SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
JUDGE

SUSSEX COUNTY COURTHOUSE
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March 9, 2015

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RE: *Ennis v. Del. Transit. Corp.*
C.A. No. S13C-09-028 THG

Dear Parties:

Before the Court is Delaware Transit Corporation's ("Defendant") Motion for Summary Judgment as to Brian Ennis's ("Plaintiff") sole complaint of racial discrimination in employment, a violation of the Delaware Discrimination in Employment Act (the "DDEA"). For the following reasons, Defendant's Motion for Summary Judgment is **DENIED**. Defendant's request to move the trial date from April 6, 2015 to April 7 is **GRANTED**.

FACTS

Plaintiff began working for Defendant's predecessor in 1994 as a mechanic for transport vehicles. Eventually, he was promoted to a supervisory role as an Auto Technician and Maintenance Foreman in Defendant's Georgetown, Delaware facility ("Georgetown facility"). Up until his forced

resignation[1] in March of 2013, Plaintiff received positive work reviews, with no performance or disciplinary issues.

Each day Plaintiff would typically eat a banana during work. At first, Plaintiff disposed of the peels in a trash can located near the employee eating area, but upon noticing the peels attracted flies and gnats, Plaintiff began tossing the peels in a grassy area ten feet from an entrance to the building. A fellow employee, Aldrich Hines ("Hines"),[2] noticed the discarded banana peels in the grass next to the sidewalk leading into the building and inquired as to who was disposing of the peels. Upon discovering Plaintiff was the culprit, Hines approached Plaintiff and requested he cease the behavior because the peels were "an eye sore"; Plaintiff immediately obliged. Hines, who is African-American, never informed Plaintiff of his belief that the act of throwing a banana peel was racially charged, nor did he tell Plaintiff where to dispose of the banana peels.

After Plaintiff's conversation with Hines, Plaintiff adopted the practice of disposing of his banana peels on the roofs of vehicles he was performing maintenance work on. He continued with this disposal routine on a daily basis for at least a year without any confrontation or protest from any fellow employees. Plaintiff threw the banana peels on the roofs of buses knowing they would later blow off.

In the year leading up to Plaintiff's constructive discharge, tensions at the Georgetown facility were high due to an unrelated, racially charged incident.[3] After Plaintiff began his new

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[1] The terms forced resignation, termination, and constructive discharge, for the purposes of this case, will be used interchangeably.

[2] Hines is one of the three employees offended by the March 15, 2013 incident that spurred Plaintiff's forced resignation. Hines had no supervisory authority over Plaintiff.

[3] Plaintiff was not involved, nor did he supervise any of the people involved in the incident.

disposal practice, a white[4] driver at the Georgetown facility gave a black driver a cookbook that caused offense to the black driver. As a result, the employees of the Georgetown facility were required to attend harassment training.[5] Defendant admits that the sensitivity training did not include education on what message banana peels might convey.

On March 15, 2013, Plaintiff ate some bananas and tossed their peels on top of the vehicle he was working on. Unbeknownst to Plaintiff, three black employees, Barr-ford, Hines, and Anthony Taylor (collectively the "offended employees") were holding a meeting in an office area above the bay where the vehicle was located. The meeting was meant as a "follow-up" to the racial harassment training. When leaving the office area, the offended employees saw the peels on a vehicle and immediately interpreted their presence as a racist gesture,[6] despite being unaware as to how the peels ended up on the vehicle. The offended employees confronted the other employees at the Georgetown facility, demanding to know who had discarded the banana peels.[7] Later that day, Barr-Ford sent an email to State Paratransit Manager, Kathy Wilson, describing the incident and urging her to take action.

Subsequent to the incident, Plaintiff admitted to his supervisor, John Syryla ("Syryla"), that

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[4] The Court means no offense in its use of the colloquial terms of "black" and "white" to describe "African-American" and "Caucasian" actors in this case.

[5] The harassment training was conducted by the Benefits Administration Manager, Beverly Barr-Ford ("Barr-Ford"). Barr-Ford is black and another of the three offended employees.

[6] Barr-Ford testified at her deposition that she believed the peel represented a racist gesture by a white person because a black person would not have discarded a banana peel on top of a vehicle. Barr-Ford Depo. at 22-24. Hines also believed the incident had racist undertones. However, Hines also admitted that if he had known Plaintiff was discarding peels on top of vehicles regularly prior to the March 15, 2013 incident, he would not have considered it racist. Hines Depo. at 43, 48.

[7] This incident will be heretofore referred to as either "the March 15 incident," or "the second banana peel incident."

he had placed the peels on the roof of the bus, explaining he had done so to avoid attracting flies and gnats to the trash can in the employee lunch area. Diana Williams ("Williams"), Defendant's Compliance Officer, conducted an investigation of the March 15 banana peel incident. Williams interviewed Plaintiff and others during her investigation. Syryla also participated in the interview, confessing he was unaware of the potential racist message of the banana peel, and indicating there was no evidence Plaintiff was aware of such message.[8] Management officials[9] eventually conferred and decided to terminate Plaintiff after Williams's investigation concluded.[10] Management did not accept Plaintiff's excuse and found that based on where the peels were located, the high racial tensions at the facility, Plaintiff's managerial role, and that Plaintiff had recently received race sensitivity training, Plaintiff had violated Defendant's Harassment Policy[11] and should be terminated.

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[8] According to Plaintiff, the offended employees eventually persuaded Syryla that the act was racially charged. At Syryla's deposition, he stated that but-for the offended employees' reactions, he would not have felt Plaintiff's conduct was racist . Syryla Depo. at 46-47.

[9] The management officials involved in the decision to terminate were Richard Paprcka ("Paprcka"), Defendant's Chief Operating Officer, Syryla, Lauren Skiver ("Skiver"), Defendant's Chief Executive Officer, and Richard Seibel ("Seibel"), Defendant's Labor Relations Manager.

[10] Whether or not management held any personal discriminatory animus when making the decision to terminate Plaintiff, Defendant may still be liable based on the "Cat's Paw" theory. The typical case using "Cat's Paw" occurs when "a biased subordinate, who lacks decision making power, uses the formal decision maker as a" "straw man" "in a deliberate scheme to trigger a discriminatory action." *Root v. Keystone Helicopter Corp.*, 2011 WL 144925, *6 (E.D. Pa. Jan. 18, 2011). An employer can be liable for discrimination even if the formal decision maker did not have any discriminatory intent. *Id.* A plaintiff need only show that "those exhibiting discriminatory animus influenced or participated in the decision to terminate" for an employer to be held liable. *Abramson v. William Paterson College of N.J.*, 260 F.3d 265, 286 (3rd Cir. 2001).

[11] Defendant's Harassment Policy states: "[Defendant] is committed to providing a work environment in which every employee can feel comfortable and be treated professionally without regard to . . . race, ethnicity . . . or any other legally protected characteristic.

[Defendant] expressly prohibits any actions, words, jokes, or comments based on an individual's . . . race, ethnicity . . . or any other legally protected characteristic.

Anyone engaging in . . . unlawful harassment will be subject to disciplinary action up to and including termination of employment." Defendant's Appendix 21-22.

Defendant gave Plaintiff the option of resigning or being terminated. Plaintiff opted to resign and drafted a resignation letter.

On September 24, 2013, Plaintiff filed a Complaint alleging Defendant had violated the DDEA. After Plaintiff served the Complaint, and Defendant answered, the parties engaged in discovery for several months. Defendant subsequently filed the instant Motion for Summary Judgment.

STANDARD OF REVIEW

This Court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[12] A motion for summary judgment should not be granted, however, when material issues of fact are in dispute or if the record lacks the information necessary to determine the application of the law to the facts.[13] A dispute about a material fact is genuine "when the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[14] Therefore, the issue at the summary judgment stage is "whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law."[15]

Although the moving party for summary judgment initially bears the burden of demonstrating

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[12] Super. Ct. Civ. R. 56(c).

[13] *Bernal v. Feliciano*, 2013 WL 1871756, at *2 (Del. Super. May 1, 2013) (*citing Ebersole v. Lowengrub*, 180 A.2d 467, 468 (Del. 1986)).

[14] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986).

[15] *Id.*

the undisputed facts support the claims, once the movant makes this showing, the burden "shifts" to the non-moving party to show there are material issues of fact for resolution by the ultimate fact-finder.[16] When considering a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmovant.[17]

"In an employment discrimination case, the burden of persuasion on summary judgment remains unalterably with the employer as movant."[18] The employer is required to demonstrate that ". . . even if all of the inferences which could reasonably be drawn from the evidentiary materials of record were viewed in the light most favorable to the plaintiff, no reasonably jury could find . . ." for the plaintiff.[19] In employment discrimination cases, summary judgment is to be used *sparingly*, especially where the court is viewing the case at first glance (emphasis added).[20]

DISCUSSION

DDEA Procedural Framework

The DDEA was created by the Delaware General Assembly to prevent unlawful discrimination by employers based on a protected class.[21] The law specifically proscribes

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[16] *Hughes ex rel. Hughes v. Christina Sch. Dist.*, 2008 WL 73710, at *2 (Del. Super. Jan. 7, 2008) (*citing Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879-80 (Del. Super. 2005)).

[17] *Joseph v. Jamesway Corp.*, 1997 WL 524126, at *1 (Del. Super. July 9, 1997) (*citing Billops v. Magness Const. Co.*, 391 A.2d 196, 197 (Del. Super. 1978)).

[18] *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 361 (3rd Cir. 2008).

[19] *Id.*

[20] *Id.* at 369.

[21] In a sense, the DDEA curbs the Doctrine of At-Will Employment ("the At-will Doctrine"). "In Delaware there is a strong presumption an employment contract, unless otherwise expressly stated, is at-will in nature, with potential indefinite duration. At-will employees may be terminated for any reason, at any time, with or without cause." *Torres v. Sussex Cty. Council*, 2014 WL 7149179, *5 (Del. Super. Dec. 8, 2014) (*citing Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000)).

discrimination based on certain protected classes[22] and lays out a procedural framework for an adversely affected employee to follow in order to obtain recourse. The DDEA states it is:

> [A]n unlawful employment practice for an employer to . . . discharge any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of such individual's race, marital status, genetic information, color, age, religion, sex (including pregnancy), sexual orientation, gender identity, or national origin . . . .[23]

The Delaware Department of Labor ("Department"), through express grant of power by the General Assembly,[24] has the power to enforce the DDEA by commencing civil actions in Superior Court for its violation.[25] The Department endeavors to eliminate unlawful discrimination through the following administrative process:

> Any person claiming to be aggrieved by a violation of [the DDEA] shall first file a charge of discrimination within 120 days of the alleged unlawful employment practice . . . , setting forth a concise statement of facts, in writing, verified and signed by the charging party. . . . The respondent may file an answer within 20 days of its receipt.[26]

"The Department . . . [then] review[s] the submissions within 60 days from the date of service upon the respondent and issue[s] preliminary findings with recommendations."[27] "After investigation, the Department . . . issue[s] a determination of either 'reasonable cause' or 'no reasonable cause' to

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[22] *See* 19 *Del. C.* §711(a).

[23] 19 *Del. C.* §711(a)(1).

[24] *See Sammons v. Ridgeway*, 293 A.2d 547 (Del. 1972).

[25] 19 *Del. C.* §712(a).

[26] 19 *Del. C.* §712(c)(1).

[27] 19 *Del. C.* §712(c)(2).

believe that a violation has occurred. . . . All cases resulting in a 'no cause determination'[28] . . . receive a corresponding Delaware Right to Sue Notice."[29] In all cases where the Department has dismissed the charge [or] issued a no cause determination . . . the Department . . . issue[s] a Delaware Right to Sue Notice.[30] "A [plaintiff-employee] may file a civil action in Superior Court, [*only*] after exhausting the administrative remedies provided [within 19 *Del. C.* §712(c)] and receipt of a Delaware Right to Sue Notice acknowledging same (emphasis added)."[31]

Employment Discrimination Jurisprudence
Delaware Law

The General Assembly patterned the DDEA off 42 U.S.C. §2000(e) of the federal Civil Rights Act of 1964 ("Title VII").[32] As such, the language of the DDEA is virtually the same as its federal counterpart.[33] Due to the similarities between the laws, the "Delaware Courts take the 'interpretive lead' from District Court and Third Circuit Court of Appeals decisions regarding interpretations of Title VII."[34] As a result, the Delaware State Courts look to the tests formulated

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[28] "No cause determination" means ". . . the Department has completed its investigation and found that there is no reasonable cause to believe that an unlawful employment practice has occurred . . . . A no cause determination is a final determination ending the administrative process and provides the [plaintiff-employee] with a corresponding Delaware Right to Sue Notice." 19 *Del. C.* §710(13).

[29] 19 *Del. C.* §712(c)(3).

[30] 19 *Del. C.* §712(c)(5). "Delaware Right to Sue Notice" is the "final acknowledgment of the [plaintiff-employee's] exhaustion of the administrative remedies provided [in the DDEA] and a written notification to the [plaintiff-employee] of a corresponding right to commence a lawsuit in Superior Court." 19 *Del. C.* §710(4).

[31] 19 *Del. C.* §714(a).

[32] *Miller v. State*, 2011 WL 1312286, at *7 (Del. Super. April 6, 2011).

[33] *Spicer v. CADapult, Ltd.*, 2013 WL 6917142, *3 (Del. Super. Nov. 15, 2013) (*citing Giles v. Family Ct. of Del.*, 411 A.2d 599, 601-02 (Del. 1980)).

[34] *Miller*, 2011 WL 1312286 at *7 (*citing Riner v. Nat.'l Cash Register*, 434 A.2d 375, 376 (Del. 1981)).

by the *McDonnell Douglas Corp. v. Green*[35] line of cases for guidance with regard to cases grounded on alleged violations of the DDEA.[36]

McDonnell Douglas Framework

A plaintiff may prove disparate treatment discrimination through direct evidence of an employer's intent to discriminate ". . . or using indirect evidence from which the Court can draw an inference of the employer's intent to discriminate."[37] However, a plaintiff is almost exclusively confined to proving his case with indirect evidence since ". . . an employer who discriminates will almost never announce a discriminatory animus or provide employees or courts with direct evidence of discriminatory intent."[38] In response to this reality, the United States Supreme Court crafted to *McDonnell Douglas* burden-shifting framework to " . . . allow plaintiffs to proceed without direct proof of illegal discrimination where circumstances are such that common sense and social context suggest that discrimination occurred."[39]

***Prima Facie* Case**

When using the *McDonnell Douglas* framework to establish a claim of disparate treatment, the plaintiff bears the initial burden of establishing a *prima facie* case of discrimination.[40] The primary purpose of the *prima facie* prong is to ". . . eliminate the most obvious, lawful reasons for the [employer's] action. . . ."[41] Therefore, ". . . when all legitimate reasons for [termination] have

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[35] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[36] *Riner*, 434 A.2d at 376.

[37] *Spicer*, 2013 WL 6917142 at *3 (*citing Doe*, 527 F.3d at 364).

[38] *Iadimarco v. Runyon*, 190 F.3d 151, 157 (3rd Cir. 1999).

[39] *Id.*

[40] *McDonnell Douglas*, 411 U.S. at 802.

[41] *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 352 (3rd Cir. 1999).

been eliminated as possible reasons for the employer's actions, it is more likely than not the employer . . . based his [employment] decision on an impermissible consideration."[42]

"A *prima facie* case cannot be established on a one-size-fits-all basis,"[43] since the facts of an employment discrimination case will inevitably vary.[44] Though the elements of a *prima facie* case are flexible[45] and will change based on the circumstances of the case, the basic elements a plaintiff must demonstrate are: (1) that the plaintiff is a member of a protected class;[46] (2) that the plaintiff was qualified for the job at issue; (3) that the plaintiff suffered an adverse employment action sufficient to invoke Title VII and/or DDEA protection; and (4) that there is a nexus or connection[47] between the plaintiff's protected trait and the adverse employment decision.[48] The plaintiff must prove its *prima facie* case by a preponderance of the evidence,[49] which can be accomplished by

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[42] *Id.* at 353 (*quoting Furnco Constr. Corp. v. Waters*, 450 U.S. 567, 577 (1978)).

[43] *Doe*, 527 F.3d at 365 (*citing Jones v. Sch. Dist. of Phila.*, 198 F.3d 403, 411 (3rd Cir. 1999)).

[44] *McDonnell Douglas*, 411 U.S. at 807, fn. 13.

[45] *Doe*, 527 F.3d at 365.

[46] "The Act prohibits All [sic] racial discrimination in employment, without exception for any group of particular employees . . . ." *Iadimarco*, 190 F.3d at 158. A white plaintiff alleging disparate treatment in a reverse discrimination case is not expected to prove any additional *prima facie* elements to satisfy his initial *McDonnell Douglas* burden. A reverse discrimination plaintiff is only required to establish that which a minority is expected to prove in the "typical" employment discrimination case. *See Id.* at 158-60 ("[T]he language of *McDonnell Douglas* itself clearly establishes that the substance of the burden-shifting analysis applies with equal force to claims of 'reverse discrimination'").

[47] It is irrelevant whether plaintiff's position was filled by another with his same protected trait as long as he demonstrates he was terminated *because of* his protected trait (emphasis added). *See Pivirotto*, 191 F.3d at 353 *citing Furnco*, 438 U.S. at 577. In short, a plaintiff must only demonstrate, given the totality of the circumstances and the facts surrounding the case, that his employer treated him less favorable due to his protected trait. *Iadimarco*, 190 F.3d at 163-64 (*citing Furnco*, 438 U.S. 577).

[48] *See Doe*, 527 F.3d at 365; *Jones*, 198 F.3d at 411.

[49] *Spicer*, 2013 WL 6917142 at *3 (*citing Doe*, 527 F.3d at 364).

presenting "sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based on a trait that is protected under Title VII" and/or the DDEA.[50] "[T]he *prima facie* requirement for making [an employment discrimination] claim 'is not onerous' and poses 'a burden easily met.'"[51]

Application

Here, Plaintiff narrowly satisfies his burden in establishing a *prima facie* case. First, Plaintiff is a member of a protected class. Though Plaintiff is a white individual, race and color are protected traits under Title VII and the DDEA. As such, Plaintiff satisfies this first prong.

Second, Plaintiff is qualified for the position he was constructively discharged from. According to the record, Plaintiff held his position with Defendant and Defendant's predecessor for nearly 20 years prior to his termination. The record is also filled with references to Plaintiff's numerous accolades and employment assessments, all of which demonstrate Plaintiff was an excellent employee.

Third, Plaintiff suffered an adverse employment action. Plaintiff was given the option of termination or resignation. Plaintiff chose the latter. "A resignation induced under pressure is tantamount to discharge."[52]

Plaintiff has the most difficulty establishing the last prong of a *prima facie* case. However, because the *prima facie* requirement is not exacting and can be easily met, and at the summary judgment stage the court interprets evidence in a light most favorable to the nonmovant, Plaintiff is

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[50] *Mosca v. Cole*, 217 Fed. Appx. 158, 161 (3rd Cir. 2006) (*quoting Iadimarco,* 190 F.3d at 161).

[51] *Doe*, 527 F.3d at 365 (*quoting Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

[52] *Anchor v. Motor Freight, Inc.*, 325 A.2d 374, 376 (Del. 1974).

be able to proceed to the next level of the *McDonnell Douglas* framework.[53] Here, Plaintiff must demonstrate that he was treated less favorably then others because he was white. Based on the facts and the record, Plaintiff was terminated due to his race. According to Barr-Ford in her deposition, she believed throwing a banana peel on top of Defendant's vehicle constituted a racist gesture by a white individual, and that a black employee would not commit such an act.[54] Paprcka stated in his deposition that he believed Plaintiff was discharged for throwing ". . . banana peels in front of an African-American supervisor."[55] By extension, Barr-Ford's and Paprcka's statements display that Plaintiff's race made the act of throwing a banana peel a racist gesture. Statements made by Skiver during her deposition are contradictory to Barr-Ford's and Paprcka's statements. Skiver claimed Plaintiff would have been terminated regardless of his race because he threw trash on top of a company vehicle.[56]

The Court is skeptical of this assertion. It is very unlikely any other employee would be terminated from Defendant's employment merely for throwing trash on top a work vehicle. Though the Court does not dispute Defendant may reprimand an employee for such an act, it does not believe Skiver's claim that it is a dischargable offense. The only cited reason for Plaintiff's discharge by Defendant is a violation of Defendant's harassment policy. A fact finder could determine that if Plaintiff was a black employee, his act may not have been interpreted as racist, and he may not have

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[53] It should be noted that at the *prima facie* stage of analysis, the Court is only determining whether a plaintiff as presented sufficient evidence of discrimination so that it may consider the next stage of the *McDonnell Douglas* test. *Jones*, 198 F.3d at 412.

[54] Barr-Ford Depo. at 22-24.

[55] Paprcka Depo. at 10, 40.

[56] Skiver Depo. at 16-18.

been discharged from employment. As such, Plaintiff has met the minimal burden of establishing a *prima facie* case of discrimination by showing a connection between his race and his constructive discharge.

Legitimate, Non-discriminatory Reason

Establishing a *prima facie* case of discrimination merely creates a rebuttable presumption of discrimination.[57] After a plaintiff sets up his *prima facie* case, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment decision.[58] "The burden that shifts to the employer . . . is to rebut the presumption of discrimination by producing evidence that plaintiff was [terminated] . . ." on permissible grounds.[59] The employer's burden, however, is merely the burden of production. The employer need not persuade the court it was actually motivated by its proffered reason in order to satisfy its burden.[60] "While the burden of production may shift, '[t]he ultimate burden of persuading the trier of fact that the [employer] intentionally discriminated against the plaintiff remains at all times with plaintiff.'"[61] The employer's evidence merely needs to raise a genuine issue of fact as to whether plaintiff was actually discriminated against in order to satisfy its burden.[62]

Application

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[57] *See Burdine*, 450 U.S. at 254.

[58] *McDonnell Douglas*, 411 U.S. at 802.

[59] *Burdine*, 450 U.S. at 254.

[60] *Id.*

[61] *Jones*, 198 F.3d at 410 (*quoting Burdine*, 450 U.S. at 252-53).

[62] *Burdine*, 450 U.S. at 254. It should be noted that the United States Supreme Court has acknowledged that though the employer's burden is low, its legitimate reasons must be clear and reasonably specific. The Court further explained that if an employer only needs to produce a legitimate nondiscriminatory reason, it is in the employer's best interest to persuade the trier of fact that it is true. *See Id.* at 258.

Defendant has adequately met its burden of production. Defendant has repeatedly stated in its briefs that Plaintiff was forced to resign due to his apparent violation of Defendant's harassment policy. Defendant's harassment policy makes clear that any type of harassment based on protected traits is strictly prohibited, and that any employee engaging in such harassment can be disciplined by termination from employment. By citing to the company harassment policy, explaining why other employees could have interpreted Plaintiff's actions as racist, and in light of the other events occurring at Defendant's Georgetown facility, Defendant has adequately explained that Plaintiff was not terminated due to his race, but rather because it believed Plaintiff's actions were meant to harass black employees. This is a legitimate, nondiscriminatory reason for Plaintiff's termination.

Pretext

If the employer produces a legitimate, nondiscriminatory reason for the plaintiff's adverse employment action, the court turns to the final prong of the *McDonnell Douglas* analysis.[63] The plaintiff is able to survive a motion for summary judgment by showing the employer's averred reason is pretextual and meant to conceal unlawful discrimination.[64] At this stage, the plaintiff's burden is twofold. First the plaintiff must convince the factfinder the employer's stated reason was false.[65] Second, plaintiff must prove discrimination was the real reason for his adverse employment

[63] *Jones*, 198 F.3d at 412.

[64] *Mosca*, 217 Fed.Appx. at 161. It should be noted that the court's focus at the pretext level of analysis, is whether there is sufficient evidence for a jury to conclude that the employer's purported reason for the adverse employment action was a pretext for discrimination. *Jones*, 198 F.3d at 412.

[65] *Fuentes v. Perskie*, 32 F.3d 759, 763 (3rd Cir. 1994) (*citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 508-09 (1993)). Convincing a factfinder that the employer's reason for the adverse action was false, alone, is not sufficient for a plaintiff to be successful. This is because the factfinder rejecting the employer's proffered reason only permits, but does not compel, a verdict in the plaintiff's favor.

action.[66] As such, the plaintiff must be given a fair opportunity to demonstrate pretext.[67]

The Third Circuit has held a plaintiff may survive summary judgment if he successfully rebuts an employer's stated reason by:

> Pointing to "some evidence, direct or circumstantial, from which a fact finder could reasonably either (1) disbelieve the employer's articulated reason[];[68] or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.[69]

The plaintiff cannot demonstrate pretext by showing the adverse employment action was spurred by a mere mistaken belief[70] ". . . since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent."[71] Instead, a ". . . plaintiff must point to 'weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions' in the employer's proffered reasons such that a reasonable fact-finder could 'rationally find them unworthy of credence. . . .'"[72] Further, the Delaware Supreme Court has stated "[a] complaining plaintiff 'must do more than merely establish a *prima facie* case and deny the

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[66] *Id.* (*citing Hicks*, 509 U.S. at 508).

[67] *McDonnell Douglas*, 411 U.S. at 804.

[68] A plaintiff may survive summary judgment by rebutting the employer's legitimate reason by introducing evidence that would allow a reasonable factfinder to infer "that each of the employer's proffered non-discriminatory reasons was either a *post hoc* fabrication or otherwise did not actually motivate the employment action." *Doe*, 527 F.3d at 370.

[69] *Mosca*, 217 Fed.Appx. at 161 (*citing Iadimarco*, 190 F.3d at 161).

[70] Though an employer's mistake is typically not sufficient to establish pretext, there are rare cases in which it will suffice. In order for proof of mistake to be enough to satisfy the plaintiff's burden, the plaintiff must demonstrate, "through admissible evidence, that the employer's articulated reason was not merely wrong, but that it was 'so plainly wrong that it cannot have been the employer's real reason.'" *Jones*, 198 F.3d at 413 (*citing Keller v. Orix Credit Alliance Inc.*, 130 F.3d 1101, 1109 (3rd Cir. 1997)).

[71] *Keller*, 130 F.3d at 1108-09.

[72] *Id.*

credibility of the [defendant's] witnesses. The Plaintiff must also offer *specific and significant probative* evidence that the [defendant's] alleged purpose is a pretext for discrimination.'"[73] Evidence introduced at the *prima facie* level may be helpful, or even sufficient, in establishing pretext.[74]

Application

Though there is a possibility Defendant may have mistakenly interpreted Plaintiff's actions as racial harassment, Defendant never made such a concession in its briefs or during oral argument. Had Defendant merely fallen on its sword and admitted it may have made a mistake as to Plaintiff's constructive discharge, the Court may have granted its Motion for Summary Judgment since termination for racial harassment is an appropriate disciplinary measure. Instead, however, Defendant has consistently claimed it was justified in forcing Plaintiff to resign because both racial harassment and tossing trash on company equipment are dischargable offenses. Therefore, because Defendant never asserted it mistakenly interpreted Plaintiff's actions as racist, and thus mistakenly terminated his employment, the Court will not consider any such possible mistake at the pretext level of analysis.

The number of weaknesses, implausibilities, and inconsistencies rampant throughout Defendant's management team gives the Court sufficient pause as to the facts to warrant a trial. Just in the brief excerpts from Hines', Barr-Ford's, Syryla's, Seibel's, and Skiver's depositions, it is clear those that gave Plaintiff the ultimatum of resignation or termination were either not on the same page *ab initio* with regard to why Plaintiff should have been terminated, or are attempting to backpedal

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[73] *Boggerty v. Stewart*, 14 A.3d 542, 554 (Del. 2011) (*quoting Schuler v. Chronicle Broad. Co.*, 793 F.2d 1010, 1011 (9th Cir. 1986)).

[74] *Doe*, 527 F.3d at 370 (*citing Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 286 (3rd Cir. 2000)).

and come up with a proper reason for Plaintiff's forced discharge. Regardless, because of this confusion or scheming, the Court believes a trial is required to resolve the clear factual disputes that will make or break Plaintiff's discrimination claim.

There are several contradictions and inconsistencies in the answers provided by those deposed. First, Hines testified at his deposition that he never told Plaintiff tossing banana peels could be interpreted as a racist gesture towards blacks, and the reason he asked Plaintiff to stop discarding the banana peels in the grass was because he considered the peels to be "an eye sore."[75] He later stated that he only interpreted the act of throwing banana peels in the grass as having racist undertones after the "cook-book incident" occurred, nearly a year and a half after the fact.[76] Further, Hines indicated he believed the second banana peel incident had racist undertones due to his prior experience with Plaintiff tossing banana peels in the grass.[77] The Court, taking these statements in conjunction, finds this confusing. It appears Hines, who does not believe Plaintiff is a racist individual,[78] and did not initially believe Plaintiff had a discriminatory motive by tossing banana peels in the grass outside a work entrance, did an about-face. This inconsistency seems to have occurred in light of another, unrelated racial incident.

In that same vein, Barr-Ford testified she interpreted the March 15 banana peel incident as a racial gesture, in part, because of Hines' prior interactions with Plaintiff. When asked why she believed the March 15 incident was racially charged, without knowing who had discarded the peels,

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[75] Hines' Depo. at 26, 22.

[76] *Id.* at 26-28.

[77] *Id.* at 43.

[78] *Id.* at 11.

she stated "[b]ecause of the previous testimony of what was going on with the banana peels by the door. . . ."[79] Hines' and Barr-Ford's testimonies show Hines' prior banana peel interaction with Plaintiff, when he was not offended, was a predicate to their offense for the March 15 incident. The Court is thus having a difficult time understanding how the prior incident can be used as a basis for offense.

The next glaring contradiction in the record deals with who recommended Plaintiff's termination. According to Skiver, the recommendation to terminate Plaintiff came from both Seibel and Syryla. Skiver testified at her deposition that "[t]he recommendation [for Plaintiff's termination] was made by our labor relations specialist . . ., who was Richard Seibel."[80] However, Seibel stated during his deposition that he did not participate in the decision-making process regarding Plaintiff's termination.[81] With that said, both Skiver and Seibel testified that Syryla recommended Plaintiff be terminated.[82] However, Syryla adamantly testified during his deposition that he was in opposition to Plaintiff's termination. When asked if he ever recommended Plaintiff be terminated, Syryla responded: "No. And what I said numerous times was–and I believe my exact words were: He should bleed, but he shouldn't be murdered. And what I meant was maybe he should be suspended for a time, but not terminated."[83] Syryla asserted that the ultimate decision to terminate came from Skiver.[84]

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[79] Barr-Ford Depo. at 22-23.

[80] Skiver Depo. at 10.

[81] Seibel Depo. at 56.

[82] Skiver Depo. at 26-27; Seibel Depo. at 53 ("[U]ltimately, it had to be [Syryla's] recommendation").

[83] Syryla Depo. at 52-53.

[84] *Id.* at 52.

If anything, this finger pointing by those that were actually a part of the decision to terminate muddies the waters. The blatant contradictions amongst those responsible for the adverse employment action only demonstrates a lack of credibility and an attempt to backtrack and circle the wagon. It is obvious to the Court that someone made the decision to deliver the ultimatum to Plaintiff, and the fact that those responsible for the decision do not know who that individual was, forces the Court find a trial is necessary to determine that fact. Though one might think this issue is of no consequence to a determination of pretext, that belief overlooks the lack of credibility the decision-makers have in the Court's eyes. Such a lack of credibility helps Plaintiff establish that the Defendant's preferred reason for termination may have been a ruse.

The last set of inconsistencies deals primarily with whether Plaintiff's race played a role in Defendant's decision to terminate. During her deposition, Skiver repeatedly insisted that Plaintiff's race had no bearing on whether the act of tossing a banana peel was considered racist, and thus whether it was a factor in his discharge. Skiver asserted that had Plaintiff been black and disposed of the banana peels by throwing them on top of a bus, he could have still been terminated, [85] explaining Plaintiff's termination was based on his disregard for the Defendant's property and equipment.[86] Skiver stated"[t]his particular case is not about [Plaintiff] being white and throwing banana peels. It's about him throwing banana peels."[87] Similarly, Seibel testified "[b]ased on the fact that the policy is a policy. . . . It wouldn't have mattered if they were black or white. They

[85] Skiver Depo. at 17.

[86] *Id.*

[87] *Id.* at 16.

would have been treated the same."[88]

However, these statements are inconsistent with statements made by Barr-Ford, who declared "I don't think a black person would have done that."[89] Though Skiver and Seibel may believe Plaintiff's termination had everything to do with the act of throwing banana peels, Barr-Ford and Hines[90] clearly felt the decision to terminate Plaintiff was centered on the belief that Plaintiff's action constituted a racist gesture due, in part, to Plaintiff's race.[91] This inconsistency leaves the Court wondering whether Plaintiff was discharged for the mere act of throwing a banana peel, an decision protected by At-will Employment, or whether he was discharged because he is white and threw a banana peel, a decision prohibited under the DDEA. As such, a trial is necessary to determine the true motive behind Plaintiff's forced resignation.

The last issue is an issue discussed briefly at the *prima facie* level of analysis. The Court believes it is implausible that Plaintiff's termination was solely for throwing banana peels on one of Defendant's buses. Defendant's standard operating procedure, according to Seibel's and Syryla's depositions, is progressive discipline.[92] Syryla explained that progressive discipline means:

> That forms of discipline take progressive levels of seriousness. So for an offense, it would normally start . . . with a verbal counseling. And then it could be a written counsel leaning [sic] and then a letter of warning and then suspension, up to and including termination, whatever, depending on the seriousness of the offense.[93]

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[88] Seibel Depo. at 56.

[89] Barr-Ford Depo. at 23. Barr-Ford is referring to the act of tossing banana peels on top of buses in this sentence.

[90] *See* Skiver Depo. at 31.

[91] Barr-Ford Depo. at 23; Hines Depo. at 43.

[92] Syryla Depo. at 64; Seibel Depo. at 55.

[93] Syryla Depo. at 64.

Skiver's assertion that Plaintiff could have been terminated for the offense of throwing trash on top of one of Defendant's buses is implausible.[94] If progressive discipline is the norm, the mere act of tossing a banana peel on top of a bus would not warrant discharging an employee. Though the Court does not dispute that Defendant could punish an employee for that act, it finds it difficult to believe it is a dischargable offense. Further, if it is true Plaintiff had been disposing of his banana peels on top of buses for nearly a year prior to the March 15 incident, the fact that no disciplinary action was ever taken by Defendant during that period only weakens Defendant's claim that such an act can lead to termination. It would appear, then, that something more was considered.

Skiver's claim, in short, amounts to an assertion that even if race played a role in the decision to terminate Plaintiff, Defendant was still entitled to fire him based solely on Plaintiff throwing banana peels on the roof of a bus. That excuse amounts to pretext. A trial is thus required to make a factual determination as to whether the act of tossing banana peels on the roof of a bus is a dischargable offense under Defendant's internal policies, and if so, why no actions were taken prior to the March 15 incident.

CONCLUSION

Based on the above, Defendant has failed to carry its burden on its Motion for Summary Judgment. Plaintiff has made out a *prima facie* case of racial discrimination. Though Defendant has produced a legitimate non-discriminatory reason for Plaintiff's termination, the amount of factual inconsistencies, contradictions, and implausibilities asserted by Defendant's employees and officers warrants a trial. Defendant's Motion for Summary Judgment is hereby **DENIED.**

Finally, Ms. Ringgold's request to move the trial from April 6 to April 7 to allow her the

[94] Skiver Depo. at 16-17.

opportunity to attend a White House event in Washington, D.C. is **GRANTED**. Also, since the Court expects the jury instructions to be more complex than the norm, it formally request that Mr. Primos begin immediately working on the instructions, hopefully being based on pattern instructions. The goal is to reach an agreement between Plaintiff and Defendant as to the applicable instructions and do so prior to trial.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

T. Henley Graves