

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

KENNETH SMITH	:	CIV. NO. 3:06CV0240(PCD)
<i>Plaintiff</i>	:	
	:	
v.	:	
	:	
STATE OF CONNECTICUT,	:	
DEPARTMENT OF CORRECTION	:	
<i>Defendant</i>	:	JANUARY 12, 2007

**MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the defendant, State of Connecticut Department of Correction, moves for summary judgment as to the plaintiff's complaint. Specifically, the defendant asserts that plaintiff's allegations of discrimination brought under Title VII fail to state a cause of action. Plaintiff has also filed a claim pursuant to 42 U.S.C. §1983, which the defendant contends also fails to state a claim upon which relief may be granted. For the reasons, more fully discussed below, the defendant's motion should be granted.

The defendant respectfully submits that the material facts not in dispute, as set forth in the accompanying Local Rule 56(a)1 Statement, amply demonstrate that the plaintiff cannot prevail in his claims. The defendant is entitled to judgment as a matter of law.

**I. FACTUAL BACKGROUND**

The detailed facts of this case are set forth fully in the Defendant's Local Rule 56(a)1 Statement. Therefore, for the purpose of this memorandum, the defendant will simply highlight salient facts as an overview. The plaintiff in this case was a Correctional Lieutenant

employed by the defendant State of Connecticut Department of Correction (“DOC”). Plaintiff had been employed with the defendant for approximately 14 years. (FACTS 1 & 2). On November 20, 2004, the plaintiff was acting as shift supervisor at the Hartford Correctional Center (HCC), i.e., he was the highest-ranking officer on duty and in charge of the entire shift. As the shift supervisor, the plaintiff was responsible for the safety and security of the prison’s staff and inmates, he was responsible for running the shift, completing necessary paperwork, and making sure there was enough staffing. (FACTS 4 & 6).

On November 19, 2004, plaintiff had a verbal argument with another Lieutenant, Lt. Rhonda Arnold, which resulted in Lt. Arnold using profanity toward the plaintiff. (FACT 5). The next day, November 20, 2004, plaintiff and Lt. Arnold engaged in a verbal and physical altercation. (FACT 7). Another Lieutenant, Lt. Godding, was present and witnessed the physical altercation. (FACT 8). After the altercation, the plaintiff and Lt. Arnold were both placed on paid administrative leave pending an investigation of the altercation, which was performed by the DOC Security Division. After the investigation, it was determined that both the plaintiff and Lt. Arnold engaged in a serious incident which violated Administrative Directives 2.17 (Employee Conduct) and 2.22 (Workplace Violence Prevention Policy). (FACTS 9-11).

After the investigation, the plaintiff attended a pre-disciplinary hearing, where he was represented by a union official. (FACT 16). After the pre-disciplinary hearing, the Director of Human Resources, Daniel Callahan, recommended that both the plaintiff and Lt. Arnold be dismissed. (FACTS 17 & 18). In recommending dismissal, Director Callahan relied upon his opinion that that the incident was serious in nature and he also relied upon the conclusions contained in the security investigation. (FACTS 18 & 19). Callahan’s decision was not based

upon plaintiff's race. (FACT 20). The plaintiff filed a grievance contesting his dismissal; however, the dismissal was upheld by an independent arbitrator. (FACTS 22 & 23).

## **II. SUMMARY JUDGMENT STANDARD**

Summary judgment is a favored remedy: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather . . . must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate. . . , prior to trial, that the claims and defenses have no factual basis." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (emphasis added.)

A moving party is entitled to summary judgment if there is no genuine issue or dispute as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 322; *Lipton v. Nature Co.*, 71 F.3d 464, 469 (2d Cir. 1995); *Larkin v. Town of West Hartford*, 891 F. Supp. 719, 723 (D. Conn. 1995). Rule 56(c) of the Federal Rules of Civil Procedure provides, in relevant part, that summary disposition:

[S]hall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

As the Supreme Court has emphasized, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there is no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Thus factual disputes that are irrelevant or

unnecessary to the resolution of the legal issues shall be disregarded in a motion for summary judgment. *Anderson*, 477 U.S. at 248.

A factual issue is not "genuine" unless "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510; *Larkin*, 891 F. Supp. at 723-24. A factual issue is not "material" unless it "might affect the outcome of the suit under the governing law." *Id.*

To defeat the motion, the nonmoving party must show more than that "some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986); *Gottlieb v. County of Orange*, 84 F.3d 511, 518 (2d Cir. 1996). "A party may not 'rely on mere speculation or conjecture as to the true nature of facts to overcome a motion for summary judgment.'" *McCloskey v. Union Carbide Corp.*, 815 F. Supp. 78, 81 (D.Conn. 1993) (quoting *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12, (2d Cir. 1986) *cert. denied*, 480 U.S. 932 (1987)). "To allow a party to defeat a motion for summary judgment by offering purely conclusory allegations of discrimination, absent any concrete particulars would necessitate a trial in all Title VII cases." *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985). Moreover, "summary judgment must be entered against 'a party who fails . . . to establish the existence of an element essential to [its] case, and on which it will bear the burden of proof at trial,'" *Larkin*, 891 F. Supp. at 723, *aff'd* without opinion, 101 F.3d 109 (2d Cir. 1996), quoting *Celotex*, 477 U.S. at 322.

### **III. ARGUMENT**

#### **A. THE DEFENDANT AGENCY IS NOT A PERSON SUBJECT TO SUIT UNDER 42 U.S.C. § 1983**

In the Second Count of the complaint, the plaintiff alleges a violation of 42 U.S.C. § 1983. He, however, has only sued the State of Connecticut Department of Correction, which is a State agency. Section 42 U.S.C. §1983 provides that any "person" acting under color of state law in violating another's federal constitutional rights is liable to the injured party. Courts have decided that neither states nor state officials acting in their official capacity are considered "persons" under Section 1983, and thus, they may not be sued under this statute. *See Will v. Michigan Department of State Police*, 491 U.S. 58, 68-71, 109 S. Ct. 2304, 105 L.Ed.2d. 45 (1989); *Francis v. State's Atty. Office*, 2006 U.S. Dist. LEXIS 60526 (D. Conn. July 28, 2006).

Therefore, the second count of plaintiff's complaint must be dismissed.

#### **B. THE COURT SHOULD GRANT SUMMARY JUDGMENT DISMISSING PLAINTIFF'S TITLE VII RACE CLAIM**

In order to survive summary judgment, plaintiff must establish a prima facie case of discrimination by a preponderance of the evidence. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Fisher v. Vassar College*, 114 F.3d 1332, 1335 (2d Cir. 1997). Once a prima facie case is established, there is a rebuttable presumption that the employer unlawfully discriminated against the employee. *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). This presumption is established "only because [it is] presumed these acts, if otherwise unexplained, are more likely than not based on the

consideration of impermissible factors.” *Id.* See also, *Fisher*, 114 F. 3d at 1341-42. When plaintiff establishes his or her prima facie case, the burden shifts to the employer to offer a “legitimate, nondiscriminatory reason” for its employment decision. *Scaria v. Rubin*, 117 F.3d 652, 654 (2d Cir. 1997) citing *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). “Although the burden of production shifts to the defendant, the ultimate burden of persuading the trier of fact of intentional discrimination remains at all times with the plaintiff.” *Id.*

If the defendant articulates a nondiscriminatory reason, “the presumption of discrimination that was raised upon a showing of the prima facie case no longer operates.” *Fisher*, 114 F. 3d at 1336 (citations omitted). “Plaintiff must then show that the proffered reason was pretextual and that, more likely than not, the true reason was the illegal discrimination that the plaintiff alleged.” *Scaria*, 117 F. 3d at 654 citing *Viola v. Philips Med. Sys. of North America*, 42 F. 3d 712, 716 (2d Cir. 1994).

In order to survive a motion for summary judgment, the plaintiff must put forth adequate evidence to support a rational finding that the nondiscriminatory reasons proffered by the employer were false, and that more likely than not the employee’s race was the real reason behind the employment decision to dismiss the plaintiff from employment. *Viola*, 42 F. 3d at 717. If plaintiff fails to raise a triable issue of fact as to whether the defendant’s offered explanation is pretextual, summary judgment in favor of defendant is appropriate. See *Holt v. KMI-Continental, Inc.*, 95 F. 3d 123, 132 (2d Cir. 1996). Summary judgment is appropriate where the “plaintiff create[s] only a weak issue of fact as to whether the employer’s reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000).

The prima facie elements the plaintiff must prove here are that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment action; and, (4) the adverse action occurred under circumstances giving rise to an inference of discrimination. *Fisher v. Vassar College*, 114 F.3d at 1344; see *McDonnell Douglas*, 411 U.S. at 802. Plaintiff's inability to make a prima facie case is addressed below.

**1. Plaintiff Cannot Meet His Prima Facie Burden.**

Plaintiff cannot meet his prima facie burden. The plaintiff did suffer an adverse employment action in that he was dismissed from state service. However, plaintiff has not shown that his dismissal was because of his race. Plaintiff was dismissed because he violated Administrative Directives 2.17 and 2.22 by engaging in a verbal and physical altercation with another Lieutenant. Administrative Directive 2.22 had been enacted as a result of the Governor's Workplace Violence Order, which had been issued in response to the shootings which occurred at the State's Lottery Commission. (FACT 12). Prior to Administrative Directive 2.22 being enacted, there had been cases of physical altercations involving DOC employees. The Director, Callahan, testified that prior to the Directive which was enacted in 2000 or 2001, the usual discipline for a physical altercation was ten days. However, there was at least one case involving a Caucasian employee (Officer Page), prior to Administrative Directive 2.22, that Director Callahan felt warranted dismissal. (Ex. 3, Callahan Depo., pp. 67:11-68:13). This case in fact was used as a comparable during plaintiff's arbitration hearing. The arbitrator considered the comparables that were offered by the Union and the DOC and decided that race did not play a factor in the plaintiff's dismissal. (See Arbitration Award, marked as Exhibit 4 of Kenneth Smith's Deposition, pp. 25-30, pp. 33-34). After the

enactment of Administrative Directive 2.22, there were several cases involving Caucasian employees in which Director Callahan recommended dismissals for violations of that Administrative Directive. In fact, one of the Caucasian employees had only entered into a verbal altercation; yet dismissal was recommended. (Ex. 4, Catherine Osten Deposition., pp. 69:21-70:3). In another comparable used by the Union at the arbitration hearings involved two Lieutenants at the Hartford Correctional Center (Lt. Choinard and Lt. Austin). The defendant offered evidence and the arbitrator found that the conduct involving these two Lieutenants did not rise to the level of severity of the incident involving the plaintiff and Lt. Arnold. (Ex. 4, Osten Depo., p. 69:8-12; Arbitration Award, marked as Ex. 4 of Smith Depo., pp. 33-34). Lt. Choinard is Caucasian and Lt. Austin is African-American and in that incident, they both received five-day suspensions. Also the union offered another comparable involving an incident at the Corrigan-Radgowski Correctional Institution, in which one of the employees was African-American and one was Caucasian. (Ex. 4, Osten Depo., p. 50:7-15). Again this incident was not truly comparable to the incident involving plaintiff and Lt. Arnold. This evidence supports Director Callahan's testimony that race played absolutely no role in determining discipline in these cases, as well as the plaintiff's case. (FACT 20, Ex. 3, Daniel Callahan Deposition, p. 70:3-6). Each incident involving an altercation is looked at individually, on a case-by-case basis, when determining discipline. (Ex. 3, Callahan Depo., pp. 64:25-65:9). Defendant contends that the plaintiff can produce no evidence to prove that his dismissal was due to his race. Therefore, he cannot sustain a prima facie case of discrimination pursuant to Title VII.

**2. The Defendant Has Set Forth Legitimate Non-Discriminatory Reasons Underlying Its Decision to Dismiss the Plaintiff**

Even if this Court determines that the plaintiff has made out a prima facie case, the defendant has shown that there were legitimate non-discriminatory reasons why the plaintiff was dismissed. There is no dispute that plaintiff engaged in a verbal and physical altercation while on duty at the Hartford Correctional Institution. (FACT 7). There is also no dispute that the plaintiff had been the shift supervisor, responsible for the operation of the prison when he engaged in this fight. (FACTS 4 & 6). This altercation was investigated and it was found that plaintiff and Lt. Arnold violated Administrative Directives 2.17 and 2.22. (FACT 11). Therefore, the defendant has offered a legitimate non-discriminatory reason for the plaintiff's dismissal.

Plaintiff can proffer no evidence, save his own self-serving and conclusory assertions and/or beliefs to counter the defendant's legitimate non-discriminatory reasons for its employment decision. Plaintiff has not shown that he was treated disparately or discriminated against in any manner by the defendant because of his race. Plaintiff cannot show that there were other employees who engaged in verbal and physical assaults to the extent he did, and were not dismissed, particularly after the enactment of the workplace violence directive. During discovery, when asked to produce such evidence, plaintiff provided DOC discipline logs. (Exhibit 1, pp. 15-20). There are no employees listed on these logs (other than the plaintiff and Lt. Arnold), who engaged in a physical altercation in violation of Administrative Directive 2.22. In fact on page 19 of Exhibit 1, employee Robert Cyr, a white male, was dismissed for the "threat of physical harm." These logs also support Director Callahan's testimony that prior to Administrative Directive 2.22, the discipline for a physical altercation was a ten-day suspension. The logs show that these suspensions were applied consistently to

Caucasian, Hispanic and African-American employees. (Exhibit 1, p. 19). On the other hand, the defendant has shown that similarly situated Caucasian employees were given the same discipline that the plaintiff received. Therefore judgment should enter for the defendant.

### **3. Plaintiff Cannot Demonstrate And Prove Pretext.**

Plaintiff simply can point to no evidence sufficient to show that the defendant's decision to dismiss him from employment was a pretext for discrimination. Plaintiff is unable to make the requisite showing that the defendant's articulated, legitimate non-discriminatory reasons for the dismissal were false. He must "produce not simply 'some' evidence, but 'sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered by the [defendant] were false, and that more likely than not [discrimination] was the real reason for the [employment action].'" *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 714 (2d Cir. 1996) (quoting *Woroski v. Nashua Corp.*, 31 F.3d 105, 110 (2d Cir. 1994)). *See also Weinstock v. Columbia University*, 224 F.3d 33, 42, 50 (2d Cir. 2000).

There are no material facts tending to show that the defendant's articulated, legitimate reasons for dismissing the plaintiff were false or not honestly held by the defendant and its representatives at the time the decision was made. *See Roge v. NYP Holdings, Inc.* 257 F.3d 164, 169 (2d Cir. 2001) (key question is not whether plaintiff's qualifications were actually inferior but rather whether employer in good faith believed they were); *Agugliaro v. Brooks Brothers, Inc.*, 927 F. Supp. 741, 747 (S.D.N.Y. 1996) ("[e]ven assuming defendants were wrong in their belief [about] plaintiff . . . , what is significant is that they based their decision [to dismiss] plaintiff on that belief, and not on his [protected status]"). Director Callahan based his recommendation for dismissal on the fact that the plaintiff had engaged in

a serious “assault” where Lt. Arnold had been “jacked up against the wall” resulting in another employee “having to physically take [plaintiff] off her,” (Ex. 3, Callahan Depo., pp. 15:22-16:9). In reaching his recommendation, Director Callahan also considered the conclusions of the Security Division investigation which found, among other things, that (1) the plaintiff could have exited the office prior to the physical altercation; (2) the plaintiff grabbed Lt. Arnold around her neck and head area; and, (3) the altercation left redness and bruising on Lt. Arnold’s neck. (Ex. 3, Callahan Depo., pp. 70:8-71:24). Therefore Director Callahan’s legitimate non-discriminatory reasons for recommending dismissal were not false. He had an independent basis for reaching his decision. Therefore, judgment should enter for the defendant on plaintiff’s Title VII claim.

In a disparate treatment employment discrimination case, the court is charged with determining whether intentional discrimination occurred, and does not have a “roving commission to review business judgment.” *Montana v. First Federal Savings & Loan Ass’n*, 869 F.2d 100, 106 (2d Cir. 1989) (internal citations omitted). Thus, the “fact that a court may think that the employer [applied inappropriate discipline] does not in itself expose him to Title VII liability.” *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). See also *Scaria v. Rubin*, 117 F.3d 652, 655 (2d Cir. 1997) (“This Court does not sit as a super-personnel department that reexamines an entity’s business decisions”), citing *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986).

The plaintiff also alleges in his complaint that he did not have a Threat Assessment Team review the incident between he and Lt. Arnold. Plaintiff did have a threat assessment; however, the “team” was not constituted in the exact fashion as listed in Administrative Directive 2.22. The threat assessment was done by the Warden of the Hartford Correctional

Center, Joel Schweidel and Director Callahan of Human Resources. (FACT 15). Even if the defendant had failed to perform a threat assessment, the plaintiff cannot show that the lack of a Threat Assessment Team was discriminatory. There is no evidence in the record to show that workplace violence incidents of other similarly situated employees were reviewed by a Threat Assessment Team. In fact, the union official, Cathy Osten, testified that she could find no evidence that the “team” existed as listed in the directive. (Ex. 4, Osten Depo., p. 32:11-20). Therefore, the lack of this “team” did not violate any of plaintiff’s rights under Title VII.

The plaintiff filed a grievance regarding his dismissal which was upheld by an independent arbitrator. At the arbitration hearings, plaintiff raised the issue of disparate treatment and issue of the lack of a Threat Assessment Team. The arbitrator considered all of the evidence presented, including the evidence of similarly situated employees, and found that there was no disparate treatment. The arbitrator also found that the lack of a Threat Assessment Team had no effect on plaintiff’s discipline. (Arbitration Award, marked as Ex. 4 of Smith Depo., pp. 33-34). Plaintiff, nor the Union, raised any issues regarding bias of the arbitrator. In fact, the Union considered the arbitrator to be fair. (FACT 25).

Courts have decided “ where an employee's ultimate termination depends upon, and is allowed by, a decision of an independent and unbiased arbitrator based on substantial evidence after a fair hearing, the arbitration decision has probative weight regarding the requisite causal link between an employee's termination and the employer's illegal motive.” *Collins v. New York City Transit Authority*, 305 F.3d 113, 115 (2d Cir. 2002). The arbitrator’s decision is further evidence that the defendant had a legitimate non-discriminatory reason for dismissing the plaintiff. There is no indicia of a discriminatory motive involved in this case. Therefore, judgment should enter for the defendant in this case.

**IV. CONCLUSION**

For the foregoing reasons, the defendant moves that the court grant this Summary Judgment Motion and enter judgment in its favor.

DEFENDANT

STATE OF CONNECTICUT  
DEPARTMENT OF CORRECTION

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**CERTIFICATION**

In accordance with the Court's Supplemental Standing Order in this matter, this certification represents only that this Memorandum in Support of Defendant's Motion for Summary Judgment on January 12, 2007 was mailed, first class postage to plaintiff's counsel, Marc L. Glenn, Esq., Law Office of W. Martyn Philpot, Jr., LLC, 409 Orange Street, New Haven, CT 06510, for his review and response, to be returned to the undersigned for filing with the Court along with any reply thereto as may be deemed appropriate.

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## **CERTIFICATION**

I hereby certify that on February 16, 2007, a copy of the foregoing Memorandum in Support of Motion for Summary Judgment was filed electronically. Notice of this filing was sent by e-mail to all parties by operation of the court's electronic filing system. Parties may access this filing through the Court's system.

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