No. 13-2209

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BBF ENGINEERING SERVICES, P.C., a Michigan Professional Service Corporation,

and

BELLANDRA FOSTER, an individual,

Plaintiffs-Appellants,

v.

THE HONORABLE RICK SNYDER, in his capacity as GOVERNOR OF THE STATE OF MICHIGAN, KIRK T. STEUDLE, in his capacity as DIRECTOR of the MICHIGAN DEPARTMENT of TRANSPORTATION, VICTOR JUDNIC and MARK STEUCHER,

Defendants-Appellees.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Honorable Nancy G. Edmunds

BRIEF AND ARGUMENT OF PLAINTIFFS-APPELLANTS
ORAL ARGUMENT REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BBF ENGINEERING SERVICES, P.C., a Michigan Corporation, and BELLANDRA FOSTER, an individual	)	Case No. 13-2209
Appellants,	)	On Appeal from E.D. Michigan S.D.
v.	)	No. 11-CV-14853
THE HONORABLE RICK SNYDER, in his capacity as GOVERNOR OF THE STATE OF MICHIGAN, KIRK T. STEUDLE, in his capacity as DIRECTOR of the MICHIGAN DEPARTMENT of TRANSPORTATION, VICTOR JUDNIC and MARK STEUCHER	)	ORAL ARGUMENT REQUESTED
Appellees.		

APPELLANTS' BRIEF

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DISCLOSURE OF CORPORATE AFFILATIONS AND FINANCIAL INTEREST

Pursuant to the Sixth Circuit Rule 26.1, Plaintiffs-Appellants, BBF Engineering Services, P.C., and Bellandra Foster, make the following disclosure:

1. Are said parties subsidiaries or affiliates of a publicly-owned corporation?

Response: NO

2. Is there a publicly-owned corporation not a party to the appeal, that has a financial interest in the outcome?

Response: NO

Respectfully submitted,

s/ Avery K. Williams

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Dated: November 4, 2013

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STATEMENT IN SUPPORT OF REQUEST FOR ORAL ARGUMENT

Oral argument should be heard in this case, because it involves issues related federal contracting dollars and major constitutional issues. First, the trial court ruled that Title VI, 42 U.S.C. § 2000d, does not prohibit discrimination based upon gender or sex even in cases involving the Federal Highway Administration ("FHWA") contrary to 23 U.S.C. § 324. Second, this case raises important issues regarding the Equal Protection Clause, the 14th Amendment and the 11th Amendment to the United States Constitution, which the district court first rejected and then reinstated and rejected again.

As a result of the discriminatory actions of a state agency and its employees, Plaintiffs and Appellants BBF Engineering Services, P.C. ("BBF Engineering") and Bellandra Foster ("Ms. Foster") ("Plaintiffs") have been driven out of business. However, the district court in this case has imposed an onerous and impossible standard of review for discrimination cases both directly and circumstantially. The district court has published an insurmountable barrier for plaintiffs in civil rights cases and attributed it to this Court when the reality is far different. Meanwhile, Plaintiffs continue to suffer as Defendants retaliate against them through an alleged audit that reaches back to 1999 and destroyed their business eliminating prime contracting opportunities. Reversal of the district court's decision is necessary to bring justice to these aggrieved parties and clarify

this Circuit's standard of review, as well as the interface between 23 U.S.C. § 324 and Title VI in FHWA projects. This appeal is meritorious. The facts and legal arguments cannot be adequately presented in the briefs and the records. This Court's deliberative process would be significantly aided by oral argument.

The district court misapplied multiple decisions of this Court. First, the district court cited *Yoder v. University of Louisville*, 2013 WL 1976515 (6th Cir. 2013) and found it controlling, when the decisions favors denying Defendants' motion. Protection from discrimination is a clearly established right—therefore, qualified immunity is inapplicable.

Second, the Court cited decisions of this Circuit that clearly state that the non-moving parties' burden in the summary judgment context is not onerous. Here, the district court continually reverted to finding that it had to draw negative inferences and, therefore, there was no direct or circumstantial evidence of discrimination. However, the case law is to the contrary. In *Griffin v. Finkbeiner*, 689 F.3d 584, 594-595 (6th Cir. 2012), this Court stated:

> Evidence that the employer's proffered reason for termination was not the actual reason does not mandate a finding for the employee…is enough to survive summary judgment.

Moreover, in addressing this case of mixed motive discrimination which is what is here, this Court held:

> Moreover, the burden of producing such evidence is not onerous and should preclude sending the case to the jury only where the record is devoid of the evidence that could reasonably be construed to support the plaintiff's claim. *Id* at 595.

The district court also cited *Wexler v. White's Fine Furniture, Inc.,* 317 F.3d 564, 574 (6th Cir. 2003) where this Court held that: "First, a court may not consider the employer's alleged nondiscriminatory reason for taking an adverse employment action when analyzing the prima facie case." The district court reliance on *Schweitzer v. Teamster Local 100,* 413 F.3d 533 (6th Cir. 2005) was misplaced because it was an ERISA case and readily distinguishable.

Finally, the district court cited *Warren v. City of Athens, Ohio,* 413 F.3d 697 (6th Cir. 2005) in support of its argument that Plaintiffs had no Equal Protection Class of One claims. The district court acknowledged that *Warren, supra,* recognizes such a claim. The district further chides Plaintiffs for not asking for an amendment when in fact, the district had already denied the proposed amendment.

JURISDICTIONAL STATEMENT

Plaintiffs' Complaint invoked the district court's jurisdiction under the United States Constitution, the Michigan Constitution of 1963, Title VI of the Civil Rights Action of 1964, 42 U.S.C. § 2000d, 23 U.S.C. §324, 42 U.S.C. §§ 1981 and 1983, the Michigan's Whistleblowers' Protection Act, MCL § 15.361.

This Court has appellate jurisdiction under 28 U.S.C. § 1291. Plaintiffs are appealing orders entered in the district court on February 6, 2012, June 7, 2012, August 22, 2012, and August 12, 2013. The district court's August 12, 2013 order granting Summary Judgment against Plaintiffs is a final order that disposed all of Plaintiffs' remaining claims. The prior orders were not final orders.

Plaintiffs timely filed their Notice of Appeal on September 10, 2013 under Fed. R. App. P.4 (a)(1)(b).

STATEMENT OF ISSUES

I. Whether the district court erred in granting Defendants' Motion for Summary Judgment on Plaintiffs claims under 42 U.S.C. §§ 1981 and 1983?

Plaintiffs answer, "Yes."
Defendants answer, "No."

II. Whether the district court erred in dismissing Plaintiffs' claims of violation of equal protection and denial of due process?

Plaintiffs answer, "Yes."
Defendants answer, "No."

III. Whether the district court erred in dismissing Plaintiffs' claims under the Michigan Whistleblowers' Protection Act, MCL § 15.361?

Plaintiffs answer, "Yes."
Defendants answer, "No."

IV. Whether the district court erred in dismissing Plaintiffs' claims under Title VI of the Civil Rights Act in light of 23 U.S.C. §324?

Plaintiffs answer, "Yes."
Defendants answer, "No."

V. Whether the district court engaged in impermissible fact finding in granting Defendants' motion for summary judgment funder Fed. R. Civ. P. 56?

Plaintiffs answer, "Yes."
Defendants answer, "No."

VI. Whether the district court improperly denied Plaintiffs' assertions of Due Process and Equal Protection claims and rights and then attempted to reinsert Equal Protection claims for a class of one and deny it yet again.

Plaintiffs answer, "Yes."
Defendants answer, "No."

VII. Whether the district court erred in its standard of review of direct and circumstantial evidence of discrimination in response to a motion for summary judgment.

Plaintiffs answer,	"Yes."
Defendants answer,	"No."

STATEMENT OF CASE

On November 3, 2011, Plaintiffs, BBF Engineering and Ms. Foster, filed a multi-count complaint, which was subsequently amended, in the United States District Court, Eastern District of Michigan, Southern Division (the "district court") against the Defendants, the State of Michigan ("State"), the Michigan Department of Transportation ("MDOT"), Victor Judnic ("Judnic") and Mark Steucher ("Steucher"), (collectively, "Defendants"). BBF Engineering and Ms. Foster asserted six counts: (1) Violation of the Equal Protection Clause; (2) Violation of the Substantiative Due Process Clause; (3) Violation of Title VI; (4) Defendants' violation of 42 U.S.C. 1983; (5) Violation of 42 U.S.C. 1981; and (6) Defendants' violation of the Michigan Whistleblowers' Protection Act ("WPA"), MCL § 15.361 *et seq.*

On November 30, 2011, Steucher filed a Motion for Partial Dismissal. The next day, on December 1, 2011, MDOT and the State filed a Motion to Dismiss. Six days later, Judnic filed a Motion to Dismiss. Plaintiffs responded to all of these motions. On February 6, 2012, the district court ruled on all of the Defendants' motions. The district court dismissed Plaintiffs' Title VI claims against all of the Defendants and the 42 U.S.C. § 1981 and § 1983 claims against the State, MDOT, and Judnic and Steucher, in their official capacities, only.

On April 27, 2012, Plaintiffs filed a Motion for Leave to File a First Amended Complaint to add claims regarding Defendants' violations of the Equal Protection Clause and the Due Process Clause of the 14th Amendment. On June 7, 2012, the district court denied Plaintiffs' Due Process claim, but allowed Plaintiffs to move forward on the Equal Protection claims against all Defendants. MDOT and the State filed a Motion for Reconsideration on June 12, 2012. On August 8, 2012, the district court reversed its prior decision and denied Plaintiffs' Equal Protection claims.

The district court only allowed Plaintiffs to amend their complaint to include the Governor of Michigan, the Honorable Rick Snyder in his official capacity in lieu of the State of Michigan, and Kirk T. Steudle in his official capacity as Director of MDOT in lieu of MDOT, as additional defendants in the case. Plaintiffs filed an amended complaint on September 5, 2012, for which only Judnic and Steucher filed an answer.

At the close of discovery, on January 18, 2013, all of Defendants filed a Motion for Summary Judgment. (Def. Mot. For SJ, RE 50, Page ID #1558-1614) Defendants argued, among other things, that Plaintiffs could not present direct or circumstantial evidence of race or gender based discrimination and that Defendants' discriminatory acts prior to November 3, 2008 were barred by the

statute of limitations.[1] The district court granted Defendants' motion on August 28, 2013. Plaintiffs timely filed a notice of appeal on September 10, 2013 with this Honorable Court.

STATEMENT OF FACTS

Ms. Foster is a black female professional engineer ("P.E.") who has a PhD in civil and environmental engineering. She has been licensed as an engineer by the State of Michigan since 1987. She is currently licensed in five states. After becoming a licensed P.E., from 1985 through 1992, Ms. Foster served as a Civil Staff Engineer with the MDOT, Assistant Design Unit Leader and finally, an MDOT Metro Region Utilities-Permits Engineer. From 1992 through 1994, Ms. Foster served the Atlanta's Department of Public Works as its Director of the Bureau of Highways and Streets. While there, Ms. Foster directed a staff of approximately 550 employees and oversaw the design, construction, and maintenance of all of Atlanta's streets and sewer systems. She left that position after the birth of her first child.

After completing her work in Atlanta, Ms. Foster returned to Michigan and established BBF Engineering. BBF Engineering was a civil and construction

[1] The district court found that it did not have to reach many of Defendants' other issues in light of the court's decision on question of whether Plaintiffs met their *prima facie* burden of going forward with direct evidence of discrimination in response to the motion (including jurisdiction over the Snyder and Steudle and the validity of Plaintiffs' damages).

engineering firm that specialized in road and bridge construction inspection/and testing, traffic and transportation engineering, utility coordination and project management. Ms. Foster was the president and principal engineer of BBF Engineering. BBF Engineering was certified as a Disadvantaged Business Enterprise ("DBE") and a Minority Enterprise.

In 1998, the FHWA named BBF Engineering as the United States Department of Transportation Minority Business Enterprise of the Year. In 2008, MDOT selected BBF Engineering as its first DBE Contractor of the Year. Prior to the advent of Steucher and Judnic, BBF Engineering's performance as a prime contractor for MDOT was exemplary.

In addition to these achievements, Ms. Foster currently serves on the Michigan State University College of Engineering's Professional Advisory Board and just completed two terms of service on the Michigan State University's Civil Engineering Alumni Advisory Board. While the district court took great pains to assert that there was no evidence of similarly situated companies being treated differently, Plaintiffs were in fact unique and indeed were a class of one. It is difficult to recognize exactly what the comparable entity would be since Plaintiffs were competing against majority owned consulting engineering firms. As for Defendants, Judnic went to work for the majority firm HNTB, who according to MDOT statistics, is the top grossing consulting engineering firm. Steucher went to

work for Iafrate Construction, which is in the top ten of MDOT construction firms for billing. In contrast, BBF Engineering is now basically defunct.

Plaintiffs' story is simple. Plaintiffs successfully served the needs of MDOT from 1997 until roughly 2010. In October 2003, MDOT hired Defendant Judnic. Several years after Judnic's arrival, beginning in approximately 2005, MDOT's relationship with Plaintiffs changed. More importantly, as Mr. Cedric Dargin testified under oath, two other things changed. One, MDOT moved into the Southeast Michigan Region with many more major contracts and projects; two, Judnic replaced Mr. Dargin as the Detroit Transportation Service Center ("TSC") region engineer.

> Q. Do you believe that BBF has been black-listed?
> A. Well, I guess what I believe is that they've had a difficult time securing work. That's what I know.
> ****
> Q. A difficult time securing work since you left?
> A. Actually, from the very beginning, to tell the truth about it.
> ****
> Q. And why do you think they've had a difficult time securing work?
> A. Well, I guess when they first started out, they were only getting work from my projects, and the reason for that was back – back around '97 or so, to tell the truth about it, when I would advertise, they were the only ones that would respond, because at that time the other consultants didn't want to work in Detroit, and that's where the bulk of my work was.
> ****
> Q. And so when other consultants wanted to come to

> Detroit, they started to get pushed out?
> A. They didn't want to start to come and do work in Detroit until some of the bigger projects started going in.
> ****
> Q. And then BBF just got pushed out?
> A. Well, you see –
> ****
> THE WITNESS: Back in that time period, BBF was – provided as-need service, or provided technical support, and they were not going for what we call full CE, acting as a consultant project engineer. They were supplying what we generally call rent-a-techs at the time, and during those years I didn't – I didn't send out any full CE contracts.
> ****
> Q. Did you ever come to believe that BBF was capable of performing full CE services?
> A. Yes.
> ****
> (C. Dargin Dep. Tr. RE 58-2, Page ID #3283 and 3284).

Plaintiffs went from receiving multimillion dollar MDOT contracts as a prime contractor to being completely shut out. (M. Caldwell Dep. Tr. RE 58-2, Page ID #3225) (Foster and her people were no longer around).

1. The FHWA's Investigation Confirms Defendants' Discrimination Against Plaintiffs.

In June 2010, an MDOT manager, Pat Collins emailed Ms. Foster and advised Ms. Foster that she had been following Plaintiffs' saga and that Plaintiffs should look at Title VI, 42 U.S.C. § 2000d. (E-mail from Pat Collins, RE 58-2,

Page ID #3339). (Foster Dep. Tr., RE 502, Page ID #1661).[2] Thereafter, Plaintiffs submitted eleven (11) Title VI Complaints to the FHWA alleging discrimination and disparate treatment by Defendants. Plaintiffs subsequently submitted two additional complaints to the FHWA on retaliation. The FHWA also accepted these last two complaints. The FHWA's Civil Rights Program Manager for the Michigan Division, Mary Finch, conducted a comprehensive investigation in conjunction with MDOT's EEO Office and Title VI Program Specialist, Cheryl Hudson, which culminated in a report, hereinafter the "Civil Rights Report." (FHWA Inv. Report, RE 58-2, Page ID #3160-3167). The Civil Rights Report concluded that Plaintiffs were discriminated against and had been subjected to disparate treatment by MDOT and its employees. The Civil Rights Report also recommended that MDOT monitor and improve its process for awarding contracts, stating as follows:

> a. **The preponderance of evidence shows that Mr. Judnic appears to have taken actions based on Ms. Foster's sex (gender) (female).** By making statements about her gender and how much money she was being awarded on a contract. Then acting later on her contracts

[2] The district court took great pains in its opinion to dismiss this initial development as inconsequential, even though it triggered Plaintiffs' action. Moreover, it came again from an MDOT management employee. The district court appears to maintain that unless the email read: "you are being discriminated against you "stupid" "n_____," "b_____,"" it was meaningless. Unfortunately, the standard of review adopted in this case by the district court basically reduces a valid claim to finding the bullet casing and the smoking gun in the form of language that is as caustic as that set forth above.

> to "suggest" that they go forward as contracts that could be cut back on.
>
> b. The preponderance of evidence shows that MDOT offices in Lansing were sending mixed messages about what they wanted to accomplish by re-advertising parts of contracts. The evidence shows that Mr. Judnic thought he was supposed to be obtaining more diversity in his contracting opportunities and **he chose to break out a contract that was already awarded to a DBE.** The result was that a large white owned firm was awarded the second half of the contract.
>
> c. **The preponderance of the evidences shows that MDOT (Mr. Mark Steucher) willfully changed the scores on the sheet to remove BBF Engineering from the top three so** the firm would not be considered. It is unclear as to motive. The evidence shows that the Consultant Selection Team is "lead" by the Project Engineer and normally has a majority of persons who work for the Project Engineer on the team. The result is that the team could be biased by the Project Engineer in their scoring etc. **The consultation selection process used although non-discriminatory on its face resulted in disparate treatment to Ms. Foster**. (sic) (Emphasis added).
>
> (FHWA Inv. Report, RE 58-2, Page ID #3160-3167).[3]

1. Defendant Judnic discriminated against Plaintiffs and in so doing, denied Plaintiffs' substantive Due Process and Equal Protection.

Judnic was employed as MDOT's Metro Region Senior Delivery Engineer. In that capacity, Judnic reviewed and awarded MDOT contracts. Marilyn

[3] Again, despite all of the effort that went into the investigation and report—none which was the subject of an evidentiary hearing or a deposition—the district court dismissed the report as unreliable based upon unreferenced standards of review purportedly adopted by this Circuit. Certainly, those standards of review assume some measure of diligence by the reviewing court before a decision is made. *Bohn Aluminium & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962).

Caldwell witnessed his declaration that "[N]o woman should be making that kind of money," in reference to Plaintiffs. Ms. Caldwell, an MDOT clerical worker, who was Judnic's executive secretary, confirmed these facts in her deposition, even though her job had been threatened. (M. Caldwell Dep. Tr., RE 58-2, Page ID #3215-3232). Contrary to the district court's assertions, Caldwell was not a mere typist. (M. Caldwell Dep. Tr., RE 58-2, Page ID #3220). Moreover, it was clear at her deposition that Ms. Caldwell's job had been threatened by MDOT. (M. Caldwell Dep. Tr., RE 58-2, Page ID #3219-3220).

a. Contract 2006-0490

In June 2006, Judnic notified Plaintiffs that MDOT was reducing the face amount of an as needed contract that had been previously awarded to Plaintiffs (Contract 2006-0490 originally, awarded at $4.2 million) and rebidding a portion of the contract, which encapsulated work for the M-10 highway in Southeastern Michigan. This was one of the first major jobs in Southeast Michigan that proceeded after Judnic replaced Mr. Dargin.

Judnic solicited new bids for this contract and awarded half of Plaintiffs' original Contract 2006-0490 to a non-minority firm. While Judnic's actions resulted in a $2 million dollar loss for Plaintiffs; more importantly, this change eliminated one year of future employment opportunity for Plaintiffs and forestalled

important opportunities to develop qualification skills for Plaintiffs on future projects and further train staff.

b. Contract 2008-0044

Less than a year later, Judnic did the same thing again, on another contract. MDOT awarded BBF Engineering Contract 2008-0044 in October 2007. Again, Judnic advised his subordinate project engineer, Jason Voigt, to cut BBF Engineering's contract. Subsequently, BBF Engineering was again asked to cut its contract in half by project engineer Mr. Voigt, who had been supervised by Judnic. The orchestrated conspiracy, to deprive Plaintiffs of their constitutional rights and to discriminate against them, intentionally, in violation of the United States Constitution including, but not limited to, the 14th Amendment and the Equal Protection Clause is demonstrated by Judnic and Mr. Voigt's actions. Defendants understood that the process for selecting consultants was selective. A loss of a small number of points in the review process resulted in loss opportunities across the board.

c. Leased Vehicles

Judnic's pattern of discrimination against BBF Engineering continued beyond the contracts. In 2010, Judnic changed one of the MDOT contracting requirements to mandate that consultants have at least five (5) leased vehicles. Plaintiffs had never seen this requirement in any MDOT RFP. Since 1998,

Plaintiffs had invoiced on the job mileage as a direct cost for its staff working on MDOT projects. Plaintiffs' employees drove their personal vehicles to the worksite, and they were reimbursed for an amount equivalent to only their on-the-job mileage as a direct cost.

Judnic was aware that such a change affected only Plaintiffs. This requirement excluded Plaintiffs from the Southfield Freeway project, among other major projects (e.g., the Gateway Project). Small and minority vendors simply could not make this type of capital investment to maintain and amortize the costs of a fleet of vehicles. Judnic intentionally changed the MDOT contracting requirements so that a majority firm would be selected. Judnic was aware that Plaintiffs did not, and could not, lease a fleet of vehicles. Judnic was also aware that the requirement of leasing vehicles did not impact on the contracted work. However, Judnic changed the requirements that contractors were required to lease a fleet of vehicles, knowing that such a change only affected on BBF Engineering. Judnic's deposition confirms this:

> Q. Do you recall developing a Scope of Services and Request for Proposals where you required subcontractors to include a fleet of vehicles in their response, of a minimum of five vehicles?
> A. Yes.
> ***
> Q. Were there any other RFPs that contained this requirement?
> A. Not to my knowledge.
> ***

Q. Do you know who ended up winning this, or being awarded this contract?
A. The prime consultant?
Q. Yes.
A. HNTB.
Q. And are they still working on this project?
A. I believe they are still.

***

Q. And so what is the total contract award amount now for that contract, if you know.
A. It's something like five-million dollars.

(Judnic Dep. Tr., RE 58-2, Page ID #3206-3207).

Of all of the prequalified contractors located within the geographical proximity to be able to submit a proposal on this project, Plaintiffs were the only company that was eliminated on account of this bizarre new requirement to have five leased vehicles. The contract ultimately was awarded to HNTB, a majority contractor, for whom Judnic now works and drives a company vehicle. (Judnic Dep. Tr., RE 58-2, Page ID #3179).

d. Office Technician Training

Judnic further discriminatorily required additional training for Plaintiffs' employees. Judnic's direct report Tia Klein (who became successor project manager for Judnic) advised Plaintiffs that their employees were required to have office technician training, offered by a majority firm, every two years even though the regular schedule was every five (5) years. There was no MDOT documentation requiring such training. This was yet, another unilateral decision targeting Plaintiffs. The district court dismissed this targeted action as mere

business judgment. However, no other contractor was subjected to it. Judnic's testimony confirms this:

> Q. Is there a requirement anywhere in the MDOT guidelines for policies for an office technician to receive recertification every five years?
> A. I don't know what the policy is.
> Q. Have you ever seen such a policy?
> A. I don't remember seeing a policy.
> (Judnic Dep. Tr., RE 58-2, Page ID #3207).

e. Principal Billing

Judnic discriminatorily restricted Plaintiffs from billing Ms. Foster as a principal (i.e., Ms. Foster could not bill for her work on projects). This conundrum is now being used as a hammer against BBF Engineering in MDOT's audit. Moreover, Judnic refused to approve invoices for which Plaintiffs would be paid as a subcontractor. Judnic's deposition confirms this:

> Q. Even though the Complaint states that you, in fact, did not take any steps to pursue BBF's non-payment, even though you were responsible for approving the invoices for URS. Do you recall that issue?
> A. I recall the issue.
> (Judnic Dep. Tr., RE 58-2, Page ID #3205).

There is not one instance cited by Judnic or the other Defendants where another contractor's invoices were rejected in this manner. This new Judnic policy was also subsequently changed. However, neither MDOT, nor Judnic advised Ms. Foster of the change. As a result, Ms. Foster could not directly bill and had to

recoup her costs as overhead, which is being held against her in the audit. Again, Plaintiffs bore the costs of Judnic's discrimination.

f. Love Charles

Finally, Judnic went out of his way to drive one of Plaintiffs' subcontractors, Love Charles, out of Plaintiffs' employ, claiming incompetence. This claim was belied by MDOT's subsequent engagement of Mr. Charles for the same type of work. Judnic engaged in an orchestrated scheme to remove Mr. Charles from Plaintiffs' employment to create a negative impact on BBF Engineering's ability to compete.

Judnic would not allow Mr. Charles to attend numerous DBE Technical Assistance meetings so that Plaintiffs would be available to assist other DBEs. (Charles Dep. Tr., RE 58-2, Page ID #3234-3454). Mr. Charles was the office technician assigned to Judnic when Judnic received his project engineer certification in 2006. In December 2008, Mr. Charles retired from Plaintiffs' company because of the harassment by Judnic. Mr. Charles testified that the attack was pre-mediated and calculated to destroy Plaintiffs. (Charles Dep. Tr., RE 58-2, Page ID #3234-3454). Defendants never refuted this testimony. Instead, the district court, again, cavalierly, mischaracterized the testimony and dismissed it as Mr. Charles being chastised for poor performance––that was not the record. Mr.

Charles testified that Judnic orchestrated a plan to force him out in order to hamper and destroy Plaintiffs' operations:

> Q. So you think Mr. Judnic was out to get you?
> A. They needed a – okay. Read what this is saying. If you go through all this, what he gave to me, what – you read it into it. You read into it what all what is being said right here. If this was not a setup, I've never seen one.
>
> ***
>
> Q. And you're referring to the –
> A. **I told Bellandra time and time again, I said: When they get rid of me, you're through.** I told her that. I said: I'm the key. I'm the key, and you're the wheel that made everything turn right here, because I had the most experience out of all the guys that she hired. She got more points from me than she did anybody.
>
> ***
>
> Q. And when you're talking about points, you're talking about the process of evaluating consultants and then –
> A. How they got hired, how they got picked for different projects. (Emphasis added)

(Charles Dep. Tr., RE 58-2, Page ID #3251).

2. Steucher Discriminated Against Plaintiffs and denied Plaintiffs' Due Process and Equal Protection rights.

a. Under Contract CS63052-JN72404

Steucher, like Judnic oversaw work on MDOT contracts. Steucher is also guilty of discriminating against Plaintiffs. Greg Johnson of MDOT, identified both Defendants as culpable, stating "[T]he two folks identified as culpable in this

incident have both left the department." (E-mail to Gregory Johnson, RE 58-3, Page ID #3472), but the district court found this admission to be meaningless.

In May 2009, Plaintiffs bid on a contract advertised by Steucher's Oakland TSC. Plaintiffs received the highest score in the initial evaluation by the members of the scoring team who originally scored the applications which included Mr. Dargin. Steucher was not there for this initial scoring. When he returned, he walked in, reviewed the preliminary scores of his panel members and stated, "Oh no, I hate her" and **rescored** the evaluation on this contract not only to remove Plaintiffs from the top spot but from the top three scores, which prevented Plaintiffs from receiving this contract:

> Q. So the preliminary ranking was not the final ranking?
> A. That's what happened. The preliminary ranking did change, yes.
> ****
> Q. So how did the preliminary ranking come to change?
> A. The preliminary ranking changed after Mark returned from his meeting.
> ****
> Q. How did – who changed it?
> A. Well, Mark came back. He asked for an update and where we stood, and the team said that we had –we had finished all the evaluations, and we had the consultants arranged in order, you know, with the number one on top and then the others down, and Mark reviewed it, and he didn't like the order and he changed it.
> ****

Q. Just unilaterally?
A. Yes. Yes, right.

****

Q. Do you recall him saying that – when he saw BBF was number one, oh, no, I hate her, referring to Miss Foster?
A. That's what he said.

****

Q. And you clearly recall that?
A. Yes.

****

Q. And then at that point he proceeded to change the ranking and the scores that the three of you had developed?
A. That's correct. He did.

(C. Dargin Dep. Tr., RE 58-2, Page ID #3281-3282)

Steucher also did not recall in his many selection team panels selecting even one DBE as a prime consultant.

Q. Have you ever been on a selection team where the team selected a DBE as a prime consultant?
A. I simply don't recall.

(M. Steucher Dep. Tr., RE 58-5, Page ID #3574-3575).

When Plaintiffs complained, MDOT removed Steucher from further selection teams due to his discriminatory actions. However, MDOT did not reverse his discriminatory actions and award the contract to Plaintiffs or at a minimum rescore the evaluations. No action was taken to remedy the harm wrought on Plaintiffs by Steucher's discriminatory acts. These facts are unrefuted. The district court chose to parse the pronoun "her" as a neutral word not relating to sex or race. The facts were that Steucher had no relationship with

Foster. There was no basis for personal animus, his only motivation was discriminating against her, Bellandra Foster—the only black woman engineer doing this type of work for MDOT.

3. Defendants Steudle, in his capacity as Director of MDOT and the Honorable Rick Snyder, in his capacity as Governor for the State Discriminated Against Plaintiffs and denied Plaintiffs' Due Process and Equal Protection rights.

Governor Snyder plans, directs, and oversees MDOT. Governor Snyder appointed Steudle. Both Governor Snyder and Defendant Steudle are "connected to" or "have responsibility for" MDOT. *Floyd v. County of Kent,* 454 Fed. Appx. 493, 499 (6th Cir. 2012). Governor Snyder and Steudle knew about discriminatory actions within the MDOT. Indeed, the FHWA Michigan Division's October 18, 2011, correspondence to Steudle advised him that after a complete investigation of MDOT's violations of Title VI of the Civil Rights Act, "Ms. Foster was not treated fairly in the procurement process by MDOT" and further, "[w]e encourage you to… work with Ms. Foster on settlement of her claims." (October 18, 2011 Letter to Steudle, RE 58-3, Page ID #3465-3467). The correspondence admonishes MDOT to repair its department, "we are requesting that you form a process improvement team aimed at strengthening MDOT's monitoring of the consulting/service contract award process," and that a Title VI coordinator be included on the team. Ultimately, even though the Civil Rights Report was based upon an independent investigation, without a hearing or any

counter-vailing evidence, the district court deemed it unreliable and the Steudle's admissions as meaningless banter.

4. Defendants' other discriminatory actions resulted in a denial of Plaintiffs' due process and equal protection rights. Requests for debriefings.

On April 8, 2009, Plaintiffs requested debriefing meetings with Judnic to discuss Plaintiffs' concern about MDOT's discrimination. (Foster Dep. Tr., RE 50-3, Page ID #1635-1636). MDOT had an established policy of holding debriefing meetings and regularly met with majority contractors to discuss scoring, evaluations and related concerns. (Foster Dep. Tr., RE 50-3, Page ID #1636). These meetings were necessary to ensure a contractor's continued improvement on MDOT work, which would ultimately result in more awarded contracts. Judnic refused to meet with Plaintiffs. Finally, when Plaintiffs were able to get Defendant Judnic to agree to meeting, he did not show up, and instead he sent a subordinate or stated he would only conduct telephonic meetings with Plaintiffs. Moreover, while Contract 2008-0044 ended on December 31, 2009, Plaintiffs did not receive an MDOT evaluation for this contract until June 2010. The failure to provide Plaintiffs with these qualitative meetings had a direct impact on Plaintiffs' ability to compete.

5. Not only have Defendants also retaliated against Plaintiffs.

Exactly one month after Plaintiffs filed Title VI complaints against MDOT in July of 2010, MDOT initiated a comprehensive financial inquisition of Plaintiffs. (MDOT Audit, RE 58-2, Page ID #3329-3330). The audit verifies that it was a witch-hunt. For example, MDOT proposed adjustments contain a notation for **"Slam Dunk."** (Audit List, RE 58-2, Page ID #3332). MDOT requested that BBF Engineering submit original documentation ("details, not summaries"), and overhead rate computations, tracking back to 1999. Defendants intended to make the audit vindictive. Defendants criticized Plaintiffs' attempts to respond to the audit, by asserting, "Look at originals. Compare to copies. Do we trust originals…" (Commission Audits, RE 58-4, Page ID #3493). Defendants were, and are, systematically retaliating against Plaintiffs' in violation of the Michigan's Whistleblowers' Protection Act, MCL § 15.361 *et seq*.

6. Results of Defendants' discrimination and denial of Due Process and Equal Protection rights.

Since 2007, Plaintiffs have bid on over thirty (30) contracts or segments of contracts and have been selected as a prime for only two (2) of them (Contracts 2008-0044 and 2008-0064-3), both which are the subject of complaints. (Amended Comp., RE 42, Page ID #703-732). The district court dismissed this fact with impunity because the former DBE of the year could not expect to win every contract. However, under Mr. Dargin's regime Plaintiffs were winning their fair

share; it was Judnic's ascension and orchestrated discrimination that moved Plaintiffs to oblivion. See pages 18 and 19, *supra*.

SUMMARY OF ARGUMENT

The following arguments will be addressed below:

February 6, 2012 Order

1. The district court erred in its February 6, 2012 order dismissing all of Plaintiffs' Title VI claims by concluding that suing Steucher and Judnic in their official capacity is redundant, because the State and MDOT were already Defendants in this case. The district court, subsequently changed course, and then summarily dismissed all Title VI claims against the State and MDOT, ignoring the evidence of race discrimination and further, finding that Title VI did not encompass sex or gender discrimination. The district court ignored 42 U.S.C. § 2000d-7(a).

2. The district court erred by dismissing Plaintiffs' Title VI retaliation claim by concluding that Defendants were "unaware" Plaintiffs' FHWA-filed complaints. (February 6, 2012 Order, RE 21, Page ID #427). The district court ignored emails to the contrary where Defendants took adverse action and concluded that there was no causal link between Plaintiffs' FHWA complaints and MDOT's cessation of awarded contracts to Plaintiffs.

June 7, 2012 Order

3. The district court erred in its June 7, 2012 order by dismissing Plaintiffs' violation of due process claims under the Fourteenth Amendment, ignoring that but for MDOT's deliberate actions (including, intentionally divesting Plaintiffs from contracts by manipulating scores), Plaintiffs would have been awarded contracts.

August 22, 2012 Order

4. The district court erred in its August 22, 2012 order by dismissing Plaintiffs' violation of equal protection claims even though the district court previously adjudged in its June 6, 2012 order that Plaintiffs could proceed and despite existence of evidence that MDOT intentionally discriminated against Plaintiffs and the district court's shifting sands view on the existence of an Equal Protection Claim.

August 12, 2013 Order

5. The district court erred in its August 12, 2013 order by entering summary judgment in favor of the Defendants. Plaintiffs offered ample evidence supporting a *prima facie* case of race and gender discrimination. The district court correctly held that Judnic and Steucher took adverse actions against Plaintiffs. Nevertheless, the district court, applied an inappropriate legal standard, engaged in prohibited fact finding, and drew inferences against Plaintiffs by summarily

determining that Plaintiffs failed to establish that Judnic and Steucher never treated a non-protected similarly situated person or entity differently even though they admittedly work for majority contractors who benefitted from their acts of discrimination against BBF Engineering.

The record is replete with incidents confirming that Judnic and Steucher treated Plaintiffs differently than similarly situated contractors, because of race and gender. Judnic and Steucher: (1) unilaterally divested Plaintiffs of an awarded contract (Contract 2006-0490) in favor of a majority firm; (2) falsely advised Plaintiffs that office technician training was required on a more aggressive schedule for Plaintiffs but not for majority owned firms; (3) unilaterally reduced contract scores against Plaintiffs (CS63052-JN72404) for which the MDOT deputy engineer for the Metropolitan Detroit Region, Paul Adjeba confirmed that such action was intentionally discriminatory as majority contractors were treated differently than Plaintiffs; (4) refused to meet with Plaintiffs to review, evaluate and explain scoring, while continuing to meet with majority owned firms; (5) instituted a new requirement of leased vehicles in its requests for proposals knowing that such inconsequential requirement would only affect Plaintiffs; (6) instituted a new requirement that principals could not invoice, knowing that such an inconsequential requirement would only affect Plaintiffs; and (7) retaliation by being black-listed from receiving prime contracts.

Defendants did not take such actions against similarly situated majority contractors. The FHWA investigation of MDOT confirmed Defendants discrimination against Plaintiffs. The district court ignored this record evidence and made inappropriate factual findings in entering summary judgment without even an evidentiary hearing. Based upon its findings, the district court declined to continue further on Plaintiffs' discrimination claims.

6. The district court erred in granting summary judgment against Plaintiffs' WPA claims by patently ignoring that Defendants failed to specifically plead the affirmative defense that Plaintiffs' WPA claims were barred by the statute of limitations for which such defense is waived. Moreover, the WPA's statute of limitations runs from the date of termination, which has not yet occurred. The district court also erred in concluding that Defendants were not protected under WPA. And, again the district court impermissibly concluded that there was insufficient factual evidence to support a WPA claim.

LAW AND ARGUMENT

A. Initial burden on the Court and the moving party

It is well-settled that this Court reviews an order granting summary judgment, *de novo* without deference to the district court's decision. See *Lake v. Metropolitan Life Ins. Co.*, 73 F.3d 1372, 1376 (6th Cir. 1995). A plaintiff is not required to "win" a case at the summary judgment stage, but this is exactly what

the district court's opinion mandated. On a motion for summary judgment, the issue does turn on what a court thinks about the evidence or the credibility of evidence; it is whether a reasonable juror could find that there is a genuine issue of material fact. Fed. R. Civ. P. 56. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-255; 106 S.Ct. 2505; 91 L.Ed.2d 202 (6th Cir. 1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether [she] is ruling on a motion for summary judgment or for a directed verdict." *Anderson*, 477 U.S. at 255. The district court totally abrogated this standard of review.

1. The moving party carries the initial burden of informing both this Court and the nonmovant of the full basis for its dispositive motion; Appellees have failed.

Plaintiffs will not belabor this point. It is already set forth in the opposition to summary judgment. (Pl Brief in Opp. to SJ, RE 58, Page ID #3099-3156). The district court erred when it argued that there was an absence of evidence to support Plaintiffs' case. (August 12, 2013 Order, RE 67, Page ID #3822-3838). The district court painstakingly analyzed Plaintiffs' evidence, but was silent on any parity of the defenses offered by Defendants. The district court arbitrarily watered down all the evidence that supported Plaintiffs' claims. A movant who fails to file an adequate record, to show that no genuine issue existed as to any element of any claim of the non-movant, has failed it initial burden under the Rule 56 standard.

Adickes v. S.H. Kress & Co., 398 U.S. 144; 90 S. Ct. 1598; 26 L. Ed. 2d 142 (1970). Fed. R. Civ. P. 56, as amended, makes it clear that a moving party must identify each **claim or defense** on which summary judgment is sought, and support it with facts in the record. See Fed. R. Civ. P. 56(C)(1), which reads:

> ***Supporting Factual Positions:*** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declaration, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials...

Defendants succeeded at neither. Therefore, all orders in this case should be reversed.

This Court has repeatedly held that the establishment of a *prima facie* case of discrimination and/or retaliation under Title VII is a burden that is not onerous, and one that is "easily met." *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987). It is a preliminary issue, and merely establishes an initial presumption of discrimination. The presumption dissipates when a defendant manages to articulate -- with admissible evidence -- a "legitimate, nondiscriminatory reasons" for its conduct, and then the court is required to consider the issue of pretext. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07;113 S.Ct. 2742;125 L.Ed.2d 407 (1993). This was not done here. Here, the district court improperly imposed the burden of Fed. R. Civ. P. 56 on Plaintiffs. "Plaintiffs Foster has not met her

burden in bringing forth evidence… Plaintiffs' discrimination claims cannot survive summary judgment." (August 12, 2013 Order, RE 67, Page ID# 3807). The district court ignored the admonitions of this Court in *Wrenn, supra*.

2. The District Court erred in failing to properly apply the burdens of proof under Fed. R. Civ. P. 56 and controlling law.

It is rather difficult, if not impossible, to win an entire case in a summary judgment brief. This is precisely why a court is exhorted not to serve as fact-finder under the guise of summary judgment. See also, *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 120 S. Ct. 2097, 147 LEd.2d 105 (2000) (directed verdict motions, liked summary judgment, "the court should review all the evidence in the record…[T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence…and must disregard all evidence favorable to the moving party that the jury is **not required to believe.**") (*Id.*, Emphasis added).

In this case, the district court systematically watered down any probative evidence cited by Plaintiffs that raised a genuine issue of material fact on every claim. Most notably, when the court rendered its version of the facts (taken mostly from Defendants' briefs), it ignored or so diluted the countervailing evidence offered by Plaintiffs that its decision became a foregone conclusion without any application of the law.

3. District Court confirmed that Plaintiffs' established the first three prongs of a *prima facie* case of discrimination.

The district court in its August 12, 2013 order confirmed that Plaintiffs met the first three prongs of the *prima facie* case in contravention of its earlier February 6, 2012 order, finding otherwise. (August 12, 2013 order, RE 67, Page ID #3836).

For the purposes of reversing the February 6, 2012 order, it is undisputed that Plaintiffs were a member of a protected class, and were both qualified, and experienced.

It is also undisputed that Defendants' actions against Plaintiffs were materially adverse. The district court's February 6, 2012 order asserted that "Plaintiffs have not shown that there was any racially-motivated discrimination." This finding was later altered by the district court's August 12, 2013 Order which contravened this earlier finding. (February 6, 2012 Order, RE 21, Page ID #425). The August 22, 2012 order narrowed but presumptively attacked the alleged deficiencies in Plaintiff's evidence, "Plaintiffs have not brought forth evidence that satisfies the similarly-situated element of a *prima facie* case of discrimination." (August 12, 2013 Order, RE 67, Page ID #3838).

In fact, Plaintiffs easily established this prong. This Court stated in *Ercegovich v. Goodyear Tire & Rubber Co*., 154 F.3d 344, 352 (6th Cir.1998): "[T]he plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered

"similarly-situated," rather, as this Court has held in *Pierce*, the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in "all of the relevant aspects." "Which aspects are to be considered depends on the circumstances of the individual case." *Chattman v. Toho Tenax Am., Inc.*, 686 F. 3d 339, 348 (6th Cir. 2012).

It did not matter in *Ercegovich, supra*, that the plaintiff did not perform the same job activity as those employees to which he sought to compare himself. It was sufficient that the positions held by all three employees were related to human resources functions and all three positions were eliminated before the other two employees were transferred.

In *Wolff v. Automobile Club*, 194 Mich. App. 6, 12; 486 N.W. 2d 75, (1992), the Michigan Court of Appeals concluded that employees that have different job titles were comparable because of the similarity of job responsibilities, despite the fact that one group worked regular hours, received a salary, and did not have to recruit customers, and the other group was paid on a commission basis, had no set schedule, and had to solicit customers. *Id.*

Additionally, in *Jackson v. FedEx Corp. Servs., Inc.*, 518 F.3d 388 (6th Cir. 2008), this Court reversed a summary judgment decision because the trial court had misapplied the "similarly situated" requirement by requiring the plaintiff to compare himself with other employees who had the same narrow job functions,

reasoning that the trial court's standard reduced the potential comparables to a "relatively small" group and deprived Jackson of a remedy. Here, the district court ignored the group at issue, consulting engineers in the Detroit TSC and the Oakland TSC, where Plaintiffs were the only ones who were subjected to disparate treatment.

The district court in its August 12, 2013 order held that these aspects of similarly situated are that: (1) males or nonprotected class women must have dealt with the same supervisor; (2) have been subject to the same standards; and (3) engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. (August 12, 2013 Order, RE 67, Page ID #3837). Plaintiffs met this standard, even though it is the wrong standard. In this case, the standard should have been applied to consulting engineers in the Detroit TSC. Plaintiffs were competing with other contractors who were primarily majority firms, including URS Corporation ("URS"); Great Lakes Engineering; Wade Trim; HNTB and Fishbeck, Thompson, Carr & Huber, Inc. ("Fishbeck Thompson"); who benefitted from the discriminatory actions. These firms were substantially similar professional consulting engineering firms, who received opportunities that were denied to Plaintiffs.

4. Plaintiffs have established the fourth prong of a *prima facie* case of discrimination for Judnic.

Plaintiffs were similarly situated as the majority contractors in the MDOT contracting process, but were treated differently by Judnic because of race and sex.

a. Same Supervisor.

Judnic was the same "supervisor" (i.e., decision maker) on MDOT contracts for which Plaintiffs, as well as majority contractors, applied. Judnic was directly involved in the selection of as-needed contracts even though at the first motion hearing in this case, Defendants argued that Judnic and Steucher were powerless engineers.

> Q. Were you part of the Request for Proposals while you were at MDOT?
> A. For 37795, I had rolled out three different contracts… yes, I was involved with the selection and the management of those three different as needed contracts.
> (V. Judnic Dep. Tr., RE 58-2, Page ID #3179).
>
> ***
>
> Q. What would, if you know, trigger a CSRT person being on the team, or deciding to be on the team?
> A. What I recall, which I'm not sure if it's changed, but over a million-dollar contract for professional services would require a CSRT member at the time, at most of the time I was doing it. CSRT wasn't always in effect when I was at MDOT.
> (V. Judnic Dep. Tr., RE 58-2, Page ID #3187).
>
> ***
>
> Q. Where there occasions where you were on teams that evaluated response to Requests for Proposals that were submitted by BBF?

A. Yes.
Q. Do you recall how many occasions?
A. I am guessing three…
(V. Judnic Dep. Tr., RE 58-2, Page ID #3187).

b. Same standards.

MDOT's own "Consultant Prequalification Application" which required of **all** contractors to submit and be MDOT approved, prior to **any** RFP submission. (MDOT Prequal Appl., RE 53-7, Page ID #2921). MDOT would not have accepted Plaintiffs' RFP for any contract – **unless** – Plaintiffs met the same gold standard as the majority contractors. Indeed, MDOT bulky ninety-one (91) page prequalification application clearly asserts, "Consultants interested in contracting with the Michigan Department of Transportation (MDOT) in the classifications listed in this application package must be prequalified as a prerequisite to submitting proposals for contracting." (MDOT Prequal Appl. RE 53-7, Page ID #2921). Plaintiffs along with their majority counterparts were MDOT prequalified. However, unlike Plaintiffs' majority counterparts, Defendants rejected Plaintiffs because of race and sex.

The evaluations and meetings that Defendants and the district court now dismiss created a benchmark for scores for future work. When Plaintiffs were scored low and denied explanations as to why, it was destructive.

c. Same conduct.

Plaintiffs' and fellow majority contractors were, engaged in the same conduct – submitting bids for work with MDOT. Judnic outlined in his deposition MDOT's contracting process: (See V. Judnic Dep. Tr., RE 58-2, Page ID #3186).

Even more on point on the "same conduct" are the actual, MDOT scoring sheets. MDOT's contracting process utilized a Central Selection Review Team Action Sheet ("CSRT") for which all contractors submitted proposals and were scored. (CSRT, RE 52-5, Page ID #2676). Further, each contractor was individually scored on MDOT's standardized "Score Sheet." (CSRT, RE 52-5, Page ID #2676). These are the score sheets for which Steucher discriminatorily changed to disqualify Plaintiffs. These score sheets judge all submitting contractors "conduct" in same six categories: understanding of service, qualification of team, past performance, quality assurance/quality control process, location, and presentation. (CSRT, RE 52-5, Page ID #2676).

Plaintiffs have established the fourth prong of a *prima facie* case of discrimination that they were "similarly situated as the majority contractors.

5. Plaintiffs have established the fourth prong of a *prima facie* case against Steucher.

Plaintiffs were similarly situated as the majority contractors in the MDOT contracting process (e.g., URS, Wade Trim, Fishbeck, Thompson, HNTB and

Great Lakes Engineering), but were treated differently by Steucher because of race and sex.

a. Same supervisor.

Steucher unilaterally altered Plaintiffs' score sheet after ascertaining that Plaintiffs had achieved the highest score for contract. Defendants do not dispute this. Steucher was the same "supervisor" (i.e., decision maker for MDOT contracts) and was directly involved in the selection of contracts for which Plaintiffs bid in competition with majority contractors. Steucher in his deposition also confirmed the process: See (M. Steucher Dep. Tr., RE 58-5, Page ID #3567-3568).

b. Same standards.

And, again, discussed, *supra,* all contractors submitted MDOT's prequalification application. No contractor who was not prequalified was allowed to submit bids on MDOT contracts.

c. Same conduct.

As Judnic outlined in his deposition, discussed, *supra*, all RFP's were listed and scored on MDOT's standardized score sheet. (CSRT RE 52-5, Page ID# 2679).

Clearly Plaintiffs' were "similarly situated" as the majority contractors. A jury could easily so find this from the record. The district court ignored these

facts. Despite Plaintiffs established *prima facie* case of discrimination, the district court declined to address Defendants' alleged a legitimate non-discriminatory reasons for its actions and Defendants' other weak defenses. (February 6, 2012 Order, RE 21, Page ID #425).

B. Title VI does prohibit discrimination based on gender and sex.

Moreover, the projects at issue were FHWA projects. Therefore, they are governed by 23 U.S.C. § 324, which bars discrimination based upon sex and gender in FHWA projects. The only case on this subject confirms this fact. Defendants are recipients of federal highway monies yet they are claiming they can discriminate against female contractors. It is both preposterous, and offensive, to think that Judnic and Steucher can intentionally discriminate against Plaintiffs and violate Ms. Foster's equal protection rights and not be liable.

Defendants originally proffered 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 (3rd Cir. 2009) and *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1396 (11th Cir. 1997). The third case−−*Bartley v. U.S. Dept. of Army*, 221 F. Supp. 2d 934, 939 (C.D. IL 2002) −−is not binding on this Court.

Plaintiffs bid on contracts involving FHWA funds; therefore, the FHWA may review how bids are awarded. *City of Cleveland v. Ohio*, 508 F.3d 827, 840-841 (6th Cir. Ohio 2007). More importantly, the district court and Defendants ignored 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 available to a discriminatee.[4]

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

> Of the other 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.)

[4] Congressional intent to prohibit sex and gender discrimination runs rampant 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.

Plaintiffs were discriminated against on the basis of race and gender. They are protected by 42 U.S.C. § 2000d in conjunction with 23 U.S.C. § 324. The district court simply ignored the law. And, Defendants' failed to provide any non-discriminatory reasons for their actions.

The district court ignored the foregoing case law while attacking Plaintiffs' evidence, "[T]here is nothing in the Complaint, other than the fact that Ms. Foster is black and the bare assertions of racial discrimination, which suggests or supports any factual basis for a claim of race-based motives for the actions taken by Defendants." (February 6, 2012 Order, RE 21, Page ID #415-436). The district court declined to continue further with an analysis of Plaintiffs' gender discrimination claims, despite the Civil Rights report confirming that, "the evidence shows that based on Ms. Foster's sex (gender) (female) an MDOT employee sent forward her contract to Lansing to have funds removed from it." (FHWA Inv. Report, RE 58-2, Page ID #3160-3167). Accordingly, the district court's order on this issue must be reversed and remanded.

The district court acknowledged the dearth of case law prohibiting gender discrimination under Title VI. (February 6, 2012 Order, RE 21, Page ID #424). However, in relying upon uncited cases of the Third and Eleventh circuits, the district court concluded that Plaintiffs could not assert a Title VI sex discrimination claim. However, Plaintiffs can clearly assert a gender discrimination claim under

Title VI, as the Civil Rights Equalization statute, 42 U.S.C. § 2000d-7(a)(1) provides:

> (a) **General provision**
>
> (1) A State shall not be immune under 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 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], 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 at law and in equity) are available for such a 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.
> (Emphasis added).

The Civil Rights equalization statute clearly allows for consideration of gender discrimination against a state. The district court chose to rule otherwise.

C. Plaintiffs have the right to pursue Title VI claims and violations of the Whistleblowers' Protection Act against Steucher and Judnic in their official capacity.

Procedurally, the district court purged Plaintiffs' Complaint of many claims against the Defendants. The February 6, 2012 order dismissed MDOT, the State, Defendants Steucher and Judnic, in their official capacity. The district court inexplicably foreclosed Plaintiffs' right to sue either governmental entities or

individuals, in their official capacities. (February 6, 2012 Order, RE 21, Page ID #415-436).

1. Title VI.

The district court averred that "Plaintiffs may not bring Title VI claims against Steucher and Judnic, personally," and, then dismissed claims against Steucher and Judnic, in their official capacity, reasoning that those claims against MDOT and the State and officials are encapsulated other claims. The district court also concluded, despite evidence to the contrary, that Plaintiffs lacked sufficient evidence of race discrimination and that Title VI did not encompass gender discrimination. For legal and evidentiary reasons, cited *supra*, Plaintiffs' have established both race and gender discrimination claims against Defendants. Moreover, Plaintiffs have established that Title VI includes gender discrimination.

Plaintiffs acknowledge the Supreme Court decision that a suit against an employee in his or her official capacity is not a suit against the official personally and the real party in interest is the entity and as such damages sought in an official capacity suit must be sought from the entity itself and replacement of the named official will result in automatic substitution of the official's successor in office. *Kentucky v. Graham,* 473 U.S. 159, 165-667; 105 S. Ct. 3099; 87 L.Ed.2d 114 (1985). Accordingly, the order should be reversed allowing Plaintiffs' claims against successors to Judnic and Steucher, in their official capacities, or

alternatively, Plaintiffs should be allowed to proceed in their claims against the MDOT and the State.

2. Whistleblowers' Protection Act.

The district court dismissed Plaintiffs' WPA claims against all Defendants citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58; 109 S.Ct. 2304; 105 L. Ed. 2d 45 (1989), discussed, *supra*. Government official in role of personal-capacity defendant is "person" subject to suit for damages under 42 U.S.C. § 1983 for actions taken in their "official capacity,", 42 U.S.C. § 1983. Absent waiver by the State or valid congressional override, the 11th Amendment bars a damages action against a State in federal court. See, *e.g.*, *Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459, 464; 65 S.Ct. 347, 350; 89 L.Ed. 389 (1945). However, this does not preclude non-equitable relief. Plaintiffs may proceed against the State and its agencies with their WPA claims.

Notwithstanding the foregoing, the district court also summarily dismissed Plaintiffs' WPA claim declaring that WPA does not apply to "independent contractors." In *Chilingirian v. City of Fraser*, 200 Mich. App. 198, 200; 504 N.W.2d 1, 2 (1993), the Court held that:

> By previously holding "that plaintiff was an independent contractor and not an employee of the city," we did not mean to imply that an independent contractor could never be considered an employee as defined in the WPA. Rather, it was, and continues to be, our opinion that under the facts of this case, plaintiff was not an employee

> of the city. The facts supporting this conclusion were set forth in our prior opinion.

In *Chilingirian, supra,* court acknowledged it was a **factual** determination as to whether or not a plaintiff was an employee or an independent contractor. Merely, using the parlance "independent contractor" does not mean that an entity or individual is in actuality an independent contractor with regard to WPA application.

In *Chilligirian, supra,* court confirmed the economic reality test for an independent contractor, i.e., the totality of the circumstances surrounding the work performed. See also, *Derigiotis v. J.M. Feighery Co*., 185 Mich. App. 90, 94; 460 N.W.2d 235 (1990). Relevant factors to consider under the test include: (1) control of a worker's duties; (2) payment of wages; (3) right to hire, fire, and discipline; and (4) performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal. *Id*. All the factors are viewed as a whole and no single factor is controlling. *Derigiotis* at 95.

Considering MDOT's oversight, management, control of principal payments, and performance reviews of its contractors, it is a jury question as whether or not Plaintiffs were an "independent contractor" affording WPA protection. The district court again pooh-poohed the evaluation form that a jury might have found much more persuasive. The form scored BBF Engineering low because it did not bow to MDOT wishes. Defendants knew that manipulation of

these evaluation forms was a way to foreclose future work opportunities because low evaluations affect future bids. Defendants knew the district court's musings to the contrary notwithstanding that minor point spreads separated the bids. Even more importantly—Ms. Foster testified to MDOT's control. (Foster Dep. Tr., RE 58-3, Page ID #3429). (Consultant Eval., RE 58-4, Page ID #3535). Accordingly, the district court's order on this issue must be reversed and remanded.

D. Plaintiffs presented sufficient evidence of a Title VI retaliation claim, despite District Court's February 6, 2012 order.

To establish a *prima facie* case of retaliation under Title VI, a plaintiff must show:

> (1) she engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action against the plaintiff, or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment. *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir. 2000). *Michael v. Caterpillar Fin. Servs. Corp*, 496 F.3d 584, 595 (6th Cir. 2007).

The district court summarizes that because Plaintiffs have only been awarded three prime consulting contracts since 2006, there was no factual basis to support a claim for retaliation. (February 6, 2012 Order, RE 21, Page ID #415-436). Any action after the date of the complaints to FHWA can be inferred as retaliation. Further, Plaintiffs' subsequent complaint filing of eleven complaints

with the FHWA in July 2010 further propelled Defendants' to retaliate. This Court has held that: "Although temporal proximity itself is insufficient to find a causal connection, a temporal connection coupled with other indicia of retaliatory conduct may be sufficient to support a finding of a causal connection." *Randolph v. Ohio Dept. of Youth Servs.*, 453 F.3d 724, 737 (6th Cir. 2006). Accordingly, the district court's order on this issue must be reversed and remanded.

E. Plaintiffs presented sufficient evidence of violations of the Due Process clause, despite District Court's June 7, 2012 order.

The district court correctly cited to *United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31, 34 (6th Cir. 1992) for holding that a "disappointed bidder" to a government contract may establish a legitimate claim of entitlement protected by due process by showing that it was actually awarded the contract at any procedural stage or that the local rules limited the discretion of state officials as to whom the contract should be awarded. *Id.* The district court ignores the evidence confirming Plaintiffs' legitimate claim of entitlement, i.e. awarded contracts which were wrested away. Plaintiffs were denied its legitimate claim of entitled protected by the due process clause of the Constitution. Accordingly, the district court's order on this issue should be reversed and remanded.

F. Plaintiffs presented sufficient evidence of violations of the Equal Protection clause.

The district court's order should be reversed and remanded. A review of the district court's varying opinions is illuminating. On June 7, 2012, the district court determined that Plaintiffs had asserted sufficient factual allegations of Defendants' violation of the Equal Protection clause of the Fourteenth Amendment. (June 7, 2012 Order, RE 35, Page ID #620). Two months later, on August 22, 2012, the district court dismissed Plaintiffs' Equal Protection claims on procedural grounds, stating: (August 22, 2012 Order, RE 41, Page ID #699).

***

> For the foregoing reasons, Defendants' motion for reconsideration is GRANTED and Plaintiffs may not allege Count 1 of Amended Complaint for violations of the equal protection clause of the Fourteenth Amendment...
> (August 22, 2012 order, RE 41, Page ID #702).

This assertion of the law is wrong. 42 U.S.C. § 1983 is a procedural statute. It is not the remedy. *Westboro Mall , Inc. v. City of Cape Girardeau,* 794 F.2d 330 (8th Cir. 1986); *Wheeler v. City of Pleasant Grove*, 746 F.2d 143 (11th Cir. 1981).

More importantly, a year later, the district court revisited Plaintiffs' claims, in August 12, 2013 and found that Plaintiffs failed to present either a direct or indirect case of discrimination. (August 12, 2013 order, RE 67, Page ID #3829). (August 12, 2013 order, RE 67, Page ID #3838).

The reality is Wade Trim and Great Lakes were consulting engineers who were working for the Detroit TSC. Wade Trim was a subcontractor to BBF

Engineering on contracts. Great Lakes was assigned workers by HNTB and Fishbeck Thomson in the Detroit TSC., the district court's conclusions to the contrary notwithstanding (August 12, 2013 Order, RE 67, Page ID #3838)

1. 42 U.S.C. § 1983 is not the exclusive remedy for allegations of constitutional violations and Plaintiffs had valid claims of the Equal Protection Clause.

As noted, the district misstated the law as to the exclusivity of 42 U.S.C. § 1983 as a remedy.

> Applying *Smith* to the case before us, the necessary factors to consider in order to determine if Title IX precludes resort to § 1983 are (1) whether CFE's Title IX claims are "virtually identical" to its constitutional claims, and (2) whether the remedies provided in Title IX indicate that Congress intended to preclude reliance on § 1983. *Id*. Recovery under § 1983 is precluded by *Smith* only if both factors are satisfied. *Communities for Equity v. Michigan High Sch. Athletic Ass'n.* 459 F.3d 676, 685 (6th Cir. 2006).
>
> ***
>
> In short, we cannot agree with our dissenting colleague that Title IX precludes relief under § 1983 simply because the Supreme Court has implied a private right of action. The Supreme Court has never held that an implied judicial remedy is enough to preclude relief under § 1983, and the case law does not support such a conclusion in the present case. The rationale on which *Lillard* was based, therefore, remains persuasive. Because we conclude that *Lillard* remains good law and is unaffected by *Rancho*

> *Palos Verdes*, CFE may seek remedies under § 1983 as well as under Title IX.
> *Communities for Equity* at 689.

Clearly, Plaintiffs can proceed with both their Equal Protection and the 42 U.S.C. § 1983 claims.

2. Plaintiffs, as discussed, supra, have presented sufficient evidence to establish both direct and indirect evidence of discrimination and as such Plaintiffs.

The Equal Protection clause of the 14th Amendment of the United States Constitution prohibits states from denying any person within its jurisdiction the equal protection of the laws. *See* U.S. Const. Amend. XIV. In other words, the laws of a state must treat an individual in the same manner as others in similar conditions and circumstances. As previously discussed and as the district court previously confirmed in its June 7, 2012 order, Plaintiffs have presented sufficient evidence of direct and indirect evidence of "racial and as well as gender discrimination." (June 7, 2012 Order, RE 35, Page ID #620). Yet, 14 months later they could not withstand a motion for summary judgment.

Both Michigan and federal courts have examined statements similar to those in this case and concluded that they constitute direct evidence of discrimination, requiring resolution by a jury. Direct evidence has been defined as "actions or remarks by the defendant that reflect a discriminatory attitude." *EEOC v. Freedom Adult Foster Care Corp.*, 929 F. Supp. 256, 261 (E.D. Mich. 1996). Similarly, in

Harrison v. Olde Financial Corp., 225 Mich. App. 601, 610; 572 N.W.2d. 679 (1997), the Michigan Court of Appeals defined direct evidence as "evidence that, if believed requires the conclusion that unlawful discrimination was at least a motivating factor…" (internal citations omitted). In *DeBrow v. Century 21, Great Lakes, Inc.*, 463 Mich. 534; 620 N.W.2d 836 (2001), the Michigan Supreme Court found that a supervisor's statement to the plaintiff that he is "getting too old for this shit" constituted direct evidence of discrimination.

The courts have outlined what constitutes direct evidence of discrimination: (1) whether the dispute remarks were made by the decision maker or by an agent of the employer uninvolved in the challenged decision; (2) whether the remarks were isolated; (3) whether the disputed remarks were made close in time to the termination; and (4) whether the remarks were ambiguous or clearly reflect discriminatory bias. See *Krohn v. Sedgwick James of Michigan, Inc*. 244 Mich. App. 289, 298-299; 624 N.W.2d 212 (2001). The first three elements exist as to Judnic's statements: (1) Judnic was a decision maker, selecting and awarding contracts; (2) the remark was isolated; and (3) the remark made close in time to Judnic's actions. The only remaining issue in dispute is whether the statement was "ambiguous or clearly reflective of discriminatory bias." *Krohn, supra*.

This Circuit has ruled, on a motion for summary judgment, that all inferences must be resolved in favor of the plaintiff. Any reasonable inference

that suggests a discriminatory reason for the decision, must be resolved in favor of the plaintiff. See *Erwin v. Potter*, 79 Fed. Appx. 893, 898, 2003 WL 22514367. Judnic's statement, "[N]o woman should be making that kind of money," clearly infers discriminatory animus. This statement is similar in discriminatory animus as the statements found in *Diaz v. City of Inkster*, 2006 WL 2192929 (E.D. Mich. August 2, 2006), in which the court concluded such statements were direct evidence of discrimination.

> …Smith further stated that Gordon told him that there were some "members on the council that wanted a black chief" and "when [Police Chief] Colwell retired, you can bet the next chief is going to be black."
> Gordon's statements are direct evidence of racial discrimination. *Diaz, supra*.

As discussed, *supra*, Plaintiffs have clearly established *prima facie* case of discrimination by establishing the fourth prong that Plaintiffs were "similarly situated" as the majority contractors. Accordingly, the district court's order on this issue must be reversed and remanded.

3. Defendants have failed to articulate a legitimate, non-discriminatory reason for its adverse employment action.

Assuming the burden was shifted, Defendants failed to carry it. First, at best this is a mixed motives case and Plaintiffs clearly met their less than onerous burden. *Griffin, supra.* Second, the district improperly evaluated Defendants' assertions vis-à-vis Plaintiffs' case before the burden had even shifted. *Wexler,*

supra. If a plaintiff establishes a *prima facie* case, the burden shifting analysis under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792; 93 S.Ct. 1817; 36 L.Ed.2d 668 (1973), applies and a defendant may rebut the plaintiff's prima facie case by articulating a "legitimate, non discriminatory reason" for the adverse employment action. See *Morris v. Oldham County Fiscal Ct.*, 201 F.3d 784, 792 (6th Cir. 2000); *Smith v. Chrysler Corp.*, 155 F.3d 799, 805 (6th Cir. 1998) (When a plaintiff establishes a prima facie case, "a mandatory presumption of discrimination is created and the burden shifts to the employer to proffer a non-discriminatory reason for" the adverse employment action). *Stevens v. Estes Express Lines*, 833 F.Supp.2d 729, 735–37 (E.D. Mich. 2011) (footnote omitted). *Tafty v. CVS Pharmacy*, No. 11-CV-14628, 2012 WL 5874782 (E.D. Mich. November 20, 2012). Here, Plaintiffs performed a "service… under a contract of hire…" for MDOT. MCL § 15.361(a). BBF Engineering was a "person" as it is a corporation.

Defendants' awareness of Plaintiffs' Title VI claims is documented in an email sent by an MDOT DBE administrator on June 18, 2010. This email provided:

> Bellandra,
> I've been following some of the issues/concerns you have regarding delayed payments and issues with some of your staff on MDOT projects, as well as other issues. Please take a look at this site and give it some thought. I can [answer] any questions you may have about the

> Federal Title VI Program and DBE options, as can Mary Finch. (Email from Pat Collins, RE 58-2, Page ID #3339).

After this email, Plaintiffs filed their Title VI and retaliation complaints. Defendants were aware of and had objective notice of Plaintiffs' Title VI intent to file complaints and retaliated. As our courts have established, there is a causal connection if the employer knew about the protected activities and subsequently retaliated. "Other plaintiffs failed to show a causal connection because the evidence indicated the employer either terminated plaintiff before finding out about the protected activity or because the employer knew of the activity but considered it inconsequential." *Thompson v. Aramark Sch Support Services, Inc.*, 490 F.3d 506, 510 (6th Cir. 2007). Plaintiffs have established the causal connection element. See *Roberson v. Occupational Health Ctr. of Am., Inc.* 220 Mich. App. 322*;* 559; N.W.2d 86, 88 (1996).

Defendants have not presented a legitimate non-discriminatory reason for their actions and the district court should have denied the motion on this basis as well. Therefore, the district court's decision should be reversed and remanded.

G. Plaintiffs presented sufficient evidence of violations of the Whistleblowers' Protection Act, despite the district court's August 12, 2013 order.

The district court abused its discretion with regard to Plaintiffs' Whistleblowers' Protection Act, claims by impermissibly evaluating the facts.

1. Plaintiffs' claims are within the Whistleblowers' Protection Act's statute of limitations.

a. Plaintiffs' filing of the complaint on November 3, 2011 is within WPA's statute of limitations.

Plaintiffs have consistently reiterated that Defendants' adverse actions are continuing – even up to October 2011, two months prior to Plaintiffs' November 3, 2011 complaint. Plaintiffs' WPA claims are, therefore, within the 90 day statute of limitations. Plaintiffs' Complaint identified the relevant dates, in their November 3, 2011 Complaint: (November 3, 2011 Complt ¶¶ 83-90, RE 1, Page ID #10).

Just after the filing of Plaintiffs' November 3, 2011 Complaint, Defendants commenced their retaliatory audit against Plaintiffs. These audits have continued to the present time. Plaintiffs' have timely amended their complaint to include these claims. Plaintiffs stated, in their First Amended Complaint: (Amended Complt ¶¶ 155-157, RE 42, Page ID #722).

Accordingly, Plaintiffs' claims are also well within the 90 day WPA filing claim period. Importantly, Plaintiffs were not sleeping on their rights, they were waiting on FHWA to complete its investigation, which never happened. After the district court's final decision, FHWA claimed it had no jurisdiction because of pending litigation. Plaintiffs were caught in the jaws of a bureaucratic vise.

b. Defendants' rejection of Plaintiffs' proposals, from December 2008 through October 2011, constitutes an adverse employment action; substantiating that Plaintiffs' WPA complaint was timely filed.

The district court stated that Plaintiffs' claims were outside of the statute of limitations. The district court ignored *Wurtz v. Beecher Metro. Dist.*, 298 Mich. App. 75, 86; 825 N.W.2d 651, 657 (2012), *app. gtd.*, 494 Mich. 862 (2013), cited in its August 12, 2013 opinion.[5] (August 12, 2013 Order, RE 67, Page ID #3852 In *Wurtz, supra,* the Michigan appellate court interpreted the second element of a WPA claim and held that the non-renewal of an employment contract qualifies as an "adverse employment action." Furthermore, the court cited to a federal case, which held that non-renewal of a university employee's five-year employment contract was an "adverse employment action" under Title VII and the ADEA. *Id.* at 657. The court agreed with this federal holding and noted that to hold otherwise, would create "an arbitrary distinction between contracted and at-will employees (who have no expectation of further employment from day to day)." *Wurtz, supra,* at 658. Applying *Wurtz, supra,* Plaintiffs filing of the complaint in this action is timely.

[5] The Michigan Supreme Court has granted the appeal of *Wurtz v. Beecher Metropolitan District*, 494 Mich. 862; 831 N.W.2d 235 (2013).

c. Judnic and Steucher's resignations are meaningless.

Defendants have argued that **Judnic's resignation from his position** from MDOT is the time frame for a statute of limitations operate against Plaintiffs. The district court evaluated the facts, agreed with the Defendants and concluded that Plaintiffs have not specified a specific time within the statute of limitations for which a WPA claim would stand. The district court failed to consider subsequent adverse events against Plaintiffs. The district court focused on Defendants' assertions regarding Judnic and Steucher's retirements: (August 12, 2013 Order, RE 67, Page ID #3847).

Plaintiffs could find no case law supporting Defendants' contention that the statute of limitations clock for a WPA claim starts upon the adverse employer's (or actor's) resignation, and not the employee's resignation. If Defendants and the district court consider the resignation of a key MDOT individual as the pivotal time from which to count 90 days, then the district court should have also calculated the period starting from the resignation of Steudle and end of the Governor Snyder's term. Applying Defendants' and the district court's rationale, Plaintiffs' WPA claims would then be timely.

2. The date of accrual for a cause of action for statute of limitations purposes is a question of fact.

Despite the district court's consideration of the facts, under Michigan law, the date of accrual of a cause of action for statute of limitations purposes is a

question of fact for the jury. *Waltzer v. Transidyne Gen. Corp.*, 697 F.2d 130, 133 (6th Cir. 1983) (citing *Tumey v. City of Detroit*, 316 Mich. 400, 411, 25 N.W.2d 571 (1947); *Flynn v. McLouth Steel Corp.*, 55 Mich. App. 669, 223 N.W.2d 297 (1974)). Accordingly, this issue should have survived summary judgment.

3. The question of whether or not Plaintiffs' are "independent contractors," is a factual determination.

The district court reviewed the evidence and asserted that "[h]ere, Plaintiffs are independent contractors." Michigan has long held that the question of whether or not the Plaintiff is an employee or an independent contractor is properly reserved for a jury, as discussed *supra*. *Chilingirian v. City of Fraser, supra.* Further, WPA's definition of "employee" and "person" contemplates the precise business relationship between MDOT and Plaintiffs. MCL § 15.361 provides:

> (a) "Employee" means a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied. Employee includes a person employed by the state or a political subdivision of the state except state classified civil service.
>
> ***
>
> **(c) "Person" means an individual, sole proprietorship, partnership, corporation, association, or any other legal entity.** (Emphasis added.)

Plaintiffs were a corporation under contract for hire.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, the district court orders granting summary judgment on all claims should be reversed and remanded and this action reinstated for further proceeding on all claims.

Respectfully submitted,

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Dated: November 4, 2013

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief on Appeal was produced in Microsoft Word, 14 point, Times New Roman font and contains 13,253 words, thereby complying with the limitations set forth in Fed. R. App. P. 32 (a)(7)(C).

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CERTIFICATE OF SERVICE

A true copy of the foregoing Brief and Argument of Appellants was served by electronic mail this 4th day of November 2013 to all parties participating in the court's electronic mail system.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RECORD ENTRY #	DESCRIPTION	PAGE ID #
58-2	FHWA Inv. Report	3160-3167
42	Amended Complt	703-732
21	February 6, 2013 Order	415-436
50	Def. Mot. for SJ	1558-1614
67	August 12, 2013 Order	3807-3855
58-2	M. Caldwell Dep. Tr.	3215-3232
58-2	V. Judnic Dep. Tr.	3169-3576
58-5	M. Steucher Dep. Tr.	3552-3576
58-2	Charles Dep. Tr.	3469-3470
58-2	E-mail from Pat Collins	3339
58-4	Commission Audits	3493
58-3	October 18, 2011 Letter to Steudle	3465-3467
41	August 22, 2012 Order	695-702
58	Pl Brief in Opp. to SJ	3099-3156
53-7	MDOT Prequal Appl	2921
52-5	CSRT	2676
58-2	C. Dargin Dep. Tr.	3261-3289
50-2	Foster Dep. Tr.	1618-1723
58-2	MDOT Audit	3329-3330
58-2	Audit List	3332-3337
58-4	Consultant Eval.	3534-3535
1	November 3, 2011 Complt	83-90
35	June 7, 2012 Order	612-621
58-3	E-mail from Gregory Johnson	3472

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BBF ENGINEERING SERVICES, P.C., a Michigan Corporation, and BELLANDRA FOSTER, an individual	)	Case No. 13-2209
Appellants,	)	On Appeal from E.D. Michigan S.D.
v.	)	No. 11-CV-14853
THE HONORABLE RICK SNYDER, in his capacity as GOVERNOR OF THE STATE OF MICHIGAN, KIRK T. STEUDLE, in his capacity as DIRECTOR of the MICHIGAN DEPARTMENT of TRANSPORTATION, VICTOR JUDNIC and MARK STEUCHER	)	ORAL ARGUMENT REQUESTED
Appellees.	)	

APPELLANTS' APPENDIX

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2006 WL 2192929
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United States District Court,
E.D. Michigan,
Southern Division.

Thomas E. DIAZ, Plaintiff,
v.
CITY OF INKSTER, Defendant.

Civil Action No. 05-CV-70423-DT. | Aug. 2, 2006.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (DKT. NO. 27) and GRANTING PLAINTIFF'S MOTION TO AMEND COMPLAINT (DKT. NO. 26)

BERNARD A. FRIEDMAN, Chief District Judge.

***1** This matter is presently before the Court on (1) Defendant's Motion for Summary Judgment and (2) Plaintiff's Motion to Amend Complaint. Thomas Diaz ("Plaintiff") is an Hispanic law-enforcement officer for the City of Inkster ("Defendant"). He alleges that Defendant racially discriminated against him, by favoring black applicants, when it did not promote him to the positions of Chief of Police, Deputy Chief of Police, or Commander. Defendant denies any racial discrimination in its hiring and promotion decisions.

The Court has reviewed the pleadings, motions and evidentiary documents in this case. Pursuant to E.D. Mich. LR 7.1(e)(2), the Court shall decide the motions without oral argument. The Court will deny Defendant's Motion for Summary Judgment and grant Plaintiff's Motion to Amend Complaint.

I. *HISTORY OF THE CASE*

A. *FACTUAL BACKGROUND*

Plaintiff was hired as a patrolman with the Inkster Police Department in 1989. (Pl.'s Am. Compl. ¶ 11; Def.'s Br. Supp. Mot. Summ. J., 2.) In the 1990s, he received disciplinary action for illegal entry into a motel room and for improper lunch usage. (Def.'s Br. Supp. Mot., Ex. A at 28-29.) In 1999, Plaintiff was promoted to Road Patrol Sergeant. [1] (Pl.'s Am. Compl. ¶ 12; Def .'s Br. Supp. Mot. Summ. J., 3.) After Plaintiff's promotion, the police department had three black sergeants, three white sergeants, and one Hispanic sergeant (Plaintiff). (Def.'s Br. Supp. Mot. Summ. J., Ex. A at 38-39.) In 2003, Plaintiff was promoted to Lieutenant. (Pl.'s Am. Compl. ¶ 12.)

In mid-May 2003, Police Chief Terry Colwell ("Colwell"), a white male, retired. (*Id.* ¶ 14; Def.'s Br. Supp. Mot. Summ. J ., 3.) Deputy Chief Phillip Ludos ("Ludos"), a white male, became the interim Police Chief. [2] (Pl.'s Am. Compl. ¶ 15; Def.'s Br. Supp. Mot. Summ. J., 3.) Defendant named Plaintiff as Administrative Lieutenant and second in command. (Pl.'s Am. Compl. ¶ 16; Def.'s Br. Supp. Mot. Summ. J., 3.) In late May 2003, Ludos resigned. [3] (Pl.'s Am. Compl. ¶ 18.)

In June 2003, Plaintiff was named as interim Police Chief (*Id.* ¶ 19); however, one week later, Marvin Winkler ("Winkler"), a black male, was named as the new Police Chief. [4] (*Id.* ¶ 23; Def.'s Br. Supp. Mot. Summ. J., 4.) In late June 2003, Gregory Gaskin ("Gaskin"), a black male, was named as Deputy Chief. (Pl.'s Am. Compl. ¶ 26; Def.'s Br. Supp. Mot. Summ. J., 4.) At that time, Plaintiff stated that his title then changed from Administrative Lieutenant back to Lieutenant. (Pl.'s Resp., Ex. A at 46.)

In April 2004, Aaron Peacock ("Peacock"), a white male, was named to the newly created position of Commander. (Pl.'s Am. Compl. ¶ 30; Def.'s Br. Supp. Mot. Summ. J., 5.) In July 2004, Peacock left the police department in order to go to law school, and Defendant promoted Gregory Hill ("Hill"), a black male, to be Commander. (Pl.'s Am. Compl. ¶ 31; Pl.'s Resp., 9; Def.'s Answer ¶ 31.)

***2** Currently, Defendant states that the command staff at the police department is comprised of five whites, four blacks, and one Hispanic. [5] (Def.'s Br. Supp. Mot. Summ. J., 5.) From 1998 to 2003, Robert Gordon ("Gordon") was Defendant's City Manager. (*Id.* Ex. B at 4-5.)

B. *PROCEDURAL HISTORY*

In December 2004, Plaintiff filed a Complaint in Wayne County Circuit Court. Defendant then removed the case to this Court. Plaintiff amended his Complaint on February 28, 2005. Defendant filed an Answer.

On March 28, 2006, Plaintiff filed a Motion to Amend (First Amended) Complaint. Defendant filed a Response.

On March 30, 2006, Defendant filed a Motion for Summary Judgment. Plaintiff filed a Response. Defendant filed a Reply.

In May 2006, the Court adjourned the motion hearings that had been scheduled for June 2006.

II. *DEFENDANT'S MOTION FOR SUMMARY JUDGMENT*

A. *STANDARD OF REVIEW*

Under Federal Rule of Civil Procedure 56, summary judgment is appropriate 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). When reviewing a motion for summary judgment, the "judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A "genuine" issue is one where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

The court must view all of the evidence in the record, as well as any reasonable inferences from that evidence, in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). This favorable light, though, does not mean that a plaintiff can defeat a defendant's motion for summary judgment simply by showing "the mere existence of a scintilla of evidence in support of the plaintiff's position." *Anderson*, 477 U.S. at 252. In other words, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.' " *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir.1989) (quoting Anderson, 477 U.S. at 257.

B. *COUNT 1 (42 U.S.C. § 1983)*

Title 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

***3** 42 U.S.C. § 1983 (2003). A sufficient claim for a violation of Section 1983 must show that: "(1) a person, (2) acting under the color of state law, (3) deprived him of a federal right." *Sutherland v. Mich. Dep't of Treasury*, 344 F.3d 603, 614 (6th Cir.2003). The United States Supreme Court has held that municipalities and local governments are considered "persons" under Section 1983, so they can therefore be liable for constitutional deprivations. *Monell v. Dep't of Soc. Servs. of N.Y .*, 436 U.S. 658, 690 (1978).

Municipal liability for constitutional deprivations can arise "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694. A municipal government, though, cannot be held liable solely on the basis of a respondeat superior theory. *Id.* at 691. *See also Bd. of County Commr's v. Brown*, 520 U.S. 397, 403 (1997) ("We have consistently refused to hold municipalities liable under a theory of *respondeat superior.")* In other words, a city government is not liable for "every misdeed of [its] employees and agents." *Garner v. Memphis Police Dep't*, 8 F.3d 358, 363 (6th Cir.1993). A city government is only liable when the custom or policy is the "moving force" behind the deprivation of plaintiff's constitutional rights. [6] *Monell*, 436 U.S. at 694. In order to show such "moving force" liability under Section 1983, the Sixth Circuit has ruled that a plaintiff must "(1) identify the municipal policy or custom, (2) connect the policy [or custom] to the municipality, and (3) show that his particular injury was incurred due to execution of that policy [or custom]." *Turner v. City of Taylor*, 412 F.3d 629, 639 (6th Cir.2005) (quoting *Alkire v. Irving*, 330 F.3d 802, 815 (6th

Cir.2003)). Thus, the municipal government itself must be the *cause* of the constitutional violation.

Here, Plaintiff alleges that Defendant violated his constitutional rights because of its municipal custom. Plaintiff asserts that Defendant practiced an "informal policy extending preferential treatment based on race in promotions." (Pl.'s Am. Compl. ¶ 35.) While a "policy" is often a formal or expressly stated rule or regulation,[7] an informal policy-"custom"-"is a legal institution that is permanent and established, but is *not authorized by written law.*" *Feliciano v. City of Cleveland,* 988 F.2d 649, 655 (6th Cir.1993) (emphasis added). In order to create municipal liability based on custom, the "custom must be 'so permanent and well settled as to constitute a 'custom or usage' with the force of law.' " *Id.* (quoting *Monell,* 436 U.S. at 691). For instance, a city government "may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Monell,* 436 U.S. at 690-91. In such a case, the plaintiff must show that "the relevant practice is so widespread as to have the force of law." *Brown,* 520 U.S. at 404.

***4** In the case at hand, Plaintiff asserts that Defendant's custom "constitute[s] a denial of Plaintiff's right to equal protection of the laws as guaranteed by the 14th Amendment." (Pl.'s Am. Compl. ¶ 35.) The Sixth Circuit has instructed that "[i]n order to establish an equal protection violation against a public employer in a section 1983 action, a plaintiff must show that the employer made an adverse employment decision 'with a discriminatory intent and purpose.' " *Boger v. Wayne County,* 950 F.2d 316, 324-25 (6th Cir.1991) (quoting *Charles v. Baesler,* 910 F.2d 1349, 1356-57 (6th Cir.1990)). The Sixth Circuit has further "held that a plaintiff in a section 1983 equal protection case must do more than just introduce evidence of discriminatory intent and suggest that 'such intent could have played a role in an adverse employment decision. Rather, a plaintiff is required to demonstrate that the adverse employment decision would not have been made 'but for' [his race].' " *Id.* at 325 (quoting *Gutzwiller v. Fenik,* 860 F.2d 1317, 1325 (6th Cir.1988)). Therefore, a Section 1983 plaintiff must not only prove the existence of a *municipal custom* of racial discrimination and demonstrate that the custom was *casually connected* to the adverse employment action, the plaintiff must also show the existence of *discriminatory intent and purpose.*

1. Police Chief Winkler

Plaintiff alleges that when Defendant hired Winkler-a black male-as its Police Chief, Defendant was acting pursuant to a racially discriminatory municipal custom in hiring and promotion. Plaintiff provides an affidavit from a former City of Inkster councilwoman, Louise Kolberg ("Kolberg"), to support his allegations. In her affidavit, Kolberg stated the following:

4. Between the time that former Inkster Police Chief Terry Colwell retired and the hiring of former Inkster Police Chief Marvin Winkler, Jr. ("Winkler"), I overheard a conversation between Councilwoman Deartriss Richardson ("Richardson") and Councilman Earnest Hendricks ("Hendricks").

5. During that conversation, Richardson and Hendricks both stated that they wanted a black Chief of Police because the City of Inkster was predominantly black.

6. Richardson and Hendricks are black.

7. During that same time period, I met with former Inkster City Manager Robert Gordon in his office.

8. Gordon informed me he was under pressure from certain City Council members and Mayor Hilliard Hampton ("Hampton") as to what they wanted in the next Chief of Police.

9. Gordon and Hampton are black.

....

12. When Council was first informed of the arrival of Winkler, it was also informed that Winkler was bringing someone with him to fill the position of Deputy Chief.

13. After a meeting of the Council, I witnessed Hampton and a black citizen scream at each other in the hallway.

14. Hampton also poked the citizen in the stomach.

15. When I later chastised Hampton for being unprofessional, he told me:

***5** a. I would not understand.

b. That was the way "black folks" talked to one another.

(Pl.'s Resp., Ex. C.)

The Court finds Kolberg's statements are not sufficient proof of a municipal custom. The alleged overheard conversation between the council members only shows that two of the members on the council may have hoped that the next Police Chief would be black. Kolberg's statement falls short of showing a council-wide custom of racial discrimination in hiring and promotion. The council members' personal preferences or opinions do not equate to official municipal views, nor do such statements establish a "relevant practice [that] is so widespread as to have the force of law." *Brown*, 520 U.S. at 404. The alleged overheard conversation was merely chit-chat between two people, not a "permanent and well settled" custom that was pervasive throughout City government. In fact, if anything, Kolberg's affidavit-in which she stated that the council members were aware that Winkler already had a person in mind for Deputy Chief-disproves Plaintiff's claim of a municipal predisposition or plan to only promote blacks. This is because Kolberg's statement shows that *Defendant did not play a role* in the selection of Deputy Chief.

Next, in the eighth paragraph of her affidavit, Kolberg stated that Gordon told her that he was under pressure from certain council members and the mayor about "what they wanted in the next Chief of Police." The Court does not find such a vague statement to demonstrate a custom of racial discrimination. Kolberg did not indicate what Gordon meant when he made the alleged statement of "what they wanted." For instance, Kolberg did not state that Gordon mentioned anything about race to her, or that he further explained his statement of "what they wanted." Also, the Court finds that Kolberg's statements-about seeing the mayor "scream" and jokingly "poke" another black citizen in the hallway-fail to show a prevalent and widespread custom of racial discrimination in hiring and promotion. Therefore, Kolberg's affidavit is not sufficient evidence to demonstrate a municipal custom.

In addition, Plaintiff provides an inter-office, background-check memorandum, sent by Gordon, on which someone had written "White Male," "Black Male," or "American Indian Male," next to each of the applicants' names for the position of Police Chief. (Pl.'s Resp ., Ex. H.) The memorandum also indicated each applicant's address, driver license number, date of birth, and social security number.[8] While former Police Chief Ludos stated that race was not needed to do a background check (*Id.* Ex. B at 38-39), Gordon stated that race was often provided for a background check on a job applicant, (Def.'s Br. Supp. Mot. Summ. J., Ex. B at 28-29.) Furthermore, it should be noted that no one seems to know who actually wrote the racial background information on the memorandum.

The Court finds that the memorandum does not demonstrate a custom so "widespread as to have the force of law." The information included in the background-check memorandum dealt with *each* applicant's background characteristics-name, address, driver license number, social security number, and race. The situation may have been different had the memorandum only contained racial categories and no other information about the Police Chief candidates. The situation would surely have been different if the memorandum included only one specific racial category-for instance, if only "black male" had been scribbled by the names of the black candidates, or if only the white candidates had been marked as "white male." In the case at hand, though, *all* relevant background information is included, as the memorandum's very purpose is a background check of each job applicant. Therefore, the Court finds that the memorandum fails to demonstrate both the existence of a racially discriminatory municipal custom or that such an alleged custom was the "moving force" behind the hiring of Winkler as Police Chief.

***6** In fact, the evidence seems to support that Defendant was fair-minded in its hiring and promotion. Plaintiff himself stated that, in 1999, he was promoted to sergeant because of his "work ethic and merit," even though a black applicant had scored better on the evaluation exam. After Plaintiff's promotion, the police department had more non-black sergeants than black sergeants. Further, the two police chiefs before Winkler were both white-Colwell and Ludos.[9] Lastly-and even more indicative of the *non-existence* of any racially discriminatory municipal custom of hiring and promotion-Defendant states that the current command staff at the police department is comprised of five whites, one Hispanic, and four blacks. Thus, there are more non-blacks on the command staff than blacks. The Court finds that such employment data does not show a discriminatory municipal custom.

Although the Court finds that Kolberg's affidavit, the background-check memorandum, and the hiring percentages do not demonstrate a racially discriminatory municipal custom, the Court does find that Plaintiff presents one piece of direct evidence. The deposition testimony of Lieutenant

Kevin Smith ("Smith"), when taken in the light most favorable to Plaintiff, could subject Defendant to municipal liability. Smith stated that Gordon told him that the next Police Chief would be black. Smith further stated that Gordon told him that there were some "members on the council that wanted a black chief" and "when [Police Chief] Colwell retired, you can bet the next chief is going to be black." (Pl.'s Resp., Ex. D at 14-15.)

While a municipality cannot be liable on a theory of respondeat superior, a municipality can be held liable under Section 1983 for a single unconstitutional action, as long as the municipal employee whose action creates the municipal liability has the final authority to establish a municipal policy or custom. *Pembaur,* 475 U.S. at 481. *See also Feliciano,* 988 F.2d at 655 (stating "the municipality is liable for an official's unconstitutional action only when the official is the one who has the 'final authority to establish municipal policy with respect to the action ordered' ") (quoting Pembaur, 475 U.S. at 481).

Here, Gordon is the final decision maker when it comes to hiring a Police Chief. Gordon stated that according to the City's charter, the "City Manager hired all department heads," which includes the position of Police Chief. (Def.'s Br. Supp. Mot. Summ. J., Ex. B at 6.) Therefore, Gordon's employment decision to hire a police chief, and his relevant statements, can be seen as the "execution of a government's policy or custom" because Gordon's "edicts or acts may fairly be said to represent official policy," and thus he "inflicts the injury that the government as an entity is responsible under § 1983." *Monell,* 436 U.S. at 694. In other words, Gordon's statement and employment action could be imputed to Defendant because Gordon has the final authority with respect to the hiring of a police chief. Therefore, when taken in the light most favorable to Plaintiff, the hiring of the police chief may have been an unconstitutional action that would subject Defendant to municipal liability under Section 1983.

2. Deputy Chief Gaskin and Commander Hill

***7** Plaintiff asserts that a racially discriminatory municipal custom also motivated the selections of Gaskin (a black male) as deputy chief and Gregory Hill (a black male) as commander. The Court disagrees.

Gordon stated that Winkler was given authority to hire his own deputy chief and commander, (Def.'s Br. Supp. Mot. Summ. J., Ex. B at 6), and that he did not influence Winkler's selections, (*Id.* at 23). However, Gordon admitted that ultimately he maintained the final authority over who was selected to fill those positions. (*Id* . at 50.) In other words, Winkler only had discretion-albeit quite broad discretion-to select the candidates. Such discretionary authority does not generate municipal liability. The Sixth Circuit has held that "[m]ere authority to exercise discretion while performing particular functions does not make a municipal employee a final policymaker unless the official's decisions are final and unreviewable." *Feliciano,* 988 F.2d at 655. Here, Winkler's employment decisions were reviewable by Gordon. Moreover, the Eastern District of Michigan has found that the "Circuit Courts of Appeal have similarly held that a municipality cannot be liable under Section 1983 for the discretionary employment decisions made by its police chief." *Nelson v. City of Flint,* 136 F.Supp.2d 703, 718 (E.D.Mich.2001). Thus, Winkler's discretionary decisions do not amount to a municipal custom.

Even so, Plaintiff fails to show that a discriminatory municipal custom was the "moving force" behind the selection of Gaskin as deputy chief and Hill as commander. Winkler first tried to hire Pierre Fortier as deputy chief. Fortier is a *white* male. He had been one of Winkler's colleagues at the Detroit Police Department for nearly 30 years. (Def.'s Br. Supp. Mot. Summ. J., Ex. C at 19-20 .) Winkler offered him the job, but Fortier turned it down. (*Id.*) Gaskin, a black male, was Winkler's second choice. Winkler explained his reasons for hiring Gaskin: "I had worked with him [Gaskin] before. I knew that he had some accounting skills which I thought would come in handy with some of the things that I had in mind to do with the police department.... And I was comfortable working with him." (*Id.* Ex. C at 20-21.) As such, Plaintiff shows neither that a municipal custom of racial discrimination existed, nor that such a custom was the "moving force" behind the hiring of Gaskin as deputy chief, nor that discriminatory intent or purpose existed.

As for the Commander position, Winkler first hired Peacock, a *white* male. Winkler explained that he selected Peacock because "he was qualified for the position"; "[h]e had the right kind of attitude"; "he was a team player"; "[h]e had goals and objectives of the organization on board"; and "he was trustworthy." [10] (*Id.* Ex. C at 30.) It was only when Peacock left that Winkler selected Hill, a black male, to fill the position. As above, the Court finds Plaintiff has shown neither the existence of a discriminatory custom, nor that such a custom was the "moving force" behind the selection of Hill, nor the existence of discriminatory intent.

***8** In sum, the Court finds that Plaintiff has demonstrated-barely-a genuine factual issue as to whether a discriminatory municipal custom was the "moving force" behind the selection of Winkler for the position of police chief. However, Plaintiff has failed to demonstrate any such municipal liability as to Defendant's selection of its deputy chief or commander. Therefore, Defendant may potentially be liable under Section 1983 only in regard to its selection of Winkler over Plaintiff for its police chief.

B. *COUNT II (42 U.S.C. § 1981) AND COUNT III (ELLIOTT-LARSEN CIVIL RIGHTS ACT)*

Title 42 U.S.C. § 1981 states:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens....

42 U.S.C. § 1981(a) (2003). Thus, Section 1981 "prohibits intentional race discrimination in the making and enforcing of contracts." *Amini v. Oberlin College,* 440 F.3d 350, 358 (6th Cir.2006). In the case at hand, Plaintiff contends that "Defendant's promotional policies deny Plaintiff his right to enter into employment contracts guaranteed by 42 U.S.C. § 1981." (Pl.'s Am. Compl. ¶ 43.)

Michigan's Elliott-Larsen Civil Rights Act, MCL § 37.2101 *et seq.*, states:

(1) An employer shall not do any of the following:

(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment ... because of religion, race, color, national origin, age, sex, height, weight, or marital status.

MCL § 37.2202(a)(1) (2001). In the case at hand, Plaintiff contends that Defendant violated Michigan law because Plaintiff "has been discriminated against on the basis of his race." (Pl.'s Am. Compl. ¶ 47.)

The same race-discrimination framework can be used to examine both Plaintiff's Section 1981 and Elliott-Larsen claims. The Sixth Circuit has explained that both types of claims call for the same race-discrimination analysis as is conducted under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq. See Sutherland,* 344 F.3d at 614 n. 4 (stating "[c]laims under Michigan's Elliott-Larsen Civil Rights Act involve the same analysis as Title VII claims"); *Dews v. A.B. Dick Co.,* 231 F.3d 1016, 1021 n. 2 (6th Cir.2000) (stating the "standards for Title VII are equally applicable to [plaintiff's] claims under 42 U.S.C. § 1981"); *Mitchell v. Toledo Hosp.,* 964 F.2d 577, 582 (6th Cir.1992) (stating the "*McDonnell Douglas/Burdine* formula is the evidentiary framework applicable not only to claims brought under Title VII, but also to claims under ... 42 U.S.C. § 1981") (citations omitted). Therefore, all of Plaintiff's claims can be examined together.

A plaintiff can "establish a prima facie case ... for racial discrimination by introducing direct evidence of discrimination or by using the *McDonnell-Douglas [/ Burdine]* burden-shifting paradigm" (for indirect or circumstantial evidence). *Singfield v. Akron Metro. Hous. Auth.,* 389 F.3d 555, 561 (6th Cir.2004). Direct evidence of racial discrimination is only that evidence where "a racial motivation is explicitly expressed." *Amini,* 440 F.3d at 359. As for indirect evidence, the United States Supreme Court has explained the applicable burden-shifting framework. The Supreme Court instructs that the plaintiff "must carry the initial burden ... of establishing a prima facie case of racial discrimination." *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). If the plaintiff establishes a prima facie case, the "burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* If the defendant meets its burden, the "plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253 (1981).

1. Police Chief Winkler

***9** Here, as set forth above, Plaintiff presents a thread of direct evidence of racial discrimination concerning the hiring of Winkler as police chief. Smith stated that Gordon told him that the next police chief would be black. Smith further stated that Gordon told him that there were some "members on the council that wanted a black chief" and "when [Police Chief] Colwell retired, you can bet the next chief is going to be black." (Pl.'s Resp., Ex. D at 14-15 .)

Gordon's statements are direct evidence of racial discrimination. The Sixth Circuit has held that "direct evidence of discrimination does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group." *Johnson v. Kroger Co.*, 319 F.3d 858, 865 (6th Cir.2003). For instance, the Sixth Circuit has explained that "a facially discriminatory employment policy or a corporate decision maker's express statement of a desire to remove employees in the protected group is direct evidence of discriminatory intent." *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir.2000). Here, Gordon is the decision maker. His discriminatory statements-expressly stating race as the determinative factor in an employment decision-are exactly those types of statements considered to be direct evidence of discrimination.

Plaintiff's presentation of direct evidence means that the burden-shifting paradigm (for indirect evidence) does not apply. The Supreme Court has held that "the *McDonnell Douglas[/Burdine]* test is inapplicable where the plaintiff presents direct evidence of discrimination." *Trans World Airlines, Inc. v. Thurston*, 469 U .S. 111, 121 (1985). Nonetheless, it should be noted that both Winkler and Plaintiff seemed qualified for the position of police chief, although Winkler seemed much more qualified. Winkler had worked for nearly 30 years at the Detroit Police Department. (Def.'s Br. Supp. Mot. Summ. J., Ex. C at 8.) Although Plaintiff had held a variety of positions within the Inkster Police Department, (Pl.'s Am. Compl. ¶ 33), he had only been employed by Defendant for approximately 15 years. Winkler had both a bachelor's degree and a master's degree. (*Id.* Ex. C at 3-6.). While Plaintiff had an associate's degree in political science and criminal justice, (Pl.'s Resp., Ex. A at 9), he was still working toward earning his bachelor's degree, (*Id.* Ex. A at 10). Also, Plaintiff had received positive feedback from his colleagues. For instance, Ludos stated that, at the time of hiring for police chief, he told Gordon that "Diaz [Plaintiff] is the only person that's in your organization currently that can do this [position of police chief]." [11] (*Id.* Ex. B at 25.)

Although the United States Supreme Court has instructed that the Title VII analysis was "not intended to diminish traditional management prerogatives," *Burdine*, 450 U.S. at 259 (quotations omitted), and although the Court seeks to avoid interfering with business-judgment decisions, the Court finds that a genuine issue of material fact exists as to Defendant's selection of Winkler as its police chief. Plaintiff has provided direct evidence that, when taken in the light most favorable to Plaintiff, indicates the existence of racial discrimination in Defendant's selection of Winkler over Plaintiff. The credibility of Plaintiff's claim is to be determined by a factfinder, not by the Court at this stage of the proceedings.

2. Deputy Chief Gaskin and Commander Hill

***10** Plaintiff fails to introduce direct evidence of racial discrimination in regard to the hiring of Gaskin as deputy chief and the promotion of Hill as commander. As set forth above, Plaintiff's evidence, in regard to Gaskin and Hill, does not demonstrate statements or actions that are facially discriminatory. Thus, Plaintiff's evidence about the employment decisions for deputy chief and commander do not rise to the level of direct evidence.

However, even though Plaintiff fails to provide sufficient direct evidence of racial discrimination, he can still seek to establish racial discrimination by indirect evidence. In such a case, the burden-shifting *McDonnell Douglas/Burdine* paradigm applies. A plaintiff can establish "a *prima facie* claim of racial discrimination based on a failure to promote" by showing that: "(1) he is a member of a protected class; (2) he applied and was qualified for a promotion; (3) he was considered for and denied the promotion; and (4) other employees of similar qualifications who were not members of the protected class received promotions." *Dews*, 231 F.3d at 1020-21 (footnote omitted).

Plaintiff, though, frames his allegations as "reverse discrimination" claims. [12] For a "reverse discrimination" claim, the Sixth Circuit has modified the traditional prongs of the prima-facie case. *Sutherland*, 344 F.3d at 614. The Sixth Circuit has held that the first prong is only satisfied if the plaintiff demonstrates "background circumstances [to] support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Id.* (quotations and citations omitted). *See also Boger*, 950 F.2d at 325 (stating same). Furthermore, the Sixth Circuit has held that the fourth prong is only satisfied if the plaintiff demonstrates that "the defendant treated differently employees who were similarly situated but were not members of the protected class." *Sutherland*, 344 F.3d at 614.

The Sixth Circuit has explained that to demonstrate employees are "similarly situated" requires "the plaintiff [to] show that the 'comparables' are similarly-situated *in all respects.*" *Mitchell*, 964 F.2d at 583. The Sixth Circuit

has further explained that "in all respects" means that a plaintiff must show that "all of the *relevant* aspects of his employment situation were 'nearly identical' to those of [the black applicant's] employment situation." *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir.1998) (quotations and citation omitted). In other words, "similarly situated" individuals cannot have "differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it ." *Mitchell*, 964 F.2d at 583.

Here, Plaintiff satisfies the second and third prongs of the prima facie case-he was apparently qualified for the positions but was denied promotion. Plaintiff was a veteran of the Inkster Police Department and had already received several promotions. In fact, Gaskin himself mentioned that "Tom [Plaintiff] would be a good candidate" for the position of deputy chief. (Pl.'s Resp., Ex. F at 7.) In the end, though, Plaintiff was not selected-an adverse employment action-for either position. Thus, Plaintiff satisfies the second and third prongs of the prima facie case.

***11** Plaintiff similarly satisfies the first prong, for he has demonstrated "background circumstances [to] support the suspicion that the defendant is that unusual employer who discriminates against the majority," *Sutherland*, 344 F.3d at 614 (quotations and citation omitted). Although the racial composition of the police department's personnel seems to be well balanced, as set forth above, there still remains the explicitly racial statements by Gordon. His facially discriminatory statements qualify as "background circumstances" sufficient to raise the "suspicion" that Defendant is that "unusual employer who discriminates against the majority." Thus, Plaintiff satisfies the first prong of the prima facie case.

As for the fourth prong-differential treatment of similarly situated candidates-Plaintiff only demonstrates that he was similarly situated in *all relevant employment aspects* to Hill, but not to Gaskin. Gaskin, who was selected as deputy chief, was one of Winkler's colleagues from the Detroit Police Department for nearly 30 years. (Def.'s Br. Supp. Mot. Summ. J., Ex. C at 18, 20.) Winkler and Gaskin knew each other well, and Winkler was already very comfortable with Gaskin. This longtime relationship certainly differentiated Gaskin and Plaintiff in their bids to become deputy chief. As such, Gaskin's and Plaintiff's employment situations were not "nearly identical" in all "relevant aspects." Thus, Plaintiff and Gaskin were not similarly situated, and Plaintiff fails to satisfy the fourth prong of the prima facie case as to the hiring of Gaskin as deputy chief.

However, Plaintiff and Hill were similarly situated. Hill, who was selected as commander, had been employed by Defendant for approximately 23 years and had held a variety of positions within the police department. (*Id.* Ex. F at 2.) Similarly, Plaintiff had been employed for approximately 15 years and had also held a variety of positions within the police department. Like Plaintiff, Hill was working on earning his bachelor's degree. (*Id.* Ex. F at 1.) Both Plaintiff and Hill had received disciplinary actions in the past. (Pl.'s Resp., Ex. F at 36.) Thus, the Court concludes that Plaintiff and Hill could be considered similarly situated. As such, Plaintiff satisfies the fourth prong of the prima facie case in regard to the promotion of Hill as commander.

As Plaintiff has presented a prima facie case of racial discrimination regarding the selection of Hill, the burden then shifts to Defendant to present a "legitimate, nondiscriminatory reason" for its employment decision. *McDonnell Douglas*, 411 U.S. at 802. The United States Supreme Court has instructed that "[i]t is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine*, 450 U.S. at 254. Moreover, the Supreme Court has explained that the "defendant need not persuade the court that it was actually motivated by the proffered reasons." *Id.*

***12** Here, Defendant provides legitimate reasons for the selection of Hill as commander.[13] Winkler stated that Hill was chosen over Plaintiff because Hill was "more of a team player." (*Id.* Ex. C at 34-35.) Further, it seemed that then-Deputy Chief Gaskin and Plaintiff did not get along well with each other. For instance, when asked if he had consistently argued with Gaskin, Plaintiff stated: "Oh absolutely. We've had disagreements." (*Id.*, Ex. A at 53.) In fact, Plaintiff stated that he has had nine arguments with Gaskin. (*Id.* Ex. A at 53-75.) Moreover, Gaskin stated that "[t]here were some issues with Thomas [Plaintiff] as far as Tom's loyalty; as far as Tom being able to keep confidential matters confidential." (Pl.'s Resp., Ex. F at 14.) Thus, the Court finds that Defendant provided legitimate, nondiscriminatory reasons for its selection of Hill to fill the position of commander.

The burden now shifts back to Plaintiff. At this point, Plaintiff must show that "the proffered reason was not the true reason for the employment decision." *Burdine*, 450 U.S. at 256. The

Sixth Circuit has explained that a "plaintiff can demonstrate pretext by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Dews*, 231 F.3d at 1021.

Here, Plaintiff has presented evidence, when taken in the light most favorable to Plaintiff, that raises a genuine issue of material fact about whether Defendant's proffered reasons did actually motivate its promotion of Hill, instead of Plaintiff, to the position of commander. First, Gaskin stated that "it would be a good idea" to hire more blacks in order to make the police department more reflective of the local area. (Pl.'s Resp., Ex. F at 51-52.) Second, Gaskin admitted that when Hill was hired, he was aware that Hill had been removed from the Narcotics Department because Hill had allowed a murder suspect to drive his vehicle. (*Id.* Ex. F at 34; Ex. D at 46-48.) Third, Gaskin stated that another officer had brought to his attention that Hill had allegedly released prisoners for money. (*Id.* Ex. F at 32-33, 59.) Gaskin apparently let the matter drop when that officer did not report back with more information. Lastly, Hill had previously failed two evaluation exams. Based on such evidence, a reasonable jury could find that Defendant's proffered reasons-Hill was more of a "team player" and Plaintiff had "loyalty" issues-for its employment decision were not its actual motivation in its selection of Hill. Thus, Plaintiff provides sufficient indirect evidence to satisfy the *McDonnell Douglas/Burdine* paradigm in regard to Hill's promotion, over Plaintiff, to be commander.

III. *PLAINTIFF'S MOTION TO AMEND COMPLAINT*

Plaintiff has filed a Motion to Amend Complaint pursuant to Federal Rule of Civil Procedure 15(d). Rule 15(d) states that "[u]pon motion of a party the court may ... permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." FED.R.CIV.P. 15(d). Plaintiff argues that the Court should allow a Second Amended Complaint because, while this case was pending, Plaintiff applied for the position of deputy chief but was not promoted. Plaintiff claims that Defendant's rejection was in retaliation for his filing of the current lawsuit. Plaintiff seeks to add two retaliation claims, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and under Michigan's Elliott-Larsen Civil Rights Act, MCL § 37.2101 *et seq.*

***13** The Court will allow the Complaint to be amended. Rule 15(d) is "intended to give the court *broad discretion* in allowing a supplemental pleading." FED.R.CIV.P. 15(d) advisory committee's note (emphasis added). The Court finds that allowing the amended Complaint serves the Court's strong judicial interest in "reducing multiplicity of litigation by permitting as many of the claims between the parties as possible to be settled in one action." 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1506 (2d ed.1990). Thus, the Court will grant Plaintiff's Motion to Amend Complaint.

IV. *CONCLUSION*

For the reasons stated above, the Court finds that there exists a genuine issue of material fact as to whether a municipal custom of racial discrimination, under Section 1983, was the "moving force" behind Defendant's hiring of Gaskin, and rejection of Plaintiff, as police chief. In addition, as to Plaintiff's Section 1981 and Elliott-Larsen claims, the Court finds genuine issues of material fact in regard to Defendant's hiring of Winkler as police chief-based on direct evidence-and as to Defendant's promotion of Hill to be commander-based on indirect evidence. Accordingly,

IT IS ORDERED that Defendant's Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that Plaintiff's Motion to Amend Complaint is granted.

Footnotes

1 Plaintiff had to pass a test in order to be promoted. Plaintiff stated that his score was the third highest in the group, but it was lower than the scores of Kenneth Brown and Gregory Hill. Both Brown and Hill are black. Even though Brown received the top score, only Plaintiff and Hill were promoted to the position of Road Patrol Sergeant. Plaintiff explained that he was promoted because of his "work ethic and merit." (Def.'s Br. Supp. Mot. Summ. J., Ex. A at 34-35.) Plaintiff stated that he was also told that Brown was not promoted because he "was a disciplinary problem." (*Id.* Ex. A at 35-36.)

2 Ludos had been hired as Deputy Chief about three-and-a-half years earlier. (*Id.* Ex. B at 9, 55.)

3 In June 2003, Ludos became the Chief of Police in Cocoa, Florida. (Pl.'s Resp., Ex. B at 3.)

4 Before being hired by Defendant, Winkler had worked at the Detroit Police Department for nearly 30 years. (Def.'s Br. Supp. Mot. Summ. J., Ex. C at 8.)

5 The command staff currently includes: Police Chief Gregory Gaskin (black); Commander Gregory Hill (black); Detective Lieutenant Kevin Smith (white); Plaintiff (Hispanic); Lieutenant Jeffrey Smith (white); Lieutenant Barry O'Brien (white); Sergeant Kenneth Brown (black); Sergeant Paul Martin (white); Sergeant Scott Rechtzijel (white); Administrative Sergeant Lashawn Smithon (black). (*Id.* at 5.)

Plaintiff's Motion to Amend indicates that the Deputy Chief position was recently filled; however, no further information was provided to the Court about the selected candidate's race.

6 In *Brown,* 520 U.S. at 404, the United States Supreme Court elaborated on the meaning of "moving force":

[I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

7 The Supreme Court has explained that an " 'official policy' often refers to formal rules or understandings-often but not always committed to writing-that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480-81 (1986) (plurality opinion).

8 Much of the applicants' personal information seems to have since been "whited-out" for inclusion as Exhibit H in Plaintiff's Response.

9 Ludos, a white male, stated that he selected 23 employees during his three-and-a-half years with the police department. Ludos stated that 71% of those employees were minority or female candidates. He further stated that of that 71%, more than 50% were black. Ludos also explained that, at the time of his hiring, he told the City Council and Gordon that he would work to diversify the population of the police department. (Def.'s Br. Supp. Mot. Summ. J ., Ex. B at 9, 55.)

Plaintiff asserts that the hiring percentages and Ludos's statements show a municipal custom of racial discrimination against non-blacks. The Court finds no such showing. First, Ludos himself is white. Defendant hired Ludos as Deputy Chief and promoted him to interim Police Chief. Second, Ludos's statement to the City about trying to diversify the department does not demonstrate a municipal custom of racial discrimination. If anything, such a statement is indicative of a City that has not been discriminating against non-blacks in its hiring and promotion.

Lastly, the hiring percentages are not sufficient evidence of an unconstitutional municipal custom. Ludos stated that more than half of the 71 % minority/female candidates hired were black. This means that more than 35.5% of the hired candidates were black. This seems not at all surprising because, as Ludos indicated, the City of Inkster is about 72% black and 28% white. (Pl.'s Resp., Ex. B at 83.) It seems more than likely that there were many more black applicants than non-black applicants in the first place. Moreover, Plaintiff provides no statistical evidence about the number of black and non-black candidates to apply for the jobs. Such evidence would have provided the Court with an opportunity to examine the number of blacks and non-blacks who applied, in relation to the number of blacks and non-blacks who were actually hired.

In addition, Plaintiff argues that a discriminatory custom is also demonstrated by the fact that Gordon, during his years as City Manager, hired no non-black candidates as department heads. (Pl.'s Resp., Ex. E at 42.)

The Court disagrees. Gordon stated that he hired only four or five department heads during his years as City Manager. (*Id.* Ex. E at 40.) The fact that Gordon hired four or five black candidates-to fill department-head positions such as Police Chief, Public Service Director, etc.-does not demonstrate a prevalent, widespread custom of racial animus against non-black applicants. Such data only shows that approximately one black department head was hired each year. Furthermore, as above, Plaintiff provides no statistical data about the race of the job applicants for those department-head positions, so as to allow a comparison between the racial makeup of the applicant pool and those actually hired.

10 Winkler explained that Peacock was hired, even though he hoped to go to law school, because "the deputy chief and I [Winkler] were going to try to talk him out of leavin' and go to law school up here ." (Def.'s Br. Supp. Mot. Summ. J., Ex. C at 30.) It seems that Peacock had been accepted at both a local law school and an out-of-state law school.

11 It should be noted that Ludos's comment only indicates his belief as to Plaintiff's qualifications relative to the other members of the police department. His comment draws no comparison as to Plaintiff's qualifications relative to outside candidates, such as Winkler.

12 Although Plaintiff is Hispanic, and therefore a member of a racial minority, he seems to consider himself as a "white" person. For instance, he often presents his allegations in terms of only "black" and "white" racial categories, and he includes himself in the "white" category. Thus, because he asserts that Defendant violated his constitutional rights by favoring blacks, the Court will treat his discrimination claim as a "reverse discrimination" claim-even though a "reverse discrimination" claim is defined as "a claim by a white person that the employer discriminated in favor of a member of a racial minority." *Boger,* 950 F.2d at 325.

13 Even if the Court were to assume that Plaintiff had also stated a prima facie case of discrimination for Defendant's selection of Gaskin, Plaintiff would still fail to satisfy the *McDonnell Douglas/Burdine* paradigm because Defendant provided legitimate,

nondiscriminatory reasons for hiring Gaskin. Winkler personally selected Gaskin as Deputy Chief because the two had worked together for a long time at the Detroit Police Department. They therefore had established a good relationship and were comfortable working together. Winkler also stated that he thought Gaskin's "accounting background" would be "extremely helpful" to the police department and to the programs he hoped to implement. (Def.'s Br. Supp. Mot. Summ. J., Ex. C at 21.) Furthermore, Plaintiff failed to produce sufficient evidence to reasonably suggest that such legitimate reasons were actually pretext for discrimination.

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79 Fed.Appx. 893
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
Sixth Circuit Rule 28. (Find CTA6 Rule 28)
United States Court of Appeals,
Sixth Circuit.

William C. ERWIN, Plaintiff-Appellant,
v.
John E. POTTER, Postmaster
General, Defendant-Appellee.

No. 02-5334. | Nov. 4, 2003.

Public employee, a former mail carrier, brought action against the Postmaster General under the Age Discrimination in Employment Act (ADEA) for unlawful discharge. The United States District Court for the Middle District of Tennessee granted summary judgment for employer. Employee appealed. The Court of Appeals, Boggs, Chief Judge, held that: (1) genuine issue of material fact existed as to whether supervisor's statement constituted direct evidence that employee was fired because of his age; (2) genuine issue of material fact existed as to whether employee was qualified for the job of mail carrier; and (3) genuine issue of material fact existed as to whether employee was replaced by a younger employee after his termination.

Reversed.

West Headnotes (3)

[1] Federal Civil Procedure
Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact existed as to whether supervisor's statement "you're too old to carry the mail" made to public employee during termination of employment constituted direct evidence that employee was fired because of his age, precluding summary judgment on employee's claim under ADEA for unlawful discharge. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

8 Cases that cite this headnote

[2] Federal Civil Procedure
Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact existed as to whether public employee was qualified for job of mail carrier, precluding summary judgment on employee's claim under ADEA for unlawful discharge; employee had worked as postal carrier for approximately four to eight weeks before first allegedly ageist remark was made, insufficient time to determine whether employee was able to do job properly. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[3] Federal Civil Procedure
Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact existed as to whether public employee was replaced by a younger employee after his termination, precluding summary judgment on employee's claim under ADEA for unlawful discharge. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

2 Cases that cite this headnote

***894** On Appeal from the United States District Court for the Middle District of Tennessee.

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Before BOGGS, Chief Judge; and KRUPANSKY and CLAY, Circuit Judges.

Opinion

BOGGS, Chief Judge.

Plaintiff William C. Erwin, proceeding pro se, filed a complaint under the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1), against the Postmaster General for unlawful discharge. Erwin claims that he was fired as a non-career temporary relief rural mail carrier because of his age. The district court granted the defendant summary judgment, holding that the alleged remark by Erwin's supervisor, "as we get older, we get slower," could be interpreted to refer to Erwin's speed in delivering the mail, rather than his age. Because the district court did not factor into its analysis the additional comment "you're too old to carry the mail," that his supervisor allegedly made when Erwin was fired, it failed to consider the evidence in the light most favorable to him. Because this second remark could constitute direct evidence of discrimination under our holding in *Wexler v. White's Fine Furniture*, 317 F.3d 564 (6th Cir.2003) (*en banc*), we hold there is a genuine issue of material fact raised by the direct evidence of discrimination. Furthermore, as we explain below, the holding in *Wexler* also has implications for the district court's analysis of Erwin's age discrimination claim based on circumstantial evidence. Therefore, we reverse the district court's grant of summary judgment.

I

William C. Erwin was hired on March 25, 2000, at the age of 45, as a temporary relief rural carrier for the Columbia, Tennessee, Post Office. Erwin had no union ***895** bargaining rights and was a non-career employee limited to working 359 days per year. His main duty was to fill in for absent mail carriers on regular routes or to deliver the mail on shorter auxiliary routes. Although he was hired primarily to cover one route, he actually rotated among four different routes during his tenure. He received training on some, but not all, of the routes to which he was assigned. Other postal employees gave him informal guidance on-the-job. The rest of his training consisted of a driver's education class in Nashville and a mail-sorting workshop in Madison, Tennessee.

From the beginning of Erwin's employment, the post office received complaints about late and mis-deliveries on the routes for which he was responsible. His supervisor, Kathy Hinkle, counseled him five to ten times about the deficiencies in his performance, based on customer complaints and the fact that Erwin often left the post office late to make his deliveries. On July 13, 2000, the local postmaster, David Dean, conducted a pre-disciplinary interview, warning Erwin that he would be removed if his performance did not improve. Customer dissatisfaction continued, however, including a letter of complaint published in the local newspaper about late deliveries on one of Erwin's routes.

The record contains evidence that Erwin's load on September 29 and 30, 2000, was unusually heavy. The record also suggests that the post office had an informal practice by which mail carriers would help each other out if one had an excessive amount of mail to deliver on a particular day. In Erwin's case, Hinkle and John Rumbaugh, her deputy, explicitly forbade other employees from assisting him, although there was evidence that they may have allowed it when other employees fell behind. On September 30, 2000, Erwin was supposed to complete his route by 3:26 p.m. When the post office closed at 7:00 p.m., Erwin had not yet returned. He called Hinkle at home when he finally finished the route at 9:30 p.m., so that she could let him into the building to clock out, which she did.

Hinkle, with the concurrence of Postmaster Dean, fired Erwin on October 2, 2000, the next business day after his late return to the post office. Erwin claims that when she fired him she told him that "he was too old to carry the mail," a statement corroborated by another employee in an affidavit. Erwin also claims that in May Hinkle said: "We're not as young as we used to be. As we get older, we get slower." He also contends that the Postmaster General discriminated against him by not providing adequate training, giving him an unreasonably heavy workload, and not providing him assistance when warranted.

Erwin testified in his deposition that he believed that he was the only temporary carrier at the Columbia post office during the six months he worked there. After his termination, the other postal workers covered his duties, until Sheila Haskin, age 38, was hired on November 4, 2000. Over the next four months, Dean hired three additional temporary relief rural carriers in addition to Haskin: Tony L. Spiess, age 47, hired on December 16, 2000; Laurie Day, aged 32, and Elmer Rittenberry, age 50, both hired on February 24, 2001.

II

We review the district court's grant of summary judgment *de novo*. *Copeland v. Machulis*, 57 F.3d 476, 478 (6th Cir.1995)(per curiam). Summary judgment is appropriate when the evidence submitted shows "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). In considering the evidence, the court must view the evidence ***896** and facts in the light most favorable to the non-moving party. *Davidson & Jones Dev. Co. v. Elmore Dev. Co.*, 921 F.2d 1343, 1349 (6th Cir.1991). "[S]ummary judgment will not lie if the dispute is about a material fact that is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

To respond to a motion for summary judgment, the non-moving party must present "significant probative evidence" to show that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos.*, 8 F.3d 335, 340 (6th Cir.1993). The non-moving party "may not rest upon [its] mere allegations ... but ... must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *see Celotex v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir.1994). The existence of a mere scintilla of evidence in support of the non-moving party's position will not be sufficient; there must be evidence on which the jury could reasonably find for the non-moving party. *Liberty Lobby*, 477 U.S. at 251; *Copeland*, 57 F.3d at 479. However, the district court is not permitted to make credibility assessments or weigh the evidence. *Liberty Lobby*, 477 U.S. at 255.

Erwin is a pro se plaintiff and did not present his argument in legal terms. It is, however, appropriate to interpret the pleadings of pro se plaintiffs liberally. *Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir.1999). In *Boswell*, the court read "sympathetically" an inmate's claim that opening a letter from the attorney general outside of his presence violated his right of access to the courts. The court reformulated the pleading into a claim for which the inmate had standing: that his First Amendment right to receive mail had been violated. *Id.* at 388. Applying this active interpretation standard, as approved in *Franklin v. Rose*, 765 F.2d 82, 85 (6th Cir.1985), we infer that Erwin intended to argue age discrimination based on the direct evidence of his supervisor's alleged statement: "you're too old to carry the mail." We also construe Erwin's allegations of age-related remarks on two separate occasions as circumstantial evidence of discrimination, requiring analysis under the separate *McDonnell Douglas* framework.

The Age Discrimination in Employment Act prohibits employers from "discharg [ing] any individual or otherwise discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). It is designed to prevent arbitrary discrimination in the workplace based on age. *Lorillard v. Pons*, 434 U.S. 575, 577, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978). The same analysis governs both suits under the ADEA and Title VII employment discrimination cases. *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 538 (6th Cir.2002). Therefore, Erwin can show age discrimination either through direct evidence or circumstantial evidence, but does not have to show both. *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 348 (6th Cir.1997). We consider each method in turn.

III

A. Direct Evidence

[1] Direct evidence is evidence that "if believed, requires the conclusion that unlawful discrimination was at least a motivating factor" in the adverse employment action. *Bartlik v. United States Dep't of Labor*, 73 F.3d 100, 103 n. 5 (6th Cir.1996) (citations omitted). Direct evidence of discrimination ***897** is rare because employers generally do not announce that they are acting on prohibited grounds. *Kline*, 128 F.3d at 348. This circuit has provided the statement "I fired you because you are disabled" as an example of direct evidence. *Smith v. Chrysler Corp.*, 155 F.3d 799, 805 (6th Cir.1998). Racial slurs or statements that suggest that the decision-maker relied on impermissible stereotypes to assess an employee's ability to perform can constitute direct evidence. *Cushman-Lagerstrom v. Citizens Ins. Co. of America*, No. 01-2690, 72 Fed.Appx. 322, 2003 WL 21774017, 2003 U.S.App. LEXIS 15635, at *25 (6th Cir. July 30, 2003) (unpublished opinion) (citing cases). The statement "you're too old to carry the mail," made while firing an employee, is sufficiently blunt that a fact finder could construe it as direct evidence of age discrimination against Erwin. Testimony that the statement was made could demonstrate that unlawful discrimination was at least a motivating factor in Hinkle's decision to fire Erwin. *See Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*,

176 F.3d 921, 926 (6th Cir.1999) (citing cases for the definition of direct evidence).

Erwin alleged that when his supervisor, Kathy Hinkle, fired him, she stated: "You're too old to carry the mail." In order to create a issue of genuine material fact, the non-movant may not just allege wrongdoing, but must also produce some affirmative evidence supporting his claims. *Celotex v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Although Erwin's deposition contains the clearest evidence that Hinkle said he was too old, a colleague confirmed that Hinkle had said something similar a few months earlier, probably in May: "I personally heard Kathy Hinkle tell Carlos Erwin that he was getting to [sic] old to do the job; that even though they were about the same age, she had been there longer, and Carlos wasn't as fast as he used to be." [1] Finally, the Postmaster General does not now challenge the fact that Hinkle said Erwin was "too old to do the job," quoting the language in his brief on appeal, although he did assert unequivocally that Erwin was fired because of his performance, not his age. Nor did Hinkle deny the more direct formulation-"you're too old to carry the mail"-under oath, although she did swear that she did not fire Erwin because of his age. Therefore the record contains slim, but nevertheless affirmative, evidence of a genuine issue of material fact, namely whether Hinkle's statement constitutes direct evidence that Erwin was fired because of his age. By only considering the blander formulation, the district court failed to view the evidence in the light most favorable to Erwin, as required on summary judgment.

In analyzing the direct evidence claim, the district court considered a different statement that Erwin alleges Hinkle made: "We are not as young as we used to be, as we get older, we get slower." The court noted that Erwin alleged that Hinkle said something similar at one other time, but it concluded that the statements showed that Erwin was fired because he was slow rather than because of his age. That is a reasonable interpretation of the "as we get older, we get slower" comment but not of the more direct statement "you're too old to carry the mail" or even Erwin's paraphrase of another alleged Hinkle statement: "it's hard to be as sharp as when I was younger." By limiting its consideration to one formulation of Hinkle's comments regarding Erwin's age and ability to ***898** deliver the mail, the district court failed to consider the evidence in the light most favorable to Erwin, the standard to which he was entitled. Failing to address favorable evidence is sufficient grounds for reversal of summary judgment. *Logan v. Denny's Inc.*, 259 F.3d 558, 567-68 (6th Cir.2001); *D'Agastino v. City of Warren*, No. 01-4357, 2003 WL 22220530, 75 Fed.Appx. 990, 2003 U.S.App. LEXIS 19823, at *14 (6th Cir. Sep. 24, 2003) (unpublished) (reversing grant of summary judgment on a § 1983 claim because the district court failed to consider the plaintiff's testimony that the arresting officer slammed his face into the pavement); *Polk v. Local 16, Int'l. Union Bricklayers & Allied Craftsmen*, No. 94-3272, 1995 WL 241999, 1995 U.S.App. LEXIS 9758, at **9-10 (6th Cir. Apr. 25, 1995) (unpublished opinion) (holding abuse of discretion in an age discrimination suit for excluding an affidavit with an alleged statement by a supervisor that "construction is a young man's game").

Furthermore, after the district court granted summary judgment against Erwin, this court decided *Wexler v. White's Fine Furniture*, in which a supervisor justified a demotion by commenting that the plaintiff, then a manager, would be happier returning to the sales staff because he was too old for the aggravation of running a store. The court found those remarks constituted direct evidence of age discrimination. *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir.2003) (*en banc*). The statements made during the meeting in which Wexler was demoted, namely "you're 60 years old, aren't you Don?" and that White's would be "really grinding their managers in the future," *ibid.*, were more oblique references to Wexler's age than the unvarnished "you're too old to carry the mail" alleged by Erwin in this case.

The context in which the comments are made is also critical. Discriminatory remarks made while implementing an adverse employment action are likely to reveal animus. *See Wexler*, 317 F.3d at 572 (citing *Weberg v. Franks*, 229 F.3d 514, 523-26 (6th Cir.2000)). In contrast, occasional disparaging remarks made during the regular course of business about age or other protected characteristics are much more likely to be considered the kind of "isolated and ambiguous" comments that do not trigger employer liability. *See Phelps v. Yale Security Inc.*, 986 F.2d 1020, 1025 (6th Cir.1993) (citing *Gagne v. Northwestern Nat. Ins. Co.*, 881 F.2d 309, 314 (6th Cir.1989)). Here, Hinkle declared, while firing Erwin, that he was "too old to carry the mail." This constitutes an "association of ... stigmatizing beliefs with an adverse employment decision" that creates a genuine issue of material fact regarding whether she was motivated, at least in part, to fire Erwin because of his age. *Wexler*, 317 F.3d at 572.

The record in this case consists of one very direct alleged statement of discrimination: "you're too old to carry the mail."

Although obviously not binding precedent on this court, the approach of the Supreme Court of Michigan in deciding a case with a parallel fact pattern is illustrative. That court allowed a plaintiff to base an age discrimination claim on his employer's statement, made when firing the plaintiff, then aged 48, that the latter was "getting too old for this shit." *De Brow v. Century 21 Great Lakes, Inc.*, 463 Mich. 534, 536, 620 N.W.2d 836 (2001) (per curiam). The court acknowledged the remark was susceptible to various interpretations ranging from discrimination to commiseration. *Id.* at 538, 620 N.W.2d 836. *See also Wexler*, 317 F.3d at 586 (Krupansky, J., dissenting) (arguing that Wexler's employer was trying to give him a "graceful exit" by portraying his return to the sales floor as prompted by Wexler's age rather than by his poor performance as a manager). ***899** Likewise, a finder of fact could interpret Hinkle's comment about Erwin being too old to carry the mail as an attempt to spare his feelings. Nevertheless, assessments about the credibility, or import of statements, are improper on summary judgment. *Ahlers v. Schebil*, 188 F.3d 365, 369 (6th Cir.1999). Because a rational jury could take Hinkle's statement at face value, summary judgment was improper in this case.

B. Circumstantial Evidence

Burden of Proof

Because direct evidence of discrimination is rare, plaintiffs are also able to present circumstantial evidence within the well-known *McDonnell Douglas* framework to prove their claims. *Trans World Airlines*, 469 U.S. at 121 (citation omitted). In order to prevail on a circumstantial case, a plaintiff must first make a prima facie showing, which gives rise to a presumption of discrimination. Then the defendant must offer a legitimate, non-discriminatory reason for the adverse employment action. In response, the plaintiff must show that the defendant's reason for acting is pretextual. *McDonnell Douglas v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Cicero v. Borg-Warner*, 280 F.3d 579, 582-83 (6th Cir.2002). Direct evidence and circumstantial evidence claims run on parallel tracks, and therefore failure to sustain a claim under one framework does not undermine the other. *Trans World Airlines*, 469 U.S. at 121; *Kline*, 128 F.3d at 348. In particular, the burden of persuasion stays with the plaintiff throughout the *McDonnell Douglas* analysis; in contrast, the defendant in a direct evidence case has the burden to show that its stated reason for acting against the plaintiff was not pretextual. *Weberg*, 229 F.3d at 522-23; *Johnson v. University of Cincinnati*, 215 F.3d 561, 572 (6th Cir.2000) (citing *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1081 (6th Cir.1994) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989))).

Therefore, the district court erred when it stated that under both direct and circumstantial evidence methods of proof, Erwin must "show that his age was a determining factor in his termination." To the contrary, under the direct evidence approach, the Postmaster General must show a legitimate reason for terminating Erwin's employment that was not related to his age. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); *See Trans World Airlines*, 469 U.S. at 121 (stating that *McDonnell Douglas* burden shifting is inapplicable where the plaintiff presents direct evidence); *Wexler*, 317 F.3d at 585, n. 10 (Krupansky, J. dissenting) (paraphrasing *Terbovitz v. Fiscal Court of Adair Cty.*, 825 F.2d 111, 115 (6th Cir.1987)).

Prima Facie Case: Qualification

[2] In order to make a prima facie case of discrimination using circumstantial evidence, Erwin must show that 1) he is forty or over; 2) he suffered an adverse employment action; 3) he was qualified for the position; and 4) he was replaced by a younger person. *See Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 69 (6th Cir.1982) (citations omitted). Parts one and two are undisputed.

The district court erred in holding, as a matter of law, that Erwin was unqualified for the job. The basic approach for a plaintiff who wants to show job qualification is to show that he has met the legitimate expectations of his employer and performed to the employer's satisfaction. *Warfield v. Lebanon Correctional Inst.*, 181 F.3d 723, 729 (6th Cir.1999). Testimony from supervisors or co-workers that an employee's performance was acceptable ***900** may not suffice to create an issue of material fact concerning an employer's overall satisfaction with job performance. *Ibid.* (citing *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1125 (7th Cir.1994)). Therefore, Erwin's assertions that his work was excellent when he was properly trained, and his colleagues' affidavits to that effect, whether hearsay or not, would be insufficient to overcome the clear dissatisfaction that Hinkle and Dean expressed with Erwin's work. This is the reasoning upon which the district court based its analysis. *But see Mills v. Ford Motor Co.*, 800 F.2d 635 (6th Cir.1986) (accepting testimony by other employees as to the plaintiff's work performance because the record showed that her supervisors did not visit her work area and only counseled her for five minutes before firing her for poor performance).

Although the district court was correct that plaintiff may not simply assert that he is qualified, this circuit has been careful to analyze qualification at the prima facie stage without taking into consideration the legitimate non-discriminatory reason for termination that a defendant may offer in the rebuttal stage. *Cline v. Catholic Diocese of Toledo,* 206 F.3d 651, 661-62 (6th Cir.2000). A claim of poor work performance is not an absolute bar to a showing of a prima facie case. *Danielson v. City of Lorain,* 938 F.2d 681, 683 (6th Cir.1991) (accepting *arguendo* that the plaintiff had made a prima facie case of age discrimination in spite of documented poor performance, including a two-week disciplinary suspension). A court must be careful to judge qualification on the actions and performance before the first instance of discrimination. *Id.* at 662-63. In Erwin's case, this would be difficult to do since Hinkle's first allegedly ageist remark was made in May 2000 and Erwin started work on March 25, 2000. Four to eight weeks is generally insufficient time to determine if a new employee is able to do the job properly.

The district court should have at least considered Erwin's education and skills acquired in previous employment as part of its analysis of his qualification for the job. *Cicero v. Borg-Warner Automotive Inc.,* 280 F.3d 579, 585-86 (6th Cir.2002). The record does not provide this information, other than Erwin's statement that he passed the post office qualification exam for a clerical position. Therefore a question of material fact exists concerning Erwin's qualifications for the job.

In addition, this circuit recently clarified that at the prima facie stage, a court should focus on a plaintiff's objective qualifications for the job, rather than the employer's assessment of the performance. *Wexler,* 317 F.3d at 575-76. Using that standard, Erwin is arguably qualified for the job for the reasons suggested above. Furthermore, *Wexler* held that if an employee's substandard performance was based on conditions outside his control, then the employer's expectations could not be the sole criterion for determining qualification. *Id.* at 575. (citing *Godfredson v. Hess & Clark Inc.,* 173 F.3d 365 (6th Cir.1999) (finding that store manager could not be held responsible for a drop in sales attributable to an economic downturn and therefore the legitimacy of the employer's expectation of sales growth was a genuine issue of material fact)). In this case, the record shows that Erwin was given heavy loads of mail to deliver, that other colleagues were prevented from helping him, as was allegedly the custom, and that his training was not consistent. Furthermore, four people were hired in the aftermath of Erwin's departure to work as temporary relief rural carriers. The post office upgraded auxiliary route 18, the route that Erwin finally completed at 9:30 p.m., leading to his termination, to a regular route shortly after his departure. Under the ***901** *Wexler/ Godfredson* line of reasoning, this is enough to raise an issue of material fact about the legitimacy of employer expectations and, consequently, Erwin's qualification for the job.

Prima Facie Case: Replacement

[3] The district court also erred in finding that Erwin did not satisfy part four of the prima facie case because he was not replaced by a younger employee. As noted above, over the next five months after he was fired, the post office hired four people, ranging in age from 32 to 50, as temporary relief rural carriers. The first person hired to fill Erwin's position started work only three weeks after he left, so that the temporary sharing of his workload among the other postal workers in the interim cannot qualify as the kind of redistribution that precludes a finding that the dismissed employee was replaced. *Barnes v. GenCorp Inc.,* 896 F.2d 1457, 1465 (6th Cir.1990) (discussing that an existing employee must take over the discharged employee's duties on a permanent basis in order for the termination of employment to be considered an economically necessary reduction in force, rather than discrimination). The person who initially replaced Erwin was 38 years old, nine years younger than he; this creates a genuine issue of material fact for the purposes of his age discrimination claim. We hold that the trial court erred in its preliminary review, and that Erwin could satisfy the fourth part of the prima facie test by showing he was replaced by someone younger.

IV

For the reasons outlined above we hold that the district court erred in granting the defendant summary judgment. We therefore REVERSE the district court's order granting the defendant's motion for summary judgment and remand this case for further proceedings not inconsistent with this opinion.

Parallel Citations

2003 WL 22514367 (C.A.6 (Tenn.))

Footnotes

1 Erwin suggests that Postmaster David Dean may have overheard the conversation in which Hinkle fired Erwin because Dean was standing right outside the door when he opened it, but Erwin did not question Dean about his presence there.

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United States District Court,
E.D. Michigan,
Southern Division.

Abdrreza Akhavan TAFTY, Plaintiff,
v.
CVS PHARMACY, Defendant.

Civil Action No. 11–CV–14628. | Nov. 20, 2012.

Opinion

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

BERNARD A. FRIEDMAN, Senior District Judge.

***1** This matter is presently before the Court on defendant's motion for summary judgment [docket entry 14]. Plaintiff has filed a response in opposition and defendant has filed a reply. Pursuant to E.D. Mich. LR 7.1(f)(2), the court shall decide this motion without oral argument.

This is an employment discrimination action. Plaintiff, who worked for defendant as a "lead pharmacy technician" until January 2010, alleges that defendant discriminated against him based on his national origin (Persian) and retaliated against him when he complained to higher management about his supervisor's mistreatment of him. Specifically plaintiff alleges that his supervisor, Dalia Omais, "a female of Arabic decent," treated him poorly, was more critical of his work than any of his previous supervisors had been, and "would curse at Plaintiff in Arabic and call him vulgar names based on his National Origin and religion (Muslim)." Compl. ¶¶ 16–24. Plaintiff further alleges that he complained to Omais' supervisor, Sarita Saade–Harfouch, that "Omais "treated him like an animal and reported the vulgar comments, but that no corrective action was taken, Omais' treatment of him worsened, and plaintiff was eventually discharged. *Id.* ¶¶ 26–36. Plaintiff asserts claims for national origin discrimination (Count I) and retaliation (Count II) under Michigan's Elliott–Larsen Civil Rights Act ("ELCRA"), Mich. Comp. Laws §§ 37.2101, *et seq.* For relief he seeks damages, costs and attorney fees.

Defendant seeks summary judgment on both counts, arguing that plaintiff has failed to state a prima facie case of national origin discrimination (based either on his termination from employment or the allegedly hostile work environment) or retaliation, and that defendant had legitimate, nondiscriminatory reasons for discharging plaintiff, namely, his failure to meet his supervisor's expectations regarding work performance. Plaintiff argues that he has stated a prima facie case of national origin discrimination and retaliation and that the facts are disputed as to whether the reasons offered for his termination are legitimate or pretextual.

Under Fed.R.Civ.P. 56(a), summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* dispute as to any *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis in original). Viewing the evidence in the light most favorable to the opposing party, summary judgment may be granted only if the evidence is so one-sided that a reasonable fact-finder could not find for the opposing party. *See Anderson*, 477 U.S. at 248–50; *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478–80 (6th Cir.1989). In other words, "[a] material issue of fact exists where a reasonable jury, viewing the evidence in the light most favorable to the non-moving party, could return a verdict for that party." *Vollrath v. Georgia–Pacific Corp.*, 899 F.2d 533, 534 (6th Cir.1990).

***2** The ELCRA prohibits employers from "discharg[ing] or otherwise discriminat[ing] against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status." Mich. Comp. Laws § 37.2202(1)(a). The statute also prohibits any person, including an employer, from "[r]etaliat[ing] or discriminat[ing] against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." Mich. Comp. Laws § 37.2701(a).

Plaintiff's Wrongful Discharge Claim

The legal standards governing plaintiff's claim that he was discharged based on his national origin have been articulated as follows:

... Under ELCRA, a plaintiff may prove discriminatory treatment by presenting direct evidence or by presenting indirect or circumstantial evidence. *Sniecinski v. Blue Cross & Blue Shield of Mich.*, 469 Mich. 124, 666 N.W.2d 186, 192 (2003)....

1. Direct evidence

Direct evidence is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Sniecinski*, 666 N.W.2d at 192 (quoting *Hazle v. Ford Motor Co.*, 464 Mich. 456, 628 N.W.2d 515 (2001)) (internal quotations omitted). It shows that the person who made the challenged decision, or was otherwise meaningfully involved in that decision, had a bias or that bias affected the challenged decision. *Nemet v. First Nat'l Bank of Ohio*, No. 98–4076, 1999 WL 1111584, *4 (6th Cir. Nov.22, 1999).

* * *

... Statements made by an immediate supervisor and decision maker, that specifically and derogatorily reference an employee's national origin and that are in a close temporal proximity to the termination decision, present sufficient evidence of causation. *Id.* [*DiCarlo v. Potter*, 358 F.3d 408, 417 (6th Cir.2004)] at 417. Conversely, a weaker temporal proximity requires a greater quantum of evidence than in cases with a tighter time line of events. *See id.* (distinguishing *Hein v. All Am. Plywood, Co.*, 232 F.3d 482 (6th Cir.2000)).

* * *

... To prove an allegation of discrimination utilizing indirect or circumstantial evidence, a plaintiff must proceed under the evidentiary framework promulgated in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Sniecinski*, 666 N.W.2d at 193. To establish discrimination under the *McDonnell Douglas* framework, the plaintiff must first establish a prima facie case of discrimination. 411 U.S. at 802. The burden then shifts to the defendant to provide a legitimate nondiscriminatory reason for the adverse employment action. *Id.* Once the defendant has met this burden, the plaintiff is then afforded the opportunity to prove that the defendant's stated reason is a pretext for unlawful discrimination. *Id.* at 804.

a. *Prima facie case*

***3** To establish a prima facie case of discrimination under ELCRA, a plaintiff must prove four things: "(1) [he] belonged to a protected class, (2) [he] suffered an adverse employment action, (3)[he] was qualified for the position, and (4) [the adverse employment action] occurred under circumstances giving rise to an inference of unlawful discrimination." *Sniecinski*, 666 N.W.2d at 193 (citing *Hazle*, 464 Mich. 456, 628 N.W.2d 515; *Lytle v. Malady*, 458 Mich. 153, 579 N.W.2d 906, 916 (1998)); *see also Town v. Mich. Bell. Tel. Co.*, 455 Mich. 688, 568 N.W.2d 64, 68 (1997).

* * *

... Circumstances give rise to an inference of discrimination if the employee "was treated differently than persons of a different class for the same or similar conduct." *Singal v. Gen'l Motors Corp.*, 179 Mich.App. 497, 447 N.W.2d 152, 156 (1989); *see also Quiros v. Kalitta Flying Service, Inc.*, No. 229229, 2003 WL 21279591, *6 (Mich.Ct.App. June 3, 2003) (per curiam). In other words, the plaintiff must show that "he was treated less favorably than a similarly situated individual outside his protected class." *Howard v. Family Indep. Agency*, No. 243973, 2004 WL 243375, *4 (Mich.Ct.App. Feb.10, 2004) (per curiam). "Employees are similarly situated if all of the relevant aspects of their employment situations are nearly identical." *Howard*, 2004 WL 243375 at *4 (citing *Town*, 568 N.W.2d at 70.)

* * *

Alternatively, a plaintiff can demonstrate that the circumstances give rise to an inference of discrimination if "the person who terminated him was predisposed to discriminate against persons in the affected class and had actually acted on that disposition in discharging him." *Singal v. Gen'l Motors Corp.*, 179 Mich.App. 497, 447 N.W.2d 152, 156 (1989), *see also Harrison*, 572 N.W.2d at 682 n. 6.

Hussain v. Highgate Hotels, Inc., 126 F.App'x 256, 262–65 (6th Cir.2005).

With these standards in mind, the Court concludes that plaintiff has failed to state a prima facie case regarding his claim that his national origin played a role in defendant's decision to terminate his employment. First, there is no direct evidence of such discrimination. As noted, direct

evidence, usually in the form of derogatory comments by a supervisor or decisionmaker, " 'requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.' " *Hazle v. Ford Motor Co.*, 464 Mich. 456, 462, 628 N.W.2d 515 (2001), *quoting Jacklyn v. Schering–Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir.1999). "For example, a facially discriminatory employment policy or a corporate decision maker's express statement of a desire to remove employees in the protected group is direct evidence of discriminatory intent." *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir.2000). Further, "evidence of discrimination is not considered direct evidence unless a racial motivation is explicitly expressed." *Amini v. Oberlin Coll.*, 440 F.3d 350, 359 (6th Cir.2006). The evidence in question must "lead ineluctably to the conclusion" that the unlawful consideration played a role in the decision at issue. *Id.*

***4** In the present case, plaintiff has no such evidence. His argument on this point is that he

> was terminated at the request of his supervisor Omais. (Exhibit G). Omais is a different ethnicity than Plaintiff, is from a different region of the Middle East than Plaintiff, and speaks a different language than Plaintiff. Omais demonstrated her animus towards Plaintiff by engaging in a pattern of behavior toward Plaintiff, the only employee of Persian descent, which was condescending and rude. Specifically, Omais (1) yelled at plaintiff on a regular basis, (2) spoke to outsiders stating that Plaintiff was incompetent or useless, (3) engaged in silent treatment toward Plaintiff after he reported Omais' treatment, and (4)[o]n various occasions used derogatory terms toward Plaintiff, including the Arabic term "kossath."

Pl.'s Br. at 9. None of these points, either together or in isolation, suggests that Omais treated plaintiff badly because of his national origin. All plaintiff has shown is that Omais treated him rudely, not that she did so because plaintiff is Persian. At his deposition, plaintiff testified he "felt" Omais did not like him because he is Iranian, but he acknowledged she never said so and, in fact, that she never said "anything to [plaintiff] that was derogatory towards Persians" and never mentioned plaintiff's Persian origin. Pl.'s Dep. at 56–57, 161–62. While plaintiff testified that Omais cursed him with an Arabic word, which he believes means "fuck your sister," he does not know if it is derogatory towards Persians specifically. *Id.* at 154–55, 161. Plaintiff conceded that he "automatically concluded" Omais' treated him rudely because he is Persian. *Id.* at 180. Clearly, this is not direct evidence of discriminatory animus because Omais never, as plaintiff has conceded, "explicitly expressed" any anti-Persian bias, nor did she ever say or do anything that "lead[s] ineluctably to the conclusion" that she was motivated by any such bias. *Amini*, 440 F.3d at 359.

Lacking direct evidence of discrimination, plaintiff must produce circumstantial evidence showing that he was discharged "under circumstances giving rise to an inference of unlawful discrimination ." *Hazle*, 464 Mich. at 463, 628 N.W.2d 515. [1] As noted above, plaintiff generally must meet this burden by showing that similarly situated employees outside of the protected class were treated more favorably. Plaintiff

> "need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered 'similarly-situated;' " rather, the plaintiff and the employee with whom the plaintiff seeks to compare herself "must be similar in 'all of the relevant aspects.' " 154 F.3d 344, 352 (6th Cir.1998) (quoting *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir.1994)). This means the plaintiff must "prove that all of the relevant aspects of his employment situation are 'nearly identical' to those of [the non-minority] employees who he alleges were treated more favorably." *Pierce*, 40 F.3d at 802.
>
> ***5** *Hatchett v. Health Care and Retirement Corp. of Am.*, 186 F.App'x 543, 548 (6th Cir.2006).

In the present case, plaintiff has not identified any non-Persian employees who were not discharged under similar circumstances. In fact, plaintiff indicates that "[t]here are no employees that were similarly situated to Plaintiff because no one else is in the same reporting capacity as Plaintiff to Omais." Pl.'s Br. at 12. Therefore, proof establishing the fourth element of the prima facie case of discriminatory termination is absent.

Plaintiff can attempt to establish the fourth element of a prima facie case by pointing to other probative evidence suggesting that unlawful discrimination played a role in the discharge

decision. Yet plaintiff has produced no such evidence. Here he relies on evidence that relates generally to his hostile work environment claim (i.e., Omais' "ridicule and constant disrespect," Pl.'s Br. at 13), but which does not give rise to any inference that his national origin played any role in defendant's decision to discharge him.

Finally, plaintiff attempts to meet the fourth element of his prima facie case by pointing to the fact that he was replaced by a non-Persian. The same attempt was made and rejected in *Hussain:*

> Lastly, Hussain argues that there is an inference of discrimination because he was replaced with an individual not shown to be a member of his protected classes. One cannot establish a prima facie case of discrimination, however, "merely by providing evidence that a qualified minority candidate was rejected in favor of a qualified nonminority candidate." *Hazle,* 628 N.W.2d at 525. Thus, the mere fact that Hussain was replaced with someone outside his protected classes is insufficient to establish an inference of discrimination.

126 F.App'x at 265.

The Court concludes plaintiff has failed to state a prima facie case that defendant discharged him, even in part, because of his national origin. Even assuming plaintiff had stated a prima facie case, the Court also concludes that he has failed to cast sufficient doubt on defendant's nondiscriminatory explanation for discharging him to defeat defendant's summary judgment motion. As the Sixth Circuit has explained,

> [a]n employee has three ways by which to prove the existence of pretext: "(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge, or (3) that they were insufficient to motivate discharge." *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1084 (6th Cir.1994) (quoting *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 513 (7th Cir.1993)); *see also Dubey v. Stroh Brewery Co.*, 185 Mich.App. 561, 462 N.W.2d 758, 760 (1990).
>
> The first type of showing is easily recognizable and consists of evidence that the proffered bases for the plaintiff's discharge never happened, i.e., that they are "factually false." The third showing is also easily recognizable and, ordinarily, consists of evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the plaintiff....
>
> ***6** The second showing, however, is of an entirely different ilk. There, the plaintiff admits the factual basis underlying the employer's proffered explanation and further admits that such conduct could motivate dismissal. The plaintiff's attack on the credibility of the proffered explanation is, instead, an indirect one. In such cases, the plaintiff attempts to indict the credibility of his employer's explanation by showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the defendant. In other words, the plaintiff argues that the sheer weight of the circumstantial evidence of discrimination makes it "more likely than not" that the employer's explanation is a pretext, or coverup.
>
> *Manzer,* 29 F.3d at 1084 (internal quotations and citations omitted).
>
> "A reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false and that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

Hussain, 126 F.App'x at 265–66.

In the present case, the evidence shows that Omais orally warned plaintiff about his work performance on September 2, 2009, and that this warning was followed by increasingly detailed written criticism and improvement directives on September 15, October 16 and November 27, 2009. *See* Def.'s Ex. 5A–5D. Some of the issues had to do with plaintiff not preparing the work schedule and workstation assignment board, not understanding the company's new computer system, not answering the telephone, not keeping the pharmacy area clean, not managing inventory correctly, not interacting with customers appropriately, and not completing certain "training modules." *See id.* Plaintiff argues that an issue of fact exists regarding pretext because "[t]he laundry list of deficiencies alleged by Omais, which appear to be the only deficiencies considered in the decision to terminate, were completely fabricated." Pl.'s Br. at 14. For support of this statement, plaintiff cites only ¶ 70 of his affidavit, where he avers that "I watched many employees succeed, be disciplined or demoted, or even fired during my time at

CVS, I never saw anyone who was treated like me." This averment does not speak to the truth or falsity of the many deficiencies in plaintiff's performance which Omais noted in the above-referenced, detailed "coaching and counseling" forms, all of which plaintiff signed. At his deposition, where he was questioned about these forms at length (*see* Pl.'s Dep. at 86–170), plaintiff had no recollection about many of these performance issues (e.g., greeting customers with a smile, completing action notes, answering the telephone, resolving insurance issues, removing trash); and as to some of those he did recall, plaintiff simply disagreed with Omais as to how the tasks should be performed (e.g., scheduling, work assignment board, inventory). Regarding the three training modules Omais directed plaintiff to complete, plaintiff could recall only completing one, but he could not recall which one. *See id.* at 108, 137–39.

***7** On this record, there is no genuine issue as to whether defendant's proffered reason for discharging plaintiff (i.e., poor performance) was a pretext for discrimination. There is no evidentiary basis for a reasonable jury to find that the proffered reason is false, as plaintiff asserts. Even if plaintiff could show that one or more of the items listed by Omais is false, he has presented no evidence from which a jury could find that anti-Persian discrimination "was the real reason." *Hicks*, 509 U.S. at 515.

For these reasons, the Court concludes that plaintiff has neither stated a prima facie case of national origin discrimination nor shown that defendant's proffered reason for discharging him was pretextual. The Court shall therefore grant summary judgment for defendant on this claim.

Plaintiff's Hostile Work Environment Claim

The legal standards governing plaintiff's claim that he was subjected to a hostile work environment based on his national origin have been articulated as follows:

> ... To establish a hostile work environment under ELCRA, a plaintiff must show five things: (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of his protected status; (3) such conduct or communication was unwelcome; (4) the unwelcome conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. *See Chambers v. Trettco, Inc.*, 463 Mich. 297, 614 N.W.2d 910, 915 (2000)....

1. *Intimidating, hostile, or offensive work environment*

... "[W]hether a hostile work environment existed shall be determined by whether a reasonable person, in the totality of the circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive environment." *Radtke v. Everett*, 442 Mich. 368, 501 N.W.2d 155, 167 (1993). A single incident of harassment is generally not sufficient to create a hostile work environment. *Id.* at 168. Rather, a court should look at all of the circumstances "including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Clark County Sch., Dist. v. Breeden*, 532 U.S. 268, 270–271, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001) (internal quotations omitted) (quoting *Faragher v. Boca Raton*, 524 U.S. 775, 787–788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998)). "Simple teasing, offhand comments, and isolated incidents (unless extremely serious)" do not rise to that level. *Faragher*, 524 U.S. at 788, *quoted in Clark County Sch. Dist.*, 532 U.S. at 271.

* * *

***8** ... For an employer to be liable on an employee's hostile environment claim, the employee must show "that the employer failed to take prompt and adequate remedial action upon notice of the creation of a hostile work environment." *Chambers*, 614 N.W.2d at 916.... Notice of the hostile environment "is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that ... harassment was occurring." *Id.* at 919. Furthermore, an employer is not strictly vicariously liable merely because a supervisor created the hostile environment. *Id.* at 916. The employer must still have notice of the alleged harassment. *Radtke*, 501 N.W.2d at 169. This notice "can be shown by evidence that a complaint was made to a higher management or that the employer should have known about the harassment because of its pervasiveness." *Jager v. Nationwide Truck Brokers, Inc.*, 252 Mich.App. 464, 652 N.W.2d 503, 510 (2001) (citing *Sheridan v. Forest Hills Public Schools* 247 Mich.App. 611, 637 N.W.2d 536 (2001); *Hartleip v. McNeilab, Inc.*, 83 F.3d 767, 776–777 (6th Cir., 1996))

> "The bottom line is that, in cases involving a hostile work environment claim, a plaintiff must show some fault on the part of the employer." *Chambers*, 614 N.W.2d at 916.

Hussain, 126 F.App'x at 267–69 (footnote omitted).

Plaintiff bases his hostile work environment claim on his allegations that Omais "blatantly treated Plaintiff less favorably than his co-workers who were not of Persian origin," that Omais "was disrespectful toward Plaintiff" and "would curse at Plaintiff in Arabic and call him vulgar names based on his National Origin and religion (Muslim)," that he "was subject to offensive communication, including ethnic slurs, [and] ... unfair scrutiny and unwarranted discipline ... because of his national origin." Compl. ¶¶ 22–24, 47–48.

Plaintiff has failed to state a claim for hostile work environment because he has produced no evidence to support the second and fifth elements. Even assuming the other elements have been established, there is no evidence that Omais' communication or conduct toward plaintiff had anything to do with his national origin. Plaintiff testified that Omais yelled at him, treated him "like a servant, animal monster ... very, very badly," criticized his work unfairly, on one day "called me kossath," sometimes would not talk to him, and generally treated him rudely. *See* Pl.'s Dep. at 150, 154, 163, 171–74. Nonetheless, plaintiff acknowledges that Omais never mentioned his national origin, never made any derogatory comments regarding his national origin, that the curse word is Arabic and plaintiff does not know if it is specifically derogatory toward Persians, and that he simply assumed Omais mistreated him because of his national origin. *See id.* at 161–62, 180. In short, there is no evidence linking plaintiff's national origin with Omais' treatment or communications towards him.

***9** Nor has plaintiff offered any evidence to establish the respondeat superior element of this claim. Plaintiff concedes he never complained to higher management that he believed Omais was discriminating against him because of his national origin. Plaintiff testified that his only effort to put higher management on notice was to contact Omais' supervisor, Sarita Saade–Harfouch, first by leaving a voicemail message and later by speaking with her in person. The voicemail message was that Omais was "treating me like a servant, animal, monster, those things ... very, very badly." *See id.* at 150. Sometime later, apparently in November 2009, plaintiff told Saade–Harfouch in person that Omais called him "kossath" and was treating him badly, but plaintiff never told her he believed Omais was discriminating against him because of his national origin or religion. *See id.* at 153–54, 163–65. Under these circumstances, no reasonable juror could find that defendant objectively should "have been aware of a substantial probability that [national origin] harassment was occurring." *Chambers*, 463 Mich. at 319, 614 N.W.2d 910.

The Court concludes that plaintiff's hostile work environment claim fails because he has produced no evidence showing that he "was subjected to communication or conduct on the basis of" his national origin or that defendant was on notice that plaintiff was being mistreated because of his national origin. The Court shall therefore grant summary judgment for defendant on this claim.

Plaintiff's Retaliation Claim

The legal standards governing plaintiff's claim that he was discharged in retaliation for complaining about his supervisor's treatment of him have been articulated as follows:

> ... The ELCRA prohibits an employer from retaliating against an employee who opposes a violation of the Act or makes a charge, files a complaint, or participates in an investigation under the Act. *See* Mich. Comp. Laws § 37.2701(a). In order to establish a *prima facie* case of retaliation under the ELCRA, plaintiff must establish: "(1) that [he] engaged in a protected activity; (2) that this was known to the defendant; (3) that the defendant took an employment action adverse to [him]; and (4) that there was a causal connection between the protected and the adverse employment action." *Barrett v. Kirtland Community College*, 245 Mich.App. 306, 315, 628 N.W.2d 63 (Ct.App.2001).
>
> ... "[A]n employee need not specifically cite the [ELCRA] when making a charge under the act." *Id.* at 319, 614 N.W.2d 910, 245 Mich.App. 306, 628 N.W.2d 63. However, "the employee must do more than generally assert unfair treatment[,] ... [he] must clearly convey to an objective employer that the employee is raising the specter of a claim of unlawful discrimination...." *Id.*
>
> * * *
>
> ... To establish a causal connection, plaintiff must show that his participation in an activity protected by the ELCRA was a "significant factor" in the employer's adverse employment action, not just that there was a causal link

between the two. *See Barrett,* 245 Mich.App. at 315, 628 N.W.2d 63. "[P]roof of temporal proximity, between the protected activity and the adverse employment action, without more, is not sufficient to support a finding of a causal connection." *Reisinger v. Ann Arbor Nights, Inc.*, No. 07–cv–13208, 2008 WL 5062888, at *10, 2008 U.S. Dist. LEXIS 10735, at *31 (E.D.Mich. Nov.25, 2008)....

***10** Third, if a plaintiff establishes a prima facie case, the burden shifting analysis under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), applies and a defendant may rebut the plaintiff's prima facie case by articulating a "legitimate, non-discriminatory reason" for the adverse employment action. *See Morris v. Oldham County Fiscal Ct.,* 201 F.3d 784, 792 (6th Cir.2000); *Smith v. Chrysler Corp.,* 155 F.3d 799, 805 (6th Cir.1998) (When a plaintiff establishes a prima facie case, "a mandatory presumption of discrimination is created and the burden shifts to the employer to proffer a non-discriminatory reason for" the adverse employment action).

Stevens v. Estes Express Lines, 833 F.Supp.2d 729, 735–37 (E.D.Mich.2011) (footnote omitted).

This claim is based on plaintiff's allegation that he "engaged in a protected activity when he complained about the national origin discrimination by his immediate supervisor, and reported her conduct to upper management [and] ... [a] causal connection exists between Plaintiff's protected activity and Plaintiff's discipline and subsequent termination." Compl. ¶¶ 55, 58.

This claim fails because plaintiff has not produced evidence supporting the first, second and fourth elements. Plaintiff testified at his deposition that he never complained to higher management that Omais was discriminating against him because of his national origin. In his only contacts with higher management—the voicemail message and the in-person meeting with Saade–Harfouch—plaintiff never indicated or even hinted that his national origin had anything whatsoever to do with Omais' treatment of him. In short, plaintiff never "clearly convey[ed] ... that [he was] raising the specter of a claim of unlawful discrimination." *Barrett,* 245 Mich.App. at 319, 628 N.W.2d 63. This simple fact makes it impossible for plaintiff to show that he engaged in protected activity, that defendant was aware of protected activity, or that a causal connection exists between the protected activity and any adverse employment action. Plaintiff correctly notes that he was not required to use "the magic words 'national origin discrimination.' " Pl.'s Br. at 19. Nonetheless, he was required to "do more than generally assert unfair treatment." *Barrett,* 245 Mich.App. at 319, 628 N.W.2d 63.

For these reasons, the Court concludes that plaintiff has failed to state a claim for retaliation under the ELCRA. The Court shall grant summary judgment for defendant on this claim.

Conclusion

For the reasons stated above, the Court finds that plaintiff has failed to state a claim under the ELCRA for discriminatory discharge based on his national origin, hostile work environment based on his national origin, or retaliation for engaging in protected activity. Accordingly,

IT IS ORDERED that defendant's motion for summary judgment is granted.

Footnotes

1 For present purposes, the Court assumes that plaintiff has met the first three elements of a prima facie case under the *McDonnell Douglas* framework, i.e., that he belongs to a protected class, that he suffered an adverse employment action, and that he was qualified for the position as lead pharmacy technician. While defendant argues plaintiff "cannot show that he was qualified for the position ... based on the mountain of record evidence that demonstrates otherwise," Def.'s Summ. J. Br. at 7, the Court may not "rely[ ] on defendant['s] non-discriminatory reasons for discharging [plaintiff] as grounds for finding [him] not qualified for the position at the prima facie stage." *Kulik v. Med. Imaging Res., Inc.*, 325 F.App'x 413, 414 (6th Cir.2009). As plaintiff worked for defendant as a lead pharmacy technician for nearly two and one-half years before being discharged, the court assumes at this stage of the case that he was at least minimally qualified for the position.

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NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
United States Court of Appeals,
Sixth Circuit.

Nina YODER, Plaintiff–Appellant,
v.
UNIVERSITY OF LOUISVILLE; Ermalynn Kiehl, in her official and individual capacity; Marcia Hern, in her official and individual capacity, Defendants–Appellees.

No. 12–5354. | May 15, 2013.

Synopsis

Background: Former student at Kentucky university's school of nursing (SON) filed § 1983 action against university, Dean of SON, and Associate Dean of Undergraduate Programs in their official and individual capacities, alleging they violated her First Amendment right to free speech and Fourteenth Amendment right to due process by dismissing her from SON for blog post on social networking site about patient's birthing experience. Student moved for summary judgment. The United States District Court for the Western District of Kentucky, 2009 WL 2406235, granted motion. Defendants appealed. The Court of Appeals, Cook, Circuit Judge, 417 Fed.Appx. 529, vacated and remanded. On remand, parties cross-moved for summary judgment. The District Court, 2012 WL 1078819, granted summary judgment for defendants. Student appealed.

Holdings: The Court of Appeals, Helene N. White, Circuit Judge, held that:

[1] student did not waive her claim for money damages;

[2] student's claim for injunctive and declaratory relief against university and individuals in their official capacities was moot;

[3] defendants were entitled to qualified immunity from liability based on First Amendment violation, as any such right allegedly violated was not clearly established;

[4] policies that student signed as part of SON program were not unconstitutionally vague or overbroad; and

[5] defendants were entitled to qualified immunity from liability for alleged violation of Fourteenth Amendment procedural due process.

Affirmed.

West Headnotes (5)

[1] Federal Courts
Civil rights

Former university School of Nursing (SON) student did not waive her claim for money damages under § 1983 stemming from her dismissal from SON for alleged violation of its honor code, which district court did not expressly reach; thus, dispute was live controversy over which Article III gave court continuing authority. U.S.C.A. Const. Art. 3, § 2, cl. 1; 42 U.S.C.A. § 1983.

[2] Civil Rights
Education

Dismissed nursing student's § 1983 injunctive claim for reinstatement into School of Nursing (SON) was moot as result of student's reenrollment in, and graduation from, SON program. 42 U.S.C.A. § 1983.

[3] Civil Rights
Schools

University, Associate Dean of Undergraduate Programs, and Dean of School of Nursing (SON) were entitled to qualified immunity from liability under § 1983 for dismissal of student from SON for blog post on social networking site expressing her views about patient's birthing

experience; defendants had legal and ethical obligations to ensure that patient confidentiality was protected and nursing students were trained with regard to their ethical obligations, and assuming that student had First Amendment right to post blog online it was not objectively unreasonable for defendants to believe she affirmatively waived that right through signature of confidentiality agreement and consent form. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983; KRS § 314.031(4)(d, k).

2 Cases that cite this headnote

[4] **Constitutional Law**
Discipline or retaliation

Constitutional Law
Discipline, suspension, or expulsion

Education
Speech and assembly; demonstrations

Policies signed by university School of Nursing (SON) student were not unconstitutionally overbroad in violation of First Amendment or vague in violation of due process; Honor Code, Confidentiality Agreement and Consent Form did not reach substantial amount of protected speech, and student's blog post on social networking site about patient's birthing experience clearly violated Consent Form, which obligated students to refrain from sharing information about their clinical patients' pregnancy and health care with any person other than instructor of course. U.S.C.A. Const.Amends. 1, 14.

1 Cases that cite this headnote

[5] **Civil Rights**
Schools

University, Associate Dean of Undergraduate Programs, and Dean of School of Nursing (SON) were entitled to qualified immunity from liability for damages under § 1983 based on alleged violation of nursing student's Fourteenth Amendment procedural due process in connection with her dismissal from SON; student could not show that clearly established law required defendants to treat her dismissal for violating patient confidentiality as disciplinary instead of academic, and defendants were not objectively unreasonable in concluding that processes used in student's dismissal afforded her adequate due process. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

On Appeal from the United States District Court for the Western District of Kentucky.

Before: WHITE and DONALD, Circuit Judges; and VARLAN, Chief District Judge. *

Opinion

HELENE N. WHITE, Circuit Judge.

***1** Plaintiff–Appellant Nina Yoder, a former student at the University of Louisville's School of Nursing ("the SON"), appeals the district court's grant of summary judgment in favor of Defendants–Appellees University of Louisville (the "University") and University employees Ermalynn Kiehl and Marcia Hern (collectively, "Defendants") in this 42 U.S.C. § 1983 action alleging that Defendants violated Yoder's First Amendment right to free speech and Fourteenth Amendment right to due process by dismissing her from the SON for a blog post on her MySpace.com page (the "Blog") that discussed various aspects of a birth she witnessed as part of the SON's childbearing clinical program. Because we conclude that Defendants are entitled to qualified immunity and that the SON's policies are neither overbroad nor vague, we AFFIRM the district court's grant of summary judgment.

I.

In January 2007, Yoder enrolled in an undergraduate nursing program at the SON. In September 2008, as part of her transition to the upper-division courses, Yoder signed an Honor Code pledge ("Honor Code") that stated:

> I join my fellow students today to pledge my commitment to the highest ideal and academic standards of my education at the University of Louisville School of Nursing.

> I recognize I am entering a profession in which I have responsibility for the lives of others. With that responsibility comes accountability for my actions.
>
> Therefore, as a representative of the School of Nursing, I pledge to adhere to the highest standards of honesty, integrity, accountability, confidentiality, and professionalism, in all my written work, spoken words, actions and interactions with patients, families, peers and faculty.
>
> I pledge to work together with my peers and to support one another in the pursuit of excellence in our nursing education and to report unethical behavior.
>
> I will work to safeguard the health and welfare of clients who have placed their trust in me and will advocate for the client's best interest.
>
> I recognize that these responsibilities do not end with graduation, but are a lifelong endeavor.

As part of her studies at the SON, Yoder took a childbearing clinical course, which required that she follow a pregnant patient through the birthing process. In January 2009, in conjunction with the course, Yoder signed a Confidentiality Agreement ("Confidentiality Agreement"):

> I ____ do hereby agree to consider confidential any and all information entrusted to me throughout my clinical rotations while a student at the University of Louisville School of Nursing. This includes medical, financial, personal, and employment related information. I realize that information shared with others could bring harm to clients. Further I understand that a proven violation of confidentiality may be cause for immediate termination of access to further data and is grounds for immediate dismissal from the School of Nursing.

When Yoder identified a pregnant patient (the "Patient") to follow, both Yoder and the Patient signed a Consent Form ("Consent Form"), which provided in pertinent part:

> ***2** Any information shared with the named nursing student will be used by that student only for written/ oral assignments. My name and my family's name will not be used in any written or oral presentation by the named student. I understand that information regarding my pregnancy and my health care will be presented in written or oral form to the student's instructor only.

On February 2, 2009, Yoder posted a blog entry on her personal MySpace.com[1] webpage entitled, "How I witnessed the Miracle of Life." The Blog stated in full:

> As part of my mother-baby clinical (99% of the time clinicals are a waste of my time) I was assigned to find a pregnant mother and follow her around. I didn't look far. If you have ever worked a 12–hour shift in the hospital, you'd know that 50% of females there are at various stages of pregnancy. People say that there's something in the water. I say it's the shift—basically, she works 3 days and has 4 days to do everything else, including getting knocked up. That's how I got surprised with my own Creep—I was working nights in the ER. Never thought I'd have one, but there ya go. If your wife is infertile, send her to work at the hospital, she'll come back with triplets.
>
> Anyway, I found my mom fairly easy—I just came to work and confronted one of the ladies. Good thing that it was her third pregnancy—and she had no problem with me being stuck to her like a tick to an ass, so I cordially invited myself to observe the glorious moment of The Popping.
>
> Now, let's bust some myths.
>
> **1. "Pregnant women are beautiful"**
>
> No. Hell—no.
>
> *Beautiful* pregnant women are beautiful, or more like, only slightly distorted with the belly (as was the case with my "mom"). Otherwise, pregnancy makes an ok-looking woman ugly, and an ugly woman—fucking horrifying.
>
> **2. "You're all glowing"**
>
> Oh really? Is that all the sweat from having to lug 35 extra lbs?
>
> **3. "Babies are God's little miracles"**

I gotta admit, there is something freakishly fascinating with the fact that one bunch of coiled protein grows a tail, forms an army, and attacks another bunch of coiled protein (which gets released by signals from a whole lot of proteins and waits patiently in a soft bed of all sorts of other proteins), then 23 + 23 becomes 46, immediately gets determined whether it's an XX or XY, or XXY or XYY, or some retarded XXXY ... anyway, it's an amazing process. But IMHO [in my humble opinion] these 'miracles' are demons sent to us from hell to torture us for the whole eternity.

4. "Children are such joy!"

Someone referred to having kids as like being pecked to death by chickens. I'll say that it's more like being ripped apart by rabid monkeys.

Last Friday I armed myself with a camera, and journeyed to the assigned hospital, where I met my wonderful lady, getting ready to pop. Since it was her third kid, everyone expected her to shoot it out within 30 minutes. She was already getting induced by elephantine dose of Oxytocin (Mmmm, Oxytocin!) I took my camera, put it on "Rec" and assumed the position.

***3** 45 minutes later, no baby.

1 hour 30 minutes later, no baby.

The anesthesiologist comes in and sets up my girl with an epidural. Having it done is one thing; watching someone else getting it done is another. The doc took out this teeny needle first and numbed her up. Then she took out this huge-ass 10 inch needle and jammed it into her spine!

I was watching the whole thing, with my face changing expressions like Louis De Funès'. But I guess everything went fine, because my 'mom' was back into position in no time, waiting for the Creep to show up.

3 hours later, no baby.

I'm looking at the mother with sheer disdain, she looks at me with sheer anger, but still—no baby.

I've got to go to work this evening, and I'm starting to cuss. I haven't slept in 36 hours, so I went to my car, got my blanket, kicked the nervous spouse out of the recliner, and went to sleep.

4 hours later she starts to throw up. I jump up, and turn my camera on again, assuming the position of a greyhound, right in between her legs.

... no baby.

5 hours.

6 hours.

7 hours.

My eyes are starting to feel like they're filled with sand, and my heart is starting to palpitate. The momma is throwing up, the daddy's stomach is growling and he's starting to bitch like a 14–year–old school girl in the mall.

8 hours later, the nurse comes in, checks the momma, and says, "ok, we're ready to push".

FINALLY!!! I turn my camera on again. Two more nurses, and a woman doctor come in. They put my momma into a position of American Eagle, prop her up with pillows, and shine bright light at the cooch.

The momma's family is sitting in the corner, shaking all over, with the two younger brothers of the baby, the in-laws, and the bitching spouse. At last my girl gave one big push, and immediately out came a wrinkly bluish creature, all Picasso-like and weird, ugly as hell, covered in god knows what, screeching and waving its tentacles in the air.

15 minutes later it turned into a cute pink itty bitty little baby girl. Mom was forgotten, the whole squacking family surrounded the new Creep; she was crowned with a pink cap, wrapped into a blanket and finally shut up with a teat.

I came to work, overwhelmed with emotions and new knowledge and experience. I sat down, looked around and once again proved that women are FREAKING STUPID and don't learn from their past mistakes.

I said: **"I want another baby!!"**

The End.

In late February 2009, Glenda Adams, the childbearing clinical course instructor learned about Yoder's Blog from another SON student, and informed Kiehl, the Associate Dean of the Undergraduate Programs at the University. Kiehl met with Hern, the Dean of the SON, to discuss the Blog, and they agreed that Yoder should be dismissed from the SON

for violating "the [H]onor [C]ode and the standards of the profession and a[C]onfidentiality [A]greement."

Kiehl asked Adams to contact Yoder and request that they meet the following morning, February 27, 2009. When Yoder arrived at what she thought would be a meeting with Adams, she instead found Kiehl, a physician who provides psychological support to students, and two law enforcement officers. Kiehl showed Yoder copies of the Blog, stated that the Blog violated patient confidentiality and the Honor Code, and informed Yoder that she was being dismissed from the SON. Several days later, Yoder received a formal letter of dismissal from Hern that stated, in relevant part:

> ***4** It has been determined that your internet postings regarding patient activities and identification as a University of Louisville School of Nursing student violates the nursing honor code which you pledged to uphold on September 7, 2008. Upon evaluation of your demonstrated fitness to continue in the program in accordance with promulgated professional standards established by the School of Nursing, you are receiving an academic dismissal from the School of Nursing and the three nursing classes in which you are currently enrolled this Spring 2009 semester.

Pursuant to the SON's policy, Yoder submitted a written petition with the Undergraduate Academic Affairs Committee requesting reinstatement in the SON program. Yoder was not permitted to participate in the Committee's deliberations, and on March 9, 2009, in a letter signed by Kiehl, the Committee denied Yoder's petition for reinstatement. Yoder did not pursue any additional internal grievance procedures.

II.

On March 12, 2009, Yoder filed a complaint pursuant to 42 U.S.C. § 1983 claiming that her dismissal from the SON violated her right to free speech and due process under the First and Fourteenth Amendments of the United States Constitution. The complaint named the University, Hern, and Kiehl as defendants,[2] and asked that: (1) Yoder be reinstated as a nursing student, (2) she be granted full credit for all academic work missed, (3) her disciplinary and academic record be cleared, and (4) University employees be enjoined from disclosing information regarding the incident. Yoder also sought compensatory damages, punitive damages, and attorney fees.

After discovery, the parties filed cross-motions for summary judgment. On August 3, 2009, the district court granted Yoder's motion for summary judgment. *See Yoder v. Univ. of Louisville*, No. 3:09–CV–205–S, 2009 WL 2406235 (W.D.Ky., Aug. 3, 2009) (unpublished). However, the court did not resolve Yoder's § 1983 claims on free speech and due process grounds, instead deciding the case on a contract theory. *Id.* at *6. The court entered a permanent injunction compelling the University to reinstate Yoder as a nursing student, but noted that, "[b]ecause Yoder succeeds on her motion for summary judgment on nonconstitutional grounds, we need not address liability for damages under 42 U.S.C. § 1983." *Id.* at *7.

Defendants filed an appeal of the district court's order with this court, and on April 8, 2011, we vacated the district court's grant of summary judgment and remanded. *See Yoder v. Univ. of Louisville*, 417 Fed.Appx. 529 (6th Cir.2011) (unpublished). This court noted that Yoder had not alleged breach of contract, and found that the district court's decision was impermissible under Federal Rule of Civil Procedure 54(c). *Id.* at 530. We declined to affirm the grant of summary judgment on free speech and due process grounds because "the district court's judgment includes no consideration of these claims or their factual grounding." *Id.* (citations omitted).

***5** On remand, both parties again filed cross-motions for summary judgment. On March 30, 2012, the district court granted Defendants' motion for summary judgment. The district court found that Yoder's claims against the University and Hern and Kiehl in their official capacities were barred by sovereign immunity, and further found that Kiehl and Hern were entitled to qualified immunity in their individual capacities. This appeal ensued.

III.

As a preliminary matter, Defendants contend that this court no longer has Article III jurisdiction because Yoder failed to

preserve her claim for money damages by cross-appealing the district court's first grant of summary judgment in her favor, which declined to rule on her § 1983 claims. Defendants further assert that, in the absence of a claim for monetary relief, Yoder's claims for injunctive and declaratory relief are moot because she was reinstated as a student and has since completed her nursing degree.

A.

[1] The district court did not expressly reach the issue of damages under 42 U.S.C. § 1983 and thus Yoder's claim for money damages is properly before this court. The district court stated in its first grant of summary judgment that its decision did not address liability for damages under § 1983: "This is not ultimately a free speech case. Nor is it fundamentally a matter of due process. There is no need, therefore, for the court to discuss the constitutional questions raised by Yoder's claim." Indeed, this court declined to affirm the district court's grant of summary judgment on constitutional grounds because "the district court's judgment includes no consideration of these claims or their factual grounding." *Yoder*, 417 Fed.Appx. at 530. And, after this court remanded the case and Defendants raised the issue of waiver below, the district court held that, "[l]iability for damages under § 1983 was not addressed by this court," and found that there was "no failure to preserve a claim that was never addressed by the court below." Thus, Defendants' claim that Yoder waived her claim for monetary damages is mistaken. And, because Yoder's claim for monetary damages "ensures that this dispute is a live one and one over which Article III gives us continuing authority," *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 387 (6th Cir.2005) (citations omitted), the case is properly before this court.

B.

[2] We agree, however, with the district court's conclusion that Yoder's claim for injunctive and declaratory relief against the University or Hern and Kiehl in their official capacities fails. It is not clear from Yoder's briefs what, if any, future action by Defendants Yoder hopes to preserve the right to enjoin. Yoder's injunctive claim for reinstatement is moot as a result of her graduation from the SON program. *See DeFunis v. Odegaard*, 416 U.S. 312, 319–20 & n. 2, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (per curiam) (holding a student's claim for injunctive relief against a law school moot when he registered for his last quarter, and the school said he would "be awarded his J.D. degree ... regardless of the outcome of this appeal"); *Fialka–Feldman v. Oakland Univ. Bd. of Trustees*, 639 F.3d 711, 714 (6th Cir.2011) (holding a student's claim for injunctive relief moot upon his graduation because university programs "tend to last longer than the time it takes to obtain a trial court ruling and an appeal, and accordingly the courts generally have not applied the capable-of-repetition exception to them"); *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir.1997) (en banc) (dispute over high school basketball player's eligibility for upcoming season was not "capable of repetition" when player graduated and there was "no reasonable expectation of another controversy over his eligibility"). Accordingly, we affirm the district court's grant of summary judgment as to the University and Hern and Kiehl in their official capacities.

IV.

***6** We review a grant of summary judgment de novo. *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 (6th Cir.2009). "Summary judgment is appropriate where the evidence shows 'that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 560 (6th Cir.2004) (quoting Fed.R.Civ.P. 56(c)). We must review the evidence in the "light most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences." *Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 861 (6th Cir.2007) (citation omitted). However, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis in original).

Hern and Kiehl argue that they are entitled to qualified immunity. The qualified-immunity doctrine shields government officials performing discretionary functions from civil liability unless their conduct violates clearly established rights. *Barker v. Goodrich*, 649 F.3d 428, 433 (6th Cir.2011) (citation and internal quotation marks omitted). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). "The doctrine focuses

on 'the objective reasonableness of an official's conduct, as measured by reference to clearly established law' to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.' " *Andrews v. Hickman Cnty., Tenn.*, 700 F.3d 845, 853 (2012) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

In order to determine whether qualified immunity applies, this court must engage in a two-step inquiry, addressing (1) whether, considering the allegations in a light most favorable to the injured party, a constitutional right has been violated and (2) whether that right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); *Campbell v. City of Springboro, Ohio*, 700 F.3d 779, 786 (6th Cir.2012). We may exercise our discretion in determining the order in which to conduct this inquiry. *See Pearson*, 555 U.S. at 236–37, 129 S.Ct. 808.

A. First Amendment Claim

[3] We begin with Yoder's claim that Defendants violated her rights under the First Amendment by dismissing her for the views expressed in the Blog. We exercise our discretion to focus on the second prong of the qualified immunity inquiry —whether, assuming Yoder had a First Amendment right to post the Blog that was violated by her dismissal from the SON, this right was clearly established. Yoder has the burden of demonstrating that the law was clearly established at the time of Defendants' challenged conduct. *Andrews*, 700 F.3d at 853 (citation omitted). For a right to be clearly established, it "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). If school administrators "of reasonable competence could disagree" on the lawfulness of the action, Defendants are entitled to immunity. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Thus, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151. The unlawfulness of the school administrator's action "can be apparent from direct holdings, from specific examples described as prohibited, or from the general reasoning that a court employs." *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir.2003) (citing *Hope v. Pelzer*, 536 U.S. 730, 740–41, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)). "When determining whether a constitutional right is clearly established, we look first to decisions of the Supreme Court, then to our own decisions and those of other courts within the circuit, and then to decisions of other Courts of Appeal." *Andrews*, 700 F.3d at 853.

***7** We find dispositive the absence of controlling authority that specifically prohibits Defendants' conduct. Because neither the Supreme Court nor a panel of our circuit has considered whether schools can regulate off-campus, online speech by students, Yoder relies on *Layshock ex rel. Layshock v. Hermitage School District*, where the Third Circuit held that "the First Amendment prohibits the school from reaching beyond the schoolyard to impose what might otherwise be appropriate discipline." 650 F.3d 205, 207 (3d Cir.2011) (en banc). We first observe that *Layshock* was not decided until June 2011—over two years after Yoder's dismissal—and thus cannot stand as clearly established law at the time of the incident. *See Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (assessing whether the law was "clearly established" at the time the challenged actions occurred). More important, other circuits have come to conflicting conclusions and permitted schools to regulate off-campus, online student speech where such speech could foreseeably cause a material disruption to the administration of the school. *See Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 572 (4th Cir.2011) (upholding summary judgment in favor of a school that punished a student for creating a MySpace page mocking a fellow student); *Doninger v. Niehoff*, 642 F.3d 334, 347 (2d Cir.2011) (holding that it is not "clearly established that off-campus speech-related conduct may never be the basis for discipline by school officials"). Indeed, Yoder herself acknowledges that student internet communications present an "enigmatic issue, since these are communications available on campus, off campus, or anywhere else."

In addition, both parties rely heavily on Supreme Court cases that govern student speech standards, [3] none of which considers the unique circumstances posed here. Yoder has not identified any case—nor are we aware of any—that undermines a university's ability to take action against a nursing (or medical) student for making comments off campus that implicate patient privacy concerns. Defendants have legal and ethical obligations to ensure that patient confidentiality is protected, and that nursing students are trained with regard to their ethical obligations. *See, e.g.*, Ky.Rev.Stat. § 314.031(4)(d), (k); *id.* § 314.111. Yoder gained access to the Patient through the SON's clinical

program, and patients allow SON students to observe their medical treatment in reliance on the students' agreement not to share information about their medical treatment and personal background. Under such circumstances, Defendants could not "fairly be said to 'know' that the law forb [ids] [discharging a student under these circumstances]." *Harlow*, 457 U.S. at 818, 102 S.Ct. 2727.

Further, assuming Yoder had a First Amendment right to post the Blog online, it was not objectively unreasonable for Defendants to believe that Yoder affirmatively waived that right. The Confidentiality Agreement states that Yoder "agree[d] to consider confidential *any and all information* entrusted to [her] throughout [her] clinical rotations while a student at the University of Louisville School of Nursing. This includes *medical*, financial, *personal*, and *employment related information*." The Confidentiality Agreement further notes that Yoder "understand[s] that a proven violation of confidentiality of any such information may be cause for immediate termination of access to further data and is grounds for immediate dismissal from the School of Nursing." The Blog discussed several medical, personal, and employment-related pieces of information related to the Patient, including:

***8** • the date the Patient was in labor;

• the Patient was an employee of the hospital;

• the child born was the Patient's third child;

• the Patient was induced by oxytocin;

• the Patient received an epidural;

• the Patient vomited during labor;

• the Patient was in labor for 15 hours;

• the baby born to the Patient was a girl; and

• the Patient was married.

The Consent Form goes further than the Confidentiality Agreement by stating that information regarding a patient's "pregnancy and healthcare will be presented in written or oral form to the student's instructor only." Although Yoder contends that this agreement was for the Patient's benefit, Yoder was also required to sign the Consent Form, indicating that she was both aware of and constrained by its limitations. The district court correctly noted that nothing about the language of the Consent Form suggests that the information that Yoder agreed not to disseminate was limited to confidential information. The patient-specific information in the Blog falls under the rubric of personal, professional, and medical information and discusses the Patient's "pregnancy and healthcare." Yoder cannot show that Defendants' reliance on the documents as a waiver of Yoder's First Amendment rights was objectively unreasonable in light of clearly established law.

Yoder also contends that for her waiver to be valid, it must be in the form of a "binding contract between the parties." Although a majority of cases considering constitutional waivers concern contractual obligations, *see, e.g.*, *Snepp v. United States*, 444 U.S. 507, 100 S.Ct. 763, 62 L.Ed.2d 704 (1980) (per curiam) (considering a contract between the CIA and its former employee regarding publication rights); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972) (outlining the considerations relevant to determination of a contractual waiver of due process rights); *Fuentes v. Shevin*, 407 U.S. 67, 95, 92 S.Ct. 1983, 32 L.Ed.2d 556 (finding no waiver of due process rights where the waiver was a contract that was "no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power"), it is not clearly established that a waiver *must* come in contractual form. For example, in *Cohen v. Cowles Media Co.*, 501 U.S. 663, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991), the Supreme Court addressed whether the First Amendment prohibits a plaintiff from recovering damages, under state promissory-estoppel law, for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information. *Id.* at 665, 111 S.Ct. 2513. The Court allowed the claim to advance, despite "the absence of a contract, [which] creates obligations never explicitly assumed by the parties." *Id.* at 668, 111 S.Ct. 2513. With this determination, the Court implicitly held that a party's voluntary promise to keep information confidential constituted a valid waiver of First Amendment rights, even in the absence of an enforceable contract.

Accordingly, we hold that any First Amendment right allegedly violated by Defendants was not clearly established such that it would have been clear to Defendants that their actions were unlawful.

B. Vagueness and Overbreadth

***9** **[4]** Yoder also asserts that the Honor Statement, Confidentiality Agreement, and Consent Form are unconstitutionally overbroad, and that the Consent Form

is unconstitutionally vague.[4] As the Supreme Court recently observed, vagueness and overbreadth are distinct concerns: vagueness implicates the Due Process Clause, while overbreadth implicates the First Amendment. *See Holder v. Humanitarian Law Project*, —— U.S. ——, 130 S.Ct. 2705, 2719, 177 L.Ed.2d 355 (2010).

Yoder challenges three SON policies—the Honor Code, the Confidentiality Agreement, and the Consent Form—as overbroad.[5] Under the traditional test for assessing restrictions on expressive conduct, a regulation (or in this case, a university policy) will be upheld if: "(1) it is unrelated to the suppression of expression, (2) it furthers an important or substantial government interest, and (3) it does not burden substantially more speech than necessary to further the interest." *Blau*, 401 F.3d at 391 (internal citations, quotation marks and brackets omitted). In attacking the SON's policies, Yoder bears the burden of demonstrating that the policies reach "a 'substantial' amount of protected free speech, 'judged in relation to the [policies'] plainly legitimate sweep.' " *Virginia v. Hicks*, 539 U.S. 113, 118–19, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)). This high burden is in place because

> there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law—particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." For there are substantial costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the "strong medicine" of overbreadth invalidation.

Id. at 119–20, 123 S.Ct. 2191 (internal citations omitted). For this reason, "the mere fact that one can conceive of some impermissible applications of a [policy] is not sufficient to render it susceptible to an overbreadth challenge." *Mems. of the City Council of the City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13–14, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972).

The policies challenged by Yoder do not reach a substantial amount of protected speech, and Defendants have a compelling interest in ensuring that students observe patient confidentiality. The SON's decision to restrict the dissemination of patient information for purposes of teaching students about their confidentiality responsibilities, ensuring that patient information is not improperly released, and encouraging patients to participate in the teaching of the students are important and valid interests. Yoder has not established that the policies burden substantially more speech than necessary. Students are still permitted to discuss childbirth, pregnancy, or any other topic they wish; they are simply not permitted to do so in the context of a *specific* patient observed in conjunction with their clinical coursework.

***10** Yoder also challenges the Consent Form as unconstitutionally vague.[6] However, this court has rejected vagueness challenges "when [a party's] conduct clearly falls within a statutory or regulatory prohibition." *Fowler v. Bd. of Educ. of Lincoln Cnty., Ky.*, 819 F.2d 657, 665 (6th Cir.1987); *see also Humanitarian Law Project*, 130 S.Ct. at 2719 ("[A] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.") (citation omitted). As discussed above, the Blog clearly violates the Consent Form.

Assuming that Yoder is permitted to pursue a vagueness challenge to the Consent Form, her arguments are unavailing. Yoder must establish that "[the Consent Form's] prohibitive terms are not clearly defined such that a person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion." *United Food & Comm. Workers Union Local 1099 v. Sw. Ohio Reg. Transit Auth.*, 163 F.3d 341, 358–59 (6th Cir.1998) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)).

The Consent Form is not unconstitutionally vague; it obligates students to refrain from sharing information about their clinical patients' pregnancy and health care with any person other than the instructor of the course. A person of ordinary intelligence would understand that posting information about a patient on MySpace.com, including a discussion of the patient's birthing process and medical

procedures, would violate this policy. Indeed, that person would understand that the Consent Form requires that he or she not discuss patients' pregnancy or health care with any person besides the course instructor.

We therefore reject Yoder's claim that the policies she signed as part of the SON program are unconstitutionally overbroad or vague.

C. Procedural Due Process Claim [7]

[5] We next consider Yoder's assertion that Defendants violated her rights under the Fourteenth Amendment by failing to provide her adequate due process. [8] At the heart of Yoder's argument is the assertion that her dismissal from the SON was disciplinary, not academic. The Supreme Court recognizes a significant distinction between "the failure of a student to meet academic standards and the violation by a student of valid rules of conduct." *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978) (holding that students are entitled to "far less stringent procedural requirements" for an academic, rather than a disciplinary, action). When a school takes action against a student for academic reasons, the due process afforded is minimal: a student is entitled only to notice that his or her academic performance was not satisfactory and a "careful and deliberate" decision regarding their punishment. *Id.* at 85, 98 S.Ct. 948; *Ku v. Tennessee*, 322 F.3d 431, 436 (6th Cir.2003). In contrast, courts reviewing a disciplinary action must conduct a "more searching inquiry," *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 634 (6th Cir.2005) (citing *Horowitz*, 435 U.S. at 86, 98 S.Ct. 948), and the student must be afforded both notice and a hearing, although the formality of the hearing will vary depending on the circumstances. *See Goss v. Lopez*, 419 U.S. 565, 581–84, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). This distinction is rooted in the Court's recognition that "[a]cademic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full hearing requirement." *Horowitz*, 435 U.S. at 89, 98 S.Ct. 948. For this reason, "[w]hen judges are asked to review the substance of a genuinely academic decision ... they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) (citations and footnotes omitted).

***11** We again focus on the second prong of the qualified immunity assessment—whether, assuming that Yoder had a right to the due process procedures of a disciplinary dismissal instead of an academic dismissal, that right was clearly established. *Cf. Pearson*, 129 S.Ct. at 818–19. It was not. The term "academic" in this context is somewhat misleading. "Courts have frequently held that an academic dismissal may be properly based on more than simply grades, particularly in a medical-professional context. For example, in *Horowitz*, "the school warned [the plaintiff] that significant improvement was needed not only in the area of clinical performance but also in her personal hygiene and in keeping to her clinical schedules." 435 U.S. at 91 n. 6, 98 S.Ct. 948. In concluding that the plaintiff was dismissed for purely academic reasons, the Court noted that "[p]ersonal hygiene and timeliness may be as important factors in a school's determination of whether a student will make a good medical doctor as the student's ability to take a case history or diagnose an illness." *Id.* This court reaffirmed that idea in *Ku*, noting "in the context of medical school, academic evaluations are not limited to consideration of raw grades or other objective criteria." 322 F.3d at 436; *see also Fenje v. Feld*, 398 F.3d 620, 625 (7th Cir.2005) ("The nexus between [the plaintiff's] lack of candor in the application process and his capacity to be trusted with patient care clearly pushes this decision into the realm of an academic dismissal.").

Here, Yoder's compliance with the Honor Code, Confidentiality Agreement, and Consent Form was mandated as a condition of her enrollment in the upper division and participation in the clinical portions of the SON program. This indicates that the required conduct was a component of Yoder's coursework, not part of a general student code of conduct. Defendants reasonably concluded that Yoder's apparent inability to keep patient information confidential was an important consideration in determining Yoder's suitability as a future nurse. Under such circumstances, Yoder cannot show that clearly established law required Defendants to treat her dismissal for violating patient confidentiality as disciplinary instead of academic.

We further find that Defendants were not objectively unreasonable in concluding that the processes used in Yoder's dismissal afforded Yoder adequate due process. As discussed above, the Supreme Court held that in cases of academic dismissal from a state educational institution,

the requirements of due process are met when the student is fully informed of faculty dissatisfaction with his or her performance and the decision to dismiss the student is "careful and deliberate." *Horowitz*, 435 U.S. at 85, 98 S.Ct. 948; *Ku*, 322 F.3d at 436 ("[W]hen the student has been fully informed of the faculty's dissatisfaction with the student's academic progress and when the decision to dismiss was careful and deliberate, the Fourteenth Amendment's procedural due process requirement has been met. No formal hearing is required...."); *see also Hlavacek v. Boyle*, 665 F.3d 823, 826 (7th Cir.2011) ("Dismissals for poor academic performance 'require no hearing at all.' ") (citation omitted). Here, by her own admission, Yoder received an explanation of why she was being dismissed. When she arrived at the meeting where she was dismissed, Kiehl expressed concern about the Blog, stated that she believed the Blog violated the Honor Code and patient confidentiality, and explained Yoder's punishment.[9] It was also not objectively unreasonable for Defendants to believe that their decision was "careful and deliberate." It is uncontested that Defendants reviewed the Blog, conferred with each other and the clinical instructor about the Blog's contents and implications, and jointly determined that the Blog violated the Honor Code, the standards of the profession, and the Confidentiality Agreement. Although a post-dismissal appeal hearing was not constitutionally required, Yoder availed herself of the University appeal process, where her dismissal was affirmed by the Committee. *See Rogers v. Tenn. Bd. of Regents*, 273 Fed.Appx. 458, 463 (6th Cir.2008) (a university's decision to dismiss a nursing student was "careful and deliberate" when it allowed her to engage in an appeal process); *Fenje*, 398 F.3d at 627 (decision was "careful and deliberate" with use of a post-termination hearing). Under such circumstances, it was not objectively unreasonable for Defendants to have believed that they provided Yoder with adequate due process procedures for an academic dismissal, and accordingly they are entitled to qualified immunity.

V.

***12** For the reasons discussed above, we affirm the district court's grant of summary judgment.

Footnotes

* The Honorable Thomas A. Varlan, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

1 "MySpace is a popular social-networking website that allows its members to create online 'profiles,' which are individual web pages on which members post photographs, videos, and information about their lives and interests." *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 208 (3d Cir.2011) (citation and internal quotation marks omitted).

2 The complaint named Hern and Kiehl in both their official and individual capacities.

3 Yoder also contends that because the Supreme Court has not applied student-speech standards to "adult college students," such standards are inapplicable here. However, a recent panel of this court expressly held that school-speech standards may be applicable to university students. *See Ward v. Polite*, 667 F.3d 727, 733–34 (6th Cir.2012).

4 Defendants argue that concepts of overbreadth and vagueness generally apply to *laws* that create a chilling effect on constitutionally-protected speech, not school policies. However, this court has previously considered vagueness and overbreadth challenges to school policies, including state university policies. *See, e.g., Savage v. Gee*, 665 F.3d 732 (6th Cir.2012).

5 The overbreadth doctrine provides an exception to the traditional rules of standing allowing Yoder to bring an action under the First Amendment based on a belief that the SON's policies are so broad or unclear that they will have a chilling effect. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) ("Litigants [ ] are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."); *Blau*, 401 F.3d at 390 ("In the context of First Amendment challenges, unlike most other areas of constitutional litigation, a claimant may seek protection not only on her own behalf but on behalf of others.").

6 Yoder does not challenge the Honor Code or Confidentiality Agreement as unconstitutionally vague.

7 Although Yoder states that Defendants violated her substantive due process rights, she fails to make any arguments in support of her claim. Moreover, as the district court correctly noted, this court has rejected the notion that substantive due process protects a medical or nursing student's interest in his or her continued enrollment. *See Rogers v. Tenn. Bd. of Regents*, 273 F. App'x 458, 463 (6th Cir.2008); *Bell v. Ohio State Univ.*, 351 F.3d 240, 249–51 (6th Cir.2003).

8 To be entitled to the procedural protections of the Fourteenth Amendment, Yoder must demonstrate that her dismissal from the school deprived her of either a "liberty" or a "property" interest. *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 82, 98 S.Ct.

948, 55 L.Ed.2d 124 (1978). Defendants do not dispute that Yoder's enrollment in the SON was a valid property interest, and we assume the same on appeal.

9 Indeed, Yoder also had prior notice from the Confidentiality Agreement that a violation of patient confidentiality "is grounds for immediate dismissal from the School of Nursing."

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