STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: January 12, 2017)

MARGARITA VELEZ,	:	
Plaintiff	:	
	:	
v.	:	**C.A. No. PC 01-6540**
	:	
MICROFIBRES, INC.,	:	
Defendant	:	

DECISION

MCGUIRL, J. This matter came before the Court for a jury-waived trial. The Plaintiff, Margarita Velez, filed a charge of discrimination with the Rhode Island Commission for Human Rights (Commission) against Defendant, Microfibres, Inc. (Microfibres). Microfibres elected to avail itself of its right to remove the matter from the Commission and have the case heard and decided by this Court in accordance with G.L. 1956 § 28–5–24.1(c). Ms. Velez alleges that Microfibres discriminated against her on the basis of her national origin in violation of the Rhode Island Fair Employment Practices Act (FEPA), §§ 28-5-1 through 28-5-42. Jurisdiction is pursuant to § 28-5-24.1(c) and G.L. 1956 § 8-2-14.

I

Findings of Fact

Ms. Velez, who was born in Puerto Rico and is Hispanic, worked as a machine operator at the Microfibres factory in Pawtucket, Rhode Island from 1994 until she was terminated on May 25, 2000. (Velez Dep. 6-7, Oct. 6, 2008 (Velez Dep.); Joint Ex. 4.) As an employee with Microfibres, Ms. Velez was a member of the Amalgamated Clothing and Textile Workers Union Greater Northeastern Joint Board Local 1832T (Union), which had a collective bargaining

agreement (CBA) with Microfibres. (Velez Dep. at 60; Joint Ex. 5.) The CBA forbids Microfibres from discriminating "against any employee on account of race, color, creed, sex, age, national origin, or disability." (Def.'s Ex. A. at 3.) Furthermore, Article 13 of the CBA requires Microfibres to have "just cause" in order to "discipline, suspend or discharge" any employee (other than a probationary employee). Id. at 16. Prior to her termination, Ms. Velez had been issued warnings by Microfibres on four separate occasions. (Velez Dep. at 15-20.) Three warnings were issued to Ms. Velez in 1995 for job performance issues including sleeping on the job, and Ms. Velez received a fourth warning in 1999 for poor quality of work. Id.

During the evening hours of May 3, 2000 into the early morning hours of May 4, 2000, Ms. Velez and her co-worker, Thomas Kodua, who is black, both were working overtime on the third shift in the Microfibres Coating Department. Id. at 21-22. While she was away from the machine she was operating, Ms. Velez saw Mr. Kodua interfere with the machine. Id. at 23. After Mr. Kodua touched her machine, the machine began to malfunction. Id. Ms. Velez reported to a leader, Robert E. Adamo, Jr., that her machine was malfunctioning and that she believed Mr. Kodua was responsible. Id. Thereafter, Ms. Velez and Mr. Kodua began to argue, and although it is unclear as to who struck whom first, it is undisputed that the two parties each struck the other in the face. Id. at 24. Mr. Adamo broke up the fight, and the two returned to work. Id.

At approximately 3:00 a.m., as Ms. Velez was leaving the Microfibres factory building at the end of her shift, she passed Mr. Kodua in the hallway and the two exchanged insults. Mr. Kodua followed Ms. Velez into the parking lot and the two parties had another confrontation in the parking lot. Id. at 24 and 26. During said confrontation, the parties pushed each other and Mr. Kodua again slapped Ms. Velez in the face. Id. at 24-25. In return, Ms. Velez slapped Mr.

Kodua in the face and tried to bite him. Id. at 25. Mr. Kodua and Ms. Velez were wrestling on the ground, pushing and shoving each other, until Mr. Adamo and another co-worker, Ronald Buisson, separated them. (Tr. Arbitration Hr'g 21, Aug. 28, 2001.)

Believing that Mr. Kodua had a stun gun on his person and that he would follow her home (Velez Dep. at 26), Ms. Velez retrieved a baseball bat from her car. (Tr. Arbitration Hr'g 21, Aug. 28, 2001.) However, Mr. Buisson promptly took the bat from Ms. Velez. Id. at 21 and 32; Velez Dep. at 27. At some point during this exchange while Mr. Kodua and Ms. Velez were outside of the Microfibres factory building, Mr. Kodua called Ms. Velez a "Spanish slut," and Ms. Velez called Mr. Kodua a "nigger." (Tr. Arbitration Hr'g 38, Aug. 28, 2001.) The parties returned to work the following day.

What transpired between Ms. Velez and Mr. Kodua (Velez-Kodua incident) was not reported to upper management until two days later on May 5, 2000, when a supervisor, Michael Jezak, informed the Director of Human Resources, Thomas J. McNamara. (Pl.'s Ex. 18A.) Mr. McNamara and Microfibres' plant manager, Peter Volante, decided to suspend Ms. Velez and Mr. Kodua on May 6, 2000, pending Mr. McNamara's investigation of the incident. (Pl.'s Ex. 18B) Mr. McNamara, Mr. Volante and Supervisor Manuel Mota met in person on the morning of May 8, 2000, to discuss Mr. McNamara's investigation and the existence of possible witnesses. (Pl.'s Ex. 18C.) The men agreed that Mr. McNamara would interview Ms. Velez, Mr. Kodua, Mr. Buisson, Mr. Adamo, Glenn Audette (the third shift supervisor in the Coating Department), and Mr. Jezak. Id.

At the conclusion of Mr. McNamara's investigation, Microfibres decided to terminate both Mr. Kodua and Ms. Velez. (Joint Ex. 6.) The discharge paperwork stated that Ms. Velez was discharged for violating Plant Rule #23—"Threatening or intimidating of fellow employees

on Company Premises" and Plant Rule #24—"Provoking, Instigating a fight or fighting on Company premises." Id. According to Microfibres' rules, the penalty for violating Plant Rule #23 is a warning while the penalty for violating Plant Rule #24 is discharge. (Joint Ex. 1.)

The Union, through filing a grievance in accordance with the three step grievance process prescribed by the CBA, sought to have Ms. Velez's employment with Microfibres reinstated. (Joint Ex. 5.) At the Step One meeting on May 10, 2000, the Union's grievance was denied by Mr. McNamara. Id. At the Step Two meeting on May 12, 2000, the Union's grievance was denied by Manuel Mota (the Manager of the Coating Department) and Mr. Volante. Id. During the final Step Three meeting on May 26, 2000, the Union's grievance was denied by James R. Fulks, the Executive Vice President of Microfibres. Id.

In addition to the Union's filing of a grievance, Ms. Velez filed a charge of discrimination with the Commission. (Joint Ex. 4.) On August 2, 2001, the Commission found probable cause to believe that Microfibres had violated the FEPA by treating Ms. Velez differently than other similarly-situated white employees because of her national origin. On August 24, 2001, Defendant elected to terminate proceedings with the Commission and to have the matter heard by this Court, which prompted the Commission to issue to Ms. Velez a right to sue letter dated September 18, 2001. See § 28-5-24.1(c)(1).

Meanwhile, the Union's challenge of Microfibres' termination of Ms. Velez proceeded to arbitration. On December 10, 2001, the arbitrator denied the Union's grievance, finding that Microfibres had just cause to terminate Ms. Velez and Mr. Kodua. See Award of Arbitrator at 1. On December 13, 2001, Ms. Velez filed a Complaint with this Court alleging that Microfibres terminated her employment because of her national origin. (Compl.) Ms. Velez seeks

compensatory and punitive damages as well as attorneys' fees and costs. Id. The case proceeded to trial and the parties later submitted post-trial memoranda.

Additional facts will be provided in the Analysis portion of this Decision.

II

Standard of Review

A non-jury trial is governed by Super. R. Civ. P. 52(a), which provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon. . . ." Therefore, in a bench trial, "[t]he trial justice sits as a trier of fact as well as of law." Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006) (citing Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984)). Thus, '"[t]he task of determining the credibility of witnesses is peculiarly the function of the trial justice when sitting without a jury.'" Greensleeves, Inc. v. Smiley, 68 A.3d 425, 436 (R.I. 2013) (quoting Bogosian v. Bederman, 823 A.2d 1117, 1120 (R.I. 2003)).

Although the trial justice is required to make specific findings of fact and conclusions of law, "brief findings will suffice as long as they address and resolve the controlling factual and legal issues." White v. LeClerc, 468 A.2d 289, 290 (R.I. 1983); see also Super. R. Civ. P. 52(a). As such, a trial justice sitting as a finder of fact "need not 'categorically accept or reject each piece of evidence'" or "resolve every disputed factual contention that may arise during a trial." Notarantonio v. Notarantonio, 941 A.2d 138, 147 (R.I. 2008) (quoting Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 102 (R.I. 2006)). Nonetheless, the trial justice's findings must be supported by '"competent evidence.'" State v. Dennis, 29 A.3d 445, 450 (R.I. 2011) (quoting Tim Hennigan Co. v. Anthony A. Nunes, Inc., 437 A.2d 1355, 1357 (R.I. 1981)).

III

Analysis

In bringing her claim of disparate treatment, Ms. Velez argues that several other non-Hispanic Microfibres employees engaged in conduct similar to her behavior in the Velez-Kodua incident but were treated more favorably by Microfibres in that their employment was not terminated. Accordingly, Ms. Velez contends that Microfibres violated FEPA when it terminated her employment for engaging in similar conduct.

FEPA prohibits employers from discharging or discriminating against an employee "with respect to hire, tenure, compensation, terms, conditions or privileges of employment, or any other matter directly or indirectly related to employment" because of the employee's "race or color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin." Sec. 28–5–7. FEPA is Rhode Island's analog to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.A. § 2000e et seq. (2000). The Rhode Island Supreme Court has applied the analytical framework of Title VII actions to those cases arising under FEPA. See Bucci v. Hurd Buick Pontiac GMC Truck, LLC, 85 A.3d 1160, 1169 (R.I. 2014) ("This Court has adopted the federal legal framework to provide structure to our state employment discrimination statutes.") (quoting Neri v. Ross–Simons, Inc., 897 A.2d 42, 48 (R.I. 2006)).

As Ms. Velez's grievance is one of employment discrimination, this Court will employ the three-part burden shifting framework as outlined by the United State Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) and its progeny. See Bucci, 85 A.3d at 1169 (employing "the now familiar three-part burden shifting framework as outlined by the United States Supreme Court in McDonnell–Douglas Corp., 411 U.S. at 802–04, 93 S.Ct.

1817"). The purpose of applying the McDonnell-Douglas framework is to "'sharpen the inquiry into the elusive factual question' of the employer's motivation." Hicks v. Johnson, 755 F.3d 738, 744 (1st Cir. 2014) (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 n.8 (1981) (parallel citations omitted)).

The first prong prescribed by the McDonnell-Douglas framework places the initial burden on the plaintiff to establish a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802. Once a prima facie case of discrimination is established, the employer is presumed to have unlawfully discriminated against the employee. See Burdine, 450 U.S. at 254. Then, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's termination. See Ctr. for Behavioral Health, R.I., Inc. v Barros, 710 A.2d 680, 685 (R.I. 1998) (citing McDonnell Douglas, 411 U.S. at 802) (citations omitted)). Provided that the employer "offers such a justification, the presumption created by the employee's prima facie case disappears and the focus shifts back to the employee to demonstrate that the proffered reasons are a mere pretext for discrimination." Id. At that point, "[t]he burdens of proof and persuasion fall squarely upon the plaintiff to demonstrate that the defendant's tendered explanation is only a pretext and that discrimination was the true motive underlying the hiring decision." McGarry v. Pielech, 47 A.3d 271, 280-81 (R.I. 2012).

A

Plaintiff's Prima Facie Case

To put forth a prima facie case, the plaintiff must prove, by a preponderance of the evidence, "(1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002) (citations omitted). The burden of

establishing a prima facie case is "easily made," Kosereis v. Rhode Island, 331 F.3d 207, 213 (1st Cir. 2003) (citations omitted) and "not especially onerous." Bucci, 85 A.3d at 1171; see also Burdine, 450 U.S. at 253. The threshold necessary to establish a prima facie case is "relatively low." Hodgens v. Gen. Dynamics, 144 F.3d 151, 165-66 (1st Cir. 1998).

Ms. Velez clearly satisfies the first three prongs of her prima facie case: as a Hispanic, she is a member of a protected group; she was qualified for the job in question; and she received an adverse employment action when she was terminated from her job. However, Microfibres contends that Ms. Velez failed to establish a prima facie case because she has not shown that Microfibres treated similarly situated non-Hispanic employees more favorably than it treated her. However, this contention is misplaced.

The First Circuit has "explicitly rejected the notion that plaintiffs in disparate treatment cases are required to demonstrate that they were treated differently as part of their prima facie case." Kosereis, 331 F.3d at 213. Furthermore, where an employer asserts a legitimate and nondiscriminatory reason for terminating an employee, the United States Supreme Court has held that whether the employee actually established a prima facie case is "no longer relevant" and thus disappears and "drops out of the picture." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510, 511 (1993).

Considering that this Court will find that Microfibres has asserted legitimate and nondiscriminatory reasons for terminating Ms. Velez, this Court will assume, without deciding, that Ms. Velez has made out a prima facie case. Thus, because Ms. Velez's case is one of disparate treatment, this Court will consider any comparative evidence "as part of the pretext analysis, and not as part of the plaintiff's prima facie case." Kosereis, 331 F.3d at 213 (citing Conward v. Cambridge Sch. Comm., 171 F.3d 12, 19 (1st Cir. 1999)).

B

Legitimate Nondiscriminatory Reason

The burden of production falls on the defendant under the McDonnell Douglas framework "to come forward with legitimate nondiscriminatory reasons for the employee's termination" once a plaintiff establishes her prima facie case. Bucci, 85 A.3d at 1171. The elimination of the presumption of discrimination established by the prima facie case is contingent upon the defendant offering these legitimate nondiscriminatory reasons. See id. Here, "a defendant need only offer affidavits supporting the nondiscriminatory reason." Id.

The record at hand indicates that Microfibres articulated several nondiscriminatory reasons why it terminated Ms. Velez. Microfibres determined that Ms. Velez intentionally engaged in a physical fight with a co-worker on Microfibres' premises twice over the course of one shift, including hitting the co-worker numerous times, trying to bite him, attempting to go after him with a baseball bat, and calling him a "nigger." Courts in other jurisdictions have found that similar reasons satisfy the employer's burden under the McDonnell-Douglas framework. See Harris v. Bank of Delmarva, No. MJG–13–2999, 2015 WL 501970, at *6 (D. Md. Feb. 4, 2015) (terminating an employee who referred to a co-worker as a nigger while performing job-related duties is a legitimate nondiscriminatory reason for terminating the employee); Morgan v. Mass. Gen. Hosp., 901 F.2d 186, 190 (1st Cir. 1990) (terminating an employee who, in a work-related dispute, struck and seriously injured a co-worker is a legitimate nondiscriminatory reason for terminating the employee); RAP, Inc. v. Dist. of Columbia Comm'n on Human Rights, 485 A.2d 173, 178 (D.C. 1984) (terminating an employee who drew a knife from her purse and swung it at her husband during a fight on the employer's premises is a legitimate nondiscriminatory reason for terminating the employee).

Consequently, the Court finds and concludes that Microfibres has satisfied its burden of proffering legitimate nondiscriminatory reasons for deciding to terminate Ms. Velez. Accordingly, the Court now must determine whether Ms. Velez has satisfied her burden of showing that the legitimate nondiscriminatory reasons proffered by Microfibres were merely a pretext for discriminating against her.

C

Pretext

Upon the employer's articulating legitimate nondiscriminatory reasons for its decision to terminate the employee, the third and final prong prescribed by the McDonnell-Douglas framework "shifts the burden back to the plaintiff to focus on 'the ultimate question of discrimination vel non.'" Bucci, 85 A.3d at 1173 (quoting Neri, 897 A.2d at 50 (citations omitted)). Under this prong, the plaintiff must prove that the real reason he or she was terminated was due to the employer's unlawful animus toward the employee. See Bucci, 85 A.3d at 1173 ("To prove discrimination, a plaintiff need not provide a 'smoking gun,' but rather must prove that '[the] defendants' legitimate, nondiscriminatory reason for . . . [its decision] was merely pretext (which would mean that the real reason . . . was unlawful animus).'") (quoting Casey v. Town of Portsmouth, 861 A.2d 1032, 1038 (R.I. 2004)). In other words, the plaintiff must prove that the alleged legitimate nondiscriminatory reasons offered by the employer for the employee's termination were "merely pretext" for discrimination. Casey, 861 A.2d at 1038 (citing Barros, 710 A.2d at 685).

There are two distinct methods by which a plaintiff may establish pretext: "'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'"

Bucci, 85 A.3d at 1173 (quoting Barros, 710 A.2d at 685). Again, regardless of which method a plaintiff utilizes in seeking to establish pretext, the plaintiff must demonstrate "that discrimination was the real reason" for the employee's termination. Id. (quoting McGarry, 47 A.3d at 281). Furthermore, the Rhode Island Supreme Court has pronounced on numerous occasions that when the reason for the employee's termination is surrounded by a "suspicion of mendacity," then the inference of discrimination is strengthened. Barros, 710 A.2d at 685.

Ms. Velez's primary argument that the legitimate nondiscriminatory reasons proffered by Microfibres for her termination were merely pretext for discriminating against her is that Microfibres treated the non-Hispanic Comparators more favorably than her. See Garcia v. Bristol-Myers Squibb Co., 535 F.3d 23, 31 (1st Cir. 2008) (recognizing that "[a] plaintiff can demonstrate that an employer's stated reasons are pretextual . . . by producing evidence that [the] plaintiff was treated differently from similarly situated employees"). For Ms. Velez to establish pretext in such a manner, Ms. Velez must be similarly situated to the Comparators "'in all relevant respects.'" Lockridge v. The Univ. of Maine Sys., 597 F.3d 464, 471 (1st Cir. 2010) (quoting Kosereis, 331 F.3d at 214); see also Conward, 171 F.3d at 20 (noting that the comparison cases "must closely resemble one another in respect to relevant facts and circumstances").

Microfibres contends that the Comparators that occurred before Mr. McNamara's tenure at the company are not evidence of pretext because two different supervisors may handle similar situations differently, and such differential treatment in and of itself does not amount to pretext. See Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 20 (1st Cir. 1999) (An employee's current supervisor, having different expectations than former supervisors—"even if

those expectations were contrary to those of [] prior supervisors—does not support a finding of pretext.").

This Court concurs with courts that have held that for an employee to be similarly situated with other employees in a disparate treatment claim, each of the employees must "'have dealt with the same supervisor, [and have] been subject to the same standards'" Sellers v. U.S. Dep't of Def., 654 F. Supp. 2d 61, 67 (D.R.I. 2009) (quoting Walker v. Ohio Dep't of Rehab. & Corr., 241 F. App'x 261, 266 (6th Cir. 2007)), because "[w]hen different decision-makers are involved, two decisions are rarely similarly situated in all relevant aspects." Stanback v. Best Diversified Prods., Inc., 180 F.3d 903, 910 (8th Cir. 1999); see also Ineichen v. Ameritech, 410 F.3d 956, 960-61 (7th Cir. 2005) (Plaintiff must prove that the alleged similarly situated employee "reported to the same supervisor."). Decisions made by different supervisors regarding different employees "are seldom sufficiently comparable . . . for the simple reason that different supervisors may exercise their discretion differently." Radue v. Kimberly–Clark Corp., 219 F.3d 612, 618 (7th Cir. 2000).

Nevertheless, although the above-mentioned Comparators were subject to disciplinary decisions rendered by different direct supervisors, the record reveals that the ultimate decision-maker, Mr. Fulks, was present both before and during Mr. McNamara's tenure at Microfibres. Consequently, the Court declines Microfibres' invitation to treat these Comparators differently on the basis of Mr. McNamara's tenure at Microfibres. This Court will now proceed to discuss in detail the incidents involving each of the proffered Comparators.

D

The Comparators

1) Rick LeBlanc

The first incident involved a Caucasian individual named Rick LeBlanc who had been employed by Microfibres since August 1984. (Pl.'s Ex. 6.) On May 6, 1997, Mr. LeBlanc was informed at the end of his shift that he was being suspended for three days on account of his violating company safety practices. (LeBlanc Dep. 18, Aug. 1, 2008.) Specifically, Mr. LeBlanc was accused of violating Plant Rule #1—"Violating a safety rule or safety practice"—for operating a forklift in such a manner as to potentially cause serious injury to a fellow employee. See Joint Ex. 1; Union Ex. 1 at the Arbitration Proceedings. Mr. LeBlanc denied the charge. (LeBlanc Dep. 18, Aug. 1, 2008.) The penalty for violating Plant Rule #1 is to receive a warning. (Joint Ex. 1.)

According to Mr. LeBlanc, earlier that day, an unidentified employee took Mr. LeBlanc's forklift truck and drove it to another part of the building. (LeBlanc Dep. 12, Aug. 1, 2008.) Mr. LeBlanc was in the process of retrieving and driving the forklift back to his work area when the same employee ran out from behind a stack of boxes, crossed Mr. LeBlanc's path within eight feet of the moving forklift, and ran into the office. Id. at 16-17. It is unclear who reported the incident; however, Mr. LeBlanc was suspended at the end of his shift for the alleged violation. See id. at 18. According to Mr. LeBlanc, he did not challenge his suspension because he had been working six to seven days per week during that period, and it "seemed like a nice thing" to be able to have some time off. Id. at 20. There are no known witnesses to this alleged incident. Id. at 13.

2) Joel Lineberger and Santos Rivera

Employee Santos Rivera is Ms. Velez's cousin and also is from Puerto Rico. There is no record of Mr. Rivera's date of hire. (Pl.'s Ex. 6.) Employee Joel Lineberger, who is Caucasian, was hired by Microfibres on September 14, 1981. Id.

On June 11, 1997, an unidentified individual bumped into Mr. Lineberger and caused him to spill half of his cup of coffee. (Pl.'s Exs. 3(b) and 3(c) (Investigatory Notes).) Mr. Lineberger then threw the remainder of his coffee out the door and it landed on Mr. Rivera's chest. Id. Mr. Rivera confronted Mr. Lineberger and demanded to know whether it was he who had thrown the coffee. Id. When Mr. Lineberger admitted having thrown the coffee, Mr. Rivera called him "a 'f… assh…[;]'" whereupon, Mr. Lineberger demanded, "what are you going to do about it?" Id. In response, Mr. Rivera threw his own coffee at Mr. Lineberger. Id.

At that point, Mr. Lineberger lunged at Mr. Rivera and both men fell to the ground. Id. While they were on the ground, Mr. Rivera asked Mr. Lineberger, "Are you going to let me up?" to which Mr. Lineberger responded, "Yes, but that's it." (Pl.'s Ex. 3(c).) Another individual at the scene, Virgilio Candalario, "tapped [Mr. Lineberger] on the shoulder to break [them] up." (Pl.'s Ex. 3(b).)

During the investigation, Mr. Rivera indicated that he had been avoiding Mr. Lineberger for several months after Mr. Lineberger allegedly threatened to break his legs. Id. Apparently, Mr. Rivera previously had reported Mr. Lineberger to his supervisor for making comments about his "waiting for Santos to say something so I can beat him up." Id.

Mr. Lineberger testified at a deposition that as he was throwing the remainder of his coffee out the door, "[i]t just so happened Santos [Rivera] was walking in the door . . . which I didn't know he was coming in, and I told him I was sorry." (Lineberger Dep. 74, Aug. 1, 2008.)

Mr. Lineberger further testified that later on Mr. Rivera "just walked up to me and threw his coffee more or less in my face[,]" id. at 78, and then "he wrapped his arms around me like a bear hug." Id. at 75. In order to free himself from Mr. Rivera's hold, Mr. Lineberger said he had to forcefully push Mr. Rivera's arms upward. Id. at 75. According to Mr. Lineberger, they "wrestled" during the resulting "scuffle[,]" but that "[n]o punches were thrown, no kicks, nothing." Id. at 74 and 75. There is no record of Mr. Rivera being deposed about the incident.

On June 13, 1997, Donna Nadeau issued Warning Notices to both men informing them that they both were being suspended for three days, without pay, for violating "Plant Rule #24: Provoking, instigating a fight or fighting on the Company premises." (Pl.'s Exs. 2(p) and 3(a).) Pursuant to Plant Rules, the penalty for violating Rule #24 is discharge. See Joint Trial Ex. 1. The Warning Notices included the following language: "It is understood that any further occurrences of this nature will result in discharge." (Pl.'s Exs. 2(p) and 3(a).)

3) Edward Kearns and Michael Trombley

Caucasian employees Edward Kearns and Michael Trombley were hired by Microfibres on November 2, 1987 and March 11, 1977, respectively. (Pl.'s Ex. 6.) On May 1, 1998, Paul Parkinson, a plant manager, suspended both men for three days for violating Plant Rule #24. (Pl.'s Exs. 9(a) and 10(a).)[1] No details of the underlying allegations are indicated in the Warning Notices; however, each party was requested to attend a meeting upon completion of their suspensions. Id.

In his deposition, Mr. Kearns testified that on the day of the alleged violation, Mr. Trombley released the brake on a piece of equipment causing Mr. Kearns to lunge forward. (Kearns Dep. 6, July 25, 2008.) In response, Mr. Kearns said he "started screaming at [Mr.

[1] The warning notice issued to Mr. Trombley referred to him as "MICHEAL TROMBLY." (Pl.'s Ex. 10(a).)

Trombley] and he pushed me." Id. Mr. Kearns did not remember exactly what he said when he screamed at Mr. Trombley; however, "[i]t was probably obscene." Id. at 7. Mr. Trombley then reported Mr. Kearns for spitting on him, which accusation Mr. Kearns denied. See id. at 6. ("If something inadvertently came off my lip, then maybe that's what happened, but I'm not going to admit that I spit on him because I didn't.") According to Mr. Kearns, the incident lasted a minute, id., did not involve any punching, hitting, slapping or weapons, id. at 16-17, and no racial slurs were exchanged. Id. at 14. Although he denied spitting on Mr. Trombley, Mr. Kearns did not grieve his suspension because he "didn't want to have any problems." Id. at 10.

At the meeting subsequent to the suspensions, Mr. Parkinson stated that "no one should have to work in a hostile environment or feel they are being provoked or intimidated in the workplace." (Pl.'s Ex. 9(b).) Mr. Parkinson also indicated that Mr. Kearns and Mr. Trombley understood that Mr. Parkinson "expect[ed] both [of them] to work together in a non-intimidating manner when necessary to accomplish what need[ed] to be done." Id.

4) Ronald J. Andrews and Rick Brown

On September 22, 1998, a physical altercation took place between Caucasian employees Ronald J. Andrews, hired March 4, 1996, and Richard Brown, date of hire unknown. (Pl.'s Ex. 6 and McNamara Dep., Vol. II, 357, Sept. 21, 2009.) A contemporaneous, handwritten note of unknown origin stated: "Why'd you call him - none of your f'n business – [g]rabbed around throat." (Pl.'s Ex. 5(c).) The note also stated: "Alan witnessed [the] whole thing." Id. It is unclear who "Alan" was or what he witnessed; however, it appears that Mr. Andrews may have choked Mr. Brown and had to be pulled off Mr. Brown's back. (Arbitration Tr. Vol. II 15, Aug. 28, 2001.)

It is not clear exactly what kind of discipline Mr. Andrews received; presumably, however, he was suspended for his actions because on September 28, 1998, his union filed a grievance that petitioned for him to return to work. (Pl.'s Ex. 5(a).) After Microfibres denied the petition at the first two steps of the grievance process, Mr. Fulks reinstated Mr. Andrews at Step No. 3. (Pl.'s Ex. 5(b).) In doing so, Mr. Fulks placed Mr. Andrews on probation for six months, with no back pay, and on a five-day suspension without pay. Id. In addition, Mr. Andrews was required to undergo counseling through an Employee Assistance Program. Id.

5) Mr. Lineberger

On April 4, 2000, another incident involving Mr. Lineberger occurred when, in the early morning hours of that day, he damaged the "E-stop" of a machine at the plant. (Pl.'s Ex. 2(a).) The resulting damage "cost the company over $4,000 in lost production, in downtime and damage to the machine including labor costs." Id.

At the time, Mr. Lineberger had been employed by Microfibres for over eighteen years, had incurred twenty-two separate warnings since 1985, and had been issued disciplinary suspensions on at least four prior, separate occasions due to poor job performance, insubordination, leaving the plant without authorization, making threats of bodily harm to supervisors, provoking and instigating a fight, and fighting on company premises. (Pl.'s Exs. 2(a) and 6.) In addition, Mr. Lineberger had "been placed on job jeopardy status on 2 occasions[,] [and was] . . . requested to obtain counseling on at least 2 separate occasions." (Pl.'s Ex. 2(a).)

Norman R. Gaudreau conducted an investigation of the damaged machine. (Pl.'s Ex. 2(e).) According to his report, Mr. Lineberger first stated that he had caused the damage by hitting the machine with his hand, but he later "admitted to hitting the E-stop with the wooden

pounder because he was aggravated at the machine for not working properly." Id. Apparently, the oven "kicked off" fourteen times while Mr. Lineberger was trying to run a sample and, after putting in "a considerable amount of time and effort into trying to get the machine to run properly[,]" Mr. Lineberger said that "he 'lost it' and struck out at the machine." Id.

After considering Mr. Gaudreau's report, Peter Volante stated in an April 5, 2000 e-mail to Mr. Edmund Reis and Mr. McNamara that the incident "is a terminable offense" that had been complicated by the fact that Mr. Lineberger "admitted to the act." (Pl.'s Ex. 2(c).) He then stated:

> "I do not know what his personnel record holds. If it is fairly clean, I would lean towards a written warning, clearly stating the next offense could lead to termination. If it is not clean, I would recommend a 3 day suspension. If it is a horror show, terminate." Id.

On April 7, 2000, Mr. McNamara informed Mr. Lineberger, by letter, that he was being placed on disciplinary suspension pending investigation of the April 4, 2000 incident. (Pl.'s Ex. 2(h).) Also on April 7, 2000, Mr. Reis issued a Warning Notice to Mr. Lineberger advising him that he had violated "Plant Rule #14 – Misusing, destroying, defacing or damaging company property." (Pl.'s Ex. 2(q).) The stated penalty for such infraction was dismissal. (Joint Ex. 1.)

Mr. Lineberger was suspended for fifteen-days and placed on probation for two years. (Pl.'s Ex. 2(q).) In addition, he was ordered to enroll in, and to complete, an Anger Management Program. Id. Specifically, the Warning Notice stated:

> "The violation of Plant Rule #14 calls for discharge – Mr. Lineberger will be allowed to keep his job provided he enrolls in and completes an Anger Management Program that must be approved by the company. He is placed on a 2-year probation. If Mr. Lineberger violates any major plant rule during this time he will be terminated . . ." Id.

Mr. Lineberger filed a grievance with his Union. See Pl.'s Ex. 2(y).

On the following Wednesday, April 12, 2000, Mr. Lineberger stopped by the plant to pick up his newly-issued paycheck. (Pl.'s Ex. 2(d).) When Mr. Lineberger asked the person at the reception desk, Jessica Hebert, for his "check from last week[,]" she thought he was requesting a previously issued paycheck and told him that the company generally doesn't hold paychecks after a few days. Id. Ms. Hebert then asked Mr. Lineberger whether he had checked his mail for the paycheck. Id. Mr. Lineberger allegedly became agitated and raised his voice, stating that he previously had confirmed with another person that he would pick it up that day and questioned how the company could "have already mailed it if the checks are issued on Wednesdays?" Id.

Ms. Hebert then realized that there had been a misunderstanding and immediately called another employee, Sherrie Petricone, to bring down the paycheck. Id. Ms. Petricone asked Ms. Hebert whether she and Mr. Lineberger had engaged in a confrontation. Id. Ms. Hebert responded by describing the incident as a "communication problem" from which she "just needed a couple of minutes to calm down." Id. Ms. Hebert indicated in a subsequent statement that she had "felt threatened because of the manner in which Mr. Lineberger was speaking to [her] and raising his voice." Id.

On April 18, 2000, "a 3rd Step Grievance Meeting" was conducted to discuss the "E-Stop" incident. (Pl.'s Ex. 2(a) at 1.) Mr. Volante, Mr. Fulks and Mr. McNamara represented Microfibres at the meeting, and afterwards, Mr. McNamara wrote a confidential memorandum "to document the discipline and agreement for [Mr. Lineberger] to return to work on Sunday night 4/23/00 . . . ." Id.

In the memorandum, Mr. McNamara summarized Mr. Lineberger's work record of warnings and violations since 1985 and stated that it was "one of the worst in the Company and

unacceptable." Id. at 2. Mr. McNamara further stated that it was "obvious you have had problems with controlling your anger for a long period of time." Id. Mr. McNamara then concluded: "After reviewing your situation due to your 19 years of service with Microfibres, the Company has decided that your job would be saved for the last time provided you comply with . . . [certain] terms and conditions[.]" Id.

6) Seth Henenbeng and Doumato Doumato

On April 7, 2000, employee Seth Henenbeng reported that employee Doumato Doumato slapped Mr. Henenbeng in the face after making fun of him for eating a lollipop. See McNamara Dep., Vol. II at 397, Sept. 21, 2009. Mr. Henenbeng, who was hired on July 31, 1984 (Pl.'s Ex. 6), was a black employee from Kenya. See McNamara Dep., Vol. II 393, Sept. 21, 2009. Mr. Doumato was hired on March 16, 1981 (Pl.'s Ex. 6) and was a "minority" who apparently was from Syria. (McNamara Dep., Vol. II 398, Sept. 21, 2009).

When confronted about the alleged event, Mr. Doumato denied Mr. Henenbeng's allegations. Id. at 395. According to Mr. McNamara, although he believed Mr. Henenbeng's version of events, no witnesses were willing to come forward; thus, the company "didn't really have any evidence to back up what [Mr. Henenbeng] had said . . . ." Id. However, Mr. McNamara drafted a Warning Notice against Mr. Doumato stating that Mr. Doumato had violated "Plant Rule #23—Threatening or intimidating fellow associates on the premises[;] Plant Rule #24 – Provoking and instigating a fight on Company premises[; and] Plant Rule #17 – Entering other than assigned work areas without specific Permission." (Pl. Ex. 7(a).) In the description portion of the draft Warning Notice, Mr. McNamara stated:

> "On Friday 4/7/00[,] . . . Mr. Doumato forceably [sic] slapped . . . Seth Henenbeng twice while teasing, chastising and threatening him[.] On Monday 4/10/00[,] Mr. Doumato physically intimidated Mr. Henebeng again by verbally abusing him . . . The penalty for

> these violations will be a 3-day disciplinary suspension. It is only because there is no active disciplinary warning in Mr. Doumato's file that he is not being discharged." Id.

Mr. McNamara also wrote a note to Peter Volante stating, "I feel strongly this abuse must stop. The victim must be protected. If we walk away from this we are contributing to the problem." Pl.'s Ex. 7(b).

In his deposition, Mr. McNamara testified Mr. Fulks ruled against any action in light of the lack of evidence against Mr. Doumato and that Mr. McNamara was "somewhat disappointed" that no formal action was taken. (McNamara Dep., Vol. II 395-96, Sept. 21, 2009). According to Mr. McNamara, Mr. Fulks "felt that [disciplinary action] wouldn't stand up in court, so to speak. So, he advised against suspending without any backup." Id. at 396. At trial, Mr. McNamara testified that after the investigation, Mr. LeBlanc, who was a Union shop steward at the time, came forward as a witness. However, in Mr. McNamara's experience, once the Union became involved in the grievance process, shop stewards generally were unreliable witnesses against fellow Union members; consequently, Mr. McNamara did not trust Mr. LeBlanc to testify against Mr. Doumato. The alleged incident did not involve any allegations involving race. Id. at 397-98.

7) Raul Gonzalez and Kurt Sparfven

On Saturday, April 22, 2000, an incident occurred between employees Raul Gonzalez and Kurt Sparfven. At the time, Mr. Gonzalez, who was Hispanic, had worked for Microfibres since December 19, 1994, and Mr. Sparfven, a Caucasian man, began working for Microfibres on October 26, 1992. Pl.'s Ex. 6.

At trial, Mr. McNamara testified that Mr. Volante called Mr. McNamara to report an incident between Mr. Gonzalez and Mr. Sparfven and to discuss appropriate discipline. See

Trial Tr. 20, Jan. 29, 2014; McNamara Dep., Vol. II 281, Sept. 21, 2009. Apparently, Mr. Gonzalez had asked Mr. Sparfven to lower the volume of his radio, and when Mr. Sparfven objected to the request, the two men engaged in a heated argument. See Trial Tr. 21, Jan. 29, 2014; McNamara Dep., Vol. I 108, Aug. 21, 2009, and Vol. II 281-82, Sept. 21, 2009. The argument did not involve a physical fight; however, the supervisor on duty, Ed Reis, did have to separate the two men. See Trial Tr. 21, Jan. 29, 2014; McNamara Dep., Vol. II 283, Sept. 21, 2009.

Afterwards, Mr. Gonzalez approached Mr. Volante and told him that "he [Mr. Gonzalez] didn't like Sparfven . . . , and he's going to go home and get a gun and shoot him." Trial Tr. 21, Jan. 29, 2014. Mr. Volante immediately suspended Mr. Gonzalez, telling him "'You're suspended. That's a threat. You can't threaten somebody.'" Id. A committee consisting of Mr. McNamara, the plant manager, Mr. Volante, and Mr. Fulks ordered Mr. Gonzalez to attend anger management. See McNamara Dep., Vol. I 109, Aug. 21, 2009 and Vol. II 284, Sept. 21, 2009. There is no evidence that Mr. Sparfven was disciplined as a result of this incident. See McNamara Dep., Vol. I 109-10, Aug. 21, 2009.

8) Kurt Sparfven

On July 22, 2000, at approximately 11:45 a.m., another incident involving Mr. Sparfven took place. On that day, a major water leak occurred in one of the buildings and Mr. Sparfven was asked to help clean up the water. (Pl.'s Ex. 8, Letter from Mr. McNamara to Mr. Sparfven, at 1.) In response, Mr. Sparfven "acted in a belligerent and sarcastic manner and refused to comply with the request citing it wasn't [his] job." Id. Supervisor Glen Johnson told Mr. Sparfven that if he refused to comply, said refusal "would be considered insubordination and

[he] would be suspended." Id. Mr. Johnson then left the area, after which, Mr. Sparfven also left the area. Id.

When Mr. Johnson suspended Mr. Sparfven at approximately 12:30 p.m. for insubordination, Mr. Sparfven "again reacted in a belligerent and sarcastic manner." Id. Thereafter, as he was leaving the building, Mr. Sparfven "made a scene in the Cafeteria . . . ." Id.

Mr. McNamara informed Mr. Sparfven, in writing, that

> "this behavior and action is entirely unacceptable to the company. Your actions constitute a violation of Plant Rule #19, Insubordination. The listed penalty for infraction of the rule is discharge.
>
> "Refusing a reasonable work order by a manager or supervisor is a serious violation of plant rules regardless of the circumstances.
>
> "The following will outline your discipline in this incident, which is made without precedent for any future violations of this type. In this circumstance the penalty for these actions is a two-week disciplinary suspension. This is in lieu of your termination from the company. You will also be placed on a two-year probationary period for any insubordinate acts. If you are involved in subordinate [sic] acts during this period of time you will be discharged from the company. Violations of the plant rules and regulations will stand on their own merits during this period." Id. at 2.

Mr. McNamara testified that Mr. Sparfven was not discharged for insubordination because "we looked in his file, there was nothing really in his file. He was a fairly, you know, his record was clean. He was with the company – I can't remember how long he was with the company, but he was there a few years, really." (McNamara Dep., Vol. I 111-12, Aug. 21, 2009.)

9) Robert E. Adamo, Jr. and Howard Leighton

On May 12, 2000, during the course of the Velez-Kodua investigation, Mr. Adamo, a Caucasian employee who was hired by Microfibres on January 28, 1996, reported two prior,

unrelated incidents involving himself and Howard Leighton, a Caucasian man who was hired on March 10, 1986. (Pl.'s Ex. 11Q; Pl.'s Ex. 6.) Mr. Adamo reported that the first incident between the two men occurred approximately one year earlier and involved a "pushing-and-shoving match in the locker room about something that happened on the floor." (McNamara Dep., Vol. II 187-88, Sept. 21, 2009.) During this alleged incident, Mr. Leighton said that would kill Mr. Adamo if Mr. Adamo snuck up on him again. (Pl.'s Ex. 11(q).). It is not known what, if anything, prompted Mr. Leighton's actions.

The second incident allegedly took place on May 11, 2000. According to Mr. Adamo, Mr. Leighton "jacked [Mr. Adamo] up, came up from behind him, and jacked him up, and threatened him, and told him if he crossed him . . . that he, you know, that he would get him." (McNamara Dep., Vol. II 189-90, Sept. 21, 2009.) However, Mr. Adamo "very emphatically told [Mr. McNamara] he didn't want [Mr. McNamara] to do anything about it[,] [that] [Mr. Adamo] could handle it[,] [and that] [h]e just wanted [Mr. McNamara] to know about it." Id at 191. Apparently, Mr. Adamo thought an investigation would go nowhere because there were no witnesses to either event. See id. at 192 (responding to Mr. McNamara's offer to investigate by stating "'No, it's not going to do anything. Please don't, because, you know, I don't need the trouble.'"). Mr. McNamara reluctantly acquiesced to Mr. Adamo's wishes; as a result, Microfibres never instituted any sort of disciplinary proceedings against Mr. Leighton for either of these alleged incidents. Id. at 191-92.

10) Rick LeBlanc and Dennis Dacier

On May 13, 2000, an incident occurred between Mr. LeBlanc and Dennis Dacier, a Caucasian man. At the time, Mr. Dacier had worked for Microfibres since December 21, 1998. (Pl.'s Ex. 6.)

On May 13, 2000, Mr. LeBlanc was suspended, without pay, ordered to attend an Anger Management Program, and placed on probation for a two-year period for violating Plant Rule #22: "Engaging in horseplay, running, scuffling, or throwing objects[,]" the penalty for which is a warning. (Pl.'s Ex. 4(a); Joint Ex. 1.) Specifically, Mr. LeBlanc was accused of striking fellow associate "Mr. Dacier in the chest with [his] fist in what could be described as horseplay[,]" resulting in Mr. Dacier going "to the hospital and [being] diagnosed with a severe bruise to his ribs." (Pl.'s Ex. 4(a).) However, there are "two completely different versions of how this happened[.]" (McNamara Dep., Vol. I 129, Aug. 21, 2009.)

Mr. Dacier testified at a deposition that he had just walked over to where Mr. LeBlanc was working when Mr. LeBlanc, who was his ex-brother-in-law, "reached into a can that they used to put rags in . . . and he came out and hit me in the chest, right in the middle of the chest." (Dacier Dep. 43 and 47, July 28, 2008.) According to Mr. Dacier, Mr. LeBlanc hit Mr. Dacier with his fist, and that he did not think the blow was accidental. See id. at 44 and 46-47. However, Mr. Dacier told Mr. McNamara that he did not want to pursue the matter because he couldn't "see the guy losing his job because he ha[d] a family[;]" however, he "d[id]n't want it to happen again.'" Id. at 55-56.

In contrast, Mr. LeBlanc testified that at the time of the incident,

> "I was running the machine. When a machine stops, there is wet adhesive that runs on the machine. So, when the machine stops, you have to run and put plastic on it so it don't spill all over the place. So, I was in a barrel grabbing this thing and he was standing right behind me. I come up, that was it." (LeBlanc Dep. 28, Aug. 1, 2008.)

Apparently, the plastic in question was contained in a barrel next to the rags and required "a lot of force" to pull out of the barrel. Id. at 32. According to Mr. LeBlanc, he was unaware that Mr. Dacier was nearby and "d[id]n't know why he was standing that close behind . . . ." Id. Mr.

LeBlanc admitted that he struck Mr. Dacier; however, he denied punching Mr. Dacier in the chest with his fist and said that the blow was accidental. Id. at 38-39 and 48-49. Mr. LeBlanc further testified that although the blow was hard, he did not apologize because when Mr. Dacier "got up and walked away, he was laughing. If I thought I hurt him, I would have said I'm sorry." Id. at 39. Mr. LeBlanc stated that approximately fifteen minutes before the incident, he and Mr. Dacier had been "fooling around." Id. at 52.

On May 31, 2000, representatives from both the Union and Microfibres determined at a "3rd Step Grievance Meeting" that Mr. LeBlanc "had struck Mr. Dacier." (Pl.'s Ex. 4(a).) However, "taking into consideration there were two completely different versions of how this happened[,] [i]t was determined that the original cause of the incident was horseplay." Id. Although violations of Plant Rule #22 only called for a warning, Mr. LeBlanc was placed on a one-month suspension from work, without pay, and on a two-year probation, during which Mr. LeBlanc would be immediately discharged if he was involved in or violated any plant rule or Company Policy related to any type of violent act. Id. and Joint Ex. 1. Lastly, Mr. LeBlanc was required to complete an Anger Management Counseling Program. Pl.'s Ex. 4(a).

In determining the aforementioned disciplinary measures, Mr. McNamara testified that he took into account Mr. LeBlanc's prior forklift incident, as well as other incidents that had to do with anger management. (McNamara Dep., Vol. I 125-26 and 131, Aug. 21, 2009.) Although Mr. McNamara believed that there was "a strong likelihood" that Mr. LeBlanc had intentionally hit Mr. Dacier, because he could not prove it was deliberate, Mr. McNamara did not recommend Mr. LeBlanc's discharge. Id. at 133. ("If we had fired him, . . . and we would have had not a good case, because we wouldn't have had the witnesses to back it up."); id. at 136 (explaining "we couldn't prove this because we didn't have any witnesses to corroborate it, and if we had, he

would have been terminated"). In addition, Mr. McNamara was unable to discount the possibility that Mr. Dacier also might have been "involved in some way in this fooling around with LeBlanc." Id. at 133.

Nevertheless, "[b]ecause there were things in his file in regard to that he had other incidents that had to do with anger management, [h]is reputation as being flying off the handle . . . [w]e ended up putting him on probation for two years." Id. at 131. In handing down the discipline, Mr. McNamara informed Mr. LeBlanc:

> "Rick this is a very serious matter. You have been with Microfibres over 15 years and have done some excellent work. The company, however, will not tolerate this type of behavior from any associate. You are being given a second chance. Please take this to heart and act accordingly. You are the only one who can control your actions." (Pl.'s Ex. 4(a).)

Having recited the details of each of the Comparators submitted by Ms. Velez, the Court now will assess whether they are sufficient to satisfy her burden of proving pretext on the part of Microfibres.

E

Whether the Comparators are Similarly Situated to Ms. Velez

Ms. Velez has submitted the aforementioned Comparators in support of her assertion that the legitimate nondiscriminatory reasons proffered by Microfibres were merely pretext for discriminating against her on the basis of her national origin. The issue for the Court to determine is whether these Comparators are similarly situated to Ms. Velez "in all relevant respects." Lockridge, 597 F.3d at 471 (emphasis added).

In analyzing whether employees are similarly situated, "'[t]he test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent . . . .'" Woodward v. Emulex Corp., 714 F.3d 632, 639 (1st Cir. 2013) (quoting Dartmouth Review v.

Dartmouth Coll., 889 F.2d 13, 19 (1st Cir. 1989)). Ms. Velez bears the burden of showing that she and the Comparators "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." Rodriguez-Cuervos, 181 F.3d at 21 (quoting Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992)). Although "[e]xact correlation is neither likely nor necessary, . . . the cases must be fair congeners." Woodward, 714 F.3d at 639.

In the instant matter, Mr. McNamara testified that he recommended Ms. Velez's termination from employment because (a) she admitted to participating in a fight that involved the exchange of blows; (b) she admitted to retrieving a bat during the fight; and (c) she admitted using a racial slur towards her co-worker, Mr. Kodua. (Trial Tr. 33-34, Jan. 23, 2014.) Mr. McNamara also testified that he could not recall any other incidents during his tenure at Microfibres that involved more than one fight during the workday, or that involved the introduction of a weapon. Trial Tr. 16-17, Jan. 9, 2014; see also id. at 45 (describing the incident as "a real fight. It wasn't a one slap. It wasn't one grab of the neck. It was -- they were fighting"); id. at 46 ("I mean, it was a real fight. It wasn't just a momentary snap, losing someone's temper."); id. ("When we heard someone went to get a weapon, that's a concern. It was just added to the other factors.") He further testified that during all of his previous investigations, he had never heard any reports of an employee using the racial slur "nigger" against another employee. (Trial Tr. 18, Jan. 23, 2014.)

In addition, Mr. McNamara testified that it was significant that (1) both Ms. Velez and Mr. Kodua admitted to engaging in a fight (see id. at 33 ("They both admitted it. I didn't need any other witnesses, even though there were.")); (2) both parties admitted using racial slurs against each other; and (3) that Ms. Velez admitted to retrieving a bat. Id. at 33-34.

Notwithstanding her admissions, however, Mr. McNamara also observed that Ms. Velez never expressed any remorse over the incident. Id. at 19.

The Court now will determine whether any or all of the Comparators that occurred during Mr. McNamara's tenure are similarly situated to the Velez-Kodua incident such that they demonstrate that the alleged legitimate nondiscriminatory reasons proffered by Microfibres for terminating Ms. Velez merely were pretext for discrimination. Accordingly, the Court must assess whether the Comparators proffered by Ms. Velez are similarly situated to the facts and circumstances of her case "in all relevant respects." Lockridge, 597 F.3d at 471; see also Conward, 171 F.3d at 20 (requiring comparators to "closely resemble one another in respect to relevant facts and circumstances").

The record reveals that three of the Comparators did not involve a physical confrontation with a fellow employee. The first of these Comparators involved Mr. LeBlanc's violation of a safety rule or safety practice; namely, his unsafe use of a forklift. Although there was a suggestion that Mr. LeBlanc was targeting a fellow employee with the forklift truck, there were no known witnesses to the incident, and thus, Microfibres would not have been able to prove any such allegation. The second Comparator involved Mr. Lineberger and the "E-stop" machine. While this incident may have involved violence, in that Mr. Lineberger deliberately damaged a machine, it did not involve any fighting or interaction with a co-worker. Similarly, the third Comparator—Mr. Sparfven's act of insubordination by refusing an order from a superior—did not involve any fighting with a co-worker.

As these Comparators did not involve fighting with a co-worker, the Court concludes that they do not even come close to being similarly situated to the circumstances surrounding the Velez-Kodua incident. See Ward v. Procter & Gamble Paper Prods. Co., 111 F.3d 558, 559 (8th

Cir. 1997) (holding that an employee who struck her supervisor after an intense argument with the supervisor is not similarly situated to the supervisor because the supervisor did not strike the employee); Maclin v. A.M. Bus Co., Inc., No. 04 C 4176, 2006 WL 463370, at *13 (N.D. Ill. Feb. 22, 2006) (holding that an employee who drove a bus into an accident following a fight between co-workers inside of the bus is not similarly situated to the fighting employees because the driver-employee was not involved in the fight).

The remaining Comparators that allegedly are similarly situated involved confrontations between co-workers. However, these Comparators are not similarly situated "in all relevant respects" because the misconduct involved was not as egregious as that of Ms. Velez. Lockridge, 597 F.3d at 471.

The second Comparator involving Mr. Sparfven occurred when he stated he was going home to get a gun with which to shoot Mr. Gonzalez after the two men had engaged in a heated argument. Clearly, such a threat was a serious matter for which he immediately was suspended; nevertheless, the incident was not similarly situated to that of the Velez-Kodua incident in that it did not involve any physical fighting, no weapon was present at the scene, and no racial slurs were exchanged.

In the case of the altercation between Mr. Kearns and Mr. Trombley, the record reveals that Mr. Kearns accused Mr. Trombley of operating machinery in such a way as to cause Mr. Kearns to lunge forward, and that a heated, obscenity-filled argument ensued. Mr. Trombley later accused Mr. Kearns of spitting at him, but Mr. Kearns denied the allegation. The incident did not involve any punching, hitting, slapping, or weapons, and no racial slurs were exchanged. Both men were suspended as a result of the incident.

With respect to the fight between Mr. Henenbeng and Mr. Doumato, the record reveals

that there was one discreet incident of an alleged slapping and a later alleged incident of intimidation. However, unlike the Velez-Kodua incident, no witnesses came forward during the investigation to verify the allegations. Furthermore, the fighting aspect of the incident was isolated, did not involve any weapons or racial slurs, and vigorously was disputed by Mr. Henenbeng—unlike the Velez-Kodua incident where the parties both admitted to their actions.

Both of the incidents involving Mr. Leighton and Mr. Adamo did not have any witnesses to verify Mr. Adamo after-the-fact accusations. Indeed, Mr. Adamo vehemently instructed Mr. McNamara not to investigate the matters. In addition, neither incident involved a weapon or any racial slurs. As for the LeBlanc-Dacier incident, not only did it not involve any weapons or racial slurs, there were two diametrically opposed versions of what happened, with no witnesses to verify either account. Accordingly, unlike in the Velez-Kodua incident, where both parties admitted to the underlying facts and where there were numerous witnesses to verify the events, Microfibres was unable to prove that Mr. LeBlanc deliberately struck Mr. Dacier as opposed to hitting him accidentally.

The closest Comparator to the instant matter is the wrestling incident involving Mr. Lineberger and Mr. Rivera. In that case, an unidentified individual bumped into Mr. Lineberger causing him to spill coffee. Mr. Lineberger threw the remainder of his coffee through an open door and it landed on Mr. Rivera, who happened to be walking in the door at the time. Mr. Rivera confronted Mr. Lineberger and then retaliated by throwing his own coffee at Mr. Lineberger. The two men then wrestled each other to the ground. During the "scuffle" that ensued, "[n]o punches were thrown, no kicks, nothing." Lineberger Dep. 74, Aug. 1, 2008. In addition, other than the coffee, no weapons were present and no racial slurs were uttered. As a result of this serious incident, both men were suspended, without pay, for three days.

In Perkins v. Brigham & Women's Hosp., 78 F.3d 747, 749 (1st Cir. 1996), an African-American employee had been terminated by his employer for "engag[ing] in inappropriate sexual banter and innuendo" on several occasions, including instances when he "described his sexual prowess in explicit detail, boasted about the length of his penis, exposed himself, patted a female employee's buttocks, and proposed a menage-a-trois." Id. In filing a disparate treatment action against his former employer, the terminated employee claimed that his Caucasian male co-worker, who had made sexually offensive remarks and directed intimidating verbal abuse toward his co-workers, was similarly situated to him. See id. However, the First Circuit upheld the District Court's finding that the two employees were not similarly situated because the Caucasian employee's misconduct, "while reprehensible, was markedly less serious" than that of the African-American employee. Id. at 751.

Similarly, in this case, the misconduct exhibited by all of the Comparators was "markedly less serious" than that of Ms. Velez. Id. None of these Comparators retrieved a physical object during his fight, nor did any of them use any kind of racial slur, much less the one used by Ms. Velez.

In McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1116 (9th Cir. 2004), the Ninth Circuit Court of Appeals declared that:

> "It is beyond question that the use of the word 'nigger' is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination. This word is perhaps the most offensive and inflammatory racial slur in English, . . . a word expressive of racial hatred and bigotry. Swinton v. Potomac Corp., 270 F.3d 794, 817 (9th Cir. 2001) (ellipsis in original) (quotation marks omitted); see also Daso v. The Grafton School, Inc., 181 F.Supp.2d 485, 493 (D.Md. 2002) (The word 'nigger' is more than [a] mere offensive utterance . . . No word in the English language is as odious or loaded with as terrible a history.); NLRB v. Foundry Div. of Alcon Indus., Inc., 260 F.3d 631, 635 n. 5 (6th Cir.2001) (That the word 'nigger' is a slur is not debatable.)."

(Internal quotations omitted.)

This Court concurs with the Ninth Circuit regarding the offensiveness and inflammatory nature of the odious racial slur that Ms. Velez directed at Mr. Kodua.

This utterance, alone, renders her incident with Mr. Kodua to be far more serious in nature than the incidents involving any of the Comparators. See Harris, No. MJG–13–2999, 2015 WL 501970, at *6 (terminating an employee who referred to a co-worker as a nigger while performing job-related duties is a legitimate nondiscriminatory reason for terminating the employee).

In addition to the racial slur, the record reveals that Ms. Velez engaged in not one, but two, physical fights during the same workday, and that she retrieved a bat from her car and was intending to return to the scene when Mr. Buisson removed it from her person. In view of these major differences between the Velez-Kodua incident and the Comparators, the Court concludes that Ms. Velez is not similarly situated to any of her Comparators.

Ms. Velez further argues that under the doctrine of spoliation, this Court should make an adverse inference against Microfibres for failing to turn over investigatory notes taken by Mr. McNamara regarding several of the incidents involving Comparators. Ms. Velez claims that these documents created by Mr. McNamara remained in Microfibres' possession following Mr. McNamara's tenure at Microfibres, but Microfibres contends that Mr. McNamara took these documents with him when his employment with Microfibres ended. See McAdam v. Grzelczyk, 911 A.2d 255, 261 (R.I. 2006) ("The doctrine of spoliation provides that 'the deliberate or negligent destruction of relevant evidence by a party to litigation may give rise to an inference that the destroyed evidence was unfavorable to that party.'") (quoting Mead v. Papa Razzi Rest., 840 A.2d 1103, 1108 (R.I. 2004)). However, even if this Court accepts Ms. Velez's argument

and makes an adverse inference against Microfibres for failing to turn over these notes, such an adverse inference does not overcome this Court's finding that none of the Comparators is similarly situated to Ms. Velez.

F

Ms. Velez's Remaining Arguments Do Not Show Evidence of Pretext.

Ms. Velez makes several other arguments to bolster her claim that the legitimate nondiscriminatory reasons proffered by Microfibres for her termination are merely pretext. Ms. Velez argues that Mr. McNamara's typed investigatory notes are evidence of pretext because they differ from his handwritten notes. In support of her contention, Ms. Velez cites to Plotke v. White, 405 F.3d 1092, 1105 (10th Cir. 2005), in which the court held that the inference that a document was created, fabricated, and placed in a terminated employee's file for the sole purpose of supporting the employee's termination furthered the allegation of pretext. The alleged fabricated document in Plotke purported to show that the terminated employee participated in a counseling session prior to being terminated.

Plotke is inapposite to the matter at hand. Plotke stands for the principle that fabricating documents solely to facilitate the termination of an employee is evidence of pretext. Here, the particular investigatory notes typed by Mr. McNamara pertain to incidents that indisputably took place—a fight between Ms. Velez and Mr. Kodua and their calling of each other racial slurs. Indeed, both parties admitted to these facts. Thus, unlike the fabricated document in Plotke, Mr. McNamara's typed investigatory notes are not the result of his attempt to concoct an event so that Microfibres would have just cause in terminating Ms. Velez. Therefore, this Court finds that Mr. McNamara's typed investigatory notes are not evidence of pretext.

As additional evidence of pretext, Ms. Velez alleges that discrimination, harassment, and

racial slurs pervaded the Microfibres' work environment and were condoned by Microfibres' supervisors. This Court disagrees. There is ample evidence showing that Microfibres took affirmative steps to maintain a work environment devoid of racial discrimination. For instance, Mr. McNamara testified by deposition that he worked with his colleagues to arrange for the Employee Assistance Program to conduct a training seminar for Microfibres' employees designed to eliminate discrimination at Microfibres and to promote "a positive workplace environment." McNamara Dep., Vol. II 199-200, Sept. 21, 2009. Moreover, Ms. Velez's argument carries with it no weight because when Ms. Velez herself used a racial slur towards Mr. Kodua, Microfibres did not condone her racial harassment whatsoever; instead, Microfibres terminated her employment. Indeed, had Microfibres opted to retain Ms. Velez as an employee despite her calling Mr. Kodua a racial slur, conceivably, Microfibres could have been held liable under FEPA for failing to take adequate remedial action in response to racial harassment.

Finally, Ms. Velez points to various notes taken by Mr. McNamara making reference to the race of employees as evidence of pretext. These notes include those taken by Mr. McNamara regarding the incident between Mr. Gonzalez and Mr. Sparfven in which the letters, "MW," signifying "male white," are written next to Mr. Sparfven's name. Ms. Velez also points to other notes written by Mr. McNamara containing the initials "WM" next to other Comparators including Ron Andrews, Joel Lineberger, Rick LeBlanc, and Ed Kearns. To support her claim, Ms. Velez relies on cases from other jurisdictions in which the race of the employee terminated had been noted by the employer prior to the employee's discharge during the employer's investigation. See Smith v. Lockheed-Martin Corp., 644 F.3d 1321 (11th Cir. 2011); Williams v. Lindenwood Univ., 288 F.3d 349 (8th Cir. 2002); Lowe v. Medco Health Solutions of Willingboro, LLC, No. 10–4823, 2012 WL 1495440 (D.N.J. Apr. 27, 2012).

Ms. Velez's reliance on these cases is misplaced. Unlike the employers in those cases, there is no evidence here of Microfibres making note of Ms. Velez's race or national origin at any point during its investigation into her incident with Mr. Kodua. The only document pertaining to the Velez-Kodua incident that makes reference to race is a page of notes describing a conversation between Mr. Fulks and Mr. McNamara in which the two men strategize how to handle the upcoming Third Step Meeting with the Union. See Pl.'s Ex. 11(s); Def.'s Ex. L(14). These notes include the statement: "They [the Union] said we never fire white males." Id. This statement is not a reflection of either Mr. McNamara or Mr. Fulks's discriminatory attitude toward Ms. Velez. Rather, it is simply their attempt to prepare for one of the arguments that they anticipated the Union would make during the Third Step Meeting. Accordingly, neither Mr. McNamara's racial notations nor his notes pertaining to his conversation with Mr. Fulks are evidence of pretext.

IV

Conclusion

For the reasons set forth herein, this Court holds that Ms. Velez failed to carry her burden to show that the legitimate nondiscriminatory reasons offered by Microfibres for her termination—physically fighting with Mr. Kodua, reengaging the fight, attempting to use a weapon during the fight, and calling Mr. Kodua a racial slur—are "mere pretext for discrimination." Barros, 710 A.2d at 685. In making this determination, it should be noted that this holding is limited to the issue of discrimination. This Court is not taking a position as to the prudence of Microfibres' decision to terminate Ms. Velez, given her overall good employment record, as it is not this Court's place "to review the multitude of personnel decisions that are made daily by employers, except those of course which contravene the law." E.E.O.C. v. Caribe

Hilton Int'l, 597 F. Supp. 1007, 1013 (D.P.R. 1984) (citing Bishop v. Wood, 426 U.S. 341, 349 (1976)). It is lawful for an employer to proceed in a manner that strikes the Court "as ill-advised or improvident, so long as the employer does not act for discriminatory reasons." Maclin, 2006 WL 463370, at *10.

Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Margarita Velez v. Microfibres, Inc.**
CASE NO:	**PC-2001-6540**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**January 12, 2017**
JUSTICE/MAGISTRATE:	**McGuirl, J.**
ATTORNEYS:	
For Plaintiff:	**Patricia E. Andrews, Esq.**
For Defendant:	**Joseph D. Whelan, Esq.** **Meghan E. Siket, Esq.**