NO. _____

In The
Supreme Court of the United States

H. RENEE JAMES,

Petitioner,

v.

CITY OF MONTGOMERY, ALABAMA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

INTRODUCTION

Petitioner H. Renee James is a former police officer with the City of Montgomery, Alabama, who was a fourteen-year veteran at the time her employment was terminated. During her employment, James suffered what she alleged were multiple unfounded or unfair disciplinary actions based on her race (black) or her sex (female), which culminated in her termination from employment with the Police Department, allegedly under the City's progressive discipline policy, but which James asserted was pursuant to impermissible discrimination and retaliation due to her filing of the instant lawsuit.

The district court and the Eleventh Circuit both found that James had failed to meet her burden to survive summary judgment as to either her claim of discrimination or retaliation. In particular, the Eleventh Circuit found that an allegedly insubordinate email James sent to the Chief of Police (and others) shortly before her termination was a "major" employment violation; that James had two prior "major" employment violations; and that James's termination was therefore "the culmination of the Department's progressive-discipline policy." Consequently, the Eleventh Circuit found that James did not establish "but-for" causation in order to survive summary judgment.

The questions presented are:

1. Whether the court deprives a plaintiff of her First Amendment right to free speech and expression when, in applying the *McDonnell Douglas* framework in an employment case on summary judgment, the court finds that an employer may discipline an employee based on the employee's candid response to a request for "feedback" about the work environment, and then later rely on that discipline to terminate her employment.

2. Whether on summary judgment in a Title VII retaliation case, the court misapplies the "but-for" causation test when it allows an employer to avoid liability by citing to some *other* factor that allegedly contributed to the challenged employment decision, rather than recognizing that events often have multiple "but-for" causes that raise conflicting inferences about an employer's intent that require a jury to determine.

LIST OF PARTIES

H. Renee James is the Plaintiff/Petitioner.

The City of Montgomery, Alabama, is the Defendant/Respondent.

CORPORATE DISCLOSURE STATEMENT

H. Renee James is an individual.

The City of Montgomery, Alabama, is a municipal corporation incorporated under Alabama law.

LIST OF ALL PROCEEDINGS

United States District Court for the
Middle District of Alabama
Civil Action No. 2:17-cv-528-ALB
H. Renee James v. City of Montgomery
Date of Entry of Judgment: July 25, 2019.
The Court's decision is not officially published;
it is available at 2019 WL 3346530.

United States Court of Appeals for the
Eleventh Circuit
Docket No. 19-13-44
H. Renee James v. City of Montgomery
Date of Opinion: August 4, 2020
This opinion is published at *James v. City of Montgomery*, 823 F. App'x 728 (11th Cir. 2020).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner H. Renee James respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered on August 4, 2020.

OPINIONS AND ORDERS BELOW

The August 4, 2020, *per curiam* opinion of the Eleventh Circuit was designated "DO NOT PUBLISH." It is available at 823 F. App'x 728 (11th Cir. 2020). It is also reproduced at App. A, 1a-14a.

The Memorandum of the District Court for the Middle District of Alabama, entered July 25, 2019, is unpublished and is included at App. B, 15a-48a. It can also be found at 2019 WL 3346530.

JURISDICTION

The Eleventh Circuit issued its Panel Opinion on August 4, 2020. This petition is timely under Supreme Court Rule 13.1 and the Order of Thursday, March 19, 2020, providing that the deadline to file any petition for a writ of certiorari due on or after March 19, 2020, is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

RELEVANT CONSTITUTIONAL PROVISION

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law … abridging the freedom of speech, or of the press …"

RELEVANT STATUTORY PROVISIONS

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3(a) provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling

> apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

FACTUAL BACKGROUND[1]

A. General Overview of James's Employment History and EEOC Filings

H. Renee James is an African American female.[2] At the time of her discharge from employment, James was a fourteen-year veteran of the Montgomery Police Department.[3]

From June 2010 until June of 2015, James worked as a Robbery Detective in the Major Crimes Bureau.[4] James, while assigned to the Major Crimes

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[1] Because this case was decided on a motion for summary judgment, "reasonable inferences should be drawn in favor of the nonmoving party." *Tolan v. Cotton*, 572 U.S. 650, 656, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014).

[2] Doc. 85, at ¶ 39; Doc. 121-1, at ¶ 2.

[3] Doc. 85, at ¶ 40; Doc. 121-1, at ¶ 3.

[4] *See* Doc. 130, at 2. James was briefly transferred from the "Major Crimes" Bureau to the "General Crimes" Bureau from February 2015 until June 2015 but remained a detective.

Bureau, was the only African American and only female detective assigned to the Bureau.[5] Indeed, the Montgomery Police Department had not otherwise employed an African American female as a Homicide Detective since the early 1990s where a single African American woman was the first and only Homicide investigator within the department.[6] In June 2015, James was reassigned to the Patrol Division, where she remained until her employment was terminated in November 2017.

As discussed more fully below, James experienced her first disciplinary action that evidenced disparate treatment based on race or sex in 2013; she first complained of racially and sexually discriminatory acts on January 23, 2015, to Deputy Chief Cook; she made another such complaint in a letter to Chief Finley on March 13, 2015; and her initial EEOC charge was filed on May 8, 2015, with a second following on November 30, 2015.[7] James was terminated while this lawsuit was pending.[8]

B. James's Discipline History

1. 2013

James suffered multiple unfounded or unfair disciplinary actions throughout her employment with the City. The first of these concerned an incident that occurred on April 16, 2013, with the disciplinary charges ensuing on May 20, 2013.

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[5] Doc. 85, at ¶ 41; Doc. 121-1, at ¶ 3.
[6] Doc. 85, at ¶ 97; Doc. 121-1, at ¶ 4.
[7] *See* Doc. 130, at 13.
[8] *See id.*

On April 16, 2013, James's daughter, who was on a school bus, called to inform James that a boy hit her during a fight on the bus.[9] James (while admittedly off duty and outside her jurisdiction) stopped the school bus and detained the boy who had assaulted her daughter, which assault had left the daughter badly beaten with swelling and bruises on her face, a black eye, and a busted lip.[10] James notified her immediate supervisor at the time, Sergeant J. Hall ("Hall"), a white male, of the incident immediately after receiving the call from her daughter, and advised him immediately after the incident of all the details.[11] Hall, though, failed to notify the Criminal Investigations Division ("CID") Command; instead, he falsely told CID Major Bryan Jurkofsky, a white male, that James did not fully disclose the incident.[12]

During the ensuing disciplinary process, Jurkofsky charged James with violating three departmental policies regarding the said incident, to include: Wrongful Arrest, Improper Use of City Equipment (using the vehicle's emergency lights to stop the school bus), and Duties to Responsible Employment.[13] Although this was James's first offense, Jurkofsky recommended that James be suspended for 120 working hours and required to attended mandatory counseling for anger management, allegedly due to the "seriousness" of the

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[9] Doc. 85, at ¶ 43; Doc. 121-1, at ¶ 5.
[10] Doc. 85, at ¶ 43; Doc. 121-1, at ¶ 5.
[11] Doc. 85, at ¶ 44; Doc. 121-1, at ¶ 8.,
[12] Doc. 85, at ¶¶ 45-46; Doc. 121-1, at ¶¶ 10-11.
[13] Doc. 85, at ¶ 47; Doc. 121-1, at ¶ 12.

offense.[14] Jurkofsky also threatened James with being arrested and placed in jail over the incident.[15]

Yet, Jurkofsky also advised James on several occasions, during and after the conclusion of the investigation that he "would've done the same thing or worse" had it been his child aboard the school bus.[16]

James's ultimate punishment for this incident was a nineteen-day suspension without pay and an order to attend mandatory psychological counseling for "anger management."[17] This punishment was far harsher than that received shortly thereafter sometime in 2014 by Detective Christopher Hogan (a white male), who severely assaulted a black male and then lied during the internal affairs investigation. That detective received a three-day suspension (without mandatory counseling)[18] and was not threatened with termination of employment, nor was he threatened with being jailed for excessive use of force.[19]

2. 2015

On February 9, 2015, a citizen filed a complaint against James. The complaint involved James allegedly degrading an arrestee (who was the son of a

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[14] *See* Doc. 130, at 4.
[15] Doc. 85, at ¶¶ 48-49; Doc. 121-1, at ¶ 14.
[16] Doc. 85, at ¶ 48; Doc. 121-1, at ¶ 13.
[17] Doc. 85, at ¶¶ 50-56; Doc. 121-1, at ¶ 16.
[18] The suspension might have been four days, but, regardless, was de minimis and far less than that imposed on James for much less severe conduct.
[19] Doc. 85, at ¶¶ 50-56; Doc. 121-1, at ¶ 15.

man convicted of murdering a Montgomery police officer) and calling the father names like "loser" and "piece of shit."[20] James's supervisor (Sergeant Bruce Thornell, a white male), used the citizen complaint (which he encouraged or "coached" in any event) as an opportunity to commence retaliation against James.[21]

On February 18, 2015, Thornell and James met regarding the citizen complaint, as well as James being late to work. Admittedly, due to Thornell's continuing hostility toward James, during this meeting, James's frustration led to her employing a "less than amicable disposition and tone when expressing matters of concern with Sgt. Thornell."[22] James was relieved of her duties the next day, but was reinstated by the new Chief of Police, Ernest N. Finley, within the hour.[23] On prior occasions, similarly heated (or even more heated) discussions had occurred between Thornell and Corporal G. Schnupp, a white male, but unlike James, charges were never brought against Schnupp for insubordination, boisterous and disruptive activity in the workplace, and neither was he ordered to attend mandatory psychological counseling for anger.[24]

Following Finley's reinstatement of James, she began to receive letters of reprimand for miniscule things; that is, her performance was scrutinized and nitpicked, especially relative to white officers.[25] For

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[20] *See* Doc. 130, at 5.
[21] Doc. 85, at ¶¶ 69-74; Doc. 121-1, at ¶ 16.
[22] Doc. 85, at ¶ 74; Doc. 121-1, at ¶ 17.
[23] Doc. 85, at ¶ 76; Doc. 121-1, at ¶ 21.
[24] Doc. 85, at ¶ 82; Doc. 121-1, at ¶ 19.
[25] Doc. 85, at ¶ 77; Doc. 121-1, at ¶ 22.

example, when James called out sick for an illness of her children and made a decision to nurse them rather than incur a $100 copay, she was written up for not providing a sick excuse although white detectives that called out sick far more often were never asked to provide an excuse from a doctor's office and although prior to complaining of race/sex discrimination, Plaintiff had never been asked by CID supervisors to produce an excuse before returning to work from being out sick.[26]

As the investigation into the February 9, 2015 citizen complaint and Thornell's allegations about the February 18, 2015 meeting continued, the investigation was reassigned. The investigator to whom it was reassigned told James that Command "wanted the conclusion of the case to yield founded charges against" James and that the outcome was "influenced by members of the Staff, particularly Simmons and Jurkofsky."[27]

And that is exactly what happened. On June 4, 2015, James was served with a statement of disciplinary charges, both as to the February 9, 2015 citizen complaint and the February 18, 2015 meeting with Thornell. James's ultimate punishment, following a meeting with the Chief, review by the Director and Mayor, and an appeal by James, was a 29-day suspension.[28]

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[26] Doc. 85, at ¶ 77; Doc. 121-1, at ¶ 23.
[27] Doc. 85, at ¶¶ 79-81; Doc. 121-1, at ¶ 24.
[28] *See* Doc. 130, at 7-8.

3. *2017*

The 2017 incident that led to James's termination was a candid email James sent to a police captain who had solicited feedback on the unusually high turnover rate within the Police Department. She also sent the email to the Chief of Police, Chief of Operations John Bowman and Chief of Staff Chris Wingard on September 26, 2017.[29] Although James's email was in response to one that had solicited a response from employees,[30] again, James's candor on the poisonous atmosphere of discrimination at the Montgomery Police Department was unfairly characterized as "insubordination" and used as a pretext to terminate her employment, the end of a sustained effort to find any reason to get rid of James.

C. Other Relevant Employment Events

1. *2013*

During 2013, while assigned to the Major Crimes Bureau, James was shouted at and treated in a hostile manner almost daily by her supervisor, Thornell, a white male, whose comments to Plaintiff included stating that she [Plaintiff] is just like his wife, and that we [women] are all the same.[31]

2. *2015*

On January 23, 2015, James verbally complained of racially and sexually discriminatory

[29] Doc. 121-1, at ¶ 34.
[30] Doc. 85, at ¶ 115, Doc. 121-1, at ¶ 35.
[31] Doc. 85, at ¶ 61; Doc. 121-1, at ¶ 25.

acts against her to Deputy Chief Cook -- particularly Thornell's hostility toward her and her denial of requests to transfer from Robbery to Homicide.[32] (Note that this meeting with Cook, where James tried to get some relief, predates by approximately only two weeks the citizen complaint that was encouraged and coached by Thornell). During the meeting, Cook made inappropriate and unprovoked sexual comments and seductive gestures, which were ignored by James; despite this conduct, Cook also assured Plaintiff he would discretely address the issues with Jurkofsky and assured Plaintiff that he would rectify the complaints, which was fine with James as long as her concerns were handled.[33] But, after meeting with Cook and after not accepting his sexual advances, Thornell's treatment towards Plaintiff became increasingly worse.[34]

On February 5, 2015 (a scant four days before the citizen complaint), James contacted Cook, asking if he had contacted Jurkofsky yet about her complaints of race/sex discrimination and hostility from supervision, because since their meeting, her treatment by supervision had become increasingly worse. Cook advised that he had not contacted anyone regarding their conversation.[35]

On March 13, 2015, James provided a written complaint to Chief Finley about the racially and sexually discriminatory behavior and retaliation

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[32] Doc. 85, at ¶ 66; Doc. 121-1, at ¶ 30.
[33] Doc. 85, at ¶ 66; Doc. 121-1, at ¶ 31; *See* also Doc. 130, at 9-10.
[34] Doc. 85, at ¶ 67; Doc. 121-1, at ¶ 32.
[35] Doc. 85, at ¶ 68; Doc. 121-1, at ¶ 33.

directed at her.[36] Among other things, James specifically stated that CID Command finds a way to rectify complaints without involving Internal Affairs or written discipline when the involved officer is part of their "clique" or "one of their white counterparts," but not when the officer is black.[37] On March 17, 2015, an investigator was appointed to supposedly look into these matters.[38]

On May 8, 2015, James filed her initial EEOC charge; a second followed on November 30, 2015.[39] James was terminated while this lawsuit was pending.[40]

3. Refusal to Transfer

James was repeatedly passed over or not considered for a transfer to the Homicide Bureau (without explanation), but a General Crimes detective (white male Corporal Mason Wells), who had only been an investigator for six months as compared to James's years of experience, was selected for additional training so that he could be selected for a Homicide Bureau position.[41]

The stated reason for James's non-transfer was that, allegedly, a policy required that a letter of transfer had to be submitted through the CID chain of

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[36] *See* Doc. 130, at 12.
[37] *See id.*
[38] *See id.*
[39] *See id.* at 13.
[40] *See id.*
[41] Doc. 85, at ¶¶ 63-65; Doc. 121-1, at ¶ 26.

command.[42] However, this policy is generally only true for officers who are not already assigned to the CID in an investigative capacity (for example, officers in the Patrol Division who want to transfer). Officers already in the CID are shown courtesy by being allowed to inner-divisionally transfer without a letter of transfer.[43] Indeed, CID was not able to produce the allegedly required letters of transfer for the last four detectives who transferred (all of whom happened to be white males).[44]

PROCEEDINGS BELOW

James filed her action against the City on August 4, 2017. As amended, and as following the dismissal of some originally named parties and claims, the complaint asserted workplace discrimination and retaliation under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C.§§ 2000e-2, 2000e-3.

The City moved for summary judgment, generally asserting (1) that James's conduct was not statutorily protected[45] (2) that James could not show the requisite "causal connection" between her conduct and the adverse employment action,[46] and (3) that the City had a legitimate, non-retaliatory reason for the adverse employment action.[47] The City also appeared

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[42] Doc. 85, at ¶¶ 98-99; Doc. 121-1, at ¶ 27.
[43] Doc. 85, at ¶¶ 98-99; Doc. 121-1, at ¶ 28.
[44] Doc. 85, at ¶¶ 98-99; Doc. 121-1, at ¶ 29.
[45] *See* Doc. 115 at 10-15.
[46] *See id.* at 15-17.
[47] *See id*. at 17.

to argue that James had not identified any valid comparators.[48]

The district court agreed with the City. At the threshold, it generally concluded that James's sworn declaration, "for the most part," failed to create a factual record that defeated summary judgment.[49] The district court (incorrectly) condemned the declaration as "full of inconsistencies, speculation, ambiguities, and statements made without personal knowledge."[50]

The district court then applied the *McDonnell Douglas* framework to James's discrimination claim and found that she had not established a prima facie case as to any of the challenged employment actions, for various reasons.

As to James's 2013 suspension, the district court found that she had not identified a valid comparator because the alleged misconduct at issue was not sufficiently similar.[51] As to the March 4, 2015 warning, the district court similarly found that James had not demonstrated the existence of valid comparators with sufficient specificity.[52] As to the denial of James's transfer requests, the Court found that such denial was not an adverse employment action, because, according to the district court, James

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[48] *See id* at 17-19.
[49] *See* Doc. 130, at 14.
[50] *Id.*
[51] *See id.* at 20-24.
[52] *See id.* at 25.

failed to show that a reasonable person would have preferred the transfer.[53]

Last, but not least as to James's discrimination claim, the district court found that James had failed to present a "convincing mosaic" of circumstantial evidence to create a triable issue of fact.[54] In this regard, the district court generally found that James had not shown that the instances of discrimination she identified involved the decisionmakers as to the employment actions.[55]

Turning to James's retaliation claim, the district court again applied *McDonnell Douglas* as its framework in analyzing the claim. Here, though, the district court significantly found that James first engaged in protected activity on January 23, 2015, and March 13, 2015, when she submitted verbal and written complaints to her superior officers regarding race and sex discrimination and the more favorable discipline received by white officers.[56] And, of course, James's EEOC complaint of May 8, 2015, was indisputably protected activity.[57]

Nevertheless, the district court also rejected James's retaliation claim. In doing so, the district

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[53] *See id.* at 17-20.
[54] *See id.* at 25-28. *See Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1220 (11th Cir. 2019); *Flowers v. Troup Cty., Ga., Sch. Dist.*, 803 F.3d 1327, 1336 (11th Cir. 2015) (recognizing that establishing the elements of the *McDonnell-Douglas* framework "is not, and was never intended to be, the *sine que non* for a plaintiff to survive a summary judgment motion").
[55] *See* Doc. 130, at 26.
[56] *Id.* at 29-30.
[57] *Id.* at 30.

court found that, as to the 2015 employment actions, there was no showing that the decisionmakers knew about the protected activity.[58]

However, it was when it turned to the 2017 decision to terminate James's employment that the district court made its most significant error. The district court noted that, when James filed the instant lawsuit, and, at the time she sent the "insubordinate" September 27, 2017 email that led to her termination, "James was already at the last step before termination under the City's progressive discipline policy." The district court then concluded that the City "took steps to ensure that it disciplined James in the same manner as others who were disciplined for the same violation."[59] According to the district court, "[t]his suggests the opposite of a retaliatory motive."

The district court concluded: "Because James has failed to show that the Mayor acted with a retaliatory motive and that her termination was anything more than the culmination of her extensive, and often egregious, discipline history, James's retaliation claims fail."

On appeal, James argued that the district court erred by rejecting portions of her sworn declaration. As to the merits of her retaliation claim,[60] James

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[58] *See id.* at 31-35.

[59] *See id.* at 37.

[60] Although James addressed the various flaws with the district court's reasoning regarding her discrimination claim on appeal as well, this petition is primarily concerned with the misapplication of the "but-for" causation standard and the impact of the First Amendment on James's termination in 2017.

argued that a reasonable jury could infer that, although her 2015 suspension did not occur until well into 2015, the retaliatory conduct began a mere two weeks after James's first protected conduct in January 2015, commencing with Thornell encouraging and coaching a citizen complaint in order to manufacture a disciplinary action against James,[61] then "tacking on" a claim of insubordination against James. James also pointed out that Hudson had not denied that he was aware of James's protected conduct and requiring James to "prove" Hudson's knowledge ran afoul of the "convincing mosaic" rule and imposed an unwarranted summary-judgment burden on James.

Last, but not least, James argued that her disciplinary history was part and parcel of the pervasive race and gender discrimination that pervaded her employment, and, consequently, the district court could not have concluded that James's firing was, as a matter of law, merely the legitimate end of a supposedly legitimate progressive disciplinary policy. Strikingly, James was subjected to an internal affairs investigation that had a pre-determined outcome that was "influenced by members of the Staff."[62] And, perhaps most strikingly, James's final disciplinary (for an alleged lack of respect) stemmed out of her sending of a candid email in reply

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Consequently, James does not address in detail the flaws in the lower courts' analyses of the discrimination claims for the 2013 and 2015 adverse employment actions.

[61] Doc. 85, at ¶¶ 69-74; Doc. 121-1, at ¶ 16.

[62] *Id*, at ¶¶ 79-80.

to one that had solicited just such a response from the employees.[63]

The Panel found that the district court did not err in disregarding some of James's sworn declaration. As to the race and sex discrimination claims, the Panel found that they failed under both the *McDonnell Douglas* framework and the convincing-mosaic theory. And, just as the district court did, the circuit court found that James's termination was simply the culmination of the Department's progressive-discipline policy:

> She was already at the last step before termination when she sent an email to the Chief of Police (and others in higher management) asserting that the Department was run like a Middle Eastern dictatorship. An official investigation ensued. It was determined that this Category B major violation (insubordination) had been preceded by two previous Category B major violations, a circumstance which had resulted in termination in the past. Based on the recommendation of the investigation, the Mayor terminated James's employment.

REASONS FOR GRANTING THE WRIT

This case presents two important issues relating to employment-discrimination law. The first involves the collision of the well-settled *McDonnell*

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[63] Doc. 121-1, at ¶ 35.

Douglas burden shifting test at summary judgment with the fundamental and substantive First Amendment right to free speech and expression when the employer's proffered "legitimate nondiscriminatory reason" for the adverse employment action is an employee's disciplinary history, where that disciplinary history was based in part on alleged "insubordination" that consisted of a candid response to a request by the employer for "feedback" from its employees about the work environment. The court deprives a plaintiff of her First Amendment right to free speech and expression when, in applying the *McDonnell Douglas* framework in an employment case on summary judgment, the court finds that an employer may discipline an employee based on the employee's candid response to a request for "feedback" about the work environment, and then later rely on that discipline to terminate her employment

The second issue is whether on summary judgment in a Title VII retaliation case, the court misapplies the "but-for" causation test when it allows an employer to avoid liability by citing to some *other* factor that allegedly contributed to the challenged employment decision, rather than recognizing that events often have multiple "but-for" causes that raise conflicting inferences about an employer's intent that require a jury to determine. A court does misapply the "but-for" test when it fails to recognize that, so long as there was *one* impermissible "but-for" cause for the decision, liability may be triggered. These issues are discussed in turn below.

THE FIRST AMENDMENT

At the heart of this case lies one of the most important fundamental and substantive Constitutional rights: James's First Amendment right to free speech and expression. In the seminal case of *Pickering,*[64] this Court settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.[65] The task then becomes, as defined in *Pickering,* the seeking of "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[66] Although many of the cases dealing with this issue involve a public employees' public comments, the First Amendment protection still applies when a public employee arranges to communicate privately with his employer rather than to express his views publicly.[67]

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[64] *Pickering v. Board of Education,* 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

[65] *Connick v. Myers*, 461 U.S. 138, 142, 103 S. Ct. 1684, 1687, 75 L. Ed. 2d 708 (1983) (citing *Keyishian v. Board of Regents,* 385 U.S. 589, 605–606, 87 S. Ct. 675, 684–685, 17 L. Ed. 2d 629 (1967); *Pickering*, 391 U.S. 563; *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697, 33 L. Ed. 2d 570 (1972); *Branti v. Finkel*, 445 U.S. 507, 515-516, 100 S. Ct. 1287, 1293, 63 L. Ed. 2d 574 (1980)).

[66] *Pickering*, 391 U.S. at 568.

[67] *Connick*, 461 U.S. at 146 (citing *Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 99 S. Ct. 693, 58 L. Ed. 2d 619 (1979)).

Under *Pickering* and later cases in the same line, employee speech is largely unprotected if it is part of what the employee is paid to do,[68] or if it involved a matter of only private concern.[69] On the other hand, when a public employee speaks as a citizen on a matter of public concern, the employee's speech is protected unless "'the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees' outweighs 'the interests of the [employee], as a citizen, in commenting upon matters of public concern.'"[70] Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.[71]

For example, in *Connick*, this Court held that an assistant district attorney's complaints about the supervisors in her office were, for the most part, matters of only private concern.[72] Under the specific circumstances presented, this Court held that the limited First Amendment interest did not require the district attorney to tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships, and the assistant's discharge therefore did not offend the First Amendment.[73]

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[68] *See Garcetti v. Ceballos,* 547 U.S. 410, 421-22, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).
[69] *See Connick*, 461 U.S. at 146–149.
[70] *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2471–72, 201 L. Ed. 2d 924 (2018) (other internal citation and quotation omitted).
[71] *Connick*, 461 U.S. at 147–48.
[72] *Id.* at 148.
[73] *Id.* at 154.

James's case, though, compels the opposite result, and her discharge does offend the First Amendment. Notably, in *Connick*, the assistant district attorney took it upon herself to circulate a "questionnaire" around the office soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns.[74]

James's situation stands in sharp contrast. In 2015, her supervisor began to treat her with disrespect, scrutinized and nitpicked her performance, and handled alleged job performance issues much more harshly than those of fellow Caucasian employees. When James finally complained to upper command, the scrutiny and "nitpicking" by her supervisor quickly escalated into letters of reprimand for miniscule things that had never been pointed out to James before and which never were made the basis for discipline of white detectives. Then, James was subjected to an internal affairs investigation that had a pre-determined outcome that was "influenced by members of the Staff."

And then, in 2017, James made the fatal mistake of sending a candid email to a police captain who had solicited feedback on the unusually high turnover rate within the Police Department. She also sent the email to the Chief of Police, Chief of

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[74] *Id.* at 141.

Operations John Bowman and Chief of Staff Chris Wingard on September 26, 2017.[75] Although James's email was in response to one that had solicited a response from employees,[76] James's candor on the poisonous atmosphere of discrimination at the Montgomery Police Department was unfairly characterized as "insubordination" and used as a pretext to terminate her employment, the end of a sustained effort to find any reason to get rid of James.

Under these circumstances, James's speech not only addressed a matter of public concern but was *solicited* by her employer. Finding that her response was "insubordinate," and then using that "insubordination" to terminate her employment, offends the First Amendment. This result is illustrated by a hypothetical posed by this Court in *Janus*. This Court asked itself: what if, in *Connick*, the assistant district attorney had not made any critical comments about her supervisors, but had refused to go along with a demand that she circulate a memo *praising* the supervisors?[77] As this Court noted, "[w]hen a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different."[78] Analogously, this Court should find that the calculus is very different when an employer solicits an opinion on a matter of public concern (here, high police department turnover, which could certainly interfere with the Department's public safety mission as a whole) and

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[75] Doc. 121-1, at ¶ 34.
[76] Doc. 85, at ¶ 115, Doc. 121-1, at ¶ 35.
[77] *Janus*, 138 S. Ct. at 2473.
[78] *Id*.

then punishes an employee because it does not like the opinion expressed or the manner in which it was expressed, even though there was no indication that James's opinion interfered with her duties.

In turn, in considering summary judgment and applying the *McDonnell Douglas* framework to James's claims, the lower courts erred in granting summary judgment to the City on the basis that the "but-for" causation of James's termination was simply the allegedly legitimate culmination of an allegedly legitimate progressive disciplinary policy.[79] This is so because this conclusion relied on a finding that James's email was a "Category B major violation (insubordination)" that had been preceded by two previous "Category B" violations, and that employees had been terminated from the Police Department based on such circumstances in the past.[80] *But,* the implicit underlying conclusion that James could properly be disciplined for speech and expression that falls within the purview of the First Amendment cannot stand without offending that Amendment. The Constitution does not allow this result.

THE *MCDONNELL DOUGLAS* FRAMEWORK AND THE "BUT-FOR" CAUSATION TEST

Absent direct evidence, a claim for intentional discrimination is analyzed under the familiar burden-shifting framework established in *McDonnell-Douglas*

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[79] *See James v. City of Montgomery*, 823 F. App'x 728, 735 (11th Cir. 2020).
[80] *See id.*

Corp. v. Green.[81] Under the *McDonnell-Douglas* framework, a plaintiff must first establish a *prima facie* case of discrimination.[82] To establish a *prima facie* case, a plaintiff must show that (1) she was in a protected class, (2) she was qualified to perform the job, (3) she suffered an adverse employment action, and (4) other similarly-situated individuals outside of her protected class were treated more favorably.[83] If the plaintiff establishes a *prima facie* case, the burden then shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action.[84] Once the employer meets its burden of production, the burden shifts back to the plaintiff to show that the employer's proffered reason is pretext for unlawful discrimination.[85]

Title VII also protects an employee against retaliation by her employer for opposing any practice prohibited by Title VII; such a claim, when based on circumstantial evidence, is also analyzed under the *McDonnell Douglas* framework.[86] A *prima facie* case of retaliation under Title VII requires the plaintiff to show that: (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3)

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[81] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), *holding modified by Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993).
[82] *Id.* at 1336.
[83] *Lewis*, 918 F.3d at 1220–21.
[84] *Flowers*, 803 F.3d at 1336.
[85] *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1326 (11th Cir. 2011).
[86] *See Goldsmith v. City of Atmore*, 996 F.2d 1155, 1162–63 (11th Cir. 1993).

there was a causal relation between the two events.[87] Causation must be established according to traditional principles of "but-for" causation.[88]

It is notable, though, that "establishing the elements of the *McDonnell Douglas* framework is not, and never was intended to be, the sine qua non for a plaintiff to survive a summary judgment motion in an employment discrimination case."[89] A plaintiff will survive summary judgment if she presents "a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." "[S]o long as the circumstantial evidence raises a reasonable inference that the employer discriminated against the plaintiff, summary judgment is improper."[90]

In this case, both lower courts, and the Eleventh Circuit in particular, misapplied the "but-for" causation test when they allowed the City to avoid liability for its adverse employment actions against

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[87] *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1363 (11th Cir. 2007).

[88] *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1739, 207 L. Ed. 2d 218 (2020).

[89] *Smith*, 644 F.3d at 1328.

[90] *Id.* The district court and Eleventh Circuit both assumed, without deciding, that a retaliation claim could potentially survive summary judgment under a "convincing mosaic" theory but found that James's evidence did not meet that standard. Again, because this petition focuses on the misapplication of the "but-for" causation standard, James will confine her discussion to the requirements of a *prima facie* case rather than this theory, but respectfully does not concede that she lacked a "convincing mosaic" as to her claims; indeed, the evidence was in abundance regarding rife discrimination at the Montgomery Police Department.

James. A careful analysis of the decisions show that James was held to an incorrect, heightened burden of proof on the causation element.

As this Court has recently clarified, "but-for" can be "a sweeping standard."[91] This is so because, logically, events often have multiple "but-for" causes. In *Bostock*, this Court illustrated the principle by referring to a typical car accident: "So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision."[92] Importing this line of thinking into the realm of Title VII, this Court quite correctly held that:

> When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff 's [protected trait] was *one* but-for cause of that decision, that is enough to trigger the law.[93]

A close reading of the Panel's decision in particular shows that it interpreted the "but-for" causation standard far too narrowly and stringently

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[91] *Bostock*, 140 S. Ct. at 1739.

[92] *Id.* (citing *Burrage v. United States*, 571 U.S. 204, 211–212, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014)) (emphasis in original).

[93] *Id.* (citing *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013)) (emphasis supplied, other internal citation and quotation omitted).

against James. Significantly, the Panel faulted James for allegedly failing to produce evidence creating a genuine issue of material fact as to whether there was a causal connection between her statutorily protected activity and adverse employment actions. As to the first two disciplinary actions, the Panel held that James supposedly "did not produce evidence showing that the decisionmakers of the first two disciplinary actions knew of her protected activity."[94] The Panel continued:

> While it is undisputed that the final decisionmaker behind James's employment termination (the Mayor) knew of her protected activity (the filing of the instant lawsuit), James did not produce evidence that would allow a reasonable juror to conclude that her protected activity, which occurred almost four months before the termination, was the but-for cause of it. Her termination was the culmination of the Department's progressive-discipline policy."[95]

The lower courts' overreliance on the "temporal proximity" test overlooked James's other substantial evidence relating to causation and how it met the "bet for" test. As the Eleventh Circuit has held, and as *Bostock* confirms, the causal link requirement is meant to be construed broadly.[96] While a plaintiff *may*

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[94] *See James*, 823 F. App'x at 734–35.
[95] *See id.*
[96] *See Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001) (citation omitted).

establish causation "by showing close temporal proximity between the statutorily protected activity and the adverse employment action,"[97] causation may be shown by other evidence and circumstances as well. And, here, James was not relying on mere "temporal proximity," but on substantial other evidence of causation that readily met the "but-for" standard.[98]

First, the retaliatory acts commenced very shortly after James's January 23, 2015 meeting with Cook -- her first protected conduct. Indeed, the March 4, 2015 written warning about not having a medical excuse, given by Hudson, that the district court referenced in its summary-judgment order,[99] was not the first instance of retaliation. Rather, the record discloses that approximately only *two weeks* after the January meeting, Thornell encouraged and coached a citizen complaint in order to manufacture a disciplinary action against James,[100] then "tacked on" a claim of insubordination against James.

To be sure, under these circumstances, a reasonable jury could infer that the reason Thornell encouraged and coached the citizen complaint and brought insubordination charges in *February* was in

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[97] *Thomas*, 506 F.3d at 1364 (citation omitted).
[98] *See Boyland v. Corr. Corp. of Am.*, 390 F. App'x 973, 974–75 (11th Cir. 2010) ("In the absence of close temporal proximity between the protected activity and the employer's adverse action, a plaintiff may be able to establish causation where intervening retaliatory acts commenced shortly after the plaintiff engaged in a protected activity." (citation omitted)).
[99] *See* Doc. 130, at 31.
[100] Doc. 85, at ¶¶ 69-74; Doc. 121-1, at ¶ 16.

retaliation for James's protected activity.[101] Too, as to the different reprimand by Hudson, in the absence of any other reason why Hudson would treat James more harshly than white detectives, a reasonable jury could likewise infer retaliation from the *March* reprimand. Requiring James to somehow adduce further evidence to "prove" that Thornell and Hudson "knew" about the protected conduct incorrectly imposed a heightened burden on James to survive summary judgment.

The conclusion that there was no causal connection between James's protected conduct and her 2017 termination fares even worse under the correct analysis of the "but-for" standard. At the threshold, everyone has conceded that the Mayor knew about James's lawsuit when he made the decision to terminate her.[102] And, as stated more fully above, James's supposed disciplinary history, rather than forming an allegedly "legitimate" basis for her termination, was actually part and parcel of the pervasive race and gender discrimination that pervaded her employment.

In considering summary judgment, the court misapplies the "but-for" causation test when it allows an employer to avoid liability by citing to some *other*

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[101] *Cf. Johnson v. Miami-Dade Cty.*, 948 F.3d 1318, 1328–29 (11th Cir. 2020) (although not finding causation in that particular case, noting that, when a disciplinary action is based, at least in part, on a falsified report of insubordination, summary judgment may be precluded when the original falsified report was in retaliation for EEOC complaints and when "no other reason for such a falsified report was readily apparent").

[102] *See* Doc. 130, at 35.

factor that allegedly contributed to the challenged employment decision, rather than recognizing that events often have multiple "but-for" causes that raise conflicting inferences about an employer's intent that require a jury to determine. That is exactly what happened here -- James presented evidence of *one* "but-for" cause for the Department's employment actions (retaliation for protected activity) and the Department presented another (her alleged disciplinary history), and the lower courts accepted the City's alleged "but-for" cause. This invaded the sacred province of a jury to choose from competing inferences and incorrectly substitutes the courts' own inferences.[103]

A foundational principle of the jury system is that when parties disagree about a question of intent, "the jury is the lie detector."[104] It is uniquely the skill set of a jury to determine intent from circumstantial evidence. In fact, the very way we talk about "inferences" and "circumstantial evidence" highlights the jury's role. Inferences are conclusions that "common experience" permits us to draw from circumstantial evidence.[105] To evaluate circumstantial evidence, a factfinder must draw an

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[103] *See Tennant v. Peoria & P.U. Ry. Co.,* 321 U.S. 29, 35, 64 S. Ct. 409, 88 L. Ed. 520 (1944) ("Courts are not free to reweigh the evidence … merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.").

[104] *United States v. Scheffer,* 523 U.S. 303, 313 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) (internal quotation marks omitted).

[105] *See, e.g., Paulino v. Harrison,* 542 F.3d 692, 700 n.6 (9th Cir. 2008) (citing *Radomsky v. United States,* 180 F.2d 781, 783 (9th Cir. 1950)); *United States v. Scruggs,* 549 F.2d 1097, 1104 (6th Cir. 1977).

"inference based on human experience that a certain circumstance is usually present when another certain circumstance or set of circumstances is present."[106]

Preserving the power of the *jury* to draw inferences when the evidence conflicts is a well-settled principle in a court's evaluation of summary judgment, and it is explicitly not the role of the court "to weigh conflicting evidence or to make credibility determinations."[107] Nowhere should this be truer than in a legal test for whether a party's given reason is pretext.

In James's case, though, purportedly using *McDonnell Douglas,* federal judges, without a jury, laid out all the inferences urged by both parties and those judges weighed them and chose among them, an application of the *McDonnell Douglas* framework that was inconsistent with the summary judgment process, James's right to a jury, and a correct application of the "but-for" causation test.

At the end of the day, taking the record in the light most favorable to James, the lower courts could not have concluded that the firing was, as a matter of law, merely the legitimate end of a supposedly legitimate progressive disciplinary policy. Rather, the lower courts should have recognized that events often

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[106] *Radomsky*, 180 F.2d at 783.

[107] *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (explaining that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge").

have multiple "but-for" causes that raise conflicting inferences about an employer's intent that require a jury to determine. In turn, the lower courts should have denied summary judgment based on the inferences James raised regarding retaliatory intent.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

H. Renee James v. City of Montgomery, Alabama

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-13044
Non-Argument Calendar

D.C. Docket No. 2:17-cv-00528-ALB-WE

H. RENEE JAMES,

Plaintiff–Appellant,

versus

CITY OF MONTGOMERY,

Defendant–Appellee.

Appeal from the United States District Court
for the Middle District of Alabama

(August 4, 2020)

Before WILSON, LUCK, and ANDERSON, Circuit Judges.

PER CURIAM:

Hortensia James, a former officer with the Montgomery, Alabama, Police Department, brought the instant suit against the Department for workplace discrimination and retaliation. James, an African-American female, raised claims of race and sex discrimination and retaliation under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C.§§ 2000e-2, 2000e-3. The district court granted the City of Montgomery summary judgment on James's claims. James appeals from this determination—and argues that the district court improperly disregarded portions of her declaration. After carefully reviewing the record, we affirm.

I. BACKGROUND

A. *James's Allegations*

While we write only for the benefit of the parties, we nonetheless set out the facts insofar as they are relevant for understanding our opinion. Hortensia James, an African-American female, worked as a police officer in the Robbery bureau of the Department. While working for the Department, she was repeatedly disciplined for misconduct and was denied an opportunity to transfer to the Homicide Bureau. She alleges that the punishments she received, along with the denial of her transfer request, occurred because the Department was discriminating against her on the basis of her sex and race.

We summarize James's allegations as follows. In 2013, she received a 19-day suspension after stopping a school bus to detain a minor who had hit

her daughter, while a white male officer in the Department received only a 3-day suspension for using excessive force against a suspect and lying about it during the subsequent investigation. Her requests to be transferred to the Homicide Bureau from the Robbery Bureau were ignored, but a less qualified white male officer had received training so that he could be moved to the Homicide Bureau once his training was complaint. She complained to Deputy Chief Ron Cook about race and sex discrimination in January 2015. Shortly thereafter, Sergeant Bruce Thornell helped coach a citizen into filing a complaint against James, leading to James confronting Thornell. At some point, Sergeant Hudson, James's superior, issued a written reprimand against James for not providing a doctor's note for missing work, a requirement not enforced against white detectives who called out sick. The investigation of the citizen complaint and the confrontation with Sergeant Thornell resulted in James's suspension in 2015. A white male detective, Corporal Schnupp, had similar confrontations with Sergeant Thornell without being disciplined. Another white man, Detective Geier, received only a 3-day suspension after cursing his supervisor.

James was ultimately terminated from her position after sending an email to the Department's Chief of Police, Chief of Staff, and Chief of Operations that compared the Department to a small "Middle Eastern country" that was run like a "dictatorship." After the Department investigated the incident, James's superior recommended that she be terminated. Then-Mayor Todd Strange approved James's termination on November 21, 2017.

B. *The Instant Lawsuit*

Prior to her termination, James filed the instant lawsuit against the City on August 4, 2017. She amended her complaint following her termination in February 2018. In relevant part, James raised retaliation and race and sex discrimination claims against the City,[1] based on the aforementioned allegations. The City, in turn, moved for summary judgment. James offered her declaration as her sole evidentiary support for the allegations in her complaint and in opposition to the City's motion for summary judgment.

The district court granted the City's motion for summary judgment. As a preliminary matter, it found that James had failed to create a factual record on which it could evaluate her claims, and that her declaration was full of inconsistencies, speculation, ambiguities, and statements made without personal knowledge. Accordingly, the district court disregarded "any improper statements" in the declaration and considered the rest of it as needed. Ultimately, the district court determined that James had not made out a *prima facie* case for either discrimination or retaliation, and that James's discrimination claims similarly failed under a convincing-mosaic theory. James timely appealed.

II. DISCUSSION

We review *de novo* a district court's grant of summary judgment, "construing all facts and drawing all reasonable inferences in favor of the nonmoving party." *Jefferson v. Sewon Am., Inc.,* 891 F.3d 911,

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[1] James dismissed with prejudice her claims against all other parties. She also dismissed with prejudice her harassment claims against the City.

919 (11th Cir. 2018). Summary judgment is appropriate when the record evidence shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Moreover, a non-moving party cannot survive summary judgment by presenting "a mere scintilla of evidence" and must instead present evidence from which a reasonable jury could find in its favor. *Brooks v. Cty. Comm'n of Jefferson Cty., Ala.,* 446 F.3d 1160, 1162 (11th Cir. 2006) (quotation marks omitted).

The party moving for summary judgment bears the initial burden to identify any portions of the pleadings, depositions, answers to interrogatories, and affidavits demonstrating the absence of a genuine issue of material fact. *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1292 (11th Cir. 2012). The burden then shifts to the nonmoving party to rebut that showing by producing relevant and admissible evidence beyond the pleadings. *Id.* The nonmoving party cannot satisfy its burden with evidence that is "merely colorable, or is not significantly probative of a disputed fact." *Id.* (quotation marks omitted).

James's appeal focuses on the alleged impropriety of the district court's grant of summary judgment to the City on her discrimination and retaliation claims. We address each of these arguments in turn, but begin first with James's argument that the district court improperly disregarded parts of her declaration.

A. *James's Declaration*

A non-conclusory affidavit which complies with Federal Rule of Civil Procedure 56, even if self-serving and uncorroborated, can create a genuine dispute concerning an issue of material fact. *United States v.*

Stein, 881 F.3d 853, 858-59 (11th Cir. 2018). Affidavits submitted in support of a summary judgment motion must be based on personal knowledge, show that the affiant or declarant is competent to testify, and set out facts that would be admissible under the Federal Rules of Evidence. Fed. R. Civ. P. 56(c)(4). Conclusory allegations have no probative value unless supported by specific facts. *Leigh v. Warner Bros., Inc.,* 212 F.3d 1210, 1217 (11th Cir. 2000).

Here, the district court stated that it disregarded as conclusory her allegation about white detectives not requiring doctor's notes and that four white men had transferred into the Homicide Bureau without letters of transfer; it disregarded her allegation that a less qualified white man received additional training to join the Homicide Bureau as speculation not supported by the evidence. James argues that the district court improperly disregarded these statements because they were neither conclusory nor speculative.

We conclude that the district court did not err in disregarding these statements. Those statements were conclusory allegations that had no probative effect because they were not based on specific facts. *See Leigh*, 212 F.3d at 1217. She alleged that her 2015 written reprimand was retaliatory without identifying times she had previously called in sick without being reprimanded or the white officers who called in sick far more often or the circumstances under which they called in sick. Her allegations regarding the Homicide Bureau were seemingly contradictory, as she simultaneously alleged that she was provided no explanation for her transfer being denied and that she was told that her transfer was

denied because of a letter-of-transfer policy. James provided no specific facts regarding her denial of transfer, such as how many times she requested transfer, when she requested transfer, and who made the decision to deny her request. Her allegations that four white men had transferred to the Homicide Bureau without letters of transfer or that a lesser qualified white male detective was receiving additional training so he could join the Homicide Bureau were conclusory and not supported by any evidence, and indeed, were in tension with her testimony that no one transferred to the Homicide Bureau while she was working at the Robbery Bureau. On balance, we conclude that these statements were conclusory in nature and therefore had no probative value; the district court properly disregarded them.

B. *Race and Sex Discrimination Claims*

Title VII prohibits employers from discriminating against any individual with respect to her compensation, terms, conditions, or privileges of employment "because of" her race or sex. 42 U.S.C. § 2000e-2(a)(1). Section 1981 prohibits "intentional race discrimination in the making and enforcement of public and private contracts, including employment contracts." *Ferrill v. Parker Group, Inc.,* 168 F.3d 468, 472 (11th Cir. 1999); 42 U.S.C. § 1981. The elements of race discrimination claims under § 1981 and Title VII are the same and therefore need not be analyzed separately. *See Rice-Lamar v. City of Fort Lauderdale*, 232 F.3d 836, 843 n.11 (11th Cir. 2000).

Under the *McDonnell-Douglas*[2] burden-shifting framework, an employee may establish a *prima facie* case of discrimination by showing that (1) she is a member of a protected class; (2) she is qualified for the position; (3) she was subject to an adverse employment action; and (4) the employer treated a similarly situated employee outside of the protected class more favorably. *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1325 (11th Cir. 2011). When an employee alleges that she was denied a different job in the same organization, she must establish that a reasonable person would prefer being transferred to the new position for that denial to amount to an adverse employment action. *Jefferson*, 891 F.3d at 921. She may do so through evidence of improved wages, benefits, or rank, as well as other serious and material changes in the terms, conditions, and privileges of employment, such as the prestige of the position. *Id.*

To the extent a plaintiff seeks to show disparate treatment of comparators of a different race or sex, those individuals must be similarly situated. *See Silvera v. Orange Cty. School Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001). For comparators to be similarly situated, they do not have to be "nearly identical," but rather, "similarly situated in all material respects." *Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1218 (11th Cir. 2019) (en banc). The meaningful comparator analysis must be conducted at the *prima facia* stage of *McDonnell-Douglas's* burden-shifting framework and should not be moved to the pretext stage. *Id.* Ordinarily, a similarly situated comparator

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[2] *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973).

will have engaged in the same basic misconduct as the plaintiff, been under the same supervisor, and share the plaintiff's disciplinary history. *See id.* at 1228.

Notwithstanding a plaintiff's failure to establish a *prima facie* case of discrimination under *McDonnell-Douglas*, she will always survive summary judgment if she presents a convincing mosaic of circumstantial evidence that creates a triable issue about the employer's discriminatory intent. *Smith*, 644 F.3d at 1328. A plaintiff may establish a "convincing mosaic" "by evidence that demonstrates, among other things, (1) suspicious timing, ambiguous statements . . . , and other bits and pieces from which an inference of discriminatory intent might be drawn, (2) systematically better treatment of similarly situated employees, and (3) that the employer's justification is pretextual." *Lewis v. City of Union City, Ga.*, 934 F.3d 1169, 1185 (11th Cir. 2019) (*Lewis II*) (quotation marks omitted).

James argues that she was subjected to race and sex-based discrimination for (1) the denial of her transfer to the Homicide Bureau; and (2) the two instances of discipline for alleged misconduct. With respect to the first allegation, James's specific argument is that the reason given by the City for denying her transfer—that she was required to have a letter of transfer—was pretextual because that policy did not apply to four white, male officers who transferred. James's argument is much the same with respect to the second allegation. Here, she argues that Detective Hogan and Corporal Schnupp received lesser discipline for similar actions, and that the difference can be explained because of discrimination on the City's part.

We conclude that the district court correctly granted summary judgment for the City as to James's discrimination claims—both because James has failed to make out a *prima facie* case for discrimination and because her claims fail under a convincing-mosaic theory. James has conceded that her discrimination claims were predicated on three events—a denial of internal transfer and two disciplinary actions. Beginning with the *prima facie* case, James's allegations of discriminatory conduct are insufficient. With respect to her allegation regarding the denied transfer, the district court concluded that James failed to demonstrate that the transfer to the Homicide Bureau was an adverse employment action, but that even if it was, James had failed to identify a valid comparator. Instead, the allegation that she made—that other detectives transferred into the Bureau without meeting the ostensible requirement of a letter of transfer—was conclusory and made without direct personal knowledge. We cannot conclude that James's vague allegations of other, successful transfers is sufficient to create a valid comparator. Moreover, James's argument regarding pretext—that because other detectives transferred without the letter, her denial was pretextual—necessarily depends upon the existence of a valid comparator.

James's second set of allegations fails for much the same reason. She failed to produce evidence showing that the allegation comparators, Hogan and Schnupp, were similarly situated to her in all material respects. With respect to her 2013 suspension, the incidents that Hogan and James were disciplined for—Hogan for using excessive force on a subject and James for stopping a school bus while off-duty (and

out of her jurisdiction) to arrest a student for fighting with her daughter—were not materially similar. Moreover, she did not produce evidence showing that she and Hogan had a similar history or were disciplined by the same supervisor at the time that they were punished. *See Lewis*, 918 F.3d at 1228. As to her 2015 written reprimand issued by Sergeant Hudson, James identified no individual as a comparator and instead relied on her conclusory allegation that white detectives were not required to provide doctor's notes when they called out sick. Her argument that Schnupp was a valid comparator for how Thornell treated her does not relate to any of the three instances of alleged discrimination. In any event, James did not produce evidence showing that she and Schnupp shared the same disciplinary history or were being disciplined for the same conduct when Sergeant Thornell interacted with them. *See id.* Accordingly, James failed to establish a prima facie case of race or sex discrimination under the *McDonnell-Douglas* framework.

We also conclude that James also failed to produce a convincing mosaic of circumstantial evidence that created a triable issue about the City's discriminatory intent. James's declaration—the only evidence on which she relied in opposing summary judgment—did not allow for a reasonable inference of the City's discriminatory intent when considered with the rest of the undisputed facts. Accordingly, we affirm the district court's grant of summary judgment for the City on James's discrimination claims and now address her retaliation claims.

C. *Retaliation Claims*

Title VII protects an employee against retaliation by their employer because the employee

has (a) opposed any practice prohibited by Title VII or (b) participated in any manner in any investigation, proceeding, or hearing under Title VII. *See* 42 U.S.C. § 2000e-3(a); *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000). While 42 U.S.C. § 1981 does not expressly protect individuals from retaliation, it has been interpreted as doing so. *See CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 451-52 (2008); *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1412-13 (11th Cir. 1998). The elements of retaliation claims under § 1981 and Title VII claims are the same and therefore need not be analyzed separately. *See Butler v. Ala. Dep't of Transp.*, 536 F.3d 1209, 1212-13 (11th Cir. 2008).

A retaliation claim based on circumstantial evidence is analyzed under the *McDonnell-Douglas* burden-shifting framework. *See Goldsmith v. City of Atmore*, 996 F.2d 1155, 1162-63 (11th Cir. 1993). A *prima facie* case of retaliation under Title VII requires the plaintiff to show that: (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there was a causal relation between the two events. *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1363 (11th Cir. 2007).

A causal link between protected expression and the materially adverse action arises where the defendant was aware of the protected activity and took materially adverse action as a result. *Shannon v. BellSouth Telecomm., Inc.*, 292 F.3d 712, 716 (11th Cir. 2007). To establish causation, a plaintiff needs to show that the decisionmaker actually knew about her protected expression. *Martin v. Fin. Asset Mgmt. Sys., Inc.*, 959 F.3d 1048 (11th Cir. 2020). Under a "cat's paw" theory of liability, the discriminatory animus of a non-decisionmaker can be imputed to a neutral

decisionmaker that acted as a mere conduit. *Crawford v. Carroll*, 529 F.3d 961, 979 n.21 (11th Cir. 2008).

Causation must be established according to traditional principles of but-for causation, which requires "proof that the desire to retaliate was the but-for cause of the challenged . . . action." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 339 (2013). Accordingly, a plaintiff is required to present at summary judgment enough evidence from which a reasonable juror could find her protected activity was a but-for cause of the adverse employment action. *See Knox v. Roper Pump Co.*, 957 F.3d 1237, 1245 (11th Cir. 2020). Causation may be inferred by close temporal proximity between the protected activity and the adverse employment action. *Thomas*, 506 F.3d at 1364. A three- to four-month period between the protected activity and adverse employment action is not sufficient. *Id.*

Here, we conclude that the district court correctly granted summary judgment for the City on James's retaliation claims—predicted on three disciplinary actions, including her employment termination—because she did not produce evidence creating a genuine issue of material fact as to whether there was a causal connection between her statutorily protected activity and adverse employment actions. James did not produce evidence showing that the decisionmakers of the first two disciplinary actions knew of her protected activity. While it is undisputed that the final decisionmaker behind James's employment termination (the Mayor) knew of her protected activity (the filing of the instant lawsuit), James did not produce evidence that would allow a reasonable juror to conclude that her protected

activity, which occurred almost four months before the termination, was the but-for cause of it. Her termination was the culmination of the Department's progressive-discipline policy. She was already at the last step before termination when she sent an email to the Chief of Police (and others in higher management) asserting that the Department was run like a Middle Eastern dictatorship. An official investigation ensued. It was determined that this Category B major violation (insubordination) had been preceded by two previous Category B major violations, a circumstance which had resulted in termination in the past. Based on the recommendation of the investigation, the Mayor terminated James's employment.

Assuming, *arguendo*, but not deciding, that retaliation claims can survive summary judgment under a convincing-mosaic theory, her declaration—the only evidence on which she relied—did not create a convincing mosaic of circumstantial evidence that created a triable issue about the City's retaliatory intent. Accordingly, we affirm the district court's grant of summary judgment for the City on James's retaliation claims.

III. CONCLUSION

For the foregoing reasons, we conclude that the district court properly granted the City of Montgomery summary judgment on James's discrimination and retaliation claims. The district court's order is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

H. RENEE JAMES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO.**
	)	**2:17-cv-528-ALB**
	)	
CITY OF MONTGOMERY,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION AND ORDER

Plaintiff H. Renee James brought this employment discrimination action against her former employer, the City of Montgomery (the "City"),[108] alleging (1) race and sex discrimination under Title VII of the Civil Rights Act, as amended, 42 U.S.C. §§

[108] James originally filed this action against the City, the City of Montgomery Police Department (the "Police Department"), the City of Montgomery Personnel Department, the City of Montgomery City Investigations ("City Investigations"), and several individually-named defendants. *See* Doc. 1. On September 21, 2017, the City, the Police Department, and City Investigations moved to dismiss the action for failure to state a claim (Doc. 23), which was granted as to only the Police Department and City Investigations. (Doc. 65). All other defendants, except the City, have since been dismissed with prejudice pursuant to the parties' Joint Stipulation of Dismissal. (Docs. 116 and 117).

2000e *et seq*. ("Title VII"), and 42 U.S.C. § 1983 ("§ 1983"); (2) race discrimination under 42 U.S.C. § 1981 ("§ 1981"); and (3) retaliation under Title VII and § 1981.[109] (Doc. 85). This matter comes before the Court on the City's Motion for Summary Judgment. (Doc. 114.) For the reasons stated below, the motion is due to be granted.**BACKGROUND**

James, an African American female, was employed by the City as a police officer for fourteen years. From June 2010 until June 2015, James worked as a detective in the Criminal Investigations Division ("CID"). Specifically, from June 2010 until approximately February 2015, James was a Robbery detective in the Major Crimes Bureau and was the only African American female assigned to that bureau. From approximately February 2015 until June 2015, James was a detective in the General Crimes Bureau.[3] And in June 2015, James was reassigned to the Patrol Division as a Corporal and eventually promoted to Sergeant.[4] While employed by the City, James was subject to multiple disciplinary actions, which, under the City's progressive discipline policy, ultimately led to her termination in November 2017.

I. James's Relevant Discipline History

A. 2013 Suspension

On April 16, 2013, when James was on her way to work, she received a call from her daughter, who

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[109] James's Amended Complaint also asserts claims against the City for retaliation under § 1983 and a hostile work environment under Title VII, § 1981, and § 1983. (Doc. 85). Pursuant to the parties' Joint Stipulation of Dismissal (Doc. 116), those claims have been dismissed with prejudice. (Doc. 117).

was on a school bus. James's daughter informed James that a boy hit her during a fight on the bus. After receiving her daughter's call, James activated her emergency equipment on her patrol vehicle, pulled her vehicle in front of the bus to stop it on its route, entered the bus and removed the boy, and detained him in the back of her vehicle until a county deputy arrived at the scene.[5] This incident occurred while James was off duty and outside of the police jurisdiction of the City of Montgomery. According to James, immediately after the incident, she fully disclosed the details to her supervisor, Sergeant Hall (white male),[6] but Sgt. Hall failed to notify CID Command[7] of the incident and told the Commander of the CID, Major Bryan Jurkofsky (white male), that James did not fully disclose the incident.

James's conduct related to this incident violated multiple policies established by the City and the Police Department. As a result, James was charged with violating the following policies: (1) Article II, Section 2.102 Duties of Responsible Employment (Engaging in any activity which may reflect negatively on the integrity, competency, or ability of the individual to perform his/her duty, or may reflect negatively on the Department); (2) Article II, Section 2.111 Duty in Off Duty Arrest; and (3)

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[6] The race and gender of each individual involved in the incidents related to this lawsuit are not clear from the record. Thus, the Court only indicates the race and gender of an individual where it is clearly identified in the record.

[7] Given the context in which it is used, the Court assumes that CID Command is made up of more than one person (and is not the same as the Commander of CID), though it is unclear from the record.

Article II, Section 2.102 Duties of Responsible Employment (Prompt and accurate reporting of all official matters).

Under the City's progressive discipline policy, James's offense was considered a Category B-Major Violation. A Category B violation can begin at any of the five discipline steps. Though this was James's first Category B offense, due to the seriousness of the offense, the recommended disciplinary action began at Step 3 under the policy, which has a punishment range of a five (5) to fifteen (15) day suspension. Major Jurkofsky recommended to Chief of Police Kevin Murphy that James be suspended for 120 working hours and required to attend mandatory counseling for anger management. Chief Murphy upheld Major Jurkofsky's recommendation and made the same recommendation to Director of Public Safety Christopher Murphy ("Director Murphy"). James waived her right to a hearing before the Mayor, and on June 12, 2013, the Mayor issued his decision to suspend James for 120 working hours. James was suspended from July 10 until July 30, 2013.

Sometime later in 2014, James observed an African American male, who had been arrested and appeared to have been beaten, being brought into the CID. According to James, in relation to this incident, Detective Christopher Hogan (white male) was suspended for violating the Use of Excessive Force policy in some way.[8]

B. 2015 Suspension

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[8] James's statements throughout the record, including her Declaration, alternate between whether the suspension was a three- or four-day suspension. However, this distinction is immaterial to the Court's analysis.

On February 8, 2015, 15-year-old Marquise Woodward was arrested by another officer and encountered James during the booking process. Woodward's father was convicted in 2008 of murdering a Montgomery police officer. When Woodward claimed that the police framed his father, James told Woodward that his father had killed a cop and that he was a loser. The next day, Woodward's mother contacted Sergeant Bruce Thornell (white male), James's supervisor at the time, to file a complaint against James regarding the incident.[9]

On February 19, 2015, Sgt. Thornell met with James to discuss the February 8, 2015 incident and to discuss James being tardy that day without notifying him. But in the meeting, James, who had previously been counseled for disrespectful behavior toward her supervisors, became hostile and disrespectful. Sgt. Thornell contacted another sergeant, Sergeant T.D. James (black male), to come to his office to serve as a witness. After the incident, Lieutenant C.J. Coughlin obtained statements from James, Sgt. Thornell, and Sgt. James. According to Sgt. James's statement, Sgt. James informed Sgt. Thornell after the incident that James's behavior was inappropriate and needed to be addressed. In addition, Sgt. James stated that James exhibited a lack of respect for Sgt. Thornell during the entire conversation and that, during his time with the

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[9] According to the City's records, Woodward's mother reported to Sgt. Thornell that James called Woodward's father a "piece of shit" and "continually degraded [Woodward] because of who his father was." She also claimed James "threatened bodily harm to him." The arresting officer, Officer Lowe, also reported to Sgt. Thornell that James "stated to Woodward 'that piece of shit is your father.'"

department, he had never witnessed that type of interaction between a supervisor and subordinate. In James's statement, she admitted that she lacked tact and diplomacy and used a "less than amicable disposition and tone when expressing matters of concern with Sgt. Thornell." She also described her discuss with Sgt. Thornell as "extremely argumentative" and stated that Woodward's father was "in fact the 'loser' [she] categorized him as." James was briefly relieved of her duties,[10] but she was reinstated by Chief of Police Ernest N. Finley within the hour on the same day.

Based on these two incidents, James was ultimately charged with several violations of departmental and city handbook policies, including: (1) Article I, Section 1.401 Human Relations, (2) Article II, Section 2.102 Duties of Responsible Employment (Respect to the Public), (3) Insubordination or lack of cooperation, (4) Abuse of authority over employees or citizens, (5) Acting in conflict with the interests of the City, and (6) Boisterous or disruptive activity. Due to the nature of James's offenses, they were again classified as Category B violations, which moved her to Step 4 under the City's progressive discipline policy. The punishment range for a Category B, Step 4, violation is 16 to 29 days. For each incident—the February 8 incident and the February 9 incident—Major William Simmons, the Commander of the CID at the time,

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[10] Based on the record, particularly James's own statements, it is unclear by whom James was relieved of her duties. At times, James claims that Major Jurkofsky relieved her of her duties, and at other times, she claims that Lt. Coughlin relieved her of her duties.

recommended a 232-hour, or 29-working day, suspension to Chief Finley.

On June 4, 2015, James was served with a statement of disciplinary charges for these incidents, and on June 24, 2015, Chief Finley met with James. On July 7, 2015, Finley overturned the recommendation and reduced the recommended suspension from 464 cumulative hours to 232 cumulative hours, also noting that effective June 5, 2015, James had been transferred to the Patrol Division. Chief Finley forwarded the recommendation to Director Murphy. After James's hearing before the Mayor, the Mayor issued a decision to suspend James for 232 hours, or 29 working days.[11] Prior to James serving her suspension, Chief Finley was advised that, based on practice, James's suspension should have been 29 calendar days, not working days. Thus, James's suspension was ultimately reduced to 29 calendar days, which she served from November 23, 2015, until December 21, 2015.

According to James, James's February 19, 2015 discussion with Sgt. Thornell was not the first hostile discussion between them. James claims that Sgt. Thornell shouted at and treated her in a hostile manner almost daily in 2013, and that during this time period, Sgt. Thornell told her that she was "just like his wife" and that women "are all the same." James did not report any of these incidents to her superiors until 2015. James also claims that Sgt. Thornell was difficult to work with for everyone and that he treated other subordinates in a hostile manner, including Corporal G. Schnupp (white male), who she claims had similarly heated or more heated conversations with Sgt. Thornell but was never

charged with insubordination or boisterous and disruptive activity.

C. 2017 Termination

On September 10, 2017, James sent an email to Captain Albert Wheeler, which was solicited, regarding her opinion related to retention issues in the Police Department. On September 26, 2017, James sent a different, unsolicited email to Chief Finley, Chief of Operations John Bowman, and Chief of Staff Chris Wingard regarding her opinion related to retention issues "just in case Wheeler didn't forward [her] message through to any of [them]." After receiving James's email and contacting Mickey McInnish, Senior Staff Attorney in the City's Legal Department, Chief Bowman requested that Major Shannon Youngblood, Commander of Sector B at the time, review the email and recommend disciplinary action based on the content of the email. For instance, the email stated, in part: "This department is being run like a dictatorship in a small Middle Eastern country."

Mayor Youngblood determined that James's email violated Article II, Section 2.102 Duties of Responsible Employment (Respect to Superior Officers). Aware of James's pending lawsuit alleging disparate treatment, Major Youngblood contacted the Legal Department to determine how to proceed with disciplinary action. Major Youngblood was advised that, in her complaint, James referenced a white detective, Detective Geier, who was allegedly charged with violating the same policy when he was disrespectful to his African-American female supervisor, so Major Youngblood pulled Det. Geier's disciplinary action and confirmed that the detective had been charged with the same violation—Respect to

Superior Officers. In that case, the violation was treated as a Category B violation. Given the parallel nature of the offenses, Major Youngblood determined that James's offense was a Category B violation.

This was James's third Category B violation, and based on her previous disciplinary actions, this placed her at Category B, Step 5, under the progressive discipline policy, which is termination. Following the progressive discipline policy, on October 16, 2017, Major Youngblood recommended to Chief Finley that James be terminated. After reviewing the evidence and meeting with James per her request under the progressive discipline policy, Chief Finley upheld Major Youngblood's recommendation and likewise recommended to Director Murphy that James be terminated. The Mayor issued his decision to terminate James on November 21, 2017, and James was terminated on November 28, 2017.

II. James's Complaints of Race and Sex Discrimination

On January 23, 2015, James met with Deputy Chief Ron Cook and verbally complained about alleged hostility—specifically from Sgt. Thornell—and incidents that she felt were clear race and sex discrimination "handed down by the CID Command," including being denied a transfer from Robbery to Homicide. At two times during this meeting, James claims that Deputy Chief Cook made inappropriate sexual comments regarding her clothing while seductively licking and biting his lips. When asked by Deputy Chief Cook whether she wanted him to have CID Command investigated or whether she wanted him to handle it discreetly by speaking with Major Jurkofsky, James told him she did not mind if he spoke with Major Jurkofsky—she just wanted it to be

handled. On February 5, 2015, James contacted Chief Deputy Cook to see if he had spoken with Major Jurkofsky because she claimed Sgt. Thornell's treatment toward her had worsened. Deputy Chief Cook advised her that he had not contacted anyone regarding their conversation.

According to James, after she made complaints of race and sex discrimination, she received letters of reprimand for "minuscule things" and her performance was "nitpicked." Specifically, on March 4, 2015, Sergeant Hudson, who was James's supervisor in the General Crimes Bureau, asked James to provide a doctor's excuse because she called in sick with less than 40 hours of accumulated sick time available. Because James failed to provide a written excuse, she received a Written Warning. This was the first time James had been asked by CID supervisors to provide a doctor's excuse after being out sick.

In addition, James claims that at some point she was "repeatedly" passed over or not considered for a transfer to the Homicide unit.[12] According to James, the Homicide unit asserted that James's transfers were denied because a letter of transfer must be submitted through the CID Chain of Command to be considered. But James claims that the policy regarding transfer letters is generally only true for officers who are assigned to other bureaus, such as the Patrol Division, not for officers who are assigned to the CID as an investigator or in an investigative capacity. She claims the latter are shown courtesy by being allowed to inter-divisionally transfer without a letter of transfer.

On March 13, 2015, James provided a written complaint—a 23-page letter— to Chief Finley

outlining what she believed to be racially and sexually discriminatory behavior as well as retaliation. One of her complaints was that CID Command finds a way to rectify complaints without involving Internal Affairs or written discipline when the officer is part of their "clique" or "one of their white counterparts" but not when the officer is black.

On March 17, 2015, Rudy Martinez was appointed, with the assistance of another investigator, to conduct an investigation regarding James's allegations that the CID discriminated against individuals with respect to how they were disciplined, promoted, and moved within the department. Martinez was selected by the Director of City Investigations because he did not know any of the participants and did not answer to anyone involved in the incident. His investigation included interviews of co-workers and supervisors in James's department, a review of documents and case files related to other complaints made by James to City Investigations, a review of case files of investigations James conducted in her capacity as a detective, and an examination of the race and sex of individuals recently promoted and in current positions within the Police Department. Neither the Director of City Investigations nor the Police Department Command Staff ordered or directed the outcome of Martinez's investigation.

James filed her initial EEOC Charge on May 8, 2015, alleging race and sex discrimination and retaliation based on her complaints of discrimination. James filed her second EEOC Charge on November 30, 2015, again alleging race and sex discrimination and retaliation. The EEOC issued James's Notice or Right to Sue letter on May 8, 2017, and James filed this action on August 4, 2017.

STANDARD OF REVIEW

Summary judgment is appropriate when 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." Fed. R. Civ. P. 56(a). The moving party "has the burden of either negating an essential element of the nonmoving party's case or showing that there is no evidence to prove a fact necessary to the nonmoving party's case." *McGee v. Sentinel Offender Servs., LLC*, 719 F.3d 1236, 1242 (11th Cir. 2013).

If the moving party meets its burden, the nonmoving party must then "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotations omitted). A genuine dispute of material fact exists when the nonmoving party produces evidence allowing a reasonable fact finder to return a verdict in its favor. *Waddell v. Valley Forge Dental Assocs.*, 276 F.3d 1275, 1279 (11th Cir. 2001). But "unsubstantiated assertions alone are not enough to withstand a motion for summary judgment." *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir. 1996). The Court views the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmoving party. *Jean-Baptiste v. Gutierrez*, 627 F.3d 816, 820 (11th Cir. 2010).

DISCUSSION

I. Preliminary Matters

For the most part, James has failed to create a factual record on which the Court can evaluate the claims in her Complaint. The only evidence she

submitted in opposition to summary judgment is her own declaration (Doc. 122-1), which generally reasserts her Complaint's allegations. But that declaration is full of inconsistencies, speculation, ambiguities, and statements made without personal knowledge. *See Larken v. Perkins*, 22 F. App'x 114, 115 (4th Cir. 2001) (noting that plaintiff's "self-serving affidavit containing conclusory assertions and unsubstantiated speculation" was properly found by the district court "to be insufficient to stave off summary judgment").

In its reply brief, the City raises a "general objection" to several specific statements in James's Declaration (Doc. 122-1), arguing that such statements are based on inadmissible hearsay and are not based on James's personal knowledge. *See* Fed. R. Civ. P. 56(c)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."); Fed. R. Civ. P. 56(c)(4) (stating that a declaration filed in support of or in opposition to a motion for summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the . . . declarant is competent to testify on the matters stated"). The Court will disregard any improper statements in the declaration and consider the remainder of the declaration, which will be addressed as necessary herein. *See Dortch v. City of Montgomery*, Nos. 2:07-cv-1034 and 2:07-cv-1035, 2010 WL 334740, at *1 (M.D. Ala. Jan. 22, 2010) (noting that courts may strike or disregard improper statements in affidavit but consider the rest of the affidavit).

II. Discrimination Claims

James asserts race and sex discrimination claims against the City under Title VII, § 1983, and § 1981 (race only). Because these claims have the same requirements of proof and are analyzed under the same framework, the Court addresses James's intentional discrimination claims with the understanding that its analysis applies equally to each claim. *Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1220-21 (11th Cir. 2019); *Flowers v. Troup Cnty., Ga., Sch. Dist.*, 803 F.3d 1327, 1335 (11th Cir. 2015) ("Though [plaintiff] brought claims under the Fourteenth Amendment's Equal Protection Clause and 42 U.S.C. §§ 1981 and 1983 as well, their fates rise and fall with his Title VII claims.").

A. McDonnell-Douglas Framework

Absent direct evidence, a claim for intentional discrimination is analyzed under the familiar burden-shifting framework established in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Flowers*, 803 F.3d at 1335. Under the *McDonnell-Douglas* framework, a plaintiff must first establish a *prima facie* case of discrimination. *Id.* at 1336. To establish a *prima facie* case, a plaintiff must show that (1) she was in a protected class, (2) she was qualified to perform the job, (3) she suffered an adverse employment action, and (4) other similarly-situated individuals outside of her protected class were treated more favorably. *Lewis*, 918 F.3d at 1220-21. If the plaintiff establishes a *prima facie* case, the burden then shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. *Flowers*, 803 F.3d at 1336. Once the employer meets its burden of production, the burden shifts back to the plaintiff to show that the employer's proffered reason is pretext for unlawful discrimination. *Smith*

v. Lockheed-Martin Corp., 644 F.3d 1321, 1326 (11th Cir. 2011).

James was explicitly asked in her deposition whether she believed her 2015 suspension or her termination was based on her race or sex, and she unequivocally responded, "No." (Doc. 114-4 at 59). In light of James's sworn deposition testimony that she does not believe that she was suspended or terminated because of her race or sex, the Court need not address the arguments of her counsel to the contrary. *See Ross v. Jefferson Cnty. Dep't of Health*, 701 F.3d 655, 661 (11th Cir. 2012) (holding that plaintiff waived her race discrimination claim by responding "no" when asked during her deposition whether she thought that her termination was related to her race). Instead, James's discrimination claims appear to center around three potential adverse employment actions: (1) her 2013 suspension, (2) her March 4, 2015 Written Warning,[13] and (3) the denials to transfer her from the Robbery unit to the Homicide unit.

First, the City argues that James has failed to demonstrate that the denial of a transfer from the Robbery unit to the Homicide unit is an adverse employment action.[14] The Court agrees.

An "adverse employment action" must "impact[ ] the terms, conditions, or privileges of [the plaintiff's] job in a real and demonstrable way." *Jefferson v.*

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[13] Though the Court has doubts regarding whether James has demonstrated that the March 4, 2015 Written Warning is an adverse employment action, the City does not raise this argument, and thus the Court assumes without deciding that it is an adverse employment action for summary judgment purposes only.

Sewon America, Inc., 891 F.3d 911, 920-21 (11th Cir. 2018). The impact "must at least have a tangible adverse effect on the plaintiff's employment." *Id.* at 921. To determine whether an employment action is "adverse," courts use an objective test: whether a reasonable person in the plaintiff's position would consider the employment action materially adverse. *Id.*; *Doe v. DeKalb Cnty. Sch. Dist.*, 145 F.3d 1441, 1448-49 (11th Cir. 1998).

When a plaintiff is denied another job within the same organization, she must show that "a reasonable person faced with a choice [between the positions] . . . would prefer being transferred to [the new] position." *Jefferson*, 891 F.3d at 921 (quoting *Webb-Edwards v. Orange Cnty. Sheriff's Office*, 525 F.3d 1013, 1032 (11th Cir. 2008)). A plaintiff may satisfy this burden by presenting evidence that the new job has more prestige, improved wages, rank, or benefits, or some other serious and material change in the terms or conditions of her employment. *Id.* (finding sufficient showing of adverse employment action where new job had significantly different responsibilities and plaintiff had strong basis for preferring transfer because she was taking classes related to the new job).

Though James's *prima facie* burden is "not onerous," as the City points out, James spends a great deal of effort asserting that a failure to transfer *can* constitute an adverse employment action without ever addressing how this one does. After the Court's examination of the record, the Court concludes that James has failed to demonstrate that a reasonable person in her position would have preferred being transferred from the Robbery unit to the Homicide unit.

As an initial matter, James has failed to identify how many alleged denials occurred or when they occurred, severely inhibiting the Court's ability to conduct the fact-specific inquiry required. Further, James testified during her deposition that the transfer involved no increase in pay, and James has offered no evidence that the transfer involved rank or benefits. Finally, James has offered no evidence that the transfer involved significantly different responsibilities or that she had a strong basis to prefer the transfer.

James testified that the Robbery and Homicide units are both in the Major Crimes Bureau, which is in the CID. In other words, James ultimately would have been under the same CID Command about which she complained. The only benefits of the transfer that James identified were that it is "a more challenging role" (though she did not identify in what way) and that "you get to put it on your resume," and the latter is true with any job. In short, this evidence is insufficient to show an adverse employment action.[15] See *Harrison v. Int'l Bus. Machines (IBM) Corp.*, 378 F. App'x 950, 954 (11th Cir. 2010) (holding that plaintiff failed to show adverse employment action where denial of lateral transfers did not result in serious and material changes to terms and conditions of employment); *Webb-Edwards*, 525 F.3d at 1032-33 ("The record in this case does not demonstrate that passing over [plaintiff] resulted in a serious and material change in the terms, conditions, and privileges of employment. Her wages, benefits, or rank were not affected."). Thus, the Court addresses James's discrimination claims based on two employment actions: her 2013 suspension and her March 4, 2015 Written Warning.

1. *2013 Suspension*

The City argues that James's *prima facie* case fails because she cannot show a valid comparator. Because James has failed to present any evidence of a comparator outside of her own conclusory say-so, the Court agrees.

As the Eleventh Circuit recently clarified, to satisfy the fourth element of a *prima facie* case, a plaintiff "must show that she and her comparators are 'similarly situated in all material respects.'" *Lewis*, 918 F.3d at 1224. Whether a comparator is similar in "all material respects" is determined on a case-by-case basis, considering the individual circumstances in each case. *Id.* at 1227. But ordinarily, a valid comparator "will have engaged in the same basic conduct (or misconduct)," "will have been subject to the same employment policy, guideline, or rule as the plaintiff," "will ordinarily (although not invariably) have been under the jurisdiction of the same supervisor as the plaintiff," and "will share the plaintiff's employment or disciplinary history." *Id.* at 1227-28.

James argues that Det. Hogan (white male) is a valid comparator with respect to her 2013 suspension. He is not. First, James and Det. Hogan did not engage in the same basic misconduct. On the one hand, James, while off-duty and outside of the police jurisdiction, used her patrol vehicle—with its emergency equipment activated— to pull in front of a school bus and stop it on its route, boarded the bus, pulled a boy off the bus, and detained him until a county deputy arrived. On the other hand, Det. Hogan used excessive force in some way against a suspect who was arrested.[16] Needless to say, while both James and Det. Hogan may have engaged in

misconduct, they did not engage in the same *type* of misconduct. James's argument "essentially boils down to quibbling about whether [Hogan's] . . . alleged violations were *worse* than [her] own, not about whether they were *sufficiently similar*." *Flowers*, 803 F.3d at 1341. But "[o]n-the-ground determinations of the severity of different types of workplace misconduct and how best to deal with them are exactly the sort of judgments about which we defer to employers." *Id.* at 1341.

Because James and Det. Hogan engaged in different types of underlying misconduct, the City also charged James and Det. Hogan with violations of different policies—James with (1) Duties of Responsible Employment (Engaging in any activity which may reflect negatively on the integrity, competency, or ability of the individual to perform his/her duty, or may reflect negatively on the Department), (2) Duty in Off Duty Arrest, and (3) Duties of Responsible Employment (Prompt and accurate reporting of all official matters)[17] and Det.

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[17] To the extent James claims that she did not violate this policy because she fully disclosed the details of this incident to Sgt. Hall, who failed to tell CID Command, the City has presented a legitimate, non-discriminatory reason for its action by showing that it had good, faith reasonable belief that she did. *Winborn v. Supreme Beverage Co.*, 572 F. App'x 672, 674 (11th Cir. 2015) (recognizing that, in lieu of a comparator, a plaintiff disciplined for violation of a work rule may establish a *prima facie* case by showing that she did not actually violate the work rule, but the employer may rebut this allegation by showing that it had a good faith, reasonable belief that the plaintiff violated the rule). Th City conducted an investigation, and Sgt. Hall advised that James called him but did not fully disclose the incident. That the City may have been mistaken in believing Hall's statement does not matter when an employer honestly believed that the employee violated the policy, "the discharge is not because of race

Hogan with Use of Excessive Force. Further, James has presented no evidence that she and Det. Hogan were under the same supervisor at the time or shared a similar discipline history. In fact, James has offered little to no proper evidence regarding the details of the incident involving Det. Hogan. Because James has failed to demonstrate any of the hallmark characteristics of a valid comparator or any other evidence that she and Det. Hogan were similar "in all material respects," James's *prima facie* case fails.

Nevertheless, even assuming James could establish a *prima facie* case, her claims would still fail because she has not offered sufficient evidence that the City's proffered reasons for her suspension were pretext for unlawful discrimination. James does not dispute that she did in fact stop the school bus while in her patrol vehicle, off-duty, and out of the police jurisdiction. She does not dispute that she arrested the boy for allegedly hitting her daughter. But she does claim that Sgt. Hall falsely told Major Jurkofsky that James did not fully disclose the details of the incident, which led to her prompt and accurate reporting violation and contributed to her suspension.

Based on the record, James believed Sgt. Hall misinformed Major Jurkofsky "to keep himself from being reprimanded for not contacting the chain of command at the time," *i.e.*, not because of her race or sex. (Doc. 114-4 at 52). Regardless, even if Sgt. Hall acted out of discriminatory animus, the Mayor was the ultimate decisionmaker regarding James's suspension, and James has offered no evidence that

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[or sex]." *Id.* Further, as discussed in the text of the opinion, James cannot show that the City's reason for her suspension is pretext for race or sex discrimination.

the Mayor harbored any discriminatory animus or had anything other than an honest, good-faith belief that she committed the violations for which she was suspended.[18] The Mayor's honest belief is further bolstered by the fact that James agreed to accept Chief Murphy's recommendation for suspension and waived her right to a hearing before the Mayor. *See generally Elrod v. Sears, Roebuck & Co.*, 939 F.3d 1466, 1470-71 (11th Cir. 1991) (explaining that plaintiff, the alleged harasser, signed without

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[18] James's entire claims center around the alleged discriminatory and/or retaliatory motives of Sgt. Hall, Major Jurkofsky, Sgt. Thornell, Deputy Chief Cook Major Simmons, and/or the "CID Command" generally. But with one exception, the Mayor made the final decision to discipline James and is thus the relevant decisionmaker for purposes of her discrimination and retaliation claims. To the extent any of the other individuals were involved in James's disciplinary actions, they *at most* made recommendations regarding the appropriate disciplinary action. Claims concerning these individuals' alleged discriminatory and/or retaliatory motives almost certainly lend themselves to a "cat's paw" theory of liability, which imposes liability on the employer when the decisionmaker does not have discriminatory animus but is influenced by a supervisor who does. *See, Staub v. Proctor Hosp.*, 562 U.S. 411, 415 (2011) ("[I]f a supervisor performs an act motivated by [discriminatory] animus that is intended by the supervisor to cause an adverse employment action, and that act is a proximate cause of the ultimate employment action, then the employer is liable."). However, James at no point presents such an argument and thus the Court need not and does not determine whether the City is liable under a cat's paw theory. *See Caldwell v. Clayton Cnty. Sch. Dist.*, 604 F. App'x 855, 861 (11th Cir. 2015) (affirming district court's decision declining to address cat's paw theory of liability when plaintiff presented no such argument at summary judgment and reaffirming the well-settled notion "[t]he parties, not the district court, bear the burden of formulating arguments based on the evidence").

objection the paper that confirmed the sexual harassment and that plaintiff had failed to show employer's belief was not credible). James also attempts to show discriminatory animus by claiming that Major Jurkofsky told her that he would have done the same thing or worse if it has been his child, but this statement in no way indicates discriminatory animus by Major Jurkofsky—or more importantly, the Mayor—or changes the fact that James violated the policies. For these reasons, James has not presented sufficient evidence that the City's proffered reasons for her suspension were pretext for unlawful discrimination.

2. *March 4, 2015 Written Warning*

With respect to her March 4, 2015 Written Warning, James asserts only that she was discriminated against because of her race. There is no dispute that James did not provide a doctor's excuse after calling in sick with less than 40 hours of accumulated sick time available. James's only contention is that she should not have been disciplined because white detectives who "called out sick far more often were never asked to provide an excuse from a doctor's office." But again, aside from this conclusory allegation, James has presented no evidence of a comparator. She has not identified these "white detectives," nor identified under what circumstances they called in sick, how much accumulated sick time they had, or whom their supervisor was at the time. Thus, James's *prima facie* case fails.

But, even if James had established a *prima facie* case, her claim would still fail because she has not offered sufficient evidence showing that the City's reason for the disciplinary action was pretext for race

discrimination. Other than conclusory allegations, which are not evidence, James points to no evidence showing that Sgt. Hudson harbored racial animus.

B. Convincing Mosaic of Circumstantial Evidence

Even if a plaintiff is unsuccessful under the *McDonnell-Douglas* framework, the Eleventh Circuit has held that a plaintiff may still survive summary judgment if she presents a "convincing mosaic" of circumstantial evidence to create a triable issue of fact concerning the City's discriminatory intent. *Lewis*, 918 F.3d at 1220 n.6; *Flowers*, 803 F.3d at 1336 (recognizing that establishing the elements of the *McDonnell-Douglas* framework "is not, and was never intended to be, the *sine que non* for a plaintiff to survive a summary judgment motion"). Aside from the evidence already addressed, James offers the following additional evidence to support her claims for discrimination: (1) that she was the only African American female in the Major Crimes Bureau, (2) that she was denied transfers from the Robbery unit to the Homicide unit and less qualified white males were selected instead, (3) that she was "nitpicked" and "scrutinized" in comparison to white officers (race only), (4) that Sgt. Thornell shouted at and treated her in a hostile manner on a near-daily basis in 2013 and made sex-based comments to her (sex only), and (5) that Deputy Chief Cook made sexual comments and gestures to her (sex only).

Perhaps the most fatal flaw in James's "convincing mosaic" theory is that she has not shown that any of these additional instances of supposed discrimination involved the decisionmakers in her 2013 suspension and March 4, 2015 Written Warning.

Still, the Court addresses each of her allegations in turn.

First, that James was the only black female in the Major Crimes Bureau during her time as a Robbery detective is not enough to create a triable issue of fact regarding the City's discriminatory intent. *See Flowers*, 803 F.3d at 1338 (noting that plaintiff's only evidence touching on race was that he was first black football coach, which, without more, was insufficient to show causal connection between his race and termination).

Next, James claims that she was "repeatedly" denies transfers from the Robbery unit to the Homicide unit based on her race or sex. In addition to the obvious shortcomings that James fails to identify when these denials occurred and by whom, this allegation is unsubstantiated for a number of other reasons. James claims that a less qualified General Crimes detective, a Mason Wells (white male), was selected for additional training to groom him for a position in the Homicide unit. Not only does James fail to present evidence that Det. Wells was *actually* transferred to the Homicide unit, the record makes clear that James's allegation is based on "speculation," not personal knowledge or any other evidence. (Doc. 114-4 at 12).

James also argues that the Homicide unit denied her transfer based on a false policy that she had to submit a letter of transfer through CID Command to be considered. To support this argument, she claims that four white male detectives transferred to the Homicide unit, for which the City was unable to produce letters of transfer.[19] Without more, including even the most basic identifiers of these individuals, this is nothing more than a

conclusory allegation unsupported by any evidence in the record. For example, James has not shown that she was similarly situated to any of these individuals.

Further, James has presented no evidence of the false policy she claims prevented her from being transferred. But even if she had, James also failed to show that the City deviated from the policy because of her race or sex. *See Mitchell v. USBI Co.*, 186 F.3d 1352, 1355-56 (11th Cir. 1999) ("Standing alone, deviation from a company policy does not demonstrate discriminatory animus."). Indeed, because James has not identified who the decisionmakers were, it is impossible to infer that these unknown decisionmakers harbored any discriminatory animus.

The only other evidence James offers to support her race discrimination claims is that she was "nitpicked" and "scrutinized" in comparison to white officers, and the only example she provides is the March 4, 2015 Written Warning, which the Court has already addressed. The only other evidence she offers to support her sex discrimination claims are the sex-based comments and gestures made by Sgt. Thornell and Deputy Chief Cook, which are equally unavailing. Even assuming James's assertions are true, these comments and actions are insufficient to withstand summary judgment because, as discussed above, James has not shown that either Sgt. Thornell or Deputy Chief Cook made the decision to suspend her in 2013 or to issue her a written warning in 2015.

III. Retaliation Claims

James asserts retaliation claims against the City under Title VII based on her complaints of race and sex discrimination and § 1981 based on her complaints of race discrimination.[20] Like James's discrimination claims, these claims are analyzed

under the *McDonnell-Douglas* framework. To establish a *prima facie* case of retaliation, James must show that (1) she engaged in statutorily protected activity, (2) she suffered an adverse employment action, and (3) there is some causal connection between the two events. *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007).

The parties do not dispute that James's formal EEOC Charges and the filing of this lawsuit constitute protected activity for purposes of James's *prima facie* case. But James claims that she first engaged in protected activity on January 23, 2015, when she verbally complained of race and/or sex discrimination to Deputy Chief Cook. She then claims she engaged in protected activity on March 13, 2015, when she submitted a written complaint—a 23-page letter—to Chief Finley, asserting, among other things, that the CID Command disciplines white officers in a more favorable manner than black officers. And finally, she claims she engaged in protected activity when she submitted a written complaint to Director Murphy, outlining alleged instances of race and sex discrimination.

The City argues that none of these complaints constitute protected activity. Instead, the City claims James did not engage in protected activity until she filed her first EEOC Charge on May 8, 2015. The Court rejects the City's arguments. In all three instances, James voiced her concerns about race and sex discrimination to her superiors. A plaintiff "need not prove the underlying claim of discrimination which led to her protest." *Holifield v. Reno*, 115 F.3d 1555, 1566 (11th Cir. 1997), *abrogated on other grounds, Lewis*, 918 F.3d at 1224-25. This is true even when evidence of the alleged underlying

discrimination is "slight," as it is here. *See id.* Thus, viewing the evidence in the light most favorable to James, the Court finds that all of these instances constitute protected activity for purposes of establishing a *prima facie* case of retaliation.

The City next argues that James cannot show a causal connection between her engagement in protected activity and her adverse employment actions. To establish a causal connection, James must show that the relevant decisionmaker was "aware of the protected conduct, and that the protected activity and the adverse employment actions were not wholly unrelated." *Shannon v. Bellsouth Telecomm., Inc.*, 292 F.3d 712, 716 (11th Cir. 2002) (quoting *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 590 (11th Cir. 2000), *overruled on other grounds, Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)). Temporal proximity alone may be enough to show that the protected activity and adverse employment actions were not "wholly unrelated," but the temporal proximity must be "very close," *Thomas*, 506 F.3d at 1364. For example, a three- to four-month time lapse between the events is not sufficiently close. *Id.* Because James first engaged in protected activity on January 23, 2015, her retaliation claims can necessarily be predicated only on her March 4, 2015 Written Warning, her 2015 suspension, and/or her termination.

A. March 4, 2015 Written Warning

Assuming for purposes of summary judgment that James's March 4, 2015 Written Warning is an adverse employment action, James *prima facie* case still fails because she has not shown that her written warning was causally related to her complaints of discrimination. James has presented no evidence,

direct or circumstantial, that Sgt. Hudson knew about her verbal complaints of discrimination to Deputy Chief Cook, which is the only complaint she had made prior to receiving the written warning. According to James, at least as of February 5, 2015, Deputy Chief Cook told James that he had not contacted anyone regarding their conversation. Further, no investigation regarding James's allegations of discrimination began until March 17, 2015. And finally, Sgt. Hudson was a sergeant in the General Crimes Bureau, not the Major Crimes Bureau, and according to James, she was not reassigned to the General Crimes Bureau until the end of February 2015. In short, James has not met her burden to show that Sgt. Hudson knew about her complaints of discrimination prior to issuing the March 4, 2015 Written Warning. *See Kidd v. Mando Am. Corp.*, 731 F.3d 1196, 1212 (11th Cir. 2013) ("[Plaintiff] has not offered any evidence to show that [the decisionmaker] was aware of any of her protected complaints, making it impossible for her to make out a prima facie case.").

B. 2015 Suspension

1. *Prima Facie Case*

Likewise, James has not shown a causal connection between her complaints of discrimination and her 2015 suspension. The City argues that James has presented no evidence that the Mayor, the relevant decisionmaker, knew about any of James's complaints of discrimination at the time he made his decision to suspend her. The Court agrees. Based on the evidence before this Court, Major Simmons made a recommendation to Chief Finley regarding James's suspension. Chief Finley then overturned Major Simmons's recommendation and made his own recommendation to the Mayor. But these were just

recommendations, not final decisions. After James had a hearing before the Mayor, the Mayor made the decision on August 18, 2015, to suspend her. Because James has offered no evidence to the contrary and has not shown that the Mayor knew about her complaints of discrimination when he issued his decision to suspend her, James has failed to show a causal link, and her *prima facie* case fails. *See Russaw v. Barbour Cnty. Bd. of Educ.*, 891 F. Supp. 2d 1281, 1292 (M.D. Ala. 2012) (recognizing that knowledge requirement is "common sense" because an individual "cannot have been motivated to retaliate by something unknown to him").

2. *Pretext*

Nevertheless, assuming *arguendo* that James has established causation for purposes of her *prima facie* case, James still cannot withstand summary judgment because she has presented insufficient evidence that the City's proffered reason for her suspension was pretext for retaliation. As evidence of retaliatory animus, James claims that (1) Sgt. Thornell handled the complaint made by Woodward's mother in an inconsistent, harsher manner than usual, (2) Sgt. Thornell encouraged or "coached" the complaint, (3) Sgt. Thornell treated her increasingly worse shortly after she met with Deputy Chief Cook, (4) she was told by the officer handling the investigation that led to her suspension that Major Simmons and Chief of Staff Jurkofsky influenced the outcome of the investigation, and (5) she was told by the investigator that CID Command "wanted the conclusion of the case to yield founded charges." All of these assertions suffer from the same insurmountable problem. Neither Sgt. Thornell, Major Simmons, nor Chief of Staff Jurkofsky made

the decision to suspend James, and thus their actions, even if James's assertions were true,[21] do not show that the Mayor acted with a retaliatory animus.

James next claims that Sgt. Thornell engaged in similar or more heated discussions with Cpl. Schnupp and that Cpl. Schnupp was not disciplined in the same manner. Cpl. Schnupp is not a valid comparator. James has offered no evidence that Cpl. Schnupp is outside of her protected class, *i.e.*, that he has not made a complaint of discrimination. And even if he were, James has not identified when any of these alleged discussions took place and has offered no evidence regarding the circumstances under which they occurred, including evidence regarding Cpl. Schnupp's discipline history, who his supervisor was at the time, whether the Mayor was aware of these discussions, or any other relevant factor.

James also argues generally that the City did not perform a thorough investigation of her complaints of discrimination, which she claims shows retaliatory animus. She points to the fact that Martinez, who conducted the investigation, did not interview multiple individuals she identified in her

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[21] Notwithstanding the fact that the Mayor is the relevant decisionmaker for purposes of the Court's analysis, the first two allegations are conclusory and unsubstantiated by the record, and any inference of retaliatory motive by Sgt. Thornell with respect to the third allegation is irrelevant to the Court's analysis and dispelled by James's own declaration. As for the fourth and fifth allegations, James does not assert how, why, or in what way Major Simmons and Chief of staff Jurkofsky influenced the investigation, and she fails to identify to whom she is referring in the "CID Command." Either way, these actions alone are not suspicious and still do not show a retaliatory motive by the Mayor.

complaints. But a closer look at the record reveals that James lacks personal knowledge concerning the details of Martinez's investigation, including the people who were interviewed. Still, even if Martinez's investigation was weak, James does not present evidence that it was weak due to a retaliatory animus harbored by Martinez or, more importantly, the Mayor. *See Pinney v. S. Nuclear Operating Co.*, No. 1:09-cv-235, 2011 WL 1215808, at *11 (M.D. Ala. Mar. 31, 2011) (finding that allegation that investigation could have been more thorough did not establish gender discrimination). In fact, there is no evidence that the Mayor even knew about the investigation as he did not know about James's complaints of discrimination.

The only additional evidence James offers is that she was denied a transfer from the Robbery unit to the Homicide unit. As with her discrimination claims, James does not identify when, by whom, or under what circumstances she was denied the transfer, not does she present evidence of a comparator who did not make a complaint of discrimination and was treated more favorably. Because James has presented no evidence regarding who made the decision to deny her transfer, this purported evidence in no way creates an inference of retaliation.

C. 2017 Termination

The City concedes that the Mayor knew about James's lawsuit filed on August 4, 2017, when he made the decision to terminate James on November 21, 2017.[22] But without more, a three-month lapse in time between the filing of the lawsuit and the Mayor's termination decision is insufficient to show a causal connection, and James has presented no other

evidence indicating that the Mayor was motivated by retaliatory animus. *See, e.g., Thomas*, 506 F.3d at 1364.

When timing is the only basis for a retaliation claim and the allegedly retaliatory adverse employment action was "the ultimate product, of 'an extensive period of progressive discipline,'" which began long prior to the plaintiff's protected activity, "an inference of retaliation does not arise." *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001); *see also Hervey v. Cnty. of Koochiching*, 527 F.3d 711, 723 (8th Cir. 2008) ("Evidence that the employer had been concerned about a problem before the employee engaged in the protected activity undercuts the significance of the temporal proximity."); *Ducksworth v. Strayer Univ. Inc.*, No. 2:16-cv-01234, 2019 WL 1897278, at *17 (N.D. Ala. Apr. 29, 2019) (stating that when "gradual adverse actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise" (quoting *Slattery*, 248 F.3d at 95)); *Jackson v. City of Homewood, Ala.*, No. 1:13-cv-737, 2015 WL 5011230, at *9 (N.D. Ala. Aug, 24, 2015) (citing *Slattery* for a similar proposition).

Here, James had an extensive history of disciplinary actions, including for insubordination and disrespectful behavior, that began long before James filed this lawsuit. As a result, prior to filing this lawsuit and prior to sending her September 27, 2017 email, James was already at the last step before termination under the City's progressive discipline policy. When James sent the September 27, 2017 email that led to her termination, the City's unrefuted evidence shows that it took steps to ensure that it disciplined James in the same manner as others who

were disciplined for the same violation. This suggests the opposite of a retaliatory motive.

Specifically, after Major Youngblood reviewed James's email and determined that it violated departmental policy, he sought advice from the Legal Department and reviewed another detective's disciplinary action for the same violation. Given the similar nature of the offenses, James's violation was categorized in the same manner as the other detective's—as a Category B violation. It is unclear what more the City could have done to treat James fairly in this circumstance. Based on James's prior discipline history, she was already at Step 4 under the City's progressive discipline policy and thus was terminated. *See July v. Bd. of Water & Sewer Comm'rs*, No. 11-cv-635, 2012 WL 5966637, at *11 (S.D. Ala. Nov. 29, 2012) ("In formulating disciplinary action, an employer is not bound to consider a particular misdeed in isolation, without the guidance and context of the employee's prior disciplinary history.").

Because James has failed to show that the Mayor acted with a retaliatory motive and that her termination was anything more than the culmination of her extensive, and often egregious, discipline history, James's retaliation claims fail.

CONCLUSION

Based on the foregoing reasons, the City's Motion for Summary Judgment (Doc. 114) is due to be **GRANTED**.

A final judgment will be entered separately.

DONE and **ORDERED** this 25th day of July, 2019.

/s/ Andrew L. Brasher

ANDREW L. BRASHER

UNITED STATES DISTRICT JUDGE