IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

PHYLLIS J. FOX, Plaintiff, v. BRIDGEWOOD HEALTH CARE CENTER, L.L.C., Defendant.	)	No. 12-CV-00768-DW

ORDER

Before the Court is the Defendant Bridgewood Health Care Center, L.L.C.'s (the "Defendant") Motion for Summary Judgment (the "Motion"). See Doc. 23. The Defendant filed suggestions in support (Doc. 24), the Plaintiff Phyllis J. Fox (the "Plaintiff") filed suggestions in opposition (Doc. 28), and the Defendant filed a reply brief (Doc. 30). The record shows that the Plaintiff's employment was terminated for a legitimate, nondiscriminatory reason, and that this reason was not pretextual. Consequently, and as explained below, the Motion is GRANTED.

I.

Only those facts necessary to resolve the pending Motion are discussed below, and those facts are simplified to the extent possible. Unless otherwise noted, the following facts are deemed undisputed, and they are primarily taken from the parties' briefs without further attribution.

The Defendant operates a long-term care facility that cares for residents with behavioral issues and medical conditions. The facility has three separate units: a large men's wing, a smaller women's wing, and a medical wing. In approximately June 2010, the Defendant hired Lois Pirtle ("Pirtle") to work as the Director of Nurses. Pirtle was subsequently promoted to Administrator, and served in that role for most of Plaintiff's employment. The Administrator has ultimate authority and

responsibility over the facility.

On July 19, 2010, the Plaintiff was hired by Defendant and worked primarily in the women's unit as a certified nursing assistant ("CNA"). On February 10, 2011, the Plaintiff injured her pinky finger while attempting to restrain a particular resident. The Plaintiff continued to work until February 28, 2011, the date she had surgery on her pinky finger. The Plaintiff returned to work several days after the surgery, though she was limited to only light duty work.

Nicole Moore ("Moore") was an employee that prepared the Plaintiff's work schedule. While the Plaintiff was on light duty, Moore directed the Plaintiff to provide one-on-one monitoring to a male resident. This meant that Plaintiff was assigned to a specific resident who needed direct supervision. The Plaintiff initially refused because she believed it violated her medical restrictions. Moore allegedly told the Plaintiff she could not decline, and so the Plaintiff worked the one-on-one assignment. This assignment ended after the patient fell on the Plaintiff, though the incident did not cause the Plaintiff to miss any work.

In May 2011, several residents accused the Plaintiff and co-employee Jennifer Vann ("Vann") of patient abuse. Doc. 24-5, p. 3, 4. In response, the Defendant and the Missouri Department of Health and Senior Services, Long-term Care Division ("DHSS") initiated an investigation. Pirtle assisted the investigation, and interviewed both residents and some staff members. One resident claimed that the Plaintiff threatened residents and pushed one resident. This resident also claimed that the Plaintiff "act[ed] just like [Vann]," and Vann allegedly pointed her finger at residents and got in residents' faces. A second resident confirmed that Plaintiff threatened and yelled at residents.[1] Although members of the staff did not want to get anyone in trouble, they did confirm that "they'd

[1] As discussed below, at least some of the accusing residents had a "psychiatric diagnosis." Doc. 29-1, p. 10. According to Pirtle, however, the investigation sought out "patients that were competent enough to answer questions appropriately." Doc. 24-3, p. 20.

heard people raise their voices. Yes, they had seen the finger shaking, but nothing that was really specific to one person." Doc. 24-3, p. 22.

After completing the interviews, Pirtle discussed the results with the facility's management team and with DHSS. The decision was made to terminate both Plaintiff and Vann for "inappropriate behavior towards residents . . . ." Doc. 24-5, p. 4. The Plaintiff was terminated on or about May 19, 2011, which was on or about the same day she was no longer restricted to light duty work.

The Plaintiff believes she was terminated because of her race and disability, not for mistreating residents. As a result, the Plaintiff filed this suit for race and disability discrimination. The Defendant now moves for summary judgment, and argues there is insufficient evidence to support either claim.

II.

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Spirtas Co. v. Nautilus Ins. Co., 715 F.3d 667, 670 (8th Cir. 2013) (citations and quotations omitted). If the moving party meets its initial burden, the nonmoving party must "come forward with specific facts showing that there is a genuine issue for trial." Conseco Life Ins. Co. v. Williams, 620 F.3d 902, 910 (8th Cir. 2010). The nonmoving party must present evidence, and cannot rest on the allegations in its pleadings. Id. There is a genuine issue of fact "if a reasonable jury could return a verdict for the party opposing the motion." Humphries v. Pulaski Cnty. Special Sch. Dist., 580 F.3d 688, 692 (8th Cir. 2009).[2]

[2] The Plaintiff argues that the Eighth Circuit "has repeatedly emphasized that summary judgment should seldom be granted in discrimination cases." Doc. 28, p. 6. This outdated argument fails as a matter of law. "The United States Supreme Court and the Eighth Circuit Court of Appeals have held that district courts should not treat

Absent direct evidence of discrimination (there is none in this case), a discrimination claim under Title VII or the Americans with Disabilities Act (the "ADA") is subject to the three-part burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). See Stanback v. Best Diversified Prod., Inc., 180 F.3d 903, 909 (8th Cir. 1999). Under this test: "[1] [t]he employee bears the initial burden of proving a *prima facie* case of discrimination. [2] The employer then has the burden to articulate a legitimate, nondiscriminatory reason for the adverse employment action. [3] Finally, to prevail, plaintiff must show that the defendant's proffered reason was a pretext for discrimination." McNary v. Schreiber Foods, Inc., 535 F.3d 765, 769 (8th Cir. 2008) (citations and quotations omitted).

III.

For purposes of resolving the Motion, the Court will assume, *arguendo*, that the Plaintiff has established a *prima facie* case of race and disability discrimination. Therefore, the second McDonnell Douglas step requires the Defendant to present a legitimate, nondiscriminatory reason for the Plaintiff's termination. The Defendant has provided such a reason in this case; specifically, the Plaintiff's inappropriate conduct toward residents. The Defendant found such conduct after an investigation that included interviews of residents, staff, and a consultation with DHSS. Indeed, the Plaintiff herself concedes that "Pirtle found consistencies in the resident's accusations of Vann and [Plaintiff] . . . ." Doc. 28, p. 2.

The Plaintiff's alleged misconduct easily constitutes a legitimate, nondiscriminatory basis for termination. Although the Plaintiff disputes the allegations, that is not the issue; the question is whether the Defendant had a good faith belief for believing she engaged in misconduct. McCullough

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discrimination differently from other ultimate questions of fact." Doucette v. Morrison Cnty., 2013 WL 2359660, at * 6 (D. Minn. May 29, 2013) (quoting Torgerson v. City of Rochester, 643 F.3d 1031, 1043 (8th Cir. 2011) (en banc)).

v. Univ. of Arkansas for Med. Sciences, 559 F.3d 855, 861-62 (8th Cir. 2009) (recognizing that the issue "is not whether the employee actually engaged in the conduct for which he was terminated, but whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge"). Here, the Plaintiff has not shown that the Defendant's investigation or findings were not undertaken in good faith. See Rosario v. Ken-Crest Serv., 189 Fed. App'x. 79, 81 (3rd Cir. 2006) (finding a legitimate basis for termination because "the results of their internal investigation indicated that [plaintiff] abused a resident").

IV.

Because the Defendant provided a legitimate basis for termination, the third step requires Plaintiff to show that this basis is a pretext for discrimination. Pretext may be found if the evidence shows "that the employer's proffered explanation is unworthy of credence because it has no basis in fact." Amini v. City of Minneapolis, 643 F.3d 1068, 1075 (8th Cir. 2011). "Alternatively, a plaintiff may show pretext by persuading the court that a prohibited reason more likely motivated the employer." Torgerson, 605 F.3d at 597.

In this case, the Plaintiff's opposition brief is only seven pages long and does not even mention the word "pretext." The Plaintiff does, however, raise the following allegations that will be construed as relating to pretext: (1) the residents accusing Plaintiff of misconduct suffered from mental illnesses and/or had attention seeking behavior; (2) in her role as Administrator, Pirtle began terminating African-Americans and hiring Caucasians; (3) Plaintiff's last day of work was the same day she returned from light duty work; (4) Pirtle was "shocked" to learn that allegations of misconduct had been made against Plaintiff and Vann; (5) "Pirtle attended a staff meeting in stereotypically African-American clothing and spoke in Ebonics;" (6) "Pirtle acknowledged white employees with 'Good Morning' without acknowledging black employees in the same vicinity;" and

(7) the investigation was not conducted in compliance with the facility's policies.[3] As explained below, these allegations, either in isolation or in combination, do not establish pretext.

First, assuming some of the residents had mental illnesses and/or attention seeking behavior, Pirtle testified that the investigation "tried to choose patients that were competent enough to answer questions appropriately." Doc. 24-3, p. 20. Moreover, some staff members at least arguably supported the resident's allegations. The Plaintiff presents generalizations about the condition of these residents, but has presented no evidence that they were unable to accurately report any alleged misconduct. See Okonkwo v. Extendicare Homes, Inc., 2006 WL 3498404, at * 6 (D. Minn. Dec. 5, 2006) (finding no pretext in part because the defendant's "administrator probably believed the resident's and his roommate's version of what happened–that [plaintiff] had pushed the resident down").

Second, the Plaintiff claims that Pirtle terminated African-Americans to "change faces" at the facility and relieve "racial tensions." But this argument misconstrues Pirtle's testimony. In reality, Pirtle testified that when she "first started [working at the facility], there were mostly black people working. There were very few white people, and I was white and brought in as a management staff and it was not well received at first, but after awhile it became less tensioned and those vibes went away. And after I had been there awhile and faces changed, those vibes went away altogether." Doc. 30-2, p. 6-7. Pirtle explained that "when I say 'new faces,' there were new faces because we needed more staff." Doc. 30-2, p. 15.

[3] The Defendant, not Plaintiff, raised other incidents identified by the Plaintiff in her deposition. Those incidents included residents using "the term 'nigger' a couple of times and [Plaintiff] attributed that to the residents parroting that term from employees, although she never heard any [employee of Defendant] use the term," and that she was treated differently than two or three other employees. These alleged events, however, are lacking in any detail, lacking in evidence, appear isolated, and/or are not otherwise sufficient to defeat summary judgment. By way of example, the Plaintiff has failed to show that she was "similarly situated in all relevant respects" to other employees that were allegedly treated differently. Hervey v. Cnty. of Koochiching, 527 F.3d 711, 725 (8th Cir. 2008).

This testimony does not support a finding of pretext; instead, as explained by Defendant, it at most "suggests some hostility, not against Plaintiff, but initially directed against Ms. Pirtle as a Caucasian newcomer–tension that eased as time passed and more employees were hired." Doc. 30, p. 8. Additionally, the Plaintiff could not provide any details about how many African-Americans left during her employment or the reason for their departure. A finding of pretext cannot be found under these circumstances. Rose-Maston v. NME Hosp., Inc., 133 F.3d 1104, 1109 (8th Cir. 1998) (recognizing that pretext may not be found through "unsubstantiated and conclusory allegations").

Third, the Plaintiff notes the temporal proximity between her termination and return to full duty work. Specifically, the Plaintiff emphasizes that her "last day at [the facility] was her first day on full duty after surgery on her disabled finger." Doc. 28, p. 4-5. Temporal proximity, however, is not sufficient in itself to show pretext. Morris v. City of Chillicothe, 512 F.3d 1013, 1019 (8th Cir. 2008).

In addition, DHSS informed Defendant of the misconduct allegations in May 2011, and Plaintiff was terminated later that month following an investigation. Under these circumstances, the timing of Plaintiff's termination does not show pretext. See Buytendorp v. Extendicare Health Serv., Inc., 498 F.3d 826, 836 (8th Cir. 2007) ("Given these undisputed facts, it would not be reasonable to characterize this proffered rationale as a last-minute, negative response to protected conduct."). Finally, any temporal argument as to disability is undermined in that Vann, a non-disabled employee, was terminated in the same month as the Plaintiff for the same reason.

Fourth, the Plaintiff notes that Pirtle was "shocked to hear that [Plaintiff] and Vann were complained about." The Plaintiff fails to provide any additional details, context, or other evidence that would show how this supports a finding of pretext. If anything, allegations of misconduct toward residents should be shocking regardless of who allegedly engaged in that conduct.

Fifth, the Plaintiff claims that Pirtle led or attended a staff meeting "in stereotypically African-American clothing and spoke in Ebonics and offended African-Americans." Doc. 28, p. 3. During this meeting, Pirtle wore a baseball cap turned around, her pants were hanging low, and she was allegedly speaking in Ebonics. The Plaintiff did not know the purpose of the meeting, but Pirtle explained that it was to explain the proper dress code for employees. According to Pirtle, the "biggest issue with the dress code that [Defendant] had at that time was pants falling down and your underwear showing." Doc. 29-1, p. 3.

Although the Plaintiff found this meeting offensive, she never raised a complaint about it with management. Doc. 24-2, p. 8. More generally, the Plaintiff admits she never made any complaints about race or disability discrimination during her employment. Doc. 24-1, p. 43-44. Nor has the Plaintiff produced any evidence that shows how the meeting supports pretext, especially in light of Pirtle's explanation that it was intended to address violations of the dress code. Finally, and even accepting the Plaintiff's version of events, Pirtle's wardrobe and conduct at the meeting was apparently isolated, and Title VII does not impose "a code of workplace civility." Mitchell v. City of Dumas, 187 Fed. App'x. 666, 668 (8th Cir. 2006) (recognizing that the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" is not actionable).

Sixth, the Plaintiff complains that Pirtle would say "Good Morning" to white employees without acknowledging black employees in the same area. This conclusory argument does not support a finding of pretext. Indeed, the Plaintiff admitted she didn't know whether Pirtle's lack of acknowledgment was "racist or not." Doc. 24-2, p. 6.

Seventh, the Plaintiff claims that Defendant's investigation of misconduct did not comply with its own "Policy and Procedure" for investigations. See Doc. 28, p. 5. Even assuming, *arguendo*, that this argument is supported by the record, an employer's failure to follow its own

procedures, in itself, does not constitute pretext. McCullough, 559 F.3d at 863 ("The appropriate scope of investigation is a business judgment, and shortcomings in an investigation do not by themselves support an inference of discrimination."). In addition, the Plaintiff has not produced evidence that Defendant "purposely ignored relevant information or otherwise truncated the inquiry because of a bias . . . ." Id. The Plaintiff also admitted that she never asked for an opportunity to present her side of the story. Doc. 24-1, p. 32. For all these reasons, and after reviewing the record, the Court finds that the Plaintiff has not presented sufficient evidence of pretext.

V.

For the foregoing reasons, it is hereby ORDERED that the Defendant Bridgewood Health Care Center, L.L.C.'s Motion for Summary Judgment (Doc. 23) is GRANTED, and the Plaintiff's claims are DISMISSED WITH PREJUDICE. The Defendant's Request for Oral Argument (Doc. 33) is DENIED AS MOOT. The Clerk of Court is directed to terminate any pending motions, and to then mark this case as closed.

IT IS SO ORDERED.

Date: August 5, 2013

/s/ Dean Whipple
Dean Whipple
United States District Judge