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NOT RECOMMENDED FOR PUBLICATION
File Name: 22a0438n.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: November 1, 2022]

MICHAEL A. CALDWELL (22-1031); ROBERT M. HAHN (22-1032), Plaintiffs-Appellants,	)
v.	)
JOSEPH M. GASPER, in his individual and representative capacities; MICHIGAN STATE POLICE, an agency of the State of Michigan,	)
Defendant-Appellees.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

OPINION

Before: COLE, CLAY, and MATHIS, Circuit Judges.

CLAY, Circuit Judge. Plaintiffs, Michael Caldwell and Robert Hahn ("Plaintiffs"), appeal the district

court's orders granting Defendants, Joseph Gasper and the Michigan State Police's ("Defendants," "Gasper," or "MSP," respectively) motions for summary judgment on Plaintiffs' Title VII and 28 U.S.C. § 1981[1] retaliation claims.[2] Plaintiffs' amended complaints allege that Defendants demoted Caldwell and terminated Hahn in retaliation for their protected opposition to: (1) Defendants' diversity initiatives; and (2) Defendants' alleged double standards in meting out discipline. For the reasons set forth below, we **AFFIRM** the district court's orders granting Defendants' motions for summary judgment.

I. BACKGROUND

A. Factual Background

This case is about two employees who were disciplined for misconduct and for disobeying certain rules when handling the transfer process for a subordinate. They brought suit alleging that the punishment they received was not justified and was imposed instead in retaliation for their opposition to their employer's efforts to diversify the police force.

Michael Caldwell and Robert Hahn served as police officers for the Michigan State Police ("MSP") for over

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[1] Plaintiffs have brought a § 1983 lawsuit based on violations of § 1981. *See Boxill v. O'Grady*, 935 F.3d 510, 519–20 (6th Cir. 2019).

[2] Plaintiffs Caldwell and Hahn each filed separate cases at the district court. The district court issued a single opinion posted in each Plaintiff's respective docket. Although Plaintiffs each filed separate appeals, this Court's opinion addresses both of their claims together, as they share the same set of facts.

thirty years. Until recently, Caldwell was the captain of the seventh district in northern Michigan. Hahn served as an inspector and reported to Caldwell in the same district. Caldwell and Hahn have been close friends since they attended the state police recruit school together in 1990.

In the fall of 2019, Plaintiffs were involved in a series of events that culminated in Caldwell's demotion and Hahn's dismissal. Plaintiffs allege that their dismissal and demotion were due to their voicing concerns over double standards and discriminatory treatment by the MSP towards white males in promotion and hiring. Defendants contend that Plaintiffs were not dismissed for voicing their concerns over discrimination, but rather, because of misconduct relating to the interview and selection process of an employee seeking to transfer to an open position in their district. Before the district court, Plaintiffs alleged that they were discriminated against and retaliated against by the MSP because they are white males and because they opposed MSP's diversity initiatives. The district court determined that Plaintiffs failed to establish a prima facie case of reverse discrimination because they could not point to any similarly situated non-white non-male employees who were treated differently. Plaintiffs have since abandoned and waived their discrimination claims, focusing only on their claim that they were retaliated against for opposing MSP's diversity initiatives.

The following sections detail the events that took place in the fall of 2019, when Plaintiffs: (1) mishandled the transfer interview process of a

subordinate; and (2) expressed their opinions about the MSP's new diversity initiatives.

1. Misconduct in Handling Transfer

On October 9, 2019, an assistant post commander position became available in Gaylord, MI, in the seventh district (then Caldwell and Hahn's district). The position was open only to employees eligible for lateral transfer or demotion. The only officer to apply for the position was a white male, Michael Bush. Bush had worked for the MSP for twenty years and had recently been promoted to detective lieutenant, serving as the Traverse Narcotics Team Commander in the seventh district.

When Bush expressed interest in the position, Hahn, Caldwell, and Bush's direct supervisor, First Lieutenant ("Lt.") Belcher, each spoke with him individually and told him they would not support his transfer because they needed him in the Traverse narcotics unit. Bush was required to obtain a recommendation from his supervisor on a PD-35 form to submit with his application. Belcher completed the PD-35 form for Bush and praised Bush's work in his current position but wrote that he was not recommended for the position because he had not been in his latest position long enough to warrant a promotion to assistant post commander.

The PD-35 was forwarded to human resources ("HR"). Upon receipt of the PD-35, HR Director Stephanie Horton spoke with Lt. Colonel Richard Arnold (Caldwell's supervisor), and they concluded that Belcher's non-recommendation contained in the PD-35

was invalid because it was based solely on Bush's short time in his current position, and not on his performance. Thereafter, Arnold called Caldwell and they discussed Bush's application. Arnold told Caldwell that MSP policy required Bush to be given an interview and that all policies should be followed. Caldwell told Arnold that unless he was overruled, he planned to deny the transfer. Arnold assured Caldwell that he would not overrule the results of the interview panel.[3] Caldwell said he left the conversation believing that Arnold told him to go through the motions of the policy.

The hiring manager for the assistant post commander position was First Lt. Jason Nemecek. Caldwell instructed Nemecek to follow policy, convene an interview panel, and interview Bush for the position. Caldwell made clear to Nemecek, however, that he would not approve the transfer regardless of the results of the interview. On October 28, 2019, Nemecek and a colleague, Connie Swander, interviewed Bush. Nemecek and Swander rated Bush very highly, 52 out of 60 points, on a form known as the PD-11. The PD-11 is required for certain positions, but it was not required for this position and HR did not list it as a required form in the instructions sent to Nemecek. Nemecek and Swander both signed the completed PD-11 form.

Hahn received the signed PD-11 form and a memo indicating that Bush had been recommended for the assistant post commander position. Hahn was

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[3] During his deposition, Arnold indicated he believed that Caldwell was going to serve on the interview panel.

surprised to receive this memo and sent it to Caldwell. Caldwell spoke with Nemecek about the scores and the selection memo, and Nemecek explained that he was going through the motions and believed he had done what the process required. After this conversation, Caldwell purportedly believed that Nemecek may have inflated Bush's scores. Caldwell asked Hahn to follow up with Nemecek and ask him if the scores on the PD-11 accurately reflected Bush's performance in the interview, and if they did not, to resubmit it with accurate scores. Hahn did as he was told and spoke with Nemecek. Nemecek, in turn, discussed Hahn's comments with Connie Swander, but she refused to change the scores. Nemecek let Hahn and Caldwell know that Swander did not want to revisit the score.

Caldwell then spoke with HR Director Stephanie Horton about Bush's application and the scores on the PD-11. During their conversation, Horton let Caldwell know that the lateral interview process did not require the use of the PD-11 form or even a full selection memo. On October 30, 2019, Nemecek revised the selection memo to advise that Bush would not be selected and to request that the assistant post commander position be opened to all applicants.

2. Investigation into Misconduct

Two days later, MSP's professional standards committee received a complaint against Hahn alleging that Hahn manipulated the hiring process to prevent Bush from obtaining the assistant post commander position. First Lt. Brody Boucher, who served as commander of the professional standards section, investigated the complaint. As part of the

investigation, Boucher monitored Hahn's and Caldwell's emails, reviewed all documents relating to Bush's application, and interviewed all of the individuals involved during the process, including Hahn, Caldwell, Nemecek, Belcher, Swander, Horton, Arnold, and Bush. Boucher's 55-page report includes notes from those interviews and detailed Nemecek's discomfort with Hahn's instructions to alter the scores on the PD-11. According to the report, Nemecek "felt sick to his stomach" and "feared retaliation from command." (Boucher Investigation Rep., Hahn R. 142-2, Page ID #1006.)[4] Nemecek also detailed several instances during the application process where Hahn raised his voice and intimidated him into rewriting the selection memorandum.

Boucher's investigation report was sent to Director Gasper on March 5, 2020. On March 9, 2020. Hahn and Caldwell were given a statement of charges and proposed discipline. The charges against Hahn related to his using his position to "bully and intimidate" employees under his command "to manipulate a selection process to ensure a qualified candidate was not selected." (Statement of Charges, Hahn R. 142-15,

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[4] For citations to the appeals court docket, "Caldwell ECF No." refers to the docket in Caldwell's case, *Caldwell v. Gasper*, No. 22-1031. The docket in Hahn's case, *Hahn v. Gasper*, No. 22-1032, in turn, is referred to by using "Hahn ECF No."

Likewise, for citations to the record before the district court, "Hahn R." refers to the trial court docket in Hahn's case, *Hahn v. Gasper*, No. 1:20-cv-403. The record in Caldwell's case, *Caldwell v. Gasper*, No. 1:20-cv-411, in turn, is referred to by using "Caldwell R."

Page ID #1053.) The charges against Caldwell indicated that he violated civil service rules during the selection process by directing his employees to score the applicant according to Caldwell's predetermined outcome and not on the basis of merit. (Statement of Charges, Caldwell R. 137-15, Page ID #1017.) The charges recommended that Caldwell be demoted and Hahn be terminated.

3. Complaints About Diversity Initiatives and Double Standards

Caldwell and Hahn allege that they engaged in protected conduct by complaining about diversity initiatives and double standards within the MSP beginning in August 2019 until March 2020, when disciplinary proceedings were initiated against them. They argue that these complaints motivated the MSP to retaliate against them. Their complaints are summarized as follows.

a. Complaint One: Sergeant Gill's Comedy Routines (Hahn only)

Hahn's first complaint was about a Black colleague's comedy routine. In August 2019, Hahn attended a retirement party. The party featured an open-mic segment, during which Sergeant Dwayne Gill, who served in the recruiting and selection department of the office of equity and inclusion, delivered a comedy routine that featured racial jokes. Hahn was upset with the jokes that Gill made during his routine and he reported them to Gill's supervisor, Inspector Lisa Rish, on September 3, 2019. Rish advised Hahn that she would get back to him about his complaint after the

October fall executive forum. Unsatisfied, Hahn also wrote an email to HR complaining about and linking to Gill's standup routines, many of which were available for viewing on YouTube. On September 19, 2019, Hahn ran into HR Director Stephanie Horton, and she mentioned she had received his email and forwarded it up the chain of command. A few weeks later, Gill's supervisor, Rish, informed Hahn that the MSP was launching an internal investigation of his complaint on Sergeant Gill's comedy routine. The investigation into Gill culminated in a finding that he had violated conduct policies and a recommendation that Gill be suspended for two days. The two-day suspension, however, was later waived by Colonel Arnold. Hahn was unsatisfied with how this investigation was handled and appealed the results to HR. He wrote to them:

> The actions I took in this matter were "protected activities," taken to remedy a clear double-standard, which has long been condoned by the Michigan State Police, and affords, among other current advantages. a higher level of first amendment protections to certain ethnic and gender classes, than it does others. As the initial primary complainant in this matter, the obstruction I was required to hurdle in order to stir other responsible commanders and division heads to action, and the lack of corrective measures taken to address Sgt. Gill's improper conduct, are wholly unacceptable and appear discriminatory against members of other ethnicities in Michigan state government. I believe an investigation into the criteria cited in

> dismissing Sgt. Gill's proposed discipline is in order, as well as an investigation into the gross lack of oversight by those who command the offices, divisions, and bureaus charged with assuring equal and consistent adherence to MSP's Discriminatory Harassment Policy.

(Robert M. Hahn Decl., Hahn R. 145-12 at Page ID #1263.)

b. Complaint Two: Debriefing the Fall Forum (Caldwell and Hahn)

On October 8, 2019, Director of the MSP, Joseph Gasper held a fall forum meeting. Defendants allege that during this meeting, Gasper released a strategic plan for 2020–2022; reiterated that diversity is the number one priority of the department; said that individuals should not think of themselves but the agency as whole if denied a promotion for the sake of diversity; and stated that the MSP is "way too White [sic] and way too male." (Pet'r's Br., Caldwell ECF No. 23 at 13; Op. and Order, Caldwell R. 166, Page ID # 1435; Strategic Plan Document, Caldwell R. 137-18, PageID # 1047.) Both Hahn and Caldwell complained about the MSP's diversity push during a debrief of the MSP's fall forum that took place the next day.

The day after the fall forum, Lt. Colonel Arnold chaired a field operation bureau meeting to discuss the diversity initiatives put forth by Gasper. At this meeting, Caldwell and Hahn both criticized Gasper's comments and his proposed initiatives. Caldwell stated that he was concerned about how these diversity initiatives were affecting white males and that the

term "white male" had taken on a negative connotation. He stated that white males feel like they are being excluded from promotional opportunities because of their race and gender and asked how the diversity initiative would foster an atmosphere of inclusion for members who are not female or members of a racial or ethnic minority. Hahn stated that recruiting and promotions should be based on merit only and that it was not the MSP's fault that it was a majority white male agency. He also criticized the MSP's "hand-wringing over demographics" as an "unwise response to the false claims of institutional racism by Black advocacy groups in the wake of Retired Colonel Etue's race-neutral Facebook post."[5] (Robert M. Hahn Decl., Hahn R. 145-12 at Page ID #1259.)

Plaintiffs allege that they became "persona non grata" after they made these statements, and their colleagues avoided them, especially when Director Gasper was present. (Pet'r's Br., Caldwell ECF No. 23 at 18; Pet'r's Br., Hahn ECF No. 23 at 19.) Caldwell recalls that Director Gasper ignored him and turned his back to him at a conference after he came over and rendered a hand salute.

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[5] Although not mentioned in the record, this Court takes judicial notice, pursuant to Federal Rule of Evidence 201, of a news article indicating that in October 2017, Colonel Kriste Kibbey Etue posted a meme on her Facebook page calling NFL players who kneel during the national anthem "degenerates." *See* Cheyna Roth, *Activists continue to call for Col. Etue's removal*, WNMU-FM PUBLIC RADIO (Oct. 17, 2017), https://www.wnmufm.org/law-enforcement/2017-10-23/activists-continue-to-call-for-col-etues-removal.

c. Complaint Three: Diversity and Inclusion Presentation (Caldwell only)

Caldwell complained about the diversity initiatives again during a presentation on diversity and inclusion. On December 12, 2019, Caldwell attended a presentation by Inspector Lisa Rish, who served as the Equity and Inclusion Officer for the MSP. At this meeting, Caldwell expressed his concerns about the diversity initiative and expressed his belief that the term white male had taken on a negative connotation within the MSP. Caldwell asked how a series of leadership seminars for women in law enforcement "fostered a feeling of 'inclusion' by male MSP members." (Michael A. Caldwell Decl., Caldwell R. 142-14 at Page ID #1237.)

d. Complaint Four: Email about Double Standard within MSP (Hahn to Caldwell)

At 10:35 a.m. Sunday March 8, 2020, Hahn wrote Caldwell an email expressing his frustration that Sergeant Gill mocked racial minorities during a comedy routine and only received a two-day suspension that was later waived. Hahn wrote, in relevant part:

> I feel the double-standfard concerns I made known to our EIO, the Office of Professional Standards, the director of our Human Resources Division, and my bureau leadership, continue to be ignored. Because of this, I feel rather foolish for having stepped up to assure EQUAL rights and protections for ALL department members.

(Pet'r's Br., Hahn ECF No. 23 at 20.) Plaintiffs argue that the timing of the discipline reveals retaliation, as

it is undisputed that Defendants were monitoring their emails and that their disciplinary processes began the day after the email was sent.

4. Disciplinary Hearing

At 1:15 p.m. on Monday, March 8, 2020, the day after Hahn sent that email to Caldwell, they were served with statements of charges and proposed discipline. The charges related to Hahn and Caldwell's handling of the selection process for the post commander position. Four days later, Lt. Colonel Chris Kelenske and Inspector Lisa Gee-Cram oversaw a disciplinary hearing during which they upheld the discipline recommended by HR: demotion of Caldwell and termination of Hahn.

B. Procedural History

In May 2020, Caldwell and Hahn filed separate lawsuits against the MSP, Governor Gretchen Whitmer, and Director Gasper, alleging that they had suffered unlawful race and gender-based discrimination and retaliation for complaining about discrimination. In July 2020, they each filed amended complaints. The district court dismissed every claim other than the discrimination and retaliation claims against Gasper and the MSP.

Defendants thereafter moved for summary judgment. The matter was fully briefed, and the district court held a hearing on the motions. At the hearing, Plaintiffs confirmed that they waived the § 1983 discrimination claim against Gasper. The district court thereafter granted Defendants' motions for summary judgment. Plaintiffs timely appealed the

order. On appeal, Plaintiffs expressly waive their Title VII discrimination claims, and appeal only the district court's grant of summary judgment on their retaliation claims against Gasper and the MSP.

II. DISCUSSION

A. Standard of Review

This Court reviews a district court's grant of a motion for summary judgement *de novo*. *See Thacker v. Ethicon, Inc.*, 47 F.4th 451, 458 (6th Cir. 2022). Summary judgment is properly granted when the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

When evaluating whether a motion for summary judgment was properly granted, "this Court views the evidence in the light most favorable to the party opposing the motion." *Kirilenko-Ison v. Bd. of Educ. of Danville Indep. Sch.*, 974 F.3d 652, 660 (6th Cir. 2020) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). This means that the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor," since "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

B. Section 1981 and Title VII Retaliation Claims Against Defendants

Plaintiffs bring retaliation claims against Gasper and the MSP pursuant to 28 U.S.C § 1981 and Title

VII. As the district court correctly determined, § 1983 provides "a vehicle to vindicate [plaintiffs'] rights under § 1981." *Boxill v. O'Grady*, 935 F.3d 510, 519–20 (6th Cir. 2019). Claims for retaliation under §1981 are analyzed under the same framework as claims for retaliation brought pursuant to Title VII. *Id*. at 520.

A claim for retaliation can be proven with either direct or circumstantial evidence. *See Spengler v. Worthington Cylinders*, 615 F.3d 481, 491 (6th Cir. 2010). Direct evidence does not require any inferences to be drawn regarding what motivated the employer's actions. *Id*. Plaintiffs do not dispute that they have not brought forward direct evidence of retaliation, so this Court will apply the *McDonnell-Douglas* burden shifting framework for circumstantial evidence of retaliation. *See Laster v. City of Kalamazoo*, 746 F.3d 714, 730 (6th Cir. 2014).

A prima face case of Title VII retaliation requires a showing that plaintiffs: (1) engaged in protected activity; (2) the defendants knew of this protected activity; (3) the defendants subsequently took an adverse employment action; and (4) that a causal connection exists "between the protected activity and the adverse employment action." *Goller v. Ohio Dep't of Rehab. & Correction*, 285 F. App'x 250, 256 (6th Cir. 2008) (citing *E.E.O.C. v. Avery Dennison Corp.,* 104 F.3d 858, 860 (6th Cir. 1997)). If the plaintiff can make out a prima facie case, "the burden of production shifts to the defendant to show that it had a legitimate, non-discriminatory basis for the adverse action." *Kirilenko-Ison v. Bd. of Educ. of Danville Indep. Sch.*, 974 F.3d 652, 661 (6th Cir. 2020). The plaintiff must

then show "by a preponderance of the evidence" that defendants' stated reasons were pretext for retaliation. *Id*.

At issue on appeal is whether the district court erred by determining that Plaintiffs failed to (1) make out a prima facie case because they did not engage in protected activity and because Defendants were not aware they engaged in protected activity,[6] and (2) show that Defendants' non-discriminatory reasons for the adverse actions were pretext.

1. Prima facie case

Here, Plaintiffs cannot make out a prima facie case for discrimination because they did not engage in protected activity. Plaintiffs argue that the following constitutes protected activity: (1) Hahn's complaints about Sergeant Gill's comedy routine; (2) Hahn and Caldwell's concerns about Director Gasper's diversity initiatives expressed in a meeting on October 9, 2019; (3) Caldwell's comments during the December 12, 2019, diversity and inclusion presentation that the term white male had taken on a negative connotation; and

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[6] Because we find that Plaintiffs did not engage in protected activity, we need not analyze whether Defendants were aware of Plaintiffs' protected activity. Even if Plaintiffs' conduct constituted protected activity, however, Plaintiffs presented no circumstantial evidence, beyond their own speculation, that indicated that either Gasper or Kelenske had knowledge of their complaints. *See Proffitt v. Metro. Govt. of Nashville and Davidson County, Tenn.*, 150 F. App'x 439, 443 (6th Cir. 2005) (finding plaintiff's reliance on a string of inferences insufficient to establish defendants' knowledge of protected activity); *see also Mulhall v. Ashcroft*, 287 F.3d 543, 553 (6th Cir. 2002).

(4) Hahn's email to Caldwell on March 8, 2020, decrying double standards in relation to Sergeant Gill's discipline.

Title VII forbids employers from retaliating against employees who oppose employment practices that may be unlawful under Title VII. 42 U.S.C. § 2000e–2(a)(1); *see also Yazdian v. ConMed Endoscopic Techs., Inc.*, 793 F.3d 634, 646 (6th Cir. 2015). An employee does not need to be correct that the employment practices he opposes are *actually* unlawful. *Yazdian,* 793 F.3d at 646–47. Instead, the employee need only prove that his complaints about the employment practices were based on "a reasonable and good faith belief that the opposed practices were unlawful." *Johnson v. U. of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000) (internal quotation marks omitted); *see also Barrett v. Whirlpool Corp.*, 556 F.3d 502, 516 (6th Cir. 2009). The requirement that the complaint be based on a reasonable and good faith belief has both an objective and subjective component. The employee who complains "must actually believe[] that the conduct complained of constituted a violation of relevant law, and a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee would believe that the conduct complained of was unlawful." *Yazdian*, 793 F.3d at 646–47 (internal quotation marks omitted).

A vague charge of discrimination does not constitute protected activity. *See id.* at 645; *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989) (noting that a vague charge of discrimination is insufficient to constitute protected activity because

"every adverse employment decision by an employer would be subject to challenge under either state or federal civil rights legislation simply by an employee inserting a charge of discrimination"). A plaintiff need not lodge a complaint with "absolute formality, clarity, or precision" but must make a specific allegation about unlawful employment discrimination and not merely express concern about "management practices." *Yazdian*, 793 F.3d at 645, 647. 3d.

Plaintiff Hahn's complaints about how the investigation into Sergeant Gill's comedy routines was handled were not protected activity because he did not complain about unlawful activity by the MSP, but rather, about management practices. Hahn did not complain because he felt that specific individuals in the office were being discriminated against or because Gill created a hostile work environment;[7] Hahn was

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[7] Hahn does not argue that his complaints were an attempt to notify his employers about a hostile work environment, but even if he did, his complaints about Gill do not constitute protected activity because there is no objective basis for believing that Gill's comedy routine created a hostile work environment. *See Barrett v. Whirlpool Corp.*, 556 F.3d 502, 514 (6th Cir. 2009) (noting that to establish that complaint about hostile work environment is protected activity, plaintiff must provide evidence of "an environment that a reasonable person would find hostile or abusive" and show he "subjectively perceive[d] the environment to be abusive"); *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (determining that plaintiff's complaint about single incident where supervisor and colleague made sexual joke was not protected activity because "[n]o reasonable person could have believed that the single incident recounted above violated Title VII's standard" for a hostile work environment); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (noting that "simple

complaining because he felt that the discipline meted out to Gill was insufficient. Even if Hahn's complaints are to be construed as complaints about unequal treatment in discipline, Hahn's comments about unequal treatment were still too vague to constitute protected activity. *See Willoughby v. Allstate Ins. Co.*, 104 F. App'x 528, 530–31 (6th Cir. 2004) (determining that district court properly granted summary judgment because plaintiff's letter was not protected activity where it contained vague charge of unequal treatment).

The same is true of Hahn's March 8, 2020, email to Caldwell regarding the alleged double standards in the handling of his complaint about Sergeant Gill. Hahn made only conclusory allegations of double standards without describing how MSP's actions in responding to his complaint were discriminatory or unlawful. *Fox v. Eagle Distribg. Co., Inc.*, 510 F.3d 587, 591–92 (6th Cir. 2007) (determining that plaintiff's general complaints of unhappiness with defendants' actions and about management being "out to get him" was not protected activity where it did not allege acts of discrimination).

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teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'" to constitute a hostile work environment). Moreover, Hahn himself admitted he was not offended by Gill's routine, thus failing to establish the subjective requirement that he believed he was experiencing a hostile work environment. (Email from Hahn to Lisa Gee-Cram, Hahn R. 145-13, Page ID #1265 ("On a personal note, Sgt Gill's remarks that people might be 'as confused as Amish people in a Best Buy store.' My grandparents were Mennonites, however, I'm not personally offended since I'm not outraged by everything.")).

Caldwell and Hahn's criticism of Director Gasper and the MSP's diversity initiatives are also not protected activity because their criticism was comprised of general complaints about unfairness and dissatisfaction with the MSP's reactions to public outcry over the lack of diversity within the police force. Plaintiffs' comments did not indicate that they or another employee were being discriminated against in hiring and promotion. *Balding-Margolis v. Cleveland Arcade*, 352 F. App'x 35, 45 (6th Cir. 2009) (determining that plaintiff's complaints did not constitute protected activity where the complaints concerned general "work-related issues" and expressed that plaintiff was "simply unhappy with the manner in which [defendant] conducted business.").

Caldwell's comments at the diversity and inclusion presentation on December 12, 2019, are similarly vague and nonspecific. At that meeting Caldwell again expressed his concern about a negative connotation associated with the word "white male" and with white males feeling like there was not enough programming specifically targeted towards them. He made no specific allegations of discrimination against him or another employee that would be sufficient to constitute protected activity. *See Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989) (noting that plaintiff's complaint was not protected activity and was only a vague charge of discrimination where plaintiff complained that charges against him were a result of "ethnocism."). Because Plaintiffs' complaints were vague, nonspecific charges of discrimination and mismanagement, their comments cannot be considered protected activity and Plaintiffs

are unable to establish a prima facie case of discrimination.

2. Pretext

Even if Plaintiffs could demonstrate a prima facie case of retaliation, they have not presented sufficient evidence to show that Defendants' legitimate nondiscriminatory reason for the adverse action was pretextual. Defendants' proffered reason for Caldwell's demotion and Hahn's dismissal was that Plaintiffs showed incompetence and used their positions to manipulate the interview process for the assistant post commander position to suit their own ends, rather than following policy. Unlike the showing at the prima facie stage, the burden at the pretext stage is onerous: Plaintiffs must "demonstrate by a preponderance of the evidence that the proffered reason was a mere pretext for [retaliation]." *Alexander v. Ohio State U. College of Soc. Work*, 429 F. App'x 481, 489 (6th Cir. 2011) (quoting *Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 542 (6th Cir. 2003)).

To prove pretext, a plaintiff has the burden to show "(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the employer's action, or (3) that they were insufficient to motivate the employer's action." *Tingle v. Arbors at Hilliard*, 692 F.3d 523, 530 (6th Cir. 2012) (quoting *Romans v. Mich. Dep't of Human Servs.,* 668 F.3d 826, 839 (6th Cir. 2012)). The ultimate inquiry in using any of these three methods is an assessment of whether the "employer made up its stated reason to conceal intentional [retaliation]." *Id.* at 530 (internal quotation marks omitted).

The district court determined that Defendants had satisfied their burden of showing that they honestly believed their non-discriminatory reason for dismissing Hahn and demoting Caldwell. A plaintiff cannot show pretext when an employer has an honest belief in its nondiscriminatory reason for discharging an employee and relies on "particularized facts that were before it at the time the decision was made." *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001); *see also Briggs v. U. of Cincinnati*, 11 F.4th 498, 515 (6th Cir. 2021).

In this case, Plaintiffs argue that Defendants and the district court's reliance on Boucher's report was "misplaced" because "Boucher was **not** a decisionmaker or participant in the decision-making process." (Pet'r's Br., Hahn ECF No. 23 at 45.) Plaintiffs cite to no authority, and we know of none, to support their contention that an employer or a court is not permitted to rely on the testimony of an individual tasked by the employer to investigate the claims of misconduct. Where an employer conducts a thorough investigation and makes an employment decision based on facts uncovered in that investigation, plaintiffs do not demonstrate pretext simply because they "might have come to a different conclusion if they had conducted the investigation." *Seeger v. Cincinnati Bell Tel. Co., LLC*, 681 F.3d 274, 287 (6th Cir. 2012).

Plaintiffs point to eight other categories of evidence that they argue proves pretext: (1) that the MSP only offers settlements to less serious offenses, meaning that MSP viewed Hahn and Caldwell's offenses as less serious; (2) that the district court considered the

discipline levied against Hahn "heavy handed;" (3) that there was no factual basis for Kelenke's assertion that Hahn lied when he denied telling Nemecek to use a PD-11; (4) that there is no factual basis for the proposition that Hahn and Caldwell lied about whether the PD-11 form was required; (5) that Defendants' explanation for the adverse action keeps changing; (6) that Defendants treated a similarly situated employee far better than Hahn even though that employee engaged in egregious conduct; (7) that defendants attempted to conceal the identity of the decisionmaker in this case; and (8) that Defendants' explanations "smack of mendacity." (Pet'r's Br., Hahn ECF No. 23 at 45–46.) None of these categories of evidence proves that Defendants did not honestly believe that Caldwell and Hahn mishandled the interview and selection process for the assistant post commander opening.[8]

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[8] Each of the pieces of evidence they offer is insufficient: (1) the fact the MSP only offers settlements to less serious offenses does not mean that it was not an offense the MSP was entitled to discipline; (2) the district court's thoughts about the severity of the punishment meted out does not affect the legal analysis relevant to whether Defendants' invocation of the honest belief rule is proper; as for reasons (3), (4), (5), the fact that Plaintiffs would have conducted the investigation differently or come to a different conclusion is not sufficient to overcome Defendants' honest belief, and Defendants' explanation for the discipline has not changed merely because there are gaps in knowledge or slight inconsistencies in the testimony of different employees; (6) Plaintiffs admit that the "similarly situated employee" is not similarly situated because he committed a more egregious offense; (7) none of the evidence cited indicates that Defendants sought to

Plaintiffs also argue that the honest belief rule does not apply when a cat's paw theory is advanced—where there is evidence that a "biased subordinate intentionally manipulated the decisionmaker"—citing *Marshall v. The Rawlings Co. LLC*, 854 F.3d 368, 380 (6th Cir. 2017). While Plaintiffs are correct, Plaintiffs did not present any evidence that Gasper or Kelenske were manipulated by a subordinate with discriminatory animus towards Hahn or Caldwell. Kelenske's termination decision was based on Boucher's investigation report. Plaintiffs do not point to any evidence that Boucher was influenced by any biased subordinate nor that Boucher himself was biased against Caldwell or Hahn. Furthermore, the honest belief rule can be applied to "the allegedly biased lower-level decisionmaker; that is, the defendant may show that the lower-level subordinate was not actually biased by showing that the lower-level subordinate held an honest belief that justified the adverse action against the plaintiff." *Marshall v. The Rawlings Co. LLC*, 854 F.3d 368, 380 n.3 (6th Cir. 2017). Boucher testified that the report he prepared was based on his interviews with Plaintiffs and all relevant witnesses and he believed that the evidence showed that they had ordered Nemecek to manipulate Bush's scores. Plaintiffs point to no evidence indicating that Boucher did not honestly believe the findings contained in his investigation report.

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conceal the identity of the decisionmaker, and indicates that Kelenske was the decision maker; and (8) this is a conclusory allegation unsupported by the record.

Accordingly, Plaintiffs also fail to establish that Defendants' employment decisions were pretextual.

CONCLUSION

For the reasons stated above, we **AFFIRM** the district court's order granting the Defendants' motion for summary judgment.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 22-1031/1032

[Filed: November 1, 2022]

MICHAEL A. CALDWELL (22-1031); ROBERT M. HAHN (22-1032), Plaintiffs - Appellants,	)
v.	)
GRETCHEN WHITMER, Defendant,	)
JOSEPH M. GASPER, in his individual and representative capacities; MICHIGAN STATE POLICE, an agency of the State of Michigan, Defendants - Appellees.	)

Before: COLE, CLAY, and MATHIS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.

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 district court's orders granting Defendants' motions for summary judgment are AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 22-1031/1032

[Filed: December 1, 2022]

MICHAEL A. CALDWELL (22-1031); ROBERT M. HAHN (22-1032),	)
Plaintiffs-Appellants,	)
v.	)
JOSEPH M. GASPER, IN HIS INDIVIDUAL AND REPRESENTATIVE CAPACITIES; MICHIGAN STATE POLICE, AN AGENCY OF THE STATE OF MICHIGAN,	)
Defendants-Appellees.	)

O R D E R

BEFORE: COLE, CLAY, and MATHIS, Circuit Judges.

The court received two petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original

submission and decision of the cases. The petitions then were circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed: December 27, 2021]

CASE No. 1:20-CV-403

HON. ROBERT J. JONKER

ROBERT M. HAHN,

Plaintiff,

v.

JOSEPH M. GASPER, et al.,

Defendants.

and

Case No. 1:20-CV-411

HON. ROBERT J. JONKER

MICHAEL A. CALDWELL,

Plaintiff,

v.

JOSEPH M. GASPER, et al.,)
)
Defendants.)
)

OPINION AND ORDER

INTRODUCTION

These are two of three civil lawsuits brought by white male police officers against their employer, the Michigan State Police, and the director of the Michigan State Police, Joseph Gasper alleging that they were discriminated and retaliated against by Defendants on account of their race and gender and the complaints they made about unlawful race and gender preferences instituted by the Michigan State Police.[1] In these two cases both Plaintiffs assert they were subjected to trumped up charges for their actions related to a hiring decision within the state police district they oversaw.

The matter is before the Court on the defense motions for summary judgment filed in both Hahn and Caldwell's cases. The Court heard argument on the motions on October 26, 2021, and thereafter took the matter under advisement. Plaintiffs plainly disagree as a policy matter with the priorities of the Michigan State Police. And at bottom, this is all they have shown. The main characters in this case are all white

[1] The Court ordered that these two cases would proceed together given the overlapping legal theories and intermingled factual assertions. The third case, *McCormick v. Gasper*, Case No. 1:20-cv-779 (W.D. Mich. 2020), has proceeded separately, although it too has common factual assertions.

males. There is scant evidence that Director Gasper had any active involvement in Plaintiffs' disciplinary process. Moreover, Plaintiffs cannot point to a comparator to make out a prima facie case of reverse race and gender discrimination. Nor can they demonstrate the reasons underlying their respective disciplines were pretext for unlawful race and gender discrimination or that their discipline was retaliation for their complaints about the administration's diversity policies. Accordingly, for the reasons explained more fully below, the Court grants the defense motions and dismisses these two lawsuits.

FACTUAL BACKGROUND

Hahn and Caldwell have each served in the Michigan State Police for over thirty years. They became acquainted as recruits and eventually obtained leadership positions in the Michigan State Police's Seventh District, an area encompassing the northern counties of Michigan's lower peninsula. In 2019, Hahn held the title of Inspector, and he reported to Caldwell, who held the title of Captain. As leaders in the Seventh District, Hahn and Caldwell were both involved in the hiring process when vacancies for subordinate positions came up within the district. Captains like Caldwell were historically given some latitude in managing the hiring process, especially as it related to lateral movements within the district. So, when Michael Bush, a white male, asked that Hahn and Caldwell approve his lateral transfer application within the district, Plaintiffs assert there was nothing out of the ordinary when they told Bush they would not support the request because they needed him in his current

position. What followed, however, was a process that eventually led to Hahn's termination and Caldwell's demotion. Plaintiffs claim that their discipline was just one example of a policy and practice dating back several decades in the Michigan State Police that preferred racial and gender minorities over white males. They were disciplined, Plaintiffs argue, for speaking out about those discriminatory practices.

All this is Plaintiffs' position in brief. Below, the Court provides additional detail.

I. The Diversity Initiative and Hahn and Caldwell's Complaints

A. Defendant Gasper Institutes the "Diversity ONE" Initiative.

In January 2019, Defendant Gasper became the Director of the Michigan State Police when Governor Gretchen Whitmer succeeded Rick Snyder as Governor of Michigan. Plaintiffs allege that after taking office the new administration doubled down on a practice in the Michigan State Police dating back to the 1980s that maintained unlawful racial and gender minority preferences in the police force. Throughout the years the practice has been more overt than at others. In response to past litigation[2] and a State constitutional amendment in 2006, for example, Plaintiffs argue the preferences have become more nuanced. But make no mistake, Plaintiffs say, in practice the state police have, both past and present, unlawfully given

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[2] *See, e.g., Herendeen v. Michigan State Police*, 39 F. Supp. 2d 899 (W.D. Mich. 1999).

preferences to racial and gender minorities in all aspects of employment.

Plaintiffs specifically allege that Defendant Gasper reinforced these past practices under a "diversity ONE initiative."[3] It began during a February 6, 2019, meeting, where Director Gasper commented that diversity would be the "number one priority" within the Michigan State Police. (Caldwell Sec. Am. Compl. ¶ 32, ECF No. 116, PageID.710-711). Then, in October 2019, Caldwell commented that the Michigan State Police was "way too white, and way too male" and announced that the Michigan State Police would diversify all ranks of the police force. He announced certain percentage targets for gender and racial minorities. As Caldwell and Hahn put it, the new diversity initiative had a negative impact on the morale of white male officers in the Michigan State Police. Not only did it effect hiring practices, but it also resulted in disparate treatment towards white male officers. Those officers were treated differently than other officers for engaging in similar conduct. It is against this backdrop that both Plaintiffs place themselves in the late summer and early fall of 2019.

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[3] The record sometimes refers to this as "Diversity 1" or "Diversity 10.0." It is not clear from the summary judgment record if the initiative has been reduced to writing. The defense provides a "strategic plan" for the Michigan State Police that highlights some of the goals of the initiative, including a "key measure" setting out percentage targets for racial and gender minorities in the trooper applicant pool. (ECF No. 142-19).

B. Plaintiff Hahn's Complaints About a Comedy Sketch by a Minority Employee.

On August 29, 2019, Plaintiff Hahn attended the retirement party of a fellow employee. Sergeant Dwayne Gill, a moonlighting comedian, took the stage for an open-mic segment. During his routine, Sergeant Gill made several jokes with a racial or gender-based tinge that Hahn understood to be in violation of the Michigan State Police's Discrimination and Harassment Policy. (Hahn Sec. Am. Compl. ¶ 48, ECF No. 121, PageID.745).[4] Hahn assumed that the senior members of the Michigan State Police who were in attendance would act on the matter, but after several days when no action had been taken, Hahn complained about the comments to Sergeant Gill's supervisor, Lisa Rish, "as he was duty bound by policy and his oath of office to do." (*Id.* at ¶ 50). Rish tried to dissuade Hahn from pursuing a complaint but Hahn pointed out that failing to investigate the matter would amount to a double standard in the application of the Michigan State Police's harassment policy. The senior members took no action, Hahn believed, because Sergeant Gill was a racial minority. Rish reluctantly agreed to investigate the matter.

Hahn also performed his own investigation. He viewed some of Sergeant Gill's comedy sketches on the internet and concluded that they also violated the

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[4] "Hahn ECF" refers to the docket in Hahn's case, *Hahn v. Gasper*, No. 1:20-cv-403. The docket in Caldwell's case, *Caldwell v. Gasper*, No. 1:20-cv-411, in turn, is referred to by using "Caldwell ECF." The summary judgment record in both case contains significant overlap.

Michigan State Police's Code of Conduct and its Discrimination and Harassment Policy. On September 13, 2019, Hahn sent Inspector Lisa Gee-Cram a link to one of the videos and copied Caldwell on the email. (Hahn ECF No. 1-5). Hahn remarked that the video was not "in step with the direction our department and society are trying to move[.]" (*Id.*). Approximately a week later, on September 19, 2019, Hahn spoke with Stephanie Horton, the Human Resources Director of the Michigan State Police about Gill's videos. She advised Hahn that his complaint to Lisa Rish was being sent up the chain of command. Ms. Rish also contacted Hahn and hold him that there would be an internal investigation of his complaint. (Hahn Sec. Am. Compl., ¶¶ 66-68, Hahn ECF No. 121, PageID.747).

C. Plaintiff Hahn and Caldwell Complain About the Diversity Initiative

A few weeks later, on October 8, 2019, Director Gasper held a fall forum event. At the forum, Director Gasper reiterated the comments he had made earlier that spring. Diversity was to be the number one priority of the state police. Gasper further commented that the police force was "way too white and way too male" and allegedly instituted a directive that the Michigan State Police was to set aside 25% of positions for minorities and 20% for females. (Hahn. Sec. Am. Compl. ¶ 31, Hahn ECF No. 121, PageID.741; Caldwell Sec. Am. Compl. ¶ 39, Caldwell ECF No. 116, PageID.711).

The following day, Lt. Colonel Rick Arnold, a member of the leadership team working underneath Director Gasper, held a bureau meeting. Both Hahn

and Caldwell were in attendance. At the beginning of the meeting, Arnold commented that the purpose of the meeting was to have a "difficult discussion" about the racial and gender preferences in the State police force. (Caldwell Sec. Am. Comp. ¶ 41, ECF No. 116, PageID.712). During the meeting, Arnold solicited feedback from the attendees. Plaintiff Caldwell spoke up and was blunt. He explained that the initiative would have a negative impact on white males in the police force under his command. He told Arnold that the term "white male" had taken a negative connotation in the state police. Caldwell asked how Director Gasper's public comments could foster an atmosphere of inclusion amongst those officers who were not racial or gender minorities. (Caldwell Decl. ¶¶ 10-14, Caldwell ECF No. 145-14, PageID.1268). Hahn spoke in favor of Caldwell's comments. He criticized the Michigan State Police's "hand-wringing over demographics" and commented that the initiative was an unwise response to false claims of institutional racism in the police force. (Hahn Decl. ¶ 15, Caldwell ECF No. 145-12, PageID.1259).

Both Hahn and Caldwell assert that following these comments, they became personas non grata at work. Other officers avoided them, especially when Director Gasper was present. (Caldwell Dep. 154-155, Hahn ECF No. 145-2, PageID.1170). And when, in January of 2020, Caldwell told Arnold that he supported Hahn's complaint about Sergeant Gill and communicated that he believed Hahn was being targeted for his complaint, Arnold responded that the two should do a better job of getting along with others. (Hahn ECF No. 145-2, PageID.1185).

II. The Lateral Transfer Request

A. Michigan State Police's New Hiring Policy and the Assistant Post Commander Opening

In August of 2019, the Michigan State Police instituted a new hiring policy for vacancies in higher level positions. Among other things, the policy directed that the vacancies for those positions would first have to be posted for lateral transfers only. The policy further required that "[t]he hiring manager *shall* hold an interview . . . to determine [the applicant's] qualifications, interest in the position, and job fit." (Hahn ECF No. 145-21, PageID.1292) (emphasis added). Only if there was no individual selected during this lateral stage could the vacancy be opened up for all applicants, including those interested in promotions.

On September 27, 2019, Hahn emailed Inspector Scott Marier requesting that a position for the Assistant Post Commander position in Gaylord, Michigan be posted for lateral or promotion applicants. (Hahn ECF No. 145-18, PageID.1276). The Assistant Post Commander position fell under the requirements of the new hiring policy but Hahn asked Marier whether they could forgo the lateral transfer stage and open the position for all applicants. But Lt. Colonel Arnold decided that the policy requiring the lateral transfer stage needed to be followed. (Hahn ECF No. 142-2, PageID.1014-1015).

Accordingly, the Assistant Post Commander position was posted on October 9, 2019, for employees interested in a lateral transfer.

B. Bush Applies for the Assistant Post Commander Position and is Told He Would Not be Selected.

After hearing of the opening, Dt./Lt. Michael Bush, a white male, emailed his supervisor, F/Lt. Belcher and expressed a desire to apply for the lateral transfer. Bush had been with the Michigan State Police for over twenty years and had recently been promoted to the position of detective lieutenant serving as the Traverse Narcotics Team ("TNT") Commander, a position in the Seventh District. (Caldwell ECF No. 137-3, PageID.985-84). Applicants in the Michigan State Police interested in moving to a different position are required to obtain a recommendation from their superiors on an internal, PD-035, form. To move forward with the application, Bush asked Belcher to complete the required PD-035 recommendation form on his behalf.

In the following days, Bush discussed the position with Caldwell, Hahn, and Belcher. None of the individuals supported the transfer. Belcher told Bush he did not support the transfer because Bush had only recently been promoted to the narcotics team and he wanted Bush to stay in the position for the needs of that team. (Hahn ECF No. 145-18, PageID.1277). In a similar vein, Caldwell told Bush that he would not approve a transfer, and that Caldwell needed Bush to remain at TNT for "operational reasons." (Hahn ECF No. 145-18, PageID.1280). On October 15, 2019, Belcher completed the PD-035 form. Belcher did not recommend Bush for the position because he believed Bush had not been in the TNT position long enough to

warrant the Assistant Post Commander position. (Caldwell ECF No. 137-4, PageID.989). The PD-035 form was forwarded to Human Resources.

C. Arnold Requires that Bush Be Given an Interview

Meanwhile, on October 14, 2019, Angela Fuqua with Human Resources sent an email to the hiring manager for the Assistant Post Commander position, F/Lt. Jason Nemecek. The email explained that Bush was the lone applicant for the position. Ms. Fuqua wrote that even though Bush was the only applicant, Nemecek was not obligated to move forward with Bush if Nemecek believed Bush was not qualified. Nemecek could also conduct an informal interview that might illuminate whether Bush was qualified for the position. (Hahn ECF No. 142-5, PageID.1029). To select Bush for the position, Nemecek was to complete a selection memo explaining that Bush was the only applicant and addressing Bush's competencies and work experience. (*Id.*). At that time, Human Resources did not yet have Bush's completed PD-035 form. Ms. Fuqua indicated that the form, and other materials, would be forwarded along to Nemecek when they were received. On October 21, 2019, Nemecek followed up with Ms. Fuqua to ask when he might receive the rest of Bush's application. (ECF No. 142-7, PageID.1036). Ms. Fuqua initially responded that because Belcher did not recommend Bush for the position, Bush would be placed back in the queue. (*Id.*). But Stephanie Horton and Richard Arnold subsequently discussed Bush's application and concluded that Belcher's PD-035 non-recommendation was invalid because it was based on Bush's lack of time

in his current position, and not his performance. There was, Arnold decided, no requirement that personnel spend a specific amount of time in a position before applying for a transfer. (Hahn ECF No. 142-2, PageID.1015).

Arnold called Caldwell and told him that under the new policy, Bush needed to be given an interview. It was important, he said, that the policy be followed. (Arnold Dep. 93, Hahn ECF No. 142-8, PageID.1039). Caldwell bristled at the interference in the process and told Arnold that unless Arnold or Director Gasper overruled him, he was going to deny the transfer. Arnold assured Caldwell that he would not overrule the interview panel. (Arnold Dep. 87, Hahn ECF No. 145-7, PageID.1229). Caldwell described Arnold's instructions as to "go through the motions" of the new lateral transfer policy. (Caldwell Dep. 39, Hahn ECF 145-2, PageID.1158).

D. Nemecek and Connie Swander Interview Bush and Select Him for the Position

Following the call with Arnold, Caldwell spoke with Nemecek about interviewing Bush. Consistent with Arnold's directions, Caldwell told Nemecek that he needed to convene an interview panel and interview Bush. But Caldwell emphasized to Nemecek that this was only so as to "go through the motions" of the new policy. Regardless of any interview, Caldwell said, he would not approve the transfer. (Hahn ECF No. 145-18, PageID.1280-1281).

On October 28, 2019, Nemecek and Connie Swander interviewed Bush for the Gaylord post. Bush was asked five questions, and Nemecek found that Bush gave "very clear and concise answers." (Caldwell ECF No. 137-2, PageID.968). The interviewers also scored Bush using a "PD-011" form, which was an interview evaluation grid. The evaluation form was a tool used for some interviews, but it was not listed as a required form in the email that Ms. Fuqua had sent Nemecek. And Hahn was emphatic that he never directed Nemecek to use the PD-011 form during the interview. Nevertheless, Nemecek and Swander completed the form for Bush and scored Bush at 52 out of 60 points, reflecting a high score. Both Nemecek and Swander signed the form, indicating they agreed to the listed scores. (Hahn ECF No. 142-9, PageID.1041).

E. Hahn and Caldwell Direct Nemecek to Review the Selection

The PD-011 form, and a memo indicating Bush had been selected for the Assistant Post Commander position, were forwarded to Hahn. Hahn was surprised that Nemecek had selected Bush, and he sent the selection memo to Caldwell. Caldwell then spoke with Nemecek about the decision. According to Caldwell, Nemecek explained that in selecting Bush for the position, he had no intention of circumventing the district; rather, he had completed the PD-011 form and authored the selection memo because he had been told to go through the motions, and Nemecek thought he had done what the process required. (Hahn ECF No. 145-18, PageID.1281). Nemecek further stated that he believed that his memo and the completed form did not

matter in any event, since Caldwell had already decided not to approve the transfer. (*Id.*).

Believing that by being told to "go through the motions," Nemecek may have "pencil whipped," or inflated, Bush's scores, Caldwell asked Hahn to follow up with Nemecek and ask if the scores on the PD-011 accurately reflected Bush's performance in the interview. If the scores were not accurate, Hahn was to instruct Nemecek to resubmit the PD-011 with accurate scores. (Hahn ECF No. 145-18, PageID.1281). Hahn did as he was told. Nemecek then discussed the matter with Connie Swander. Ms. Swander indicated she would not revisit the score. Nemecek then informed Hahn and Caldwell.

F. Caldwell Speaks to H.R. About the Bush Application

Caldwell and Horton subsequently had a conversation about the Bush application and Nemecek and Swander's PD-011 scores. During the conversation, Ms. Horton indicated that a lateral interview does not require the use of the PD-011 scoring grid or a full selection memo. (Hahn ECF No. 142-2, PageID.1014). In a follow up email, Horton confirmed that the PD-011 form was not required. (Hahn ECF No. 145-18, PageID.1278). Having received word that the PD-011 form was not required, there was no longer any need to revisit the scores on the PD-011. And on October 30, 2019, Nemecek completed a revised selection memo that requested the Assistant Post Commander position be opened to all applicants. (Hahn ECF No. 142-14, PageID.1051).

III. The Disciplinary Process

A. Internal Affairs Investigates Hahn and Caldwell

On November 1, 2019, the Michigan State Police's Professional Standards Committee received a complaint that alleged Hahn "used his position to manipulate a hiring process to exclude D/Lt. Mike Bush from a lateral transfer to the Gaylord Post." (Hahn ECF No. 142-2, PageID.1004). The complaint was investigated by F/Lt. Brody Boucher, the commander of the Professional Standards section.

Over the course of several weeks, the investigation grew to include Caldwell. Boucher received permission to monitor Caldwell and Hahn's emails, reviewed other documents, and interviewed Hahn, Caldwell, Nemecek, Belcher, Swander, Horton, Arnold, and Bush. In his report summarizing his interviews, Boucher described how Nemecek and Swander felt uncomfortable with how Hahn and Caldwell had interacted with them during the application process. Nemecek described how Hahn and raised his voice and badgered him. Nemecek felt "sick to his stomach" about how things had taken place. (Hahn ECF No. 142-2, PageID.1006).

B. Charges are Filed Against Hahn and Caldwell

Boucher's internal affairs investigation resulted in a final report that was sent to Director Gasper on March 5, 2020. (Hahn ECF No. 154-4,

PageID.1402).[5] Four days later, a statement of charges and proposed discipline against Hahn and Caldwell was released. The statement of charges as to Plaintiff Hahn recommended termination. The charges described the basis for the recommendation:

> An internal affairs investigation . . . established that in October 2019, you violated department policy when you used your position to bully and intimidate members under your command participating in a selection process. You demonstrated a lack of competence when you failed to verify the necessary requirements of a selection process and provided inaccurate and unethical direction to a subordinate employee. You violated Civil Service Rules when you directed a subordinate to manipulate a selection process to ensure a qualified candidate was not selected. You were insubordinate when you stated you understood a directive not to discuss the internal affairs investigation and subsequently sent emails to another principal member prior to their investigatory interview.

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[5] This exhibit was included in a Motion to Supplement that was filed in both cases. (Hahn ECF No. 154; Caldwell ECF No. 158). In addition to the motion to supplement, counsel for Plaintiffs referenced additional authority as part of his oral argument. The defense opposes the motion to supplement. The gist of the opposition is that the exhibits amount to an improper sur-reply. The Court has reviewed the motion, and the defense opposition. None of the additional exhibits chage the analysis or the conclusions the Court reaches below. The Court grants the motion to supplement, however, to the extent it assists in demonstrating a more complete factual record.

> After being given a direct order to fully and truthfully answer questions, you were less than truthful during your investigatory interview.

(Hahn ECF No. 142-15, PageID.1053).

Plaintiff Caldwell's charges recommended demotion:

> An Internal Affairs investigation . . . established that in October 2019, you violated Civil Service Rules when you directed the review of independently assessed interview scores, not on a basis of known merit, efficiency, or fitness; rather to align with your predetermined outcome. Your actions show a clear and distinct intent to undermine the selection process. You demonstrated a lack of competence when you provided inaccurate and contradictory information regarding the relevant facts and details related to your role in the selection process, including a notarized affidavit. You failed to uphold high ethical standards and ensure the integrity of state government.

(Caldwell ECF No. 137-15, PageID.1017).

C. Hahn's Email to Caldwell

Plaintiffs contend these charges were hastily prepared after Hahn emailed Caldwell a day earlier about the results of the Michigan State Police's investigation into his complaints about Sergeant Gill. That investigation resulted in a recommendation that Gill receive a two-day suspension, though that discipline was later waived by Lt. Colonel Arnold.

After hearing about the results of the Gill investigation, apparently from Caldwell, Hahn sent an email to Caldwell expressing his displeasure that Gill had received such a light sanction. Hahn remarked that he believed his complaints about the Michigan State Police's double-standards were being ignored. Hahn sensed that he was being viewed as a dissenter by his peers and by the leadership team. He believed he was being punished for his comments. (Hahn ECF No. 145-15, PageID.1271). Asserting that their email was being monitored at this time, Plaintiffs allege the charges were written up when it was clear that Hahn was not going to let the Gill matter go.

D. The Disciplinary Conferences Result in Hahn's Termination and Caldwell's Demotion.

Hahn and Caldwell's disciplinary conference took place on March 13, 2020, before Lt./Col. Chris Kelenske and Inspector Lisa Gee-Cram. At the hearing, Hahn alleged that he was targeted for opposing the racial and gender minority preferences of the state police and his complaints about Sergeant Gill. (Kelenske Dep. 14-15, Hahn ECF No. 142-18, PageID.1082). At the conclusion of the hearing, the recommended discipline was upheld. Caldwell was ultimately replaced by another white male within the MSP. Hahn's position had not been filled at the time briefing had concluded, however at the hearing on this matter, counsel for the defense stated that Hahn's position had also been filled by a white male.

PROCEDURAL HISTORY

Hahn and Caldwell filed their respective lawsuits raising state and federal claims on May 11, 2020. Following the Rule 16 scheduling conference, Second Amended Complaints were filed both raising identical federal claims.[6] Count I asserts a claim against Defendant Gasper under 42 U.S.C. § 1983 for Fourteenth Amendment reverse race and gender Discrimination. Count II presents a claim against Defendant Gasper under Section 1981 for unlawful retaliation. Count III raises a claim against the Michigan State Police for reverse discrimination under Title VII. Finally Count IV brings a claim of Title VII retaliation against the Michigan State Police.

Following discovery, the defense filed a motion for summary judgment in both cases. (Hahn ECF No. 141; Caldwell ECF No. 136). Plaintiffs responded in both cases by waiving their claims in Count I. Plaintiffs oppose the motions in all other respects. At the October 26, 2021, hearing the Court confirmed with the parties that Plaintiffs were waiving their Section 1983 claim against Defendant Gasper, and then heard argument on the remaining three counts. Thereafter the Court took the matter under advisement. The matter is ready for decision.

LEGAL STANDARDS

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving

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[6] The Court declined to exercise supplemental jurisdiction over the state law claims at the Rule 16 conference.

party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). Material facts are facts which are defined by substantive law and are necessary to apply the law. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id*. at 252. In deciding a motion for summary judgment, the court must draw all inferences in a light most favorable to the non-moving party, but may grant summary judgment when "'the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.'" *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986)). In *Scott v. Harris*, 550 U.S. 372 (2007), the Court ruled that in considering a motion for summary judgment in the context of an excessive force claim, a court should "view[]the facts in the light depicted by the videotape." *Harris*, 550 U.S. at 380-81. The Court emphasized that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. *Id*. at 380.

DISCUSSION

I. Title VII Reverse Discrimination

The Court begins with Count III of Plaintiffs' Second Amended Complaints, which raise a Title VII claim against the Michigan State Police for reverse

race and gender discrimination. Plaintiffs do not contend they have direct evidence of discrimination in support of this claim. Instead, both sides analyze the discrimination claim under the burden shifting approach set out in *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973), as modified in cases of reverse discrimination. Applying that framework, the Court concludes the defense is entitled to summary judgment in its favor,

A. Burden Shifting in a Reverse Discrimination Case

Typically, under *McDonnell Douglas*, a plaintiff must first establish a prima facie case of discrimination by showing that "(1) he is a member of a protected class; (2) he was qualified for his job; (3) he suffered an adverse employment decision; and (4) he was replaced by a person outside the protected class or treated differently than similarly situated non-protected employees." *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 391 (6th Cir. 2008). "The Sixth Circuit has adapted this four-prong test to cases of reverse discrimination, where a member of the majority is claiming discrimination." *Leadbetter v. Gilley*, 385 F.3d 683, 690 (6th Cir. 2004). "In such cases, a plaintiff satisfies the first prong of the prima facie case by demonstrating background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Id.* (internal citations and quotation marks omitted); *see also Romans v. Mich. Dep't of Human Servs.*, 668 F.3d 826, 837 (6th Cir. 2012) (in case involving majority plaintiff, the plaintiff "must establish the first prong of

a prima facie case by showing background circumstances to support the suspicion that the defendant is the unusual employer who discriminates against the majority"). "To satisfy the fourth prong in a reverse-discrimination case, the plaintiff must show that the defendant treated differently employees who were similarly situated but were not members of the protected class." *Leadbetter*, 385 F.3d at 690 (internal citations and quotation marks omitted). The first and fourth prongs should be viewed separately. "Showing that similarly situated employees of other races were treated differently than the plaintiff is an independent evidentiary requirement . . . holding that such evidence also satisfies the background circumstances requirement would collapse a four-legged test into a three-legged one." *Treadwell v. Am. Airlines, Inc.*, 447 F. App'x 676, 679 (6th Cir. 2011).

If a plaintiff makes out a prima facie reverse discrimination case, the "the burden shifts to the defendant to offer evidence of a legitimate, non-discriminatory reason for the adverse employment action." *White*, 533 F.3d at 391; *Romans*, 668 F.3d at 838-839 (applying *McDonnell-Douglas* approach in reverse-discrimination case). "Finally, if the defendant succeeds in this task, the burden shifts back to the plaintiff to show that the defendant's proffered reason was not its true reason, but merely a pretext for discrimination." *White*, 533 F.3d at 391-92.

B. Prima Facie Case

The defense does not dispute that Plaintiffs were qualified for their positions and that they suffered an adverse employment action. The defense argues,

however, that Plaintiffs are unable to demonstrate the background circumstances that are required to satisfy the first element. The defense further contends Plaintiffs are unable to show they were treated differently than non-white, non-male employees. While Plaintiffs likely have done enough to show background circumstances, the Court determines that Plaintiffs fail to meet the fourth element of a prima facie case.

i. Background Circumstances

The background circumstances requirement stems from a 1981 case from the D.C. Circuit, *Parker v. Baltimore & Ohio Railroad*, 652 F.2d 1012 (D.C. Cir. 1981); *see* II BARBARA T. LINDERMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, Ch. 37.II.B, pp. 2488 (4th ed. 2007). Under this approach, a plaintiff must establish that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Parker*, 652 F.2d at 1017-18. "The types of background circumstances that might support this type of inference are: (1) evidence indicating that the employer has some reason or inclination to discriminate invidiously against the majority group, or (2) evidence from which an inference of discrimination can otherwise be drawn." LINDERMANN & GROSSMAN, *supra* at pp. 2489. The Sixth Circuit has further stated that to show background circumstances, the plaintiff may present evidence of the defendant's unlawful consideration of race in employment decisions in the past. *Sutherland v. Mich. Dept. of Treasury*, 344 F.3d 603, 615 (6th Cir. 2003). This showing "is not onerous, and can be met through a variety of means, such

as statistical evidence; employment policies demonstrating a history of unlawful racial considerations; evidence that the person responsible for the employment decision was a minority; or general evidence of ongoing racial tension in the workplace." *Johnson v. Metro. Gov't of Nashville & Davidson Cty.*, 502 F. App'x 523, 536 (6th Cir. 2012).

The defense argues, in the main, that Plaintiffs cannot demonstrate background circumstances because all the actors involved in this case are white males. (Hahn ECF No. 142, PageDI.983-984). Michael Bush is a white male. Hahn and Caldwell are also both white males, and so are Gasper, Boucher, Arnold, and Kelenske. This distinguishes those cases, the defense points out, where minority supervisors discriminated against white male employees. (*Id.*). Moreover, the defense identifies a litany of cases where the Michigan State Police have been sued for discriminating against racial or gender minorities. On this basis it insists it cannot be the unusual employer who discriminates against white males. It is true that courts often find background circumstances where a member of a racial or gender minority is responsible for taking the adverse employment action. *See, e.g.*, *Leavey v. City of Detroit,* 467 F. App'x 420, 425 (6th Cir. 2012) ("The mere fact that a racial minority took an adverse action against Plaintiff is sufficient to satisfy the background circumstances requirement."). But that is not the only way to demonstrate background circumstances. And here Plaintiffs have pointed to enough to raise at least a material issue of fact that there was ongoing racial tension within the Michigan State Police and in particular that white males felt they were being

treated differently than other, non-white and non-male employees. In *Johnson* for example, a panel of the Sixth Circuit found sufficient background circumstances where the plaintiffs "presented depositions by persons at all levels of [the defendant employer's] hierarchy who testified that the department was interested in promoting diversity and that it was acutely conscious of its long history of racial and gender imbalance." *Johnson v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, 502 F. App'x 523, 537 (6th Cir. 2012). Plaintiffs point to similar evidence here by way of their own depositions and declarations, as well as through other statements by white male officers. A jury may well believe that the Michigan State Police's efforts were legitimate efforts towards promoting diversity in its ranks rather than unlawful race and gender discrimination. Under the Rule 56 lens, however, the Court concludes Defendants have done enough to satisfy this element.

ii. Different Treatment

Plaintiffs fail, however, to meet their burden with respect to the fourth element of a prima facie case. Because they were both replaced by other white males, to meet this element Plaintiffs must show they were treated differently than similarly situated, non-white or non-male employees. *Romans*, 668 F.3d at 837. "In order to be considered 'similarly situated' for the purposes of comparison, the employment situation of the comparator must be similar to that of the plaintiff in all relevant aspects." *Id.* at 837-838 (quoting *Highfill v. City of Memphis*, 425 F. App'x 470, 474 (6th Cir. 2011)). In evaluating whether an individual is

sufficiently similarly situated, courts consider "whether the employees: (1) engaged in the same conduct, (2) dealt with the same supervisor, and (3) were subject to the same standards." *Johnson v. Ohio Department of Public Safety*, 942 F.3d 329, 331 (6th Cir. 2019). At bottom, "Plaintiff must show that a minority [employee] engaged in similarly-sanctionable conduct, but received a less severe sanction." *Arendale v. City of Memphis*, 519 F.3d 587, 604 (6th Cir. 2008).

Plaintiffs each identify the same four individuals as "egregious examples of disparate discipline:" (1) Sergeant Dwayne Gill; (2) Keyonn Whitfield; (3) Monica Yesh; and (4) Captain James Grady. (Hahn ECF No. 145, PageID.1148-1149; Caldwell ECF No. 142, PageID.1116-1117).[7] Applying the above

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[7] The factual discussion of Plaintiffs' briefs identify a Captain Greg Michaud as a "telling comparator." (Hahn ECF No. 145, PageID.1142; Caldwell ECF No. 142, PageID.1110). Plaintiffs allege that Captain Michaud improperly used the state police's LIEN network for personal purposes and lied about his actions. (ECF No. 145, PageID.1142). Plaintiffs do not reference Captain Michaud in their argument section, but to the extent Plaintiffs contend Michaud assists them in satisfying this element of a prima facie case as a comparator, the Court disagrees. As a male, Michaud does not assist them in a disparate treatment claim on account of gender. Plaintiffs also do not provide Michaud's race. Assuming Captain Michaud is a racial minority, it is not clear how Captain Michaud was treated better than Plaintiffs. It appears Captain Michaud and Plaintiff Caldwell held the same rank. Like Plaintiff Caldwell, the recommended discipline was demotion. Indeed, Michaud's recommended discipline was even worse—it included a 30-day suspension. (ECF No. 145, PageID.1142). Michaud chose to retire, while Plaintiff Caldwell did not. But that

standards, none of these individuals are sufficiently comparable. Gill, Whitfield, and Grady are all males, for one thing, and so cannot assist Plaintiffs on a reverse gender discrimination claim. Plaintiffs also do not compare themselves to Sergeant Gill. Rather they assert that Gill was treated better than another white male colleague who allegedly made sexist remarks. But this does not demonstrate that they were treated differently than members outside a protected class, and so Sergeant Gill does not assist Plaintiffs in meeting their burden. Even if Plaintiffs could step in the shoes of F/Lt. Rod (the white male they compare to Sgt. Gill), they do not satisfy their burden of demonstrating Rod is sufficiently comparable to Gill. Gill and Rod held different ranks. And Plaintiffs do not state when Rod made the remarks, or who his superiors were. Thus Gill is not a sufficient comparator.

Hahn next asserts Whitfield was treated differently than he was, but Whitfield is not sufficiently comparable to him.[8] According to an internal affairs report referenced by Hahn, Whitfield is an African American male who is a First Lieutenant in the Second District. Apparently in response to the same fall forum that Plaintiffs identify, Whitfield held a staff meeting on November 20, 2019. At the meeting, Whitfield spoke about a specific panel at the forum he had attended

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does not demonstrate Michaud was treated differently. Plaintiffs themselves state they were given the option of retiring and refused. (ECF No. 145, PageID.1141).

[8] Caldwell does not allege that Whitfield was treated differently than he was. (Caldwell ECF No. 142, PageID.1117).

and referred to one panelist as "he gay." Several staff members felt offended or embarrassed by Whitfield's comments. Whitfield admitted he discussed the forum but denied making the specific comments. The internal report determined that Whitfield had created a hostile work environment in describing a male employee and that he had engaged in conduct contrary to that expected by a command officer by referring to an employee in a manner that caused angst, anger, and embarrassment amongst his subordinates. (ECF No. 145-33, PageID.1317-18). Hahn attempts to shoehorn his alleged conduct aside that of Whitfield. He says that Whitfield lied and intimidated his subordinates. Hahn contends this is the same conduct that was asserted against him, but Whitfield was not terminated. (ECF No. 145, PageID.1149). The Court disagrees. There is no indication in the internal affairs report that Whitfield had lied. And rather than intimidate subordinates as part of an internal hiring process, Whitfield was alleged with creating a hostile work environment that was offensive. It was not alleged to be intimidating. Whitfield also held a different rank and served in a different district than Hahn. Thus, Whitfield is not an appropriate comparator to Plaintiff Hahn.

Next, both Plaintiffs state that Monica Yesh, a white female, is a comparator because she engaged in misconduct but did not receive a sanction. They contend that Ms. Yesh awarded towing and automotive service contracts in exchange for sports tickets and work on her personal vehicle. An investigation confirmed improprieties, but Ms. Yesh was permitted to transfer to a different position and the investigation

was not completed. (Hahn ECF No. 145, PageID.1149; Caldwell ECF No. 142, PageID.1117). Monica Yesh is not sufficiently comparable because the misconduct alleged happened in 2015, four years earlier than events of this case. (McCormick Dep. 239, ECF No. 145-9, PageID.1237). As the defense points out, at that point Governor Whitmer had not yet been elected and Defendant Gasper was not yet in office. Another individual was in charge of conducting internal affairs. The differences in timing, investigators, and the supervisors involved means Ms. Yesh is not a sufficient comparator.

Plaintiffs' reference to *McMillan v. Castro*, 405 F.3d 405 (6th Cir. 2005), does not change matters. In *McMillan*, a panel of the Sixth Circuit reviewed a trial court's jury instructions that to be similarly situated "the individual with whom Plaintiff seeks to compare her treatment must have dealt with the same supervisor." *Id.* at 413. The court observed that the same supervisor language in its earlier cases "has never been read as an inflexible requirement." *Id.* at 414 (quoting *Seay v. Tenn. Valley Auth.,* 339 F.3d 454, 479-80 (6th Cir. 2003)). What matters is that the plaintiff and comparator be similar in "all of the *relevant* aspects." Thus whether the same supervisor "criterion is relevant depends upon the facts and circumstances of each individual case." *Id.* Along these lines the Sixth Circuit in *Seay* found an employee sufficiently comparable to the plaintiff even though they had different immediate supervisors because "all of the people involved in the decision-making process, including Plaintiff's immediate supervisor and the department manager, were well-aware of the discipline

meted out to past violators, including [the non-protected employee], who had violated the policy on at least two occasions." *Seay*, 339 F.3d. at 480.

Like *Seay*, Plaintiffs say, everyone knew about Ms. Yesh and her misconduct. (Caldwell Dep. 180-181, Hahn ECF No. 145-2, PageID.1175). Given the turnover of the directors within the Michigan State Police after a change in administration, Plaintiffs argue, this is one of those instances where the same supervisor criterion is not relevant. But this is not simply a case where Ms. Yesh and Plaintiffs had different supervisors. And the involvement of the director in these situations, if any, appears to be minimal. The conduct that Ms. Yesh allegedly committed is much different than that alleged against Plaintiffs. The timing, difference in districts, difference in investigators, and difference in the alleged misconduct all weigh against finding sufficient similarity.

Finally, both Plaintiffs argue that Captain James Grady, a black male, is a comparator. According to Plaintiffs, Grady was faced with the same situation they were in. Serving in the same position as Caldwell in another district, Caldwell had an opening for a lateral transfer with a single applicant (who happened to be Caldwell's brother). Grady denied the lateral transfer request and he was not punished. (Caldwell Dep. 252-254, ECF No. 145-2, PageID.1184). Grady is not sufficiently comparable because Plaintiffs were not sanctioned for denying a lateral transfer. Rather, it was their alleged interference and misconduct in the process that led the investigation and subsequent

discipline. They do not allege that Grady engaged in any conduct similar to that which led to their charges. To the extent Plaintiffs allege Grady was treated better because Arnold did not interfere in the process under Grady, the Court is not persuaded. Plaintiffs state that Grady "went through the motions" with his applicant, which is all that Plaintiffs allege their superiors required with Bush.

For all the above reasons, then, Plaintiffs fail to meet the fourth element and have not satisfied their burden of establishing a prima facie case of race and gender discrimination.

C. Non-Discriminatory Reasons and Pretext

Even if Plaintiffs were able to satisfy their burden of demonstrating a prima facie case of reverse race and gender discrimination, they have not demonstrated that the reasons justifying their demotion and termination were pretext for unlawful discrimination.

At the second step of the *McDonnell Douglas* analysis, the defendant needs to advance a legitimate, non-discriminatory reason for its employment decision. Defendants say they have done so. Following the investigation, it was determined that Hahn and Caldwell, believing a PD-011 form was necessary, instructed Nemecek to change the score, and obstructed Bush's lateral transfer. Then during the investigation, Hahn was less than truthful about what he had done. Plaintiffs say the description in the defense brief does not entirely align with the statement of charges, but they do not expressly contend that

Defendants have failed to satisfy their burden at the second step. (*see, e.g.,* Caldwell ECF No. 142, PageID.1118).

Thus, the matter proceeds to the third step of the *McDonnell Douglas* approach and the burden shifts back to Plaintiffs. At this stage, the plaintiff prevails only if he proves "either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate [the plaintiff's] discharge, or (3) that they were *insufficient* to motivate discharge." *Russell v. Univ. of Toledo*, 537 F.3d 596, 604 (6th Cir. 2008) (quotation omitted). No matter the path chosen, the plaintiff retains the ultimate burden of producing "sufficient evidence from which the jury could reasonably reject [the employer's] explanation and infer" intentional discrimination. *Braithwaite v. Timken Co.*, 258 F.3d 488, 493 (6th Cir. 2001) (internal quotation omitted).

Furthermore, if an employer "honestly believes" its proffered nondiscriminatory reason, courts do not infer pretext just because the reason proves "mistaken, foolish, trivial, or baseless." *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998). "In other words, arguing about the accuracy of the employer's assessment is a distraction because the question is not whether the employer's reasons for a decision are *right* but whether the employer's description of its reasons is *honest*." *Id.* (internal quotations omitted). A belief is honestly held so long as the employer can "establish its reasonable reliance on the particularized facts that were before it at the time the decision was made." *Id.* at 807. The employee must then produce "proof to the

contrary" that challenges the foundation of the employer's belief or lose on summary judgment. *Id.*; *see also Braithwaite*, 258 F.3d at 494.

Plaintiffs claim Defendants' proffered justifications are pretextual for six reasons. (Hahn ECF No. 145, PageID.1150-1151; Caldwell ECF No. 142, PageID.1118-1119). All the arguments come down to the assertion that Hahn and Caldwell did not manipulate the hiring process and that they did not intimidate Nemecek into altering a PD-011 form that Hahn and Caldwell both believed was necessary for lateral transfers. Plaintiffs fail to demonstrate pretext, however, because even accepting this assertion, there is plenty to demonstrate that Defendants honestly believed Plaintiffs interfered and intimated Nemecek during the process and Plaintiffs fail to produce proof to the contrary.

The investigation into Hahn and Caldwell was lengthy and thorough. It included document reviews, including an affidavit authored by Caldwell, and interviews of the main players, including Nemecek, Arnold, Horton, Hahn, and Caldwell. Boucher testified that it was Plaintiffs own statements that led him to conclude Hahn and Caldwell believed a PD-011 form was necessary as part of the interview process. (Boucher Dep. 32-33, Caldwell ECF No. 137-16, PageID.1025). During his investigation, Nemecek told Boucher that Hahn had yelled at him, and that he felt sick to his stomach about the process. (Caldwell ECF No. 137-2, PageID.967). All told, there is ample evidence demonstrating Defendants' honest belief in the nondiscriminatory reason for Plaintiffs' discipline.

Plaintiffs offer nothing that would challenge the foundation of the Michigan State Police's nondiscriminatory belief. The six bullet points they list all fail to create a triable issue of pretext. In their first and sixth arguments, Plaintiffs attempt to demonstrate pretext by showing there was no basis in fact for Defendants' assertion that Plaintiffs incorrectly believed a PD-011 form was necessary. This is so, they say, because Nemecek testified he did not recall whether Hahn instructed him to complete a PD-011 form when he interviewed Bush. (Nemecek Dep. 21, Hahn ECF No. 145-19, PageID.1283). But to overcome Defendants' honest belief, Plaintiffs "must allege more than a dispute over the facts upon which [the discipline] was based." *Braithwaite v. Timken Co.*, 258 F.3d 488, 494 (6th Cir. 2001). This is all they have done here. Moreover, the conduct that led to Plaintiff's discipline was what took place afterwards when, having received Nemecek and Swander's completed PD-011, Caldwell and Hahn pressured Nemecek into reviewing the PD-011. This conduct, Boucher testified, was inconsistent with individuals who believed PD-011s were not necessary, as Hahn had told Boucher. Indeed, Plaintiff's own brief makes clear Plaintiffs did, for a time, believe PD-011 forms were necessary when they admit they asked Nemecek to review his scores for accuracy.

As further evidence of pretext, Plaintiffs contend the reasons offered by the Defendants were not the actual reason for their discipline because the justifications between the statement of charges, the defense brief, and the hearing officer do not perfectly align. But Defendants see daylight when there is none.

The statement of charges, hearing officer's testimony, and defense brief all reflect that Plaintiffs faced discipline for interfering in Bush's selection process and acted in a manner that reflected they believed a PD-011 form was necessary.

Next, Plaintiffs assert that the defendants selectively enforced its transfer policy. "[S]elective enforcement or investigation of a disciplinary policy can also show pretext." *Baker v. Macon Resources, Inc.*, 750 F.3d 674, 677 (7th Cir. 2014). Plaintiffs allege Defendants selectively enforced the applicant policy against them but did not enforce it against Captain Grady. (Hahn ECF No. 145, PageID.1150). The Court sees no selective enforcement because Plaintiffs assert that like them, Grady had to "go through the motions" on the lateral transfer policy. (*Id.* at PageId.1149). Thus, the policy applied equally to Grady and Plaintiffs.

Finally, Plaintiffs contend that Defendants' pattern and practice of discriminating against white males, along with their concealment of Gasper as the ultimate decisionmaker, amounts to pretext. The Court disagrees. As set out more fully below, the evidence of Defendant Gasper's active involvement, if any, in Hahn and Caldwell's disciplinary process is extremely thin. And Plaintiffs offer nothing to demonstrate that other employees acted to conceal Gasper's involvement.

Based on all the above, the Court concludes that Defendants are entitled to summary judgments in their favor on Count III of Plaintiffs' Second Amended Complaints. Plaintiffs fail to establish a prima facie case of reverse race and gender discrimination. Even if

they had, Plaintiffs fail to demonstrate that the justifications for Hahn's termination and Caldwell's demotion were pretext for unlawful employment discrimination.

II. Retaliation

Plaintiffs' remaining two counts both assert that their discipline was retaliation for the protected comments they made regarding the racial and gender preferences within the Michigan State Police. Count II alleges retaliation in violation of 42 U.S.C. § 1981 against Defendant Gasper and Count IV alleges retaliation in violation of Title VII against the Michigan State Police.[9] "The elements of a retaliation claim under § 1981 are the same as those under Title VII." *Boxill v. O'Grady*, 935 F.3d 510, 520 (6th Cir. 2019) (citing *Noble v. Brinker Int'l, Inc.*, 391 F.3d 715, 720 (6th Cir. 2004); *see also Wade v. Knoxville Utilities*

[9] In general, Section 1981 does not provide a cause of action against state actors, like Defendant Gasper, sued in their individual capacity. *See McCormick v. Miami Univ.*, 693 F.3d 654, 661 (6th Cir. 2012); *Garceau v. City of Flint*, No. 12-cv-15513, 2013 WL 5954493 (E.D. Mich. Nov. 7, 2013) (dismissing Section 1981 race retaliation claim against state actor in official and individual capacities). The defense did not seek dismissal of Count II for this reason, however, and the Court notes that plaintiffs may bring claims under Section 1983 that are premised on violations of Section 1981. *See Boxill v. O'Grady*, 935 F.3d 510, 519 (6th Cir. 2019). Count II of Plaintiffs' Second Amended Complaint incorporates the previous paragraphs, including those referencing Section 1983. Accordingly, for purposes of this motion, the Court construes Count II of Hahn and Caldwell's complaints as asserting Section 1983 claims against Defendant Gasper premised on violations of Section 1981.

Bd., 259 F.3d 452, 464 (6th Cir. 2001) (race retaliation claim brought under Section 1981 "governed by the same burden-shifting standards as the claims under Title VII.").

McDonnell Douglas burden shifting applies to Title VII retaliation claims premised on indirect evidence. *Laster v. City of Kalamazoo*, 746 F.3d 714, 730 (6th Cir. 2014). To establish a prima facie case of retaliation under Title VII, a plaintiff must show that (1) he engaged in protected activity; (2) the defendant knew of plaintiff's engagement in protected activity; (3) the defendant took an action materially adverse to the plaintiff; and (4) there exists a causal connection between the protected activity and the materially adverse action. *Id.* "Title VII retaliation claims 'must be proved according to traditional principles of but-for causation," which "requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.'" *Id.* (quoting *Univ. of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 362 (2013)).

If a plaintiff establishes a prima facie case, the burden shifts to the defendant to show a legitimate, non-retaliatory reason for the materially adverse action. If the defendant satisfies this requirement, the burden shifts back to the plaintiff to establish that the reason given is a pretext. *Montell v. Diversified Clinical Services, Inc.*, 757 F.3d 497, 508 (6th Cir. 2014). A plaintiff can demonstrate pretext by showing "(1) that the proffered reasons had no basis *in fact*; (2) that the proffered reasons did not *actually* motivate [her discharge], or (3) that they were *insufficient* to

motivate discharge." *Blizzard v. Marion Technical College*, 698 F.3d 275, 285 (6th Cir. 2012) (quotation marks omitted) (emphasis in original). Pretext "is a commonsense inquiry: did the employer fire the employee for the stated reason or not." *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 n. 4 (6th Cir. 2009). "At the summary judgment stage, the issue is whether the plaintiff has produced evidence from which a jury could reasonably doubt the employer's explanation. If so, [his] prima facie case is sufficient to support an inference of discrimination at trial." *Id.*

A. Prima Facie Case

i. Protected Conduct

Plaintiffs' claims arise from Title VII's so-called "opposition clause," which prohibits employers from discriminating against an employee "because he has opposed any practice made an unlawful employment practice. 42 U.S.C. § 2000e-3(a); *see Crawford v. Metro Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 274 (2009). A plaintiff's Title VII retaliation claim based on the opposition clause must put "h[is] employer on notice that h[is] complaint concerns statutory rights." *Brown v. VHS of Michigan, Inc.*, 545 F. App'x 368, 373 (6th Cir. 2013). "An employee has engaged in opposing activity when [he] complains about unlawful practices to a manager, the union, or other employees." *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 516 (6th Cir. 2009). "A plaintiff's objection to an employment practice is protected activity if [his] supervisors 'should have reasonably understood that [he] was making a complaint of sex discrimination.'" *Mumm v. Charter Twp. of Superior*, 727 F. App'x 110, 112 (6th Cir. 2018)

(quoting *Braun v. Ultimate Jetcharters, LLC*, 828 F.3d 501, 512 (6th Cir. 2016)). "Title VII does not restrict the manner or means by which an employee may oppose an unlawful employment practice." *Yazdian v. ConMed Endoscopic Technologies, Inc.*, 793 F.3d 634, 645 (6th Cir. 2015). A plaintiff's complaint does not have to be "lodged with absolute clarity, or precision." *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989). However, "Title VII does not protect an employee . . . if his opposition is merely a 'vague charge of discrimination.'" *Yazdian*, 793 F.3d at 645 (quoting *Booker*, 879 F.2d at 1313). A complaint "must allege unlawful discrimination rather than general unfairness." *Mumm*, 727 F. App'x at 113. Applying these standards, Plaintiffs fail to demonstrate a triable issue of protected activity.

Plaintiffs point to three complaints that they allege amount to protected activity: (1) Hahn's September 2019 complaint to Lisa Rish about Dwayne Gill's retirement party comedy routine and Caldwell's January 2020 comments to Arnold supporting Hahn's complaint; (2) Hahn and Caldwell's October 9, 2019, comments at the bureau meeting; and (3) Hahn's email to Caldwell on March 8, 2020. Even when viewed under the Rule 56 lens, the actions Plaintiffs identify demonstrate at most, a complaint of general unfairness, rather than unlawful discrimination. For example, Plaintiff Hahn's comments reflect he was upset that the Michigan State Police failed to apply its own professional standards and code of conduct to Sergeant Gill's comments. He complained about Gill's comments not because he felt Defendants were discriminating against whites, but because he felt

compelled by his oath of office to point out a violation of Michigan State Police's code of conduct. There is nothing in this statement, or Caldwell's statement of support, that would lead an employer to reasonably understand that Hahn and Caldwell were complaining about unlawful discrimination, rather than their perception of a general unfairness in the way the Michigan State Police ran their operations and conducted their internal disciplinary process. In this, Hahn's complaint, and Caldwell's statement of support are similar to the complaints of "ethnocism" the Sixth Circuit Court of Appeals found did not amount to protected activity in *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989).

Indeed, the entire thrust of the complaints Plaintiffs depend upon is that their chief concern was their belief that the diversity initiative was unfair to white police officers, not that it unlawfully discriminated against white males. There is nothing wrong with a commitment to diversity, and the comments Plaintiffs point to, both on October 9, 2019, and March 8, 2020, merely demonstrate that they believed that the initiative would have a negative impact on the morale of white male officers, not that the initiative ever crossed the line into unlawful discrimination. The Court concludes that Plaintiffs have not made a prima facie case because they have not demonstrated they engaged in protected activity.

ii. Knowledge

Even if any of the complaints Plaintiffs identify could amount to protected activity, Plaintiffs have failed to present evidence that the decisionmaker was

aware of their protected activity. Here Plaintiffs are emphatic that the one who decided to terminate Hahn's employment and demote Caldwell was Director Gasper. Assuming for purposes of argument this is true, Plaintiffs fail to demonstrate Gasper had any knowledge they complained about Gill or about the Michigan State Police's diversity initiatives.

In most Title VII retaliation cases, "the plaintiff will be able to produce direct evidence that the decision making officials knew of the plaintiff's protected activity." *Mulhall v. Ashcroft*, 287 F.3d 543, 552 (6th Cir. 2020). This is true even for those cases relying on circumstantial evidence under the *McDonnell-Douglas* framework. *See id.* at 552 & 552 n.5 (citing *Peterson v. Dialysis Clinic, Inc.,* No. 96–6093, 1997 WL 580771, at *4 (6th Cir. Sept. 18, 1997)). "In many such cases, for example, the adverse action will be taken by the same supervisor to whom the plaintiff has made complaints in the past." *Id.* at 552. Here, however, Plaintiffs do not have direct evidence that Gasper knew of the alleged protected activity. Gasper testified he did not know, until just before his deposition, that Hahn had complained about Sergeant Gill. Rather, when the complaint arose, Gasper gave instructions to Stephanie Horton that he did not want to know who the complainant was. (Gasper Dep. 28-29, Hahn ECF No. 142-20, PageID.1093-1094). He did not recall hearing from Lt. Colonel Arnold that Hahn and Caldwell had made comments about the diversity initiative during the October 9, 2019, meeting. (Gasper Dep. 34, Caldwell ECF No. 142-6, PageID.1176; Gasper Dep. 38, Hahn ECF No. 142-20, PageID.1097). Gasper was not in attendance during that meeting. (*Id.* at 38).

Plaintiffs state that Gasper did not deny that Arnold inform him of Plaintiff's protected activity (Caldwell ECF No. 142, PageID.1112) but crucially they do not provide any testimony that Arnold or Rish or Zarotney or anyone else ever relayed their comments to Gasper.

It is true that direct evidence of knowledge or awareness is not a requirement, and that a plaintiff may survive summary judgment by pointing to circumstantial evidence of the decisionmaker's knowledge. *Mulhall*, 287 F.3d at 552. Here Plaintiffs contend that "it strains credulity" to suggest that Arnold, or others, did not inform Gasper of Plaintiffs' protected activity. But rather than point to circumstantial evidence, Plaintiffs merely speculate that Gasper must have known of their protected activity. This is not enough.

For example, Plaintiffs seem argue that Gasper must have known that Plaintiffs were opposed to his diversity policy since others who directly reported to Gasper knew about their complaints. They specifically note they had opposed the initiative to Lt. Arnold, who reported directly to Gasper, and Gasper testified that "it would be helpful to know" if there was dissension in the ranks. (Gasper Dep. 33-34, Hahn ECF No. 145-6, PageID.1208). Again, Plaintiffs state that Defendant Gasper did not deny that Lt. Colonel Arnold informed him of Plaintiffs' protected activity, as if it is somehow positive evidence that Arnold did tell Gasper about it. But Gasper testified he didn't remember Arnold telling him about Caldwell and Hahn's comments. (Gasper Dep. 34, ECF No. 145-6, PageID.1208). More importantly, Plaintiffs do not point to any testimony

from Arnold to demonstrate that he did speak to Gasper about the matter. Without this, Plaintiffs' assertion that others in the ranks knew of their comments fails to satisfy their burden of showing Gasper knew about their comments. *See Evans v. Pro. Transp., Inc.*, 614 F. App'x 297, 301 (6th Cir. 2015) (noting that general corporate knowledge of protected activity is not enough and concluding the plaintiff's claim failed because there was no evidence that the decisionmaker had knowledge of plaintiff's protected activity). Even if internal affairs investigations were a standing agenda item at meetings where Gasper attended, Plaintiffs point to nothing by which a jury could conclude that Gasper knew the Complaint originated with Plaintiff Hahn. Plaintiffs point to the deposition testimony of Lt. Colonel Arnold and Deputy Director Shawn Sible in support of the assertion that the Gill investigation was discussed at these meetings where Gasper was in attendance. Sible testified that he had learned that Hahn had made a complaint, but he didn't learn about it until "after the fact." (Sible Dep. 30, Hahn ECF No. 145-20, PageID.1290). He further testified that there was not a specific meeting about the Complaint, but he recalled a discussion about speech in private functions versus department sponsored functions, specifically concerning a retirement party." (*Id.*). Lt. Colonel Arnold did not recall seeing Hahn's September 13 email that was "forwarded up the chain." He remembers a general discussion about Sergeant Gill's comments in one of the leadership meetings." (Arnold Dep. 35-36, ECF No. 145-7, PageID.1219). At most, then, the cited record suggests that Sergeant Gill was discussed at a leadership meeting, it does not

suggest that Gasper was aware that Hahn had made the complaint.

Plaintiffs' other arguments are not persuasive. Plaintiffs claim that Gasper must have known about their complaints because he gave them a cold shoulder at a meeting, and commented at a meeting that the Michigan State Police didn't need any more "White Male military types with crew cuts." Plaintiffs say this obviously referred to Caldwell and that it obviously means that Gasper knew about his protected activity. (Hahn ECF No. 145, PageID.1145). But without more, there is nothing to indicate that Gasper was referring to Caldwell specifically, rather than generic white males, much less that he was aware of their comments.

For all these reasons, the Court determines that Plaintiffs have failed to demonstrate a genuine issue of material fact that Gasper, the alleged decisionmaker, knew of their alleged protected comments. Based on the above, Plaintiffs have failed to make out a prima facie case of Title VII or Section 1981 race or gender retaliation.

B. Pretext

Even if Plaintiffs could satisfy their burden of showing a prima facie case of race or gender retaliation in violation of Title VII or Section 1981, the defense has offered a legitimate, nondiscriminatory reason for Plaintiffs' discipline, and Plaintiffs have failed to show a triable issue of pretext.

The analysis tracks the *McDonnell Douglas* framework used in Plaintiff's Title VII reverse race and

gender discrimination claim. If a prima facie case is shown, the burden shifts to the employer to articular some legitimate nondiscriminatory reason for its actions. *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792-93 (6th Cir. 2000). The Plaintiff must then demonstrate "that the proffered reason was not the true reason for the employment decision." *Id.*

Here, both sides' references incorporate their arguments from Plaintiffs' Title VII reverse race and gender discrimination claims. For the reasons set out above, the Court concludes that the defense has provided a legitimate, nondiscriminatory reason for Plaintiffs' disciplines, and Plaintiffs have not shown those reasons were pretext for unlawful retaliation. Accordingly, Defendants are entitled to summary judgment on Plaintiffs' retaliation claims.

CONCLUSION

ACCORDINGLY, IT IS ORDERED:

1. Plaintiffs' Motions to Supplement (Hahn ECF No. 154; Caldwell ECF No. 158) are **GRANTED.**

2. Defendants' Motions for Summary Judgment (Hahn ECF No. 141; Caldwell ECF No. 136) are **GRANTED.**

3. These cases are **DISMISSED.** A separate Judgment shall issue.

Dated: December 27, 2021

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed: December 27, 2021]

CASE No. 1:20-CV-403

HON. ROBERT J. JONKER

ROBERT M. HAHN,	)
	)
Plaintiff,	)
	)
v.	)
	)
JOSEPH M. GASPER, et al.,	)
	)
Defendants.	)
	)

JUDGMENT

In accordance with the Opinion and Order entered this day, Judgment is entered in favor of Defendants and against Plaintiff Robert Hahn.

Dated: December 27, 2021

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed: December 27, 2021]

Case No. 1:20-CV-411

HON. ROBERT J. JONKER

MICHAEL A. CALDWELL,	)
	)
Plaintiff,	)
	)
v.	)
	)
JOSEPH M. GASPER, et al.,	)
	)
Defendants.	)
	)

JUDGMENT

In accordance with the Opinion and Order entered this day, Judgment is entered in favor of Defendants and against Plaintiff Michael Caldwell.

Dated: December 27, 2021

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX F

EXHIBIT B

S T A T E O F M I C H I G A N
COURT OF CLAIMS

[Dated: May 8, 1996]

THOMAS A. CREMONTE,	)
	)
Plaintiff,	)
	)
v	)
	)
MICHIGAN STATE POLICE, an agency of the STATE OF MICHIGAN,	)
	)
Defendant.	)
	)

Court of Claims
Case No. 95-15727 CM

Consolidated with Livingston County
Circuit Court Case No. 94-13442 NO

OPINION

Plaintiff, Thomas A. Cremonte, filed this two-count Court of Claims complaint against the Michigan Department of State Police on April 12, 1995. In Count I, paragraph 10 of his Complaint, Plaintiff alleges that Defendant's actions of refusing to promote him are

"contrary to the public policy embodied in the Michigan and United States Constitutions." In Count II, paragraph 13, Plaintiff alleges that the actions and policies of the State Police constitute a "denial of Plaintiff's right to equal protection of the laws as guaranteed by the 14th Amendment to the United States Constitution and the Michigan Constitution."

This action was transferred to this Court and consolidated with the above captioned Elliott-Larsen Civil Rights Action then pending here. Trial of these cases commenced on January 30, 1996, and continued on January 31, February 2nd, 5th, 6th, 7th, 9th, 20th, 21st, and 22nd. The following were called as witnesses, either live or through deposition: Colonel Michael Robinson, Trooper Donald Arbic, Chief Robert Krichke, Trooper Barry Lewis, Dr. Martin Wing, Livingston County Prosecutor David Morse, Plaintiff Trooper Thomas Cremonte, Deborah Gilmore, Trooper Therese Fogarty-Cremonte, Chief William Smith, Lt. Chris Lewis, Lt. Thomas Finco, Lt. Dianne Garrison, Captain Christopher Hogan, Lt. Michael Knuth, Lt. Shelby Slater, Lt. Britt Weber, Lt. John E. Behnke, Captain Timothy Barker, Captain James Cox, Lt. Steven Brown, Lt. Col. James Bolger, Charles Green, Shirley England, Lt. Robert Young, Prof. Dennis Gilliland, Captain Philip David Charney, Captain Gene Hoakwater, Trooper Daniel Keuhn, Chief (Retired) Michael Oyler, Michael Vance, and Dennis Diggs.

Sixty-six (66) exhibits were received into evidence. The jury rendered judgment in favor of Plaintiff in the sum of $850,000 in the Circuit Court action. The parties agreed that the opinion in this case would not

be rendered until they had the opportunity to submit detailed proposed positions following receipt of the jury verdict in the Circuit Court action. Each party has submitted their proposals which have been considered by the Court.

Many of the essential facts involved in this matter are hotly disputed.

Plaintiff is a classified civil servant employed by the Michigan State Police as a trooper. He began his employment with the Michigan State Police in 1977, and is presently assigned to the Brighton Post. The gravamen of his complaint is that less qualified minorities (i.e., women, African-Americans and Hispanics) have been promoted to sergeant over himself, a white male.

His contention is that he is a victim of race and gender discrimination as a result of the Michigan Department of Civil Service's policy of "augmented certification," which, according to Plaintiff, is contrary to public policy and violates his constitutional equal protection rights.

Augmented certification was a process used by the State Police to place members of protected classes into the pool of applicants considered for a given promotional position. Protected classes or groups include females, Afro-Americans, Hispanics, American-Indians, and Asians.

A trooper's score on the promotional examination determines eligibility for promotion. The applicant's

scores are divided into bands.[1] Those achieving a score of 92-100 were placed in the first band, while those whose score was 83-91 were placed in the second band. Under Civil Service rules and procedures, there must be at least three candidates for an appointment or promotion to be made by the appointing authority. When a promotional opening becomes available in a particular geographical area, a list of qualified candidates is forwarded to the hiring agency for consideration.

In regions of the State where underutilization of protected persons exists, the list of persons eligible for promotion is "augmented" by adding to it the names of protected group members from successively lower bands, until the total number of names of the protected group equals three or more. Under this system all first banders were eligible for promotion. However, when the list of first banders contained an insufficient number of eligible candidates from a underutilized protected group, the list is augmented by adding to it the names of protected persons from lower bands of test scores. Thus white males from the second band did not have the same promotional opportunities as protected persons from the second band.

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[1] This practice was discontinued June 27, 1994. From May 1987 until June 27, 1994, the scores were divided into four bands. To address concerns that the applicant pool was limited, (9-15 applicants) the bands were widened into two bands. Those with scores of 100-83 are placed in the first band, and those with scores of 82-70 are placed in the second band. The Circuit Court action was commenced March 15, 1994. The Court of Claims action was filed April 12, 1995. This Opinion address the bands as they existed at the time that these consolidated cases were filed.

Plaintiff first took the sergeant promotional examination in 1984. He testified that he was interested in any promotional assignment, except in the upper peninsula or thumb area. For all practical purposes Plaintiff was ineligible for promotion from 1984 through May, 1993 because he was a second band white male.[2] In both 1993 and 1995 he scored in the high first band. He claims that he continues to suffer discrimination, along with all other white males, even though he is now in the first band. This is because Defendant considers race and gender in its promotional decisions.

Defendant's affirmative action programs for 1989 and forward set a goal of 13% for minority group representation in the law enforcement personnel ranks.[3] As of September 1, 1991, minority group officers comprised 12.8% of all enlisted personnel.[4] Minorities comprise approximately 17% of the enlisted ranks, including troopers, sergeants and above.[5] In 1994, minorities comprised at least 13.5% of the

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[2] Protected persons from the second band would have moved into the augmented list of promotional candidates, while white males in the second band were not so shifted.

[3] Minorities include African-Americans, Hispanics, American Indians, and Asians. Consent Decree, United States District Court Western District, Southern Division, Civil Action No. G75-472-CA5. Exhibit 21, p. 26. Exhibit 22, p. 25. This Court notes that the "Goals and Timetables" section of these two exhibits appears to be identical.

[4] Exhibit 22, p. 14.

[5] Testimony Lt. Steven Brown February 6, 1996.

workforce.[6] As far back as 1990 minorities held 13.4% of the positions in occupational categories applicable to Plaintiff.[7] Despite this attainment in the Michigan State Police workforce, Defendant, pursuant to the Preference Policy, gave 16.8% of the sergeant promotions to minorities during the period 1993-1995.[8]

Trooper Cremonte started with the Michigan State Police in 1977. He has had various assignments since that time. In 1983 the Department evaluated him for promotional potential.[9] He was described as:

> . . . a very dedicated employee who displays an intense spirit and possesses a unique awareness in the area of criminal investigation. . . . his stamina and enthusiasm during prolonged and arduous investigations appears to be endless. . . . The respect and confidence which is afforded him by his fellow officers is exceptional. . . . Cremonte is an exceptional Detective and is definitely capable of performing the duties of a first line supervisor. His abilities by far exceed that which would be considered acceptable for the position applied for.

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[6] Judicially notice fact, Exhibit P.

[7] Exhibit 21, Attachment D: Uniform Sergeants (Technicians, 8.6%), Uniform Troopers and Detective Sergeants (Protective Services, 14.6%).

[8] Exhibit J.

[9] Exhibit 44. Promotional potential evaluations are no longer utilized by the Department, and were criticized as being too subjective by ranking officers who testified on the subject.

He also established that he received a local Trooper of the Year award in 1987, was involved in the organization and operations of a local drug enforcement unit, received a B.B.A. from Cleary College (3.85 GPA), had Post Commander and Sergeant recommendations for promotion, and had experience as Acting Sergeant at the Brighton Post. Other witnesses testified to his many good attributes and qualities. Even those witnesses who were called to testify against him attested to his unique ability in the field of drug enforcement. He attributes his lack of promotion to discriminatory practices and policies and to the Department's displeasure concerning his complaints to the Director about what he considered to be unconstitutional and illegal practices in the hiring and promotional process.

Defendant, on the other hand, denies any unconstitutional or illegal practices in the promotional process, and claims that Trooper Cremonte was not promoted for reasons directly related to his own style of doing things. They point out that he questions the authority of supervisors who issue orders that he disagrees with, is not a team player, is too independent and prefers to do things his way despite contrary directions from supervisors, is too strong willed, inflexible, and set in his ways, is not known by some post commanders who have filled sergeant vacancies at their posts, is a poor role model and mentor for new troopers, has indicated a lack of interest in performing the administrative skills of a sergeant, and stereotyped individual members of the State Police based on their skin color and gender.

It is probably an understatement to observe that this case was vigorously contested on both sides. Plaintiff presented what he thought to be his qualifications and reasons why he should have been promoted, and evidence concerning the promotional policies and practices of the Department. Defendant brought out what it thought to be many non-discriminatory and otherwise valid reasons why, in its opinion, Trooper Cremonte was not promoted, and denied any violation of the Constitution or laws. This was met by a response from Trooper Cremonte which demonstrated that other ranking officers within the organization were promoted or retained following disclosure that they too were not perfect. It is unnecessary to do more than note the existence of this testimony in arriving at a decision in this matter.

PLAINTIFF'S PUBLIC POLICY CLAIM

The Michigan Constitution of 1963 provides:

Art. I, § 2

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

Art. XI, §5

State Trooper promotions are to be:

> determined by competitive examination and performance on the basis of merit, efficiency and fitness.

Further that:

> No person shall be appointed to or promoted in the classified service who has not been certified by the commission as qualified for such appointment or promotion. No appointments, promotions, ... in the classified service shall be made for religious, racial, or partisan consideration.
>
> . . .
>
> Violation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state.

Plaintiff claims that he was denied promotion in part, because he opposed violations of the Michigan Constitution. Specifically, in response to a survey request from Colonel Davis, he wrote a memo objecting to the hiring and promotional policies of the Michigan State Police.[10]

Each of the parties has relied upon *Vagts v Perry Drug Stores*, 204 Mich App 481, (1994). In that case the

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[10] Exhibit 2.

Court of Appeals summarized the three forms of "public policy" claim in the following manner:

> Generally, employment relationships are terminable at will, with or without cause, "at any time for any, or no, reason." *Suchodolski v Michigan Consolidated Gas Co.*, 412 Mich 692, 694-695; 316 NW 2d 710 (1982). "However, an exception has been recognized to that rule, based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable." *Id.* at 695. These grounds are "[m]ost often ... found in explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty." *Id.* (first exception). " [C]ourts have also occasionally found sufficient legislative expression of policy to imply a cause of action for wrongful termination even in the absence of an explicit prohibition on retaliatory discharges" such as "where the alleged reason for the discharge ... was the [employee's] failure or refusal to violate a law in the course of employment." *Id.* (second exception). Courts have also "found implied a prohibition on retaliatory discharges when the reason for a discharge was the employee's exercise of a right conferred by a well-established legislative enactment."*Id.* At 695-696. (third exception).
> *Vagts v Perry Drug Stores*, 204 Mich App 481, 484 (1994).

Defendant argues that all three forms of a "public policy" claim set forth in *Suchodolski*, supra, require the discharge of an employee before the Courts have recognized a public policy claim. Defendant suggests, as noted in *Vagts*, that the first of the three grounds has probably been eliminated by the Supreme Court's holding in *Dudewicz v Norris-Schmid Inc*, 443 Mich 68; 503 NW 2d 645 (1993); since the Elliott-Larsen Civil Rights Act provided a remedy for someone discharged or retaliated against for opposing a violation of the Act. They further point out that Plaintiff has availed himself of the remedies of that Act. However, Plaintiff argues that the Elliott-Larsen Civil Rights Act prohibits retaliation for opposition to a violation of the Elliott-Larsen Civil Rights Act, not to a violation of the Michigan Constitution.

Each of the parties has skillfully argued the facts concerning the weight of the voluminous testimony on the subject of the reasons why Trooper Cremonte should have been, or was not promoted. It is clear to this Court that the Michigan State Police is a close knit organization and that his letter to the Colonel was a major factor causing Trooper Cremonte's star to fall. The obvious result of writing such a letter was best summarized by the testimony of Lt. Steven Brown who characterized Cremonte as being a "very brave or very foolish individual" for voicing his opinion with respect to protected groups. The defense has not argued that he was brave.

A "public policy" cause of action may be found in explicit legislative statements prohibiting the discharge, discipline or other adverse treatment of

employees who act in accordance with a statutory right or duty. Here the plaintiff openly opposed violations of the constitutional provision which requires that promotions be determined by competitive examination and performance on the basis of merit, efficiency and fitness, and that no promotion is to be made for religious, racial or partisan consideration. He claims that, as a result, Defendant retaliated against Plaintiff by not promoting him, in spite of his obvious qualifications.

In the Circuit Court Elliott-Larsen Civil Rights action, Plaintiff amended his complaint to include claims of discrimination on the basis of age, gender, race and retaliation for expressing his opinion with respect to those policies. In his Court of Claims complaint, at ¶9 of his public policy claim, Plaintiff alleges that "Defendant refuses to promote Plaintiff because he expressed the view that Defendant should treat all troopers equally irrespective of age, race, or gender." Both actions allege retaliation based on the same conduct of Plaintiff. A public policy claim is sustainable only where there is not also an applicable statutory prohibition against retaliation for the conduct at issue. *Dudewicz v Norris-Schmid Inc*, 443 Mich 68, 80; 503 NW 2d 645 (1993). The Elliott -Larsen Civil Rights Act prohibits retaliation "against a person because the person has opposed a violation of [the] act, or because the person has made a charge, . . . under this act." As a result, because the Elliott -Larsen Civil Rights Act provides relief for the conduct alleged herein, his public policy claim is not sustainable.

CONSTITUTIONAL CLAIM

The Michigan Constitution of 1963 provides:

Art. I, § 2

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

A claim for damages against the state may be brought where the state violates the Michigan Constitution. *Smith v Dept of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987). A plaintiff states a constitutional claim by showing that, by virtue of a custom or policy, the state deprived the plaintiff of a constitutional right. *Marlin v Detroit (After Remand)*, 205 Mich App 335, 338; 517 NW2d 305 (1994); *Johnson v Wayne Co*, 213 Mich App 143; 540 NW2d 66 (1995).

Plaintiff has challenged Defendant's affirmative action plans[11] alleging that they embody an illegal preference. The policy challenged herein is remedial governmental action in classification of civil service employees. These classifications, known as protected groups, are challenged in three categories, race-based, gender-based, and age-based.

> Equal protection of the law is guaranteed by both the federal and state constitutions. US

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[11] Exhibit 21, pp.22-23; Exhibit 22, p. 22, Exhibit 23.

> Const, Am XIV; Const 1963, art 1 § 2. The equal protection guarantee requires that persons in similar circumstances be treated alike. *El Souri v Dep't of Social Services*, 429 Mich 203, 207; 414 NW2d 679 (1987). ... When a ... classification is challenged as violative of equal protection, the test to determine its validity depends on the type of classification and the nature of the interest affected. *Dep't of Civil Rights v Waterford Twp*, 425 Mich 173, 190; 387 NW2d 821 (1986).
> *Thompson v Merritt*, 192 Mich App 412, 424-425 (1991).

The standard of review to be applied to race-based classification is strict scrutiny. *Adarand Constructors, Inc. v Pena*, 515 US ___, 115 S Ct ___, 132 L Ed 2d 158 (1995). This standard applies when the race-based government action is remedial in nature. *id.*

Plaintiff has the burden of showing that the totality of the circumstances give rise to an inference of race-based discrimination. *Haberkorn v Chrysler Corp.*, 210 Mich App 354 (1995). To survive judicial scrutiny, the racial classifications must serve a compelling governmental interest, and must be narrowly tailored to further that interest.

Defendant has established a policy of affirmative action which it has implemented through its augmentation certification process.[12] This procedure gives rise to an inference of race-based discrimination,

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[12] See Policy Statements Exhibits 21, 22, & 23. And Exhibit 4.

such that the burden shifts to the defendant to show that the racial classifications serve a compelling governmental interest, and are narrowly tailored to further that interest. Defendant implemented the affirmative action policy "to overcome present effects of past exclusion or discrimination, or both, in carrying out its promotion, retention, and other personnel actions with regard to race, color, national origin, or handicap status."[13] The affirmative action program was developed with the knowledge that non-discrimination alone had been insufficient to assure equal opportunity.[14]

Defendant's goal was to attain 13% minority representation in the personnel ranks. This goal has been achieved and exceeded, yet Defendant continued to use the "augmentation certification" process for promotions. Defendant continues to consider race and gender in its promotional decisions.[15] While the goal represents a legitimate interest, the continued use of "augmentation" after attaining that goal is not narrowly tailored. The race-based augmentation policy is an unconstitutional discrimination.

Plaintiff also challenges the same policy based on gender discrimination. To be upheld, this gender-based classification scheme must further an important governmental interest and be substantially related to achieving that interest. *Craig v Boren*, 429 US 190; 97

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[13] Policy Statements Exhibits 21, 22, & 23.

[14] Introductory notes to Affirmative Action Plan.

[15] Deposition testimony Coronal Michael Dean Robinson. (42).

S Ct 451; 50 L Ed 2d 397 (1976), reh den 429 US 1124 (1977).

Defendant's goal, pursuant to the Consent Decree was to graduate at least 50 women into the position of Trooper 07 (Trooper I) over four academy classes. As early as 1990, this goal was exceeded.[16] According to the Consent Decree, Defendant was to propose a secondary, long-term goal[17] for participation of women in law enforcement with the Michigan State Police. The goal with respect to woman did not change. Defendant continued its augmentation policy with respect to women despite achieving its expressed goal. The gender-based augmentation policy cannot be said to be substantially related to achieving a goal which was realized as early as 1990. The gender-based augmentation policy is an unconstitutional discrimination.

Plaintiff has also challenged Defendant's policies based on age. Absent a fundamental interest or suspect classification, the burden is placed on Plaintiff to show that the classification is arbitrary and not reasonably or rationally related to the object of the policy. *People v Perkins*, 107 Mich 440 (1981).

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[16] Exhibit 21, p.26.

[17] ¶ 4.(c) of the Consent Decree provides:
Not later than two years from the entry of this Decree or the graduation of those four classes, whichever is sooner, the defendants, based on their experience with women in general police work, will propose to plaintiff a long-term goal for participation of women in law enforcement with the Michigan State Police.

> Age is not a suspect classification for equal protection purposes. *Massachusetts Board of Retirement v Murgia*, 427 US 307, 313-314; 96 S Ct 2562; 49 L Ed 2d 520 (1976), Johnson v City of Opelousas, 488 F Supp 433(WD La, 1980). *id.*, p. 443.

Plaintiff has not established that there exists any arbitrary distinction based on age. Further, any discrimination which has occurred due to Defendant's promotional policies appears to be rationally related to the object of that policy, to overcome present effects of past exclusion or discrimination.

Plaintiff has established that he was at least as qualified, or more so, than several applicants who were promoted after being placed on the promotional roster as a result of augmentation based on race or gender.[18]

Fashioning an appropriate remedy in this case is problematic. After having considered numerous alternatives, the Court is satisfied that the following award and remedy is appropriate.

Plaintiff may have injunctive relief, enjoining Defendant from making promotions based upon criteria other than that which is contained in the 1963 Constitution, Art XI, § 5.

Plaintiff is awarded damages in the sum of $850,000.00. Said damages are not to be construed as

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[18] See testimony, Captain Chris Hogan, February, 5, 1996; Lt. Britt Weber, February 6, 1996; and Lt. John Behnki February 6, 1996.

cumulative to the amount awarded in the Circuit Court action.

Plaintiff shall submit a judgment in conformity with this Opinion within ten (10) days.

MAY 08 1996
Date

DANIEL A. BURRESS
Daniel A. Burress
Court of Claims Judge
by Assignment