# UNITED STATES DISTRICT COURT
## MIDDLE DISTRICT OF FLORIDA
### ORLANDO DIVISION

**DENNIS BONILLA,**

**Plaintiff,**

**-vs-** **Case No. 6:02-cv-762-Orl-22KRS**

**JOHN E. POTTER, Postmaster General of the United States,**

**Defendant.**

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# ORDER

## I. INTRODUCTION

Postal worker Dennis Bonilla sues his employer for alleged race discrimination and retaliation in violation of Title VII, 42 U.S.C. § 2000e *et seq.* Defendant John E. Potter, the Postmaster General of the United States, has filed a motion seeking summary judgment on Bonilla's claims. Upon considering the parties' submissions, the Court determines that the Defendant is entitled to summary judgment.

## II. FACTS[1]

Bonilla is Hispanic. He has worked for the United States Postal Service ("Postal Service" or "USPS") since 1979, and currently serves as a letter carrier.

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[1]These facts are derived from the parties' summary judgment submissions and the written opinion of the arbitrator who decided Bonilla's union grievance arising from the employment action at issue. *See* Regular Regional Arbitration Panel Decision and Award (Ex. 5 to Doc. 16), issued on January 11, 1996 (hereinafter, "Arbitration Decision"). All facts and inferences have been construed in a light most favorable to Bonilla.

On the morning of Saturday, March 25, 1995, a fellow letter carrier, William Walsh, was involved in a charitable fund-raising activity. A suggested minimum contribution amount had been announced; however, Bonilla was unaware of this. Bonilla contributed one dollar, which was passed to Walsh by Customer Service Supervisor Ralf Christiano. Upset over the amount of Bonilla's contribution, Walsh went to Bonilla's work station, threw the dollar bill at him,[2] remarked that Bonilla could keep his dollar,[3] and walked away. This angered Bonilla, who began shouting obscenities. Supervisor Christiano and Bonilla went into Christiano's office, where Christiano succeeded in calming Bonilla. Bonilla then left Christiano's office and began his mail route. Neither Bonilla nor Walsh, who is white, were disciplined as a result of this incident.

That afternoon, Bonilla returned to the post office, clocked out, approached Walsh's work area, known as a "case," and began berating Walsh.

> Letter Carrier Walsh, who initially had his back to [Bonilla], turned and faced [Bonilla], and tossed aside a hamper which was sitting at the entrance to his case. Whether this action was intended as a show of assertiveness or was a means of allowing Mr. Walsh a means of escape from the case was unclear.[4] In response, [Bonilla] threw a bag of books which he had been holding to the ground. [Bonilla's] verbal berating grew loud,

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[2]"There were conflicting statements as to whether the dollar had been crushed into a ball before it was thrown, and as to whether it had been thrown at [Bonilla's] face or tossed into his tray." Arbitration Decision at 3. For summary judgment purposes, the Court will assume that Washed balled up the dollar and threw it in Bonilla's face.

[3]Walsh may even have said "God damn dollar." *See* Arbitration Decision at 3.

[4]For present purposes, the Court will assume that Walsh's action was meant as a sign of assertiveness.

> obscene and profane.[5] He also balled one of his fists, although there is no evidence that he cocked his arm or otherwise initiated any act which could reasonably be construed as an attempted battery. The two exchanged words for several minutes. There is conflicting testimony as to whether Letter Carrier Walsh was as loud as [Bonilla], but he did not employ obscenities or profanities.[6] There is also conflicting evidence as to whether [Bonilla] told Letter Carrier Walsh that he was going to "kick his ass."[7] However, there is no dispute that during this confrontation, [Bonilla] invited Letter Carrier Walsh to "take it outside," to which Letter Carrier Walsh re[p]lied that he did not want to fight [Bonilla]. [Bonilla's] height is 5'9" to 5'10" and his weight 170 to 180 lbs. Mr. Walsh is 6'5", his weight approximately 265 lbs. The incident concluded when [Bonilla] walked away, at which time Letter Carrier Walsh shouted after him that he could go to hell and that he would have to answer to his Maker.

Arbitration Decision at 3-4 (footnote in original defining battery omitted; footnotes 4-7 added).

Supervisor Christiano did not witness this second altercation because he had already left the post office for the weekend. The following Monday, several employees reported the incident to Christiano and indicated that they had been frightened by Bonilla's conduct. However, the majority of the employees who witnessed the exchange stated that they had not felt threatened. Christiano collected witness statements and reported the altercation to his manager, Rick Forsythe. Forsythe directed Christiano to investigate further. As part of his investigation, Christiano interviewed Walsh and Bonilla. Walsh stated that he had felt threatened by Bonilla during the second incident, that he thought Bonilla had been about to

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[5]Bonilla admitted in his deposition that he called Walsh "pig shit," "a low-life and piece of trash," "no fucking good," "a waste of scum," and "an ugly motherfucker." Ex. 1 to Doc. 16 at 44.

[6]The Court will assume that both parties were equally loud.

[7]The Court will assume that Bonilla did not make this particular statement.

commit an act of physical violence against him, and that he was very frightened to be working in the same building with Bonilla.

At the conclusion of his investigation, Christiano recommended that Bonilla be discharged for violating the Postal Service's well-recognized "zero tolerance" workplace violence policy. That policy prohibits threats of violence, as well as actual violence. *See* Ex. "K" to Doc. 18; Ex. 3 to Ex. 1 to Doc. 16. Christiano's termination recommendation was followed. Bonilla then grieved his discharge under the collective bargaining agreement between his union and the Postal Service. An arbitrator sustained the grievance and reduced Bonilla's discipline to a fourteen (14) day suspension.[8] Bonilla remains employed by the Postal Service. Walsh received no discipline in connection with the second incident.

## III. SUMMARY JUDGMENT STANDARD

A motion for summary judgment should be granted 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 a judgment as a matter of law." Fed. R. Civ. P. 56(c). "The party seeking summary judgment bears the initial burden of identifying for the district court those portions of the record 'which it believes demonstrate the absence of a genuine issue of material fact.'" *Cohen v. United Am. Bank of Cent. Fla.*, 83 F.3d 1347, 1349 (11th Cir. 1996) (quoting *Cox v. Adm'r U. S. Steel & Carnegie*, 17 F.3d 1386, 1396, *modified on other grounds*, 30 F.3d 1347 (11th Cir. 1994), *cert.*

[8]The arbitrator found that Bonilla had indeed violated the USPS workplace violence policy. However, based on the presence of mitigating factors surrounding the incident, Bonilla's clean disciplinary record, and his length of service, the arbitrator determined that termination would be unduly harsh. *See* Arbitration Decision at 13-14.

*denied*, 513 U.S. 1110 (1995)). "There is no genuine issue for trial unless the non-moving party establishes, through the record presented to the court, that it is able to prove evidence sufficient for a jury to return a verdict in its favor." *Cohen*, 83 F.3d at 1349. The Court considers the evidence and all inferences drawn therefrom in the light most favorable to the non-moving party. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 918 (11th Cir. 1993), *reh'g and reh'g en banc denied*, 16 F.3d 1233 (11th Cir. 1994).

## IV. ANALYSIS

### A. Discrimination Claim

Circumstantial evidence disparate treatment claims are evaluated under the framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dept. of Comty. Affairs v. Burdine*, 450 U.S. 248 (1981). *See Wilson v. B/E Aerospace, Inc.*, – F.3d – , 2004 WL 1459558 *5 (11th Cir. June 30, 2004). "Under this framework, the plaintiff first has the burden of establishing a prima facie case of discrimination, which creates a rebuttable presumption that the employer acted illegally." *Id.* at *5. "When the plaintiff establishes a prima facie case, . . . the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions." *Id.* "If the employer satisfies its burden by articulating one or more reasons, then the presumption of discrimination is rebutted, and the burden of production shifts to the plaintiff to offer evidence that the alleged reason of the employer is a pretext for illegal discrimination." *Id.*

"A plaintiff establishes a prima facie case of disparate treatment by showing that she was a qualified member of a protected class and was subjected to an adverse employment action in contrast with similarly situated employees outside the protected class." *Id.* "'In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways.'" *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir.1999) (quoting *Jones v. Bessemer Carraway Med. Ctr.*, 137 F.3d 1306, 1311 (11th Cir.), *opinion modified by* 151 F.3d 1321 (1998)). "The most important factors in the disciplinary context are the nature of the offenses committed and the nature of the punishments imposed." *Maniccia*, 171 F.3d at 1368. The Eleventh Circuit "require[s] that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." *Id.*; *see also Silvera v. Orange County School Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001) (quoting *Maniccia* for the proposition that a comparator's misconduct must be nearly identical to the plaintiff's), *cert. denied*, 534 U.S. 976 (2001); *Wilson*, 2004 WL 1459558 at *10 (citing *Silvera* for the proposition that "the comparator must be nearly identical to the plaintiff"); *but see Anderson v. WBMG-42*, 253 F.3d 561, 565 (11th Cir. 2001) (rejecting argument that "conduct of comparator employees must be the same or nearly identical," and stating that "the law only requires 'similar' misconduct from the similarly situated comparator").

Bonilla has failed to present evidence sufficient to survive summary judgment on the issue of whether he and Walsh were similarly situated for the purpose of establishing a prima

facie case. Bonilla's and Walsh's conduct was manifestly dissimilar. Crumpling up a single dollar bill and tossing it in someone's face, even when accompanied by the statement "you can keep your God damn dollar," is a far cry from the behavior Bonilla engaged in. Pure and simple, Bonilla's actions were threatening and constituted a direct challenge to partake in physical violence, i.e., a fistfight. By calling Walsh particularly vile names, balling up his fists, and eventually inviting Walsh to "take it outside," Bonilla left no doubt that he had violence in mind. Clearly, as determined by the arbitrator, this violated the USPS workplace violence policy.[9] In contrast, Walsh expressly declined Bonilla's invitation to fight, and Bonilla walked away only after Walsh made it clear that he would not participate in physical combat. Finally, even if Walsh's conduct during the two incidents might be considered a violation of the "zero tolerance" policy, it was a very minor violation in comparison to Bonilla's behavior. Accordingly, there is no genuine issue of fact concerning whether the two men were similarly

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[9]In the arbitrator's words:

> [Bonilla's] statements were not simply shop talk, but were spoken in obvious anger, and were directed at Letter Carrier Walsh for the manifest purpose of chastising and intimidating Mr. Walsh for his provocation of [Bonilla] earlier that day. [Bonilla's] suggestion that he and Mr. Walsh "take it to the parking lot" was an offer to engage in physical combat, and [Bonilla's] other statements, gestures and intensity were intended to convey, and did convey [a] threat to Mr. Walsh. Thus, [Bonilla's] conduct contravened the prohibitions against threats of violence in the workplace.

Arbitration Decision at 12.

situated with respect to their conduct; as a matter of law, they were not.[10] Bonilla has thus failed to establish a prima facie case of discrimination.

Based on the same reasoning, Bonilla has not presented any evidence of pretext in order to survive summary judgment. The Defendant has articulated a legitimate non-discriminatory reason for disciplining Bonilla: his violation of the "zero tolerance" policy. In response, Bonilla reiterates his position that he and Walsh were similarly situated, yet treated differently. *See* Doc. 18 at 9-10. It is entirely proper to attempt to demonstrate pretext by relying on "the same evidence offered initially to establish the prima facie case." *Wilson,* 2004 WL 1459558 at *5. However, as previously noted, Bonilla has failed to present evidence creating a genuine issue of material fact concerning similarity. Accordingly, the Defendant is entitled to summary judgment on this additional basis.

**B. Retaliation**

The same *McDonnell Douglas* burden-shifting approach applies to claims of retaliation. *See Holifield v. Reno,* 115 F.3d 1555, 1566 (11th Cir. 1997).[11] In order to establish a prima facie case of retaliation, a plaintiff must show "(1) that he engaged in statutorily protected expression; (2) that he suffered an adverse employment action; and (3) that there is some causal relationship

[10]This result follows regardless of whether the appropriate standard is "'similar' misconduct . . . or the seemingly more stringent 'nearly identical' misconduct." *Maynard v. Bd. of Regents of Div. of Univs. of Fla. Dept. of Ed. ex rel Univ. of S. Fla.*, 342 F.3d 1281, 1290 (11th Cir. 2003) (noting potential conflict among Eleventh Circuit decisions).

[11]In *Holifield,* the Eleventh Circuit affirmed the district court based on the reasoning contained in the lower court's summary judgment order, which is attached as an appendix to the appellate opinion. *See Holifield,* 115 F.3d at 1556-57. The legal propositions cited in the instant Order are derived from the appended district court order.

between the two events." *Id.* "To meet the causal link requirement, the plaintiff 'merely has to prove that the protected activity and the negative employment action are not completely unrelated.'" *Id.* (emphasis omitted; quoting *E.E.O.C. v. Reichhold Chemicals, Inc.*, 988 F.2d 1564, 1571-72, *reh'g denied*, 996 F.2d 316 (11th Cir. 1993)).

The Defendant seeks summary judgment on the basis that Bonilla cannot satisfy the causation requirement because the most recent protected activity in which he was involved took place nearly three years before he suffered the adverse employment action at issue in this case. The Defendant founds this argument on Bonilla's interrogatory answers, in which Bonilla identified incidents in January and November 1992 where he represented co-employees in EEO matters. *See* Ex. 6 to Doc. 16, Interrog. Ans. 3 at 5-6. It is clear that these events are too dated to create an issue of fact concerning causation. *See Maniccia v. Brown*, 171 F.3d 1364, 1370 (11th Cir.1999) (affirming district court's grant of summary judgment on retaliation claim, stating "[t]he more than 15-month period that elapsed between Appellant's grievance and the alleged adverse employment action belies her assertion that the former caused the latter").

In apparent recognition of this deficiency in his client's case, Bonilla's counsel has responded to the summary judgment motion by producing a document he says evidenced Bonilla's involvement in an EEO matter on behalf of a co-employee just three days prior to the incident which led to his discipline. Concerning this document, Bonilla's counsel states:

> [O]n or about March 22, 1995 the Plaintiff assisted Mr. Russ Dill with filing an informal EEO claim accusing Supervisors Christiano and Forsythe of retaliation. On the very same day that Mr. Dill made his informal complaint, the Plaintiff in his capacity as union representative for Mr. Dill, put Supervisors Christiano and Forsythe on verbal notice of Mr. Dill's EEO

> complaint. Additionally, the EEO complaint filed by Mr. Dill clearly lists the Plaintiff as his union representative. (The EEO Complaint filed by Mr. Dill is attached hereto as Exhibit "L" and is incorporated herein by reference.) However, because of the Plaintiff's termination he was unable to continue assisting Mr. Dill with his EEO claim. The incident that the Defendant contends gave rise to the Plaintiff's ultimate termination, occurred just three (3) days after the Plaintiff put Supervisor Christiano and Forsythe on verbal notice of Mr. Dill's complaint. Furthermore, in accordance with USPS policy and procedures in handling EEO complaints, Supervisors Christiano and Forsythe had been provided a copy of Mr. Dill's complaint prior to their final determination to terminate Mr. Bonilla's employment.
>
> Mr. Christiano and Mr. Forsythe were upset that Mr. Bonilla was participating in yet another EEO Complaint against them, and they seized the first opportunity to terminate him when the incident with Mr. Walsh occurred.

Doc. 18 at 11.

This presentation is insufficient to create a genuine issue of fact concerning causation. At the outset, the Court is compelled to note that the form EEO complaint attached to Bonilla's summary judgment response is not authenticated by anyone. The copy of the document filed with the Court does not bear Bonilla's signature; it merely contains his printed name and address as his fellow-employee's designated representative. *See* Ex. "L" to Doc. 18. Moreover, all of the statements of counsel set forth in the two paragraphs quoted above are just that: statements of counsel. The EEO form itself does not substantiate the attorney's version of events. Bonilla has presented no actual evidence that he actually assisted the co-employee with an informal EEO complaint on March 22, 1995; that he orally notified Christiano and Forsythe of the complaint that same day; that the two managers were provided a copy of the EEO complaint before reaching a final decision to discharge Bonilla; and that the two managers were

"upset" with Bonilla for "participating in yet another EEO complaint against them." Obviously, mere unsworn statements of counsel do not constitute evidence. Absent actual evidence corroborating counsel's version of the events surrounding creation of the EEO complaint, the mere submission of that document is insufficient to create a genuine issue of fact concerning causation.

In any event, in the face of the Defendant's articulated legitimate non-discriminatory reason for disciplining Bonilla - his violation of the "zero tolerance" policy - the mere fact that Bonilla assisted in preparing an EEO charge shortly before suffering an adverse employment action is insufficient to create a genuine issue of material fact concerning pretext. Otherwise, an employer could never discipline a worker who participated in protected activity shortly before committing an act of misconduct, even extreme misconduct. More absurdly, an employee could intentionally insulate himself from discipline by preemptively engaging in protected activity. From a procedural standpoint, if simply engaging in protected activity shortly before an adverse employment decision were sufficient to reach a jury on a retaliation claim, this would completely vitiate the second and third steps of the *McDonnell Douglas* burden-shifting analysis. In other words, a plaintiff would need only to establish a prima facie case of retaliation to survive summary judgment, even where, as here, the defendant had an ironclad and indisputable reason for imposing discipline.

In this case, as in *Holifield v. Reno*, "the defendant's evidence of a legitimate, non-discriminatory reason for its action is so strong as to rebut completely the inference raised by the plaintiff's prima facie case of retaliation." 115 F.3d at 1567. In other words, "[t]he

evidence supporting [Bonilla's] prima facie case is simply not sufficient to create an issue of fact in light of the substantial evidence of lawful motive presented by the defendant." *Id.* Moreover, the fact that Walsh was not disciplined is also irrelevant for purposes of establishing pretext; as previously discussed, he and Bonilla were not similarly situated. Under these circumstances, the Defendant is entitled to summary judgment on Bonilla's retaliation claim.

## V. CONCLUSION

Based on the foregoing, it is ORDERED as follows:

1. The Defendant's Motion for Summary Judgment (Doc. 16), filed May 25, 2004, is GRANTED.

2. The Clerk shall enter a final judgment providing that the Plaintiff, Dennis Bonilla, shall take nothing on his claims against the Defendant, John E. Potter, Postmaster General of the United States. The judgment shall further provide that the Defendant shall recover his costs of action.

3. Any other pending motions are moot.

4. The Clerk shall close this case.

**DONE** and **ORDERED** in Chambers, in Orlando, Florida this ___12th____ day of July, 2004.

ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Party

Administrative Law Clerk