STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		**SUPERIOR COURT**
	(FILED – SEPTEMBER 19, 2012)	
JEAN CHAPMAN	:	
	:	
V.	:	**C.A. No. PC 01-4767**
	:	
RHODE ISLAND VETERANS' HOME, WILLIAM CAMARA, In his capacity as DIRECTOR OF NURSES, DAVID FOEHR, In his capacity as COMMANDANT, and RHODE ISLAND DEPARTMENT OF HUMAN SERVICES	:	

DECISION

MCGUIRL, J. Before this Court is Plaintiff Jean Chapman's ("Plaintiff") Motion for a New Trial pursuant to Super. R. Civ. P. 59. The underlying action involves Plaintiff's retaliation claim under chapter 50 of title 28 of the Rhode Island General Laws, entitled the Rhode Island Whistleblowers' Protection Act ("RIWPA"), against her former employer, the Rhode Island Veterans' Home ("Home"), as well as the Rhode Island Department of Human Services ("RIDHS") (collectively "Defendants").[1] The case was tried before a jury, and a verdict was rendered in favor of Defendants. Plaintiff timely challenged the jury's findings as against the weight of the evidence. Defendants have objected to Plaintiff's Motion. Jurisdiction is pursuant to G.L. 1956 § 28-50-4 and Super. R. Civ. P. 59.

[1] The Plaintiff originally filed a four-count complaint. Count I was brought pursuant to chapter 5 of title 28 of the Rhode Island General Laws, entitled the Rhode Island Fair Employment Practices Act; Count II was brought pursuant to chapter 112 of title 42 of the Rhode Island General Laws, entitled the Rhode Island Civil Rights Act; Count III was brought pursuant to chapter 48 of title 28 of the Rhode Island General Laws, entitled the Rhode Island Parental and Family Medical Leave Act; and Count IV was brought pursuant to chapter 50 of title 28 of the Rhode Island General Laws, entitled the Rhode Island Whistleblowers' Protection Act. Prior to trial, Plaintiff voluntarily dismissed Counts I-III, leaving only Count IV for consideration by a jury.

I

Facts and Travel

The Home was established in 1890 and functioned for many years as a Domiciliary Home for Civil War Veterans. See 15 070 CRIR 002 at 6. It is a State-run facility located in Bristol, Rhode Island. Id. The Home is managed and controlled by the director of RIDHS, or his or her designee. See G.L. 1956 § 30-24-1

In August 1997, the Home hired Plaintiff as a staff nurse.[2] From August 1997 until January 1998, Plaintiff worked the third shift. In January 1998, Plaintiff moved to the second shift. In March 1999, Plaintiff became the charge nurse for the second shift upon the promotion of former charge nurse, Ray Tierney, to nursing supervisor. Throughout Plaintiff's tenure, David Foehr held the highest level position at the Home as commandant. In late 1997, following Plaintiff's hiring, Bill Camara joined the Home as director of nurses.

The record reveals that Plaintiff began complaining about certified nursing assistants applying topical prescription medication to patients in violation of Department of Health Regulations beginning some time around November 1997. In November 1998, Plaintiff made her first report of such violations directly to Bill Camara. In March 1999, Plaintiff filed a grievance against Bill Camara, alleging that he had pointed at her and attempted to intimidate her. See Mar. 16, 1999 Grievance Form. Also in early 1999, Plaintiff submits that she began to complain to Ray Tierney about male residents fraternizing with her female aides. Finally, some time around September or October of 1999, Plaintiff began complaining to the day charge nurse, Stephanie Borges, about patient mistreatment and neglect.

[2] The hierarchy for each shift at the Home was a follows, starting from the bottom: (1) certified nursing assistants or "aides"; (2) staff nurses; (3) charge nurses; (4) nursing supervisor; (5) director of nurses; (6) administrator; and (7) commandant. In all personnel matters, the Home reported to the RIDHS.

The record also reveals that Plaintiff had a history of receiving formal discipline during her tenure at the Home. On May 4, 1999, Defendants issued Plaintiff a document memorializing an April 26, 1999 oral reprimand for allegedly allowing her staff to fraternize with patients, and for causing certain of her staff members to be insubordinate to Nursing Supervisor Maureen Streicher. See Apr. 26, 1999 Oral Reprimand Memo. On July 7, 1999, Defendants issued Plaintiff a written reprimand—dated June 22, 1999—for excessive absenteeism. See June 22, 1999 Written Reprimand. On November 15, 1999, Defendants suspended Plaintiff for two days for allegedly committing multiple clinical errors, including leaving medicated creams at the nurses' station on October 8, 1999; leaving medications at a patient's bedside on October 8, 1999; and refusing to administer VRE/MRSA scans in violation of a directive on October 18, 1999. See Nov. 15, 1999 RIDHS Suspension Letter.[3] In late December 1999, the Home alleged that Plaintiff was a "no call/no show" during the week of the Christmas holiday. See Week Ending 12/25/99 Attendance Report. The RIDHS held a hearing on the matter in early 2000. Before the RIDHS issued a decision specifically pertaining to the no call/no show issue, the issue of Plaintiff's termination came before the RIDHS.

At the hearing on Plaintiff's termination, six additional alleged clinical errors were addressed, including but not limited to several incidents of failing to properly note withholding of medications; failing to follow procedures regarding shift change narcotic counts; several incidents of Plaintiff improperly leaving nebulizer masks on patients; and conducting late

[3] Bill Camara had submitted several other alleged infractions for consideration during the suspension hearing, including but not limited to Plaintiff's allegedly improper removal of an egg crate mattress on October 15, 1999; Plaintiff's allegedly inappropriate charting of an Aveeno bath in a patient's record on September 30, 1999; and purported lateness to work. See Nov. 9, 1999 United Nurses & Allied Professionals Letter to RIDHS. The RIDHS found that these alleged infractions did not constitute grounds for a suspension.

nebulizer treatments. See Mar. 1, 2000 RIDHS Letter of Termination. On March 1, 2000, the RIDHS issued a decision, stating as follows:

> "After considering the progressive disciplinary actions to date, the no call/no show on December 23, 1999 and the egregious pattern of violations of the Nursing Policies and Procedures of the Rhode Island Veterans Home listed above, [RIDHS has] determined that you [Plaintiff] should be separated from employment at the Rhode Island Veterans Home for the good of the service." Id.

Following each adverse employment action above, Plaintiff filed a grievance with the union. The union, on behalf of Plaintiff, shepherded the matter through the grievance procedure, ultimately bringing each adverse action before the Rhode Island Department of Administration, Labor Relations Division ("RIDOA"). In each instance, the RIDOA held a hearing and found the adverse action to have been warranted. Plaintiff's termination was thus final as of March 1, 2000. See Apr. 28, 2000 RIDOA Grievance Denial Letter.

Following Plaintiff's termination, the union sought arbitration in accordance with the terms of the union contract. The parties, however, agreed to withdraw the grievance without prejudice.

On September 11, 2001, Plaintiff filed a complaint with the Superior Court in which she alleged, inter alia, that the Home and RIDHS had violated the RIWPA.[4] In particular, Plaintiff maintains that she was disciplined and ultimately terminated in retaliation for "complain[ing] about improper practices including patient abuse and neglect." (Complaint ¶ 14.) The matter was tried before a jury. Thereafter, the Court entered judgment on the verdict in favor of Defendants and Plaintiff filed the instant Motion. Additional facts will be provided as needed in the Analysis portion of this Decision.

[4] As noted above, Plaintiff voluntarily dismissed the other allegations; thus, only the RIWPA claim survived presentation to the jury.

II

Standard of Review

Rhode Island Rule of Civil Procedure 59(a) governs motions for new trial. It provides in pertinent part:

> "A new trial may be granted to all or any of the parties and on all or part of the issues, (1) in an action in which there has been a trial by jury for error of law occurring at the trial or for any of the reasons for which new trials have heretofore been granted in actions at law in the Courts of this state; . . . ." Super. R. Civ. P. 59(a).

The role of a trial justice in deciding whether to grant a motion for a new trial is well-settled in Rhode Island. "In deciding a motion for a new trial, a trial justice sits as the super [ ] juror and is required to independently weigh, evaluate and assess the credibility of the trial witnesses and evidence." Morrocco v. Piccardi, 713 A.2d 250, 253 (R.I. 1998). In conducting her independent analysis of the evidence, the trial justice may accept some or all of the evidence, and may reject testimony if it is impeached or contradicted by other testimony or circumstantial evidence, or if the trial justice finds it is inherently improbable or inconsonant with undisputed physical facts or laws. Barbato v. Epstein, 97 R.I. 191, 193, 196 A.2d 836, 837 (1964). In addition, the trial justice may add to the evidence by drawing proper and consistent inferences. Id. at 193-94, 196 A.2d at 837.

"If the trial justice determines that the evidence is evenly balanced or is such that reasonable minds in considering the same evidence could come to different conclusions, the trial justice must allow the verdict to stand." Botelho v. Caster's, Inc., 970 A.2d 541, 545 (R.I. 2009) (citing Marcotte v. Harrison, 443 A.2d 1225, 1232 (R.I. 1982); Bajakian v. Erinakes, 880 A.2d 843, 851 (R.I. 2005)). If, on the other hand, his or her "'superior judgment' tells [the trial justice] that the verdict is against the preponderance of the evidence and thereby fails to either do

justice to the parties or respond to the merits of the controversy," the jury's verdict must be set aside and a new trial ordered. Bajakian, 880 A.2d at 851 (quoting Ruggieri v. Big G Supermarkets, Inc., 114 R.I. 211, 216, 330 A.2d 810, 812 (1975)).

"If the trial justice has carried out the duties required by Rule 59 of the Superior Court Rules of Civil Procedure and [the Supreme Court's] decided cases, his or her decision is accorded great weight by [the Supreme] Court and will not be disturbed unless the plaintiff 'can show that the trial justice overlooked or misconceived material and relevant evidence or was otherwise clearly wrong.'" Botelho, 970 A.2d at 546 (quoting Int'l Depository, Inc. v. State, 603 A.2d 1119, 1123 (R.I. 1992)). The trial justice "need not perform an exhaustive analysis of the evidence." Reccko v. Criss Cadillac Co., Inc., 610 A.2d 542, 545 (R.I. 1992) (citing Zarrella v. Robinson, 460 A.2d 415, 418 (R.I. 1983)). However, "he or she should refer with some specificity to the facts which prompted him or her to make the decision so that the reviewing court can determine whether error was committed." Id.

III

Analysis

Plaintiff maintains that the jury's verdict was contrary to the law and against the weight of the evidence. Applying the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Plaintiff contends that the jury failed to consider whether Defendants' proffered nonretaliatory reasons for Plaintiff's discipline and eventual termination were pretext. If the jury had considered all of the evidence of pretext, including the circumstantial evidence of pretext, Plaintiff reasons, its only conclusion could have been that Plaintiff's ill treatment was as a result of her whistle-blowing activity.

Our Supreme Court has not directly addressed a claimant's burden of proof in seeking

relief under the RIWPA; however, the Federal District Court for the District of Rhode Island applied the McDonnell Douglas Corp burden-shifting framework. See Barboza v. Town of Tiverton, No. 07-339-ML, 2010 WL 2231995, at *7 (D.R.I. June 2, 2010). This framework also has been utilized in other discrimination/retaliation types of cases in Rhode Island. See Shoucair v. Brown University, 917 A.2d 418 (R.I. 2007) (applying the McDonnell Douglas burden-shifting framework in the context of allegations of discriminatory retaliation in violation of the Fair Employment Practices Act); Neri v. Ross Simons, 897 A.2d 42, 48 (R.I. 2006) (age and gender discrimination); DeCamp v. Dollar Tree Stores, Inc., 875 A.2d 13 (R.I. 2005) (gender-based disparate claim); Wellborn v. Spurwink/Rhode Island, 873 A.2d 884 (R.I. 2005) (sexual/gender discrimination allegations); Casey v. Town of Portsmouth, 861 A.2d 1032 (R.I. 2004) (age discrimination); Nicolae v. Miriam Hosp., 847 A.2d 856 (R.I. 2004) (employment-discrimination). Consequently, this Court deems it appropriate to apply the McDonnell Douglas burden-shifting framework to the instant matter.

The purpose of the burden-shifting framework is to "allocate[] burdens of production and orders the presentation of evidence so as progressively to sharpen the inquiry into the elusive factual questions of intentional discrimination." Neri, 897 A.2d at 48 (quoting Ctr. for Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 685 (R.I. 1998)) (internal quotations omitted). The first step in analyzing retaliation under the McDonnell Douglas framework is for an employee to establish his or her prima facie case. See Shoucair, 917 A.2d at 427. At this stage, the plaintiff's burden "is not especially onerous . . . ." Barros, 710 A.2d at 685 (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993)). If the employee is successful, "a presumption of discrimination results, and the burden of production, not persuasion, then falls to the employer, who must respond with some legitimate,

nondiscriminatory reason for the act at issue." Shoucair, 917 A.2d at 427 (citing Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (2000)). Again "[t]his imposes merely a burden of production, not one of proof." Harrington v. Aggregate Industries—Northeast Region, Inc., 668 F.3d 25, 31 (1st Cir. 2012).

If the employer satisfies its burden of production, "the presumption of discrimination disappears, and the employee then must demonstrate that the employer's proffered explanation amounts to mere pretext." Shoucair, 917 A.2d at 427 (citing Barros, 710 A.2d at 685). In other words, "if the employer produces evidence of a legitimate nonretaliatory reason, the plaintiff must assume the further burden of showing that the proffered reason is a pretext calculated to mask retaliation." Harrington, 668 F.3d at 31.

Although the employee is not required to produce "evidence of the smoking gun variety[,]" he or she "must do more than simply cast doubt upon the employer's justification." Barros, 710 A.2d at 685 (internal quotations omitted). That is because "the ultimate burden of persuasion in these matters" always rests with the employee. Id. (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981)). However, "[a]n employee can 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." Id. (Internal quotations omitted.)

Furthermore, "in situations in which the elements of a sufficient prima facie case combine with the factfinder's belief that the basis for dismissing the employee was pretextual, particularly if 'accompanied by a suspicion of mendacity,' the factfinder is permitted 'to infer the ultimate fact of intentional [retaliation].'" Barros, 710 A.2d at 685 (quoting Hicks, 509 U.S. at 511).

Indeed, "[i]n retaliation cases, the whole is sometimes greater than the sum of its parts[,]" because "bits and pieces of evidence . . . taken collectively, [can] have significant probative value." Harrington, 668 F.3d at 34. Accordingly, "irregularities in an employer's dealings with an employee who have fallen out of favor can support a reasonable inference of pretext." Id.

A

The Prima Facie Case

For Plaintiff to prevail on her claim of retaliation under RIWPA, she first had to set forth her prima facie case under the McDonnell Douglas framework. In order to do so, she had to present evidence that "(1) she engaged in protected conduct; (2) she experienced an adverse employment action; and (3) there was a causal connection between the protected conduct and the adverse employment action." Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 25 (1st Cir. 2004) (citing Gu v. Boston Police Dep't, 312 F.3d 6, 14 (1st Cir. 2002)).

Section 28-50-3 of the RIWPA provides in pertinent part:

> "An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment:
>
> > (1) Because the employee, or person acting on behalf of the employee, reports or is about to report to a public body, verbally or in writing, a violation which the employee knows or reasonably believes has occurred or is about to occur, of a law or regulation or rule promulgated under the law of this state, a political subdivision of this state, or the United States, unless the employee knows or has reason to know that the report is false, or
> > . . .
> > (4) Because the employee reports verbally or in writing to the employer or to the employee's supervisor a violation, which the employee knows or reasonably believes has

> occurred or is about to occur, of a law or regulation or rule promulgated under the laws of this state, a political subdivision of this state, or the United States, unless the employee knows or has reason to know that the report is false. Provided, that if the report is verbally made, the employee must establish by clear and convincing evidence that the report was made" Sec. 28-50-3.

A "public body" is defined in pertinent part as a "body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body." Sec. 28-50-2(4)(iv). The definition of a supervisor "means any individual to whom an employer has given the authority to direct and control the work performance of the affected employee or any individual who has the authority to take corrective action regarding the violation of a law, rule or regulation about which the employee complains." Sec. 28-50-2(5).

Our Supreme Court has declared that "[f]or conduct to fall within the purview of the act, a plaintiff must report or threaten to report, misconduct to a public body." Zinno v. Patentaude, 770 A.2d 849, 851 (R.I. 2001). The record reveals that the Home is a state-run facility that is managed and controlled by the Director of RIDHS. As such, the Home clearly falls within the definition of a "public body" as set forth in § 28-50-2(4)(iv). Consequently, when Plaintiff reported to her superiors that nursing assistants were applying medications in violation of Department of Health regulations and that patients were being mistreated and neglected, she satisfied the first prong of her prima facie case; namely, that she had engaged in protected conduct.

It is undisputed that Plaintiff experienced an adverse employment action when she was terminated from her employment. Consequently, she satisfied the second prong of her prima

facie case. Next, Plaintiff was required to prove that there was a causal connection between the protected conduct and the adverse employment action.

Courts have found that temporal proximity alone may be sufficient to establish a prima facie case of retaliation. See DeCaire v. Mukasey, 530 F.3d 1, 19 (1st Cir. 2008) (stating that "temporal proximity alone can suffice to meet the relatively light burden of establishing a prima facie case of retaliation) (internal quotations omitted). Thus, "in the context of temporal proximity, courts typically look to the time between protected activity and retaliation." Harrington, 668 F.3d at 32. At the same time, "chronological proximity does not by itself establish causality, particularly if [t]he larger picture undercuts any claim of causation." Wright v. CompUSA, Inc., 352 F.3d 472, 478 (1st Cir. 2003) (internal citations and quotations omitted).

In the instant matter, Plaintiff, by her own admission, commenced filing complaints almost immediately upon assuming employment with the Home in August 1997. However, Plaintiff's March 1999 grievance against Mr. Camara for what she characterized as "intimidation" was followed in relatively short order by an April 26, 1999 oral reprimand for allegedly allowing her staff to fraternize with patients, and for causing certain of her staff members to be insubordinate to Nursing Supervisor Maureen Streicher. See Apr. 26, 1999 Oral Reprimand Memo. On May 4, 1999, Defendants issued Plaintiff a document memorializing the April 26, 1999 oral reprimand. Then, on July 7, 1999, Defendants issued Plaintiff a written reprimand—dated June 22, 1999—for excessive absenteeism. See June 22, 1999 Written Reprimand.

The Court observes that Plaintiff's subsequent two-day suspension and ultimate termination were based, at least, in part upon a series of reports made by other nurses, not by Mr. Camara. The Court also is mindful of RIDHS Associate Director of Human Resources Edward

Hynes' testimony that the propriety of such personnel decisions ultimately rested with the RIDHS, which conducted independent hearings and afforded Plaintiff an opportunity to present her side of the story. However, given that Plaintiff's burden at this stage of the process "is not especially onerous . . . [,]" (Barros, 710 A.2d at 685), the Court concludes that Plaintiff satisfied the causation element of her prima facie case due to the temporal proximity between her complaints and grievance and the subsequent reprimands that she received. See Mariani–Colón v. Dep't of Homeland Sec. ex rel. Chertoff, 511 F.3d 216, 224 (1st Cir.2007) (finding prima facie case of retaliation where plaintiff alleged that approximately two months had transpired between protected conduct and adverse employment action).

B

The Rebuttal Evidence

In response to Plaintiff's prima facie case, the Home was required to articulate a legitimate, nonretaliatory reason for disciplining and eventually terminating Plaintiff's employment. Such explanation merely had to "be legally sufficient to justify a judgment for the [Home]." Texas Dept. of Com'ty Affairs, 450 U.S. at 255. Thus, the Home was not required to persuade the jury that the proffered reason was its actual motivation. See id.

During the trial, a number of nurses testified regarding Plaintiff's alleged shortcomings. Annette Jarvis testified regarding Plaintiff's need to improve her interpersonal skills, as documented in Plaintiff's first probationary report. Ray Tierney similarly explained to the jury that Plaintiff had a negative attitude toward supervisors and had on a number of occasions failed to administer medications. Rosemary Gama testified regarding reports she made as a result of Plaintiff leaving medications in patients' medication drawers and for refusing to follow directives to perform VRE/MRSA screens. Rosemary Plamondon also testified about reports she

made as a result of Plaintiff leaving medication at a patient's bedside, leaving nebulizer masks on multiple patients, and improperly indicating that medications had been administered. Stephanie Borges testified that Plaintiff continually refused to implement directives and to communicate issues during shift changeovers, which eventually caused her to report the problem to Bill Camara. Joan Nevins' deposition testimony, which was read to the jury, evinces that she witnessed Plaintiff's failure to listen to Stephanie Borges, and she opined that Plaintiff was not a team player and was difficult to deal with.

In addition to this witness testimony, the Home also produced several incident reports concerning Plaintiff's alleged infractions. Various nurses—including Stephanie Borges, Rosemary Plamondon, Rosemary Gama, and Diane Kemmy—submitted reports regarding Plaintiff's alleged mistakes ranging from failure to administer medications as documented to leaving nebulizer masks on patients following a shift. Indeed, even Plaintiff herself admitted to a number of on-the-job mistakes, including leaving medication at a patient's bedside table, failing to properly document withholding of medication, and ordering a blood test in error.

Based upon the foregoing evidence, the Court is satisfied that Home articulated a legitimate, nonretaliatory reason for its adverse action and thus satisfied its burden of production under the McDonnell Douglas framework. As a result, it then became Plaintiff's burden to persuade the jury that the articulated reason was pretextual, and that the Home, in fact, terminated her employment in retaliation for her protected conduct.

C

Evidence of Pretext

As stated previously, under the McDonnell Douglas framework, evidence of the Home's nonretaliatory reasons for Plaintiff's termination did not mark the end of the jury's inquiry. See

Barros, 710 A.2d at 685 (citing Resare, 981 F.2d at 42). Rather, the jury had to consider Plaintiff's evidence of pretext and determine whether the Home more likely was motivated by retaliation and/or whether its proffered explanation was "unworthy of credence." See id. (quoting Burdine, 450 U.S. at 256).

This Court joins a number of the federal circuit courts of appeals in starting with the premise that a plaintiff is not cloaked in immunity for her inadequacies and unsatisfactory performance simply because she has filed a complaint or reported a violation of law or regulation. See Mesnick v. General Electric Co., 950 F.2d 816, 828-29 (1st Cir. 1991) (ADEA case) (citing favorably to Eighth Circuit precedent); Jackson v. St. Joseph State Hosp., 840 F.2d 1387, 1391 (8th Cir. 1988) (Title VII case). Rather, where a plaintiff believes she is the victim of retaliation in the workplace, it is her burden of production and of proof to show that "but for" her employer's retaliatory animus, she would not have been terminated. See Barros, 710 A.2d at 685 (discussing burden-shifting framework); Brown, 891 F.2d at 352-54 (discussing "but for" causation standard).

Here, Plaintiff set forth her prima facie case of retaliation, alleging that she engaged in protected conduct, that she suffered an adverse employment action, and that the conduct and the adverse action were causally related. See Calero-Cerezo, 355 F.3d at 25 (listing evidence required to establish prima facie case of retaliation). In turn, the Home produced ample evidence of legitimate nonretaliatory reasons for the various disciplinary actions taken, as well as Plaintiff's eventual termination. See Barros, 710 A.2d at 685 (citing McDonnell Douglas, 411 U.S. at 802; Resare, 981 F.2d at 42). However, to prevail at trial, Plaintiff had to prove to the jury by a preponderance of the evidence that the Home's proffered reasons were pretextual—

designed merely to conceal its true retaliatory impetus for disciplining and terminating Plaintiff. See id. (citing Resare, 981 F.2d at 42).

The Plaintiff could demonstrate pretext several ways, including but not limited to proving that other non-reporting nurses were treated more favorably after committing similar infractions, and/or showing that the Home strayed from its regular investigation and disciplinary procedures in dealing with Plaintiff. See Farrell v. Planters Lifesavers Co., 206 F.3d 271, 281 (3d Cir. 2000) (explaining that evidence of causal link is not limited to "timing and demonstrative proof" but "can be other evidence gleaned from the record as a whole from which causation can be inferred"). In other words, the jury had to determine whether Plaintiff, despite all of her alleged mistakes and missteps, would not have been subject to discipline and termination "but for" her reporting activity. See Medina v. Ramsey Steel Co., Inc., 238 F.3d 674, 685 (5th Cir. 2001) (explaining plaintiff must show he would not have been terminated "but for" engaging in protected activity); Brown v. Trs. of Boston Univ., 891 F.2d 337, 352-54 (1st Cir. 1989) (discussing use of "but for" causation standard in sex discrimination/retaliation case); see also Price Waterhouse v. Hopkins, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting) (quoting W. Keeton et al., Prosser and Keeton on Law of Torts, 265 (5th ed. 1984)) ("As Dean Prosser puts it, '[a]n act or omission is not regarded as a cause of an event if the particular event would have occurred without it.'").

1

"Similarly Situated" Comparators

A plaintiff may prove that a defendant employer's proffered reason for taking an adverse action is mere pretext via evidence that similarly situated individuals outside the statutorily protected class were treated more favorably. See McDonnell Douglas, 411 U.S. at 804. In

determining whether individuals or scenarios qualify as "similarly situated" comparators, "[t]he test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated." Dartmouth Review v. Dartmouth Coll., 889 F.2d 13, 19 (1st Cir. 1989) (overruled on other grounds); see also Barboza, 2010 WL 2231995, at *10 (citing favorably to First Circuit's "prudent person" test); Sellers v. U.S. Dep't of Def., 654 F. Supp. 2d 61, 67 (D.R.I. 2009) (same).

The Plaintiff points to numerous other employees of the Home who purportedly were "similarly situated," but who did not report any violations of law or regulation and were treated more favorably than Plaintiff. For example, Plaintiff observes that she was suspended for two days on November 15, 1999, in part due to her failure to obtain VRE/MRSA screens, whereas the nurses on the next shift were neither questioned nor disciplined for their failure to produce the VRE/MRSA screens despite knowing that the screens still were needed.

However, a review of the evidence shows that Plaintiff specifically had been directed by the day shift charge nurse, Stephanie Borges, to complete the VRE/MRSA screens, but that she refused to do so, stating that they were "day's" responsibility. See Nov. 15, 1999 RIDHS Suspension Letter; Oct. 18, 1999 Borges Incident Report; Feb. 9, 2000 Borges Letter Regarding VRE/MRSA Incident; Oct. 19, 1999 Plamondon Incident Report; Feb. 1, 2000 Plamondon Letter Regarding MRSA Cultures. There is no similar documentation or testimony evincing a comparable direct order to Nurses Plamondon, Gama or Nevins, or any such evidence of deliberate noncompliance. Nurse Borges also testified that Plaintiff had a history of refusing to produce VRE/MRSA screens at her request, a history notably lacking among the other nurses. See also Sept. 16, 1999 Borges Incident Report Regarding Plaintiff Failure to Obtain VRE Swab. Accordingly, although Plaintiff received disparate treatment for failing to complete the

VRE/MRSA screens as compared to Nurses Rosemary Plamondon, Rosemary Gama, and Joan Nevins, a reasonable jury could have rejected the contention that these nurses were "similarly situated" to Plaintiff.

A number of Plaintiff's other asserted "similarly situated" arguments are premised upon acts, or failures to act, for which Plaintiff ultimately was not disciplined. For example, Plaintiff contends that she received unfavorable treatment when she was wrongfully accused of leaving a nitro patch on a patient. In that instance, another nurse, Nurse Angela Marshall, admitted to having committed the error. Plaintiff's argument lacks merit because Plaintiff never was counseled or disciplined for said failure. Similarly, Plaintiff's contention that she was singled out for less favorable treatment due to her failure to inform the third shift supervisors about a new check list procedure is unavailing. Although Bill Camara did submit this incident to Human Resources for consideration during Plaintiff's suspension hearing, and although no other nurses were questioned for an overall failure to share information about the new checklist policy, Plaintiff was not suspended for the alleged infraction. In the absence of some adverse action, the Court will not infer pretext under a "similarly situated" analysis. See Sellers, 654 F. Supp. 2d at 98 ("[I]ncidents which do not involve the imposition or withholding of discipline . . . are not comparable.").

Other posited "similarly situated" comparators stop short of compelling an inference of pretext because the incidents alleged are not "roughly equivalent." See Dartmouth Review, 889 F.2d at 19 (requiring appellants "to identify and relate specific instances where persons similarly situated in all relevant aspects were treated differently") (internal quotations omitted). In particular, the Court notes Plaintiff's arguments with regard to Nurses Maureen Streicher and Rosemary Gama. Nurse Nevins testified that she had reported concerns about Nurse Streicher to

Bill Camara—including that she appeared drunk at work and had black eyes—and that Bill Camara took no disciplinary action. The Plaintiff testified that she had reported to Bill Camara concerning Nurse Gama's alleged unkind treatment of a dying patient, but that there was no immediate response to the report.

In neither case, however, is it clear that no action at all was taken to elucidate or corroborate these reports. To begin with, at trial, Nurse Gama flatly denied the allegations Plaintiff made against her. Furthermore, Bill Camara testified that Nurse Streicher ultimately was sent to rehabilitation, albeit after Plaintiff's termination. Importantly, even though mistreatment of a patient and arriving drunk to work unquestionably are egregious acts, neither is "roughly equivalent" to, for example, leaving medication on a patient's bedside table or failing to remove a patient's nebulizer mask, which are clear violations of established protocols. See id. ("The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated."). Such differences in the infractions might warrant a more sensitive and protracted pre-discipline investigation than the relatively cut-and-dry infractions for which Plaintiff received discipline. The jury was thus free to decline to draw an inference of pretext, either by finding that these alleged infractions of fellow nurses never in fact occurred, or that the disparity in Bill Camara's responses was solely a result of the disparity in the infractions themselves.

The jury, likewise, may have been reluctant to give much credence to Plaintiff's generic statements that other nurses had found medication at residents' bedsides—an infraction for which Plaintiff received discipline—because Plaintiff submitted no evidence before or during trial that any of these other nurses had completed incident reports or reported the infractions to

Bill Camara. The evidence simply does not show who may have left these medications at other bedsides, or how the alleged perpetrators were treated as a result.

These are just several of a litany of alleged "similarly situated" comparators posited by Plaintiff. Despite the overwhelming number of alleged comparators, a reasonable jury could have found that the quantity of allegations was far outweighed by a fairly consistent lack of quality, or, in other words, a marked absence of the apples to apples comparisons required under the prevailing case law. See Dartmouth Review, 889 F.2d at 19 ("Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples.").

This is not to say that the Court finds none of Plaintiff's alleged comparators compelling. To the contrary, the Court is persuaded that Nurse Nevins and Plaintiff were sufficiently similarly situated in their poor administration of nebulizer treatments such that Nevins' lack of counseling or discipline, as opposed to Plaintiff's eventual termination, could conceivably give rise to an inference of pretext. The Court observes that both Nurse Nevins and Plaintiff administered a patient's nebulizer treatment late during the same shift, and that while Plaintiff failed to document such treatment was delayed, Nurse Nevins similarly indicated on a medication kardex that she had administered a second treatment that, in reality, she had not. See Pt. Ri Progress Notes; Pt. Ho Progress Notes; Pt. Ho Medication Kardex. Both nurses were late in administering treatment, and both were dishonest in their documentation of the treatments. Although Plaintiff was solely responsible for leaving the nebulizer masks on the patients at the end of her shift, the Court views the improper conduct as sufficiently similar to warrant, or at least justify, a similar response, i.e., counseling or discipline.

Nevertheless, a reasonable juror could have opted not to draw an inference of retaliation, focusing instead upon the material differences between Nurse Nevins' and Plaintiff's overall disciplinary records. See Walker v. City of Holyoke, 523 F. Supp. 2d 86, 103 (D. Mass. 2007) (citing Tobin v. Liberty Mut. Ins. Co., 433 F.3d 100, 106 (1st Cir. 2005) (declining to treat two employees as similarly situated comparators where more favorably treated employee's next-most-recent infraction was two years prior and less favorably treated employee's most recent infraction was "the last in a long chain of difficulties occurring over the previous six months"); Russell v. Univ. of Toledo, 537 F.3d 596, 607 (6th Cir. 2008) (citing plaintiff's "extensive history of poor performance" as differentiating circumstance rendering purported comparators not similarly situated). A reasonable juror also could have found that Plaintiff's failure to remove the nebulizer masks rendered her conduct markedly more serious in nature than Nurse Nevins' conduct. Accordingly, this Court is not satisfied that evidence of any variance in treatment between Plaintiff and Nurse Nevins necessarily caused the jury's verdict to be against the law or the greater weight of the evidence.

2

Procedural Irregularities

The Plaintiff submits that various purported irregularities in Defendants' investigation and use of disciplinary procedures constituted compelling circumstantial evidence that Defendants' proffered nonretaliatory reasons for the adverse employment actions were mere pretext. Indeed, our Supreme Court in Barros relied in part on a showing of employer deviation from established discipline and termination policies as evidence of pretext. Barros, 710 A.2d at 686-87.

The Plaintiff first directs the Court's attention to Bill Camara's testimony that nurses frequently make errors, and that Plaintiff had not necessarily made the most errors of any nurse. Although this observation may have been the case, nevertheless, the Court is mindful of the relatively short period of time during which Plaintiff's various infractions took place. See Walker, 523 F. Supp. 2d at 103 (considering frequency of plaintiff's misconduct over a six-month period).

Between October of 1999 and February of 2000, for example, Plaintiff's work was the subject of at least six incident reports, alleging such on-the-job mistakes as leaving medication at a resident's bedside table and in a resident's medication drawer, to improperly leaving nebulizer masks on patients. See Oct. 10, 1999 Plamondon Incident Report; Jan. 19, 2000 Gama Incident Report; Feb. 4, 2000 Kemmy Incident Report; Feb. 13, 2000 Plamondon Incident Report Regarding Patient Ha Ativan; Feb. 13, 2000 Plamondon Incident Report Regarding Patient Ho Nebulizer; Feb. 13, 2000 Plamondon Incident Report Regarding Patient Ri Nebulizer. Thus, even if Plaintiff may have committed fewer overall errors than some of her colleagues, given the frequency of her errors over such a limited span of time, the Court declines to infer pretext from the Home's application of progressive discipline.

The Plaintiff further submits that she was not provided re-education or training before receiving discipline. In support of this allegation, she points to testimony from Third Shift Supervisor Annette Jarvis and Commandant David Foehr regarding the common use of re-education and in-service training prior to formal discipline at the Home. The Court is unaware of any written policy of the Home pertaining to re-education or in-service training. Moreover, this Court is not persuaded that the Home would blindly apply re-education and in-service training techniques to a nurse who was already aware of, and knew how to abide by, the very

rules and procedures she had violated. See Barbato, 97 R.I. at 193, 196 A.2d at 837 (stating trial justice considering new trial motion may reject testimony if inherently improbable). Plaintiff testified that she knew the rules; the Court cannot fathom how re-education or in-service training could have been of any use in convincing her to follow said rules.

The Court, furthermore, finds credible David Foehr's testimony that Plaintiff was, in fact, subject to progressive discipline in line with standard practices at the Home. Foehr's testimony is bolstered by the documentary evidence, including, in order, the memorialization of an oral reprimand, a written reprimand, and a documented two-day suspension prior to Plaintiff's termination. See Apr. 26, 1999 Oral Reprimand Memo; June 26, 1999 Written Reprimand; Nov. 15, 1999 RIDHS Suspension Letter.

With regard to the investigation into Plaintiff's performance and the subsequent RIDHS and RIDOA hearings, Plaintiff asserts that Bill Camara never sought Plaintiff's version of any of the incidents. This may be true. Nevertheless, the evidence before the Court indicates that Plaintiff also was afforded the opportunity to testify on her own behalf at each of the hearings before the adverse decisions became final and binding. See e.g., June 29, 1999 RIDHS Affirmation of Oral Reprimand; Oct. 25, 1999 Notice of Admin. Hr'g; Jan. 7, 2000 Typewritten Hr'g Notes; Feb. 8, 2000 Attendance Record at Hr'g; Apr. 25, 2000 Attendance Record at Hr'g. However, she generally did not testify when given the opportunity. Accordingly, the Court finds that this was not a case in which RIDHS or RIDOA merely "rubber stamped" the adverse actions recommended by Bill Camara. See Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1231 (10th Cir. 2000) (finding decision maker was not conduit for safety supervisor's discriminatory animus where decision maker asked employee for his version of events and employee declined); see also Long v. Eastfield College, 88 F.3d 300, 307 (5th Cir. 1996)

(considering whether decision maker conducted an independent investigation in determining whether adverse actions were causally linked to departmental supervisors' retaliatory intent). The Court also finds compelling the consistent testimony of RIDHS Personnel Officer Paul Morrissey, RIDHS Associate Director of Human Resources Edward Hynes, and United Nurses & Allied Professionals Business Agent Jack Callaci that Plaintiff was afforded the same procedural treatment as any other employee.

3

Weighing the Evidence

The jury's task was to weigh the evidence before it, make certain credibility determinations, and draw reasonable inferences to determine whether Plaintiff met her burden of proving retaliation. Accordingly, on this Motion for a New Trial, the Court must assess whether the jury's failure to draw an inference of pretext was contrary to the law or against the greater weight of the evidence. See Bajakian, 880 A.2d at 851 (discussing standard of review on motion for new trial).

The Court finds that Plaintiff's circumstantial evidence—be it through similarly situated comparators, procedural irregularities, or otherwise—falls short of compelling an inference of pretext. As previously discussed, the facts themselves do not compel such an inference, but rather could give rise to any number of inferences. Nor does a credibility assessment necessarily tip the scales in favor of Plaintiff. For example, the jury was free to disregard Plaintiff's testimony that Bill Camara told her to "keep [her] mouth shut" and called her a "rabblerouser" as lacking in credibility. Likewise, the testimony of other nurses regarding Plaintiff's work performance could have enhanced, in the jury's collective mind, the trustworthiness of Bill

Camara's and David Foehr's testimony that retaliation played no role in Plaintiff's treatment at the Home.

Over the course of extensive pre-trial discovery and a five-week jury trial, the Court has amassed a prodigious amount of evidence in this case. The fact that the testimony and documentary evidence cuts both ways does not render the jury's verdict contrary to the evidence or indicate that the jury failed to consider material evidence of pretext in contravention of existing law. See Botelho, 970 A.2d at 545 (declaring that the verdict must stand where "the evidence is evenly balanced or is such that reasonable minds in considering the same evidence could come to different conclusions").

IV

Conclusion

Having carefully considered the copious evidence on record and the arguments of counsel, this Court does not find that the jury's verdict was against the law or the greater weight of the evidence. The Court concludes that the jury could have drawn two reasonable inferences based upon the facts and the law before it. The Court further holds that the jury's verdict responded to the merits of the case, including the issue of pretext. Accordingly, this Court must allow the jury's verdict to stand. Plaintiff's Motion for a New Trial is denied. Counsel shall submit an appropriate judgment for entry.