

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: July 27, 2022

Ms. Sheila Gray
P.O. Box 708
Farmington Hills, MI 48332

Re: Case No. 21-1657, *Sheila Gray v. City of Detroit, MI*
Originating Case No. 2:18-cv-12146

Dear Ms. Gray,

The Court issued the enclosed Order today in this case. Judgment to follow.

Sincerely,

s/Gretchen Abruzzo, Case Manager for
Julie Connor, Case Manager
Direct Dial No. 513-564-7033

cc: Ms. Kinikia D. Essix
Ms. Letitia C. Jones

Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION

No. 21-1657

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jul 27, 2022

DEBORAH S. HUNT, Clerk

SHEILA GRAY,)
)
 Plaintiff-Appellant,)
)
 v.) ON APPEAL FROM THE UNITED
) STATES DISTRICT COURT FOR
 CITY OF DETROIT, MI,) THE EASTERN DISTRICT OF
) MICHIGAN
)
 Defendant-Appellee.)
)
)

ORDER

Before: SUTTON, Chief Judge; GUY and COLE, Circuit Judges.

Sheila Gray, a pro se Michigan resident, appeals a district court judgment in favor of the defendant, the City of Detroit (the City), after a jury trial on Gray's claim of failure to accommodate under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Gray is a former police officer for the City. She asserted claims under the ADA and the Michigan Persons with Disabilities Civil Rights Act, Mich. Comp. Laws § 37.1101 et. seq., for disparate treatment, harassment, failure to accommodate, and retaliation, as well as claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and Michigan's Elliott-Larsen

Civil Rights Act, Mich. Comp. Laws § 37.2101 et seq., for discrimination and retaliation. Gray sought economic and non-economic (i.e., emotional) damages, costs, and fees.

After discovery, upon the City's motion, the district court entered summary judgment in favor of the City on all claims except Gray's failure-to-accommodate claim. The case then proceeded to trial on that claim, and a jury found in favor of the City.

On appeal, Gray (1) challenges the jury's verdict, (2) maintains that Sergeant Carlos Dennis, her former supervisor, should have been sequestered, (3) argues that Dr. Gerald Alan Shiener, a psychiatrist, should not have been allowed to testify without a consent waiver from her, (4) challenges the amendment to a jury instruction, and (5) argues that the district court erred in admitting certain documents into evidence.

Challenge to Jury Verdict

Gray argues that the evidence does not support the jury's verdict. But this argument is not properly before us because Gray failed to preserve the issue for appellate review by raising it in a motion for a new trial under Federal Rule of Civil Procedure 50(b) or 59. *See Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 403-05 (2006) (holding that a litigant "forfeit[s]" the right to have an appellate court review the sufficiency of the evidence where the litigant fails to file "an appropriate postverdict motion in the district court"); *Pennington v. Western Atlas, Inc.*, 202 F.3d 902, 911 (6th Cir. 2000) (holding that the failure to move for a new trial "precludes appellate review" of argument that jury's verdict was against great weight of the evidence). The Supreme Court has emphasized that an appellate court cannot review the sufficiency of evidence after trial absent a post-verdict motion, reasoning that "[a] postverdict motion is necessary because '[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart.'" *Unitherm*, 546 U.S. at 405 (second alteration in original) (quoting *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947)).

Moreover, Gray's argument "is forfeited twice over" because she has failed to make any specific evidentiary challenge to the jury's verdict on appeal. *Hanover Am. Ins. Co. v. Tattooed*

Millionaire Ent., LLC, 974 F.3d 767, 779 (6th Cir. 2020). She merely reasserts some of her allegations and generally questions what evidence the jury relied upon to find in favor of the City. But “[a] party may not raise an issue on appeal by ‘mention[ing it] . . . in the most skeletal way, leaving the court to . . . put flesh on its bones.’” *United States v. Hendrickson*, 822 F.3d 812, 829 n.10 (6th Cir. 2016) (second alteration in original) (quoting *United States v. Robinson*, 390 F.3d 853, 886 (6th Cir. 2004)).

In short, because Gray did not raise her challenge to the verdict in a post-trial motion and has further failed to sufficiently challenge the verdict on appeal, we are prevented from entertaining her argument that the verdict lacks evidentiary support.

Presence of Dennis at Trial

Gray maintains that the district court erred in denying her motion to sequester Dennis, her former supervisor. A district court’s decision regarding sequestration of witnesses is reviewed for an abuse of discretion. *Roberts v. Galen of Va., Inc.*, 325 F.3d 776, 784 (6th Cir. 2003).

In denying Gray’s motion to sequester, the district court explained that Dennis is an employee of the City and was designated as the City’s representative at trial and, therefore, Federal Rule of Evidence 615(b) did not authorize his exclusion at trial. *See* Fed. R. Evid. 615(b) (providing an exception to sequestration when the witness is “an officer or employee of a party that is not a natural person, after being designated as the party’s representative by its attorney”). This was not an abuse of discretion.

Amendment to Jury Instruction No. 37

Next, Gray argues that the district court erred in amending Jury Instruction No. 37. This argument is subject to plain error review because Gray did not object to this instruction. *See Cranpark, Inc. v. Rogers Grp., Inc.*, 821 F.3d 723, 736 (6th Cir. 2016).

Jury Instruction No. 37 initially read, in pertinent part, that “[s]ix out of eight jurors are required to reach a verdict.” But after one of the jurors was dismissed during trial, the district court amended Jury Instruction No. 37 to provide that “[s]ix out of seven jurors are required to reach a verdict.” This amended instruction was proper to reflect the dismissal of one of the jurors.

Admission of Dr. Shieners’ Testimony and Report

Gray also argues that the district court erred in admitting Dr. Shiener's testimony and his independent medical examination (IME) report because she never consented to waiving her privacy rights under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The City had hired Dr. Shiener to conduct a "fitness for duty examination" of Gray, and his notes and findings from that assessment were compiled in an IME report. Dr. Shiener testified about what information Gray had given him as it relates to her claims for failure to accommodate and emotional damages (e.g., information about her workload and health ailments).

As an initial matter, Gray agreed to have Dr. Shiener testify, as indicated in the parties' joint pretrial order. And at trial, although Gray initially objected to the relevance of Dr. Shiener's testimony, she then proceeded to question Dr. Shiener about his conversation with her. Gray never objected that Dr. Shiener's testimony and report should be excluded on privacy grounds.

Fatal to Gray's argument, though, is that Dr. Shiener's report expressly states that Gray "understood . . . that the information disclosed during the course of [the] evaluation *was not to be considered privileged and would be disclosed to the consulting party.*" (emphasis added). In other words, the record shows that Gray expressly waived any rights that she has under HIPAA with respect to her conversation with Dr. Shiener. *See Nyce v. Jones*, No. 20-4013, 2021 U.S. App. LEXIS 31298, at *13-14 (6th Cir. Oct. 18, 2021) (finding no HIPAA violation when medical documents were disclosed because the person whose medical documents were at issue had "waived her right to confidentiality as to these documents"). Similarly, plaintiffs, like Gray, who place their mental health at issue and who seek emotional damages, waive any applicable privileges or statutory protections that their medical records would have otherwise had. *See Simon v. Cook*, 261 F. App'x 873, 886 (6th Cir. 2008). Gray's argument that Dr. Shiener's testimony and report should have been excluded at trial therefore is without merit.

Admission of Exhibit

Finally, Gray argues that the district court erred in admitting "Exhibit # into evidence." But she does not identify this exhibit or its contents, so this court cannot assess whether, as Gray claims, the exhibit was irrelevant, wrongfully withheld during discovery, or admitted without allowing her an opportunity to question witnesses about it. We therefore reject this argument.

For these reasons, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 27, 2022
DEBORAH S. HUNT, Clerk

No. 21-1657

SHEILA GRAY,

Plaintiff-Appellant,

v.

CITY OF DETROIT, MI,

Defendant-Appellee.

Before: SUTTON, Chief Judge; GUY and COLE, Circuit Judges.

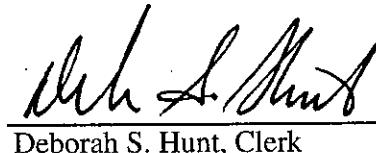
JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was submitted on the
briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court
is AFFIRMED.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHEILA D. GRAY,

Plaintiff,

vs.

Case No. 2:18-cv-12146
HON. MARK A. GOLDSMITH

CITY OF DETROIT,

Defendant.

JUDGMENT

A jury trial was conducted in this matter on September 14, 15, 17, 20, and 23, 2021. The jury returned a verdict in favor of Defendant the City of Detroit and against Plaintiff Sheila Gray on Plaintiff's claim failure-to-accommodate claim under the Americans with Disabilities Act.

In accordance with the jury's verdict, the Court enters a judgment of no cause of action in favor of Defendant and against Plaintiff, with costs and fees as allowed by law.

Dated: September 23, 2021
Detroit, Michigan

s/ Mark A. Goldsmith
MARK A. GOLDSMITH
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on September 23, 2021.

s/J. McCoy for Karri Sandusky
KARRI SANDUSKY
Case Manager

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHEILA D. GRAY,

Plaintiff,

vs.

Case No. 2:18-cv-12146
HON. MARK A. GOLDSMITH

CITY OF DETROIT,

Defendant.

VERDICT FORM

On the failure to accommodate claim of Plaintiff Gray, we, the Jury, find in favor of (check one):

Plaintiff Sheila Gray

Defendant City of Detroit.

If the above finding is in favor of Defendant City of Detroit, have your foreperson sign and date this form because you have completed your deliberation on this claim.

If the above finding is in favor of Plaintiff Gray, complete the following paragraphs:

We find Plaintiff's non-economic damages to be:

\$ _____ (state the amount or, if none, write the word "none").

We award Plaintiff back pay, as follows:

\$ _____ (state the amount or, if none, write the word "none")

We award Plaintiff front pay, as follows:

\$ _____ (state the amount or, if none, write the word "none").

DATE: 9-23-21

s/ Jury Foreperson

In compliance with the Privacy Policy
adopted by the Judicial Conference, the
verdict form with the original signature has
been filed under seal

s/ Jury Foreperson

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHEILA DENISE GRAY,

Plaintiff,

Civil Action No. 18-12146
HON. MARK A. GOLDSMITH

vs.

CITY OF DETROIT.

Defendant.

OPINION & ORDER

**(1) ADOPTING IN PART AND REJECTING IN PART THE AMENDED REPORT AND
RECOMMENDATION OF THE MAGISTRATE JUDGE DATED JANUARY 3, 2020
(Dkt. 41); (2) SUSTAINING IN PART AND OVERRULING IN PART DEFENDANT'S
OBJECTIONS (Dkt. 42); (3) AND GRANTING IN PART AND DENYING IN PART
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Dkt. 26)**

Plaintiff Sheila Denise Gray, proceeding pro se, filed this Title VII and American with Disabilities (“ADA”) action against Defendant City of Detroit. The matter was referred to Magistrate Judge David R. Grand for all pretrial proceedings. See Order of Referral (Dkt. 10). On January 6, 2020, the magistrate judge issued a Report and Recommendation (“R&R”) recommending the Court grant in part and deny in part the City’s motion for summary judgment (Dkt. 39). Because some of the City’s exhibits contained Gray’s personal identifying information, the magistrate judge granted the City’s motion to strike those exhibits (Dkt. 40), and issued an Amended R&R citing corrected exhibits (Dkt. 41).

In the Amended R&R, the magistrate judge recommended granting the City’s motion for summary judgment on all but Gray’s failure to accommodate claims. The magistrate judge instructed the parties that they had fourteen days to file objections to the R&R. The City objected to the magistrate judge’s recommendation that its motion be denied as to the failure to

accommodate claims. Gray has not filed objections to the R&R, and the time to do so has expired. See Fed. R. Civ. P. 72(b)(2).¹

For the reasons that follow, the Court sustains in part and overrules in part the City's objections.

I. BACKGROUND

The factual and procedural background has been adequately set forth by the magistrate judge and need not be repeated here in full. In relevant part, Gray is a retired City of Detroit police officer who suffered a knee injury in 2006 while on duty. R&R at 1-2. She went on restricted duty status in 2011. Id. at 2. She was placed at the Records and Identification Unit ("ID Unit"), where she was assigned clerical duties, such as fingerprinting, background checks, and sex offender registration. Id. Restricted duty positions are used as temporary accommodations to allow officers to rehabilitate and, if possible, return to active duty. Id. Although Gray made annual requests to make her position with the ID Unit permanent, she remained on restricted duty status at the ID Unit until her retirement in November 2016. Id.

In the summer of 2016, Gray took Family and Medical Leave Act leave. Id. at 3. In August, Gray's doctor issued restrictions indicating that she could perform light work, but that she could not walk for prolonged distances and could not stand for prolonged periods. Id. When Gray returned to work in August, her supervisor moved her workstation to the back of the office, which, according to Gray, caused her to walk and stand for longer durations than her doctor had recommended. Id. at 4. In September 2016, Gray applied for retirement due in part to the increased

¹ Gray filed an untimely motion for an extension of time to respond to the City's objections (Dkt. 47). Under Federal Rule of Civil Procedure 6, a court may grant an untimely motion for more time, for good cause shown, if a party failed to act because of excusable neglect. Gray does not set forth any basis for extending her time to respond to the City's objections to the R&R in her motion. Therefore, the motion is denied.

strain on her knee at work. Id. A few weeks later, a doctor found Gray was permanently incapacitated and unable to perform twelve of the twenty-four “essential functions” of a City of Detroit Police Officer. Id. at 4-5. The City found Gray’s knee condition to be a disability, and granted Gray’s retirement application. Id. at 5. Gray’s last day of work was in November 2016. Id.

II. STANDARD OF DECISION

The Court reviews de novo any portion of the R&R to which a specific objection has been made. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); Alspaugh v. McConnell, 643 F.3d 162, 166 (6th Cir. 2011) (“Only those specific objections to the magistrate’s report made to the district court will be preserved for appellate review; making some objections but failing to raise others will not preserve all the objections a party may have.”). Any issues raised for the first time in objections to an R&R are deemed waived. Uduko v. Cozzens, 975 F. Supp. 2d 750, 757 (E.D. Mich. 2013) (citing Murr v. United States, 200 F.3d 895, 902 n.1 (6th Cir. 2000) (“[I]ssues raised for the first time in objections to magistrate judge’s report and recommendation are deemed waived.”)).

III. ANALYSIS

The magistrate judge found in the City’s favor on all but Gray’s reasonable accommodation claims under Michigan’s Persons with Disabilities Civil Rights Act (“PWD CRA”) and the Americans with Disabilities Act (“ADA”). The City argues that the magistrate judge erred by (i) finding that Gray was disabled within the meaning of the PWD CRA, and that she was otherwise qualified for her position as a police officer within the meaning of the ADA; (ii) finding that Gray’s work duties worsened her disability; and (iii) finding that there is a fact question related to whether Gray requested an accommodation. The City’s arguments will be taken in turn.

A. PWDCRA/ADA

The City argues that the magistrate judge erred by not giving Peden v. City of Detroit, 680 N.W.2d 857, 860 (Mich. 2004), controlling weight on Gray's PWDCRA claim. Obj. at 2. As noted in the R&R, because the ADA and the PWDCRA have similar purposes and burden requirements, claims under both Acts are often analyzed together. See R&R at 23 n.13. Indeed, the magistrate judge analyzed the two claims in this case together. However, as explained in Peden, the PWDCRA and ADA are not identical in all respects. Peden, 680 N.W.2d at 870. This is one of those rare instances where the Acts do not lend themselves to identical analysis.

In Peden, a City of Detroit police officer was placed on restricted duty after suffering a heart attack while performing clerical tasks consistent with his clerk position. Id. at 860. The officer remained in his clerical position for some time before taking a position with the City's Crime Analysis Unit. Id. After ten years on restricted duty, the City placed the officer on involuntary disability retirement/because he could not perform the "24 Essential Job Functions of a Law Enforcement Officer" ("EFL"), which included functions such as pursuing suspects on foot, effecting forcible arrests, and overcoming violent resistance. Id. There was no dispute that the officer could not perform all EFL tasks. Id. at 873. Therefore, even though the officer was not performing patrol officer duties, the Michigan Supreme Court held that because the officer could not perform all EFL tasks, with or without an accommodation, his PWDCRA and ADA claims could not survive summary disposition. Id. at 872-873.

Gray's PWDCRA claim is indistinguishable from the officer's claim in Peden. Gray was a City of Detroit police officer who was placed on restricted duty because of a knee injury. She performed largely clerical tasks for nearly six years, and she cannot perform twelve of the EFL tasks. R&R at 4-5. Therefore, the City's objection to the R&R based on Peden is sustained,

because the R&R failed to consider the Michigan Supreme Court's interpretation of the PWDCRA with respect to Michigan police officers placed on restricted duty and years later forced to retire for failing to meet the EFL applicable to all Michigan police officers regardless of job duties. Gray's claim under the ADA, however, fares better.

The City argues that the magistrate judge erred by using Gray's restricted duty position at the ID Unit, rather than her position as an active duty officer, when considering her ADA claim. Obj. at 2-3. The City argues that Gray cannot show that she was otherwise qualified to perform her duties as an active duty officer. Id. at 3. The City's argument misses the mark.

The magistrate squarely addressed and rejected the City's argument that Gray should be measured by her active police officer position. R&R at 26-27. As noted in the R&R, "an employer has a duty under the ADA to consider transferring a disabled employee who can no longer perform his old job even with accommodation to a new position within the [c]ompany for which that employee is otherwise qualified." Kleiber v. Honda of Am. Mfg., Inc., 485 F.3d 862, 869 (6th Cir. 2007) (quoting Burns v. Coca-Cola Enters., Inc., 222 F.3d 247, 257 (6th Cir. 2000)). Gray worked in the ID Unit for almost six years, and, according to Gray, she only retired because her supervisor changed her workstation. R&R at 27. Gray's position was not eliminated, and she had otherwise been able to perform the functions of that position for many years. Therefore, Gray has met her burden of showing that with a reasonable accommodation (returning her to the previous workstation) she was otherwise qualified for the position at the ID Unit.

B. Worsened Condition

In its second argument, the City argues that Gray's condition could not have worsened by moving her workstation. See Obj. at 3. It argues that Gray was required to walk the same distance regardless of whether her workstation was in the front or in the back of the ID Unit because at least

two of her duties, working the front counter and tending to the fax machine, were at opposite ends of the office. Id. However, even assuming the layout of the office is as the City represents it is, its argument does not account for frequency of the tasks. If Gray spent most of her time at the front desk, then being moved further away from the front desk would necessarily increase the amount of time she spent walking. Whether that increase in walking worsened Gray's disability is a fact question for a jury and cannot be decided on a motion for summary judgment.

C. Request for Accommodation

In its final argument, the City argues that the magistrate judge erred by finding that Gray requested an accommodation. Obj. at 3-4. The City argues that Gray did not affirmatively request an additional accommodation (presumably being moved back to her previous workstation). Id. at 4. The City is mistaken.

The City is correct that it is not required to speculate as to the extent of an employee's disability or the employee's need for an accommodation. Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1046-1047 (6th Cir. 1998). However, as the magistrate judge explained, there is "no bright-line test for when the form of an employee's request is sufficiently clear to constitute a request for an accommodation," Judge v. Landscape Forms, Inc., 592 F. App'x 403, 407 (6th Cir. 2014), and "an employee need not use the magic words 'accommodation' or even 'disability,'" Leeds v. Potter, 249 F. App'x 442, 449 (6th Cir. 2007). The request can be made clear "from the context that it is being made in order to conform with existing medical restrictions." Leeds, 249 F. App'x at 449.

The magistrate judge observed that whether Gray made a request for an accommodation is a close call. R&R at 29. Nonetheless, the magistrate judge found that Gray's comments to her supervisor that she wanted to move closer to her former workstation so that she would not need to

walk as much, and her subsequent comment to the same supervisor that working the counter violated her restrictions, were clear enough to survive summary judgment. Id. at 30. The Court agrees. This does not, as the City argues, put the onus on the City to understand and propose an accommodation. Obj. at 5. A jury could reasonably find that Gray's comments were clear enough under the circumstances to inform her employer of her disability and the desire for an accommodation. Nothing more is required to survive a summary judgment motion.

IV. CONCLUSION

For the reasons stated above, the City's objection to the R&R with respect to Gray's PWDCRA claim is sustained. All other objections are overruled. The magistrate judge's R&R (Dkt. 41) is adopted in part and rejected in part. The City's motion for summary judgment (Dkt. 26) is denied as to Gray's reasonable accommodation claim under the ADA, and granted in all other respects.²

SO ORDERED.

Dated: February 18, 2020
Detroit, Michigan

s/Mark A. Goldsmith
MARK A. GOLDSMITH
United States District Judge

² The parties also filed motions to strike (Dkts. 43 & 45) portions of the City's motion for summary judgment because the City inadvertently included personal identifiers in the filings. The City moved to strike Exhibits 12 and 13 (Dkts. 26-12 & 26-13) and refiled redacted versions of the Exhibits. The City's motion to strike (Dkt. 45) is granted. Gray's motion to strike does not explain what "Private and Personal Information" is contained in the remainder of the City's Exhibits. To the extent that Gray desires to have further documents struck, redacted, or sealed, Gray should confer with opposing counsel regarding potential HIPAA protections and whether counsel would oppose sealing medical records. Gray's motion to strike (Dkt. 43) is denied without prejudice. If the parties agree on further corrections to the record, counsel for the City can submit a stipulated proposed order through the utilities function of ECF.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on February 18, 2020.

s/Karri Sandusky
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHEILA D. GRAY,

v.

Plaintiffs,

Civil Action No. 18-12146

Honorable Mark A. Goldsmith

Magistrate Judge David R. Grand

CITY OF DETROIT,
a municipal corporation,

Defendant.

AMENDED REPORT AND RECOMMENDATION TO GRANT IN PART AND DENY IN PART DEFENDANT CITY OF DETROIT'S MOTION FOR SUMMARY JUDGMENT [26]

Before the Court is Defendant City of Detroit's ("City") Motion for Summary Judgment which was filed on June 21, 2019. (ECF No. 26.) Plaintiff Sheila D. Gray ("Gray") filed a response to the City's motion on July 26, 2019 (ECF No. 31), and the City filed a reply on August 1, 2019. (ECF No. 33.)

An Order of Reference was entered on August 3, 2018, referring all pretrial matters to the undersigned pursuant to 28 U.S.C. § 636(b). (ECF No. 10.) The Court heard oral argument on September 17, 2019, and the parties then filed supplemental briefs. (ECF No. 37; No. 38.)

I. RECOMMENDATION

For the reasons set forth below, **IT IS RECOMMENDED** that the City's Motion for Summary Judgment (ECF No. 26) be **GRANTED IN PART AND DENIED IN PART**.

II. REPORT

A. Background

Plaintiff Sheila Gray worked for the Detroit Police Department from November 15, 1999, through November 9, 2016. (ECF No. 26, PageID.130-133; ECF No. ECF No. 7, Page ID.28-35.)

In 2006 she suffered an injury to her knee, which, after a lengthy dispute resolution process, was determined to have been an “on duty” injury. Gray went on restricted duty status effective February 28, 2011, due to her knee. (ECF No. 26-3, PageID.496.)

She was then placed at the Records and Identification Unit (sometimes referred to as “Ident.”) at the Third Precinct – a facility where officers handle clerical assignments, like fingerprinting, background checks, and sex offender registration. (ECF No. 36-1 (“Gray dep.”) at 35).¹ Gray knew these “restricted duty” positions were not “permanent” and instead are “used as an accommodation to allow the officer to rehabilitate and hopefully return to their command as an active duty officer.” (*Id.*, at 26-27; ECF No. 37-2, PageID.1265.) Accordingly, after being placed at Ident., Gray put in annual requests to remain there in a “permanent” capacity, with her last request being made on February 15, 2015. (Gray dep., at 26-29, 77; ECF No. 26-6). Two other employees – Charles Barnes (white male) and Carole Furstenau (white female) secured permanent Ident. positions, and Gray alleges those placements were discriminatory against her based on her race. (Gray dep., at 107-08.) While the record is not entirely clear as to the specific dates of those placements, Gray alleges that Barnes and Furstenau were “permanently transferred into Ident. in 2015.” (ECF No. 31, PageID.593, 610-11.) While Gray never received a “permanent” Ident. position, she remained in her position at Ident. from the time she was first placed there in early 2011 through November 9, 2016, when she retired.

Gray experienced numerous work problems in the interim at Ident. She experienced stress

¹ Gray alleges that this position was given to her to accommodate her restrictions from “prolonged sitting, standing, or walking”, but she provides no evidence that a doctor imposed these restrictions at this time. (ECF No. 7, PageID.31.) Indeed, the medical evidence Gray supplied from that time simply indicates that she would experience “limitation of mobility (left knee) intermittently,” that she would need time off work only “when exacerbation occurs,” and that she was “able to work when she does not have flare up.” (ECF 31-1, PageID.753-55.)

at work for which she sought medical treatment. (ECF 36-1, PageID.1036-1043.) In 2015, the Ident department moved locations to the Detroit Detention Center. (Gray dep., at 68). This was a larger facility, and required Gray to sometimes stand at the counter during the day, and then walk from the counter to a file area to retrieve files. (*Id.*) According to Gray, this involved “a lot of walking” and “a lot of standing,” and thus “went against [her] duty restrictions.” (*Id.*) However, a doctor’s note from January 2015 contained no specific functional restrictions, but merely limited Gray to “light duty.” (ECF No. 31-1, PageID.781.)

In October of 2015, Gray filed an internal complaint against co-worker Andre Sigmon regarding an incident that occurred between the two in the workplace on October 17, 2015. (Gray dep., at 83-88.) According to Gray, she was working at a particular computer, and Sigmon entered the room and turned off her computer so that he could use it. (*Id.*) Gray admits that she had no idea what caused Sigmon to behave in that manner, but importantly, she did not testify that it was on account of her race, sex, or disability. (*Id.*) After Gray reported the incident to her supervisor, Sergeant Carlos Dennis, he recommended that Sigmon be given a written reprimand. (ECF No. 26-11.) Sigmon was in fact reprimanded for failing to “use command of temper” and “to show courtesy” to a co-worker. (ECF No. 38, PageID.1387.)

A number of months later, in the summer of 2016, Gray went on Family and Medical Leave Act leave due to mental health issues, and was scheduled to return on August 1, 2016.² (ECF NO. 36-1, PageID.1043.) On August 3, 2016, Gray’s doctor issued restrictions as to her physical limitations, indicating that she could perform “light work,” but could not walk for “prolonged” distances, and could not stand for “prolonged” periods. (ECF No. 36-1, PageID.1044.) The doctor

² It appears that Gray actually returned to work on August 2, 2016, and the Court will use that date. (Gray dep. at 37-38; ECF No. 36-1, PageID.1041; ECF No. 31, PageID.594.)

also found that Gray could sit for an hour at a time, but then was required to “be up” for 10-15 minutes before sitting again. (*Id.*)

Gray alleges that upon her return from that leave, her supervisor, Sergeant Dennis, subjected her to different terms and conditions of employment based on her race, sex, and disability, and retaliated against her for having filed the complaint against Sigmon. (ECF No. 36-1, PageID.1205.) Among other allegations, Gray claims that Dennis moved her work station to the back of the office and assigned her to work the counter, which caused her to have to walk and stand more than her restrictions allowed. (ECF No. 7, PageID.30; ECF No. 31-1, PageID.741-742, 772-776.) Gray also claims that other employees began to treat her in a hostile manner and tried to sabotage her work. (*Id.*)

Gray testified that as a result of these actions, she “was forced to retire . . . where the environment was so hostile and demeaning and disgrading [sic], [she] wasn’t able to take it no more.” (Gray dep., at 110.) On September 23, 2016, Gray applied for retirement due to an alleged “permanent disability.” (ECF No. 36-1, PageID.1225.) While Gray alleges in this lawsuit that her retirement resulted from her inability to work in the “hostile environment” she describes, her application for permanent disability was based *solely* on her knee impairment and alleged inability to walk. (*Id.*) Specifically, when asked to give the “full explanation of the nature and causes of your disability,” Gray answered:

Severe degenerative arthritis in my left knee and [cyst] it causes pain and swelling in my whole leg. Over the years my injury to my right leg has worsen[ed] due to overworking it . . . My condition is permanent and at times I can’t walk at all . . .

(*Id.*)

A few weeks later, Gray was evaluated by Dr. Melvin C. Murphy, M.D. (ECF No. 31-2, PageID.794-97.) On a form provided by the City, Dr. Murphy found that Gray was “permanently

incapacitated" and that she was unable to perform twelve of the twenty four "essential functions" of a City of Detroit Police Officer. (*Id.*)³ Thereafter, the City granted Gray's retirement application, specifically finding that it was her knee condition that disabled her, and her last day of work was November 9, 2016. (ECF No. 26-13.)

After some sort of "correspondence" to the EEOC in June 2017, and again on September 21, 2017, *see infra* at 11-13, Gray filed a formal EEOC complaint on September 27, 2017, alleging disability, race and sex discrimination, stating:

On or about October 17, 2015, I filed a hostile work environment complaint against my co-worker [Sigmon]. From approximately June 2016 until September 2, 2016⁴ I was out on leave. When I returned from my leave my supervisor subjected me to different terms and conditions of employment based on my race (African American) and sex (female) and retaliated against me for having filed my complaint by moving my work location making my known disability worse. Then on November 9, 2016 I was forced to retire. I feel I was forced to retire in retaliation for having made [m]y complaint against my coworker [Sigmon].

I believe I have been discriminated against on the basis of my . . . disability by . . . having my work location moved . . .

(ECF No. 36-1, PageID.1205.) (emphasis added)

After the EEOC investigated and found that it could not substantiate a violation of law occurred, it issued a right to sue notice on April 9, 2018, advising Gray that she could "file a lawsuit against [the City] under federal law based on this charge in federal or state court" within 90 days. (ECF No. 36-1, PageID.1206.) Gray then filed suit in this Court on July 9, 2018, and

³ Gray does not dispute that, in light of her knee condition and related restrictions, she was unable to perform all 24 essential functions of a City police officer as defined in the City's "Essential Job Functions of a Law Enforcement Officer" form (the "Essential Functions Form"). (ECF No. 31-2, PageID.795-97; Gray Dep., p. 99-106.)

⁴ This date appears to be an error, as the evidence shows that Gray returned to work on August 2, 2016. *See supra* at 3 n.2. Similarly, while it is worth noting that the EEOC complaint identifies the "earliest" date when the alleged discrimination took place as "September 2, 2016," this, too, relates to the date when Gray returned from leave – August 2, 2016. (ECF No. 36-1, PageID.1205.)

filed an amended complaint on July 27, 2018, asserting the following claims:

- Counts I and III – violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.* and the Michigan Persons with Disabilities Civil Rights Act (“PDCRA”), M.C.L. § 37.2101 *et seq.*, by subjecting Gray to disparate treatment and harassing her because of her disability, failing to accommodate her disability, and retaliating against her for filing complaints about that treatment;
- Counts II and IV –violation of Title VII, 42 U.S.C. § 2000e, *et seq.* and Michigan’s Elliott-Larsen Civil Rights Act (“ELCRA”), M.C.L. § 37.2101 *et seq.*, by discriminating against Gray because of her race and sex, and retaliating against her for filing complaints about that discrimination.

(ECF No. 7.) With discovery having closed, the City now moves for summary judgment as to all of Gray’s claims, arguing that she failed to exhaust her administrative remedies, failed to prove a *prima facie* case of discrimination on any basis, and failed to raise a material question of fact as to her failure to accommodate claim. (ECF No. 26.)

B. The Applicable Legal Standards

Pursuant to Rule 56, the Court will grant summary judgment if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Pittman v. Cuyahoga County Dep’t of Children & Family Servs.*, 640 F.3d 716, 723 (6th Cir. 2011). A fact is material if it might affect the outcome of the case under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a genuine issue of material fact exists, the Court assumes the truth of the non-moving party’s evidence and construes all reasonable inferences from that evidence in the light most favorable to the non-moving party. *See Ciminillo v. Streicher*, 434 F.3d 461, 464 (6th Cir. 2006). The Court’s function at the summary judgment stage “is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson*, 477 U.S. at 249.

The party seeking summary judgment bears the initial burden of informing the court of the

basis for its motion, and must identify particular portions of the record that demonstrate the absence of a genuine dispute as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Alexander v. CareSource*, 576 F.3d 551, 558 (6th Cir. 2009). “Once the moving party satisfies its burden, ‘the burden shifts to the nonmoving party to set forth specific facts showing a triable issue.’” *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 453 (6th Cir. 2001) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In response to a summary judgment motion, the opposing party may not rest on its pleadings, nor “rely on the hope that the trier of fact will disbelieve the movant’s denial of a disputed fact” but must make an affirmative showing with proper evidence in order to defeat the motion.” *Alexander*, 576 F.3d at 558 (quoting *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989)). Indeed, “[t]he failure to present any evidence to counter a well-supported motion for summary judgment alone is grounds for granting the motion.” *Id.* (quoting *Everson v. Leis*, 556 F.3d 484, 496 (6th Cir. 2009)). “Conclusory statements unadorned with supporting facts are insufficient to establish a factual dispute that will defeat summary judgment.” *Id.* at 560 (citing *Lewis v. Philip Morris, Inc.*, 355 F.3d 515, 533 (6th Cir. 2004)).

C. Analysis

1. *Timeliness of Gray’s EEOC Complaint*

The City first argues that Gray’s claims fail because she did not timely file her claim with the EEOC. (ECF No. 26, PageID.136-37.) This particular argument is only persuasive as to Gray’s claim that she was subjected to racial and sexual discrimination when the City, in 2015, placed Barnes and Furstenau in permanent Ident. positions instead of Gray.

Very recently, the Honorable Gershwin A. Drain explained the exhaustion process for claims brought under Title VII and the ADA:

Under Title VII, a claim for discrimination can proceed in federal district court only after administrative remedies are exhausted. 42 U.S.C. § 2000e-5(e); *Mitchell v. Chapman*, 343 F.3d 811, 820 (6th Cir. 2003). “It is well settled that a plaintiff must satisfy two prerequisites before filing a Title VII action in federal court: (1) timely file a charge of employment discrimination with the EEOC; and (2) receive and act upon the EEOC’s statutory notice of the right to sue.” *Granderson v. Univ. of Michigan*, 211 F. App’x 398, 400 (6th Cir. 2006). The EEOC charge “shall be in writing under oath or affirmation and shall contain such information and be in such form as the [EEOC] requires.” 42 U.S.C. § 2000e-5(b). The charge must be “sufficiently precise to identify the parties, and to describe generally the action or practices complained of.” 29 C.F.R. § 1601.12(b); *Williams v. CSX Transp. Co.*, 643 F.3d 502, 508 (6th Cir. 2011).

An employee seeking to bring a claim under the ADA must also first exhaust administrative remedies. *Jones v. Natural Essentials, Inc.*, 740 F. App’x 489, 492 (6th Cir. 2018). Analogous to Title VII, to properly exhaust administrative remedies under the ADA, a plaintiff must file a charge of discrimination within 300 days of the alleged discrimination. 42 U.S.C. § 12117 and *Sherman v. Optical Imaging Systems, Inc.*, 843 F. Supp. 1168, 1180-81 (E.D. Mich. 1994).

Stevens v. Concentrix Corp., No. 19-11530, 2019 WL 6728362, at *4 (E.D. Mich. Dec. 11, 2019).

The law differentiates between “distinct” claims of discrimination that accrued on a particular date and claims of ongoing discrimination that amount to a “hostile environment.” While the former must be brought within 300 days of the particular discriminatory act, hostile environment claims must be brought within 300 days of the last related act:

The “continuing violations” doctrine allows courts to toll limitation periods for alleged discriminatory conduct that is deemed continuing in nature. Under the “continuing violations” doctrine, where “there is an ongoing, continuous series of discriminatory acts, they may be challenged in their entirety as long as one of those discriminatory acts falls within the limitations period.” [] “To establish a continuing violation, plaintiff must first produce evidence of a current violation taking place within the limitations period. Second, plaintiff must show that the current violation ... is indicative of a pattern of similar discriminatory acts continuing from the period prior to the limitations period.” []

In Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), a Title VII action, the majority opinion written by Justice Thomas emphasized the clear distinction between applying the

continuing violations doctrine to “hostile environment claims” and applying it to “discrete claims of discrimination or retaliation.” As held in *Morgan*, “[e]ach incident of discrimination ... constitutes a separate actionable ‘unlawful employment practice’. [Plaintiff] can only file a charge to discrete acts that occurred within the appropriate time period.” In other words, when an employee seeks redress for discrete acts of discrimination or retaliation, the continuing violation doctrine may not be invoked to allow recovery for acts that occurred outside the limitations period.

Brown v. Donahoe, No. 2:10-CV-12374, 2012 WL 2115180, at *3 (E.D. Mich. June 11, 2012) (internal citations omitted), aff’d sub nom. *Brown v. Potter*, 516 F. App’x 563 (6th Cir. 2013).

a. Gray’s Race and Sex Discrimination Claims Based on the City’s Selection of Other Officers for “Permanent” Identification Unit Positions

As discussed above, one of Gray’s claims is that the City discriminated against her when it placed Barnes (white male) and Furstenau (white female) in permanent Ident. Unit positions instead of her. These are specific employment hiring decisions that constitute “discrete claims of discrimination.” *Morgan*, 536 U.S. at 114 (“Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable ‘unlawful employment practice.’”). “Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the [] 300-day time period after the discrete discriminatory act occurred.” *Id.*, at 113.

Here, Gray admits that the City’s selection of Barnes and Furstenau instead of her occurred in 2015. (ECF No. 31, PageID.593, 610-11.) Accordingly, Gray was required to file a charge of discrimination about those discrete acts of alleged discrimination within 300 days, or by approximately the end of October 2016, at the latest. It is undisputed that Gray did not do so, as the earliest date she filed her EEOC charge was June 29, 2017. *See infra* at 11-12. The City is therefore entitled to summary judgment as to Gray’s claims based on Barnes and Furstenau being

selected for permanent Ident. positions.⁵ ⁶

b. Gray's Other Race, Sex, and Disability Discrimination Claims

A different analysis applies to Gray's other claims of race, sex, and disability discrimination, which all involve claims by Gray that she was subjected to repeated and pervasive instances of race, sex and disability discrimination over a lengthy period of time, and which allegedly resulted in Gray being "forced" to retire on November 9, 2016. As the U.S. Supreme Court explained in *Morgan*:

Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. [] The "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.

* * *

Given, therefore, that the incidents constituting a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim. In order for the charge to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment.

Morgan, 536 U.S. at 115-118.

⁵ This discrete claim is also subject to dismissal because it arose prior to her return to work on August 2, 2016. *See infra* at 13-14.

⁶ In her summary judgment response brief, Gray asserts that an African American male employee, John Hall, was also placed into a permanent Ident. position. (ECF No. 31, PageID.611.) However, Gray fails to raise a material issue of fact as to Hall. First, when discussing the issue of the permanent Ident. positions in her complaint, Gray referenced only "white male and female co-workers" as comparators. (ECF No. 7, PageID.38.) Similarly, when asked at her deposition how she was discriminated against on the basis of race, Gray responded by pointing to Furstenau's and Barnes' alleged permanent Ident. placements. (Gray dep., at 107-08.) However, when, in the very next set of questions Gray was asked, "how is it that you were discriminated against based on your sex," she did not mention Hall's alleged permanent Ident. placement. (*Id.*, at 108.) Indeed, Gray has provided no evidence whatsoever about Hall's alleged permanent Ident. placement, and her mere reference to that placement in her summary judgment response brief does not constitute evidence which can form the basis for a material question of fact. *See Veeder v. Tri-Cap*, No. 17-cv-11690, 2018 WL 7254610, at *8 (E.D. Mich. Dec. 13, 2018).

The record indicates that Gray's last day of work was November 9, 2016. (ECF No. 26-13, PageID.564.) This means the latest possible deadline for Gray to file her EEOC complaint was September 5, 2017. The City argues that because Gray filed her EEOC complaint on "September 27, 2017," it was tardy, and that she therefore failed to exhaust her claims. (ECF No. 26, PageID.136 (citing ECF No. 36-1, PageID.1205.))

While it is true that Gray filed her ultimate EEOC Charge of Discrimination on September 27, 2017, the City's argument ignores that that filing appears to have supplemented prior related EEOC filings by Gray "between June 29, 2017 and September 21, 2017" that the EEOC deemed to be a timely "charge" of employment discrimination, a construction supported by the EEOC's September 21, 2017 letter to Gray, which read:

Dear Ms. Gray:

This is in response to your correspondence you submitted between June 29, 2017 and September 21, 2017, in which you alleged employment discrimination by [the City]. The information indicates that the matter complained of is subject to Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990.

The enclosed EEOC Form 5, Charge of Discrimination, was drafted as a result of the information you provided. To enable proper handling of this action by the Commission you should:

- (1) Review the enclosed charge form, sign, date, have notarized and return.

* * * *

Since charges must be processed within the time limits imposed by law, please complete these steps within 30 days of the date of this letter. Failure to do so will result in the dismissal of your charge. Please note that the EEOC has complied with the law and has sent a Notice of Charge of Discrimination to [the City] indicating that you have filed a charge of discrimination. We have not sent a copy of the unsigned charge at this time. However, should you fail to return the signed charge of discrimination within 30 days of this letter the EEOC will send a copy of the unsigned charge to [the City], along with a copy of the dismissal notice.

(ECF No. 31, PageID.616.) (emphasis added)⁷

The EEOC's letter to Gray indicates that her claim was assigned EEOC Charge No. 471-2017-03424, but it is unclear when that file number was created. (*Id.*) In its reply brief, the City did not address the EEOC's reference to Gray having filed some sort of charging document on June 29, 2017,⁸ which would have been well within the 300-day statutory period. It is, undisputed, however, that Gray filed her ultimate EEOC charging document on September 27, 2017, within the 30 days indicated in the EEOC's letter to her. (ECF No. 36-1, PageID.1205.)

In sum, at least based on the present record, a question of fact exists as to whether Gray timely exhausted her administrative remedies as to her hostile environment claims.

Moreover, “[a]s the Court of Appeals for the Sixth Circuit has explained, the administrative requirement of filing an EEOC charge is a precondition ‘that, like a statute of limitation, is subject to waiver, estoppel, and equitable tolling.’” *See Crawford v. Knoxville Health Care Center, L.P.*, 2010 WL 2721481, at *2 (E.D. Tenn. 2010) (citing *Truitt v. County of Wayne*, 148 F.3d 644, 646 (6th Cir. 1998)). Equitable tolling is “sparingly bestowed.” *Graham-Humphreys*, 209 F.3d 552, 560 (6th Cir. 2000). A litigant seeking equitable tolling or estoppel “must come with clean hands.”

⁷ In another (undated) letter, the EEOC explained to the City, “Often the EEOC receives letters from potential charging parties that contain information which is minimally sufficient to file a charge of discrimination. By law, the EEOC is required to date stamp such a letter, assign an EEOC charge number to it, draft a basic charge of discrimination (Form 5) and mail it to the charging party to return the signed charge within 30 days of receipt of such charge.” (ECF No. 36-1, PageID.1204.) The EEOC's two letters seem to belie the City's contention that it was the *timing* of Gray's September 21, 2017 submission “which would explain why initially the EEOC indicated the City did not have to take any action when it gave notification of the complaint.” (ECF No. 26, PageID.136-37.) That is, it appears the reason the EEOC did not require the City to respond initially was because it was waiting for Gray to supplement the “charge” she already filed. Once she did that, the EEOC forwarded it to the City for a response.

⁸ Gray asserts in her response brief that she first filed her EEOC charge on “July 28, 2017.” (ECF No. 31, PageID.596.)

King v. Henderson, 230 F.3d 1358, 2000 WL 1478360, at *5 (6th Cir. 2000). Even a one day extension is inappropriate unless there are “compelling equitable considerations.” *Id.* There are five factors to consider when determining whether a claim can be equitably tolled: “(1) lack of notice of the filing requirement; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one’s rights; (4) absence of prejudice to the defendant; and (5) the plaintiff’s reasonableness in remaining ignorant of the particular legal requirement.” *Truitt v. Cty. Of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998). Here, Gray has at least raised questions about whether the document(s) she submitted to the EEOC prior to the expiration of the 300-day filing period equitably toll the running of that deadline; Gray appears to have commenced her EEOC charge on June 29, 2017 – prior to the deadline – which shows diligence; the City does not allege that the additional few weeks before Gray’s ultimate charge was filed prejudiced it; and Gray acted as directed in the EEOC’s letter.

Accordingly, the City is not entitled to summary judgment as to Gray’s hostile environment claims based on the timeliness of her EEOC charge.

2. *Claims Outside the Scope of Gray’s EEOC Charge*

Notwithstanding the foregoing analysis, this Court lacks jurisdiction to consider Gray’s race, sex, and disability discrimination claims that arose prior to her post-medical-leave return to work on August 2, 2016 because they exceed the scope of her EEOC charge. A district court’s jurisdiction to hear cases arising under the Title VII and the ADA is “limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination.” *Oliver v. Titlemax*, 149 F. Supp. 3d 857, 863 (E.D. Tenn. 2016) (quoting *Johnson v. Cleveland City Sch. Dist.*, 344 Fed.Appx. 104, 109 (6th Cir. 2009)). “Therefore, a plaintiff may bring suit on an uncharged claim if it was reasonably within the scope of the charge filed[,]” or if the agency

discovers evidence of the discrimination relating to the uncharged claim while investigating plaintiff's charge. *Id.* (citing *Davis v. Sodexho, Cumberland Coll. Cafeteria*, 157 F.3d 460, 463 (6th Cir.1998)). Here, the EEOC found no evidence of disability discrimination (ECF No. 36-1, PageID.1206.), and reviewing Gray's operative EEOC charge makes clear that many of her race, sex, and disability discrimination claims are not reasonably within the scope of the "charge filed."

As noted above, in her EEOC charge, Gray specifically asserted that the discrimination and retaliation occurred after she returned from medical leave on August 2, 2016. (ECF No. 36-1, PageID.1205.) The EEOC charge went on to note that August 2, 2016, was the "earliest" date when the alleged discrimination took place. (*Id.*) Accordingly, events which allegedly took place prior to August 2, 2016, are simply not reasonably within the scope of Gray's EEOC charge, and the City is entitled to summary judgment as to these particular claims. *See 42 U.S.C. §2000e-5(e)(1).* This includes Gray's claims referenced in paragraphs 7 – 23 of her response brief arising out of alleged "sexual advances" by one of her supervisors in November 2010, and treatment she faced from her supervisor and colleagues prior to August 2, 2016. (ECF No. 31, Page.ID 590-94.).

In sum, Gray's only race, sex, and disability discrimination claims that proceed to a substantive discussion on summary judgment are those that arose after she returned to work from her medical leave on August 2, 2016. The Court now turns to a consideration of those claims.

3. Race and Sex Discrimination, Harassment, and Retaliation Claims

a. The City is Entitled to Summary Judgment on Gray's Disparate Treatment Race and Sex Discrimination Claims

Gray alleges that when she returned from her leave of absence, the City subjected her to different terms and conditions of employment based on her race and sex. (ECF Nos. 36-1, PageID.1205; 26-12, PageID.559; *see also* ECF No. 7.) As the City recognizes, Gray does not attempt to allege or prove that she suffered disparate impact discrimination. Instead, her race and

sex discrimination claims are entirely founded on alleged disparate treatment. To prove such a claim, the plaintiff must first establish a prima facie case of disparate treatment for race/sex discrimination by proving that: (1) she was a member of the protected class; (2) she suffered an adverse employment action; (3) she was qualified for the position; and (4) she was (a) replaced by someone outside the protected class, or (b) treated less favorably than similarly-situated persons outside the class. *Ward v. A-1 Int'l Courier Serv., Inc.*, No. 05-72330, 2007 WL 325342, at *4 (E.D. Mich. Jan. 31, 2007) (citing *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582, 582 n. 4 (6th Cir.1992)).⁹ To be deemed “similarly-situated,” the plaintiff must show that “all of the relevant aspects of [her] employment situation were nearly identical to those of [the compared employee’s] employment situation.” *Mich. Dept. of Civ. Rights ex rel. Burnside v. Fashion Bug*, 473 Mich. 863, 869, 702 N.W.2d 154 (2005) (internal quotations omitted).

If the plaintiff can establish a prima facie case, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for its challenged conduct. If the defendant does so, the burden shifts back to the plaintiff to show that the reason offered was pretext. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1972); *Mitchell*, 964 F2d at 582 (1992).

Gray identifies a few employment decisions and conditions that she claims constitute unlawful race and/or sex discrimination. Most are far too vague, and completely unsupported by any evidence, to give rise to a claim. For example, Gray asserts in her response brief, (1) “Officer Melissa Adam a white female was able to go and come as she pleases and she received full medical treatment for (her finger injury),” and (2) “co-worker Officer Turner consumed alcohol a lot and would come into work and go to sleep on the floor [] [and] was operating his private business on

⁹ The same prima facie elements apply to Gray’s discrimination claims brought under the ELCRA. See *Lytle v Malady (On Rehearing)*, 458 Mich. 153, 172-173; 579 NW2d 906 (1998).

the job . . . ” (ECF No. 31, PageID.610-11.) But Gray offers no evidence to support these accusations, and the unsupported accusations in her response brief cannot raise a material question of fact at the summary judgment stage. *See Veeder*, 2018 WL 7254610, at *8.

Gray also alleges that Daniel Emery, a white male, was allowed to go to physical therapy during the day, while she was not, and thus had to attend her physical therapy sessions on her own time. (ECF No. 31, PageID.610-11.) She also alleges that Emery was allowed to run errands for Dennis during the day, while she remained at her duty station. (*Id.*) It is unclear whether this treatment occurred during the relevant period (Gray dep., at 77-78), but even if it did, Gray still has failed to raise a *prima facie* case of discrimination.

While Gray and Emery were similarly situated in some respects – they were both City of Detroit police officers working on temporary restricted duty in the Identification Unit under Sergeant Dennis – Gray fails to show that she and Emery had the same medical restrictions. Moreover, Sergeant Dennis provided an affidavit in which he avers that Emery was allowed to attend physical therapy during the day because he had “gone through the proper procedures within the medical section,” while Gray “did not go through the proper process and wanted to go to a doctor which had not been approved by the medical section.” (ECF No. 26-5, PageID.520.) Dennis concludes, “Because it wasn’t sanctioned by the medical section, I did not release [Gray] to go to the therapy” during worktime hours. (*Id.*) Gray presented no evidence showing that Dennis’ proffered reasons were pretext, and thus she has failed to raise a material question of fact as to this issue.

The only other specific allegation of disparate treatment raised by Gray is in connection with Charles Barnes (white male) and Carole Furstenau (white female) being placed into permanent Ident positions. (ECF No. 31, PageID.610.) However, as discussed above, *supra* at 9-

10, Gray's EEOC charge as to those discrete acts of alleged discrimination was untimely. (ECF No. 31, PageID.593, 610-11.)

For all of these reasons, the City is entitled to summary judgment on Gray's disparate treatment race and sex discrimination claims.

b. The City is Entitled to Summary Judgment on Gray's Racial and Sexual Harassment Claims

To the extent Gray is claiming she was subjected to a racially or sexually hostile work environment, that claim also fails. Under Title VII and the ELCRA, racial and sexual harassment are actionable offenses. *Malan v. General Dynamics Land Sys.*, 212 Mich. App. 585, 587 (1995); *CBOCS West Inc. v. Humphries*, 553 U.S. 442 (2008). To establish such a claim the plaintiff must prove: (1) she was a member of a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment was race-based or sex-based; (4) the harassment unreasonably interfered with her work performance by creating an environment that was intimidating, hostile or offensive; and (5) the employer was liable for the harassing conduct. *Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 706 (6th Cir.2007) (citing *Hafford v. Seidner*, 183 F.3d 506, 512 (6th Cir.1999)). However, as the City correctly points out, Title VII and the ELCRA are not meant to be a general civility code, ridding the workplace of petty slights and annoyances. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998). Rather, their purpose is to protect against severe and pervasive harassment based on a protected characteristic. *See id.*

Gray presents no evidence of overt racial harassment such as racial epithets being used in the workplace, and she presents no other evidence that could be construed as creating a racially-hostile atmosphere. Gray has identified only one specific issue that could even potentially be considered sexually harassing in nature. She alleges a single incident when her supervisor told her that because part of her job involved registering sex offenders, she needed to wear longer shirts

that would cover her buttocks. (Gray dep., at 47.) While Gray disputes wearing any inappropriate clothing, this single relatively benign comment does not rise to the level of actionable sexual harassment. *Faragher*, 524 U.S. at 787-88.

Accordingly, the City is entitled to summary judgment on Gray's claims that she was subjected to racial and sexual harassment.

c. The City is Entitled to Summary Judgment on Gray's Retaliation Claims

In her complaint, Gray claims that she was retaliated against because she "opposed practices prohibited by Title VII [and the ELCRA]." (ECF No. 7, PageID.37, 41.) However, a careful review of the record shows that was not the actual basis of her retaliation claim. Gray's EEOC charge unequivocally alleges that she was retaliated against "for having filed [her] complaint" against Sigmon, and Gray's testimony makes clear that her complaint had nothing to do with alleged discrimination in violation of Title VII or ELCRA. (ECF No. 36-1, PageID.1205; Gray dep., at 83-88.) Rather, Gray filed her complaint because Sigmon came into her workspace and turned off her computer so that he could use it, and Gray admits she has no idea why he acted in that unprofessional manner. (Gray dep. at 83-88) Thus, Gray presents no record evidence that her complaint against Sigmon had anything to do with her race or sex. This dooms her Title VII retaliation claim.

To prove a *prima facie* case of retaliation under Title VII, the plaintiff must show: 1) that she engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding; 2) that her exercise of her protected rights was known to the defendants; 3) that she was subjected to an adverse employment action subsequent to or contemporaneous with the protected activity; and 4) that there was a causal connection between the protected activity and the adverse employment action. *Canitia v. Yellow Freight System, Inc.*, 903 F.2d 1064, 1066 (6th Cir.

1990).

As to the first element, the plaintiff is not required to show that she engaged in formal proceedings under Title VII. “Rather, an informal complaint to an employer concerning practices which are prohibited by Title VII is sufficient to constitute protected activity.” *Weaver v. Ohio State Univ.*, 71 F. Supp. 2d 789, 793–94 (S.D. Ohio 1998), aff’d, 194 F.3d 1315 (6th Cir. 1999) (citing *E.E.O.C. v. Romeo Community Schools*, 976 F.2d 985, 989 (6th Cir.1992)). However, “[c]omplaints concerning unfair treatment in general **which do not specifically address discrimination** are insufficient to constitute protected activity.” *Weaver*, 71 F.Supp.2d 793-94 (emphasis added). This is because “[r]etaliation claims brought under Title VII must stem from alleged retaliation for activities protected under Title VII.” *Leligdon v. McDonald*, No. 1:14 CV 2810, 2016 WL 10590098, at *14 (N.D. Ohio Nov. 21, 2016) (citing *Weaver*, 71 F.Supp.2d at 793-94 (S.D. Ohio 1998), aff’d 194 F.3d 1315 (6th Cir. 1999) and *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 520 (6th Cir. 2009)). Gray’s Title VII retaliation claim fails this requirement as it arose not out of a report of “discrimination” but out of a report of an unpleasant interaction with a colleague.¹⁰

4. *Disability Claims*

In her complaint, Gray makes a variety of claims related to her alleged disabilities – “bilateral degenerative arthritis in her knees as well as generalized anxiety and depression.” (ECF No. 7.) Specifically, she alleges that the City “discriminated against [her] because of her disability

¹⁰ Similarly, with respect to Gray’s disability claims, to the extent she alleges she was retaliated against as a result of her complaint against Sigmon, the City is entitled to summary judgment, as Gray was required to show that she was retaliated against for engaging in activity “protected under the ADA” and the PDCRA. *Morrissey v. Laurel Health Care Co.*, No. 18-1704, 2019 WL 7043167, at *3–4 (6th Cir. Dec. 23, 2019); *Applewhite v. FCA US LLC*, No. CV 17-11132, 2019 WL 6894229, at *6 (E.D. Mich. Dec. 18, 2019).

by subjecting her to disparate treatment because of her disability”; “discriminated against [her] by failing to provide reasonable accommodations to [her]”; “retaliated against [her] for requesting accommodations and for opposing violations of the ADA [and the PDCRA]”; and “permitted its employees to harass [her] because of her disabilities and failed to take prompt remedial action to redress such harassment after [she] reported it.” (*Id.*) But many of those have nothing to do with Gray’s EEOC charge, in which she asserted:

On or about October 17, 2015, I filed a hostile work environment complaint against my co-worker [Sigmon]. From approximately June 2016 until [August 2, 2016] I was out on leave. When I returned from my leave my supervisor subjected me to different terms and conditions of employment based on my race (African American) and sex (female) and retaliated against me for having filed my complaint [against Sigmon] **by moving my work location making my known disability worse.** Then on November 9, 2016 I was forced to retire. I feel I was forced to retire in retaliation for having made [m]y complaint against my coworker [Sigmon].

I believe I have been **discriminated against on the basis of my . . . disability by . . . having my work location moved . . .**

(ECF No. 36-1, PageID.1205.)

Gray’s charge thus makes clear that the only issue she raised about her disability was that by moving her work location **in early August 2016** her “known” disability became worse. While that creates a potentially viable claim under the ADA and/or PDCRA (which the Court will analyze below), it is a far cry from most of the disability claims Gray purports to bring in this civil action, such as alleged long-standing failure by the City to accommodate her disabilities, persistent “harassment” by other employees, and “retaliation” for complaining about alleged “violations of the ADA.”

A review of the chronology alleged in paragraphs 19-23 of Gray’s response brief shows that those “claims” all preceded her August 2, 2016 return to work and are unrelated to her office move. (*See* ECF 31, PageID.593-94.) Thus, as discussed above, *supra* at 13-14, none of those

claims is “reasonably within the scope of” Gray’s narrow and specific charge that Sergeant Dennis moved her workstation after she returned to work on August 2, 2016, and that such move worsened her disability. (*Id.*, PageID.594.) *Oliver*, 149 F. Supp. 3d at 863. Accordingly, the City is entitled to summary judgment as to those other claims of disability discrimination that are not encompassed within Gray’s EEOC complaint.

The Court thus turns to Gray’s remaining claim about Sergeant Dennis moving her office after she returned from her medical leave. In her response brief, Gray explained this claim as follows:

23. When [she] returned back to work on ***August 2, 2016*** Supervisor Carlos Dennis called [her] on the office phone and told her to start working in [an] office [] in the back of the building. He said Aloha Dodd is Pregnant and can’t do a lot of [walking] so she needs her trainee in the room next to her. (Record Removal Room) When Plaintiff mentions her restrictions he said “he was ordering her to work in that office.” He also ordered her to work the counter which required a lot of walking and standing.

(*Id.*, PageID.594.) (emphasis added) Later in her brief, Gray explained, “Sergeant Dennis knew of Plaintiff [sic] disability he knew that ordering her to work the counter would do a greater bodily harm to her. . . He gave her a Direst [sic] order and forced her to work in an area that wasn’t close to material and the essential needed [sic] to do her job (example) fax machine, printer, live scan computer and other item. He (Maliciously and with Malice further violated and went against her known job restrictions.)”¹¹ (*Id.*, PageID.600.) (parenthesis in original) In other words, Gray’s

¹¹ Importantly, the restrictions that Gray seems to be referring to – that she “cannot walk for prolonged distances, cannot stand for prolonged periods, . . . sitting for one hour then must be up for 10-15 minutes before sitting again” – were not imposed until August 3, 2016 – the day *after* she returned to work from her medical leave. (ECF No. 36-1, PageID.1044.) Therefore, when Dennis moved her office on August 2, 2016, he necessarily could not have done so in violation of her “known” restrictions – at least not the ones imposed one day later.

claim seems to be that by requiring her to work in the “back” of the office and at the counter, Dennis failed to accommodate her disability.¹²

Very recently, the Sixth Circuit explained the standards applicable to disability claims like Gray’s remaining failure to accommodate claim:

The ADA prohibits an employer from “discriminat[ing] against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a). ADA discrimination claims are analyzed under two different rubrics, depending on whether the plaintiff relies on “direct” or “indirect” evidence of discrimination. *See Ferrari v. Ford Motor Co.*, 826 F.3d 885, 891-92 (6th Cir. 2016). This court has explained the logic behind this distinction as follows:

When an “employer acknowledges that it relied upon the plaintiff’s handicap in making its employment decision[,] the *McDonnell Douglas* burden shifting approach is unnecessary because the issue of the employer’s intent, the issue for which *McDonnell Douglas* was designed, has been admitted by the defendant[] and the plaintiff has direct evidence of discrimination on the basis of his or her disability.”

Id. at 892 (alterations omitted) (quoting *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1182 (6th Cir. 1996)). Direct evidence of disability discrimination “does not require the fact finder to draw any inferences” to conclude “that the disability was at least a motivating factor.” *Hostettler v. College of Wooster*, 895 F.3d 844, 853 (6th Cir. 2018) (quoting *Martinez v. Cracker Barrel Old Country Store, Inc.*, 703 F.3d 911, 916 (6th Cir. 2013)).

Because “not making reasonable accommodations” is listed in the ADA’s definition of disability discrimination, *see* 42 U.S.C. § 12112(b)(5)(A), “claims premised upon an employer’s failure to offer a reasonable accommodation necessarily involve direct evidence (the failure to accommodate) of discrimination.” *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 868 (6th Cir. 2007).

Under the direct framework, [the plaintiff] bears the burden of establishing (1) that she is disabled, and (2) that she is “otherwise qualified for the position despite his or her disability: (a) without accommodation from the

¹² Although Gray technically raised this office move in connection with her retaliation claim (ECF No. 36-1, PageID.1205) (“retaliated against me . . . by moving my work location . . .”) that the Court has found is subject to dismissal, the substance of the allegation that the move violated her restrictions and worsened her condition is nevertheless “reasonably within the scope of the charge,” and therefore properly before the Court. *Oliver*, 149 F. Supp. 3d at 863.

employer; (b) with an alleged essential job requirement eliminated; or (c) with a proposed reasonable accommodation.” *Kleiber*, 485 F.3d at 869 (citation and internal quotation marks omitted). Once the plaintiff has established these elements, the employer “bear[s] the burden of proving that ... a proposed accommodation will impose an undue hardship upon the employer.” *Monette*, 90 F.3d at 1186.

Morrissey v. Laurel Health Care Co., No. 18-1704, 2019 WL 7043167, at *3–4 (6th Cir. Dec. 23, 2019).¹³

One final principle must be highlighted. An “employer is not required to speculate as to the extent of [an] employee’s disability or the employee’s need or desire for an accommodation.” *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1046–47 (6th Cir. 1998). “Nor is it the employer’s obligation to propose an accommodation—the employee must affirmatively request one.” *Lowes v. Baldwin*, No. 2:18-CV-537, 2019 WL 7290504, at *11 (S.D. Ohio Dec. 30, 2019) (citing *Cady v. Remington Arms Co.*, 665 F. App’x 413, 418 (6th Cir. 2016); 29 C.F.R. pt. 1630 App. § 1630.9 (2016) (“[I]t is the responsibility of the individual with a disability to inform the employer that an accommodation is needed.”)). This is “because many disabled people do not need an accommodation, and the employee is in the best position to know how the disability impacts their work. Furthermore, the ADA generally prohibits employers from inquiring about a disability’s severity.” *Cady*, 665 F. App’x at 418. “Only once a disabled employee has requested the reasonable accommodation does the employer have the duty to make a reasonable effort to accommodate that employee.” *Lowes*, 2019 WL 7290504, at *11 (citing *Gantt*, 143 F.3d at 1046–47).¹⁴ Although there is “no bright-line test for when the form of an employee’s request is

¹³ Michigan’s PDCRA also protects a person with a disability, defined as “an individual who has one or more disabilities.” MCL § 37.1103(d)(i)(A). Although the PDCRA differs in some respects from the ADA, its relevant provisions, like the ADA, require that an employer accommodate a person with a disability unless the employer demonstrates that the accommodation would impose an undue hardship. MCL § 37.1210(2)–(6), (8)–(12), (14)–(15); *See Rourk v. Oakwood Hospital*, 458 Mich. 25, 32 (1998). Thus, the Court will address Gray’s ADA and PDCRA claims together.

¹⁴ Once an employer becomes aware of an employee’s request for an accommodation, it must

sufficiently clear to constitute a request for an accommodation,” *Judge v. Landscape Forms, Inc.*, 592 F. App’x 403, 407 (6th Cir. 2014), and “an employee need not use the magic words ‘accommodation’ or even ‘disability,’ the request does need to make it clear from the context that it is being made in order to conform with existing medical restrictions.” *Leeds v. Potter*, 249 Fed.Appx. 442, 449 (6th Cir. 2007).

Careful application of the relevant case law and legal standards to the record evidence shows that summary judgment is inappropriate on Gray’s failure to accommodate claim.

a. *Disabled*

Gray has at least raised a question of fact as to the first element of her failure to accommodate claim – showing that she had a disability. Under the ADA, a “disability” is defined in three ways: (A) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(1). For purposes of this definition, “major life activities” “include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. 42 U.S.C. § 12102(2). The ADA further provides: “(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter; (B) The term ‘substantially limits’ shall be interpreted consistently with the

“make a reasonable effort to determine the appropriate accommodation.” 29 C.F.R. pt. 1630 App. § 1630.9. “The appropriate reasonable accommodation is best determined through a flexible interactive process that involves both the employer and the [employee] with a disability.” *Id.* Further, when an employee requests a reasonable accommodation, an employer must individually address the requested accommodation. *Cehrs v. Northeast Ohio Alzheimer’s Research Center*, 155 F.3d 775, 782 (6th Cir.1998).

findings and purposes of the ADA Amendments Act of 2008; (C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability; and (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” 42 U.S.C. § 12102(4).

The City argues that Gray “had no problems performing clerical duties that were temporarily granted as an accommodation” and that “[t]he fact that she can work, albeit not in the position that she was hired for, shows she is not substantially limited.” (ECF No. 26, PageID.142.) However, the City cites no facts or case law in support of its argument, and ignores: (1) that during the relevant time in early August 2016, a doctor imposed new restrictions that Gray “cannot walk for prolonged distances, cannot stand for prolonged periods, . . . sitting for one hour then must be up for 10-15 minutes before sitting again”; and (2) just a few months later, Gray applied for and received permanent disability on account of her knee condition and its impact on her ability to walk. (ECF No. 36-1, PageID.1044.) At a minimum, this shows that Gray raised a material question of fact as to whether she was “disabled” during the relevant period.

b. Otherwise Qualified

Gray has also raised a question of fact as to whether she was “otherwise qualified” for her position: (a) without accommodation from the employer; (b) with an alleged essential job requirement eliminated; or (c) with a proposed reasonable accommodation. As to this issue, the City’s argument presumes the analysis revolves around whether Gray could perform the “24 essential functions” of an active-duty police officer. While Gray admits that she was unable to perform many of those functions, such as climbing over obstacles and chasing down suspects (Gray dep. at 99-106), this does not end the analysis because “a ‘reasonable accommodation’ under the ADA may include ‘reassignment to a vacant position.’” *Kleiber*, 485 F.3d at 869 (quoting 42

U.S.C. § 12111(9)(B)). “[A]n employer has a duty under the ADA to consider transferring a disabled employee who can no longer perform his old job even with accommodation to a new position within the [c]ompany for which that employee is otherwise qualified.” *Id.* (alteration in original) (quoting *Burns v. Coca-Cola Enters., Inc.*, 222 F.3d 247, 257 (6th Cir. 2000)).

The City recognizes this principle (ECF No. 37, PageID.1255.), but, citing *Meade v. AT&T Corp.*, 657 F. App'x 391, 396 (6th Cir. 2016), asserts that it was not required to accommodate Gray by “creating” a permanent light duty position for her. (ECF No. 37, PageID.1255.) The problem with this argument, though, is that the City admits it had already put Gray into “a restricted duty position that did not require her to go out on patrol.” (ECF No. 26-12, PageID.557.) While the City argues that this was done only as “a temporary accommodation,” and contrasts this position with the “permanent” restricted duty positions that Gray applied for and did not receive (ECF No. 37, PageID.1255.), at least two facts call that argument into question: (1) Gray held the supposed “temporary” position for about 5½ years before the issue giving rise to her instant claim – Dennis’ decision in August 2016 to move her office and assign her to the counter – occurred; and (2) Gray’s employment ended not because the City eliminated her restricted duty position, but because Gray filed for disability retirement. These facts amply distinguish Gray’s case from *Meade*, in which the employer had initially accommodated an employee’s temporary restrictions by allowing him to do light-duty tasks around the office which “was not part of a formal position within [the employer],” but “[u]pon learning that the [employee’s] limitations would be permanent . . . refused to create a permanent light-duty position.” *Meade*, 657 Fed.Appx. at 392, 396.

In sum, given that the City maintained between 123-155 “restricted duty positions” during the time in question (ECF No. 26-12, PageID.561.), and that Gray held her restricted duty position

for almost 6 years, questions of fact exist as to whether Gray was “otherwise qualified” for the position she held at the time the alleged violation occurred in early August 2016.

c. Request for Accommodation

Finally, as explained above, to state a *prima facie* case, Gray must show that she affirmatively requested an accommodation from the City. Construing the evidence in the light most favorable to Gray, as the Court must do at this stage of the litigation, it finds that she has raised a material question of fact as to this issue.

Gray returned to work from a medical leave on August 2, 2016, and Dennis then moved her workstation to the back of the office and assigned her to work the “counter” on at least some occasions. The very next day, Gray’s doctor issued restrictions as to her physical limitations, indicating that she could perform “light work,” but could not walk for “prolonged” distances, and could not stand for “prolonged” periods. (ECF No. 36-1, PageID.1044.) Gray provided evidence which at least raises a question of fact as to whether keeping her at the new work station and continuing to have her work the counter violated these restrictions.

First, Gray provided a video that showed the distance she had to walk from her new workstation to utilize basic office equipment, such as a fax machine and copier. While the distance itself was not terribly lengthy, it was appreciable enough that, if Gray had to make the walk often during the day, a factfinder could conclude she had to engage in “prolonged” walking. Certainly that finding could easily be made vis-à-vis the amount of walking she would have had to do if the fax machines, etc. were in vicinity of her office. The City contends this was a non-issue because Sergeant Dennis avers that, “[w]hile the fax/copier were up front, [Gray] did not have to go back and forth, she could have waited for a pile of work to be faxed or copied – like the Office

Management Assistant (Lewis) does now!” (ECF No. 37-4, PageID.1290.) But this merely raises a question about whether, to *effectively* do her job, Gray had to walk “prolonged” distances.

Second, Gray testified about the challenges she encountered in being assigned to work the counter. For instance, she explained, that it “[s]till [involved] a lot of walking and standing because if you worked the counter, you still have to get the file. They give you a file number. That file is not at the counter. You have to go pull the index card. You have to go pull the file. You have to walk up to the front of the building and make copies. (Gray dep., at 68-69.) She also explained that “there was no sitting at the counter.” (*Id.*, at 68.) The City did not dispute Gray’s characterization of the counter work.

Still, in order to establish a *prima facie* case, Gray must show that she requested a reasonable accommodation. Although a close call, Gray has at least raised a material question of fact as to whether she satisfied this requirement. It is unclear exactly when the August 3, 2016 restrictions were communicated to the City, but it appears that they were provided by the doctor to the City that same day, and the City does not contend it did not receive them. It is also undisputed that Gray complained to at least two of her supervisors. She presents evidence that she complained to Dennis right away when her workstation was moved about it resulting in her having to walk too much. (ECF No. 31-1, PageID.742, 772.) Dennis recognized Gray’s communication as a request to “move” her and then, according to Gray, Dennis “called the medical section [himself] . . . and said i [sic] was having a problem with my work location . . .” (*Id.*)¹⁵ Dennis

¹⁵ Gray clearly should have called the “medical section” herself, instead of flippantly declining to do so (ECF No. 31-1, PageID.742, 772) (“I said why should i [sic] call the medical section i [sic] moved to the back like you said.”), but her description of the events is consistent with the City’s “Complaint Procedures,” which state, “Any commanding officer or supervisor who becomes aware of any violation or possible violation, shall take immediate and appropriate corrective action, and may consult with the EEOC for further direction.” (ECF No. 36-1, PageID.1197.) In its supplemental brief, the City states, “If [Gray’s] restrictions were not being accommodated, and

does not dispute Gray's evidence, and there is nothing in the record to suggest that the City engaged in an interactive discussion with Gray about the specific issue. Gray also presents evidence that she raised the issues at least one more time with a different supervisor, Braxton Hall, specifically referencing her "restrictions" in connection with difficulties being at her new "work location" and working at the "counter." (ECF No. 31-1, PageID.742, 772.) Again, the City does not dispute Gray's evidence, and there is nothing in the record to suggest that any sort of interactive discussion followed Gray's communication with Hall.

The only question then, is whether Gray's communications to Dennis and/or Hall rose to the level of a "request" for an accommodation sufficient to have triggered the City's obligation to engage in an interactive discussion with Gray about her concerns. This is a close call because Gray was required to show that she requested a "specific accommodation," *Steward v. New Chrysler*, 415 Fed. Appx. 632, 642 (6th Cir. 2011), and her communications certainly could have been more specific.¹⁶ At the same time, Gray was not required to use any particular words to request an accommodation, which includes "making existing facilities readily accessible," *see 42*

she did not agree with Sgt. Dennis' assessment/response, she could have brought it to the attention of the Lieutenant in charge of the Unit, the Medical Section, Personnel or the Chief's Office. There's no evidence that she gave notice to anyone else or that she sought an alternative accommodation." (ECF No. 37, PageID.1257.) But the City's factual assertion is incorrect – Gray did advise a different supervisor, Braxton Hall about the issues, *see infra* at 29 – and the City cites no law that would render Gray's statements to her two supervisors ineffective in terms of triggering the City's obligation to engage in an interactive process.

¹⁶ Questions exist, also, about the claim's overall merits. Shortly before her August 2016 return to work (and move to the back of the office) a psychiatrist had performed a psychiatric evaluation of Gray. When Gray told the psychiatrist that she had been "walking on a treadmill" for exercise, he "confront[ed] her about how she can walk on a treadmill if she has arthritis in her knees and can't walk around her office, and she [was] unable to explain this discrepancy." (ECF No. 26-15, PageID.570.) At the same time, Gray has presented her physician-imposed walking restrictions which are reasonably consistent with medical records stretching over a decade, and the Court may not weigh competing evidence in determining whether summary judgment is appropriate. *Anderson*, 477 U.S. at 249.

U.S.C. § 12111(9)(B); 29 C.F.R. § 1630(o)(2). As shown above, Gray's comments to Dennis were clear enough that he understood she wanted a "move" so that she would not need to walk so much to access basic office equipment.¹⁷ Moreover, Gray's subsequent communication to Hall specifically referenced that issue, as well as her contention that working the "counter" violated her "restrictions." Considered in a light most favorable to Gray, the Court finds that she did enough to request an accommodation – moving her office or providing her with office equipment – to trigger the City's obligation to engage in the interactive process. *See Moore v. Hexacomb Corp.*, 670 F. Supp. 2d 621, 630 (W.D. Mich. 2009) ("What matters under the ADA are not formalisms about the manner of the request, but whether the employee or a representative for the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and the desire for an accommodation.") (quoting *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir.1999)). *See also Thompson v. E.I Dupont deNemours & Co.*, 140 F.Supp.2d 764, 774 n. 8 (E.D. Mich. 2001).

Accordingly, the burden shifted to the City to prove that Gray's proposed accommodation would have imposed an undue burden. *Morrissey*, 2019 WL 7043167, at *4; 42 U.S.C. § 12111(10)(B). Again, there is nothing in the record to suggest that the City even engaged with Gray regarding her request, and the City presented no evidence that moving Gray or providing her the necessary equipment would have caused it any burden.¹⁸ Accordingly, summary judgment on this claim is inappropriate.

¹⁷ According to Gray, Dennis even stated that he had moved Gray so that a different employee who was pregnant could use her old space and not have to "do to [sic] much walking." (ECF No. 31-1, PageID.772.)

¹⁸ The City argues that "[t]he only accommodation [Gray] appears to want to work is a permanent position in the Identification Unit." (ECF No. 37, PageID.1254.) But, as shown above, at least during the timeframe the Court finds to be relevant, Gray was seeking a different accommodation.

III. CONCLUSION

For the foregoing reasons, **IT IS RECOMMENDED** that the City of Detroit's Motion for Summary Judgment (**ECF. No. 26**) be **GRANTED IN PART** and **DENIED IN PART**, with only Gray's failure to accommodate claim under the ADA and PDCRA, as described above, surviving.

Dated: January 7, 2020
Ann Arbor, Michigan

s/David R. Grand
DAVID R. GRAND
United States Magistrate Judge

NOTICE TO THE PARTIES REGARDING OBJECTIONS

Within 14 days after being served with a copy of this Report and Recommendation and Order, any party may serve and file specific written objections to the proposed findings and recommendations and the order set forth above. *See* 28 U.S.C. §636(b)(1); Fed. R. Civ. P. 72(b)(2); E.D. Mich. LR 72.1(d)(1). Failure to timely file objections constitutes a waiver of any further right of appeal. *See Thomas v. Arn*, 474 U.S. 140, (1985); *United States v. Sullivan*, 431 F.3d 976, 984 (6th Cir. 2005). Only specific objections to this Report and Recommendation will be preserved for the Court's appellate review; raising some objections but not others will not preserve all objections a party may have. *See Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987); *see also Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 596-97 (6th Cir. 2006). Copies of any objections must be served upon the Magistrate Judge. *See* E.D. Mich. LR 72.1(d)(2).

A party may respond to another party's objections within 14 days after being served with a copy. *See* Fed. R. Civ. P. 72(b)(2); 28 U.S.C. §636(b)(1). Any such response should be concise, and should address specifically, and in the same order raised, each issue presented in the objections.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on January 7, 2020.

s/Eddrey O. Butts
EDDREY O. BUTTS
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHEILA D. GRAY,

Plaintiffs, Civil Action No. 18-12146
v. Honorable Mark A. Goldsmith
Magistrate Judge David R. Grand

CITY OF DETROIT,
a municipal corporation,

Defendant.

**REPORT AND RECOMMENDATION TO GRANT IN PART AND DENY IN PART
DEFENDANT CITY OF DETROIT'S MOTION FOR SUMMARY JUDGMENT [26]**

Before the Court is Defendant City of Detroit's ("City") Motion for Summary Judgment which was filed on June 21, 2019. (ECF No. 26.) Plaintiff Sheila D. Gray ("Gray") filed a response to the City's motion on July 26, 2019 (ECF No. 31), and the City filed a reply on August 1, 2019. (ECF No. 33.)

An Order of Reference was entered on August 3, 2018, referring all pretrial matters to the undersigned pursuant to 28 U.S.C. § 636(b). (ECF No. 10.) The Court heard oral argument on September 17, 2019, and the parties then filed supplemental briefs. (ECF No. 37; No. 38.)

I. RECOMMENDATION

For the reasons set forth below, **IT IS RECOMMENDED** that the City's Motion for Summary Judgment (ECF No. 26) be **GRANTED IN PART AND DENIED IN PART**.

II. REPORT

A. Background

Plaintiff Sheila Gray worked for the Detroit Police Department from November 15, 1999, through November 9, 2016. (ECF No. 26, PageID.130-133; ECF No. ECF No. 7, Page ID.28-35.)

In 2006 she suffered an injury to her knee, which, after a lengthy dispute resolution process, was determined to have been an “on duty” injury. Gray went on restricted duty status effective February 28, 2011, due to her knee. (ECF No. 26-3, PageID.496.)

She was then placed at the Records and Identification Unit (sometimes referred to as “Ident.”) at the Third Precinct – a facility where officers handle clerical assignments, like fingerprinting, background checks, and sex offender registration. (ECF No. 26-2 (“Gray dep.”) at 35).¹ Gray knew these “restricted duty” positions were not “permanent” and instead are “used as an accommodation to allow the officer to rehabilitate and hopefully return to their command as an active duty officer.” (*Id.*, at 26-27; ECF No. 37-2, PageID.1265.) Accordingly, after being placed at Ident., Gray put in annual requests to remain there in a “permanent” capacity, with her last request being made on February 15, 2015. (Gray dep., at 26-29, 77; ECF No. 26-6). Two other employees – Charles Barnes (white male) and Carole Furstenau (white female) secured permanent Ident. positions, and Gray alleges those placements were discriminatory against her based on her race. (Gray dep., at 107-08.) While the record is not entirely clear as to the specific dates of those placements, Gray alleges that Barnes and Furstenau were “permanently transferred into Ident. in 2015.” (ECF No. 31, PageID.593, 610-11.) While Gray never received a “permanent” Ident. position, she remained in her position at Ident. from the time she was first placed there in early 2011 through November 9, 2016, when she retired.

Gray experienced numerous work problems in the interim at Ident. She experienced stress

¹ Gray alleges that this position was given to her to accommodate her restrictions from “prolonged sitting, standing, or walking”, but she provides no evidence that a doctor imposed these restrictions at this time. (ECF No. 7, PageID.31.) Indeed, the medical evidence Gray supplied from that time simply indicates that she would experience “limitation of mobility (left knee) intermittently,” that she would need time off work only “when exacerbation occurs,” and that she was “able to work when she does not have flare up.” (ECF 31-1, PageID.753-55.)

at work for which she sought medical treatment. (ECF 26-2, PageID.304-311.) In 2015, the Ident department moved locations to the Detroit Detention Center. (Gray dep., at 68). This was a larger facility, and required Gray to sometimes stand at the counter during the day, and then walk from the counter to a file area to retrieve files. (*Id.*) According to Gray, this involved “a lot of walking” and “a lot of standing,” and thus “went against [her] duty restrictions.” (*Id.*) However, a doctor’s note from January 2015 contained no specific functional restrictions, but merely limited Gray to “light duty.” (ECF No. 31-1, PageID.781.)

In October of 2015, Gray filed an internal complaint against co-worker Andre Sigmon regarding an incident that occurred between the two in the workplace on October 17, 2015. (Gray dep., at 83-88.) According to Gray, she was working at a particular computer, and Sigmon entered the room and turned off her computer so that he could use it. (*Id.*) Gray admits that she had no idea what caused Sigmon to behave in that manner, but importantly, she did not testify that it was on account of her race, sex, or disability. (*Id.*) After Gray reported the incident to her supervisor, Sergeant Carlos Dennis, he recommended that Sigmon be given a written reprimand. (ECF No. 26-11.) Sigmon was in fact reprimanded for failing to “use command of temper” and “to show courtesy” to a co-worker. (ECF No. 38, PageID.1387.)

A number of months later, in the summer of 2016, Gray went on Family and Medical Leave Act leave due to mental health issues, and was scheduled to return on August 1, 2016.² (ECF NO. 26-2, PageID.311.) On August 3, 2016, Gray’s doctor issued restrictions as to her physical limitations, indicating that she could perform “light work,” but could not walk for “prolonged” distances, and could not stand for “prolonged” periods. (ECF No. 26-2, PageID.312.) The doctor

² It appears that Gray actually returned to work on August 2, 2016, and the Court will use that date. (Gray dep. at 37-38; ECF No. 26-2, PageID.309; ECF No. 31, PageID.594.)

also found that Gray could sit for an hour at a time, but then was required to “be up” for 10-15 minutes before sitting again. (*Id.*)

Gray alleges that upon her return from that leave, her supervisor, Sergeant Dennis, subjected her to different terms and conditions of employment based on her race, sex, and disability, and retaliated against her for having filed the complaint against Sigmon. (ECF No. 26-2, PageID.473.) Among other allegations, Gray claims that Dennis moved her work station to the back of the office and assigned her to work the counter, which caused her to have to walk and stand more than her restrictions allowed. (ECF No. 7, PageID.30; ECF No. 31-1, PageID.741-742, 772-776.) Gray also claims that other employees began to treat her in a hostile manner and tried to sabotage her work. (*Id.*)

Gray testified that as a result of these actions, she “was forced to retire . . . where the environment was so hostile and demeaning and disgrading [sic], [she] wasn’t able to take it no more.” (Gray dep., at 110.) On September 23, 2016, Gray applied for retirement due to an alleged “permanent disability.” (ECF No. 26-2, PageID.493.) While Gray alleges in this lawsuit that her retirement resulted from her inability to work in the “hostile environment” she describes, her application for permanent disability was based *solely* on her knee impairment and alleged inability to walk. (*Id.*) Specifically, when asked to give the “full explanation of the nature and causes of your disability,” Gray answered:

Severe degenerative arthritis in my left knee and [cyst] it causes pain and swelling in my whole leg. Over the years my injury to my right leg has worsen[ed] due to overworking it . . . My condition is permanent and at times I can’t walk at all . . .

(ECF No. 26-2, PageID.493.)

A few weeks later, Gray was evaluated by Dr. Melvin C. Murphy, M.D. (ECF No. 31-2, PageID.794-97.) On a form provided by the City, Dr. Murphy found that Gray was “permanently

incapacitated" and that she was unable to perform twelve of the twenty four "essential functions" of a City of Detroit Police Officer. (*Id.*)³ Thereafter, the City granted Gray's retirement application, specifically finding that it was her knee condition that disabled her, and her last day of work was November 9, 2016. (ECF No. 26-13.)

After some sort of "correspondence" to the EEOC in June 2017, and again on September 21, 2017, *see infra* at 11-13, Gray filed a formal EEOC complaint on September 27, 2017, alleging disability, race and sex discrimination, stating:

On or about October 17, 2015, I filed a hostile work environment complaint against my co-worker [Sigmon]. From approximately June 2016 until September 2, 2016⁴ I was out on leave. When I returned from my leave my supervisor subjected me to different terms and conditions of employment based on my race (African American) and sex (female) and retaliated against me for having filed my complaint by moving my work location making my known disability worse. Then on November 9, 2016 I was forced to retire. I feel I was forced to retire in retaliation for having made [m]y complaint against my coworker [Sigmon].

I believe I have been discriminated against on the basis of my . . . disability by . . . having my work location moved . . .

(ECF No. 26-2, PageID.473.) (emphasis added)

After the EEOC investigated and found that it could not substantiate a violation of law occurred, it issued a right to sue notice on April 9, 2018, advising Gray that she could "file a lawsuit against [the City] under federal law based on this charge in federal or state court" within 90 days. (ECF No. 26-2, PageID.474.) Gray then filed suit in this Court on July 9, 2018, and filed

³ Gray does not dispute that, in light of her knee condition and related restrictions, she was unable to perform all 24 essential functions of a City police officer as defined in the City's "Essential Job Functions of a Law Enforcement Officer" form (the "Essential Functions Form"). (ECF No. 31-2, PageID.795-97; Gray Dep., p. 99-106.)

⁴ This date appears to be an error, as the evidence shows that Gray returned to work on August 2, 2016. *See supra* at 3 n.2. Similarly, while it is worth noting that the EEOC complaint identifies the "earliest" date when the alleged discrimination took place as "September 2, 2016," this, too, relates to the date when Gray returned from leave – August 2, 2016. (ECF No. 26-2, PageID.473.)

an amended complaint on July 27, 2018, asserting the following claims:

- Counts I and III – violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.* and the Michigan Persons with Disabilities Civil Rights Act (“PDCRA”), M.C.L. § 37.2101 *et seq.*, by subjecting Gray to disparate treatment and harassing her because of her disability, failing to accommodate her disability, and retaliating against her for filing complaints about that treatment;
- Counts II and IV –violation of Title VII, 42 U.S.C. § 2000e, *et seq.* and Michigan’s Elliott-Larsen Civil Rights Act (“ELCRA”), M.C.L. § 37.2101 *et seq.*, by discriminating against Gray because of her race and sex, and retaliating against her for filing complaints about that discrimination.

(ECF No. 7.) With discovery having closed, the City now moves for summary judgment as to all of Gray’s claims, arguing that she failed to exhaust her administrative remedies, failed to prove a *prima facie* case of discrimination on any basis, and failed to raise a material question of fact as to her failure to accommodate claim. (ECF No. 26.)

B. The Applicable Legal Standards

Pursuant to Rule 56, the Court will grant summary judgment if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Pittman v. Cuyahoga County Dep’t of Children & Family Servs.*, 640 F.3d 716, 723 (6th Cir. 2011). A fact is material if it might affect the outcome of the case under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a genuine issue of material fact exists, the Court assumes the truth of the non-moving party’s evidence and construes all reasonable inferences from that evidence in the light most favorable to the non-moving party. *See Ciminillo v. Streicher*, 434 F.3d 461, 464 (6th Cir. 2006). The Court’s function at the summary judgment stage “is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson*, 477 U.S. at 249.

The party seeking summary judgment bears the initial burden of informing the court of the

basis for its motion, and must identify particular portions of the record that demonstrate the absence of a genuine dispute as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Alexander v. CareSource*, 576 F.3d 551, 558 (6th Cir. 2009). “Once the moving party satisfies its burden, ‘the burden shifts to the nonmoving party to set forth specific facts showing a triable issue.’” *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 453 (6th Cir. 2001) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In response to a summary judgment motion, the opposing party may not rest on its pleadings, nor “‘rely on the hope that the trier of fact will disbelieve the movant’s denial of a disputed fact’ but must make an affirmative showing with proper evidence in order to defeat the motion.” *Alexander*, 576 F.3d at 558 (quoting *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989)). Indeed, “[t]he failure to present any evidence to counter a well-supported motion for summary judgment alone is grounds for granting the motion.” *Id.* (quoting *Everson v. Leis*, 556 F.3d 484, 496 (6th Cir. 2009)). “Conclusory statements unadorned with supporting facts are insufficient to establish a factual dispute that will defeat summary judgment.” *Id.* at 560 (citing *Lewis v. Philip Morris, Inc.*, 355 F.3d 515, 533 (6th Cir. 2004)).

C. Analysis

1. *Timeliness of Gray’s EEOC Complaint*

The City first argues that Gray’s claims fail because she did not timely file her claim with the EEOC. (ECF No. 26, PageID.136-37.) This particular argument is only persuasive as to Gray’s claim that she was subjected to racial and sexual discrimination when the City, in 2015, placed Barnes and Furstenau in permanent Ident. positions instead of Gray.

Very recently, the Honorable Gershwin A. Drain explained the exhaustion process for claims brought under Title VII and the ADA:

Under Title VII, a claim for discrimination can proceed in federal district court only after administrative remedies are exhausted. 42 U.S.C. § 2000e-5(e); *Mitchell v. Chapman*, 343 F.3d 811, 820 (6th Cir. 2003). “It is well settled that a plaintiff must satisfy two prerequisites before filing a Title VII action in federal court: (1) timely file a charge of employment discrimination with the EEOC; and (2) receive and act upon the EEOC’s statutory notice of the right to sue.” *Granderson v. Univ. of Michigan*, 211 F. App’x 398, 400 (6th Cir. 2006). The EEOC charge “shall be in writing under oath or affirmation and shall contain such information and be in such form as the [EEOC] requires.” 42 U.S.C. § 2000e-5(b). The charge must be “sufficiently precise to identify the parties, and to describe generally the action or practices complained of.” 29 C.F.R. § 1601.12(b); *Williams v. CSX Transp. Co.*, 643 F.3d 502, 508 (6th Cir. 2011).

An employee seeking to bring a claim under the ADA must also first exhaust administrative remedies. *Jones v. Natural Essentials, Inc.*, 740 F. App’x 489, 492 (6th Cir. 2018). Analogous to Title VII, to properly exhaust administrative remedies under the ADA, a plaintiff must file a charge of discrimination within 300 days of the alleged discrimination. 42 U.S.C. § 12117 and *Sherman v. Optical Imaging Systems, Inc.*, 843 F. Supp. 1168, 1180-81 (E.D. Mich. 1994).

Stevens v. Concentrix Corp., No. 19-11530, 2019 WL 6728362, at *4 (E.D. Mich. Dec. 11, 2019).

The law differentiates between “distinct” claims of discrimination that accrued on a particular date and claims of ongoing discrimination that amount to a “hostile environment.” While the former must be brought within 300 days of the particular discriminatory act, hostile environment claims must be brought within 300 days of the last related act:

The “continuing violations” doctrine allows courts to toll limitation periods for alleged discriminatory conduct that is deemed continuing in nature. Under the “continuing violations” doctrine, where “there is an ongoing, continuous series of discriminatory acts, they may be challenged in their entirety as long as one of those discriminatory acts falls within the limitations period.” [] “To establish a continuing violation, plaintiff must first produce evidence of a current violation taking place within the limitations period. Second, plaintiff must show that the current violation ... is indicative of a pattern of similar discriminatory acts continuing from the period prior to the limitations period.” []

In Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), a Title VII action, the majority opinion written by Justice Thomas emphasized the clear distinction between applying the

continuing violations doctrine to “hostile environment claims” and applying it to “discrete claims of discrimination or retaliation.” As held in *Morgan*, “[e]ach incident of discrimination … constitutes a separate actionable ‘unlawful employment practice’. [Plaintiff] can only file a charge to discrete acts that occurred within the appropriate time period.” In other words, when an employee seeks redress for discrete acts of discrimination or retaliation, the continuing violation doctrine may not be invoked to allow recovery for acts that occurred outside the limitations period.

Brown v. Donahoe, No. 2:10-CV-12374, 2012 WL 2115180, at *3 (E.D. Mich. June 11, 2012) (internal citations omitted), aff’d sub nom. *Brown v. Potter*, 516 F. App’x 563 (6th Cir. 2013).

a. Gray’s Race and Sex Discrimination Claims Based on the City’s Selection of Other Officers for “Permanent” Identification Unit Positions

As discussed above, one of Gray’s claims is that the City discriminated against her when it placed Barnes (white male) and Furstenau (white female) in permanent Ident. Unit positions instead of her. These are specific employment hiring decisions that constitute “discrete claims of discrimination.” *Morgan*, 536 U.S. at 114 (“Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable ‘unlawful employment practice.’”). “Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the [] 300-day time period after the discrete discriminatory act occurred.” *Id.*, at 113.

Here, Gray admits that the City’s selection of Barnes and Furstenau instead of her occurred in 2015. (ECF No. 31, PageID.593, 610-11.) Accordingly, Gray was required to file a charge of discrimination about those discrete acts of alleged discrimination within 300 days, or by approximately the end of October 2016, at the latest. It is undisputed that Gray did not do so, as the earliest date she filed her EEOC charge was June 29, 2017. *See infra* at 11-12. The City is therefore entitled to summary judgment as to Gray’s claims based on Barnes and Furstenau being

selected for permanent Ident. positions.⁵ ⁶

b. Gray's Other Race, Sex, and Disability Discrimination Claims

A different analysis applies to Gray's other claims of race, sex, and disability discrimination, which all involve claims by Gray that she was subjected to repeated and pervasive instances of race, sex and disability discrimination over a lengthy period of time, and which allegedly resulted in Gray being "forced" to retire on November 9, 2016. As the U.S. Supreme Court explained in *Morgan*:

Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. [...] The "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.

* * *

Given, therefore, that the incidents constituting a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim. In order for the charge to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment.

Morgan, 536 U.S. at 115-118.

⁵ This discrete claim is also subject to dismissal because it arose prior to her return to work on August 2, 2016. *See infra* at 13-14.

⁶ In her summary judgment response brief, Gray asserts that an African American male employee, John Hall, was also placed into a permanent Ident. position. (ECF No. 31, PageID.611.) However, Gray fails to raise a material issue of fact as to Hall. First, when discussing the issue of the permanent Ident. positions in her complaint, Gray referenced only "white male and female co-workers" as comparators. (ECF No. 7, PageID.38.) Similarly, when asked at her deposition how she was discriminated against on the basis of race, Gray responded by pointing to Furstenau's and Barnes' alleged permanent Ident. placements. (Gray dep., at 107-08.) However, when, in the very next set of questions Gray was asked, "how is it that you were discriminated against based on your sex," she did not mention Hall's alleged permanent Ident. placement. (*Id.*, at 108.) Indeed, Gray has provided no evidence whatsoever about Hall's alleged permanent Ident. placement, and her mere reference to that placement in her summary judgment response brief does not constitute evidence which can form the basis for a material question of fact. *See Veeder v. Tri-Cap*, No. 17-cv-11690, 2018 WL 7254610, at *8 (E.D. Mich. Dec. 13, 2018).

The record indicates that Gray's last day of work was November 9, 2016. (ECF No. 26-13, PageID.564.) This means the latest possible deadline for Gray to file her EEOC complaint was September 5, 2017. The City argues that because Gray filed her EEOC complaint on "September 27, 2017," it was tardy, and that she therefore failed to exhaust her claims. (ECF No. 26, PageID.136 (citing ECF No. 26-2, PageID.473.))

While it is true that Gray filed her ultimate EEOC Charge of Discrimination on September 27, 2017, the City's argument ignores that that filing appears to have supplemented prior related EEOC filings by Gray "between June 29, 2017 and September 21, 2017" that the EEOC deemed to be a timely "charge" of employment discrimination, a construction supported by the EEOC's September 21, 2017 letter to Gray, which read:

Dear Ms. Gray:

This is in response to your correspondence you submitted between June 29, 2017 and September 21, 2017, in which you alleged employment discrimination by [the City]. The information indicates that the matter complained of is subject to Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990.

The enclosed EEOC Form 5, Charge of Discrimination, was drafted as a result of the information you provided. To enable proper handling of this action by the Commission you should:

- (1) Review the enclosed charge form, sign, date, have notarized and return.

* * * *

Since charges must be processed within the time limits imposed by law, please complete these steps within 30 days of the date of this letter. Failure to do so will result in the dismissal of your charge. Please note that the EEOC has complied with the law and has sent a Notice of Charge of Discrimination to [the City] indicating that you have filed a charge of discrimination. We have not sent a copy of the unsigned charge at this time. However, should you fail to return the signed charge of discrimination within 30 days of this letter the EEOC will send a copy of the unsigned charge to [the City], along with a copy of the dismissal notice.

(ECF No. 31, PageID.616.) (emphasis added)⁷

The EEOC's letter to Gray indicates that her claim was assigned EEOC Charge No. 471-2017-03424, but it is unclear when that file number was created. (*Id.*) In its reply brief, the City did not address the EEOC's reference to Gray having filed some sort of charging document on June 29, 2017,⁸ which would have been well within the 300-day statutory period. It is, undisputed, however, that Gray filed her ultimate EEOC charging document on September 27, 2017, within the 30 days indicated in the EEOC's letter to her. (ECF No. 26-2, PageID.473.)

In sum, at least based on the present record, a question of fact exists as to whether Gray timely exhausted her administrative remedies as to her hostile environment claims.

Moreover, “[a]s the Court of Appeals for the Sixth Circuit has explained, the administrative requirement of filing an EEOC charge is a precondition ‘that, like a statute of limitation, is subject to waiver, estoppel, and equitable tolling.’” *See Crawford v. Knoxville Health Care Center, L.P.*, 2010 WL 2721481, at *2 (E.D. Tenn. 2010) (citing *Truitt v. County of Wayne*, 148 F.3d 644, 646 (6th Cir. 1998)). Equitable tolling is “sparingly bestowed.” *Graham-Humphreys*, 209 F.3d 552, 560 (6th Cir. 2000). A litigant seeking equitable tolling or estoppel “must come with clean hands.”

⁷ In another (undated) letter, the EEOC explained to the City, “Often the EEOC receives letters from potential charging parties that contain information which is minimally sufficient to file a charge of discrimination. By law, the EEOC is required to date stamp such a letter, assign an EEOC charge number to it, draft a basic charge of discrimination (Form 5) and mail it to the charging party to return the signed charge within 30 days of receipt of such charge.” (ECF No. 26-2, PageID.472.) The EEOC's two letters seem to belie the City's contention that it was the *timing* of Gray's September 21, 2017 submission “which would explain why initially the EEOC indicated the City did not have to take any action when it gave notification of the complaint.” (ECF No. 26, PageID.136-37.) That is, it appears the reason the EEOC did not require the City to respond initially was because it was waiting for Gray to supplement the “charge” she already filed. Once she did that, the EEOC forwarded it to the City for a response.

⁸ Gray asserts in her response brief that she first filed her EEOC charge on “July 28, 2017.” (ECF No. 31, PageID.596.)

King v. Henderson, 230 F.3d 1358, 2000 WL 1478360, at *5 (6th Cir. 2000). Even a one day extension is inappropriate unless there are “compelling equitable considerations.” *Id.* There are five factors to consider when determining whether a claim can be equitably tolled: “(1) lack of notice of the filing requirement; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one’s rights; (4) absence of prejudice to the defendant; and (5) the plaintiff’s reasonableness in remaining ignorant of the particular legal requirement.” *Truitt v. Cty. Of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998). Here, Gray has at least raised questions about whether the document(s) she submitted to the EEOC prior to the expiration of the 300-day filing period equitably toll the running of that deadline; Gray appears to have commenced her EEOC charge on June 29, 2017 – prior to the deadline – which shows diligence; the City does not allege that the additional few weeks before Gray’s ultimate charge was filed prejudiced it; and Gray acted as directed in the EEOC’s letter.

Accordingly, the City is not entitled to summary judgment as to Gray’s hostile environment claims based on the timeliness of her EEOC charge.

2. *Claims Outside the Scope of Gray’s EEOC Charge*

Notwithstanding the foregoing analysis, this Court lacks jurisdiction to consider Gray’s race, sex, and disability discrimination claims that arose prior to her post-medical-leave return to work on August 2, 2016 because they exceed the scope of her EEOC charge. A district court’s jurisdiction to hear cases arising under the Title VII and the ADA is “limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination.” *Oliver v. Titlemax*, 149 F. Supp. 3d 857, 863 (E.D. Tenn. 2016) (quoting *Johnson v. Cleveland City Sch. Dist.*, 344 Fed.Appx. 104, 109 (6th Cir. 2009)). “Therefore, a plaintiff may bring suit on an uncharged claim if it was reasonably within the scope of the charge filed[,]” or if the agency

discovers evidence of the discrimination relating to the uncharged claim while investigating plaintiff's charge. *Id.* (citing *Davis v. Sodexho, Cumberland Coll. Cafeteria*, 157 F.3d 460, 463 (6th Cir.1998)). Here, the EEOC found no evidence of disability discrimination (ECF No. 26-2, PageID.474.), and reviewing Gray's operative EEOC charge makes clear that many of her race, sex, and disability discrimination claims are not reasonably within the scope of the "charge filed."

As noted above, in her EEOC charge, Gray specifically asserted that the discrimination and retaliation occurred after she returned from medical leave on August 2, 2016. (ECF No. 26-2, PageID.473.) The EEOC charge went on to note that August 2, 2016, was the "earliest" date when the alleged discrimination took place. (*Id.*) Accordingly, events which allegedly took place prior to August 2, 2016, are simply not reasonably within the scope of Gray's EEOC charge, and the City is entitled to summary judgment as to these particular claims. *See 42 U.S.C. §2000e-5(e)(1).* This includes Gray's claims referenced in paragraphs 7 – 23 of her response brief arising out of alleged "sexual advances" by one of her supervisors in November 2010, and treatment she faced from her supervisor and colleagues prior to August 2, 2016. (ECF No. 31, Page.ID 590-94.).

In sum, Gray's only race, sex, and disability discrimination claims that proceed to a substantive discussion on summary judgment are those that arose after she returned to work from her medical leave on August 2, 2016. The Court now turns to a consideration of those claims.

3. Race and Sex Discrimination, Harassment, and Retaliation Claims

a. The City is Entitled to Summary Judgment on Gray's Disparate Treatment Race and Sex Discrimination Claims

Gray alleges that when she returned from her leave of absence, the City subjected her to different terms and conditions of employment based on her race and sex. (ECF Nos. 26-2, PageID.473; 26-12, PageID.559; *see also* ECF No. 7.) As the City recognizes, Gray does not attempt to allege or prove that she suffered disparate impact discrimination. Instead, her race and

sex discrimination claims are entirely founded on alleged disparate treatment. To prove such a claim, the plaintiff must first establish a prima facie case of disparate treatment for race/sex discrimination by proving that: (1) she was a member of the protected class; (2) she suffered an adverse employment action; (3) she was qualified for the position; and (4) she was (a) replaced by someone outside the protected class, or (b) treated less favorably than similarly-situated persons outside the class. *Ward v. A-1 Int'l Courier Serv., Inc.*, No. 05-72330, 2007 WL 325342, at *4 (E.D. Mich. Jan. 31, 2007) (citing *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582, 582 n. 4 (6th Cir.1992)).⁹ To be deemed “similarly-situated,” the plaintiff must show that “all of the relevant aspects of [her] employment situation were nearly identical to those of [the compared employee’s] employment situation.” *Mich. Dept. of Civ. Rights ex rel. Burnside v. Fashion Bug*, 473 Mich. 863, 869, 702 N.W.2d 154 (2005) (internal quotations omitted).

If the plaintiff can establish a prima facie case, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for its challenged conduct. If the defendant does so, the burden shifts back to the plaintiff to show that the reason offered was pretext. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1972); *Mitchell*, 964 F2d at 582 (1992).

Gray identifies a few employment decisions and conditions that she claims constitute unlawful race and/or sex discrimination. Most are far too vague, and completely unsupported by any evidence, to give rise to a claim. For example, Gray asserts in her response brief, (1) “Officer Melissa Adam a white female was able to go and come as she pleases and she received full medical treatment for (her finger injury),” and (2) “co-worker Officer Turner consumed alcohol a lot and would come into work and go to sleep on the floor [] [and] was operating his private business on

⁹ The same prima facie elements apply to Gray’s discrimination claims brought under the ELCRA. See *Lytle v Malady (On Rehearing)*, 458 Mich. 153, 172-173; 579 NW2d 906 (1998).

the job . . .” (ECF No. 31, PageID.610-11.) But Gray offers no evidence to support these accusations, and the unsupported accusations in her response brief cannot raise a material question of fact at the summary judgment stage. *See Veeder*, 2018 WL 7254610, at *8.

Gray also alleges that Daniel Emery, a white male, was allowed to go to physical therapy during the day, while she was not, and thus had to attend her physical therapy sessions on her own time. (ECF No. 31, PageID.610-11.) She also alleges that Emery was allowed to run errands for Dennis during the day, while she remained at her duty station. (*Id.*) It is unclear whether this treatment occurred during the relevant period (Gray dep., at 77-78), but even if it did, Gray still has failed to raise a *prima facie* case of discrimination.

While Gray and Emery were similarly situated in some respects – they were both City of Detroit police officers working on temporary restricted duty in the Identification Unit under Sergeant Dennis – Gray fails to show that she and Emery had the same medical restrictions. Moreover, Sergeant Dennis provided an affidavit in which he avers that Emery was allowed to attend physical therapy during the day because he had “gone through the proper procedures within the medical section,” while Gray “did not go through the proper process and wanted to go to a doctor which had not been approved by the medical section.” (ECF No. 26-5, PageID.520.) Dennis concludes, “Because it wasn’t sanctioned by the medical section, I did not release [Gray] to go to the therapy” during worktime hours. (*Id.*) Gray presented no evidence showing that Dennis’ proffered reasons were pretext, and thus she has failed to raise a material question of fact as to this issue.

The only other specific allegation of disparate treatment raised by Gray is in connection with Charles Barnes (white male) and Carole Furstenau (white female) being placed into permanent Ident positions. (ECF No. 31, PageID.610.) However, as discussed above, *supra* at 9-

10, Gray's EEOC charge as to those discrete acts of alleged discrimination was untimely. (ECF No. 31, PageID.593, 610-11.)

For all of these reasons, the City is entitled to summary judgment on Gray's disparate treatment race and sex discrimination claims.

b. The City is Entitled to Summary Judgment on Gray's Racial and Sexual Harassment Claims

To the extent Gray is claiming she was subjected to a racially or sexually hostile work environment, that claim also fails. Under Title VII and the ELCRA, racial and sexual harassment are actionable offenses. *Malan v. General Dynamics Land Sys.*, 212 Mich. App. 585, 587 (1995); *CBOCS West Inc. v. Humphries*, 553 U.S. 442 (2008). To establish such a claim the plaintiff must prove: (1) she was a member of a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment was race-based or sex-based; (4) the harassment unreasonably interfered with her work performance by creating an environment that was intimidating, hostile or offensive; and (5) the employer was liable for the harassing conduct. *Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 706 (6th Cir.2007) (citing *Hafford v. Seidner*, 183 F.3d 506, 512 (6th Cir.1999)). However, as the City correctly points out, Title VII and the ELCRA are not meant to be a general civility code, ridding the workplace of petty slights and annoyances. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998). Rather, their purpose is to protect against severe and pervasive harassment based on a protected characteristic. *See id.*

Gray presents no evidence of overt racial harassment such as racial epithets being used in the workplace, and she presents no other evidence that could be construed as creating a racially-hostile atmosphere. Gray has identified only one specific issue that could even potentially be considered sexually harassing in nature. She alleges a single incident when her supervisor told her that because part of her job involved registering sex offenders, she needed to wear longer shirts

that would cover her buttocks. (Gray dep., at 47.) While Gray disputes wearing any inappropriate clothing, this single relatively benign comment does not rise to the level of actionable sexual harassment. *Faragher*, 524 U.S. at 787-88.

Accordingly, the City is entitled to summary judgment on Gray's claims that she was subjected to racial and sexual harassment.

c. The City is Entitled to Summary Judgment on Gray's Retaliation Claims

In her complaint, Gray claims that she was retaliated against because she "opposed practices prohibited by Title VII [and the ELCRA]." (ECF No. 7, PageID.37, 41.) However, a careful review of the record shows that was not the actual basis of her retaliation claim. Gray's EEOC charge unequivocally alleges that she was retaliated against "for having filed [her] complaint" against Sigmon, and Gray's testimony makes clear that her complaint had nothing to do with alleged discrimination in violation of Title VII or ELCRA. (ECF No. 26-2, PageID.473; Gray dep., at 83-88.) Rather, Gray filed her complaint because Sigmon came into her workspace and turned off her computer so that he could use it, and Gray admits she has no idea why he acted in that unprofessional manner. (Gray dep. at 83-88) Thus, Gray presents no record evidence that her complaint against Sigmon had anything to do with her race or sex. This dooms her Title VII retaliation claim.

To prove a prima facie case of retaliation under Title VII, the plaintiff must show: 1) that she engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding; 2) that her exercise of her protected rights was known to the defendants; 3) that she was subjected to an adverse employment action subsequent to or contemporaneous with the protected activity; and 4) that there was a causal connection between the protected activity and the adverse employment action. *Canitia v. Yellow Freight System, Inc.*, 903 F.2d 1064, 1066 (6th Cir.

1990).

As to the first element, the plaintiff is not required to show that she engaged in formal proceedings under Title VII. “Rather, an informal complaint to an employer concerning practices which are prohibited by Title VII is sufficient to constitute protected activity.” *Weaver v. Ohio State Univ.*, 71 F. Supp. 2d 789, 793–94 (S.D. Ohio 1998), aff’d, 194 F.3d 1315 (6th Cir. 1999) (citing *E.E.O.C. v. Romeo Community Schools*, 976 F.2d 985, 989 (6th Cir.1992)). However, “[c]omplaints concerning unfair treatment in general **which do not specifically address discrimination** are insufficient to constitute protected activity.” *Weaver*, 71 F.Supp.2d 793-94 (emphasis added). This is because “[r]etaliation claims brought under Title VII must stem from alleged retaliation for activities protected under Title VII.” *Leligdon v. McDonald*, No. 1:14 CV 2810, 2016 WL 10590098, at *14 (N.D. Ohio Nov. 21, 2016) (citing *Weaver*, 71 F.Supp.2d at 793-94 (S.D. Ohio 1998), aff’d 194 F.3d 1315 (6th Cir. 1999) and *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 520 (6th Cir. 2009)). Gray’s Title VII retaliation claim fails this requirement as it arose not out of a report of “discrimination” but out of a report of an unpleasant interaction with a colleague.¹⁰

4. *Disability Claims*

In her complaint, Gray makes a variety of claims related to her alleged disabilities – “bilateral degenerative arthritis in her knees as well as generalized anxiety and depression.” (ECF No. 7.) Specifically, she alleges that the City “discriminated against [her] because of her disability

¹⁰ Similarly, with respect to Gray’s disability claims, to the extent she alleges she was retaliated against as a result of her complaint against Sigmon, the City is entitled to summary judgment, as Gray was required to show that she was retaliated against for engaging in activity “protected under the ADA” and the PDCRA. *Morrissey v. Laurel Health Care Co.*, No. 18-1704, 2019 WL 7043167, at *3–4 (6th Cir. Dec. 23, 2019); *Applewhite v. FCA US LLC*, No. CV 17-11132, 2019 WL 6894229, at *6 (E.D. Mich. Dec. 18, 2019).

by subjecting her to disparate treatment because of her disability”; “discriminated against [her] by failing to provide reasonable accommodations to [her]”; “retaliated against [her] for requesting accommodations and for opposing violations of the ADA [and the PDCRA]”; and “permitted its employees to harass [her] because of her disabilities and failed to take prompt remedial action to redress such harassment after [she] reported it.” (*Id.*) But many of those have nothing to do with Gray’s EEOC charge, in which she asserted:

On or about October 17, 2015, I filed a hostile work environment complaint against my co-worker [Sigmon]. From approximately June 2016 until [August 2, 2016] I was out on leave. When I returned from my leave my supervisor subjected me to different terms and conditions of employment based on my race (African American) and sex (female) and retaliated against me for having filed my complaint [against Sigmon] **by moving my work location making my known disability worse**. Then on November 9, 2016 I was forced to retire. I feel I was forced to retire in retaliation for having made [m]y complaint against my coworker [Sigmon].

I believe I have been **discriminated against on the basis of my . . . disability by . . . having my work location moved . . .**

(ECF No. 26-2, PageID.473.)

Gray’s charge thus makes clear that the only issue she raised about her disability was that by moving her work location **in early August 2016** her “known” disability became worse. While that creates a potentially viable claim under the ADA and/or PDCRA (which the Court will analyze below), it is a far cry from most of the disability claims Gray purports to bring in this civil action, such as alleged long-standing failure by the City to accommodate her disabilities, persistent “harassment” by other employees, and “retaliation” for complaining about alleged “violations of the ADA.”

A review of the chronology alleged in paragraphs 19-23 of Gray’s response brief shows that those “claims” all preceded her August 2, 2016 return to work and are unrelated to her office move. (*See* ECF 31, PageID.593-94.) Thus, as discussed above, *supra* at 13-14, none of those

claims is “reasonably within the scope of” Gray’s narrow and specific charge that Sergeant Dennis moved her workstation after she returned to work on August 2, 2016, and that such move worsened her disability. (*Id.*, PageID.594.) *Oliver*, 149 F. Supp. 3d at 863. Accordingly, the City is entitled to summary judgment as to those other claims of disability discrimination that are not encompassed within Gray’s EEOC complaint.

The Court thus turns to Gray’s remaining claim about Sergeant Dennis moving her office after she returned from her medical leave. In her response brief, Gray explained this claim as follows:

23. When [she] returned back to work on ***August 2, 2016*** Supervisor Carlos Dennis called [her] on the office phone and told her to start working in [an] office [] in the back of the building. He said Aloha Dodd is Pregnant and can’t do a lot of [walking] so she needs her trainee in the room next to her. (Record Removal Room) When Plaintiff mentions her restrictions he said “he was ordering her to work in that office.” He also ordered her to work the counter which required a lot of walking and standing.

(*Id.*, PageID.594.) (emphasis added) Later in her brief, Gray explained, “Sergeant Dennis knew of Plaintiff [sic] disability he knew that ordering her to work the counter would do a greater bodily harm to her. . . He gave her a Direst [sic] order and forced her to work in an area that wasn’t close to material and the essential needed [sic] to do her job (example) fax machine, printer, live scan computer and other item. He (Maliciously and with Malice further violated and went against her known job restrictions.)”¹¹ (*Id.*, PageID.600.) (parenthesis in original) In other words, Gray’s

¹¹ Importantly, the restrictions that Gray seems to be referring to – that she “cannot walk for prolonged distances, cannot stand for prolonged periods, . . . sitting for one hour then must be up for 10-15 minutes before sitting again” – were not imposed until August 3, 2016 – the day *after* she returned to work from her medical leave. (ECF No. 26-2, PageID.312.) Therefore, when Dennis moved her office on August 2, 2016, he necessarily could not have done so in violation of her “known” restrictions – at least not the ones imposed one day later.

claim seems to be that by requiring her to work in the “back” of the office and at the counter, Dennis failed to accommodate her disability.¹²

Very recently, the Sixth Circuit explained the standards applicable to disability claims like Gray’s remaining failure to accommodate claim:

The ADA prohibits an employer from “discriminat[ing] against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a). ADA discrimination claims are analyzed under two different rubrics, depending on whether the plaintiff relies on “direct” or “indirect” evidence of discrimination. *See Ferrari v. Ford Motor Co.*, 826 F.3d 885, 891-92 (6th Cir. 2016). This court has explained the logic behind this distinction as follows:

When an “employer acknowledges that it relied upon the plaintiff’s handicap in making its employment decision[,] the *McDonnell Douglas* burden shifting approach is unnecessary because the issue of the employer’s intent, the issue for which *McDonnell Douglas* was designed, has been admitted by the defendant[] and the plaintiff has direct evidence of discrimination on the basis of his or her disability.”

Id. at 892 (alterations omitted) (quoting *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1182 (6th Cir. 1996)). Direct evidence of disability discrimination “does not require the fact finder to draw any inferences” to conclude “that the disability was at least a motivating factor.” *Hostettler v. College of Wooster*, 895 F.3d 844, 853 (6th Cir. 2018) (quoting *Martinez v. Cracker Barrel Old Country Store, Inc.*, 703 F.3d 911, 916 (6th Cir. 2013)).

Because “not making reasonable accommodations” is listed in the ADA’s definition of disability discrimination, *see* 42 U.S.C. § 12112(b)(5)(A), “claims premised upon an employer’s failure to offer a reasonable accommodation necessarily involve direct evidence (the failure to accommodate) of discrimination.” *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 868 (6th Cir. 2007).

Under the direct framework, [the plaintiff] bears the burden of establishing (1) that she is disabled, and (2) that she is “otherwise qualified for the position despite his or her disability: (a) without accommodation from the

¹² Although Gray technically raised this office move in connection with her retaliation claim (ECF No. 26-2, PageID.473) (“retaliated against me . . . by moving my work location . . .”) that the Court has found is subject to dismissal, the substance of the allegation that the move violated her restrictions and worsened her condition is nevertheless “reasonably within the scope of the charge,” and therefore properly before the Court. *Oliver*, 149 F. Supp. 3d at 863.

employer; (b) with an alleged essential job requirement eliminated; or (c) with a proposed reasonable accommodation.” *Kleiber*, 485 F.3d at 869 (citation and internal quotation marks omitted). Once the plaintiff has established these elements, the employer “bear[s] the burden of proving that ... a proposed accommodation will impose an undue hardship upon the employer.” *Monette*, 90 F.3d at 1186.

Morrissey v. Laurel Health Care Co., No. 18-1704, 2019 WL 7043167, at *3–4 (6th Cir. Dec. 23, 2019).¹³

One final principle must be highlighted. An “employer is not required to speculate as to the extent of [an] employee’s disability or the employee’s need or desire for an accommodation.” *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1046–47 (6th Cir. 1998). “Nor is it the employer’s obligation to propose an accommodation—the employee must affirmatively request one.” *Lowes v. Baldwin*, No. 2:18-CV-537, 2019 WL 7290504, at *11 (S.D. Ohio Dec. 30, 2019) (citing *Cady v. Remington Arms Co.*, 665 F. App’x 413, 418 (6th Cir. 2016); 29 C.F.R. pt. 1630 App. § 1630.9 (2016) (“[I]t is the responsibility of the individual with a disability to inform the employer that an accommodation is needed.”)). This is “because many disabled people do not need an accommodation, and the employee is in the best position to know how the disability impacts their work. Furthermore, the ADA generally prohibits employers from inquiring about a disability’s severity.” *Cady*, 665 F. App’x at 418. “Only once a disabled employee has requested the reasonable accommodation does the employer have the duty to make a reasonable effort to accommodate that employee.” *Lowes*, 2019 WL 7290504, at *11 (citing *Gantt*, 143 F.3d at 1046–47).¹⁴ Although there is “no bright-line test for when the form of an employee’s request is

¹³ Michigan’s PDCRA also protects a person with a disability, defined as “an individual who has one or more disabilities.” MCL § 37.1103(d)(i)(A). Although the PDCRA differs in some respects from the ADA, its relevant provisions, like the ADA, require that an employer accommodate a person with a disability unless the employer demonstrates that the accommodation would impose an undue hardship. MCL § 37.1210(2)-(6), (8)-(12), (14)-(15); *See Rourk v. Oakwood Hospital*, 458 Mich. 25, 32 (1998). Thus, the Court will address Gray’s ADA and PDCRA claims together.

¹⁴ Once an employer becomes aware of an employee’s request for an accommodation, it must

sufficiently clear to constitute a request for an accommodation,” *Judge v. Landscape Forms, Inc.*, 592 F. App’x 403, 407 (6th Cir. 2014), and “an employee need not use the magic words ‘accommodation’ or even ‘disability,’ the request does need to make it clear from the context that it is being made in order to conform with existing medical restrictions.” *Leeds v. Potter*, 249 Fed.Appx. 442, 449 (6th Cir. 2007).

Careful application of the relevant case law and legal standards to the record evidence shows that summary judgment is inappropriate on Gray’s failure to accommodate claim.

a. *Disabled*

Gray has at least raised a question of fact as to the first element of her failure to accommodate claim – showing that she had a disability. Under the ADA, a “disability” is defined in three ways: (A) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(1). For purposes of this definition, “major life activities” “include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. 42 U.S.C. § 12102(2). The ADA further provides: “(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter; (B) The term ‘substantially limits’ shall be interpreted consistently with the

“make a reasonable effort to determine the appropriate accommodation.” 29 C.F.R. pt. 1630 App. § 1630.9. “The appropriate reasonable accommodation is best determined through a flexible interactive process that involves both the employer and the [employee] with a disability.” *Id.* Further, when an employee requests a reasonable accommodation, an employer must individually address the requested accommodation. *Cehrs v. Northeast Ohio Alzheimer’s Research Center*, 155 F.3d 775, 782 (6th Cir.1998).

findings and purposes of the ADA Amendments Act of 2008; (C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability; and (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” 42 U.S.C. § 12102(4).

The City argues that Gray “had no problems performing clerical duties that were temporarily granted as an accommodation” and that “[t]he fact that she can work, albeit not in the position that she was hired for, shows she is not substantially limited.” (ECF No. 26, PageID.142.) However, the City cites no facts or case law in support of its argument, and ignores: (1) that during the relevant time in early August 2016, a doctor imposed new restrictions that Gray “cannot walk for prolonged distances, cannot stand for prolonged periods, . . . sitting for one hour then must be up for 10-15 minutes before sitting again”; and (2) just a few months later, Gray applied for and received permanent disability on account of her knee condition and its impact on her ability to walk. (ECF No. 26-2, PageID.312.) At a minimum, this shows that Gray raised a material question of fact as to whether she was “disabled” during the relevant period.

b. Otherwise Qualified

Gray has also raised a question of fact as to whether she was “otherwise qualified” for her position: (a) without accommodation from the employer; (b) with an alleged essential job requirement eliminated; or (c) with a proposed reasonable accommodation. As to this issue, the City’s argument presumes the analysis revolves around whether Gray could perform the “24 essential functions” of an active-duty police officer. While Gray admits that she was unable to perform many of those functions, such as climbing over obstacles and chasing down suspects (Gray dep. at 99-106), this does not end the analysis because “a ‘reasonable accommodation’ under the ADA may include ‘reassignment to a vacant position.’” *Kleiber*, 485 F.3d at 869 (quoting 42

U.S.C. § 12111(9)(B)). “[A]n employer has a duty under the ADA to consider transferring a disabled employee who can no longer perform his old job even with accommodation to a new position within the [c]ompany for which that employee is otherwise qualified.” *Id.* (alteration in original) (quoting *Burns v. Coca-Cola Enters., Inc.*, 222 F.3d 247, 257 (6th Cir. 2000)).

The City recognizes this principle (ECF No. 37, PageID.1255.), but, citing *Meade v. AT&T Corp.*, 657 F. App'x 391, 396 (6th Cir. 2016), asserts that it was not required to accommodate Gray by “creating” a permanent light duty position for her. (ECF No. 37, PageID.1255.) The problem with this argument, though, is that the City admits it had already put Gray into “a restricted duty position that did not require her to go out on patrol.” (ECF No. 26-12, PageID.557.) While the City argues that this was done only as “a temporary accommodation,” and contrasts this position with the “permanent” restricted duty positions that Gray applied for and did not receive (ECF No. 37, PageID.1255.), at least two facts call that argument into question: (1) Gray held the supposed “temporary” position for about 5½ years before the issue giving rise to her instant claim – Dennis’ decision in August 2016 to move her office and assign her to the counter – occurred; and (2) Gray’s employment ended not because the City eliminated her restricted duty position, but because Gray filed for disability retirement. These facts amply distinguish Gray’s case from *Meade*, in which the employer had initially accommodated an employee’s temporary restrictions by allowing him to do light-duty tasks around the office which “was not part of a formal position within [the employer],” but “[u]pon learning that the [employee’s] limitations would be permanent . . . refused to create a permanent light-duty position.” *Meade*, 657 Fed.Appx. at 392, 396.

In sum, given that the City maintained between 123-155 “restricted duty positions” during the time in question (ECF No. 26-12, PageID.561.), and that Gray held her restricted duty position

for almost 6 years, questions of fact exist as to whether Gray was “otherwise qualified” for the position she held at the time the alleged violation occurred in early August 2016.

c. Request for Accommodation

Finally, as explained above, to state a *prima facie* case, Gray must show that she affirmatively requested an accommodation from the City. Construing the evidence in the light most favorable to Gray, as the Court must do at this stage of the litigation, it finds that she has raised a material question of fact as to this issue.

Gray returned to work from a medical leave on August 2, 2016, and Dennis then moved her workstation to the back of the office and assigned her to work the “counter” on at least some occasions. The very next day, Gray’s doctor issued restrictions as to her physical limitations, indicating that she could perform “light work,” but could not walk for “prolonged” distances, and could not stand for “prolonged” periods. (ECF No. 26-2, PageID.312.) Gray provided evidence which at least raises a question of fact as to whether keeping her at the new work station and continuing to have her work the counter violated these restrictions.

First, Gray provided a video that showed the distance she had to walk from her new workstation to utilize basic office equipment, such as a fax machine and copier. While the distance itself was not terribly lengthy, it was appreciable enough that, if Gray had to make the walk often during the day, a factfinder could conclude she had to engage in “prolonged” walking. Certainly that finding could easily be made vis-à-vis the amount of walking she would have had to do if the fax machines, etc. were in vicinity of her office. The City contends this was a non-issue because Sergeant Dennis avers that, “[w]hile the fax/copier were up front, [Gray] did not have to go back and forth, she could have waited for a pile of work to be faxed or copied – like the Office

Management Assistant (Lewis) does now!” (ECF No. 37-4, PageID.1290.) But this merely raises a question about whether, to *effectively* do her job, Gray had to walk “prolonged” distances.

Second, Gray testified about the challenges she encountered in being assigned to work the counter. For instance, she explained, that it “[s]till [involved] a lot of walking and standing because if you worked the counter, you still have to get the file. They give you a file number. That file is not at the counter. You have to go pull the index card. You have to go pull the file. You have to walk up to the front of the building and make copies. (Gray dep., at 68-69.) She also explained that “there was no sitting at the counter.” (*Id.*, at 68.) The City did not dispute Gray’s characterization of the counter work.

Still, in order to establish a *prima facie* case, Gray must show that she requested a reasonable accommodation. Although a close call, Gray has at least raised a material question of fact as to whether she satisfied this requirement. It is unclear exactly when the August 3, 2016 restrictions were communicated to the City, but it appears that they were provided by the doctor to the City that same day, and the City does not contend it did not receive them. It is also undisputed that Gray complained to at least two of her supervisors. She presents evidence that she complained to Dennis right away when her workstation was moved about it resulting in her having to walk too much. (ECF No. 31-1, PageID.742, 772.) Dennis recognized Gray’s communication as a request to “move” her and then, according to Gray, Dennis “called the medical section [himself] . . . and said i [sic] was having a problem with my work location . . .” (*Id.*)¹⁵ Dennis

¹⁵ Gray clearly should have called the “medical section” herself, instead of flippantly declining to do so (ECF No. 31-1, PageID.742, 772) (“I said why should i [sic] call the medical section i [sic] moved to the back like you said.”), but her description of the events is consistent with the City’s “Complaint Procedures,” which state, “Any commanding officer or supervisor who becomes aware of any violation or possible violation, shall take immediate and appropriate corrective action, and may consult with the EEOC for further direction.” (ECF No. 26-2, PageID.465.) In its supplemental brief, the City states, “If [Gray’s] restrictions were not being accommodated, and

does not dispute Gray's evidence, and there is nothing in the record to suggest that the City engaged in an interactive discussion with Gray about the specific issue. Gray also presents evidence that she raised the issues at least one more time with a different supervisor, Braxton Hall, specifically referencing her "restrictions" in connection with difficulties being at her new "work location" and working at the "counter." (ECF No. 31-1, PageID.742, 772.) Again, the City does not dispute Gray's evidence, and there is nothing in the record to suggest that any sort of interactive discussion followed Gray's communication with Hall.

The only question then, is whether Gray's communications to Dennis and/or Hall rose to the level of a "request" for an accommodation sufficient to have triggered the City's obligation to engage in an interactive discussion with Gray about her concerns. This is a close call because Gray was required to show that she requested a "specific accommodation," *Steward v. New Chrysler*, 415 Fed. Appx. 632, 642 (6th Cir. 2011), and her communications certainly could have been more specific.¹⁶ At the same time, Gray was not required to use any particular words to request an accommodation, which includes "making existing facilities readily accessible," *see 42*

she did not agree with Sgt. Dennis' assessment/response, she could have brought it to the attention of the Lieutenant in charge of the Unit, the Medical Section, Personnel or the Chief's Office. There's no evidence that she gave notice to anyone else or that she sought an alternative accommodation." (ECF No. 37, PageID.1257.) But the City's factual assertion is incorrect – Gray did advise a different supervisor, Braxton Hall about the issues, *see infra* at 29 – and the City cites no law that would render Gray's statements to her two supervisors ineffective in terms of triggering the City's obligation to engage in an interactive process.

¹⁶ Questions exist, also, about the claim's overall merits. Shortly before her August 2016 return to work (and move to the back of the office) a psychiatrist had performed a psychiatric evaluation of Gray. When Gray told the psychiatrist that she had been "walking on a treadmill" for exercise, he "confront[ed] her about how she can walk on a treadmill if she has arthritis in her knees and can't walk around her office, and she [was] unable to explain this discrepancy." (ECF No. 26-15, PageID.570.) At the same time, Gray has presented her physician-imposed walking restrictions which are reasonably consistent with medical records stretching over a decade, and the Court may not weigh competing evidence in determining whether summary judgment is appropriate. *Anderson*, 477 U.S. at 249.

U.S.C. § 12111(9)(B); 29 C.F.R. § 1630(o)(2). As shown above, Gray's comments to Dennis were clear enough that he understood she wanted a "move" so that she would not need to walk so much to access basic office equipment.¹⁷ Moreover, Gray's subsequent communication to Hall specifically referenced that issue, as well as her contention that working the "counter" violated her "restrictions." Considered in a light most favorable to Gray, the Court finds that she did enough to request an accommodation – moving her office or providing her with office equipment – to trigger the City's obligation to engage in the interactive process. *See Moore v. Hexacomb Corp.*, 670 F. Supp. 2d 621, 630 (W.D. Mich. 2009) ("What matters under the ADA are not formalisms about the manner of the request, but whether the employee or a representative for the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and the desire for an accommodation.") (quoting *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir.1999)). *See also Thompson v. E.I Dupont deNemours & Co.*, 140 F.Supp.2d 764, 774 n. 8 (E.D. Mich. 2001).

Accordingly, the burden shifted to the City to prove that Gray's proposed accommodation would have imposed an undue burden. *Morrissey*, 2019 WL 7043167, at *4; 42 U.S.C. § 12111(10)(B). Again, there is nothing in the record to suggest that the City even engaged with Gray regarding her request, and the City presented no evidence that moving Gray or providing her the necessary equipment would have caused it any burden.¹⁸ Accordingly, summary judgment on this claim is inappropriate.

¹⁷ According to Gray, Dennis even stated that he had moved Gray so that a different employee who was pregnant could use her old space and not have to "do to [sic] much walking." (ECF No. 31-1, PageID.772.)

¹⁸ The City argues that "[t]he only accommodation [Gray] appears to want to work is a permanent position in the Identification Unit." (ECF No. 37, PageID.1254.) But, as shown above, at least during the timeframe the Court finds to be relevant, Gray was seeking a different accommodation.

III. CONCLUSION

For the foregoing reasons, **IT IS RECOMMENDED** that the City of Detroit's Motion for Summary Judgment (**ECF. No. 26**) be **GRANTED IN PART** and **DENIED IN PART**, with only Gray's failure to accommodate claim under the ADA and PDCRA, as described above, surviving.

Dated: January 6, 2020
Ann Arbor, Michigan

s/David R. Grand
DAVID R. GRAND
United States Magistrate Judge

NOTICE TO THE PARTIES REGARDING OBJECTIONS

Within 14 days after being served with a copy of this Report and Recommendation and Order, any party may serve and file specific written objections to the proposed findings and recommendations and the order set forth above. *See* 28 U.S.C. §636(b)(1); Fed. R. Civ. P. 72(b)(2); E.D. Mich. LR 72.1(d)(1). Failure to timely file objections constitutes a waiver of any further right of appeal. *See Thomas v. Arn*, 474 U.S. 140, (1985); *United States v. Sullivan*, 431 F.3d 976, 984 (6th Cir. 2005). Only specific objections to this Report and Recommendation will be preserved for the Court's appellate review; raising some objections but not others will not preserve all objections a party may have. *See Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987); *see also Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 596-97 (6th Cir. 2006). Copies of any objections must be served upon the Magistrate Judge. *See* E.D. Mich. LR 72.1(d)(2).

A party may respond to another party's objections within 14 days after being served with a copy. *See* Fed. R. Civ. P. 72(b)(2); 28 U.S.C. §636(b)(1). Any such response should be concise, and should address specifically, and in the same order raised, each issue presented in the objections.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on January 6, 2020.

s/Eddrey O. Butts

EDDREY O. BUTTS

Case Manager

Mary Linda Murphy, LMSW

Phone: 248-
201-
Fax: 248-
201-
Farming Road • Livonia • MI • 48178

Declaration

My name is Mary Linda Murphy, LMSW, the facts stated in this declaration are based on my personal knowledge.

Pursuant to 28 U.S.C. 1746 (2), I declare under penalty of perjury that the statements in this declaration are true and correct.

Sheila Gray was a patient under my care (psychotherapy) starting 9/23/2014 when she began individual treatment and continued sessions throughout the years. Starting 11/14/2018 she began attending small non-individual meetings voluntarily to increase her abilities to cope with her work-related stress.

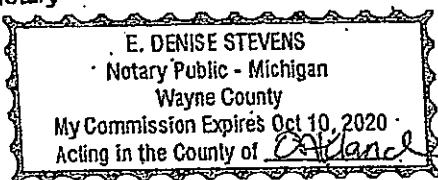
Her reasons for beginning treatment on 9/23/2014 were anxiety, chronic left knee pain, insomnia, crying spells and her often described work-related stress. She said had ulcers and indigestion. I could see bumps on her face that she noted were from stress. She described her insomnia as being related to not knowing what she would have to endure at work.

Her diagnosis was 300.02 Generalized Anxiety and She has Panic Disorder F41.0. I have continued to see her in her small non-individual meetings to learn stress management techniques.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 21, 2019.

Signed: Mary Linda Murphy Date: 6/21/2019

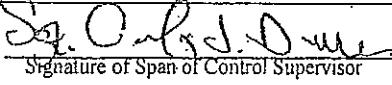
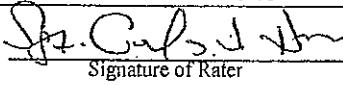
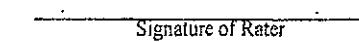
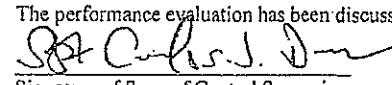
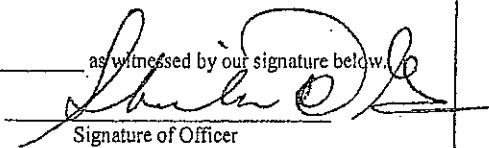
State of Michigan
County of OAKLAND
Mary Linda Murphy did appear
before me this 1st day of June 2019
E. Denise Stevens 10-10-2020
notary commission expires



PERFORMANCE EVALUATION RATING
POLICE OFFICER

Name SHEILA GRAY		Rank Police Officer	Badge No. 0767	Period Covered 11/01/2015-4/30/2016
Bureau DETECTIVE BUREAU	Division RECORDS	IDENTIFICATION UNIT		
1.0, 1.5 Inadequate – Seldom if ever displays this characteristic 2.0 Weak – Occasionally displays this characteristic 2.5, 3.0, 3.5 Average – Usually displays this characteristic 4.0 Good – Displays this characteristic more than the average 4.5, 5.0 Outstanding – Always displays this characteristic All scores below 2 and above 4 must be documented on (Reverse side)				
<u>Appearance:</u> Includes neatness of the worn uniform or civilian clothes; and the impression Given to others, i.e., is the appearance neat and orderly or does it display carelessness? Is His dress appropriate to his assignment? 4.5				
<u>Cooperation:</u> Consider if the cooperation is given willingly and if the level of cooperation is the same if he is working with peers or superiors. 4.0				
<u>Enthusiasm:</u> Is the level of fervor exhibited consistent with all areas of his responsibility Or is he enthusiastic only in his dealings with his superiors or certain areas of his duties 4.5				
<u>Flexibility:</u> Is the man –woman capable of adapting to changing conditions; and is he/she willing to accept progressive change? How well does he/she adapt to new administrators? 4.5				
<u>Good Judgement:</u> Are his/her decisions based on all available facts? Is he/she consistently objective Under stress? Does he/she avoid rash and imprudent judgements? 4.5				
<u>Civil Rights Integrity:</u> Does he/she enforce the laws with impartiality? Does he/she address all citizens with the respect that they deserve? *See Manual Directive 401.1 – 3.4 Rating Traits 4.0				
<u>Level of General Knowledge:</u> Does he/she possess a good basic knowledge of police procedures? Does he/she possess a good working knowledge of federal laws, state laws, city ordinances and department rules, regulations and policies? 4.5				
<u>Level of Specialized Knowledge:</u> Is he/she familiar as he/she should be with the laws and procedures, that uniquely affects his/her position? Does he/she keep abreast of new legislation, court decisions, and policy changes that affects his/her assignment? 4.5				
<u>Maturity:</u> Does his/her behavior indicates that he/she acts in a rational and thoughtful manner without Pique or ulterior motives? 4.5				
<u>Moral Courage:</u> Is he/she willing to stand up and be counted and defend his/her position and beliefs? Is he/she willing to make decisions or does he/she pas the buck whenever possible? Will he/she admit Error when wrong? 4.0				
<u>Motivation:</u> Does he/she function without prodding? Is he/she capable of performing his/her duties with A minimum of supervision or is he/she merely putting in his/her time? 4.5				
<u>Patience:</u> Does he/she display calmness and maintain control of a situation without becoming Emotional? 4.0				
<u>Quality of Work:</u> Does he/she devote his/her efforts toward producing good work? Is he/she careful to Insure that assignments are totally completed or is he/she merely interested in a large quantity Of work? 4.5				
<u>Quantity of Work:</u> Does his/her total workflow compare favorably with others in similar assignments? In general patrol work, does his/her overall work performance show the proper diversity or does he/she Overemphasize one area to the detriment of other areas. Is his/her work performance output consistent? 4.5				
<u>Reliability:</u> Can he/she be trusted to act reasonably in a given situation? Are assignments given To him/her with a feeling that they will be completed quickly and with accuracy? Is he/she punctual? 4.5				
<u>Resourcefulness:</u> Does he/she seek solutions to problems and react to each individually, or is It always done one way? Can he/she rise to an occasion by using imagination? 4.5				
<u>Self-Improvement:</u> Does he/she see his/her shortcomings and seek to correct them? Has he/she taken steps To further his/her education or improve his/her verbal and writing ability? 4.0				
<u>Speaking Ability:</u> Is his/her conversations and verbal reports clear, concise, and to the point? When speaking with citizens, does he/she attempt to convey his/her meaning clearly or does he/she try to Dazzle them with police jargon and inappropriate verbiage? 4.5				
<u>Tact:</u> When he/she speaks, is he/she considerate of the feelings of others? Can he/she communicate with Others without giving offense and arousing hostility? 4.5				
<u>Writing Ability:</u> When completing written assignments and reports, does he/she convey the facts Clearly and orderly? Is his/her choice and use of the language accurate and appropriate? 4.0				
Total				87.0

* PERFORMANCE EVALUATION RATING
POLICE OFFICER

Name SHEILA GRAY		Rank Police Officer	Badge No. 0767	Period Covered 11/01/2015-4/30/2016
Bureau DETECTIVE BUREAU	Division RECORDS	Section or Unit IDENTIFICATION UNIT		
Part V. (Use this section to explain any ratings below 2 or above 4 in Parts I and II and any additional comments deemed appropriate.)				
Same as previously documented.				
Flexibility	OFFICER GRAY ACCEPTS ADVERSITY, CHANGE AND CHALLENGE WITHOUT HESITATION OR OBJECTION			
Motivation	EXTREMELY SELF-MOTIVATED TO DO WHATEVER IS EXPECTED OF HER TO COMPLETE THE DAILY TASKS AT HAND			
Quantity of Work	SHE COMPLETES ALL ASSIGNED WORK AS WELL AS ANY ADDITIONAL RESPONSIBILITIES WITHOUT REQUEST.			
Quality of Work	HER QUALITY OF WORK SURPASSES THAT OF HER PEERS			
Name and Rank of Span of Control Supervisor SGT. CARLOS DENNIS S-341		Name and Rank of Rater SGT. CARLOS DENNIS S-341	Name and Rank of Rater Lt. David Torey L-18	
				
Signature of Span of Control Supervisor		Signature of Rater	Signature of Rater	
The performance evaluation has been discussed in detail on 		6-10-16	as witnessed by our signature below 	
Signature of Span of Control Supervisor			Signature of Officer	