-American employees

that were not related to Taylor-Stephens's claim. As previously stated, evidence regarding alleged discrimination of third-party employees, such as Hogan's complaint against Radak, is not relevant to a plaintiff's discrimination claim. *Thompson*, 8th Dist. Cuyahoga Nos. 72626 and 72627, 1999 Ohio App. LEXIS 2150. Thus, although this evidence was arguably inadmissible, the trial court allowed Taylor-Stephens to introduce testimony over Rite Aid's objection.

{¶105} After reviewing the record, we find no irregularities in the proceedings that would justify a new trial. Therefore, the fourth assignment of error is overruled.

E. Costs

{¶106} In the fifth assignment of error, Taylor-Stephens argues the trial court erred in taxing costs in the amount of $7,834 and refusing to stay its ruling on costs until after the appeal. She contends the trial court should not have charged expenses associated with depositions as costs.

{¶107} Civ.R. 54(D) provides: "Except when express provision therefore is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs." This rule grants the trial court broad discretion to assess costs, and the court's ruling will not be reversed absent an abuse of that discretion. *Vance v. Roedersheimer*, 64 Ohio St.3d 552, 555, 597 N.E.2d 153 (1992); *Vanadia v. Hansen Restoration, Inc.*, 8th Dist. Cuyahoga No. 101033, 2014-Ohio-4092, ¶ 32.

{¶108} "Costs are generally defined as the statutory fees to which officers, witnesses, jurors and others are entitled for their services in an action *and* which the statutes authorize to be taxed and included in the judgment." (Emphasis added.) *Benda v. Fana*, 10 Ohio St.2d 259, 227 N.E.2d 197 (1967), paragraph one of the syllabus. Thus, in order to be taxable as a cost under

Civ.R. 54(D), the expense must be authorized by statute. *Nithiananthan v. Toirac*, 12th Dist. Warren No. CA2014-02-021, 2015-Ohio-1416, ¶ 89.

{¶109} There is no statutory authority expressly authorizing the taxing of all depositions costs. *Carr v. Lunney*, 104 Ohio App.3d 139, 142, 661 N.E.2d 246 (8th Dist.1995). This court has held that "in the absence of statutory authorization, deposition costs and other litigation expenses may not be properly taxed as costs." *Beal v. State Farm Ins. Co.*, 132 Ohio App.3d 203, 210, 724 N.E.2d 860 (8th Dist.1999), citing *Carr*.

{¶110} Sup.R. 13(D) generally allows the expenses associated with recording testimony, editing film, playing the video deposition at trial, and playing the video for the purpose of ruling on objections to be taxed as costs. However, Sup.R. 13(A)(6) provides that the expense of a transcript of the deposition shall be borne by the requesting party. Therefore, Sup.R. 13 does not allow the expense of a transcript of a videotaped deposition to be taxed as costs in favor of a prevailing party but allows costs associated with recording and playing the videotaped deposition to be taxed.

{¶111} Nevertheless, in *Naples v. Kinczel*, 8th Dist. Cuyahoga No. 89138, 2007-Ohio-4851, ¶ 13, this court held that a deposition transcript may be taxable as costs pursuant to R.C. 2303.21, which states:

> When it is necessary in an appeal, or other civil action to procure a transcript of a judgment or proceeding, or exemplification of a record, as evidence in such action or for any other purpose, the expense of procuring such transcript or exemplification shall be taxed in the bill of costs and recovered as in other cases.

However, the *Naples* court explained that expenses associated with procuring a deposition transcript are only taxable as a cost "when it is used 'as evidence in such action or for any other purpose' that is necessary." *Naples* at ¶ 14.

{¶112} In its motion to tax costs, Rite Aid sought an award of costs in the amount of $7,834. The itemized bill of costs included two videotaped depositions and transcripts of Taylor-Stephens (Volumes I and II), playing the video depositions of Taylor-Stephens at trial, and the deposition transcripts of the following six witnesses who were either subpoenaed or testified at trial: Eric Hanson, Joanne Fedder, Lois Manos, Asia Grayscreetch Haddox, Fien Elad, and Vickie Blue.

{¶113} Rite Aid used the transcript and video recordings of Taylor-Stephens's depositions for impeachment purposes at trial. Therefore, the expenses associated with procuring the videos and transcripts of her depositions, as well as the playing of her depositions at trial, were taxable expenses under R.C. 2303.21 and Sup.R. 13.

{¶114} However, Rite Aid did not require the transcripts of the other witnesses to establish any material fact in its case-in-chief because, with the exception of Vickie Blue, these witnesses testified for Rite Aid at trial, and Rite Aid did not use the transcripts to impeach its own witnesses. And because Vickie Blue never testified at trial, the transcript of her deposition was not necessary either. Therefore, the cost of procuring the deposition transcripts of Hanson, Fedder, Haddox, Elad, and Blue were not taxable as costs because Rite Aid did not require the use of those transcripts as evidence in the action.

{¶115} Taylor-Stephens argues that even if the deposition expenses are taxable as costs, it was inequitable to assess costs against Taylor-Stephens. She argues the trial court abused its discretion in awarding costs to Rite Aid because the total amount of the costs is unduly burdensome.

{¶116} Civ.R. 54(D) states that "costs shall be allowed to the prevailing party unless the court otherwise directs." The phrase "unless the court otherwise directs" grants the court

discretion to order that the prevailing party bear all or part of his or her own costs. *Vance*, 64 Ohio St.3d 552 at 555, 597 N.E.2d 153.

{¶117} As previously stated, Taylor-Stephens is not responsible for the full amount of taxable costs ordered by the trial court because only the expenses for Taylor-Stephens's depositions were taxable as costs. These expenses include $2,311.60 for Taylor-Stephens's first deposition, $1,628.50 for her second deposition, and $1,200 for the playing of her depositions at trial for a total amount of $5,140.10. The other transcripts were not taxable because Rite Aid did not need them to defend against Taylor-Stephens's claims.

{¶118} Costs in the amount of $5,140.10 could be considered burdensome for the average individual. However, when applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *Vannucci v. Schneider*, 8th Dist. Cuyahoga No. 105577, 2018-Ohio-1294, ¶ 22. The trial court, who presided over the trial, watched the case unfold and was in the best position to evaluate the fairness of assessing costs. Undoubtedly Rite Aid incurred significant litigation expenses and attorney fees in defending against Taylor-Stephens's claims, and it is seeking to recoup a small fraction of those costs. Furthermore, Rite Aid's litigation expenses were increased as a result of Taylor-Stephens's decision to dismiss her complaint without prejudice and refile the action, which caused Rite Aid to take her deposition twice.

{¶119} The purpose of Civ.R. 54(D) is to offset the litigation costs of the prevailing party, and Civ.R. 54 does not limit costs to a party's ability to pay. Therefore, we cannot say that the trial court abused its discretion by awarding costs to Rite Aid. Accordingly, the fifth assignment of error is sustained in part and overruled in part. Only the expenses associated with the videotaped depositions of Taylor-Stephens in the amount of $5,140.10 were taxable as costs.

F. Manifest Weight of the Evidence

{¶120} Although Taylor-Stephens claimed the jury's verdict was against the manifest weight of the evidence in her statement of the assignments of error, she failed to provide any argument, citations to the record, or legal authority to support this claim as required by App.R. 16(A)(7).

{¶121} The burden is on the appellant, not the appellate court, to construct the legal arguments necessary to support an appellant's assignment of error. *Grein v. Grein*, 11th Dist. Lake No. 2009-L-145, 2010-Ohio-2681, ¶ 50. Appellate courts are not advocates. Therefore, appellate courts "cannot and will not search the record in order to make arguments on appellant['s] behalf." *Helman v. EPL Prolong, Inc.*, 139 Ohio App.3d 231, 240, 743 N.E.2d 484 (7th Dist.2000). Where an appellant fails to comply with App.R. 16(A)(7), the reviewing court may disregard the assignment of error. *Young v. Kaufman*, 8th Dist. Cuyahoga Nos. 104990 and 105359, 2017-Ohio-9015, ¶ 44, citing App.R. 12(A)(2).

{¶122} Taylor-Stephens failed to set forth any argument with citations to the record and legal authority to support her sixth assignment of error. Therefore, the sixth assignment of error is overruled.

{¶123} The trial court's judgment is affirmed in part and reversed in part. The judgment in favor of Rite Aid is affirmed except that its award of costs is reduced from $7,834 to $ 5,140.10.

It is ordered that appellee and appellant share costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

TIM McCORMACK, P.J., CONCURS;
MARY J. BOYLE, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE OPINION

MARY J. BOYLE, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶124} I respectfully dissent with the majority's analysis regarding Taylor-Stephens's second assignment of error. It is my view that the trial court erred when it entered a directed verdict for Rite Aid on Taylor-Stephens's retaliation claim. I would find that Taylor-Stephens presented sufficient evidence to survive a directed verdict on this claim.[3] I would therefore sustain Taylor-Stephens's second assignment of error, reinstate her retaliation claim, and remand for a new trial on this claim. I concur with the majority on Taylor-Stephens's remaining assignments of error.

{¶125} A motion for a directed verdict "tests the legal sufficiency of the evidence." *McKenney v. Hillside Dairy Co.*, 109 Ohio App.3d 164, 176, 671 N.E.2d 1291 (8th Dist.1995). Pursuant to Civ.R. 50(A)(4), a motion for directed verdict shall be granted "[w]hen, * * * the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party[.]"

{¶126} When ruling on a motion for directed verdict, the trial court does not weigh the evidence or evaluate the credibility of the witnesses; rather, the issue is solely a question of law,

namely, "did the plaintiff present sufficient material evidence at trial on a claim for relief to create a factual question for the jury?" *Ridley v. Fed. Express*, 8th Dist. Cuyahoga No. 82904, 2004-Ohio-2543, ¶ 82. Under this rule, a trial court may not grant a directed verdict unless the evidence, when construed in the light most favorable to the nonmoving party, leads reasonable minds to only one conclusion, and that conclusion is adverse to the nonmovant. Civ.R. 50(A), therefore, requires the trial court to give the nonmoving party the benefit of all reasonable inferences that may be drawn from the evidence. *Broz v. Winland*, 68 Ohio St.3d 521, 526, 629 N.E.2d 395 (1994). If there is sufficient evidence to permit reasonable minds to reach different conclusions on an essential issue, then the trial court must submit that issue to the jury. *O'Day v. Webb*, 29 Ohio St.2d 215, 280 N.E.2d 896 (1972), paragraph four of the syllabus.

{¶127} Because a motion for a directed verdict presents a question of law, an appellate court must conduct a de novo review of the trial court's judgment. *Howell v. Dayton Power & Light Co.*, 102 Ohio App.3d 6, 13, 656 N.E.2d 957 (4th Dist.1995); *Nichols v. Hanzel*, 110 Ohio App.3d 591, 599, 674 N.E.2d 1237 (4th Dist.1996).

{¶128} Thus, the question in this case is whether Taylor-Stephens presented sufficient evidence of a retaliation claim. She argues that

> [i]t is undisputed that [Rite Aid] terminated [her] just 2 days after she told [District Manager] Asia Grayscreetch that she was in litigation over the same things for which her subordinates were seeking union representation, and Grayscreetch admitted she told Taylor-Stephens "[t]hat changes everything."

{¶129} R.C. 4112.02(I) prohibits retaliation

> against any person because that person has opposed any unlawful discriminatory practice * * * or because that person has made a charge [of discrimination], testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

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[3] Neither party moved for summary judgment.

A plaintiff may prove a retaliation claim through either direct or circumstantial evidence that unlawful retaliation motivated the employer's adverse employment decision. *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 543 (6th Cir.2008); *Reid v. Plainsboro Partners, III*, 10th Dist. Franklin Nos. 09AP-442 and 09AP-456, 2010-Ohio-4373, ¶ 55. Direct evidence is that evidence which, if believed, requires no inferences to establish that unlawful retaliation was the reason for the employer's action. *Imwalle* at 543-544.

{¶130} When a plaintiff lacks direct evidence, he or she may establish retaliation through circumstantial evidence using the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Imwalle* at 544. Under the *McDonnell Douglas* framework, a plaintiff bears the initial burden of establishing a prima facie case of retaliation. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). To establish a prima facie case of retaliation under R.C. 4112.02(I) based on indirect evidence, Taylor-Stephens had to establish the following: (1) she engaged in a protected activity; (2) Rite Aid knew of her participation in a protected activity; (3) she suffered an adverse employment action; and (4) a causal link exists between the protected activity and the adverse action. *Imwalle* at 544. The establishment of a prima facie case creates a presumption that the employer unlawfully retaliated against the plaintiff.

{¶131} Once a plaintiff establishes a prima facie case, the burden shifts to the employer to "articulate some legitimate nondiscriminatory reason for" its action. *Carney v. Cleveland Hts.-Univ. Hts. City School Dist.*, 143 Ohio App.3d 415, 429, 758 N.E.2d 234 (8th Dist.2001), citing *Burdine* at 252-253. If the employer carries its burden, then the burden shifts back to the plaintiff to prove that the employer's stated reason is a pretext for discrimination. *Id.*, citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105

(2000); *see also Brown v. Renter's Choice, Inc.*, 55 F.Supp.2d 788, 795 (N.D.Ohio 1999), quoting *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181 (11th Cir.1984) ("An employer may make employment decisions 'for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.'").

{¶132} A "causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." *Wrenn v. Gould*, 808 F.2d 493, 501 (6th Cir.1987), quoting *Burrus v. United Tel. Co.*, 683 F.2d 339 (10th Cir.1982). But the mere fact that an adverse employment action occurs subsequent to the protected activity does not alone support an inference of retaliation. *See Cooper v. N. Olmsted*, 795 F.2d 1265, 1272 (6th Cir.1986).

{¶133} Furthermore, when it comes to retaliation claims, courts apply a higher standard of causation than the one that is applied in discrimination claims. *Wholf v. Tremco Inc.*, 8th Dist. Cuyahoga No. 100771, 2015-Ohio-171, ¶ 42, citing *Univ. of Texas S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013). With discrimination claims, a plaintiff only needs to prove that "race, color, religion, sex, or national origin was a *motivating factor*" in the adverse employment action. (Emphasis added.) *Id.* at ¶ 28. But with retaliation claims, the "'but-for' causation standard defined in *Nassar*" applies. *Id.* at ¶ 44. This means that a plaintiff must show that retaliation is the determinative factor — not just a motivating factor — in the employer's decision to take the adverse employment action. *Smith v. Ohio Dept. of Pub. Safety*, 10th Dist. Franklin No. 12AP-1073, 2013-Ohio-4210, ¶ 59; *see also Nassar* at 362 (in retaliation cases, the plaintiff must show that the retaliatory animus was the "but-for cause of the alleged adverse employment action").

{¶134} In this case, Taylor-Stephens testified that she decided she could not tell her store associates at the March 30, 2015 meeting that if they did not vote for the union, Rite Aid would address all of their issues. Taylor-Stephens stated that Rite Aid had not addressed her issues of hostile work environment and harassment that she had been complaining about for years, so she could not tell her associates that Rite Aid would handle their issues. She decided the day before the meeting that she could not lie to her employees. When Asia Grayscreetch Haddox, Taylor-Stephen's district manager, came to the store on the morning of the meeting, Taylor-Stephens told her "I can't do this. As much as I love my job, I'm not going to do this. I'm not going to lie." Taylor-Stephens testified:

> The things that they were telling me to say [were] not true. Rite Aid was not there for me. Rite Aid didn't support me. Rite Aid allowed me to be in that situation, harassed, hostile environment. Not only me, my staff. And that was because of where we're located and because of our race. They did not treat the white stores and the white managers the same way. If you see in all of them investigation reports, they went over them and didn't do a complete investigation.

{¶135} Taylor-Stephens said that she told Grayscreetch Haddox that she did not believe that Rite Aid would help the employees because they did not help her when she was complaining about the same issues, which is why she was in litigation against Rite Aid. Grayscreetch Haddox testified that Taylor-Stephens said to her, "I'm not going to deliver these talking points. I've been advised by counsel to not do this." Grayscreetch Haddox testified that she was angry and that she told Taylor-Stephens, "this changes things," and she walked away from Taylor-Stephens at that point. Two days later, Rite Aid terminated Taylor-Stephens's employment. It is my view that construing this evidence in a light most favorable to Taylor-Stephens, reasonable minds could reach different conclusions, and therefore, the trial court should have denied Rite Aid's motion for directed verdict.

{¶136} Furthermore, although Rite Aid presented evidence of a legitimate nondiscriminatory reason for firing Taylor-Stephens, Taylor-Stephens presented counter evidence regarding Rite Aid's pretext for retaliation. Specifically, Taylor-Stephens presented evidence that Caucasian store managers were disciplined or written up first before they were fired. Thus, reasonable minds could come to different conclusions regarding pretext based on this evidence.

{¶137} Therefore, I would sustain Taylor-Stephens's second assignment of error because it is my view that the jury should have been able to consider this claim. Accordingly, I would reverse the judgment of the trial court, reinstate Taylor-Stephens's retaliation claim, and remand for a new trial on this claim.