No.

In the Supreme Court of the United States

COLETTE MARIE WILCOX, PETITIONER

v.

NATHAN H. LYONS ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment prohibits retaliation against a person who has complained about invidious discrimination.

PARTIES TO THE PROCEEDING

Petitioner (plaintiff-appellant below) is Colette Marie Wilcox.

Respondents (defendants-appellees below) are Nathan H. Lyons and Phillip C. Steele.

RELATED PROCEEDINGS

United States District Court (W.D. Va.):

Wilcox v. *Lyons*, No. 7:17-cv-530 (Dec. 8, 2018) (granting motion to dismiss)

Wilcox v. *Lyons*, No. 7:17-cv-530 (April 25, 2018) (denying reconsideration of order granting motion to dismiss)

Wilcox v. *Lyons*, No. 7:17-cv-530 (Mar. 23, 2018) (granting motion to dismiss)

United States Court of Appeals (4th Cir.):

Wilcox v. *Lyons*, No. 19-1005 (Aug. 11, 2020)

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Petitioner Colette Marie Wilcox respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 970 F.3d 452. The opinion of the district court (App., *infra*, 24a-33a) is not published in the Federal Supplement but is available at 2018 WL 1955826.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2020. On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari due on or after that date to 150 days from, as relevant here, the date of the lower court judgment. Under this Court's order, the deadline for filing a petition for a writ of certiorari is January 8,

2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

2. Section 1983 of Title 42 of the United States Code provides, in pertinent part, that

> [e]very 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.

STATEMENT

Petitioner filed suit against respondents—her former supervisor and a former colleague—alleging that she was fired from her position as a Deputy Commonwealth's Attorney in retaliation for complaining about sex discrimination in the workplace. Petitioner alleged that such retaliation violates the Equal Protection Clause of the Fourteenth Amendment and is therefore actionable under 42 U.S.C. § 1983. The district court dismissed petitioner's retaliation claim, and the court of appeals affirmed. The court of appeals held—in acknowledged conflict with the Second Circuit—that the Equal Protection Clause does not prohibit retaliation for complaints of

sex discrimination. This case thus presents this Court with an opportunity to resolve an important, recurring issue of constitutional law that has divided the courts of appeals.

1. In 2014, respondent Nathan M. Lyons, then the elected Commonwealth's Attorney for Carroll County, Virginia, hired petitioner to serve as a Deputy Commonwealth's Attorney. App., *infra*, 2a. In November 2015, petitioner reported to Lyons that one of her colleagues, respondent Phillip C. Steele, had punched her shoulder while making a derogatory comment toward women. *Id.* at 2a-3a. Petitioner also complained to Lyons that women faced discrimination in the office. *Id.* at 3a.

Lyons apologized to petitioner for the workplace hostility, but did not reprimand Steele. App., *infra*, 3a. Nor did he do anything else to address the assault against petitioner or his office's general hostility toward women. *Ibid.*

Less than three months later, Lyons summoned petitioner to his office and reprimanded her for her use of leave. App., *infra*, 4a. Although Lyons had himself approved several requests by petitioner for leave over the prior weeks, he asserted that petitioner had used too much leave and was thus in violation of a state compensation board policy. *Id.* at 3a-4a. Lyons refused petitioner's request for clarification and demanded that she acknowledge a reprimand letter with her signature. *Id.* at 4a. When petitioner asked to read the letter and to review a copy of the leave policy before signing it, Lyons turned his back on petitioner and yelled at her that she was fired for insubordination. *Ibid.*

2. Petitioner sued respondents in federal district court. App., *infra*, 4a. As relevant here, petitioner

asserted a claim under 42 U.S.C. § 1983 alleging that respondents had violated the Equal Protection Clause by retaliating against her for complaining about sex discrimination. *Id.* at 4a-5a.

The district court dismissed petitioner's retaliation claim. App., *infra*, 36a-37a. In a memorandum opinion issued in response to petitioner's motion for reconsideration, the district court assumed for the purpose of its decision that retaliation claims are actionable under the Equal Protection Clause. *Id.* at 28a. The court held, however, that petitioner had failed to establish a prima facie case of retaliation because she did not allege a sufficient causal connection between her complaints of discrimination and respondents' retaliatory actions. *Id.* at 28a-32a.[1]

3. The court of appeals affirmed. App., *infra*, 1a-23a. It began by rejecting the district court's conclusion that petitioner had failed to state a prima facie claim of retaliation. *Id.* at 6a-7a. It held that petitioner's allegations regarding Lyons's overreaction in firing her for insubordination, in combination with the timing of that decision, suggested pretext and sufficiently pleaded a causal connection between petitioner's complaints of discrimination and respondents' retaliatory actions. *Id.* at 7a. Thus, the court of appeals concluded, petitioner's "claim would survive dismissal" if a claim alleging retaliation for complaints of sex discrimination is "cognizable as a violation of the Equal Protection Clause." *Id.* at 7a-8a.

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[1] The district court subsequently dismissed petitioner's remaining federal claim and declined to exercise supplemental jurisdiction over her state-law battery claim. See App., *infra*, 5a n.2.

Turning to that question, the court of appeals held that the Equal Protection Clause does not prohibit retaliation for complaints about sex discrimination. App., *infra*, 22a. The court of appeals observed that "sex discrimination and sexual harassment against public employees by persons acting under color of state law violate the Equal Protection Clause and are actionable under Section 1983." *Id.* at 9a. It held, however, that retaliation for complaining about sex discrimination is not itself a prohibited form of sex discrimination. *Id.* at 10a-11a.

In support of that conclusion, the court of appeals stated that "[r]etaliation for reporting alleged sex discrimination imposes negative consequences on an employee because of the employee's report, not because of the employee's sex." App., *infra*, 12a. Thus, in the court of appeals' view, retaliation imposes adverse consequences based on an employee's *speech*, not based on any invidious classification. *Id.* at 10a-12a. As a consequence, the court of appeals held, retaliation against a public employee might be subject to scrutiny under the First Amendment, but is not actionable as a violation of the Equal Protection Clause. *Id.* at 10a-11a.

The court of appeals acknowledged (App., *infra*, 18a) that the Second Circuit had "reached a contrary conclusion" in *Vega* v. *Hempstead Union Free School District*, 801 F.3d 72 (2015), but it declined to follow the Second Circuit's decision. The court of appeals reasoned that the Second Circuit had erred in *Vega* by relying on the protections afforded by Title VII of the Civil Rights Act of 1964 to inform its analysis of the Equal Protection Clause. App., *infra*, 18a-20a. The court of appeals also rejected (*id.* at 20a-21a) the Second Circuit's reliance on this Court's decision

construing Title IX of the Education Amendments of 1972 in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005). The court of appeals acknowledged *Jackson*'s holding that Title IX's broadly phrased prohibition of discrimination "on the basis of sex" by recipients of federal education funding, 20 U.S.C. § 1681(a), prohibits retaliation against those who complain about sex discrimination. App., *infra*, 20a (citing *Jackson*, 544 U.S. at 173-181). But the court of appeals reasoned that *Jackson* and related decisions of this Court did not inform the constitutional question presented in this case because they "turned on the text and history of the statutes being interpreted—neither of which they share with the Equal Protection Clause." *Id.* at 21a.

REASONS FOR GRANTING THE PETITION

The court of appeals held in this case that retaliation against a public employee who has complained about sex discrimination in the workplace does not constitute intentional discrimination in violation of the Equal Protection Clause. That decision is in acknowledged conflict with the Second Circuit's decision in *Vega* v. *Hempstead Union Free School District*, 801 F.3d 72 (2015); it is incorrect; and it raises an issue of recurring importance. Review by this Court is therefore warranted.

A. There Is A Circuit Conflict On The Question Presented

1. The court of appeals' decision in this case conflicts with the Second Circuit's decision in *Vega* v. *Hempstead Union Free School District*, 801 F.3d 72 (2015). In *Vega*, a public-school teacher sued his school and its two principals, alleging that they retaliated against him for complaining about

discrimination because of his Hispanic ethnicity. *Id.* at 76-77. The defendants argued that the teacher's retaliation claim was not cognizable under the Equal Protection Clause, but the Second Circuit squarely rejected that argument. *Id.* at 81-82. Relying on this Court's holding in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005)—that Title IX's broadly phrased prohibition of discrimination encompasses claims for retaliation—the Second Circuit held that "[w]hen a supervisor retaliates against an employee because he complained of discrimination, the retaliation constitutes intentional discrimination against him for purposes of the Equal Protection Clause." *Vega*, 801 F.3d at 82.

2. In the decision below, by contrast, the court of appeals held that such a retaliation claim "is not cognizable under the Equal Protection Clause." App., *infra*, 15a. It stated that petitioner's claim that she was fired "in retaliation for her complaint of sexual harassment and discrimination" did "not implicate an impermissible classification or discrimination on the basis of [petitioner's] membership in a class defined by an immutable characteristic." *Id.* at 14a. Rather, the court of appeals held that petitioner had "suffered adverse consequences because of her speech and conduct," *id.* at 14a, such that her claim could arise only under the First Amendment, *id.* at 16a. The court of appeals acknowledged that the Second Circuit had "reached a contrary conclusion," but expressly declined to follow the Second Circuit's reasoning in V*ega*. *Id.* at 18a.

As the court of appeals observed, its conclusion was consistent with decisions of other circuits holding, also in conflict with the Second Circuit, that the Equal Protection Clause does not prohibit retaliation

against those who complain about discrimination on the basis of a protected classification. App., *infra*, 16a-17a; see also *Thomas* v. *Independence Twp.*, 463 F.3d 285, 298 n.6 (3d Cir. 2006) (retaliation for complaints about racial discrimination); *Yatvin* v. *Madison Metro. Sch. Dist.*, 840 F.2d 412, 418 (7th Cir. 1988) (retaliation for complaints about sex discrimination); *Maldonado* v. *City of Altus*, 433 F.3d 1294, 1308 (10th Cir. 2006) (retaliation for complaints about national origin discrimination); *Watkins* v. *Bowden*, 105 F.3d 1344, 1354-1355 (11th Cir. 1997) (retaliation for complaints about race and sex discrimination).[2]

3. This Court's intervention is warranted now to resolve the conflict in the courts of appeals. As noted above, the court of appeals in this case expressly confronted the Second Circuit's reasoning in *Vega* but declined to follow it. App., *infra*, 18a-22a. For its part, *Vega* represents the Second Circuit's considered resolution of the question presented here, which the court reached after carefully parsing its own prior

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[2] The court of appeals was wrong to claim support (App., *infra*, 16a-17a) from *Thompson* v. *City of Starkville*, 901 F.2d 456 (5th Cir. 1990), and *R.S.W.W., Inc.* v. *City of Keego Harbor*, 397 F.3d 427 (6th Cir. 2005). Because neither decision involved retaliation for complaints about intentional discrimination based on a protected classification, they do not implicate the question presented here. See *Thompson*, 901 F.2d at 468 (retaliation for complaints about improper promotions and misconduct by other police officers); *R.S.W.W., Inc.*, 397 F.3d at 439-440 (retaliation for complaint about police harassment). In addition, as the court of appeals correctly acknowledged (App., *infra*, 17a), the Eighth Circuit did not directly resolve the question presented in *Burton* v. *Arkansas Secretary of State*, 737 F.3d 1219 (2013). In that case, the court held only that the defendant was entitled to qualified immunity because there was no *clearly established* right under the Equal Protection Clause to be free from retaliation for complaints about invidious discrimination. *Id.* at 1237.

precedents and the decisions of this Court. See 801 F.3d at 80-82. And the Second Circuit has continued to apply *Vega*'s holding in recent years. See *Collymore* v. *City of New York*, 767 Fed. Appx. 42, 46-47 (2019); *Bamba* v. *Fenton*, 758 Fed. Appx. 8, 12 (2018), cert. denied, 139 S. Ct. 2757 (2019). There is thus no reasonable prospect that the circuit conflict on the question presented will be resolved absent this Court's intervention.[3]

B. The Decision Below Is Wrong

This Court's review is also warranted because the decision below is incorrect. The text, historical background, and animating purposes of the Equal Protection Clause all demonstrate that it prohibits retaliation against those who complain about invidious discrimination on the basis of a protected classification.

1. The Equal Protection Clause provides that "[n]o State shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. This Court has repeatedly held that "[i]ntentional discrimination on the basis of gender by state actors

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[3] The other circuits that have held that the Equal Protection Clause does not prohibit retaliation for complaints about discrimination have done so without directly confronting this Court's holdings in *Jackson* and related cases. Nonetheless, they have continued to reaffirm that conclusion in more recent years and have shown no inclination to revisit it in light of this Court's decisions or the Second Circuit's contrary holding in *Vega*. See, *e.g.*, *West* v. *City of Albany*, No. 19-11418, 2020 WL 5870246, at *4-5 (11th Cir. Oct. 2, 2020); *Locke* v. *Haessig*, 788 F.3d 662, 672 (7th Cir. 2015); *Owens* v. *Jackson Cty. Bd. of Educ.*, 561 Fed. Appx. 846, 848 (11th Cir. 2014); *Allstate Sweeping, LLC* v. *Black*, 706 F.3d 1261, 1266 (10th Cir. 2013); *Oras* v. *City of Jersey City*, 328 Fed. Appx. 772, 775 (3d Cir. 2009).

violates the Equal Protection Clause." *J.E.B.* v. *Alabama*, 511 U.S. 127, 130-131 (1994); see also, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 534 (1996); *Craig* v. *Boren*, 429 U.S. 190, 204 (1976); *Reed* v. *Reed*, 404 U.S. 71, 77 (1971). That prohibition encompasses petitioner's retaliation claim because, when a state actor retaliates against an individual who has complained about intentional sex discrimination, that conduct itself amounts to intentional discrimination on the basis of sex.

a. The conclusion that retaliation against a person who has complained of discrimination is itself a form of discrimination follows directly from a series of decisions, beginning with *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), in which this Court has held that broadly worded prohibitions of discrimination encompass claims for retaliation.

In *Sullivan*, this Court considered a claim brought under 42 U.S.C. § 1982, which states in broad terms that "[a]ll citizens of the United States shall have the same right * * * as is enjoyed by white citizens * * * to inherit, purchase, lease, sell, hold, and convey real and personal property." Sullivan, a white man, had leased a house to Freeman, a black man, and assigned him a membership share that permitted him to use a private park. The corporation that owned the park refused to approve the assignment because Freeman was black, and when Sullivan complained he was expelled from membership. See 396 U.S. at 234-235.

This Court held that Sullivan could pursue a claim under Section 1982 based on his "expulsion for the advocacy of Freeman's cause." 396 U.S. at 237. This Court explained that the corporation's action sought to punish Sullivan "for trying to vindicate the rights of minorities protected by [Section] 1982," and it

reasoned that "[s]uch a sanction would give impetus to the perpetuation of racial restrictions on property." *Ibid.* Thus, Section 1982's "broad and sweeping" prohibition of racial discrimination encompasses claims based on retaliation against those who complain about such discrimination. *Ibid.*

More recently, this Court held in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), that the broadly worded prohibition against discrimination in Title IX of the Education Amendments of 1972 protects against retaliation based on complaints about such discrimination. The provision of Title IX at issue in *Jackson* states that "[n]o person in the United States shall, on the basis of sex, * * * be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Jackson, who was the male coach of the girls' basketball team at the high school where he taught, alleged that his employer had violated Title IX by retaliating against him for complaining about the sex discrimination against the team. 544 U.S. at 171.

This Court held that Title IX's prohibition of "discrimination on the basis of sex" includes a prohibition against retaliation for complaints of sex discrimination. 544 U.S. at 174. As this Court explained, claims of retaliation fall comfortably within Title IX's "broadly written general prohibition on discrimination" even though the statute lacks a specific anti-retaliation provision. *Id.* at 175. That conclusion follows from "the text of Title IX," the Court reasoned, because "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination." *Id.* at 173. "Retaliation is, by

definition, an intentional act," the Court explained, and "retaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination." *Id.* at 173-174.

This Court applied the same principle in *Gomez-Perez* v. *Potter*, 553 U.S. 474 (2008). In that case, this Court addressed a claim under the federal-sector provision of the Age Discrimination in Employment Act (ADEA), which provides that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age * * * shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). The plaintiff in *Gomez-Perez* alleged that her federal employer retaliated against her after she filed an administrative age-discrimination complaint. 553 U.S. at 478. Relying on *Sullivan* and *Jackson*, this Court held that the ADEA's "prohibition of 'discrimination based on age' * * * proscrib[es] retaliation." *Id.* at 481. As this Court explained, although "[t]he *Jackson* dissent strenuously argued that a claim of retaliation is conceptually different from a claim of discrimination, * * * that view did not prevail." *Ibid.* (citation omitted). And the Court emphasized that it had not reached that conclusion in *Jackson* merely because it "concluded as a policy matter that [retaliation] claims are important," but rather that "the holding in *Jackson* was based on an interpretation of the 'text of Title IX.'" *Id.* at 484 (quoting *Jackson*, 544 U.S. at 173).

That same day, in *CBOCS West, Inc.* v. *Humphries*, 553 U.S. 442 (2008), this Court reached the same conclusion about a retaliation claim brought under 42 U.S.C. § 1981. Section 1981 provides, in

pertinent part, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens." 42 U.S.C. § 1981(a). Humphries, a black man who was an assistant restaurant manager, alleged that his employer had violated Section 1981(a) by firing him after he complained about racial discrimination against another black employee. 553 U.S. at 445. Again relying on *Sullivan* and *Jackson*, see *id.* at 446-447, 453, this Court held that Section 1981 "encompasses retaliation claims," *id.* at 446.

Taken together, this Court's decisions in *Sullivan*, *Jackson*, *Gomez-Perez*, and *CBOCS West* establish a straightforward proposition: A "broadly written general prohibition on discrimination," *Jackson*, 544 U.S. at 175, is naturally understood to prohibit retaliation against persons who complain about prohibited discrimination. It thus follows that the Equal Protection Clause encompasses claims for retaliation. As with the statutes addressed in each of the cases cited above, the Equal Protection Clause is a broadly worded prohibition of invidious discrimination, including discrimination on the basis of sex. See *J.E.B.,* 511 U.S. at 130-131. Since "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination," *Jackson*, 544 U.S. at 173, the Equal Protection Clause proscribes retaliation of the sort alleged by petitioner here.

b. The court of appeals held that petitioner's retaliation claim was not cognizable under the Equal Protection Clause because, in its view, "[r]etaliation for reporting alleged sex discrimination imposes negative consequences on an employee because of the

employee's report, not because of the employee's sex." App., *infra*, 12a. But that rationale simply restates the argument—which this Court has repeatedly rejected—that a "claim of retaliation is conceptually different from a claim of discrimination." *Gomez-Perez*, 553 U.S. at 481. The decision below thus cannot be squared with this Court's recognition in *Jackson* that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination." 544 U.S. at 173.

The court of appeals stated that it did not "read * * * *Jackson* to suggest that every statute prohibiting discrimination—much less the Constitution's aged guarantee of equal protection—also necessarily incorporates a right to be free from retaliation for reporting discrimination." App., *infra*, 20a-21a. But petitioner's argument does not proceed from the premise that *every* prohibition of discrimination must necessarily prohibit retaliation. It is possible that, when a proscription refers to "discrimination" or employs analogous language, other contextual indicia of meaning could suggest that retaliation is not encompassed. In the absence of any such contrary indications, however, *Jackson* and this Court's other decisions establish that that the ordinary meaning of a broadly worded prohibition against discrimination encompasses retaliation.[4]

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[4] Because petitioner does not contend that every use of the word "discrimination," in every context, necessarily encompasses retaliation, the court of appeals' reliance (App., *infra*, 21a) on Title VII's express anti-retaliation provision was misplaced. As this Court has explained, "Title VII spells out in * * * detail the conduct that constitutes discrimination in violation of that statute." *Jackson*, 544 U.S. at 175. It was therefore natural that

The court of appeals neglected that basic lesson when it insisted "that *Jackson* and cases like it turned on the text and history of the statutes being interpreted—neither of which they share with the Equal Protection Clause." App., *infra*, 21a. Tellingly, the court of appeals did not identify any pertinent distinction in either the text or history of the Equal Protection Clause. To the contrary, although the language of the Equal Protection Clause is not identical to the statutes at issue in this Court's prior decisions (which themselves did not address identical statutory language), it does not differ in any material respect. Like the statutory provisions this Court has considered, the Equal Protection Clause employs "broad and sweeping" language, *Sullivan*, 396 U.S. at 237, to effectuate a "general prohibition on discrimination," *Jackson*, 544 U.S. at 175; see also *CBOCS West*, 553 U.S. at 447-448. It is therefore naturally understood to prohibit retaliation for complaints about prohibited discrimination.

2. The principle that broadly worded prohibitions of discrimination encompass retaliation applies with added force to the Equal Protection Clause in light of the close historical connection between that provision and the anti-discrimination statutes that this Court addressed in *CBOCS West* (42 U.S.C. § 1981) and *Sullivan* (42 U.S.C. § 1982).

Congress would choose to expressly prohibit retaliation in Title VII, lest the statute's specific references to other forms of discrimination lead to a negative inference that retaliation was not prohibited. This Court has declined, however, to draw any such inference from Title VII's express anti-retaliation provision when construing other provisions that broadly prohibit discrimination without "list[ing] any specific discriminatory practices." *Ibid.* (emphasis removed).

This Court has repeatedly traced the interrelated history of Sections 1981 and 1982 and the Equal Protection Clause. See, *e.g.*, *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 383-391 (1982). The key language of Sections 1981 and 1982 is traceable to the Civil Rights Act of 1866. See *Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439-440 (1973). After the ratification of the Fourteenth Amendment in 1868, Congress reenacted Sections 1981 and 1982 as part of the Enforcement Act of 1870 under its new Fourteenth Amendment powers. See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968); see also *General Bldg. Contractors*, 458 U.S. at 385 (1870 Act is "codified verbatim" in the current versions of Sections 1981 and 1982).

The same Congress that enacted the Civil Rights Act of 1866 also passed the joint resolution that was later adopted as the Fourteenth Amendment. See *General Bldg. Contractors*, 458 U.S. at 384 (citing Cong. Globe, 39th Cong., 1st Sess., 3148-3149, 3042 (1866)). Thus, as this Court has recognized, Sections 1981 and 1982 and the Fourteenth Amendment "were expressions of the same general congressional policy." *Id.* at 384-385 (quoting *Hurd* v. *Hodge*, 334 U.S. 24, 32-33 (1948)). Indeed, the Fourteenth Amendment was largely adopted to confirm the constitutionality of Sections 1981 and 1982 and to enshrine the legislative policies underlying those statutes into the Constitution. See *Jones*, 392 U.S. at 436.

Given that close historical connection, there is no persuasive reason to cabin this Court's decisions in *CBOCS West* and *Sullivan* to the statutory context they directly addressed, as the court of appeals sought to do in the decision below. To the contrary, those decisions demonstrate that, at the time of the Equal

Protection Clause's adoption, its broad prohibition of discrimination would naturally have been understood to prohibit retaliation.

3. The court of appeals' narrow understanding of the Equal Protection Clause's protections is also mistaken because it disserves that provision's animating purpose—the eradication of invidious discrimination, including racial and sex discrimination, by state actors. See, *e.g.*, *Johnson* v. *California*, 543 U.S. 499, 505-506 (2005); *Frontiero* v. *Richardson*, 411 U.S. 677, 686-687 (1973); *Reed*, 404 U.S. at 76-77. Indeed, the construction of the Equal Protection Clause adopted by the court of appeals in this case would seriously undermine that provision's protections. By allowing public employers to openly rely on an employee's complaints about discrimination as a permissible basis for taking adverse employment actions, the decision below will undoubtedly allow discrimination to go unchecked in individual cases: It will be enough for the public employer to tell an employee that she has been fired for complaining about sex discrimination, rather than because of her sex.

More broadly, the rule adopted below will systematically undermine the Equal Protection Clause's prohibition of discrimination by deterring those who would otherwise lodge a complaint of discrimination from taking that step. As this Court has emphasized in the statutory context, retaliation against a person who has complained about illegal discrimination "give[s] impetus to the perpetuation" of such discrimination. *Sullivan*, 396 U.S. at 237. That same observation applies with equal force to the Equal Protection Clause: Permitting state actors to retaliate against those who report discrimination will

necessarily "give impetus" to further discrimination, *ibid.*, by chilling those who might otherwise come forward to bring such discrimination to light. There is no sound justification for construing the Equal Protection Clause in such a self-defeating manner.

C. The Question Presented Is Important, And This Case Presents A Sound Vehicle For Resolving It

1. The question whether the Equal Protection Clause prohibits retaliation against those who report invidious discrimination is an important one that arises with frequency. In addition to the decisions discussed above, see pp. 6-9, *supra*, the lower courts have confronted the question presented in a number of other cases, including in recent years.[5]

This case illustrates the circumstances under which the question presented is particularly likely to recur and to play an outcome-determinative role. In most cases, of course, an employee who has faced

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[5] See, *e.g.*, *Dasilva* v. *Indiana*, No. 1:19-cv-02453-JMS-DLP, 2020 U.S. Dist. LEXIS 35257, at *30-32 (S.D. Ind. Mar. 2, 2020); *Hurd* v. *City of Lincoln*, No. 4:16CV3029, 2018 U.S. Dist. LEXIS 234902, at *56-63 (D. Neb. July 23, 2018) (qualified immunity); *Oliviera* v. *City of Atlanta*, No. 1:14-CV-0708-CC-JSA, 2016 U.S. Dist. LEXIS 195350, at *77 (N.D. Ga. Aug. 4, 2016); *Moyer* v. *Fort Sumner*, No. 2:13-CV-00164 WPL/SMV, 2013 U.S. Dist. LEXIS 206060, at *8-9 (D.N.M. July 15, 2013); *Matthews* v. *City of West Point*, 863 F. Supp. 2d 572, 604-605 (N.D. Miss. 2012); *Cushmeer-Muhammad* v. *Fulton Cty.*, No. 1:08-CV-3256-GET-JFK, 2009 U.S. Dist. LEXIS 136418, at *12-13 (N.D. Ga. July 7, 2009); *Dorcely* v. *Wyandanch Union Free Sch. Dist.*, 665 F. Supp. 2d 178, 198-199 (E.D.N.Y. 2009); *Lange* v. *Town of Monroe*, 213 F. Supp. 2d 411, 418-420 (S.D.N.Y. 2002); *Sims* v. *Unified Gov't of Wyandotte Cty./Kansas City*, 120 F. Supp. 2d 938, 959 (D. Kan. 2000); *Strouss* v. *Michigan Dep't of Corr.*, 75 F. Supp. 2d 711, 733-734 (E.D. Mich. 1999); *Gates* v. *City of Dallas*, No. 3:96-CV-2198-D, 1998 U.S. Dist. LEXIS 10877, at *14-16 (N.D. Tex. July 15, 1998).

retaliation for complaints about discrimination in the workplace may pursue a claim under Title VII. See 42 U.S.C. § 2000e–3(a). Such a claim was not available to petitioner, however, because her former employer, the Carroll County Commonwealth's Attorney's Office, had fewer than the 15 employees necessary to trigger Title VII's coverage. See 42 U.S.C. § 2000e(b). Confirming that the Equal Protection Clause prohibits retaliation against those who complain about discrimination is thus particularly important for petitioner and other similarly situated employees of small governmental employers, who lack any avenue for redress under Title VII.

2. This case is a sound vehicle for resolving the question presented. The court of appeals held that petitioner's allegations were sufficient to make out a prima facie case of retaliation. App., *infra*, 7a. Its decision affirming the dismissal of petitioner's retaliation claim turned exclusively on its purely legal conclusion that the Equal Protection Clause does not prohibit state actors from retaliating against a person who has complained about discrimination. *Id*. at 8a, 22a. The issue that has divided the courts of appeals is therefore squarely presented for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2020

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1005

COLLETTE MARIE WILCOX,
PLAINTIFF - APPELLANT

v.

NATHAN H. LYONS, ESQ.;
PHILLIP C. STEELE, ESQ.,
DEFENDANTS - APPELLEES

AND

CARROLL COUNTY,
VIRGINIA, DEFENDANT

Argued: Jan. 30, 2020
Decided: Aug. 11, 2020

Appeal from the United States District Court
for the Western District of Virginia
(7:17-cv-000530-MFU-RSB)
Michael F. Urbanski, Chief District Judge, Presiding

Before: NIEMEYER, QUATTLEBAUM, and RUSHING, Circuit Judges.

RUSHING, Circuit Judge:

Collette Marie Wilcox, a former Deputy Commonwealth Attorney for Carroll County, Virginia, sued her former employer, contending that she was fired in retaliation for reporting alleged sex discrimination. Wilcox sought to proceed solely pursuant to 42 U.S.C. § 1983, on the theory that her public employer's retaliation violated the Fourteenth Amendment's Equal Protection Clause. In line with our precedent and the majority of courts to consider the question, we conclude that a pure retaliation claim is not cognizable under the Equal Protection Clause. We therefore affirm the district court's dismissal of Wilcox's retaliation claim.

I.

A.

Nathan Lyons, the elected Commonwealth Attorney for Carroll County, hired Wilcox to serve as a Deputy Commonwealth Attorney in May 2014.[1] Following an incident on November 30, 2015, Wilcox reported alleged sex discrimination to Lyons. The incident occurred when one of Wilcox's colleagues recounted his efforts to protect a female relative from "rough-housing and unwanted violence." J.A. 138. During this conversation, another of Wilcox's colleagues, defendant Phillip Steele, forcefully struck

[1] We take the facts as alleged in Wilcox's complaint, which we accept as true on a motion to dismiss. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). We therefore do not consider the defendants' attempts to add to the factual record.

Wilcox on her right arm or shoulder with a closed fist. Steele accompanied his strike with a derogatory comment toward women. Taken aback, Wilcox told Steele not to "use [her] as demonstrative evidence of violence against women." J.A. 138. She asked Steele to back away from her, but he did not comply. Wilcox feared he might attempt to hit her again. At this point, Lyons entered the room. Wilcox uttered a "nervous joke" about filing a worker's compensation claim for battery and began to leave. J.A. 138. Before Wilcox had made a complete exit, a female colleague entered the room, and Wilcox exclaimed to her that there was "hostility in the room against women." J.A. 139.

Later that afternoon, Wilcox sent Lyons an email describing the incident. The next day, Wilcox met with Lyons to discuss her email. During that meeting, she expressed her opinion that the Commonwealth Attorney's Office promoted, or at least tolerated, discrimination against women. Lyons apologized "for the Office hostility" but did not take "affirmative steps" to reprimand Steele or correct his behavior. J.A. 140. In the weeks after the incident, Wilcox perceived that her colleagues were "distanc[ing] themselves" from her. J.A. 140.

Thereafter, on several occasions in January 2016 Wilcox missed or was late to work due to bad weather or illness. At one point, Lyons asked Wilcox to inform him about her absences by phone rather than text message but added that it was "no big deal." J.A. 141. At the end of January, Wilcox submitted her monthly timesheet to Lyons. Court proceedings had run long one of the days Wilcox was late to work, so although she had arrived late, she made a notation on her

timesheet explaining she had worked the equivalent of a full day.

On February 16, 2016, Lyons directed Wilcox to resubmit her January timesheet to reflect sick leave for part of the day on which court proceedings had run late. The next day, Lyons called Wilcox into his office and informed her that she had used too much leave, despite his approval of her leave requests. Lyons then told Wilcox she was in violation of a "state compensation board policy" concerning leave and he was going to issue her a written reprimand. J.A. 142. Wilcox told Lyons she did not know about the policy to which Lyons was referring and asked why Carroll County's leave policy was not applicable. Lyons handed Wilcox the letter of reprimand and directed her to sign it. Wilcox asked if she could read the letter first and requested a copy of the pertinent policy to review. In response, Lyons turned his back, raised his voice, and told Wilcox she was fired for insubordination.

B.

Wilcox subsequently filed this lawsuit against Lyons, Steele, and Carroll County. She alleged sex discrimination, hostile work environment, and retaliation in violation of the Equal Protection Clause, as well as deprivation of a liberty interest in violation of the Due Process Clause and common law battery. The defendants moved to dismiss. The district court dismissed with prejudice all claims against Carroll County and the hostile work environment claim. The court also rejected Wilcox's claims for sex discrimination, retaliation, and deprivation of a liberty interest but granted Wilcox leave to amend those claims.

Wilcox filed an amended complaint in which she dropped her allegation of sex discrimination, asserted additional facts to support her claim for deprivation of a liberty interest, and reasserted her retaliation and battery claims. Pertinent for this appeal, Wilcox did not amend her retaliation claim but instead sought reconsideration of the district court's prior order dismissing that claim. The district court denied Wilcox's motion for reconsideration.[2] Briefly surveying our precedent regarding Section 1983 retaliation claims, the court observed that it "is far from certain" that "her retaliation claim alleging adverse action on account of her complaint of discrimination is actionable under § 1983 as a violation of the Equal Protection Clause." J.A. 126-127. However, the court determined it need not reach that issue because, even assuming such a claim were viable, Wilcox had failed to state a prima facie case for retaliation.

Drawing on the requirements for a Title VII retaliation claim, the district court concluded that Wilcox failed to sufficiently allege a causal relationship between her protected activity and her termination. Wilcox "relie[d] heavily on temporal proximity" to allege causation, but the court concluded that the two-and-a-half month time span between her report of alleged sex discrimination and her termination was too long to establish causation by

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[2] The district court subsequently dismissed with prejudice the claim for deprivation of a liberty interest and, in the absence of any viable federal cause of action, declined to exercise supplemental jurisdiction over the state-law battery claim. J.A. 169-180. That order disposed of all of Wilcox's remaining claims, thereby ripening for appeal the dismissal of her retaliation claim.

temporal proximity alone. J.A. 129. Finding that Wilcox had not pleaded any other evidence of retaliatory animus, the court held that the complaint failed to state a claim for retaliation.

Wilcox appealed. On appeal, she argues that her retaliation claim is actionable under Section 1983 as a violation of the Equal Protection Clause and that she has sufficiently alleged causation to support her retaliation claim. We review the district court's dismissal de novo. *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010).

II.

As noted above, the district court assumed for the sake of argument that Wilcox's retaliation claim was cognizable under the Equal Protection Clause but determined that she failed to sufficiently allege causation to support her claim. We likewise first consider whether, assuming such a claim is cognizable, Wilcox has sufficiently pleaded it in her complaint. *Cf. Hagans v. Lavine*, 415 U.S. 528, 547 (1974) (reiterating the "ordinary rule that a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available").

The district court borrowed the prima facie case framework from the Title VII retaliation context. Under that framework, to establish a prima facie case of retaliation, a plaintiff must show "(i) that she engaged in protected activity, (ii) that her employer took adverse action against her, and (iii) that a causal relationship existed between the protected activity and the adverse employment activity." *Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243, 250 (4th Cir. 2015)

(brackets and internal quotation marks omitted). Although we have not drawn a bright temporal line, we have observed that two-and-a-half months between the protected activity and the adverse action "is sufficiently long so as to weaken significantly the inference of causation between the two events" in the absence of other evidence of retaliation. *King v. Rumsfeld*, 328 F.3d 145, 151 n.5 (4th Cir. 2003); *see id.* at 151 & n.5 (nevertheless concluding that temporal proximity was sufficient to establish causation in that case because the end of the school year was "the natural decision point"); *cf. Foster*, 787 F.3d at 253 (holding complaints of discrimination one month before termination sufficient to create jury question regarding causation prong of prima facie case).

But here, Wilcox has alleged additional facts suggesting retaliation, namely Lyons's alleged overreaction in firing Wilcox for insubordination in response to her request for clarification about the attendance policy and time to read the letter of reprimand. A disproportionate response to a minor workplace infraction suggests pretext and can bolster the causation element of a plaintiff's prima facie case. *See, e.g.*, *Hernandez v. Fairfax Cnty.*, 719 Fed. App. 184, 189-190 (4th Cir. 2018) (per curiam). Considered together, Wilcox's allegations about Lyons's overreaction in the reprimand meeting and the two-and-a-half month span between Wilcox's complaint and her termination are sufficient to plead causation at this preliminary stage.

Thus, if Wilcox's retaliation claim were governed by the Title VII framework, her claim would survive dismissal. But Wilcox did not plead a Title VII claim;

she has advanced only a Section 1983 claim alleging a violation of the Equal Protection Clause, which she argues should follow the Title VII pattern. We therefore are squarely presented with the question whether a pure retaliation claim is cognizable as a violation of the Equal Protection Clause.

III.

Public employees enjoy the protection of antidiscrimination statutes such as Title VII as well as the protection of the Constitution, which they may enforce against their employers in civil actions pursuant to 42 U.S.C. § 1983.[3] *see*, *e.g.*, *Holder v. City of Raleigh*, 867 F.2d 823, 828 (4th Cir. 1989) ("We have held that Title VII is not an exclusive remedy for employment discrimination by a public entity. A state employee may still bring a Fourteenth Amendment challenge under 42 U.S.C. § 1983 to discriminatory employment decisions."). We have recognized as cognizable, for example, claims by public employees alleging that their employers violated their rights under the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See*, *e.g.*, *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000) (First Amendment); *Stone v. Univ. of Md. Med. Sys. Corp.*,

[3] Section 1983 provides that "[e]very 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."

855 F.2d 167, 172 (4th Cir. 1988) (Due Process); *Talbert v. City of Richmond*, 648 F.2d 925, 929 (4th Cir. 1981) (Equal Protection).

The Equal Protection Clause of the Fourteenth Amendment commands that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This constitutional imperative of equal protection does not entirely remove the States' power to classify but "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Distinctions on the basis of sex or gender are subject to heightened scrutiny under equal protection analysis. *See Knussman v. Maryland*, 272 F.3d 625, 635 (4th Cir. 2001).[4] Thus, this Court has recognized that the Equal Protection Clause confers on public employees "a right to be free from gender discrimination that is not substantially related to important governmental objectives." *Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994); *see Davis v. Passman*, 442 U.S. 228, 234-235 (1979). Intentional sex discrimination and sexual harassment against public employees by persons acting under color of state law violate the Equal Protection Clause and are actionable under Section 1983. *Beardsley*, 30 F.3d at 529; *cf. J.E.B. v. Alabama*, 511 U.S. 127, 130-131

[4] Distinctions on the basis of race, by contrast, are subject to the strictest judicial scrutiny because "'[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'" *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 240-241 (4th Cir. 2010) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229 (1995)).

(1994) ("Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where . . . the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.").

Neither our Court nor the Supreme Court has recognized an equal protection right to be free from retaliation. To the contrary, we have previously held that "'[a] pure or generic retaliation claim . . . simply does not implicate the Equal Protection Clause.'" *Edwards v. City of Goldsboro*, 178 F.3d 231, 250 (4th Cir. 1999) (quoting *Watkins v. Bowden*, 105 F.3d 1344, 1354 (11th Cir. 1997)). Instead, we have consistently considered retaliation claims brought under Section 1983 to be more properly characterized as claims asserting a violation of the First Amendment. *See Martin v. Duffy*, 858 F.3d 239, 252 (4th Cir. 2017); *Kirby v. Elizabeth City*, 388 F.3d 440, 447 (4th Cir. 2004); *Edwards*, 178 F.3d at 250. As we have explained, allegations that an employer subjected an employee to adverse consequences "in retaliation for his speech are, at their core, free-speech retaliation claims that do 'not implicate the Equal Protection Clause.'" *Kirby*, 388 F.3d at 447 (quoting *Edwards*, 178 F.3d at 250).[5] When an employee experiences an

[5] In *Kirby*, the employee advanced two equal protection claims: first, that his employer was actually motivated to treat him differently in retaliation for his speech, and second, that his employer had no rational basis for treating him differently. 388 F.3d at 447. Wilcox does not argue that Lyons lacked any "conceivable rational basis" to terminate her. *Id.* at 448. Nor has she alleged that the defendants, without a rational basis, treated her discrimination complaint differently from other employees' discrimination complaints. Rather, she contends

adverse employment action after "voic[ing] a grievance" to her public employer, "[a] violation of the First Amendment's protection of the right to speak out is a necessary predicate to a claim of pure retaliation." *Beardsley*, 30 F.3d at 530; *cf. Martin*, 858 F.3d at 252 (affirming dismissal of equal protection claim because prisoner's claim of retaliation for filing grievance and participating in grievance resolution process was "best characterized as a mere rewording of his First Amendment retaliation claim").

Wilcox acknowledges this body of precedent but contends that the subject matter of her complaint—sex discrimination and harassment—makes her claim of retaliation in response to that complaint cognizable under the Equal Protection Clause. In other words, she asks us to expand the reach of the Fourteenth Amendment in claims arising under Section 1983. We are not persuaded.

The Supreme Court has subjected discrimination on the basis of sex to heightened equal protection scrutiny because differences between the sexes are so rarely a legitimate reason to treat otherwise similarly situated people differently. *See Frontiero v. Richardson*, 411 U.S. 677, 686-687 (1973) ("[T]he sex characteristic frequently bears no relation to ability to perform or contribute to society."); *Craig v. Boren*, 429 U.S. 190, 198-199 (1976) (recognizing that "classifications by gender" have served as "inaccurate prox[ies]" for other classifications, rooted in stereotypes and "outdated misconceptions" about women). The Court views classifications based on sex

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only that Lyons fired her in retaliation for her complaint of discrimination.

or gender with suspicion because of their roots in our Nation's "long and unfortunate history of sex discrimination." *Frontiero*, 411 U.S. at 684; *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) ("Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination."). Moreover, "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth," therefore "the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility." *Frontiero*, 411 U.S. at 686 (internal quotation marks omitted). Thus, state action that causes "different treatment [to] be accorded to [individuals] on the basis of their sex . . . establishes a classification subject to scrutiny under the Equal Protection Clause." *Reed v. Reed*, 404 U.S. 71, 75 (1971).[6]

Retaliation for reporting alleged sex discrimination imposes negative consequences on an employee because of the employee's report, not because of the employee's sex. The very premise of a

[6] This is not to say that all sex-based classifications are unconstitutional. "The two sexes are not fungible," and "[p]hysical differences between men and women . . . are enduring." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (internal quotation marks omitted). Indeed, "[i]nherent differences between men and women" need not be ignored or suppressed but rather "remain cause for celebration." *Id.* Classifications based on sex, however, may not be used, "as they once were, to create or perpetuate the legal, social, and economic inferiority of women." *Id.* at 534.

retaliation claim is that the employer has subjected an employee to adverse consequences in response to her complaint of discrimination. For example, to establish a prima facie case of retaliation under Title VII, a plaintiff must prove: (1) that she engaged in a protected activity, which includes complaining to her superior about sex discrimination or harassment; (2) that her employer took an adverse action against her; and (3) that there was "a causal link between the two events." *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 281 (4th Cir. 2015) (internal quotation marks omitted). The necessary causal link is between the employee's complaint and the adverse action, not between her sex and the adverse action. *See Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 868 (7th Cir. 2018) ("[A]ll anti-retaliation provisions . . . provide[] protections not because of who people are, but because of what they do."). A retaliation claim of this type thus does not implicate disparate treatment on the basis of a classification forbidden by the Equal Protection Clause.

Consider a male employee who has not personally experienced discrimination but denounces his superior's misogyny and is punished for doing so. *See Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998) (identifying protected activities under Title VII, including "voicing one's opinions in order to bring attention to an employer's discriminatory activities"); *cf.*, *e.g.*, *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 110 (2d Cir. 2010) (holding that non-African American plaintiff had established a prima facie claim of Title VII retaliation stemming from "concerns she expressed on behalf of an African-American coworker"). His superior's retaliation is a product of the employee voicing his

opinion, not his sex. *Cf. CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 460 (2008) (Thomas, J., dissenting) ("When an individual is subjected to reprisal because he has complained about racial discrimination, the injury he suffers is not on account of his *race*; rather, it is the result of his *conduct*."). The sex of the complainant is irrelevant, because it is not the complainant's sex that motivated the employer's retaliatory adverse action. *See Yatvin v. Madison Metro. School Dist.*, 840 F.2d 412, 419 (7th Cir. 1988); *cf. Love-Lane v. Martin*, 355 F.3d 766, 788 (4th Cir. 2004) (plaintiff who alleged she was demoted "in retaliation for her vocal opposition to race discrimination" had a viable First Amendment claim but "none of [the plaintiff's] evidence that she was [demoted] in retaliation for her speech suggests that she was [demoted] because of her race," so summary judgment was warranted on her racial discrimination claims).

Likewise here, Wilcox has alleged that the defendants fired her in retaliation for her complaint of sexual harassment and discrimination, not because she is a woman. These allegations do not implicate an impermissible classification or discrimination on the basis of Wilcox's membership in a class defined by an immutable characteristic. Rather, Wilcox alleges she suffered adverse consequences because of her speech and conduct: reporting alleged harassment and discrimination. In such a case, the Equal Protection Clause's concern with treating similarly situated people differently on the basis of sex is not implicated. *See Yatvin*, 840 F.2d at 418 ("Although sex discrimination by state agencies has been held to violate the equal protection clause, retaliating against a person for filing charges of sex discrimination is not

the same as discriminating against a person on grounds of sex . . . .").

This is not to say that retaliation can never be evidence of sex discrimination. For example, if a public employer retaliated against women who filed complaints or participated in an investigation but not against men who did the same, the women may have a cognizable Equal Protection Claim. That claim, however, would not be for retaliation but for straightforward sex discrimination, because their employer was treating similarly situated employees differently on the basis of sex. *See id.* Similarly, continued sexual harassment and adverse treatment of a female employee unlike the treatment accorded male employees remains actionable as a violation of the Equal Protection Clause even when the sex discrimination and harassment continue after, and partially in response to, the female employee's report of prior discrimination and harassment. *See Beardsley*, 30 F.3d at 530. The employee's claim in such a case is not "a claim of pure retaliation," *id.*, but instead implicates the basic equal protection right to be free from sex discrimination that is not substantially related to important governmental objectives. *Id.* at 529; *see also Watkins*, 105 F.3d at 1354 (distinguishing a "pure or generic retaliation claim" from a situation like that in *Beardsley*).

A "pure or generic retaliation claim," however, even if premised on complaints of sex discrimination, is not cognizable under the Equal Protection Clause. *Edwards*, 178 F.3d at 250 (internal quotation marks omitted). To the extent a public employee contends she suffered adverse consequences for expressing complaints or reporting discrimination to her

employer, her claim arises under the First Amendment. *See Campbell v. Galloway*, 483 F.3d 258, 266-268, 272 (4th Cir. 2007); *Watkins*, 105 F.3d at 1354. To the extent a public employee links an alleged retaliatory action to her gender, that allegation would constitute part of an equal protection discrimination claim, not a freestanding retaliation claim. *See Watkins*, 105 F.3d at 1354. Wilcox has not made such an allegation, nor has she pleaded a First Amendment action. The "right to be free from retaliation for protesting sexual harassment and sex discrimination" upon which Wilcox solely relies "is a right created by Title VII, not the equal protection clause." *Gray v. Lacke*, 885 F.2d 399, 414 (7th Cir. 1989); *see also Boyd v. Ill. State Police*, 384 F.3d 888, 898 (7th Cir. 2004) ("[T]he right to be free from retaliation may be vindicated under the First Amendment or Title VII, but not the equal protection clause."). To be clear: these existing legal avenues for challenging public employer retaliation remain open to employees; we simply decline to create a new one under the auspices of the Fourteenth Amendment.

In reaching this conclusion, we join the vast majority of circuit courts to have considered the question. At least six of our sister circuits have held that the Equal Protection Clause cannot sustain a pure claim of retaliation. *See Thomas v. Indep. Twp.*, 463 F.3d 285, 298 n.6 (3d Cir. 2006) (retaliation for complaint of race discrimination); *Thompson v. City of Starkville*, 901 F.2d 456, 468 (5th Cir. 1990) (retaliation for complaints about improper promotions and misconduct by other police officers); *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 439-440 (6th Cir. 2005) (retaliation for complaint of police harassment); *Boyd*, 384 F.3d at 898 (retaliation for

filing charges of race discrimination); *Yatvin*, 840 F.2d at 418 (retaliation for filing charges of sex discrimination); *Maldonado v. City of Altus*, 433 F.3d 1294, 1308 (10th Cir. 2006) (retaliation for complaint of national origin discrimination); *Teigen v. Renfrow*, 511 F.3d 1072, 1084-1086 (10th Cir. 2007) (retaliation for complaints about violations of state employment laws); *Watkins*, 105 F.3d at 1354 (retaliation for complaints of sexual and racial harassment); *see also Burton v. Ark. Sec'y of State*, 737 F.3d 1219, 1237 (8th Cir. 2013) (observing that other courts have rejected equal protection retaliation claims and concluding that "no clearly established right exists under the *equal protection* clause to be free from retaliation" (internal quotation marks omitted)). And a host of district courts—both within our circuit[7] and beyond (including in circuits that have not yet resolved this question)[8]—have reached the same conclusion.

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[7] *See, e.g.*, *Whitehurst v. Bedford Cnty. Sch. Bd.*, No. 6:19-cv-00010, 2020 WL 535962, at *12-13 (W.D. Va. Feb. 3, 2020); *White v. Gaston Cnty. Bd. of Educ.*, No. 3:16- cv-00552-MOCDSC, 2017 WL 220134, at *3-4 (W.D.N.C. Jan. 18, 2017); *Johnson v. Scott Cnty. Sch. Bd.*, No. 2:12-cv-00010, 2012 WL 4458150, at *3 (W.D. Va. July 31, 2012); *Bailey v. Fairfax Cnty. Va.*, No. 1:10-cv-1031, 2011 WL 3793329, at *2 (E.D. Va. Aug. 18, 2011); *Byrd v. Md. Dep't of Health & Mental Hygiene - State Bd. of Dental Exam'rs*, No. WMN-07-2740, 2008 WL 11509375, at *7 (D. Md. Apr. 16, 2008); *Phillips v. Mabe*, 367 F. Supp. 2d 861, 870-871 (M.D.N.C. 2005).

[8] *See, e.g.*, *Harrison v. Fed. Bureau of Prisons*, 298 F. Supp. 3d 174, 181 (D.D.C. 2018); *Roy v. Correct Care Sols., LLC*, 321 F. Supp. 3d 155, 170 n.6 (D. Me. 2018), *rev'd in part on other grounds*, 914 F.3d 52 (1st Cir. 2019); *see also Benson v. City of Lincoln*, No. 4:18-cv-3127, 2019 WL 1766159, at *9 (D. Neb. Apr. 22, 2019); *Zimmerman v. Ark. Dep't of Fin. & Admin.*, No. 5:17-cv-00160-JM, 2018 WL 700850, at *3 (E.D. Ark. Feb. 2,

Only the Second Circuit has reached a contrary conclusion, in *Vega v. Hempstead Union Free School District*, 801 F.3d 72 (2d Cir. 2015), and Wilcox urges us to adopt its reasoning. But we do not find *Vega* persuasive.

After distinguishing contrary circuit precedent, the *Vega* court offered two primary reasons undergirding its conclusion that retaliation is actionable under the Equal Protection Clause. First, the court observed that "an 'equal protection claim [largely] parallels [a plaintiff's] Title VII claim,'" and found "no sound reason to deviate from this principle for a retaliation claim." *Id.* at 82 (second alteration in original) (quoting *Feingold v. New York*, 366 F.3d 138, 159 (2d Cir. 2004)). While Title VII's antidiscrimination provision overlaps the ambit of the Equal Protection Clause, and we have applied a similar framework in analyzing workplace protected-characteristic discrimination claims under each, the scope of the two laws is not identical. *See United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 206 n.6 (1979) ("Title VII . . . was not intended to incorporate and particularize the commands of the . . . Fourteenth Amendment[]."); *Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 627-628 n.6 (1987) (rejecting the notion that "the obligations of a public employer under Title VII must be identical to its obligations under the Constitution"). Title VII, for instance, permits litigants to assert

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2018); *Mazzeo v. Gibbons*, No. 2:08-cv-01387-RLH, 2010 WL 4384207, at *5 (D. Nev. Oct. 28, 2010); *Occhionero v. City of Fresno*, No. CV F 05-1184 LJO SMS, 2008 WL 2690431, at *7-8 (E.D. Cal. July 3, 2008); *Rodriguez-Melendez v. Rivera*, No. CIV. 97- 1258 SEC, 1998 WL 151870, at *3-4 (D.P.R. Mar. 23, 1998).

discrimination claims under a "disparate impact" theory, but such claims are not cognizable in the context of the Equal Protection Clause. *Compare Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."), *with Washington v. Davis*, 426 U.S. 229, 242 (1976) ("Disproportionate impact . . . [s]tanding alone" does not violate Equal Protection Clause.).

Another critical difference between Title VII and the Equal Protection Clause directly undermines the rationale relied upon by the court in *Vega*: Title VII contains a provision—separate from its antidiscrimination provision—expressly prohibiting retaliation. *See* 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter . . . ."); *see*, *e.g.*, *Peters v. Jenney*, 327 F.3d 307, 320 (4th Cir. 2003) (outlining the elements of a Title VII retaliation claim). The Equal Protection Clause contains no comparable antiretaliation language. And as the Supreme Court has explained, Title VII's antidiscrimination and antiretaliation provisions "differ not only in language but in purpose as well." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). "The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." *Id.* We cannot read this additional, and materially different,

language and purpose into the Equal Protection Clause.

Second, the *Vega* court reasoned that "retaliation is a form of discrimination," relying on the Supreme Court's interpretation of Title IX in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005). Title IX, which "prohibits sex discrimination by recipients of federal education funding" is a "broadly written general prohibition on discrimination." *Jackson*, 544 U.S. at 173, 175. The statute declares that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The question in *Jackson* was whether Title IX's implied private right of action encompasses claims of retaliation. The Court held that it did, relying on its "repeated holdings construing 'discrimination' under Title IX broadly," Congress's awareness of precedent issued shortly before Title IX's passage, the absence of language limiting the statute to "discrimination on the basis of *such individual's* sex," and Congress's purposes in enacting the statute. *Jackson*, 544 U.S. at 173-181.[9]

We do not read the Court's decision in *Jackson* to suggest that every statute prohibiting discrimination—much less the Constitution's aged

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[9] The Supreme Court has also construed the federal employer provision of the Age Discrimination in Employment Act and 42 U.S.C. § 1981 to encompass retaliation, again focusing on the particular language and history of the statutes and relevant precedent. *See Gomez-Perez v. Potter*, 553 U.S. 474, 479 (2008) (ADEA); *CBOCS*, 553 U.S. at 445 (Section 1981).

guarantee of equal protection—also necessarily incorporates a right to be free from retaliation for reporting discrimination. As an initial matter, that proposition is difficult to square with Title VII, which contains an antidiscrimination provision and a separate express antiretaliation provision. If a prohibition on discrimination always encompassed retaliation, Title VII's antiretaliation provision would be mere surplusage. Such an interpretation flies in the face of commonly applied canons of statutory construction. *See In re Total Realty Mgmt., LLC*, 706 F.3d 245, 251 (4th Cir. 2013). But, more importantly, it illustrates that—at least in the mind of Congress—retaliation is not always included within the conceptual ambit of discrimination. *See Gomez-Perez*, 553 U.S. at 495 (Roberts, C.J., dissenting) (explaining that although "broad bans on discrimination, standing alone, may be read to include a retaliation component," differences in the "text and structure of" the ban, along with factors such as "the broader . . . scheme of which [the ban] is a part," can counsel in favor of the opposite conclusion—that retaliation is not included). The better understanding is that *Jackson* and cases like it turned on the text and history of the statutes being interpreted—neither of which they share with the Equal Protection Clause.

In fact, the Supreme Court has specifically held that Title IX's antidiscrimination imperative is not coterminous with the Equal Protection Clause. In *Fitzgerald v. Barnstable School Committee*, the Court engaged in a "comparison of the substantive rights and protections guaranteed" by Tile IX and the Equal Protection Clause and determined that "Title IX's protections are narrower in some respects and broader in others." 555 U.S. 246, 256 (2009). As the Court

explained, Title IX applies in circumstances in which the Equal Protection Clause does not, as well as vice versa, and "[e]ven where particular activities and particular defendants are subject to both Title IX and the Equal Protection Clause" the pertinent standards provided by each "may not be wholly congruent." *Id.* at 257.

We therefore cannot agree with the *Vega* court's conclusion that because the term "discrimination" in Title IX encompasses retaliation, the Equal Protection Clause's prohibition on unjustified classifications based on sex must also encompass pure claims of retaliation based not on sex but on an employee's speech. The guarantee of equal treatment for similarly situated persons is conceptually distinct from a right to be free from retaliation for voicing complaints of discrimination. While the latter may serve to guard and secure the former primary objective, the enforcement mechanism is distinct from the right itself. *See Burlington N.*, 548 U.S. at 63. It does not follow that because discrimination sometimes includes retaliation in other contexts, the Equal Protection Clause must have the same remedial scope. We decline to break new constitutional ground based on the interpretation of statutes with different histories, different structures, and different text than the Fourteenth Amendment.

* * *

Because Wilcox has pleaded her retaliation claim solely under the Equal Protection Clause, she has failed to present a cognizable claim. The district court therefore did not err when it granted the defendants' motion to dismiss. Accordingly, for the reasons set

forth in this opinion, the decision of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Case No. 7:17-cv-000530

COLLETTE M. WILCOX,
PLAINTIFF

v.

NATHAN H. LYONS, ESQ.,
ET AL., DEFENDANTS

[Filed: April 25, 2018]

MEMORANDUM OPINION

Plaintiff Colette M. Wilcox filed this employment action pursuant to 42 U.S.C. § 1983, alleging violations of her Equal Protection rights under the Fourteenth Amendment to the United States Constitution. Defendants moved to dismiss Wilcox's claims. The court held a hearing on defendants' motions to dismiss on March 22, 2018. The following day, it entered an order dismissing with prejudice Wilcox's claims against Carroll County as well as her hostile work environment claim (Count III) against

defendants Nathan H. Lyons, Esq. and Phillip C. Steele, Esq. The court dismissed Wilcox's sex discrimination (Count I), retaliation (Count II) and deprivation of liberty interest (Count IV) claims without prejudice and gave her leave to amend. The state law battery claim against defendant Steele (Count V) survived the motion to dismiss.

Wilcox now moves to amend her complaint and for reconsideration of the court's order as regards Count II, alleging retaliation. She seeks leave to amend her complaint to assert additional allegations supporting her claim for deprivation of liberty interest, which the court already granted in its March 23 order, to reassert her battery claim, and to reassert her retaliation claim *without* amending the relevant factual allegations. The proposed amended complaint does not include a claim for sex discrimination.

As regards the retaliation claim, Wilcox asks the court to reconsider its March 23 ruling, arguing she has alleged a claim for relief sufficient to survive a challenge pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Wilcox posits that her burden of establishing a prima facie case of retaliation at this stage is not onerous, and her allegation of temporal proximity alone is enough to establish a causal connection between the protected activity and the adverse employment action and therefore state a valid claim for retaliation. The court disagrees and, as such, will **GRANT in part** and **DENY in part** Wilcox's motion to amend and **DENY** her motion for reconsideration.

I.

Pursuant to Rule 54(b), the court has the power to reconsider and modify its interlocutory orders that resolve fewer than all claims "at any time before the entry of a judgment adjudicating all the claims and all the parties' right and liabilities." Fed. R. Civ. P. 54(b); *Am. Canoe Ass'n v. Murphy Farms. Inc.*, 326 F.3d 505, 514-15 (4th Cir. 2003). Accordingly, "[m]otions for reconsideration of interlocutory orders are not subject to the strict standards applicable to motions for reconsideration of a final judgment." *Am. Canoe Ass'n*, 326 F.3d at 514. At plaintiff's request, the court will review its prior ruling in light of the argument she raises.

II.

Plaintiff presumes that her retaliation claim alleging adverse action on account of her complaint of discrimination is actionable under § 1983 as a violation of the Equal Protection Clause of the Fourteenth Amendment—but that fact is far from certain. While the Fourth Circuit in *Holder v. City of Raleigh*, 867 F.2d 823, 828 (4th Cir. 1989), held state employees could bring Fourteenth Amendment challenges under § 1983 to discriminatory employment decisions, rather than relying exclusively on Title VII, *Holder* does not speak specifically to retaliation claims. Ten years later, the Fourth Circuit addressed retaliation claims in the context of § 1983 and stated *Edwards v. City of Goldsboro* that a "pure or generic retaliation claim . . . simply does not implicate the Equal Protection Clause." 178 F.3d 231, 250 (4th Cir. 1999); *see also Martin v. Duffy*, 858 F.3d 239 (4th Cir. 2017) (holding plaintiff's equal protection claim was best characterized as a

rewording of his First Amendment retaliation claim and, in such circumstances, generic retaliation claims do not implicate the Equal Protection Clause, citing *Edwards*). District courts have since relied on *Edwards* in holding the Fourth Circuit does not recognize generic retaliation claims based on equal protection. *See, e.g.*, *Phillips v. Mabe*, 367 F. Supp. 2d 861, 871 (M.D.N.C. 2005): *Johnson v. Scott Cnty. Sch. Bd.*, No. 2:12-cv-00010, 2012 WL 4458150, at * (W.D. Va. July 31, 2012) (James, J.). Instead, courts have found retaliation claims are more properly alleged under the constitution's First Amendment protections. *See, e.g.*, *White v. Gaston County Board of Education*, No. 3:16-cv-00552, 2017 WL 220134, at *3 (W.D.N.C. Jan. 18, 2017) (retaliation claim properly asserted under § 1983 as violation of First Amendment, rather than Fourteenth Amendment); *Knox v. Mayor & City Council Baltimore City*, No. JKB-17-1384, 2017 WL 5903709 (D. Md. Nov. 29, 2017) (citing *Edwards* and holding retaliation claim not violation of right to equal protection, rather it "'is clearly established as a *first amendment* right and as a *statutory* right under Title VII; but no clearly established right exists under the *equal protection* clause to be free from retaliation.'"). Wilcox asserts no First Amendment claim of retaliation here.

The court notes that at least one circuit has recently changed its stance on this issue. In *Vega v. Hempstead Union Free School District*, the Second Circuit acknowledged the "considerable confusion surrounding the viability of retaliation claims under § 1983" and clarified that "retaliation claims alleging an adverse action because of a complaint of discrimination are actionable under § 1983" alleging a violation of the Equal Protection Clause. 801 F.3d 72,

80 (2d Cir. 2015). The Second Circuit reasoned that an employer's retaliatory action in response to an employee's participation in a discrimination investigation and proceedings constituted an impermissible reason to treat an employee differently for purposes of the Equal Protection Clause. *Id*. at 81-82. The court further remarked that retaliation is a form of discrimination and, as it has recognized that an equal protection claim parallels a Title VII claim, it found no good reason to deviate from this principle for retaliation claims, when the retaliatory action is taken because a plaintiff complains of or opposes discrimination. *Id*. at 82.

It is unclear whether the Fourth Circuit would adopt the reasoning of the Second Circuit in *Vega* and find a retaliation claim brought pursuant to § 1983 and the Equal Protection Clause is viable. The court need not reach that issue, however, as Wilcox has failed to state a prima facie case for retaliation under the Title VII framework, even assuming it is applicable here.

III.

To establish a prima facie case of retaliation, Wilcox must show: (i) "that [she] engaged in protected activity," (ii) "that [her employer] took adverse action against [her]," and (iii) "that a causal relationship existed between the protected activity and the adverse employment activity." *Foster v. Univ. of Maryland-E. Shore*, 787 F.3d 243, 250 (4th Cir. 2015). The court held that Wilcox failed to satisfy the third causation element and gave her leave to amend. In her motion for reconsideration, Wilcox argues she need not amend, as her allegation as to temporal proximity is

alone sufficient to state a prima facie case for retaliation.

Wilcox's allegations plainly satisfy the first and second elements of a retaliation claim. She alleges she engaged in protected activity by complaining about the alleged discrimination and hostile work environment and that she suffered adverse employment action as a result. Am. Compl., ECF No. 26-1, at ¶¶ 92, 94. As regards the causal link, Wilcox "relies heavily on temporal proximity"—the two-and-a-half month time span between her November 30, 2015 protected activity and her February 17, 2016 termination. Mot. to Reconsider, ECF No. 25, at 4-5.

"The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close[.]'" *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (citations omitted). While there is no "bright temporal line," case law from the Fourth Circuit suggests that two-and-a-half months between the protected activity and the adverse action is too long to establish causation by temporal proximity alone. *See King v. Rumsfeld*, 328 F.3d 145, 151 n.5 (4th Cir. 2003) (two months and two weeks "sufficiently long so as to weaken significantly the inference of causation between the two events"); *Horne v. Reznick Fedder & Silverman*, 154 Fed. App'x 361, 364 (4th Cir. 2005) (holding district court did not err in granting summary judgment in defendant's favor on retaliation claim, as plaintiff's only evidence of causation was that she was fired two months after discrimination complaint, citing *King*); *see also Perry*

v. Kappos, 489 Fed. App'x 637, 643 (4th Cir. 2012) (holding three month lapse too long to establish causation, without more); *Pascual v. Lowe's Horne Ctrs., Inc.*, 193 Fed. App'x 229, 233 (4th Cir. 2006) (three to four month separation between termination and claimed protected activity too long to establish a causal connection by temporal proximity alone); *Wilson v. City of Gaithersburg*, 121 F. Supp. 3d 478, 485 (D. Md. 2015) (lapse of more than three months too long a period to establish a causal relationship on temporal proximity alone); *cf. Foster v. Univ. of Md.*, 787 F.3d 243, 247 (4th Cir. 2015) (complaints of discrimination one month prior to termination sufficient to create a jury question regarding causation prong of prima facie case); *Jenkins v. Gaylord Entertainment Co.*, 840 F. Supp. 2d 873, 881 (D. Md. 2012) (two-day span between opposition activity and suspension was "very close" and sufficient to state a cognizable causation claim).

Wilcox cites several cases from the Fourth Circuit in support of her position that the two-and-a-half month time lapse is sufficient to establish a causal link and state a prima facie case of retaliation. *See* Mot. to Reconsider, ECF No. 25, at 4-5. Two of these cases do not help the plaintiff. In *Penley v. McDowell County Board of Education*, 876 F.3d 646, 656 (4th Cir. 2017), the Fourth Circuit held "[s]tanding alone, knowledge [of protected speech] eight to nine months prior [to adverse action] is not 'very close'" and was too distant to raise an inference of causation. Another case cited by Wilcox, *Price v. Thompson*, is a failure-to-hire case. There, the Fourth Circuit held plaintiff had established a prima facie case of retaliation because a reasonable trier of fact could conclude that defendant knew plaintiff had engaged in protected

activity and declined to hire him at the first available opportunity. 380 F.3d 209, 213 (4th Cir. 2004). Neither of these cases is on point.

Wilcox relies primarily on *Williams v. Cerberonics*, 871 F.2d 452 (4th Cir. 1989) and *King v. Rumsfeld*, 328 F.3d 145 (4th Cir. 2003), both of which are factually distinguishable. In *Williams*, the court held that plaintiff had "satisfied the less onerous burden of making a prima facie case of causality," but ultimately determined the evidence did not support the inference that the probable "but for" motive behind Williams' discharge was retaliation. *Id*. at 457, 459. Williams filed a discrimination complaint on November 4. She was placed on probation on January 6, but her supervisor was not aware of the discrimination charge at the time he made that decision. *Id*. at 454. By the time she was terminated on February 22, her supervisors were aware of the discrimination charge. Although it is unclear when Williams' supervisors became aware of the discrimination complaint, the time span between the protected activity and the adverse action was somewhere around six weeks—less than the two and a half months at issue in the instant case.

The plaintiff in *King*, a teacher for the Department of Defense Dependent Schools, was fired two months and. two weeks after his superior was notified that King had filed an EEO complaint. The Fourth Circuit stated in a footnote that this length of time "is sufficiently long so as to weaken significantly the inference of causation between the two events." 328 F.3d at 151 n.5. Nevertheless, the court went on to hold that King had made out a prima facie case of retaliation. The court explained:

> Yet, in the context of this particular employment situation, this length of time does not undercut the inference of causation enough to render King's prima facie claim unsuccessful. Here, [King's superiors] committed to ongoing reviews of King's performance that set the end of the academic school year as the natural decision point, thus making likely that any discharge, lawful or unlawful, would come at that time.

Id. It is clear in *King* that the Fourth Circuit's determination that a two-and-a-half month time lapse gave rise to a sufficient inference of causation given the facts of that particular case, where the natural decision point was the end of the academic year. There is no comparable decision point in the instant case.

In short, the case law cited by Wilcox gives the court no reason to reconsider its prior ruling as to her retaliation claim. This case does not involve the kind of "very close" time span between protected activity and adverse action that gives rise to an inference of causation and establishes a prima facie case of retaliation. "In cases where 'temporal proximity between protected activity and allegedly retaliatory conduct is missing, courts may look to the intervening period for other evidence of retaliatory animus.'" *Lettieri v. Equant Inc.*, 478 F.3d 640, 650 (4th Cir. 2007). There is no such retaliatory animus alleged in the instant case. The only other allegation Wilcox advances in support of her retaliation claim is that co-workers Felts and Jones distanced themselves from her in December 2015. *See* Am. Compl., ECF No. 26-1, at 41. As neither Felts nor Jones was the decision maker here, this allegation is simply not probative of retaliatory animus.

IV.

For these reasons, the court will **DENY** Wilcox's motion for reconsideration of its prior dismissal of her retaliation claim. The court will **GRANT in part** Wilcox's motion to amend and direct the Clerk to file the proposed amended complaint on the docket. However, because Wilcox did not amend her claim for retaliation, Count I of the proposed amended complaint will be **DISMISSED** pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, consistent with the court's March 23, 2018 ruling.

An appropriate Order will be entered.

ENTERED: 04-25-2018
/s/ Michael F. Urbanski
Michael F. Urbanski
Chief United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Case No. 7:17-cv-000530

COLLETTE M. WILCOX,
PLAINTIFF

v.

NATHAN H. LYONS, ESQ.,
ET AL., DEFENDANTS

[Filed: April 25, 2018]

ORDER

For the reasons set forth in the accompanying Memorandum Opinion entered this date, plaintiff's motion for reconsideration (ECF No. 24) is **DENIED**, and her motion to amend (ECF No. 26) is **GRANTED in part** and **DENIED in part**. The Clerk is **DIRECTED** to file plaintiff's proposed amended complaint, ECF No. 26-1, on the docket. However, Count I of his amended complaint is hereby **DISMISSED** pursuant to Rule 12(b)(6) of the Federal

Rules of Civil Procedure, consistent with the court's March 23, 2018 ruling.

It is **SO ORDERED**.

ENTERED: 04-25-2018
/s/ Michael F. Urbanski
Michael F. Urbanski
Chief United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Case No. 7:17-cv-000530

COLLETTE M. WILCOX,
PLAINTIFF

v.

NATHAN H. LYONS, ESQ.,
ET AL., DEFENDANTS

[Filed: March 23, 2018]

ORDER

This matter is before the court on defendant Carroll County, Virginia's motion to dismiss (ECF No. 3) and defendants Nathan H. Lyons' and Phillip C. Steele's joint motion to dismiss (ECF No. 5) plaintiff Collette M. Wilcox's complaint (ECF No. 1). The court heard oral arguments by all parties at a hearing on March 22, 2018.

For the reasons stated on the record, the court **GRANTS** the County's motion to dismiss and

DISMISSES with prejudice all claims against the County.

In addition, the court **DENIES in part** and **GRANTS in part** Lyons' and Steele's motion to dismiss as follows. The court DENIES the motion with regard to Count V (battery). The court **GRANTS** the motion with regard to Count III (hostile work environment) and **DISMISSES it with prejudice**. The court **GRANTS** the motion with regard to Count I (sex discrimination), Count II (retaliation), and Count IV (deprivation of liberty interest) and **DISMISSES** these claims **without prejudice**.

The federal rules provide that leave to amend should be given freely "when justice so requires," Fed. R. Civ. P. 15(a)(2), and generally favor resolution of cases on their merits, *see Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980*); see also Foman v. Davis*, 371 U.S. 178, 182 (1962).

The court finds little prejudice to Lyons or Steele in granting Wilcox leave to amend Counts I, II, and IV of the complaint. The parties have taken no depositions and the trial is still seven months away. As such, the court gives Wilcox leave to file an amended complaint for Counts I, II, and IV, but with a caveat. It is accordingly **ORDERED** as follows:

1. Wilcox will file an amended complaint within 14 days.

2. If there is no factual support for the claims alleged in Counts I and II in the amended complaint such that they do not survive another Rule 12(b)(6) motion to dismiss or a motion for summary judgment, the court will entertain a Rule 11 motion for sanctions by

remaining defendants and consider awarding remaining defendants attorneys' fees and costs incurred in defending Counts I and IL

ENTERED: 03-22-2018
/s/ Michael F. Urbanski
Michael F. Urbanski
Chief United States District Judge