UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BBF ENGINEERING SERVICES, P.C.
a Michigan Corporation, and
BELLANDRA FOSTER, an individual

PLAINTIFFS,

CASE NO.: 11-CV-14853

HON. NANCY G. EDMUNDS
MAG. LAURIE J. MICHELSON

STATE OF MICHIGAN, a Michigan Public Corporation, MICHIGAN DEPARTMENT of TRANSPORTATION, a Department of the State of Michigan, VICTOR JUDNIC, and MARK STEUCHER

DEFENDANTS.

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PLAINTIFFS BBF ENGINEERING SERVICES, P.C. AND BELLANDRA FOSTER'S BRIEF IN OPPOSITION TO DEFENDANTS STATE OF MICHIGAN AND MICHIGAN DEPARTMENT OF TRANSPORTATION'S MOTION FOR DISMISSAL UNDER FED. R. CIV. P. 12(B)(1) & (6)

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INTRODUCTION

The Court should deny the instant motion because: (1) Plaintiffs Bellandra Foster ("Foster") and BBF Engineering Services, PC ("BBF") (collectively "Plaintiffs") have stated a claim under Title VI 42 U.S.C. § 2000d *et seq* and 23 U.S.C. § 324 ; (2) Defendants State of Michigan ("State"), Michigan Department of Transportation ("MDOT"), Victor Judnic ("Judnic") and Mark Steucher ("Steucher") collectively "Defendants") are not entitled to sovereign immunity due to the Title VI and retaliation claims ; (3) Plaintiffs' Title VI claims are based on the provisions in Title VI and the remedial civil rights statutes codified as 42 U.S.C § 1981 and 42 U.S.C. § 1983 and not a theory of respondeat superior as alleged by Defendants; (4) as a matter of law, the accrual of a claim for purposes of the statute of limitations analysis is a matter of fact and not subject to dismissal under Fed. R. Civ. P. 12(b)(6); and (5) Defendants do not enjoy unfettered sovereign immunity for violations of Plaintiffs'constitutionally protected rights.

Through a conundrum of legal gymnastics and formulaic gyrations in this case, Defendants seek to eviscerate their clear liability for well-established and documented constitutional wrongdoings. By carefully parsing through selected legal escape hatches Defendants believe are available to each of them separately, they are attempting to winnow out of a clear case of discrimination. The facts clearly establish that these Defendants systematically and intentionally discriminated against and attacked the business of this one black female (Ms. Foster) to the point of eradication. Defendants now seek to ignore two irrefutable facts——Ms. Foster is black and female; to hate her and to attack her and her business is to attack and discriminate against her on only two basic levels—race and gender.

The State of Michigan's retaliatory conduct, discrimination and disparate treatment continuing even to the time of this filing have made Plaintiffs' operations die an untimely and

unnatural death. In defense of the facts, Defendants now parse the law; it should not be so easy. Plaintiffs' operations have been constitutionally violated well-nigh to the point of eradication and death. Plaintiffs did not realize the foundation of Defendants' insidious plot until 2010, and they filed complaints. Plaintiffs did know the plot would be confirmed in September 2011, and they waited until it was confirmed to file suit.

First, Defendants argue that Plaintiffs' Title VI claim related to Judnic cutting Plaintiffs' Contract No. 2008-0049 and his statement that: "No woman [should] be making money like that" are barred by the statute of limitations. As a matter of law however, the accrual of the statute of limitations under federal law is a fact intensive inquiry. Plaintiffs have made factual allegations that when viewed in their favor raises a plausible claim. Plaintiffs acted once they were indeed victims of the cancer that is discrimination.

Second, Defendants argue that because Plaintiffs' claims are allegedly all gender based, there is no viable basis for a Title VI claim because 42 U.S.C.§ 2000d does not prohibit gender based discrimination. This argument is simply a strangely self-serving reformulation of the facts. Ms. Foster is first black and then female. Both unalterable facts resulted in adverse action. Defendants argue that there is no viable Title VI claim made against them because in their individual capacities because they received no federal funds and because the claims may be based in part on gender. Defendants' arguments ignore the plain language of 23 U.S.C. § 324, which applies to Federal Highway Programs (which is all that is at issue here).

These assertions are unfathomable on their face under 42 U.S.C. § 2000d, since race, sex, and gender are inextricably intertwined in the pattern of discrimination, disparate treatment and retaliation Defendants have regularly and continuously imposed on Plaintiffs in their official capacity well until this point in time and beyond. Ms. Foster was unaware of it and had the

wool or quilt pulled over her eyes for way too long. However, Defendants should not be allowed to benefit from their subterfuge.

Moreover, Defendants Steucher and Judnic have both gone on to work for majority contractors who work for MDOT and receive Federal funds. A backhanded and perverse consequence of Defendants' actions is to reduce Plaintiffs' share of potential contracts while increasing the share of contracts available to the companies for whom Mssrs. Judnic and Steucher now work and who pay them in part with Federal funds. (Plaintiffs' Complaint ¶¶ 3-60) Plaintiffs should be allowed to explore what segment of Steucher and Judnic's work is paid for by Federal funds.

Third, Defendants argue that neither the State nor Defendants Judnic and Steucher in their official capacities are liable under 42 U.S.C. § 1983 and 42 U.S.C. § 1981 because of sovereign immunity under the Eleventh Amendment to the U.S. Constitution. Even if this is so, and Plaintiffs contend it is not, Defendants Judnic and Steucher remain liable in their individual capacities. As "persons" in their individual capacity— the State's investigation demonstrates that they discriminated and retaliated against Plaintiffs. The actions at an individual level amply demonstrate intentional discrimination and disparate treatment for illegal reasons targeted at Plaintiffs.

Lastly, Defendants argue that Plaintiffs have failed to state a retaliation claim. Application of the retaliation factors, requires an inquiry into the facts. To this end, Plaintiffs have pled facts sufficient to establish that each of the four factors is more favorable to her and that Defendants retaliated against her for reporting their wrongdoing.

FACTUAL BACKGROUND

Ms. Foster is a "black" "female" PhD, who is a professional engineer, registered and licensed in the State of Michigan and who owns BBF Engineering. Plaintiffs have regularly provided engineering services to Defendant MDOT. Upon information and belief, Ms. Foster was the first black female professional engineer licensed by the State of Michigan. In addition, Ms. Foster was the first black female to receive her Doctorate in civil engineering from a Michigan college and may have been one of the first black females with a doctorate in engineering in the country. (See Plaintiffs' Complaint ¶¶ 3-13.) These realities appear to have intimidated Defendants Judnic and Steucher. This fact is evidenced by Judnic's statement that he never thought of BBF Engineering in a discussion regarding disadvantaged business enterprises—"really"? (Plaintiffs' Complaint)

BBF Engineering is a civil engineering company licensed in the State of Michigan that has regularly provided civil engineering services to MDOT. BBF Engineering was formed as a professional service corporation in 1997. To the best of Plaintiffs' knowledge, BBF Engineering began performing contract work for MDOT in 1997. (See Plaintiffs' Complaint ¶¶3-13 and 17-19.) At all times relevant to this matter, BBF Engineering was owned solely by Plaintiff Foster.

a. Mark Steucher

Steucher was at all times relevant to Ms. Foster's complaint a duly designated project engineer and a project manager for Defendant MDOT. On or about May 2009, Plaintiffs' bid for contract CS63052-JN72404. Initially, this contract was scored by members of a scoring team selected in accordance with MDOT's supposed selection team guidelines, revised as July 17, 2007. (Complaint at ¶¶ 61-78) During the initial selection process, Plaintiffs had the highest score on the scoring sheets. Subsequently, Plaintiffs' scores were unilaterally reduced by

Steucher even though Plaintiffs received the highest score on the original scoring sheets as proffered by the designated scoring team, but they did not win the bid. In short, Plaintiffs were foreclosed from this project by Defendant's discriminatory actions (See Complaint, ¶¶ 61-78 and Exhibit A to Plaintiffs' Complaint)

When Plaintiffs requested that Steucher debrief them on why they were not selected, they were informed by Steucher that BBF Engineering simply had not measured up. Initially Steucher would not respond to emails from Plaintiffs requesting the debriefing. Plaintiffs had to send a certified letter to Steucher before he would respond to the request for a debriefing request. Plaintiffs subsequently learned that Steucher's assertions were merely a subterfuge. In fact, after the initial scoring was submitted, Steucher reviewed the scoring sheets and unilaterally changed the scoring sheets to reduce BBF Engineering's scores because he did not like Ms. Foster because she was a black woman. (See Plaintiffs' Complaint ¶¶ 61-78 and Exhibit A thereto Plaintiffs' Complaint)

According to the investigations conducted by Mary Finch ("Ms. Finch"), FHWA/USDOT Federal Highway Act Civil Rights ("FHWA") Michigan Program Manager, as well as Title VI Program Specialist, Cheryl Hudson ("Ms. Hudson"), MDOT, Steucher changed Plaintiffs' score sheets after coming into the room and ascertaining that BBF Engineering was the number one bidder. Steucher, according to the investigation report stated, "Oh no, I hate her." After stating that, "Oh no, I hate her", Steucher unilaterally changed all of the score sheets originally submitted by the scoring team resulting in Plaintiffs going from the first position to the last position in overall scores. Plaintiffs' score was not among the top three scores after Steucher's machinations were complete. Consequently, Plaintiffs' bid was not among the proposals sent to the regional office for consideration. (Complaint ¶¶ 61-78, and Exhibit A thereto) Pursuant to

Ms. Finch's investigative report, this selection process on its face resulted in disparate treatment to Ms. Foster. (See Plaintiffs' Complaint Exhibit A thereto). Ms. Finch found discrimination by Defendants, yet Defendants now deny it.

The above-described sequence of events was brought to the attention of MDOT's management. However, no action was taken to remedy the harm wrought on Plaintiffs by Steucher's discriminatory acts. Instead, MDOT merely removed Steucher from further selection teams beginning at some point in 2010. (Plaintiffs' Complaint ¶¶ 61-78 and Exhibit A thereto) Two sets of interviews conducted by Ms. Hudson verified with Mr. Cedric Dargin, one of MDOT's selection team members for the contract at issue that these events occurred. According to Mr. Paul Ajegba, Deputy Region Engineer for the Metropolitan Detroit Region of MDOT, Steucher was removed from further selection teams due to his discriminatory actions related to Ms. Foster. (See Plaintiffs' Complaint ¶¶ 61-78)

b. Victor Judnic

Judnic was at all times relevant to Ms. Foster's complaint a duly designated project engineer and a project manager for MDOT. In those roles, Judnic carried out an insidious plot to destroy Plaintiffs' livelihood based on Plaintiffs' race and gender. With respect to Plaintiffs, Judnic told his secretary "No woman should be making money like that." The next step in Judnic's mission—eliminate the black female contractor. Judnic used all of his MDOT authority to systematically drive Plaintiffs out of business.

In June 2006, Judnic notified Plaintiffs that MDOT had been instructed to cut in half the as-needed contract (#2006-0490) that had already been awarded to Plaintiffs. The contract previously awarded Plaintiffs was reduced from $4.2 million to about $2 million. The larger half of the contract was then awarded to a majority contractor Fishbeck, Thompson, Carr and Huber.

Judnic later attempted to cut another one of Plaintiffs' contracts (#2008-0044) in half, but this time Judnic had Project Engineer Jason Voigt whom Judnic supervised at the time, do the dirty deed. Plaintiffs however, refused to cut the contract.

In furtherance of his broader plot, Judnic gradually chipped away at Plaintiffs' MDOT performance records to reduce Plaintiffs chances at being awarded future MDOT contracts. Judnic refused to meet with Plaintiffs monthly to discuss Plaintiffs' projects. [Finch Report] These meetings are important because the score sheets are subjective. The meetings provide valuable feedback on performance. Contractors can incorporate that knowledge into their businesses and use it to improve scores. Scores are important since past performance evaluations become part of the criteria for scoring bids. Judnic denied Plaintiffs any opportunity for these meetings for race and gender. [Finch Report]

In July 2008, Plaintiffs met with the Project Manager Jason Voigt, Judnic, and other MDOT officials. At the end of the meeting, Ms. Foster requested an interim evaluation for the same reasons. Issues that go unaddressed may negatively impact the contractors' performance evaluation. Past performance is one of the criteria on the bid score sheets. Poor scores have a long-term effect on a contractor's ability to score well on future bids. Judnic was keenly aware of these facts. He abused the evaluation process to reduce Plaintiffs' chances at winning future bids.

Ms. Foster sent a number of emails to Voigt requesting an interim evaluation. Mr. Voigt ultimately left MDOT without ever providing Plaintiffs with the requested evaluation. However, a month after Voigt was gone and after another inquiry from Ms. Foster, Plaintiffs finally received the evaluation. The transmitted email was suspicious because it contained Voigt's electronic signature, but it was sent from someone else's email address; At the time it

was received, Voigt was no longer even working for MDOT. Moreover, the scores on the evaluation were inconsistent with Foster's conversations with Voigt.

Plaintiffs have stated a claim against the Defendants for violations of 42 U.S.C. § 2000d *et seq.* and for prospective damages under 42 U.S.C. §§ 1981 and 1983. Plaintiffs have raised plausible issues of fact with regards to the accrual of the statute of limitations and their retaliation claims. Plaintiffs have pled facts sufficient to sustain their claims as a matter of law.

STANDARD OF REVIEW

Defendants first move to dismiss under Fed. R. Civ. P 12(b)(1) To defeat a motion under Fed. R. Civ. P. 12(b)(1), the plaintiff need only show that the complaint alleges a claim under federal law, and that the claim is "substantial." *Transcontinental Leasing, Inc. v. Michigan National Bank of Detroit,* 738 F.2d 163, 165 (6th Cir. 1984). A federal claim is substantial unless "prior decisions inescapably render [it] frivolous." *Transcontinental Leasing Inc. supra.* The plaintiff can survive the motion by showing any arguable basis in law for the claim made. See *Musson Theatrical v. Federal Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996). This standard has been met here

Plaintiffs adopt Defendants statement of the legal standards applicable to Fed. R. Civ. P. 12(b)(6) motions. However, Plaintiffs must elaborate. To survive a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the plaintiff must show that his complaint alleges facts which, if proven, would entitle him to relief. *First Am. Title Co. v. DeVaugh,* 480 F.3d 438, 443 (6th Cir. 2007). In *United States v University of Michigan,* 860 F. Supp 400, 402 (ED MI 1994), this court held that:

> In order for a complaint to be dismissed for failure to state a claim, a court must conclude "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

That is not the case here.

The court must accept as true the non-movant's evidence and draw "all justifiable inferences" in the non-movant's favor *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255; 106 S.Ct. 2505 91 L.Ed.2d 202 (1986)As the Supreme Court stated in *Bell Atlantic Corp. v. Twombly, supra,* 550 U.S. at 570: "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Twombly, supra,* 550 U.S. at 556. The plausibility standard "does not impose a probability requirement at the pleading stage; it simply calls for enough facts "to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." *Twombly, supra,* 550 U.S. at 556. Moreover, in deciding whether the plaintiff has set forth a "plausible" claim, the court must accept the factual allegations in the complaint as true. *Twombly,* 550 U.S. at 556.

ARGUMENT

I. Plaintiffs have stated a claim for racial and gender discrimination under Title VI, 42 and 23 U.S.C. § 324

A. Title VI prohibits discrimination against women.

Defendants are recipients of federal highway monies yet they are claiming they can discriminate against female contractors. It is preposterous and offensive to think that Judnic and Steucher can intentionally discriminate and violate Ms. Foster's rights to equal protection and Defendants are not liable for it.

Defendants proffer three unrelated and irrelevant and nonbinding legal authorities to support their claim that Title VI excludes gender discrimination. Two of the cases were decided on grounds which had nothing to do with the issues presented here. See *Shannon v Lardizzone*, 334 Fed. Appx 506, 507 n. 1 (3d Cir. 2009) and *Davis v Monroe County Bd. of Educ.*, 120 F.3d

1390, 1396 (11th Cir. 1997). The third care—*Bartley v. U.S. Dep't of Army,* 221 F. Supp 2d 934, 939 (C.D. Ill. 2002)—is not binding on this Court.

Plaintiffs bid on contracts involving Federal Highway funds; therefore, the Federal Highway Administration ("FHWA") may review how bids are awarded. *City of Cleveland v. Ohio*, 508 F.3d 827, 840-841 (6th Cir. Ohio 2007). More importantly, Defendants ignore 23 U.S.C. § 324, which reads as follows:

> No person shall on the ground of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance under this title or carried on under this title. This provision will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination, under Title VI of the Civil Rights Act of 1964. However, this remedy is not exclusive and will not prejudice from or cut off any other legal remedies to a discriminate.[1]

In *MC West, Inc. v Lewis,* 522 F Supp 338, 346 (MD TN 1981) the court held that:

> Of the four statutes relied on by the Secretary, none are specific enough to authorize the agency's action in this case. The regulations in this case involve federally assisted highway projects, not airport development, railroad revitalization or mass transit. The only statute that pertains to the highway program is 23 U.S.C. § 324, but it merely prohibits discrimination on account of sex. The Secretary's regulations extend to benefit more than those discriminated on account of sex. (Emphasis added)

Plaintiffs are discriminated on the basis of race and gender. They are protected by 42 U.S.C. § 2000d through 23 U.S.C. § 324. Defendants need to stop grasping at straws.

As this Court explained in *Michigan Rd. Builders Ass'n v. Blanchard*, 761 F. Supp. 1303, 1306-1307 (E.D. MI 1991) Surface Transportation and Uniform Relocation Assistance Act of 1987 includes women as a group presumed to be disadvantaged. While no Michigan Court has addressed the specific question as to whether gender discrimination is prohibited by Title VI.

[1] Congressional intent to prohibit sex and gender discrimination runs rampart under various Federal statutes. For example, see 40 U.S.C.§ 122, 42 U.S.C. § 3123 and 42 U.S.C. § 5891, among other provisions.

Michigan Rd. Builders Ass'n, supra, acknowledges implicitly **the FHWA also aims to protect women business owners from gender discrimination.**

B. Plaintiffs have presented a prima facie case for discrimination.

In *Harris v. Members of the Bd. of Governors of Wayne State Univ,* 2010 WL 5173666, **3-4 (E.D. MI), this Court addressed whether a plaintiff failed to state a Title VI claim and therefore, which should be dismissed under Fed. R. Civ. P. 12(b)(6). The plaintiff in *Harris, supra,* filed a Title VI claim against Wayne State University ("WSU"), alleging that numerous defendants discriminated against him and that he had been denied admission to one of defendant's graduate schools on account of his race. *Harris, supra.* The plaintiff, who was the sole transfer student, was denied admission. *Harris, supra.*

When evaluating a Title VI claim, the Court explained that the same analysis applicable to claims brought under the Fourteenth Amendment's Equal Protection Clause ("Equal Protection Clause") applies in Title VI cases. *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1405 n. 11 (11th Cir. 1993) (holding that the Title VI analysis "duplicate[s] exactly [an] equal protection analysis) (cited in *Harris, supra* at *3). 42 U.S.C. § 2000d *et al.,* provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program activity receiving Federal financial assistance.

The Equal Protection Clause asserts that all persons similarly circumstanced shall be treated alike. *Harris, supra* at *2 (quoting *Plyler v. Doe*, 457 U.S. 202, 216; 102 S.Ct. 2382; 72 L.Ed. 2d 786 (1982) (quotation omitted)). To establish an Equal Protection violation, the plaintiff must demonstrate that the challenged action was motivated by intent to discriminate because of race, sex or age. See *Buchanan v. City of Bolivar*, 99 F.3d 1352, 1356 (6th Cir. 1996) Although plaintiff must prove intent at trial in order to prevail on a Title VI action, intent need

not be pled in the complaint. *Grimes v. Superior Home Health Care of Middle Tennessee, Inc.*, 929 F. Supp. 1088 (MD TN 1996)

Furthermore, in the absence of direct evidence of discrimination, a plaintiff can use the burden shifting framework set forth in *McDonnell Douglas v. Green*, 411 U.S. 792; 93 S.Ct. 1817; 36 L.Ed. 2d 668 (1973); *Paasewe v. Ohio Arts Council*, 74 Fed. Appx. 505, 2003 WL 22017539 (6th Cir. 2003) (applying *McDonnell Douglas* framework to a Title VI claim) (cited in *Harry, supra* *3*).*

The *McDonnell Douglas, supra,* framework is usually applied in the context a Title VII or Title IX claim (employment discrimination claim); however the Court's "Congress modeled Title IX after Title VI of the Civil Rights Act of 1964, and passed Title IX with the explicit understanding that it would be interpreted as Title VI was" *Harris, supra at *3* (quoting *Maislin v. Tennessee State Univ.*, 665 F. Supp. 2d 922, 928-29 (M.D. Tenn. 2009)). Under the *McDonnell Douglas, supra,* analysis, if the plaintiff proves by a preponderance of evidence a prima facie case of discrimination, then the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the defendant's actions. *Harris, supra* at *3. The burden then shifts back to the plaintiff who has the opportunity to prove that the reasons provided by the defendant are mere pretext for discrimination. *Harris, supra* at *3.*

The defendant in *Harris* put up the *same* strawman argument as Defendants proffered in this case. The defendants characterized the plaintiff's allegations as unsubstantiated, speculative, and insufficient to establish a prima facie case. *Harris, supra* at *2-3. However, the Court found that the plaintiff had under *McDonnell Douglas, supra,* alleged a prima facie case of discrimination. *Harris, supra* at 3. Pointing to the plaintiff's complaint and exhibits, the Court concluded plaintiff alleged that (1) he is a member of a protected class (Ms. Foster is); (2) that he

was qualified for admission (Ms. Foster clearly is); (3) that he suffered an adverse decision (destruction of a going concern is); and (4) that similarly situated non-protected applicants were treated more favorably (everyone was treated better). Plaintiffs in the instant case have plead a multitude of allegations that satisfy the foregoing criteria.

As a matter of law, Plaintiffs have stated a claim of racial and gender discrimination under Title VI. Defendants sanctimoniously ignore that the most basic fact here—Ms. Foster is a black female, race and gender permeate every decision Defendants made regarding Ms. Foster. Defendants again seek to parse words by unraveling the pervasive pattern of discrimination into individual contracts. Here, however, the conduct is so pervasive that it subsumes all of Plaintiffs' contracts and bids. Defendants Steucher and Judnic treated Plaintiffs with racial animosity.

There is no speculation here. MDOT employees gave statements to Ms. Finch stating that Defendants Judnic and Steucher made the statements that Plaintiffs alleged are the basis for its claims of constitutional violations. These facts rise beyond mere speculation as suggested by Defendants.

Moreover, Defendant Judnic's careful attack on Plaintiffs' score sheets to manipulate and lower Plaintiffs' scores is not mere personal animus. Defendant Judnic blocked action by his subordinate Voigt and then later undertook the action himself to lower Plaintiffs' scores. Judnic then fraudently placed Voigt's mechanical signatures on a damaging score sheet. Judnic never fought with or had a personal altercation with Ms. Foster; nor did Steucher. Their actions were always the closed door pervasive pattern of racist and sexist behavior that is often later justified on grounds of neutrality and personal animus. See *Scelsa v CUNY,* 806 F Supp 1126 (SD NY 1992). However, proof is not required where, like here, there is a disparate impact.

It is clearly more than plausible that Defendants intentionally discriminated against and subjected Plaintiffs to disparate treatment as found by Ms. Finch. Judnic while providing customary meetings with prime contractors to address issues with their projects, refused to provide Plaintiffs' with these meetings. And under the similar terms, Steucher personally violated the Federal Highway Administration's regulations regarding highway construction bidding; he unilaterally altered Plaintiffs scores after they were the highest bidder on contract CS63052-JN72404. In addition, Plaintiffs do not rely on a respondeat superior theory to support its Title VI claims against Defendants as alleged by Defendants in their motion. Plaintiffs rely on the express terms of Title VI to establish Defendants' liability.

II. The statute of limitations for Plaintiffs' Title VI and 42 U.S.C. 1983 claims began to run when Plaintiff learned of Judnic's statements in May 2010.

Defendants also argue that Plaintiffs' Title VI claims as related to Plaintiffs' allegations that Judnic split Contract No. 2006-0490 and his statement that "no woman should be making this kind of money is time barred by the statute of limitations. First, Defendants cannot deny that their actions demonstrate a pattern of pervasive discrimination. Equitably, this Court should not allow Defendants to unravel the quilt of pervasive discrimination by pulling at the threads of each contract. The quilt started in 2008 (See Finch Report); however, Defendants are still sewing. Defendants are engaged in a continuing wrong. They seek to divert this Court's attention from the fact of that continuing wrong by arguing the dates of the contracts. The reality is that these contracts are in many cases still open. The award dates mean nothing. The wrongs that occurred and the harm caused continue even to this day as Plaintiffs have been reduced to one office, no work and a continuing pattern of discriminatory conduct.

The statute of limitations for a Title VI claim is governed by state law. The three-year statute of limitations set forth the MCL 600.5805(10) applies to Plaintiffs' Title VI claim. *Wolfe*

v. Perry, 412 F.3d 707, 714 (6th Cir. 2006); followed by *Cunningham v Wilson*, 2010 WL 3522272,*16 (E.D. MI). However, Federal law determines when the statute of limitations begins to accrue on Plaintiffs' Title VI claim. *Wallace v Kato*, 549 U.S. 384, 388; 127 S.Ct. 1091, 166 . Ed. 2d 973 (2007). Under Federal law the statute begins to run when the plaintiffs knew or should have known of the injury which forms the basis of their claims. *Ruff v Runyon*, 258 F.3d 498, 500 (6th Cir. 2001)(citing *Friedman v. Estate of Presser*, 929 F.2d 1151, 1159 (6th Cir. 1991)).

A fact specific inquiry should be applied to this Court's analysis. See generally *Cunningham v Wilson, supra*, Defendants argue that on November 3, 2008 the statute of limitations began to run with respect to claims related to Judnic's statement made in November 2008 when he cut Plaintiffs' Contract No. 2008-0049 in half; thus applying the three-year statute of limitations, the claim expired on November 11, 2011, nearly ten days after Plaintiffs' filed their complaint. However, Plaintiffs did not learn of Judnic's racist statement until May 2010 when his former secretary, Ms. Caldwell told Ms. Foster confessed the seriousness of the comment Judnic made back in 2008 and the plan to implement it. The race and gender discrimination factual allegations that form the basis of Plaintiffs' Title VI and 42 U.S.C. §§ 1981 and 1983 claim did not come to Plaintiffs' attention until May 2010 which is only one year before the November 11, 2011, statute of limitations claimed by Defendants.

If this Court determines that Plaintiffs' claims with respect to Judnic's statement and conduct in 2008 are beyond the limitations period, alternatively, the doctrine of equitable tolling should apply. As cases from the Sixth Circuit indicate, the three-year statute of limitations set forth in MCL § 600.5805 may be tolled, depending on the circumstances. See *Drake v. City of Detroit, Michigan,* 266 Fed.Appx. 444, 449 (6th Cir. 2008) (applying MCL §§ 600.5805(10),

and MCL 600.5855). To effect a tolling, Plaintiffs need only show conduct on the part of [defendant] that prevented the assertion of their rights within the statutory period. *Drake v. City of Detroit, Michigan, supra.*

In the instant case, when Judnic cut Plaintiffs' Contract No 2008-0449, he deliberately misrepresented the truth about his motivations when Ms. Foster asked him why the contract was being cut. Plaintiffs did not learn until May 2010 that Judnic harbored racial and gender animosity towards Ms. Foster that he was acting upon. It was only in May 2010 that Plaintiffs learned that Judnic's reason for cutting Plaintiffs' contract was based on race and gender. It was in May 2010 that Plaintiff learned of her injuries which had been concealed by Judnic's remark that Lansing had instructed him to cut Plaintiffs'contract. Judnic effectively prevented Plaintiffs from discovering his unlawful discrimination by misrepresenting why Plaintiffs' contract was being cut. Consequently, Plaintiffs had no knowledge of the gender and racial epithet and thus, no impetus to file suit against Judnic and Defendants.

III. Plaintiffs allegations of retaliation are beyond speculation and as a matter of law are not subject to dismissal under Fed. R. Civ. P. 12(b)(6).

Under Michigan law, to establish a prima facie case of retaliation, Plaintiffs must show: (a) they engaged in activity protected by Title VI; (which is unrefuted); (b) this exercise of protected rights was known to Defendants; (another irrefutable fact); (c) defendant thereafter took adverse action against the plaintiff, or the plaintiff was subjected to severe or pervasive retaliatory harassment (another irrefutable fact); and (d) there was a causal connection between the protected activity and the adverse action. *Dumas v. Hurley Med. Ctr.*, 2011 WL 3112882 (E.D. MI) To avoid dismissal, Plaintiffs need to allege sufficient facts to raise a question of fact with respect to the four (4) factors. In support of its prima facie showing Plaintiffs allege that they were: (1) competitive bidders who performed work subject to the FHWA regulations; (2)

Defendants funded the work with FHWA funds and in doing so subjected themselves to Title VI which abrogates unlawful discrimination and they were fully apprised of Plaintiffs participation in bidding for Defendants' contracts that were subject to Title VI; (3) throughout their Complaint, Plaintiffs allege various instances of pervasive unlawful discrimination by project engineers and managers, Judnic and Steucher, which increased once Plaintiffs started complaining Defendants' misconduct; and (4) Plaintiffs have plead that the unlawful and unconstitutional conduct of Defendants negatively impacted Plaintiffs' bid scores, their contracts, and their potential contracts and their pay which has in effect put them out of business since no other contractors including the contractors employed by Defendants will engage them.

Defendants want to musee that there is no causal connection between the alledged discrimination and any adverse impact. By eradicating all of Plaintiffs' bids and their contracts, Defendants clearly had an adverse impact on Plaintiffs. Plaintiffs have been made pariahs and lepers in the MDOT contracting community. (See Plaintiffs' Complaint—Exhibit B)They now cannot even obtain subcontracting work— let alone work as a prime contractor. In short their going concern is gone. Ms. Foster is personally suffering from serious health ailments as a result of these actions for which she has been treating for nearly five years. How much more adverse can Defendants get? These are facts —and not mere allegations.

If Defendants desire a more thorough and detailed complaint rather than notice pleading, Plaintiffs will with this Court's blessing, be more than happy to accommodate them. Plaintiffs have shown that they have only been awarded two prime contracts out of the 22 prime contracts they have bid on since Defendants began a pattern of discrimination against them. Defendants do not deny their discrimination; instead, Defendants argue that they should be shielded from liability because the contracts have different effective dates.

Another example of Judnic's retaliatory conduct is exemplified by his refusal to respond to Plaintiffs' requests for meetings after Ms. Foster complained to MDOT's Finance Division Director, Mr. Myron Frierson about being again asked to cut one of Plaintiffs' contracts by Project engineer Jason Voigt who had been supervised by Judnic. Plaintiffs believe that Judnic began retaliating against her for taking this issue to MDOT's Finance Division Director. This occurred in October 2007. Thereafter, as alleged in Plaintiffs' Complaint, Judnic embarked on a mission to prevent Plaintiffs from winning any bids. (See Plaintiffs' Complaint).

Another example of retaliation is premised on Judnic's claim that he did not conduct in person debriefing meetings with contractors even though other majority firm were provided with this leg up. (Plaintiffs' Complaint ¶ 51). These are just small examples and Plaintiffs plan to show other examples of retaliation as this case moves forward.

All of these allegations establish that Judnic began retaliating after Plaintiffs first complained to MDOT in 2006. Judnic began retaliating against them by lowering their scores and not providing them with equal treatment. Judnic's actions were calculated to have a negative impact on Plaintiffs' ability to successfully win MDOT contracts. It continues until today. It is just a part of a continuing pattern of pervasive discrimination. On these facts, it is at least plausable that Judnic's conduct thereafter was adverse action. It is this plausibility and Plaintiffs' factual allegations that prohibit dismissal under Fed. R. Civ. P. 12(b)(6). See *Fritz v Charter Twp. of Comstock,* 592 F.3d 718, 722 (6th Cir. 2010) ("[T] he plaintiff must plead sufficient factual matter' to render the legal claim plausible, i.e., more than merely possible.")(quoting *Ashcroft v IQBAL,* 556 U.S. 662; 129 S.Ct. 1937, 1949; 173 L.Ed.2d 868 (2009).

IV. Sovereign immunity does not protect Defendants in this case.

Defendants argue that the State's sovereign immunity can only be waived by consent where Congress has not explicitly abridged sovereign immunity. Indeed, Congress must act explicitly to overcome Defendants' Eleventh Amendment (11th Amendment) immunity protection. In the case at bar Plaintiffs' allege that they were subjected to various forms of retaliation when they reported violations of Title VI including racial and gender discrimination by Defendants.

Defendants may have sovereign immunity for any claims under 42 U.S.C. §§ 1981 and 1983 (the State and MDOT and Judnic and Steucher in their official capacities. Defendants' argument regarding sovereign immunity under Title VI is misplaced. Congress has foreclosed this argument by adopting 42 U.S. C. § 2000d-7(a) which provides as follows:

> (1) A State shall not be immune when the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, Title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph 1), remedies (including remedies both in law and in equity) are available for such violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

In *Eisfelder v Michigan Department of Natural Resources,* 847 F.Supp. 78 (WD MI 1993), the Court analyzed a motion under Fed. R. Civ. P. 12(b)(6). There, the Court upheld money damage remedies against the individuals under 42 U.S.C. § 1983 *Id.* at 82 and cited 42 U.S.C. § 2000d-7 for the proposition that actions under the Civil Rights, i.e., Title VI) statutes were not barred by the Eleventh Amendment. *Id.* at 82 and 83. Sovereign immunity does not protect Defendants from 42 U.S.C. §2000d.

It is plausible that Plaintiffs' claims raise an issue as to whether Defendants unlawful violations of Federal constitutional law which are linked to Plaintiffs' retaliation claims are subject to sovereign immunity. The discrimination is what led to the retaliation by Defendants. Indeed, the scope of prohibition against intentional discrimination in Title VI of Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., implicitly includes action against retaliation. *Kimmel v Gallaudet Univ*, 639 F. Supp.2d 34 (D.D.C. 2009). As discussed above, Plaintiffs have stated a retaliation claim that is not subject to a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

V. 42 U.S.C § 1981 and 42 U.S.C. §§ 1981 and 1983 applies to Defendants with respect to Plaintiffs' request for prospective injunctive relief.

Pursuant to longstanding jurisprudence, *Ex Parte Young*, 209 U.S. 123 , 28 S.Ct. 441, 52 L.Ed. 714 (1908) recognizes an exception to the general rules regarding the inability to sue Defendants under 42 U.S.C. § 1981 and 42 U.S.C. § 1983. Plaintiffs adopt their arguments from the Steucher Response. Plaintiffs seek to have the Court enjoin Defendants from further retaliatory actions to reduce Plaintiffs' bid scores with a negative impact as Defendants, Judnic, and Steucher's did in furtherance of unlawful discriminatory conduct.

CONCLUSION

For all the foregoing reasons, Bellandra Foster and BBF Engineering, P.C. respectfully requests that the Court deny the State of Michigan and MDOT's motion to dismiss.

Respectfully submitted,

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Date: December 28, 2011

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on December 28, 2011, I electronically filed the above document with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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