No. 22-1217

In The
Supreme Court of the United States

AKIEL MCKNIGHT,

Petitioner,

v.

THE PICKENS POLICE DEPARTMENT, THE CITY OF PICKENS, TRAVIS RIGGS, and DENNIS HARMON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the lower courts improperly determine there was no material issue of fact showing the City terminated McKnight for a history of misconduct and attempting to sexually-solicit a high school student who was a minor.

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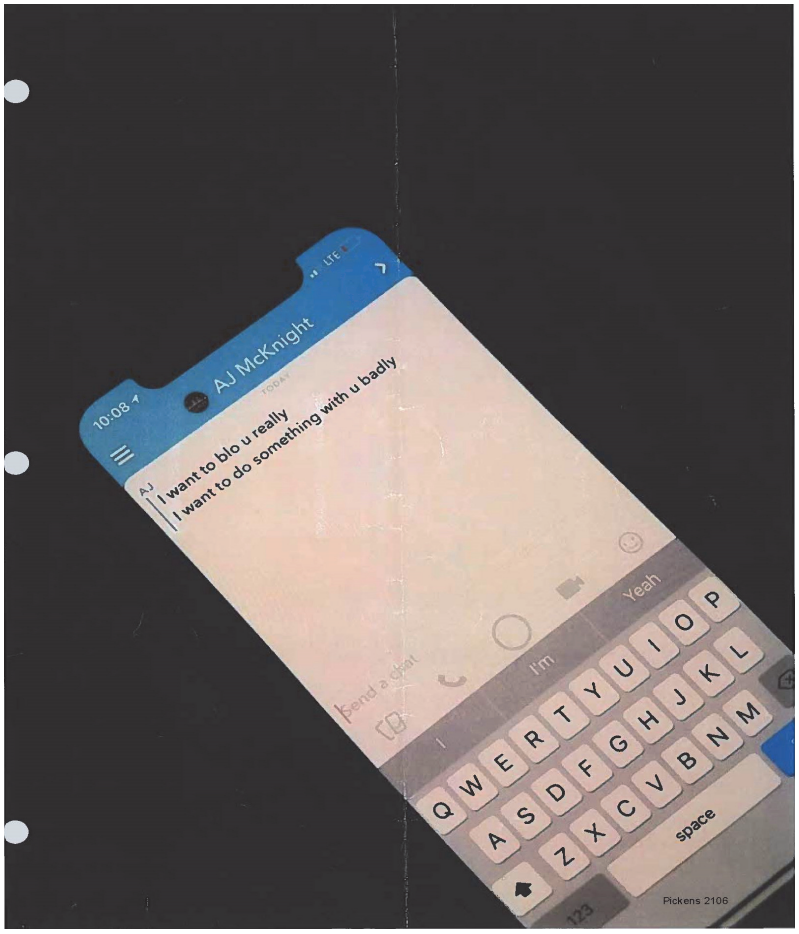
STATEMENT OF JURISDICTION

This case alleges federal questions, e.g., 42 U.S.C. § 2000 et seq. and therefore arises under the original jurisdiction of this Court under 42 U.S.C. § 1331.

STATEMENT OF THE CASE

The Pickens Police Department hired McKnight as a patrol officer in January 2016. He had a mixed employment record prior to the events leading to his discharge. He received warnings for being late to court, improper attire, drug or alcohol containers being found in his patrol car, operating outside the jurisdiction, and improperly discussing investigations outside the Department. (JA 62–70). More seriously, he was put on six-month probation for forcibly entering a residence without proper cause. (JA 64).

In April 2018, the Pickens Police Chief (Riggs) received communications from the Pickens County Sherriff that a parent complained that McKnight was Snapchatting sexual solicitations to Pickens High School students. (McKnight occasionally had school resource officer duties that brought him into the school.). He was also accused of seeking out social-media information on troubled youth in a church program. (JA 96–98); (JA 71). Chief Riggs also obtained the following image of the Snapchat message from "AJ McKnight" to student Hunter Nelms. (JA 46). McKnight admitted to the Chief he sent the message. (JA 96–98).



Citing his Complaint to establish the allegation, McKnight claims Nelms solicited him first by sending a nude picture, however, in his deposition, McKnight testified that he did not "acquire" any pictures of Pickens High School students other than in the course of his police duties. (JA 288 Lines 19–23). His deposition testimony, of course, controls over McKnight's unsworn

Complaint allegations.[1] *See*, *e.g.*, *Ladner v. Thornton Twp.*, 968 F.2d 1218 (7th Cir. 1992); *Leary v. Livingston Cnty.*, 528 F.3d 438, 444 (6th Cir. 2008) ("When a claimant's testimony contradicts the allegations in his complaint, we will credit his later testimony. . . . A claimant may not create a triable issue of fact by saying one thing in a complaint and something else in a deposition.") (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)) (noting that a summary judgment motion "requires the nonmoving party to go beyond the pleadings"); *Scott v. Harris*, 550 U.S. 372 1776 (2007); and *Wysong v. City of Heath*, 260 Fed. App'x 848, 857 (6th Cir. 2008).

In any event, McKnight didn't tell Chief Riggs that Nelms initiated sexual contact nor was it even relevant. (JA 74). McKnight was terminated for soliciting an underage high school student. Who initiated contact was irrelevant.

Nelms testified that he first met McKnight when McKnight pulled him over for speeding. (JA 128–129). At the time, Nelms was interested in law enforcement and he ended up doing four or five ride-alongs with McKnight. The messages began after the last ride-along. Nelms confirmed he received the Snapchat message from McKnight. He showed it to another student (Zach Jones) who took a picture of it with his smartphone. (JA 131). It was Zach who showed the picture to his father who, in turn, made the complaint to

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[1] At some point after initial filing, McKnight did file a "verification" of his Complaint. (JA 406).

the Pickens County Sherriff's Department. Nelms further testified that a South Carolina Law Enforcement Department (SLED) agent later showed him multiple pictures from McKnight's phone. Included in these were photos of nude men, including Pickens High School students. (JA 133–134). Nelms also related that he had another snapchat from McKnight in which McKnight offered him $40 if Nelms would let McKnight perform oral sex on him. In yet another message, McKnight invited Nelms to his apartment. (JA 135–136). All these messages occurred in a two-week time period and immediately followed Nelms' last ride-along with McKnight. In that last ride-along, McKnight asked to "run his fingers though [Nelms'] hair." (JA 140). It was after this that Nelms cut off contact with McKnight.

Chief Riggs met with McKnight who admitted "sexting" Hunter Nelms. In the discussion, it also came up that McKnight had taken Helms on more than one "ride-along." McKnight's excuse for his conduct was that sixteen was the "age of consent" in South Carolina and, therefore, he had done nothing wrong. The Chief informed him that it was never okay for a police officer to be sexting an underage high school student. When McKnight questioned whether it was because he was bi-sexual, the Chief responded that it didn't matter. McKnight refused to accept that he had done anything wrong. Chief Riggs suspended McKnight for two weeks. (JA 97). Chief Riggs did not contact Nelms and, therefore, did not know about the other messages or the solicitation on the last ride-along.

In his deposition, McKnight admitted knowing Nelms and taking him on several ride-alongs. However, he pleaded his Fifth Amendment rights in answer to any question about conduct toward Nelms. (JA 99–101).

Following this meeting, Chief Riggs checked the ride-along authorization forms and saw that McKnight had only obtained one authorization. Policy requires a new one for each ride-along. (JA 82).

Following his suspension, McKnight wrote an email to City Manager Dennis Harmon about the incident. He again admitted sexting Hunter Nelms and again asserted it was not improper because sixteen was the age of consent in South Carolina. (JA 73–74).

In early May, Chief Riggs received a direct complaint from a parent asking that McKnight not be allowed around school kids. Soon thereafter, Riggs received a request from the School District that McKnight not be allowed back in any of the District's schools. (JA 77–80). Due to these new concerns, Riggs placed McKnight back on suspension pending further review of the situation. (JA 81). The matter was also reported to SLED around this time. After reconsidering McKnight's conduct, Riggs felt he should no longer be a Pickens Police officer. He recommended discharge and the Town Administrator, Dennis Harmon, agreed. (JA 82).

In October 2019, McKnight was arrested by SLED officers, in part for his sexual solicitation of Nelms. (JA 99). His South Carolina law enforcement certification

was suspended at the same time. Those charges are still pending.

ARGUMENT

This Case Does Not Present Any Compelling Ground for Supreme Court Review

Under Supreme Court Rule 10, a petition for writ is granted only for "compelling grounds." Rule 10 lists the most common compelling grounds as: (1) a question on which the courts of appeals are in conflict; (2) a state court has issued a decision on a federal question that is in conflict with decisions of other state courts; or (3) a state, or federal court of appeals, has decided an important federal question that should be reviewed by the Supreme Court or is in conflict with a prior decision of the Court.

Rule 10 specifically provides that review is "rarely granted" when the issue is only an alleged misapplication of law or procedural error.

McKnight has not raised any issue that Rule 10 recognizes as compelling. In fact, the grounds he raises are solely alleged misapplication of law to fact or procedural error. He has alleged, without basis, orientation bias, misapplication of Title VII law, and procedural errors by the lower courts. None of the reasons he raises warrant review by this Court.

"Age of Consent"

McKnight continues to assert, even within his writ, that he violated no law by soliciting Hunter Nelms because Hunter was within the "age of consent." (JA 102). The issue is actually not relevant, because an employer is permitted to fire employees for "conduct unbecoming" regardless of whether that conduct was illegal and whether or not it occurred on-duty. Courts have clearly recognized that a public employer may discipline based on misconduct by a public employee that touches on the workplace.

> To the extent that those activities impact in any way on the workplace environment (such as work performance, morale among co-workers, **community concern**, etc.), they are almost never protected from employer regulation.

15 Causes of Action 2d 139, *Cause of Action Against a Public Employer for Violation of Privacy in the Workplace* (Originally published in 2000) (emphasis added). In fact, most courts have held that inquiry into an off-duty adulterous affair, even with no workplace consequences, is not improper.[2]

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[2] *Smith v. Price*, 616 F.2d 1371 (5th Cir. 1980) (Police officer's termination did not violate his right to privacy because reason for adverse job action was not simply that plaintiff was having an extra-marital affair, but because the affair interfered with on-duty performance (visits while on duty, gunplay with lover using police issue gun); *Shawgo v. Spradlin*, 701 F.2d 470 (5th Cir. 1983) (Male and female police officers' rights to privacy were not violated by demotion for having an off-duty (non-adulterous) sexual relationship even though there was no evidence that

In any event, McKnight is wrong. He thinks one can solicit anyone for sex if they are sixteen or older. However, S.C. Code § 16-15-342 makes it a crime for an adult to solicit sexual activity from a person under the age of eighteen. It is true that consent by a sixteen or seventeen year old is a defense to the crime. *Id.* This is where McKnight gets confused. If a sixteen or seventeen year old does not consent to be solicited, then the adult has violated the statute. (Similarly, S.C. Code § 16-3-655, governing sexual battery upon a minor, precludes consent by a person under sixteen. This does not mean sexual battery may be committed on persons sixteen or older).

McKnight's Remaining Claims Are All Evaluated Using the Same Order of Evidence

McKnight's claims are all based on the allegation that he was terminated on the basis of his race and sexual orientation. He asserts violations of Title VII, South Carolina's equivalent anti-discrimination laws, and he asserts a hodgepodge of alleged constitutional civil rights violations. With respect to the civil rights

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relationship interfered with either officer's work performance). Generally, however, courts find that there is no constitutional protection or "right to privacy" to engage in adultery, even if the off-duty activities have no impact on the workplace. Other potentially illegal off-duty activities are also unprotected. *See*, *e.g.*, *Fleisher v. City of Signal Hill*, 829 F.2d 1491 (9th Cir. 1987) (Probationary police officer's termination did not violate constitution since right to privacy does not extend to consensual off-duty sex with a minor (statutory rape)).

causes, he utilizes (as he must) 42 U.S.C. §§ 1981 and 1983 to address these alleged violations.

McKnight, at times, seems to claim this is a "direct evidence" case, *i.e.*, that Defendants have admitted discrimination, or there is non-circumstantial evidence of discriminatory intent. He brazenly claims that the "mayor" stated the decision to terminate "was based, in part, on sexual orientation." (McKnight Writ p. 3). This is untrue. First, he is talking about Fletcher Perry, who was not the mayor at the time of McKnight's termination. It is also unrefuted that he had no role in the decision. McKnight claims that Perry told him "this is a small town biblical community." (JA 112–114). McKnight testified that he understood this to mean a reference to being bi-sexual or gay, but he admitted he "couldn't get a clear answer on that." *Id.* McKnight testified that Councilman McKinney made a similar remark to him about the community being biblical and that he used the word "homosexual," however, McKnight could not recall exactly how McKinney used the word "homosexual." "I don't recall how he used it." (JA 114–115). Perry himself testified that, "I think him being bisexual, in conjunction with the person being a student played a part in it." (JA 118). However, Perry clarified that he was not saying McKnight's sexual orientation was a reason for his discharge. When specifically asked whether McKnight's sexuality actually played any part of the decision, Perry said it did not.

> Q: I just want to establish that there's some part, maybe a little like you say, or a lot like I

> say, but some part was that he was homosexual or bisexual.
>
> Mr. Thompson: Object
>
> A: I can't agree with that.
>
> Q: Well, you told me a minute ago that him being bisexual in conjunction with a student being in school were the reasons for McKnight's dismissal. Isn't that what you told me?
>
> . . .
>
> A: I think I said it may have been a factor in it. I think the major factor was that he was involved with a student.

(JA 119).

After this exchange, Plaintiff's counsel repeatedly tried to get Perry to agree there was a "genuine issue of material fact" as to the reason for McKnight's discharge.

> Q: So is it a genuine dispute or is it not a genuine dispute?
>
> A: Mr. Hawkins, my position is and it's not going to change, okay, that Mr. McKnight was fired because he was having a relationship with a student that was in school, okay.

(JA 122).

> A: . . . I can't recall if we got into the specifics about how old the person was, but we did agree he was a student, okay. And when he

> said he was a student, his bisexual/sexual orientation really didn't matter to me at that time okay. What mattered to me was he was a police officer having an affair with a student who happened to be male.

(JA 126).

Perry made clear he was not saying that McKnight's orientation was a reason for the discharge—only that it was a factor considered in Council's discussions of the situation because that was the factual background of what happened. Perry also testified that neither he nor the Town Council directed that McKnight be terminated nor did he discuss it with Riggs or Harmon.

> Q: . . . Do you believe that the fact that Mr. McKnight was involved with a male student had something to do with his termination?
>
> A. I can't answer that. I didn't fire him. It's the chief of police who did.
>
> Q. All right. Now, did you tell the chief or the administrator to fire him?
>
> A. No.
>
> Q. Did you give them an opinion as to whether or not he should be fired?
>
> A. No, I did not.
>
> Q. Did the council discuss firing him? Do you recall the council discussing whether or not to fire him?

> A. I think we went into executive session, but I don't think council understood the problem with that person being a student and I think that decision was basically left up to the chief. At that time the chief had the authority to take action.

(JA 117, 127).

At most, Perry was giving his opinion that McKnight's sexuality was somewhere in the mix of the factual discussion by Council but was not the reason for the termination. In any event, he testified the Council was not involved in the decision—they merely discussed it without providing any input to the decision-makers. He also stated that if the student were female, he thought the decision would be the same. (JA 127).

To the extent Perry's testimony and McKinney's alleged words might be some circumstantial evidence of discriminatory intent, it falls far short of being sufficient to reverse the district court. It is true that the Fourth Circuit Court of Appeals allows some other circumstantial evidence to be considered on summary judgment. *See*, *e.g.*, *Westmoreland v. TWC Administration*, 924 F.3d 718 (2019) (person delivering termination notice makes derogatory comment referring to plaintiff's age). McKnight's supposed evidence, however, is inconsequential. At most, Perry expressed an opinion that McKnight's bi-sexuality might have played a role in a review of the situation. He made clear it was not a basis for the decision. With respect to McKinney, McKnight could not even remember how

McKinney used the word "homosexual." Such subjective statements, with no substance or reference to the decision, are not evidence of discriminatory intent. *See*, *e.g.*, *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 962 (4th Cir. 1996) (finding district court's decision to strike portions of plaintiff's affidavit not improper as the portions struck contained self-serving opinions and unsupported assertions of colleagues' qualifications); *Wahi v. Charleston Area Med. Ctr.*, 453 F.Supp.2d 942, 959 (S.D. W. Va. 2006), *aff'd sub nom. Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599 (4th Cir. 2009) ("Self-serving opinions, without corroborating objective evidence, are not considered to be significantly probative."); *Holley v. N. Carolina Dep't of Admin., N.C.*, 846 F.Supp.2d 416, 434 (E.D.N.C. 2012) ("allegations and opinions are not relevant evidence of race discrimination related to Holley's October 2006 non-promotion.").

McKnight also argues that former Pickens employee Renee Elrod's affidavit establishes that McKnight was discriminated against. However, Elrod's affidavit is completely conclusory. She was not a witness to any statements or events relevant to the case. The affidavit contains no specific factual allegations. In fact, her statements do not appear to be based on personal, first-hand information of any kind. She repeatedly conditions her statement with the phrase "it is my understanding." Federal courts require that facts submitted to oppose, or support, summary judgment must be supported by valid affidavits or similar materials. In *Simms v. Poe*, 924 F.2d 1053 (4th Cir. 1991)

(unpublished), the court rejected allegations which, if accepted, would have defeated the motion for summary judgment. The court noted that "there are no affidavits in the record that support the alleged facts in anything other than a speculative fashion." Such an error is fatal. *Id.* This point was also made clear in *Choe v. Smith*, 67 F.3d 294 (4th Cir. 1995) (unpublished). In that case, the court noted that:

> In response to the defendants' affidavits rebutting Choe's claims, Choe merely alleged that defendants were lying. She submitted no affidavits or evidence in support of this allegation. To survive summary judgment, however, Choe was required to produce more than a mere allegation of the existence of a material fact. Unsupported speculation is insufficient to defeat a motion for summary judgment.

Id. (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986) and *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987)). *See also Rexnord Holdings v. Bidermann*, 21 F.3d 522 (2d Cir. 1994) ("although Biderman pointed to certain issues of facts in his memorandum of law and at oral argument, he failed to provide evidentiary support for his contentions. Since Bidermann failed to offer competent evidence raising a genuine issue of material fact sufficient to preclude summary judgment, entry of judgment in favor of RHI was proper."); *British Airways v. Boeing*, 585 F.2d 946, 952 (9th Cir. 1978) (legal memoranda and oral argument are not evidence and cannot create issue of fact capable of defeating otherwise valid motion for

summary judgment); *Smythe v. American Red Cross*, 797 F.Supp. 147, 152 (N.D.N.Y. 1992) (same); *Poulson, Inc. v. Bromar, Inc.*, 775 F.Supp. 1329, 1332 (D. Haw. 1991) (same); *Ramsey v. United States*, 463 F.2d 815 (D.C. Cir. 1972) ("noting that the facts unsupported by an affidavit would not be accepted").

Rule 56(e) states that affidavits used to support or oppose summary judgment "shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein." Fed.R.Civ.P. 56(e). *See also Antonio v. Barnes*, 464 F.2d 584, 585 (4th Cir. 1972) ("the absence of an affirmative showing of personal knowledge of specific facts vitiates the sufficiency of the affidavit."); *Cummings v. Roberts*, 628 F.2d 1065 (8th Cir. 1980); *Gordon v. Watson*, 622 F.2d 120 (1st Cir. 1980); *Dudis v. Barrows*, 538 F.2d 904 (1st Cir. 1976); *United States v. Bosurgi*, 530 F.2d 1105 (2d Cir. 1976); *Stevens v. Barnard*, 512 F.2d 876 (10th Cir. 1975); *Urbina v. Gilfilen*, 411 F.2d 546 (9th Cir. 1969).

The Elrod affidavit simply does not meet the Rule's requirements. Furthermore, it ignores the fact that Amanda Smith was not a minor at the time she had a relationship with officers and, in any event, there is no evidence that Chief Riggs was aware of the relationships. The assertion that Amanda Smith was a "teenager" does not make the situation comparable to McKnight's situation. She was an adult at the time and consented to the activity, unlike Hunter Nelms, who

neither consented, nor was he an adult. Additionally, the Smith situation did not involve on-duty conduct.

In his writ, McKnight also claims the Chief asked him to resign "because of the morals of the situation." In fact, the cited testimony makes clear that what McKnight claimed in his testimony was that the County Sherriff, not the Chief, said this to him. (JA 112).

Additionally, McKnight raises a brand-new argument that he never made to the district court or the court of appeals. He argues that the parent who complained about McKnight, Chris Hickey, had anti-orientation bias which transferred to the City. First, this argument is properly rejected because it was not raised below. *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 430 (1992); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 368 (2006) (" . . . it does not appear that the Sereboffs raised this distinct assertion below. We decline to consider it for the first time here.").

In any event, McKnight's conclusory assertion of Hickey's bias is not borne out by the record. The only evidence of Hickey's intent is the two communications he sent complaining of McKnight's conduct. In neither communication (JA 77 and 80) does he say anything negative about sexual-orientation. McKnight seems to claim that Hickey's reference to "boys" in the second message somehow implies bias, but the reference is nothing more than an accurate depiction of what McKnight did. McKnight himself admitted that he was targeting boys (male, non-adults). In any event,

the caselaw on transferred intent does not support McKnight's argument. Even if Hickey had clear anti-orientation bias, it does not mean an employer cannot act on the underlying events reported. If the underlying facts show grounds to support an adverse employment action, that action is still legitimate. Without evidence that the decision-maker used such bias, the argument fails. *Balk v. New York Inst. of Tech.*, 683 Fed. App'x 89, 94 (2d Cir. 2017) ("Balk has not presented sufficient evidence from which a reasonable jury could find that the students or others were motivated by discriminatory animus toward him, or that NYIT succumbed to any discriminatory animus.").

McKnight, therefore, presents, at best, a circumstantial case which may be evaluated using the *McDonnell-Douglas* scheme of proof developed in employment discrimination matters. "The *McDonnell Douglas* framework, developed for Title VII, has been used to evaluate [] discrimination claims under [all] three statutes." *Love–Lane v. Martin*, 355 F.3d 766, 786 (4th Cir. 2004); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (referring to Title VII, 42 U.S.C. § 1981, and 42 U.S.C. § 1983).[3]

The prima facie case can take varying forms but, because McKnight is alleging he was treated differently from others, the applicable scheme requires a showing that: (1) Plaintiff is in the protected class;

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[3] This is not a direct evidence case. McKnight has not alleged that he has some sort of direct evidence there was racial or sexual-orientation bias in the termination decision.

(2) the conduct he engaged in was similar to that of persons outside the class; and (3) the discipline against him was more severe. *See*, *e.g.*, *Cook v. CSX Transportation Corp*., 988 F.2d 507 (4th Cir. 1993) (*citing Moore v. City of Charlotte*, 754 F.2d 1100 (4th Cir.), *cert. denied*, 472 U.S. 1021 (1985)). Regardless of how a termination claim is framed, the claim is defeated if the employer offers a legitimate non-discriminatory reason which the plaintiff cannot rebut. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 (4th Cir. 2004) (*en banc*); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985); *Mays v. City School Bd. for the City of Lynchburg*, 5 Fed. App'x 181 (4th Cir. 2001). "Although the evidentiary burdens shift back and forth under the *McDonnell Douglas* framework," the ultimate burden of persuasion is to show that the defendant intentionally discriminated.

McKnight's history of discipline, and his sexual solicitation of Nelms, are appropriately considered both as proof he was not meeting legitimate expectations and, with respect to the sexual solicitation incident, the City's legitimate and non-discriminatory reason for discharge.[4]

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[4] Poor performance of the employee can be used in both the "legitimate expectations" inquiry and the "non-discriminatory reason" rebuttal.

> Although the plaintiff's burden is "not onerous," it nevertheless requires him to "prov[e] by the preponderance of the evidence a prima facie case of discrimination. And, because a plaintiff must show by a preponderance of the evidence that he met the employer's legitimate job expectations to prove his prima

To show discrimination by comparing himself to another employee, McKnight must show the other employee was in a very similar situation.[5] *See*, *e.g.*, *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992) ("to be similarly situated, individuals must have the same supervisors and must have engaged in the same conduct without differentiating or mitigating circumstances") (emphasis added) (cited *in Edwards v. Newport News Shipbuilding*, 166 F.3d 1208 (4th Cir.

> facie case, the employer may counter with evidence defining the expectations as well as evidence that the employee was not meeting those expectations. To require otherwise would turn the plaintiff's burden at the prima facie stage into a mere burden of production, making it "difficult to imagine a case where an employee could not satisfy the 'qualified' [or legitimate expectation] element as defined in *Cline*." Diluting this element of the prima facie case "defeats the whole purpose of this first stage of the *McDonnell Douglas* inquiry, which is, after all, to 'create[ ] a presumption that the employer unlawfully discriminated against the employee' by 'eliminat [ing] the most common nondiscriminatory reasons' for the employer's action." In short, we find no impermeable barrier that prevents the employer's use of such evidence at different stages of the *McDonnell Douglas* framework.

Warch v. Ohio Cas. Ins. Co., 435 F.3d 510, 515–16 (4th Cir. 2006) (internal citations omitted).

[5] A Plaintiff could, instead of using comparator evidence, create an issue of fact by showing "persuasively" that the employer's reason for termination is pretext. *See*, *e.g.*, *Ellington v. Metro. Sec. Servs., Inc.*, No. CV 2:15-1804-MGL, 2017 WL 541051, at *2 (D.S.C. Feb. 10, 2017) (Geiger-Lewis) (*citing Laning v. Fed. Exp. Corp.*, 703 F.3d 713, 720 (4th Cir. 2013)). This is not the theory chosen by McKnight. His claim is specifically based on the allegation he was treated differently.

1998) (unpublished)); *Roberts v. General Electric*, 1 F.3d 1234 (4th Cir. 1993) (comparator was not terminated for the same offense); *Cook v. CSX Transportation Corp.*, 988 F.2d 507 (4th Cir. 1993) (must be a comparator who committed "conduct of comparable seriousness"); *Kirk v. CSX Transportation Corp*., 988 F.2d 507 (4th Cir. 1993) (to be relevant, comparator evidence must be of persons who, qualitatively and quantitatively, committed the same infractions); *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994) (same); *Nelms v. Ross Stores, Inc.*, 853 F.Supp. 883 (M.D.N.C. 1994) (not enough to show others also gossiped if plaintiff gossiped about management); *Afande v. National Lutheran Homes*, 868 F.Supp. 795, 802 (D. Md. 1994) (not enough to show others committed the same infractions and had a similar number of infractions if plaintiff's infractions were more frequent).

In this case, McKnight has raised only two possible comparators. He has misrepresented the facts concerning these comparators. McKnight alleged that white Pickens Police Officers Noe Suddeth and Braden Wimpey dated an underage "teenage" female named Amanda Smith (on separate occasions) and were not terminated. Suddeth and Wimpey did have a relationship with Smith, however, Smith testified that she was an adult and not a student at the time. (JA 85–87, 90, 94). In addition, no one testified that Chief Riggs was aware they were dating and Chief Riggs testified he had no knowledge of Suddeth or Wimpey dating anyone underage. (JA 98). Contrary to McKnight's assertions, Chief Riggs never acknowledged he thought

Suddeth or Wimpey unconsensually solicited an underage female student. The reference used by McKnight to support this claim says nothing of the sort. (JA 292). McKnight claims that the Chief mentioned Suddeth and Wimpey to him as being involved with "underage" female. Riggs denies this (JA 98) but, in any event, McKnight did not claim the Chief knew the female did not consent or that she was a student. Furthermore, it was conclusively established that the female (Smith) was not underage nor was she a student. (*infra*). Finally, there was no community complaint regarding their relationship. In short, neither Suddeth nor Wimpey are valid comparators.

McKnight's admitted misconduct, and inability to show dissimilar comparators conclusively establishes the City's legitimate and non-discriminatory reason for terminating him. His self-serving attempts to justify his admitted misconduct do not create a question of fact. *See*, *e.g.*, *Ham v. Washington Suburban Sanitary Comm'n*, 158 Fed. App'x 457 (4th Cir. 2005) (summary judgment proper where plaintiff admitted his behavior was abrupt); *Vandevander v. Voorhaar*, 29 Fed. App'x 169 (4th Cir. 2002) (dismissal of termination claim upheld when plaintiff could not rebut the employer's reason for termination even if Plaintiff had engaged in protected conduct or was harassed); *Campbell v. University of Akron*, 211 Fed. App'x 333, 348, 2006 WL 2986404, 12 (6th Cir. 2006) ("because Campbell cannot rebut as pretext the University's legitimate non-discriminatory reason for hiring Grizer, he cannot prevail on this claim"); *Boone v. Galveston Independent*

School Dist., 126 Fed. App'x 660, 662 (5th Cir. 2005) (same); *Kahl v. The Mueller Co., a Tyco Intl. Ltd. Co.*, 1999 Westlaw 196556, 5 (6th Cir. 1999) ("the district court correctly found that he cannot rebut Mueller's legitimate, nondiscriminatory reasons for terminating his employment, to wit-poor performance").

McKnight alleges that inconsistent, or varying reasons were given for his discharge. This is simply untrue. The underlying reason was always McKnight's conduct toward Nelms. The fact that this conduct was described as "conduct unbecoming" and, in another document, as "contributing to the delinquency of a minor," amounted to slight variations in description of what McKnight did. For a "shifting" reason to suggest pretext, it must be an "inconsistent, post hac explanation." *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 647 (4th Cir. 2002). "Different or varying explanations that are not materially inconsistent may not be suggestive of pretext." *Furlow v. Donahoe*, No. 1:11CV862, 2013 WL 595915, at *8 (M.D.N.C. Feb. 15, 2013) (*citing Baldwin v. England*, 137 Fed. App'x 561, 564–65 (4th Cir. 2005) (unpublished) ("the Navy's proffer of consistent, though varying, reasons that [plaintiff] could not be promoted fails to support an allegation that any of those reasons are false, much less that all of them are a pretext for discrimination"). McKnight's argument doesn't rise to the point of a shifting reason. In fact, the descriptions cannot even fairly be described as "varying."

For these reasons, the Court of Appeals should be affirmed as to the dismissal of McKnight's claims of

racial and sexual-orientation discrimination, including his civil rights causes.

The Court May Consider the Strength of the Employer's Non-Discriminatory Reason Against Plaintiff's Weak (if any) Showing

Even if McKnight had made some weak showing of a case through Perry's testimony and McKinney's alleged statements, that weak showing can (and should) be determined to be overwhelmed by the City's strong reason for termination. McKnight sexually solicited a minor who was a student at a school he worked in as an SRO. He admitted it. It is hard to imagine a more compelling reason for terminating a person who so abuses their position of trust. The court can, and should, affirm in these circumstances. *E.g.*, *Burns v. AAF–McQuay, Inc.*, 96 F.3d 728, 732 (4th Cir. 1996) (in evaluating whether plaintiff has adduced a sufficient quantity of proof, the court may consider the relative strength of the employer's asserted non-discriminatory reasons); *Stoyanov v. Winter*, 2006 WL 5838450, at *11 (D. Md. July 25, 2006), aff'd, 266 Fed. App'x 294 (4th Cir. 2008) ("In evaluating whether the plaintiff has adduced a sufficient quantity of proof, the court may consider the relative strength of the employer's asserted non-discriminatory reasons."). *See Reeves v. Sanderson Plumbing Prod., Inc*., 530 U.S. 133, 148 (2000) ("an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether

the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred").

The overwhelming misconduct of McKnight clearly outweighs the indirect and vague circumstantial evidence (if any) related to Perry and McKinney.

Finally, McKnight argues that only a jury can be permitted to decide if he committed a wrong and or whether it is possible Chief Riggs had orientation bias in his heart. Appellant simply is incorrect. It is, of course, well-established that he must present evidence of illegal bias. Whether or not he actually committed an illegal act, or even an immoral one, is irrelevant. An employer may take an adverse action for any reason, provided it is not a reason expressly prohibited by law. It is not for the courts to decide if the employer was wise, or even correct. *See*, *e.g.*, *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000) (*quoting DeJarnette v. Cornin Inc.*, 133 F.3d 293, 299 (4th Cir. 1998)); *DeJarnette v. Corning, Inc.*, 133 F.3d 293, 299 (4th Cir. 1998) (A federal court "does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination); *Anderson v. Westinghouse Savannah River Co.*, 418 F.3d 393, 394 (4th Cir. 2005). ("[w]e do not sit as a super-personnel department weighing the prudence of employment decisions made by the defendants."); *Ptasznik v. St. Joseph Hosp.*, 464 F.3d 691, 697 (7th Cir. 2006) ("we do not sit as a super-personnel department with authority" to correct an employer's decision that is unwise or unfair); *Gordon v. United*

Airlines, Inc., 246 F.3d 878, 889 (7th Cir. 2001) ("[W]e do not sit as a super-personnel department that will second guess an employer's business decision.").

Although McKnight accuses the district court of having improperly determined facts, he does not specifically mention any material fact. Indeed, his conclusion is based on a misunderstanding of discrimination law. The lower court did nothing more than note the legitimate and non-discriminatory reason utilized by the City to terminate McKnight and also the fact that McKnight had not presented an issue of fact to show that reason was pretext for discrimination.

CONCLUSION

For the foregoing reasons, the Respondents request the Court of Appeals' decision be affirmed.

Respectfully submitted,

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