IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RONALD ROGERS,

Plaintiff,

OPINION AND ORDER

v.

00-C-135-C

WISCONSIN KNIFE WORKS, INC.,

Defendant.

Plaintiff Ronald Rogers has filed a civil lawsuit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, contending that his former employer, defendant Wisconsin Knife Works, Inc., discriminated against him on the basis of race when it fired him after a workplace fight. Plaintiff, who is African American, alleges that defendant treated him more harshly than white employees who fought on the job. Defendant has moved for summary judgment, arguing that plaintiff has not established that he was fired because of his race. I find from the undisputed facts that defendant is correct and I am granting summary judgment in its favor. Plaintiff has not made a prima facie showing of racial discrimination because he cannot show that he was meeting defendant's work expectations and he cannot show that the defendant treated him more harshly than similarly situated employees who were not African American.

From the parties' submissions, I find that the following facts are undisputed:

UNDISPUTED FACTS

A. Plaintiff's Termination

Defendant Wisconsin Knife Works, Inc. is a company in Beloit that manufactures knives and other tools. Prior to June 30, 1994, defendant was a wholly-owned subsidiary of Black & Decker, Inc. Defendant employed plaintiff Ronald Rogers as a machine operator until it fired him on April 21, 1999, following a workplace fight.

On April 16, 1999, plaintiff was working third shift. At some point during the shift, a physical altercation took place between plaintiff and co-worker Donelle E. Ruston. Both plaintiff and Ruston are African American. Following the altercation, plaintiff approached the lead person of that shift, Doug Ruckert, and told him that Ruston had jumped him. Plaintiff was bare-chested, holding his shirt in his hands; he explained that Ruston had torn off his shirt. Ruckert reported this to the plant manager, Don Ludlum, who met separately with plaintiff and Ruston before the shift ended.

Ludlum interviewed plaintiff at approximately 4:00 a.m. Ludlum noticed no visible marks on plaintiff except for a bump on the right side of his head. Ludlum prepared a written memorandum of this interview that same day in which he reported:

> [Plaintiff] was fairly calm and stated that the confrontation began at 3:15 a.m. today, (4/16/99). Ron says he had been at his machine all night long and was

> headed to the break room to get a cup of water. Don was in the hallway and said to Ron, "what the fuck you talking about?"
>
> Ron went on to say that Don walked in an aggressive way toward him to where Ron felt threatened. Ron says Don was going to hit him with his fist and after Don did hit Ron, Ron hit him back. Ron was pushed into the wall which caused a visible bump on his right hand side of his head.
>
> The fight continued past the shop men's restroom and into the break room. Ron says Don pushed him and continued hitting him into the break room. At that time Ron reportedly threw some chairs at Don hitting him. Don also tore Ron's shirt off from Ron as he was trying to get away from Don. Ron stated that he did break away from Don and reported the fight to Doug Ruckert.
>
> Ron stated that the disagreement started over a "family" situation concerning a girl showing up in the parking lot who was not Don's known girlfriend.
>
> * * *
>
> Ron stated that he knew that fighting was not allowed, however also said that he valued his job and would work at avoiding any further situations of this kind.

Affid. of Don Ludlum, dkt. #20, Exh. A.

At 4:30 a.m. Ludlum interviewed Ruston. Ludlum observed that Ruston had an open cut on his right temple and scuff marks on his elbow and knuckles, so he administered first aid. Ludlum prepared a written memorandum of this interview that same day in which he reported:

> Don was calm however, as I was talking to Don in the shop, I noticed he had a cut on the right temple area of his head. We stopped at the First Aid room and dressed the cut before we went to my office. Don also had a scuff mark on his left elbow and a cut/scuff on the knuckles of his right hand.

> Don stated that he was locking up the Finished Goods Room after getting tooling and that Ron was walking by and asked "What's up Don?" Don said he said nothing and that Ron went on to say that he was spreading around lies about his personal life. Don stated that Ron pushed Don first and the fight was on. They hit and pushed each other in the hall and into the break room. Don restated that Ron was in his face and pushed him first. Don went on to say that after they reached the break room that Ron was running around the tables and that chairs may have been moved. Don felt threatened by Ron and was defending himself. Don saw Ron leave the break room with Ron and Doug Ruckert returning a short time later.
>
> Don said there was some family issues between Ron and himself that escalated to the physical confrontation tonight. Don also stated that his shirt was torn, his safety glasses were broken, and his watchband had been broken during the scuffle.

Affid. of Ludlum, dkt. #20, Exh. B.

Ludlum suspended both men pending further investigation.

On April 20, 1999, Ludlum conducted follow-up interviews with Dean Senglaub, defendant's Vice President of Operations. Senglaub's notes of plaintiff's interview state:

> Friday, Ron was walking by the crib on the way to the bathroom, Ron said how are you doing, Don replied what the fuck you mean. Ron then said he pushed Don as he felt Don was going to hit him. Ron commented it is not my fault he was seeing this girl in the lot.
>
> After Ron pushed Don, Don hit him - they exchanged some fists, he couldn't remember how many. They were then choking each other and tossling on the ground.
>
> Ron wasn't sure how long they fought - 5 minutes - maybe a little more.

> Ron said he then broke loose and ran into the break room. Ron then said chairs went flying. Ron said he didn't throw any. He said they ran around the cafeteria tables and then Ron ran out to talk to Doug in Router Bit.
>
> Ron said his shirt was bloody from Don's blood and that his shirt was torn. He also said he had a bump on his head.
>
> Ron said after all this happened (Friday morning) that he saw Don and a friend sitting in a car outside Ron's house for 5 or 10 minutes. Ron said he hasn't seen Don since.
>
> * * *
>
> I asked Ron why he didn't run - he's bigger than me. If I would have run I would have been a wimp.

Affid. of Ludlum, dkt. #20, Exh. C.

On April 20, 1999, Ludlum and Senglaub also interviewed Ruston. Senglaub's interview notes state:

> Don was locking the crib up - Ron came up on him - Don thought he wanted to fight - got right up in Don's face and said what's up and then pushed him.
>
> Don dropped the wheels he had and pushed him back. They got into a scuffle, it started by the finished goods room - they scuffled on the ground. Ron hit Don in the head. Got up and they were still scuffling by the bathroom and they kept fighting - into the breakroom.
>
> Ron then ran out of the breakroom - Don went to bathroom to wash up.
>
> Doug/Casey/Nick were around Ron & Don started to argue and they had to be separated. (This [corroborates] what Nick & Doug said - they had to keep them apart again.)
>
> Doesn't know how many times he hit Ron.

I asked if he could have run - he just replied ya.

When they were scuffling by the cafeteria door is when Ron's shirt got ripped off.

* * *

Don said Ron hit him a lot. The cut on his head was from Ron's punches, the scrape on the elbow is from scuffle on the ground.

Don said he knows he should have walked away.

Affid. of Ludlum, dkt. 20, Exh. D.

Defendant's work rules prohibit fighting on the job. Plaintiff understood that fighting on the job would result in discipline by defendant up to and including termination of plaintiff's employment. On April 21, 1999, Senglaub fired both plaintiff and Ruston for fighting on the job. Senglaub determined that the fight between plaintiff and Ruston warranted their termination because his investigation established that the fight between plaintiff and Ruston was sustained, involved wrestling, choking and multiple blows and resulted in physical injury.

B. Other Fights By Defendant's Employees

In January 1993, when defendant was still a part of Black & Decker, co-workers Robert Jones and Tom Loomis got into a fight at work. Jones was African American and Loomis was Caucasian. This fight involved pushing, multiple punches, including punches to the head and face, wrestling on the ground and physical injury. The police responded and ultimately arrested

Jones for assault. As a result of this fight, Senglaub fired both Jones and Loomis. Robert Jones's brother, Willie Jones, was also involved in the fight. (He jumped on Loomis's back as the two combatants wrestled on the floor.) Senglaub did not fire or even discipline Willie Jones because he determined that Willie Jones had been acting as a "peacemaker" who had been trying to break up the fight. Willie Jones is African American. On May 2, 1997, defendant's employees Don Kiser and Craig Wilson, who are both white, scuffled during work time on work premises. The men encountered each other in the men's restroom as Wilson was leaving and Kiser was entering. As they passed each other, Wilson poked Kiser once in the mid-section, and Kiser responded by cuffing Wilson once on the head. A co-worker separated them before anything else occurred. As a result of this altercation, Senglaub suspended Wilson and Kiser for five days each and issued each a final written warning. Senglaub also demoted Kiser from his position as lead technician, resulting in a significant loss of pay and responsibilities. Senglaub determined that the fight between Wilson and Kiser did not merit termination of either employee because it involved only a single poke and a single cuffing that had not resulted in physical injury.

C. Plaintiff's Work History with Defendant

On October 12, 1995, plaintiff asked for a wage advance, which Senglaub initiated and approved in the amount of $220. Senglaub did not have to do this and in fact normally did not give employees advances on their wages.

On September 16, 1996, following a work accident, plaintiff tested positive for cocaine and marijuana. Plaintiff's positive drug test violated defendant's rules and could have resulted in termination. However, Senglaub did not fire plaintiff or discipline him. Instead, Senglaub gave plaintiff the opportunity to seek counseling and treatment through defendant's employee assistance program, thereby enabling him to retain his employment. On August 13, 1997, plaintiff left his machine unattended in violation of defendant's rules. While unattended, the machine slipped and its grinding wheel shattered. Shards of the grinding wheel flew through the work area and could have caused serious injury to nearby workers. As a result of this incident, some of plaintiff's co-workers told Senglaub that they thought plaintiff should be fired. Senglaub elected not to terminate plaintiff, opting instead for a verbal warning.

PLAINTIFF'S SUPPLEMENTAL PROPOSED FINDINGS OF FACT

On September 22, 2000, the magistrate judge allowed plaintiff to obtain certain documents from Black & Decker because they were potentially relevant to this summary judgment motion. See Sept. 22 Order, dkt. #29, at 1. Plaintiff sought leave to supplement his response with evidence obtained from Black & Decker on October 16, 2000, after defendant

had filed its reply. Defendant objected, but the magistrate judge allowed the supplementation and set new final briefing deadlines.

In his supplemental brief, plaintiff proposed additional findings of fact Nos. 32-36, asserting: 32) on October 15, 1993, the Wisconsin Equal Rights Division (ERD) made an initial determination of probable cause on Robert Jones's discrimination complaint arising out of his termination for fighting; 33) on June 12, 1995, plaintiff's attorney, Willie Nunnery, wrote to defendant during settlement negotiations in another case, alleging that in November 1993, an employee at a temporary employment agency had reported that a co-employee had told her that an unnamed employee of defendant's had advised her that defendant did not want any more blacks sent over; 34) Dean Senglaub was responsible for the working relationship with the temporary employment agencies who worked with defendant; 35) during the October 9, 1995 deposition of Charles Brown, a plaintiff in an employment discrimination lawsuit against defendant, Brown testified that several co-employees had told him that he would never get a promotion from defendant because he was black; and 36) Brown testified that someone else had told him that one of defendant's plant managers had told that person that he (the plant manager) did not work well with minorities and chose not to work with them. See Plaintiff's Supplemental Br., dkt. #40, at 1-2.

Defendant has moved to strike these supplemental proposed facts and plaintiff's supporting brief. I will not strike the brief because the magistrate judge granted plaintiff

permission to file his supplemental brief. However, I will not considered any of plaintiff's newly proposed facts in deciding summary judgment because, as defendant observes, some are hearsay, some are irrelevant and some are both.

Hearsay that is inadmissible at trial is unusable in summary judgment proceedings absent a showing that it could be replaced readily at trial by admissible evidence. Minor v. Ivy Tech State College, 174 F.3d 855, 856-57 (7th Cir. 1999); see also Morrow v. Wal-Mart Stores, Inc., 152 F.3d 559, 563 (7th Cir. 1998); cf. Williams v. Pharmacia, Inc., 137 F.3d 944, 950 (7th Cir. 1998)(statement made by company's employee is not admissible statement on behalf of the company excepted from hearsay rule unless employee is speaking while employed about matter within scope of his employment). Plaintiff's proposed findings of fact Nos. 33, 35 and 36 consist of hearsay so densely layered that a baklava would be jealous. Plaintiff has made no showing that he can track down any declarants with personal, relevant knowledge about any of these issues, so I will not consider them in deciding summary judgment. In light of this, proposed finding of fact No. 34 becomes irrelevant.

Equally irrelevant is proposed finding of fact No. 32, regarding the ERD's initial determination of probable cause to find discrimination in the firing of Robert Jones. As defendant points out, the ERD ultimately dismissed Jones's complaint with prejudice because he failed to prosecute it, so there was no final administrative finding that defendant discriminated against Jones. The preliminary finding by the ERD on Jones's complaint was a

tentative legal conclusion that cannot bind this court, and it was based on facts that are not before this court. Thus, it has no legal or factual significance to the instant motion for summary judgment. Further, the facts upon which the ERD based its preliminary finding (set forth in Exh. 1 of Cynthia Manlove's affidavit, dkt. 41), are hearsay and therefore inadmissible apart from the ERD's preliminary finding, which is the only fact actually proposed by plaintiff.

Put another way, once a discrimination complaint moves from the administrative arena to the judicial, the parties are not bound by the agency's legal rulings but may start with a clean slate. If it were otherwise, then this court could find as a fact that on December 6, 1999, the Equal Employment Opportunity Commission dismissed plaintiff's claim in this case after finding that it could discern no violation of the federal antidiscrimination statutes. See Dismissal and Notice of Rights form, attached to the complaint, dkt. #2. Obviously, I have not done this; neither will I consider the ERD's orphaned probable cause finding in the Jones proceeding.

OPINION

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see Stockett v. Muncie Indiana Transit System, 221 F.3d 997, 1000 (7th Cir. 2000). To prove his Title VII claim alleging employment discrimination, plaintiff must offer direct

proof that defendant was motivated by discriminatory intent when it fired him or must show racially disparate treatment by means of the indirect, burden-shifting method outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See id. In this case, plaintiff is proceeding solely under the indirect method.

To prove discrimination using the McDonnell Douglas method, plaintiff must first make out a prima facie case of discrimination, which requires him to prove four elements: 1) he belongs to a protected class; 2) he performed his job satisfactorily; 3) he suffered an adverse employment action; and 4) defendant treated similarly situated employees outside the protected class more favorably. See Stockett, 221 F.3d at 1000-01. If plaintiff meets this burden, then there is a presumption that defendant discriminated against him; it then becomes defendant's burden to prove that it had a legitimate, non-discriminatory reason for firing plaintiff. If defendant meets its burden, plaintiff must prove by a preponderance of the evidence that the reason offered by the defendant is merely a pretext for discrimination. Id. at 1001. In many cases the analysis of plaintiff's prima facie case will dovetail with the pretext analysis, but the two should not be confused: the prima facie case is the condition precedent to the pretext analysis. Plair v. E.J. Brach & Sons, Inc., 105 F.3d 343, 347 (7th Cir. 1997).

In this case there is no dispute over the first and third elements of the McDonnell Douglas test: plaintiff is a member of a protected class, and defendant fired him. The parties dispute whether plaintiff was performing his job satisfactorily: plaintiff contends that as the

passive victim of Ruston's attack he did not violate defendant's policy against fighting; defendant contends that plaintiff gave as good as he got on April 16. The parties also dispute whether defendant treated plaintiff more harshly than similarly situated white employees who fought on the job.

As discussed below, I conclude that plaintiff was not meeting defendant's expectations because defendant had a legitimate, nondiscriminatory basis to conclude that plaintiff had violated its rule against fighting. I also conclude that defendant did not punish plaintiff more harshly for fighting than it had punished similarly situated white employees. Although the analysis employs some elements of the McDonnell Douglas burden shifting test, there is no need to apply this second test because plaintiff has not made a prima facie showing of discriminatory firing.

As a starting point, I note that plaintiff has attempted to create a dispute of material fact by countering the defendant's proposed findings of fact with the self-exculpatory version of the fight he offered at his deposition on July 25, 2000. There, plaintiff portrayed himself as a passive victim of Ruston's aggression, a portrayal at odds with his alleged admissions to Ludlum and Senglaub. Plaintiff has used his deposition testimony to dispute defendant's proposed findings of fact drawn from the contemporaneous memoranda. This dispute is immaterial to defendant's motion for summary judgment.

There is no dispute that Ludlum and Senglaub's interview memoranda say what they say, which is why I quoted them at length in the fact section. This is not the same as finding that the memos accurately report what plaintiff said, but this distinction turns out to be irrelevant. Although plaintiff never argues explicitly that Ludlum's and Senglaub's memos misreport what he told them on April 16 and 20, his proposed findings of fact imply this. At his recent deposition, plaintiff portrayed Ruston as the aggressor; plaintiff claimed that he never threw a punch, never choked Ruston and never wrestled on the floor and he had no idea how Ruston ended up with a cut brow, how Ruston's blood ended up on plaintiff's shirt, or how Ruston's glasses broke. Obviously, this recollection is totally inconsistent with the statements plaintiff—and Ruston—reportedly made to Ludlum and Senglaub the morning of the fight and four days later.

Although summary judgment is not appropriate when there is a genuine dispute of material facts, the Seventh Circuit's oft-invoked policy against allowing after-the-fact self-serving testimony to defeat summary judgment is applicable. See McPhaul v. Board of Commissioners of Madison County, ___ F.3d ___, Case No. 99-1092, 2000 WL 1156427 at *4 (7th Cir. 2000)(self-serving affidavits without factual support in the record will not defeat a motion for summary judgment; therefore, when the only evidence in support of ADA claim was plaintiff's self-serving testimony, there was insufficient basis for a reasonable jury to find in plaintiff's favor). Even so, I hesitate to apply this policy despite my grave doubts as to the

accuracy of plaintiff's deposition testimony because plaintiff's deposition testimony was provided under oath while the contemporaneous reports, although palpably more reliable, were not. However, there are several reasons why this does not create a genuine dispute of any fact material to the outcome.

First, the evidence does not suggest that Senglaub, defendant's decision maker, had any reason to doubt the accuracy of the information contained in the April 16 and April 20 interview reports. Senglaub was entitled to base his termination decisions on the version of events actually known to him at the time. Cf. Paluck v. Gooding Rubber Co., 221 F.3d 1003, 1015 (7th Cir. 2000) (in evaluating whether reasons given for firing were pretextual, court must look to management's state of mind at time it acted); Green v. National Steel Corp., Midwest Division, 197 F.3d 894, 899 (7th Cir. 1999) (regardless whether employer is correct in its beliefs and regardless whether employer should have conducted more thorough investigation, absent evidence from which to conclude that employer did not honestly believe that employee acted improperly, court will not second guess employer's business decision).

The evidence does not support plaintiff's implication that he told Ludlum and Senglaub in 1999 that he was a passive victim of Ruston's aggression. There is no showing that Ludlum or Senglaub misreported what they were being told or in some other fashion were "out to get" plaintiff. To the contrary, Senglaub had bent over backwards to accommodate plaintiff in the years preceding the fight, advancing plaintiff's salary in contravention of policy, allowing

plaintiff a second chance after a failed drug test and forgiving a work rule breach that damaged a machine and could have injured co-workers. In short, it is undisputed that Senglaub and Ludlum bore no ill will toward plaintiff and thus would have had no motive to fabricate their reports.

Thus, it would be appropriate to accept the four reports prepared by Ludlum and Senglaub in 1999 as an accurate reflection of what defendant's decision makers believed at the time. As the Court of Appeals for the Seventh Circuit noted in Denisi v. Dominick's Finer Foods, Inc., 99 F.3d 860 (7th Cir. 1996), a plaintiff's intimations that defendant tampered with evidence in an attempt to manufacture a post hoc justification for firing him will not defeat summary judgment in a discrimination case unless plaintiff presents specific evidence allowing a reasonable inference that the defendant's proffered reasons for the adverse job actions did not represent the truth. Id. at 866 n.7. Put another way, summary judgment is proper where no rational fact finder could believe that the employer lied about its proffered reasons for dismissal. Id. In this case, no reasonable fact finder could believe that Senglaub lied when he stated that he fired plaintiff for actively participating in a fight.

This conclusion holds even if I were to give credit to plaintiff's current version of the fight. At most this would have presented Senglaub with competing versions of the fight from the participants. Ruston claimed that plaintiff was the aggressor, that plaintiff had punched him a lot, that plaintiff's blows had cut Ruston's head and broken his glasses and that Ruston

had scraped his elbow while scuffling on the floor with plaintiff. Even if plaintiff had made unequivocal assertions back on April 16 and April 20 that he never punched, choked or wrestled with Ruston, this merely would have presented Senglaub with conflicting versions of events. The physical evidence would have corroborated Ruston, not plaintiff. This would have provided ample support for Senglaub's conclusion that this was a serious fight for which both men were blameworthy. Even if Senglaub were incorrect in this assessment, plaintiff could not prevail on his Title VII claim:

> This Court has long championed an employer's right to make its own business decisions, even if they are wrong or bad. Therefore, regardless of whether it is correct in its beliefs, if an employer acted in good faith and with an honest belief, we will not second-guess its decisions.

Green v. National Steel Corp., Midwest Division, 197 F.3d 894, 899 (7th Cir. 1999).

A plaintiff cannot successfully challenge the honesty of an employer's reasons for firing him unless he can provide facts tending to show that the proffered reasons were false, thereby implying that the real reason was illegal discrimination. Such rebuttal is not an unfettered invitation to criticize the employer's evaluation process or question its conclusions; the plaintiff must present specific facts that call the employer's decision into question. Id; see also Giannopoulos, 109 F.3d at 411 (where defendant claimed to discharge plaintiff for fighting on job, plaintiff could not avoid summary judgment with unadorned claim that jury might not believe this explanation; he must point to evidence suggesting that defendant itself did not

honestly believe explanation). As the court explained in Green, 197 F.3d at 900, it is a "distraction" for plaintiff to argue about the accuracy of defendant's assessment of his involvement in the alleged behavior that led to his discharge because that is not the determinative issue. It simply does not matter whether plaintiff actually was an aggressor in the fight so long as defendant had a good faith reason to believe that he was. In this case, Senglaub had a good faith basis for such a belief. Therefore, defendant had a legitimate basis to conclude that plaintiff was not meeting its job expectations.

The next question is whether defendant treated plaintiff worse than similarly situated white employees who fought. Plaintiff contrasts his treatment with that afforded Kiser and Wilson, the two white employees who were merely suspended for fighting. I conclude that Kiser and Wilson were not similarly situated to plaintiff; therefore, plaintiff cannot show that he was treated worse than they were.

An employer is entitled to use ferocity as a criterion for distinguishing between workplace fights. See, e.g., Shepherd v. Slater Steels Corp., 168 F.3d 998, 1012 (7th Cir. 1999). In Shepherd, plaintiff was a male factory worker who was being tormented in sexual and other fashions by a male co-worker. The abuse continued despite plaintiff's complaints to his supervisors and culminated with the tormentor's attacking plaintiff with a block of wood, breaking plaintiff's thumb. Plaintiff riposted with a steel bar, gouging his attacker's hand. The two combatants offered completely contradictory accounts of their melee to the company,

which decided to fire them both. See id. at 1002-03. Plaintiff filed a sexual harassment lawsuit that included a claim of retaliatory discharge. In support of the latter, plaintiff showed that defendant had not fired other employees who had been involved in altercations. The trial court was unimpressed because neither of plaintiff's examples compared with plaintiff's armed battle with his persecutor and it granted summary judgment. The court of appeals affirmed because plaintiff had not shown that defendant did not genuinely believe that discharge was warranted, for instance by showing that defendant had not fired other employees who fought so ferociously. Id. at 1012, 1012 n. 12.

Similarly, in Johnson v. Artim Transportation System, 826 F.2d 538, 544 (7th Cir. 1987), the court of appeals endorsed the notion that a district court is entitled to compare conduct rather than rule violations in its disparate treatment analysis. Although the issue in Johnson was drinking on the job, the court quoted with approval a Fifth Circuit case in which the court ruled that plaintiff had not established a prima facie case of racially motivated discharge because the African American plaintiff who was fired had cut his white coworker with a knife, while that white coworker, who was not fired, had fought unarmed. Id. at 544 (citing Green v. Armstrong Rubber Co., 612 F.2d 967, 968 (5th Cir. 1980)).

In the instant case, the parties have presented two other fights for comparison. In the first, between Loomis and Jones, a white employee and an African American employee exchanged numerous punches and wrestled on the floor, injuring each other in the process;

defendant fired both. In the second, between Kiser and Wilson, two white employees poked and cuffed each other once; defendant did not fire either, but it disciplined both. In the instant case, blows were struck, Ruston was injured, his glasses were broken, plaintiff's shirt was torn off, and there was a reasonable basis for defendant to conclude that each man had gotten his licks in. On the ferocity spectrum, plaintiff's fight with Ruston is virtually indistinguishable from the Loomis-Jones bout and completely distinguishable from the Kiser-Wilson altercation. Therefore, it was entirely appropriate for defendant to treat plaintiff and Ruston as it had treated Loomis and Jones: by firing them both. Therefore, plaintiff has not shown that defendant treated him more harshly than its similarly situated white employees.

Because plaintiff has not established a prima facie case of discriminatory firing, defendant is entitled to summary judgment.

ORDER

It is ORDERED that defendant Wisconsin Knife Work's motion for summary judgment is GRANTED. The Clerk of Court is directed to enter judgment for defendant and close this case.

Entered this 30th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB

District Judge