No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Eugenie Henning — PETITIONER
(Your Name)

VS.

City of Jackson, TN — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

☐ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

_____

_____

☒ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☐ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____

_____, or

☐ a copy of the order of appointment is appended.

Eugenie Henning
(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Eugenie Henning, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$18,763.32	$ N/A	$ 2,160.00	$ N/A
Self-employment	$ 0	$ N/A	$ 0	$ N/A
Income from real property (such as rental income)	$ 0	$ N/A	$ 0	$ N/A
Interest and dividends	$ 0	$ N/A	$ 0	$ N/A
Gifts	$ 1,000.00	$ N/A	$ 0	$ N/A
Alimony	$ 0	$ N/A	$ 0	$ N/A
Child Support	$ 0	$ N/A	$ 0	$ N/A
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ N/A	$ 0	$ N/A
Disability (such as social security, insurance payments)	$ 0	$ N/A	$ 0	$ N/A
Unemployment payments	$ 0	$ N/A	$ 0	$ N/A
Public-assistance (such as welfare)	$ 0	$ N/A	$ 0	$ N/A
Other (specify): Refund	$ 900.00	$ N/A	$ 0	$ N/A
Total monthly income:	$ 20,663.32	$ N/A	$ 2,160.00	$ N/A

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Royal Furniture	2855 Hwy 45 Bypass Jackson, TN 38305	08/3/2023 - Present	$ 2,218.74
Onin Staffing Service	1256 NW Broad St Murfreesboro, TN 38305	05/22/2023 - 07/24/2023	$ 2,738.79
Express Professional Staffing	196 Carriage House Dr. Jackson, TN 38305	03/27/2023 - 04/28/2023	$ 2,248.50

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ N/A
N/A	N/A	N/A	$ N/A
N/A	N/A	N/A	$ N/A

4. How much cash do you and your spouse have? $ $6.00
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
Checking	$ $34.95	$ N/A
Saving	$ $63.44	$ N/A
N/A	$ N/A	$ N/A

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☒ Home
Value $167,000.00

☐ Other real estate
Value $0

☒ Motor Vehicle #1
Year, make & model 2008 Mazda CX-9
Value $3,450.00

☒ Motor Vehicle #2
Year, make & model 2001 Chevrolet Impala
Value $150.00

☐ Other assets
Description N/A
Value 0

List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

2. Continued

Employer	Address	Dates of Employment	Gross Monthly Pay
P. L. Marketing	300 Dave Cowens Dr. 8th Floor Newport, KY 41071	02/05/ - 04/01/2023	$2,368.96
Express Employment Professional	1734 S. Rutherford Blvd Murfreesboro, TN 37130	11/6 – 12/4/2023	$1,890.85

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$ $0	$ N/A
N/A	$ $0	$ N/A
N/A	$ $0	$ N/A

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
N/A	N/A	N/A
N/A	N/A	N/A
N/A	N/A	N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☒ Yes ☐ No Is property insurance included? ☒ Yes ☐ No	$ 617.28	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 300.00	$ N/A
Home maintenance (repairs and upkeep)	$ 150.00	$ N/A
Food	$ 250.00	$ N/A
Clothing	$ 25.00	$ N/A
Laundry and dry-cleaning	$ 0	$ N/A
Medical and dental expenses	$ 100.00	$ N/A

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$ N/A
Life	$ 52.00	$ N/A
Health	$ .99	$ N/A
Motor Vehicle	$ 50.40	$ N/A
Other: Vision and Dental Insurance	$ 4.50	$ N/A
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ 0	$ N/A
Installment payments		
Motor Vehicle	$ 0	$ N/A
Credit card(s)	$ 350.00	$ N/A
Department store(s)	$ 0	$ N/A
Other: Internet	$ 50.00	$ N/A
Alimony, maintenance, and support paid to others	$ 0	$ N/A
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ N/A
Other (specify): Gas for vehicle expense	$ 200.00	$ N/A
Total monthly expenses:	$ 2,150.17	$ N/A

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☒ Yes ☐ No If yes, describe on an attached sheet.

Student loan payment will resume,and health issues.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☒ Yes ☐ No

If yes, how much? $15,000.00

If yes, state the attorney's name, address, and telephone number:

Dan Norwood
2055 Cedar Bluff Dr.
Decaturville, TN 38329
(901) 210-2424

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☒ Yes ☐ No

If yes, how much? Information is shown below

If yes, state the person's name, address, and telephone number:

McCommon Reporting | P. O. Box 10216 | Jackson, TN 38308 | (731) 668-6833 | $1,229.45
Stephen L. Shield | 262 German Oak Drive | Memphis, TN 38018 | (731) 754-8001 | $1,012.50

12. Provide any other information that will help explain why you cannot pay the costs of this case.

My income is just not enough to include an additional expense that will protect my rights for filing this Writ of Certiorari.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 12, 2023

Eugene Henning
(Signature)

No.

IN THE

SUPREME COURT OF THE UNITED STATES

EUGENIE HENNING,

Petitioner,

v.

CITY OF JACKSON, TN

Respondent,

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

EUGENIE HENNING
12 BRUSHWOOD COVE
JACKSON, TN 38305
(731) 394-2201
PRO SE

QUESTIONS PRESENTED

1. Whether "shall be made free from any discrimination" permits an employee's actions that are not made free from any discrimination or retaliation, as long as discrimination or retaliation is not the but-for cause of the employee's action or rather prohibits the employee's actions where discrimination and retaliation are a factor.

2. Whether comparator evidence can support an inference of discrimination when Henning and comparators do share the same job titles, duties, and supervisor.

3. Whether Henning 's complaint was sufficient to state a plausible Title VII claim of race discrimination and retaliation, where it included factual allegations that constitutes a protected activity under the employment discrimination and retaliation laws.

4. Whether 42 U.S.C. §1981(c) applies against government employers acting under color of State law.

5. Whether a shred of adequate evidence has been presented to make the issue of fact a proper question for the factfinder.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this the petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

The order and opinion of the Court of Appeals for the Sixth Circuit (App. A) is reported at Eugenie Henning v. City of Jackson, TN, No. 22-5851 (June 14, 2023). The order and opinion for the District Court for the Western District of Tennessee Eastern Division (App. B) are reported at Eugenie Henning v. City of Jackson, Tennessee, No. 1:21-CV-1040-JDB-jay (W.D. Tenn. Aug. 25, 2022).

JURISDICTION

The Court of Appeals for the Sixth Circuit entered judgment on June 14, 2023. No petition for rehearing was timely filed in my case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

Courts must interpret a pro se litigant's complaint and arguments liberally. Harines v. Kerner, 404 U.S. 519, 520 (1972) also, Supreme Court found that pro se pleadings should be held to "less stringent standards" than those drafted by attorneys. Cited: Various Rulings Related to Being Pro Se.

Title VII makes it unlawful for an employer to discriminate and retaliate against someone because of his or her race, color, religion, sex, or national origin.

E. Henning brought suit against her former employer, the City of Jackson, claiming that the City wrongfully terminated her based on her race, in violation of Title VII. Following discovery, the City moved for summary judgment, and the District Court granted their motion.

The Appeals Court viewed the District Court's Grant of Summary Judgment. The summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. Notes of Advisory Committee on Rules – 1937.

FACTUAL BACKGROUND

Eugenie Henning is an African-American female. E. Henning was a City of Jackson employee who filed a race discrimination and retaliation claim under Title VII of the Civil Rights Act of 1964, as amended,42 U.S.C. 2000 et seq, and the Civil Rights Act of 1866, 42 U.S.C §1981. E. Henning also brought about an EEOC race

and sex discrimination claim in 2017 against the City of Jackson while working in the Groundskeeping Department.

The City of Jackson, a governmental entity is the Defendant. Scott Conger took the office of Mayor in May 2019. Alex Reed became his Chief of Staff. Lynn Henning remained the Director of the Human Resources Department throughout E. Henning's employment with the City of Jackson.

E. Henning began her employment with the City on February 5, 2011, she provided over nine years of loyal and diligent service to the City of Jackson, first as a Senior Secretary in the City of Jackson GroundsKeeping Department for a couple of years before being promoted to an Administrative Specialist position in that same department under Charles Evans a Caucasian male who was the Superintendent.

Despite this service, E. Henning was furloughed on April 24, 2020, and when other employees were recalled from the furlough, she was not recalled. Instead, on June 23, 2020, E. Henning was informed that she was terminated due to a Reduction in Force (RIF).

E. Henning filed an EEOC claim alleging race and sex discrimination in 2017. E. Henning received a notice of her right-to-sue but did not pursue it. The claims were due to her job responsibilities being reassigned and compensation given to a Caucasian male, with no promotional raise, and overtime denied. E. Henning continued to work for the City and she continued to protest against the ongoing problems and mistreatment that she was facing while working in the Groundskeeping Dept. E. Henning sought to transfer out of the GroundsKeeping

department from 2017 through 2019 by applying for open positions throughout the City despite being told by L. Henning, "I'm down with transfers," on June 2, 2017. E. Henning sought a different avenue to address the issues she was facing and to alleviate herself from a hostile work environment by requesting to meet with Reed on or about September 18, 2019. E. Henning gave Reed a copy of the April 10, 2017, EEOC claim that was filed on June 9, 2017, as well as notes on statements made and the timing of events in which she experienced bad and unequal treatment. E. Henning explained to Reed that she had an in-person meeting with L. Henning, Willie Woods(African American), and Tony Black(African American) on June 2, 2017. E. Henning shared with Reed that she was told by L. Henning that blacks should want to help blacks and that Eugenie was not going to receive a raise, transfer, promotion, or progression. L. Henning's verbal statement to E. Henning on June 2, 2017:

> "if you don't want to work, you will continue like you are, then I will assist you, I don't understand why you are too time-consuming to deal with issues that are none issues, I don't understand why black people just don't want to promote or help him (Willie Woods) more especially because he is black, we're not going to deal with no raises, we might be dealing with less money than we're talking about right now, you're (E. Henning) to high maintenance, I'm down with transfers, and I'm going to keep you in your lane."

Reed stated to E. Henning that he was going to look into it and he asked E. Henning if he could speak with L. Henning about what he and she had discussed. E.

Henning agreed. On December 12, 2019, Reed asked E. Henning to meet with him in his office to discuss a proposal to exchange positions with Rena Tyler, a Caucasian female who worked in the Health and Sanitation Dept. of the City of Jackson as an Executive Secretary. E. Henning accepted Reed's proposal.

E. Henning began working in the Health & Sanitation Department on Dec. 16, 2019, keeping her same job title as an Administrative Specialist. From January through March 2020, E. Henning asked Kathleen Huneycutt, a Caucasian female who was the Director of the Health and Sanitation Department of the City of Jackson, about a promotional raise, training, and overtime to learn the new job responsibilities that she now had. On the contrary, E. Henning's request was denied after making numerous requests to Huneycutt. In February 2020, some of E. Henning's job responsibilities were taken away from her by Huneycutt and given to Cynthia Walker, a Caucasian female who was a secretary in the Health & Sanitation Department and served the City for 1 year. In the month of March 2020, all of E. Henning's job responsibilities were given to Walker, and E. Henning was moved to another office to only answer the phones. The City's explanation was due to the social distancing. That same month E. Henning was also subjected to unequal terms and conditions of employment by being denied once again the training that she requested to Huneycutt from Tyler in the GroundsKeeping, as well as denied a promotional raise. Most importantly, during that same period, the Caucasian employee who had previously been given E. Henning's job duties was given training by Tyler in the GroundsKeeping, given a promotional raise, and allowed to work

overtime. Walker gained a new job title of an Administrative Specialist (Reed Deposition) after receiving E. Henning's job duties. Huneycutt stated to E. Henning that once Walker chooses the job responsibilities that she wants to do, then E. Henning will take on whatever Walker wishes not to perform.

On April 5, 2020, E. Henning emailed her concerns to Huneycutt and carbon-copied Reed about discriminatory treatment, and not being given an opportunity for true equality.[1] Doc 28; 331 email itself. Reed forwarded. E. Henning's email to L. Henning. Id. 331. Instead of being given a legitimate business reason or provided a remedy for this bad treatment, E. Henning was informed by Huneycutt on April 24, 2020, at approximately 3:45 P.M., 15 minutes before the end of the work day that she was being furloughed. Consequently, this was immediately after a Citywide Zoom meeting for all employees that was conducted by Mayor Scott Conger. During the Zoom meeting, all employees who were furloughed were promised to return on August 24, 2023.

E. Henning was one of the 193 employees who were furloughed on April 24, 2020, the City stated that the furlough was due to the COVID-19 pandemic. E. Henning's Caucasian co-worker Walker, who had recently been given E. Henning's job duties, was not furloughed on April 24, 2020. Walker was fired in May 2020, not due to the COVID-19 pandemic. Walker was included in the number of employees furloughed under false pretenses by L. Henning. Instead of recalling E. Henning to

[1]Under Title VII of the Civil Rights Act and other federal, state, and local nondiscrimination laws, individuals have the right to oppose conduct they reasonably believe constitutes an unlawful employment practice, such as discrimination. Engaging in this conduct is generally considered "protected activity."

the Health and Sanitation Department, the City recalled Stacy Mays, a Caucasian female who worked in the City of Jackson's Police Department as an Administrative Specialist from April 24, 2020, furlough to work in the position that E. Henning once held in the Health and Sanitation Department.

The City began to plan for the RIF in February 2020 or sooner, according to L. Henning's deposition (ECF; Doc. 32-2, Id 386). This was during the time E. Henning's job duties began to be removed from her and given to Walker. The City declared that the deficit was due to the COVID-19 pandemic and a proposed shortfall was expected. Evidence can be presented that the City was experiencing financial problems before the COVID-19 pandemic. In October 2019, the State of Tennessee Comptroller of the Treasury ended its investigation concluding that the City had issues with overspending and budget practices.

Reed instructed the department heads and management through an email to come up with a list of employees whom they thought were no-standard employees. L. Henning indicated during her deposition that she had a list, contrary to her stating that she did not have a list and the list came from the City Council.

The Sixth Circuit Appeals Court reviewed the District Court's Grant of Summary Judgment as stated de novo. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to **any** material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

The District Court failed to acknowledge all of E. Henning's facts. E. Henning presented additional facts and raised genuine issues of material fact that could have been construed in her favor during the summary judgment stage[2].

Any party opposing the motion for summary judgment must, ..., serve and file a response to each fact set forth by the movant either (i) agreeing that the fact is undisputed, (ii) agreeing that the fact is undisputed for purposes of ruling on the motion for summary judgment only, or (iii) demonstrating that the fact is disputed. Rule 56.03.

The adverse party, in opposing the motion, does not produce any evidentiary matter or produces some but not enough to establish that there is a genuine issue for trial[3]. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. Frederick Hart & Co., Inc. v. Recordgraph Corp., 169 F. 2d 580 (3d Cir. 1948).

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. Notes of Advisory Committee on Rules – 1963 Amendment.

Concerning E. Henning's claims for punitive damages under Title VII and § 1981, the City states that E. Henning may prove her case by either direct or circumstantial evidence. Doc 24-1, Id 71. The Court of Appeals sided with the

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[2]Supporting and opposing affidavits shall be made on personal knowledge.... The court may permit affidavits to be supplemented or opposed by deposition, answers to interrogatories, or further affidavits. ...an adverse party may not rest upon the mere allegation ..., but his or her response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Rule 56.06.

[3]Plaintiff's Statement of Additional Undisputed Material Facts. Doc. 32-1, Id 375.

District Court agreeing with the City of Jackson's position that § 1981 does not create an independent cause of action against a municipality and finding that E. Henning had failed to establish a prima facie case of discrimination or retaliation. Doc 24-1, Id 2. The Appeals Court observed that E. Henning named only the City as a defendant in her action, stating that § 1981 does not create an independent cause of action. No. 22-5851; Doc 24-1, Id 6.

Blankenship v. Warren County, VA (W.D.Va. 1996) § 1981 provides a cause of action for employees who have suffered racial discrimination. § 1981a was passed by Congress in 1991 to expand the remedies available to Title VII plaintiffs and to equalize the relief available under Title VII and § 1981. H.R.Rep. No. 40(I), 102d Cong., 1st Sess. 65, 71 (1991), 1991 U.S.C.C.A.N. 549. Congress has not made absolutely clear its intention to override state sovereign immunity in the language of the statute. Stating that, the defendants' arguments are not wholly unpersuasive, it falters when one attempts to parse § 1981a without reference to Title VII's definitional provisions. In turn, reliance on Title VII's definitional provisions brings one to the conclusion that a state violator of Title VII is liable for compensatory damages under § 1981a just as any other private Title VII defendant. Section 1981a(b) authorizes recovery of compensatory and punitive damages by any "complaining party"[3] against any "respondent" who violates 42 U.S.C. §§ 2000e-2, 2000e-3, but fails to define "respondent." To determine who qualifies as a respondent, one has no recourse but to look to § 2000e-5(b), which defines "respondent" as, inter alia, an "employer." At this point one has come full circle: as

defendants concede, it is beyond cavil that employers under Title VII include state employers. Moreover, it is clear that Congress intended § 1981a to supplement, if not amend, Title VII. First, the Civil Rights Act of 1991, of which § 1981a is a part, begins by declaring its purpose to be "[t]o amend the Civil Rights Act of 1964 [Title VII] to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions...." Civil Rights Act of 1991, Pub.L. No. 102-166, § 102, 105 Stat. 1071 (1991).

The District Court, in this case, premised its dismissal based on the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) applying the familiar burden-shifting framework. The four steps that set forth the elements required to establish a prima facie case of discrimination based on race in violation of Title VII: 1) he or she was a member of a protected class; 2) he or she was qualified for the position; 3) he or she suffered an adverse employment action; and 4) he or she was replaced by someone outside the protected class or was treated differently than similarly-situated, not-protected employees. Id. 508. The fourth element is modified when the plaintiff is terminated as part of a RIF. The District Court stated correctly, "A workforce reduction situation occurs when business considerations cause an employer to **eliminate** one or more positions within the company[4]." Passmore v. Mapco Express, Inc., 447 F. Supp. 3d. 654, 666(M.D. Tenn 2017)

[4]In Michas v. Health Cost Controls of Ill., Inc., 209 F.3d 687 (7th Cir. 2000), the court noted that a reduction in force "occurs when an employer permanently eliminates certain positions from its workplace." "Because the employer has removed the position entirely," the Michas court pointed out, "the position will never be refilled."

(quoting Bell v Prefix, Inc., 321 F. App'x 423, 428 (6th Cir. 2009)). The standard in the fourth element of the prima facie case requires the plaintiff to present additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons. Barnes v. GenCorp., Inc., 896 F. 2d 1457, 1465 (6th Cir. 1990). A reduction in force **or** corporate reorganization can constitute a legitimate business reason for the occurrence of an adverse employment action[5]. Gambill v. Duke Energy Corp,456 Fed. App'x 578, 584 (6th Cir. 2012) (recognizing a RIF as a legitimate, nondiscriminatory reason). A plaintiff can also meet the last element by showing that the adverse employment action "occurred under circumstances that would allow an inference of intentional discrimination." Makky v. Chertoff, 541 F. 3d 205, 214 (3rd Cir. 2008). However, just because the City had a legal right to do an RIF, does not mean that the selection of E. Henning to be one of the City's employees who lost her job in that legal RIF is not a pretext for race discrimination against her and/or retaliate against her for her present and prior protest of discrimination[6].

To establish a prima facie case at summary judgment, "evidence must be sufficient to convince a reasonable factfinder to find all of the elements of [the]

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[5] The U. S. Eighth Circuit Court of Appeals explained in Yates v. Rexton, Inc., 267 F. 3d 793 (8th Cir. 2001), "even within the context of a legitimate reduction in force, an employer may not fire an employee because" of the employee's race, color, national origin, sex, pregnancy, religion, disability, or age.

[6] E. Henning contends that 1) she should not have been the employee in her department who was selected to be furloughed in the April 2020 RIF; 2) that she should have later been recalled to her job instead of another employee who had been furloughed from a different department, who was Caucasian and who had not engaged in any protected activity as the plaintiff had; 3) that she should not have been the employee in her department who was then terminated on June 23, 2020, when other employees in her department were not;(Doc. 28, Id 338) 4) her job duties were given to her Caucasian coworker, this same person received a pro.

prima facie case." Duffy v. Paper Magic Grp., 265 F.3d 163, 167 (3d Cir. 2001). Grice v. Jackson-Madison County. Gen. Hosp. Dist., 981 F. Supp. 2d 719, 728 (W.D. Tenn. 2013) ("If the defendant meets its burden, "a plaintiff can show pretext in three interrelated ways: (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." Chen v. Dow Chem. Co., 580 F.3d 394, 400 (6th Cir. 2009) (advising courts to avoid formalism in the application of this test and to not "lose sight of the fact that at bottom the question is always whether the employer made up its stated reason to conceal intentional discrimination") (Citing: Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 460 (6th Cir.2004)).")

If a plaintiff fails to raise a genuine dispute of material fact as to **any** of the elements of the prima facie case, she has not met her initial burden, and summary judgment is properly granted for the defendant[7]. See Geraci v. Moody-Tottrup, Int'l, Inc., 82 F. 3d 578, 580 (3rd. 1996) (quoting Burton v. Telefex Inc. 707 F.3d 417 (3d Cir. 2013)).

The District Court points to E. Henning's argument[8] concluding that the evidence that one competent employee was retained over another is not sufficiently

[7]ARGUMENT: There are genuine issues of material fact whether the plaintiff was selected for furlough, not recalled to work, and then terminated during the defendant's reduction in force in 2020 due to race discrimination and/or retaliation for her prior protests of race discrimination. Doc. 28, Id 338.

[8]In March 2020, Huneycutt gave some of her job duties to Cynthia Walker, who is white. She claims that Walker was also given training denied to Henning, a raise, and permission to work overtime. Plaintiff further submits that, after she was furloughed in April 2020, an unidentified white employee who had worked in the City's police department was also furloughed but recalled to work

probative to allow a factfinder to believe that the employer intentionally discriminated against the plaintiff because of her race in the RIF context. Citing: Thompson v Fresh Prod., LLC, 985 F. 3d at 528 (brackets and internal quotation marks omitted). The District Court ruled in this case that E. Henning's burden of production of an essential element of her racial discrimination claim in the prima facie case has not been shown and the claim must fail. Doc. 35, Id 431. E. Henning would like to bring forth to the Supreme Court that the City's reason for eliminating E. Henning's position was due to a projected shortfall in its upcoming fiscal budget brought on by the COVID-19 pandemic. The City eliminated the Administrative Specialist position in the H & S Department which E. Henning held. The City did not eliminate this position within itself, instead, E. Henning was replaced by Walker, and later Walker was replaced by Mays and additional employees who were hired before the reduction in force on June 23, 2023. Indicating that the position was not eliminated, therefore, the City's claims of a deficit fail.

As observed by the U.S. Seventh Circuit Court of Appeals in Paluck v. Gooding Rubber Co., 221 F.3d 1003 (7th Cir. 2000), even if the reduction in force was otherwise legitimate or genuine, "pretext may be shown by demonstrating that the reduction in force was used to get rid of workers belonging to a protected class."

On appeal, E. Henning challenged the District Court's admission of the evidence concerning her race discrimination and retaliation case. The Sixth Circuit Court agreed with the District Court's decision stating, "E. Henning failed to

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in the Health and Sanitation Department instead of Henning and apparently not terminated. Doc 35, Id 431.

establish a prima facie case of discrimination." No: 22-5851, Doc 24-1, Id4. The fourth element of the prima facie is modified when, the plaintiff is terminated as part of an RIF, instead of showing that she was replaced. E. Henning must show "additional direct, circumstantial, or statistical evidence ..., the Appeals Court errored by removing circumstantial evidence as a showing that the evidence tended to indicate that the employer singled out the plaintiff for discharge for impermissible reasons[9]. The evidence that the Appeals Court points to is part of the plea that this is circumstantial evidence. Henning was treated less favorably than Walker, she was not denied like E. Henning by her director. Walker was not furloughed on April 24, 2020, Mays was not terminated and remained in the position that E. Henning held. No. 22-5851. E. Henning's circumstantial evidence was established.

The Court in Connelly, v Lane Construction Corp 809 F.3d 780 (3d Cir. 2016) stated that the fourth element may be established, at the summary judgment stage, by no further evidence beyond that showing the plaintiff was subject to less favorable treatment than a similarly situated employee outside the plaintiff's protected category. Doe v. C.A.R.S Protection Plus, Inc., 527 F.3d 358, 366 (3d Cir. 2008) (observing that the most often used means for establishing a causal nexus between a plaintiff's protected characteristic and adverse action is "that of disparate treatment[10], whereby a plaintiff shows that she was treated less favorably than

[9]Henning did not present direct evidence of discrimination or any statistical evidence.
[10]Disparate treatment is the less favorable treatment of employees in a protected class. A disparate treatment claim argues that the individual suffered less favorable treatment than similarly situated individuals. The basis for the less favorable treatment may be due to the individual's race, religion,

similarly situated[11] employees who are not in plaintiff's protected class"); Torre v. Casio, Inc., 42 F.3d 825, 831-32 (3d Cir. 1994) (holding fourth prong of prima facie case satisfied with evidence that employer transferred age discrimination plaintiff who was a regional sales manager, but did not transfer younger employees who were also regional sales managers, and fired plaintiff while retaining younger employees during reduction in force. Here in this case, E. Henning's complaint contains precisely such factual allegations of disparate treatment: that the City furloughed her from her job in the Health & Sanitation Department, instead of her being recalled to work in that Department, she was left on furlough while an employee who had been furloughed from a job in a different department and who was Caucasian, was recalled to work in the Health & Sanitation Department, as well as being terminated. The complaint additionally asserts that E. Henning continued to apply for the open positions of Administrative Specialist/Assistant after her termination, even though one of the positions was in the Health and Sanitation Department. Such factual content is more than sufficient "'to raise a reasonable expectation that discovery in a trial will reveal evidence of' the

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sex, color, or national origin. In disparate treatment claims, the employer's intent is the matter at issue. Examples of disparate treatment are; providing higher pay to men as opposed to women for the same job, and offering overtime hours to white workers over minority workers. The three areas of conduct related to employment and hiring that are commonly associated with disparate treatment claims are failure to hire, termination, and terms and conditions of work. Cited: Disparate Treatment vs Disparate Impact: What's The Difference? – Workplace Rights Law Group. workplacerightslaw.com/library/discrimination/disparate-treatment.

[11]In West v. City of Houston, 960 F.3d 736 (5th Cir. 2020), the Fifth Circuit defined employees alleging employment discrimination under Title VII are similarly situated to other employees who allegedly did not suffer from such discrimination. It required a showing that they hold the same job or responsibilities; that they shared the same supervisor or have their employment status determined by the same person, and have essentially comparable violation histories. Cited; Cornell Law School Nov. of 2021; Wex Definitions Team.

necessary element" that E. Henning was treated less favorably than her Caucasian co-worker. The courts differ when viewing similarly situated employees[12], but in this case, E. Henning and Walker had the same director, and job responsibilities, and E. Henning, Walker, and Mays had the same job title. E. Henning's complaint pleaded factual allegations showing the plausibility of her race discrimination claim, and the district court's dismissal was an error.

The District Court's decision on E. Henning's retaliation claim mirrors the decision on the racial discrimination claim, holding that E. Henning lacked an essential element of the prima facie claim and must fail.

In the District Court's observation, pointing to the department head – Huneycutt was the selector of employees to be furloughed and terminated during the RIF and not L. Henning whose position during the 2017 EEOC charge and E. Henning's termination was the HR Director, as well as the April 5, 2020 email. Doc 35, Id 433. If Huneycutt selected Henning for the furlough, Huneycutt did not have the authority to implement the furlough, which came from the Mayor and L. Henning. Huneycutt was furloughed along with Henning on April 24, 2020, and terminated on June 23, 2020. Huneycutt had no involvement with the termination of Henning on June 23, 2020.

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[12] Just how "similarly situated" must a plaintiff and her comparator(s) be? Generally, a court will look at whether the plaintiff has identified another employee who has some or all of these characteristics.
The plaintiff needs to present evidence of similarly situated employees outside the protected class that were treated better. Some of the criteria that courts will look to are: 1) Did you hold the same job title? 2) Do you have the same supervisor? 3) Do you have the same job responsibilities? 4) How long have you and the other employee been at the company?

Here again, employment E. Henning has to sustain the burden-shifting analysis articulated in the McDonnell Douglas framework. There are four stages that E. Henning has to establish in this prima facie case of retaliation: 1) she engaged in protected activity; 2) the City knew she exercised her protected rights; 3) the City took adverse employment action against her; 4) her protected activity was the but-for cause of the adverse employment action (there was a causal connection between the protected activity and the materially adverse action). The ultimate burden "remains with the plaintiff to convince the factfinder that the defendant retaliated against her for engaging in protected activity." Jackson v. Genesee County. Rd. Comm'n, 448 F. Supp. 3d 734 (E.D. Mich. 2020). Here again, the City claims that E. Henning fails at the fourth element of the prima facie case claiming that E. Henning's claims failed to plead sufficient factual allegations to show causation.

In Gonzalez-Bermudez v. Abbott Labs. PR Inc., 349 F. Supp. 3d 93 (D.P.R. 2018), quoting Reeves v. McKinney Hospital Venture, 235 F.3d 219 (5th Cir. 2000), "the District Court stated, "it should consider whether defendants' produced reason for their actions is not the true reason, i.e., age discrimination and retaliation action against Ms. Gonzalez and whether the true reason for the adverse action was to discriminate and/or retaliate against her because she filed a charge of age discrimination..." In E. Henning's case, she filed an EEOC charge in 2017, she spoke with Reed about the 2017 EEOC charge, and in turn, he spoke with L. E.

Henning in September of 2019, and she protested through an email to Huneycutt about the discriminatory working conditions.

Even though the District Court and the Appeals Court agree that E. Henning is not similarly situated to Walker or Mays, the two courts did not make any statements of what is required to be similarly situated. The two courts errored in their conclusion that E. Henning had not established the "but for[13]" cause of the City's action that resulted in her being furloughed and terminated.

E. Henning had many years of experience in an Administrative Specialist position yet her complaints, opposes, and concerns that were addressed to the City were used against her causing her to be furloughed and terminated. The City was alerted when E. Henning mentioned that she felt discriminated against and she wanted true equality. By no means would E. Henning have been furloughed nor terminated if she had not opposed in 2017 and again in 2020.

In Barnes v. Gencorp Inc., 896 F.2d 1457 (6th Cir. 1990), the U.S. Sixth Circuit Court of Appeals determined that "[a] workforce reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company." In Phair v. New Page Corporation, 708 F.Supp.2d 57 (D. Maine 2010), the court explained that "an employee is not eliminated as part of a reduction in force when he or she is replaced after his or her discharge." Thus, when an employer claims that an employee was terminated as part of a reduction in

[13] The "but-for" test is a common legal and factual causation test used to determine whether the defendant's conduct caused the plaintiff's harm. It asks whether, but for the defendant's conduct, the plaintiff's harm would have occurred.

force but replaces the employee following the discharge, then the employee was not terminated pursuant to a legitimate or genuine reduction in force. In other words, no true reduction in force occurs when the discharged employee is replaced.

The City's strong financial condition will show that reductions in the workforce were not needed, and the City's lack of evidence regarding its objective plan to implement a reduction in force is pretextual. Cited: James P. Tarquin, PA; Reduction in force Used to Hide Discrimination. When an employee shows that he or she was not terminated as part of a legitimate or genuine reduction in force, the employee has demonstrated pretext because the proffered reason for the discharge—a reduction in force—is unworthy of belief and the discharge was used as a pretext to hide unlawful discrimination.

According to James P. Tarquin, evidence of an employer's financial health or profitability may be used to undermine the credibility of an employer's assertion that an employee was terminated as part of a reduction in force. As observed by the U.S. Eighth Circuit of Appeals in Hardin v. Hussman Corp., 45 F.3d 262 (8th Cir. 1995), a reduction in force is generally accompanied by "objective evidence of a business decline" and the lack of such evidence "militates against [the] claim of genuine business decline."

On June 23, 2020, Mayor Scott Conger proposed that the City use its $16.3 million rainy day fund to meet the deficit, and the City Council voted to implement the plan. Cited: Adam Friedman. "Jackson mayor to cut 23 employees, including directors of the farmers market and health and sanitation," Jackson Sun, June 23,

2020, pg. Evidence can be presented to attest to the facts. According to the City Council Agenda Report, on June 16 and 23, 2020, there were no additional cuts besides the elimination of 23 employees including E. Henning this caused the City to save $863,000 of its deficit contrary to the City's statement that they had a $2 million deficit. Evidence can be presented that the City as a governmental entity received funds for the State of Tennessee through the Cares Act in March and June of 2020 due to the COVID-19 pandemic. Cited: Evidence will show that the City did not have a deficit at the end of June 2020[14]. Cited: Id. 28 &29

To this extent, the District Court premised its dismissal on the absence of factual allegations showing race-based animus or a failure to show that the City decided to furlough, terminate, and not rehire E. Henning, this was also an error. As to evidence of discriminatory animus, it was incorrect for the District Court to construe the absence of the presented evidence as, in and of itself, fatal to E. Henning's claim.

. The District Court and the Appeal Court viewed E. Henning's email as being unclear from the context in which the term "true equality" was used. The two courts felt that there was no basis for E. Henning's claims when she emailed Huneycutt and Reed about concerns of discrimination and true equality. Stating:

> However, it is unclear from the context in which the term was used whether she meant equality in the sense of being a member of some

[14] The Eighth Circuit in Hillebrand v. M-Tron Industries, Inc., 827 F.2d 363 (8th Cir. 1987) found that there was sufficient evidence to establish that there was no bona fide reduction in force and also observed that there "exists little evidence" of an "objective plan to reduce expenses at the time [of the employee's] discharge, nor is there much evidence of a genuine business decline

> protected class or whether she perceived that she was unappreciated for some nonprotected reason. In its totality, the email reads as a complaint to Huneycutt that other employees in the department did not like her, that she was not being taken seriously, and that her personal needs for advancement were not being met as quickly as she would have preferred, all of which could have arisen for any number of reasons. Indeed, Plaintiff never mentioned her race, or anyone else's or suggested that the treatment of which she complained had anything to do with race. While she complained that Walker was shown some favoritism, she offered no indication as to what she considered to be the underlying reason for it.

The two courts stated, "viewing the proffered evidence in the light most favorable to the nonmovant, the Court finds that the vague intimations contained in the April 5, 2020, email fall short of satisfying the protected activity prong of the prima facie case. (citation omitted).

The District Court and the Appeal Court also submitted their view on L. Henning's response to E. Henning's email that was forwarded to L. Henning from Reed stating that the email was a vague charge of discrimination. 22-5851 F.3d 5(6th 2023). Viewing the email as not a protected activity to establish a prima facie case. 22-5851 F.3d 4 (6th 2023). The District Court viewed the email if taken in its entirety works against the Plaintiff. The Appeals court errored stating that E. Henning's supervisor forwarded the email to the City's Director of Human. Reed

forwarded E. Henning's email to L. Henning. This within itself indicates that E. Henning was expecting a response from Huneycutt and Reed, and not L. Henning. E. Henning was unaware that L. Henning knew anything about the concerns that she was addressing to Huneycutt and Reed. After reviewing the response email from L. Henning after the mediation and deposition, E. Henning viewed this statement as L. Henning acknowledging that there was an issue of discrimination, and it was a complaint regarding Title VII violation. 1:21-cv-01040-JDB-jay Document 35 Filed 08/25/22 Page 13 of 14 Page ID 435. Indeed, E. Henning's email was sufficient to put the City on notice that she was opposing an unlawful employment practice.

> "In my role as the Director of Human Resources for the City of Jackson, I am the investigator of complaints brought against employees of the City with regard to Title VII violation namely discriminatory practice, acts and /or conditions relative to race, gender, religion, disability, age, etc.

Henning v. City of Jackson, 1:21-cv-01040-JDB-jay (W.D. Tenn. Aug. 25, 2022). E. Henning rebutted the City's claims that she received L. Henning's response letter[15]. L. Henning stated that she sent a responding email to E. Henning on April 7, 2020[16].

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[15] Eugenie H. rebutted the City's claims that she received L. Henning's letter during the mediation, the deposition, as well as in Eugenie H.'s Brief. and even the City's counsel's letter indicates that Eugenie H. denied knowing about the letter. 22-5851, Doc. 23, Id 16.

[16] That she (L. Henning) did not receive a response to the letter that she emailed to Eugenie H., that she sent the email to an external address, yet the evidence that was presented to Eugenie H. has an internal email address (ehenning@cityofjackson.net)... L. Henning stated that she did not follow up with Eugenie H. to see if she received

L. Henning was the City's Director of Human Resources during the time that E. Henning filed her EEOC charge against the City in 2017, as well as at the time decisions were made to furlough E. Henning in April 2020 and terminate E. Henning during the 2020 RIF. L. Henning indicated in her affidavit; the second declaration that she had no involvement with the selection of which City employees would be furloughed ....no involvement....to furlough Eugenie Henning. (Doc 33-1, Id 413). The color-coded list that consisted of the names of employees who were to be furloughed and terminated in 2020 was created by Reed, L. Henning, and Bobby Arnold, (ECF; Doc. 24-5L U/d 254-264, pg. 20; Id 263, pg. 24, 25; Id 264-265, pg. 28) (ECF; Doc 32-2, pg. 394 pg. 67) contrary to L. Henning statement that she was not involved.

Contrary to the District Court and the Appeal Court's dismissal and not taking into account E. Henning's reference to a hostile work environment, disparate impact, harassment, and common law negligence, the Appeal Court states, "We will not consider these issues on appeal because E. Henning did not raise them before the district court...22-5851 F.3d 4(6th 2023)." E. Henning merely spoke of a hostile work environment concerning being victimized and unfairly mistreated. Her plea was stated in her 2020 EEOC complaint and throughout the course of this case.

E. Henning used the words "discrimination" and "equality," in her email. She does not mention her own race, her colleague's race, or any other protected characteristic

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the letter via email, yet she stated that she sent the email to Eugenie H's personal email address because she wanted to be sure that she received it. (ECF; Doc. 32-2; Page ID 395, pg. 69-72, Page Id 396 pg. 73-76).

under Title VII. Yet, Huneycutt and Reed knew the basis of the race that E. Henning mentioned in the email. When E. Henning opposed that she was being treated less favorably than one colleague, yet again, Huneycutt and Reed knew of the basis of the unequal treatment that they created. Giving Reed reasons to forward the email to the L. Henning who is the Director of Human Resources felt obliged to ask why E. Henning felt that way. E. Henning's April 2020 email as the courts indicate, "fitting neatly among the vague charges of discrimination" is just that, a pure indication of discrimination.

The Appeal Court confirms that E. Henning's 2017 EEOC charge was unquestionably protected activity under the participation provision. 22-5851 F.3d 5(6th 2023). Contrary to the Appeals Court's view that the evidence does not support an inference that there was a causal connection between that activity and the City's adverse employment decisions. The allegations would permit the inference that E. Henning's sequence of complaints, beginning in 2017, led to a gradual escalation of retaliatory animus that ended in E. Henning's termination from the City. "To prove a causal connection, a plaintiff must produce sufficient evidence from which an inference can be drawn that the defendant took the adverse employment action because the plaintiff engaged in protected activity." Bledsoe v. Tenn. Valley Auth. Bd. Of Dirs., 42 R. 4th 568, 588 (6th Cir. 2022) (Cited: 22-5851 F.3d 6(6th 2023).

Observed in Farrell v. Planters Lifesavers Co., 206 F.3d 271, 281 (3d Cir. 2000) the court has rejected the proposition that evidence of close temporal proximity or retaliatory animus is required to create an inference of causation

stating, evidence probative of a causal link "is not limited to timing and demonstrative proof, such as actual antagonistic conduct or animus. Rather, it can be other evidence gleaned from the record as a whole from which causation can be inferred."

A demonstration of close temporal proximity—or any temporal proximity—between the protected activity and an adverse action is not required to show causation at all; it is merely a fact that may help prove causation. See, e.g., Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 178 (3d Cir. 1997) ("It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn."); Sitar v. Indiana Dep't. of Transp., 344 F.3d 720, 728 (7th Cir. 2003) (holding that the district court erred in "focus[ing] on such a small part of the picture—the time period between the [protected activity] and the date of termination. Cited; Equal Emp't Opportunity Comm'n v. Prod. Fabricators, Inc., 873 F. Supp. 2d 1093 (D. Minn. 2012).

The fact that the lapse of time between E. Henning's April 5, 2020, protected activity and the City's furlough on April 24, 2020, was approximately 3 weeks. September 12, 2019, is another occurrence when E. Henning addressed Reed about the EEOC 2017 claim that he discussed with L. Henning. E. Henning was passed over the open position that she applied for after her termination on June 23, 2020. The causal connection itself is enough to prove that E. Henning has proven a prima facie case of retaliation.

E. Henning's 2020 complaint stated plausible claims that the city discriminated and retaliated against her in violation of Title VII by refusing to allow her to receive training, promotional raise, overtime, reassigning her job duties, and moving her out of the office, not only these instances, but furloughing her 3 weeks after she addressed her concerns about discrimination and true equality, then not being recalled in August 2020, the initial time for all employees to return to work, but yet terminating her on June 23, 2023, because of her race and retaliating for her protected activity. The factual allegation is that the City began its plan to conduct a reduction in force in February 2020 contrary to their claims that the decision was based on an emergency brought about by the COVID-19 pandemic in April 2020.

Each strand of evidence that has been presented by E. Henning is sufficient to establish that the City's justification for the termination was a pretext for race discrimination.

REASONS FOR GRANTING THE PETITION

The District Court and the Sixth Circuit Court of Appeals have decided an important question of federal law that should be viewed by this Court. Their observation conflicts with the way the law is set. To have the Supreme Court determine if there is a need for a trial, to determine what is considered a protected activity, and to determine how similar situated should to comparators being to meet the fourth element of the prima facie case.

CONCLUSION

For the foregoing reasons, the petitioner, Eugenie Henning, respectfully requests that the petition for a writ of certiorari should be granted.

NOT RECOMMENDED FOR PUBLICATION

No. 22-5851

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EUGENIE HENNING,	)	
	)	
Plaintiff-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE WESTERN DISTRICT OF
CITY OF JACKSON, TN,	)	TENNESSEE
	)	
Defendant-Appellee.	)	

ORDER

Before: CLAY, WHITE, and LARSEN, Circuit Judges.

Eugenie Henning, proceeding pro se, appeals the district court's entry of judgment in favor of her former employer, the City of Jackson, Tennessee, on her claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, and 42 U.S.C. § 1981. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the reasons that follow, we affirm.

The City hired Henning, an African-American woman, to work in its groundskeeping department in 2011. In June 2017, Henning filed a discrimination charge against the City with the Equal Employment Opportunity Commission ("EEOC"), but she did not recover any damages. Henning continued to work in the groundskeeping department.

In December 2019, Henning asked to switch jobs. The City reassigned her to the health and sanitation department, where she reported to a different supervisor. On April 5, 2020, Henning emailed her new supervisor, alleging that she was "not being treated fairly" in her new position and requesting "true equality." Although Henning did not mention race in the email, she claimed that she was being "discriminated" against and "set up to fail." Most of the email explained

Henning's perception that her supervisor was giving one of Henning's colleagues, Cynthia Walker, preferential treatment. For example, Henning complained that her office had been moved (Walker's had not), that she had not received the training she requested (Walker did receive training), and that her job duties had been reassigned to Walker. Henning also noted that she did not receive a promotional raise after changing positions. Henning's supervisor forwarded the email to the City's Director of Human Resources. Two days later, the Director sent Henning a letter, asking Henning several clarifying questions and stating that she would open an investigation into Henning's complaint.

Meanwhile, in March 2020, the City declared a state of emergency due to the COVID-19 pandemic. On April 24, the City furloughed approximately 200 of its 790 employees—including Henning. On June 23, the City terminated 22 employees—including Henning—as part of a reduction in force ("RIF") to address an anticipated budget shortfall.

Henning sued the City, alleging racial discrimination and retaliation in violation of Title VII and 42 U.S.C. § 1981. The City moved for summary judgment, which Henning opposed. The district court granted the motion, ruling that § 1981 does not create an independent cause of action against a municipality and finding that Henning had failed to establish a prima facie case of discrimination or retaliation. Henning appeals.

We review a district court's grant of summary judgment de novo, viewing the facts in the light most favorable to the non-moving party. *Flagg v. City of Detroit*, 715 F.3d 165, 178 (6th Cir. 2013). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). If the moving party makes a properly supported motion for summary judgment, then the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968)). "Our review of a district court's summary-judgment ruling is confined to the record," *Equal Emp. Opportunity Comm'n v. Ford Motor Co.*, 782 F.3d 753, 765 (6th Cir. 2015) (en banc), "even if an appellant proffers evidence that might

show a genuine issue of material fact after the district court . . . granted the defendants' motion for summary judgment," *Bormuth v. County of Jackson*, 870 F.3d 494, 500 (6th Cir. 2017) (cleaned up).

Title VII prohibits employers from "discriminat[ing] against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's race," 42 U.S.C. § 2000e-2(a)(1), or retaliating against an employee because she has engaged in activity protected under Title VII, *id.* § 2000e-3(a). A Title VII claim may be proven with either "direct evidence of discrimination or . . . circumstantial evidence that would allow an inference of discriminatory treatment." *Johnson v. Kroger Co.*, 319 F.3d 858, 864-65 (6th Cir. 2003).

Because Henning did not present direct evidence of discrimination or retaliation, we analyze her Title VII claims under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Thompson v. Fresh Prods., LLC*, 985 F.3d 509, 522 (6th Cir. 2021). Under that framework, Henning bears the initial burden to establish a prima facie case of discrimination or retaliation. *McDonnell Douglas*, 411 U.S. at 802. If Henning establishes a prima facie case, then the burden shifts to the City to articulate a "legitimate, nondiscriminatory reason for" the adverse employment action. *Id.* Finally, if the City satisfies that burden, the burden shifts back to Henning to prove that the stated reason was a pretext for unlawful discrimination or retaliation. *Id.* at 804; *Thompson*, 985 F.3d at 522.

"To establish a prima facie case of discrimination, a plaintiff must show that (1) she is a member of a protected group, (2) she was subject to an adverse employment decision, (3) she was qualified for the position, and (4) she was replaced by a person outside of the protected class." *Carter v. Univ. of Toledo*, 349 F.3d 269, 273 (6th Cir. 2003). But the fourth requirement is modified when, as here, the plaintiff is terminated as part of a RIF. Instead of showing that she was replaced, Henning must show "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." *Barnes v. GenCorp., Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990).

Because the City does not dispute the first three elements of Henning's prima facie case, our analysis turns on the fourth requirement. Henning did not present direct evidence of discrimination or any statistical evidence. Instead, she introduced evidence that she was treated differently than two of her Caucasian colleagues, Cynthia Walker and Stacy Mays.[1] Although Walker was terminated as part of the RIF, Henning asserts that she was not furloughed at the same time as Henning. And although Mays was furloughed at the same time as Henning, she was not terminated as part of the RIF. But the record does not indicate that Walker or Mays was incompetent or even less qualified than Henning. And "evidence that one competent employee was retained over another is not 'sufficiently probative to allow a factfinder to believe that the employer intentionally discriminated against the plaintiff because of [her race]' in the RIF context." *Thompson*, 985 F.3d at 528 (quoting *Barnes*, 896 F.2d at 1466) (alteration in original). Nor does the evidence "show that [Henning's] employer made statements indicative of a discriminatory motive." *Barnes*, 896 F.2d at 1466 (observing that such evidence might satisfy the fourth element of a prima facie age-discrimination case for a plaintiff who was terminated as part of a RIF). Accordingly, we agree with the district court that Henning failed to establish a prima facie case of discrimination.

To establish a prima facie case of retaliation, Henning must establish that (1) she engaged in activity protected by Title VII, (2) the City knew she engaged in the protected activity, (3) the City later took an employment action that was adverse to Henning, and (4) there was a causal connection between the protected activity and the materially adverse action. *Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 542 (6th Cir. 2003). Henning argues that the City retaliated against her for two protected acts: her April 2020 email and her 2017 EEOC charge.

As an initial matter, Henning's April 2020 email is not "protected activity" for purposes of establishing a prima facie case. "Under Title VII, there are two types of protected activity:

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[1] In her principal brief, Henning refers to a hostile work environment, disparate impact, harassment, and common law negligence. We will not consider these issues on appeal because Henning did not raise them before the district court. *See Sheet Metal Workers' Health & Welfare Fund of N.C. v. L. Off. of Michael A. Demayo, LLP*, 21 F.4th 350, 355 (6th Cir. 2021).

participation in a proceeding with the [EEOC] and opposition to an apparent Title VII violation." *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 469 (2012) (citing *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989)). The opposition provision applies to any activity undertaken by an employee before statutory proceedings begin, such as Henning's email. *Booker*, 879 F.2d at 1313. To constitute protected activity under the opposition provision, Henning's email must have been sufficient to put the City on notice that she was opposing an unlawful employment practice. *See Yazdian v. ConMed Endoscopic Techs., Inc.*, 793 F.3d 634, 645-46 (6th Cir. 2015). But "a vague charge of discrimination in an internal letter or memorandum is insufficient to constitute opposition to an unlawful employment practice." *Booker*, 879 F.2d at 1313. Although Henning used the words "discrimination" and "equality," her email does not mention her own race, her colleague's race, or any other protected characteristic under Title VII. Nor does context suggest she was talking about a protected characteristic. Henning primarily complains that she was being treated less favorably than one colleague – but no reason is ever given or hinted at. The underlying basis for that less-favorable treatment is so vague that Defendant's Director of Human Resources felt obliged to ask why Henning she felt that way. The April 2020 email fits neatly among the vague charges of discrimination we have observed fail to constitute protected activities. *E.g.*, *Booker*, 879 F.2d at 1313-14 (letter to HR focused on his supervisor's conduct was not protected activity); *Speck v. City of Memphis*, 370 F. App'x 622, 626 (6th Cir. 2010) (complaint "about being targeted for unfair treatment, but not being targeted because of" protected characteristic was not protected activity); *Willoughby v. Allstate Ins. Co.*, 104 F. App'x 528, 530-31 (6th Cir. 2004) (letter "read[ing] as if [appellant] is trying to impeach [coworker's] credibility" not protected activity despite "mention[ing] three previous sexual harassment complaints").

Henning's 2017 EEOC charge was unquestionably protected activity under the participation provision, but the evidence does not support an inference that there was a causal connection between that activity and the City's adverse employment decisions. "To prove a causal connection, a plaintiff must produce sufficient evidence from which an inference can be drawn

that the defendant took the adverse employment action because the plaintiff engaged in protected activity." *Bledsoe v. Tenn. Valley Auth. Bd. of Dirs.*, 42 F.4th 568, 588 (6th Cir. 2022) (cleaned up). "A plaintiff who shows that the adverse action occurred immediately after the protected activity may be able to rely on temporal proximity alone to overcome a motion for summary judgment." *Id.* But if "some time elapses between when the employer learns of a protected activity and the subsequent adverse employment action, the employee must couple temporal proximity with other evidence of retaliatory conduct to establish causality." *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 525 (6th Cir. 2008). Nearly three years elapsed between Henning's 2017 EEOC charge and the adverse employment actions. Given the absence of other evidence of retaliatory conduct, Henning failed to establish a prima facie case of retaliation.

Finally, Henning asks us to reverse the district court's judgment on her § 1981 claim. But Henning named only the City as a defendant in her action. And, as the district court held, § 1981 does not create an independent cause of action against a governmental entity. *Arendale v. City of Memphis*, 519 F.3d 587, 598-99 (6th Cir. 2008).

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

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 06/14/2023.

Case Name: Eugenie Henning v. City of Jackson, TN
Case Number: 22-5851

Docket Text:
ORDER filed: We AFFIRM the district court's judgment. Decision not for publication, pursuant to FRAP 34(a)(2)(C). Mandate to issue. Eric L. Clay, Circuit Judge; Helene N. White, Circuit Judge and Joan L. Larsen, Circuit Judge.

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

Ms. Eugenie Henning
12 Brushwood Cove
Jackson, TN 38305

A copy of this notice will be issued to:

Mr. John D. Burleson
Mr. Matthew Robert Courtner
Ms. Wendy R. Oliver

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-5851

EUGENIE HENNING,

Plaintiff-Appellant,

v.

CITY OF JACKSON, TN,

Defendant-Appellee.

Before: CLAY, WHITE, and LARSEN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Tennessee at Jackson.

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

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

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

EUGENIE HENNING,

Plaintiff,

v. No. 1:21-cv-01040-JDB-jay

CITY OF JACKSON, TENNESSEE,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND
DISMISSING CASE

INTRODUCTION AND PROCEDURAL BACKGROUND

On March 11, 2021, the Plaintiff, Eugenie Henning, brought this action against the Defendant, City of Jackson, Tennessee (the "City"), pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981, alleging discrimination on the basis of race and retaliation. (Docket Entry ("D.E.") 1.) Pending on the Court's docket is the City's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (D.E. 24), to which Plaintiff responded (D.E. 32), and Defendant replied (D.E. 33).[1] As the motion has been fully briefed, it is ripe for disposition.

STANDARD OF REVIEW

Rule 56 provides in relevant part that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to

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[1]To aid the Court in its review of Defendant's submissions, counsel is instructed, in future filings, to include when docketing exhibits a brief description of the exhibit's contents, for example, "Exhibit A – Deposition of Eugenie Henning."

judgment as a matter of law." Fed. R. Civ. P. 56(a). At the summary judgment stage, a plaintiff "can no longer rest on allegations alone[.]" *Reform Am. v. City of Detroit, Mich.*, 37 F.4th 1138, 1148 (6th Cir. 2022) (internal quotation marks omitted), *reh'g en banc denied*, 2022 WL 2914586 (6th Cir. July 18, 2022). Rather, upon the filing of a proper motion for summary judgment, the nonmoving party "must present significant probative evidence that will reveal that there is more than some metaphysical doubt as to material facts." *Wiley v. City of Columbus, Ohio*, 36 F.4th 661, 667 (6th Cir. 2022) (internal quotation marks omitted). "A dispute is 'genuine' only if a reasonable jury could decide it either way, and it is 'material' only if its resolution could affect the case's outcome." *Reform Am.*, 37 F.4th at 1147. In making its determination, the court is to "view the factual evidence in the light most favorable to the nonmoving party, and draw all reasonable inferences in that party's favor." *Stein v. Gunkel*, ___ F.4th ___, 2022 WL 3210205, at *4 (6th Cir. Aug. 9, 2022) (quoting *Burwell v. City of Lansing*, 7 F.4th 456, 462 (6th Cir. 2021)). "The moving party is entitled to summary judgment when the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Goodman v. J.P. Morgan Inv. Mgmt., Inc.*, 954 F.3d 852, 859 (6th Cir. 2020) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)) (internal quotation marks omitted), *reh'g en banc denied* (July 1, 2020).

UNDISPUTED MATERIAL FACTS

The following material facts are undisputed. Defendant hired Henning, who is black, on February 5, 2011, as a senior secretary in its groundskeeping department. She was later promoted to the position of administrative specialist in the same department. On or about June 9, 2017, Plaintiff filed an EEOC charge against the Defendant. At the time the charge was filed, her supervisor was Willie Woods, Lynn Henning was the City's HR Director, and the position of City

Mayor was held by Jerry Gist. The charge, of which Lynn Henning was aware, concluded without any recovery of damages.

After Plaintiff filed the EEOC charge, she continued to work for the Defendant and received cost of living raises. In the summer of 2019, Scott Conger replaced Gist as City Mayor and hired Alex Reed as his chief of staff. Around December of that year, Henning approached Reed and informed him that she was unhappy in the groundskeeping department and that she would like a different job. At approximately the same time, Rena Tyler, then an employee of the City's health and sanitation department, advised Reed that she too was unhappy in her position. Reed proposed that Henning and Tyler, who is white, switch jobs, to which both women agreed. As a result, Plaintiff began working in the health and sanitation department under her new supervisor, Kathleen Honeycutt.

In March 2020, the City entered a state of emergency in light of the COVID-19 pandemic. Around that time, Defendant determined that an expected revenue shortfall might lead to an inability to pay salaries and wages.

On April 5, 2020, Henning sent an email to Honeycutt that stated in its entirety as follows:

> I've address many concerns that I have to you in the last several months since I've been in this department, yet again, after I was given the information that you shared with me Friday morning I was baffled. I pondered on the information as to why would Cynthia [Walker] move from the office that she has been in since she began in the department. She is your assistant; therefore, I would think that she should be the person nearest to you. You stated last month that Mayor Conger wanted Cynthia to be responsible for all of the billing, and the receipt of payments, which include the receipt of payments that is mailed in, and payments made in person by customers. You stated that he told you that one person should be responsible for the receipt book, and that person is Cynthia. I asked you Friday about the fact that she is the responsible person, you indicated that I can receipt payments; in which, in contradictory. Now, suddenly that has change once again. I feel that I am not being treated fairly. As I have mentioned before to you, that I would like to be a part of the team, not isolated where I am not given any information, but overhear and notice the whispering that indicates there is talk pertaining to me. I am never asked what I prefer, if I have a choice, what part would I like to play in assisting in

> the office work, nor what I think of a matter. I am told what my responsibilities are in the office, or how it will change after Cynthia has chosen the office responsibilities that she prefer, as you indicated before to me. I asked for on hand training from Rena at the GroundsKeeping location, but I was told that she would have to come over to the H & S Dept., yet Cynthia was given the opportunity to go to Rena's location for training over a period of days. I asked for overtime to learn the job, and to get ahead. I wasn't given that opportunity, yet Cynthia was/is given that opportunity once again. When I was transferred from GroundsKeeping to H & S, I was told that I was going to take Rena's position, but I wasn't truly given that opportunity, no on hand training and no increase in pay. I feel that I am being set up to fail, or not to succeed. I haven't really been given the clear understanding as to what me position really consist of, even though I've asked numerous time.
>
> I made the decision to transfer to the H & S Dept. from GroundsKeeping, based on my thought that I would be treated fairly, respected, and given an opportunity of equality. I do feel that I am being discipline, for what reason I am unsure. I have been place in a situation to feel that I am being discriminated. I put my heart and soul into my job, so that I can make a difference to helping the department to advance. I am aware that this is a learning process, but I haven't been given the opportunity to prove that I am a team player. I am easy to get along with, and respectful of other people feelings.
>
> The choices shouldn't be given to one person, and that person shouldn't be given the rights to continuously slander, belittle, or degrade other people, based on what he or she wants. If the issue at hand would be addressed, instead of looking at certain workers for speaking up as troublemakers, this world and that which is in it, would be a better place to live, work, and dwell.
>
> If you feel that I am not the right person to work in your department, please inform the Mayor; with due respect, the true reason for your decision. I have put every effort into making this transition transpire that would be beneficial to the City of Jackson, H & S Dept., and as well as myself. Value me as a person first, then as an employee who does want to have true equality.

(D.E. 24-3 at PageID 224-25.) The email was forwarded by Reed to Lynn Henning, who responded to the email on April 7, 2020:

> In my role as the Director of Human Resources for the City of Jackson, I am the investigator of complaints brought against employees of the City with regards to Title VII violations, namely discriminatory practices, acts and/or conditions relative to race, gender, religion, disability, age, etc.
>
> Additionally, each year during the month of October, as Title VI Coordinator, I make all employees and citizens aware of our commitment to non-discrimination in our programs, services, etc. While employees do not fall specifically under this

title, the intent is to bring awareness to any practices, acts or the like that may be discriminatory in nature.

With that being said, I have a copy of the letter that you sent to Kathleen Huneycutt on April 6, 2020, where you allege unfair treatment, among other issues. I am opening an investigation as per policy and will report my findings to Mayor Scott Conger. I will need your cooperation in providing as much detail as possible relative to when incidents occurred, where they occurred and witness(es) to any incidents.

1. You said that you are not being treated fairly.

    a. Describe the incident or incidents that occurred to indicate that you are being treated unfairly.

    b. When did she commit the act(s)?

    c. What did she do?

    d. Who witnessed this act?

2. You said that you feel that you are being set up to fail.

    a. Describe how you are being set up to fail.

    b. What did she do?

    c. When did she do it?

    d. Who witnessed this act?

3. You said that you feel that you are being disciplined.

    a. When did the discipline take place?

    b. What form of discipline was it?

4. You said that you are being discriminated against.

    a. Please explain.

5. You said that people have been given the rights to continuously slander, belittle or degrade.

    a. Please explain.

b. What was said?

c. Who said it?

d. Were there any witnesses? If yes, who were they?

6. You said—value me as a person first, then as an employee who does want to have true equality.

a. Please explain.

b. How are you treated ["]less than a person["]?

c. How are you not treated equally as other employees?

Again, as I will conduct a full investigation into these accusations, the more details and information that you can provide will be helpful.

(D.E. 32-3 at PageID 402-03.)

Around April 24, 2020, Defendant furloughed some 200 of its 790 employees. Plaintiff was among those employees affected. Later, when movant began preparing its upcoming fiscal budget and projections indicated an anticipated $2 million budget deficit, the City, on June 23, 2020, terminated twenty-two employees as part of a reduction in force ("RIF") in an attempt to reduce the deficit. Of that number, eleven were white and eleven were black. Plaintiff was one of those fired. It was the City's department heads who made recommendations as to which employees should be selected for RIF furlough and termination. Lynn Henning was still the HR Director at the time of the RIF.

ARGUMENTS OF THE PARTIES AND ANALYSIS

SECTION 1981.

Although Plaintiff seeks redress pursuant to § 1981, the statute does not create an independent cause of action against a municipality. *See Arendale v. City of Memphis*, 519 F.3d 587, 598-99 (6th Cir. 2008); *see also Johnson v. Louisville-Jefferson Cty. Metro. Gov't*, Civil

Action No. 3:19-CV-00431-GNS-CHL, 2020 WL 6386395, at *4 (W.D. Ky. Oct. 30, 2020); *Marshall v. Wayne Cty.*, Case No. 2:19-cv-12515, 2020 WL 5505382, at *3 (E.D. Mich. Sept. 11, 2020). Accordingly, her § 1981 claims cannot stand.

TITLE VII.

Racial Discrimination

Title VII prohibits "discriminat[ion] against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ." 42 U.S.C. § 2000e-2(a)(1). Where, as is the case here, a plaintiff lacks direct evidence of discrimination, the court is to apply the familiar burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Thompson v. Fresh Prod., LLC*, 985 F.3d 509, 522 (6th Cir. 2021).

Generally, the framework consists of three steps. *Briggs v. Univ. of Cincinnati*, 11 F.4th 498, 507-08 (6th Cir. 2021). A plaintiff bears the initial burden of establishing a prima facie case of discrimination by showing that (1) "he or she was a member of a protected class"; (2) "he or she suffered an adverse employment action"; (3) "he or she was qualified for the position"; and (4) "he or she was replaced by someone outside the protected class or was treated differently than similarly-situated, non-protected employees." *Id.* at 508. If the plaintiff fails at this stage, defendant is entitled to summary judgment on the claim. *Equal Emp't Opportunity Comm'n v. Clarksville Health Sys., G.P.*, ___ F. Supp. 3d ___, 2022 WL 3009502, at *6 (M.D. Tenn. July 28, 2022); *see also Briggs*, 11 F.4th at 508 ("On a motion for summary judgment, a district court considers whether there is sufficient evidence to create a genuine dispute at each stage of the *McDonnell Douglas* inquiry."). If the plaintiff succeeds on this showing, "[t]he burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for its actions, supported by

admissible evidence that if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *Briggs*, 11 F.4th at 508 (internal quotation marks omitted). At that point, the burden returns to the plaintiff, requiring her to prove by a preponderance of the evidence that "the employer's proffered reasons were a mere pretext for discrimination." *Id.* at 508-09.

As noted above, Plaintiff was terminated as part of a RIF. "A workforce reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company." *Passmore v. Mapco Express, Inc.*, 447 F. Supp. 3d 654, 666 (M.D. Tenn. 2017) (quoting *Bell v. Prefix, Inc.*, 321 F. App'x 423, 428 (6th Cir. 2009)). Because of the unique nature of such circumstances, the fourth element of the prima facie case has been modified to require a heightened showing where the adverse action involved a RIF. *Thompson,* 985 F.3d at 522; *Peeples v. City of Detroit*, 891 F.3d 622, 634 (6th Cir. 2018), *reh'g denied* (July 6, 2018). Under this standard, the plaintiff must present "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." *Peeples*, 891 F.3d at 634 (quoting *Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990)).

The instant motion focuses on the fourth element of the prima facie case, as modified for RIF actions. In making its determination as to whether this requirement has been met, courts have been instructed that "[t]he guiding principle is that the evidence must be sufficiently probative to allow a factfinder to believe that the employer intentionally discriminated against the plaintiff because of" race. *Barnes*, 896 F.2d at 1466; *see also Pio v. Benteler Auto. Corp.*, Case No. 1:18-cv-1265, 2021 WL 5925363, at *9 (W.D. Mich. Feb. 23, 2021), *aff'd*, 2022 WL 351772 (6th Cir. Feb. 7, 2022).

Plaintiff argues that, in March 2020, Honeycutt gave some of her job duties to Cynthia Walker, who is white. She claims that Walker was also given training denied to Henning, a raise, and permission to work overtime. Plaintiff further submits that, after she was furloughed in April 2020, an unidentified white employee who had worked in the City's police department was also furloughed but recalled to work in the health and sanitation department instead of Henning and apparently not terminated. However, "evidence that one competent employee was retained over another is not sufficiently probative to allow a factfinder to believe that the employer intentionally discriminated against the plaintiff because of her race in the RIF context." *Thompson*, 985 F.3d at 528 (brackets and internal quotation marks omitted). Such evidence may be enough to clear the bar upon a showing that the plaintiff was more qualified than the nonprotected individual or that the employer "made statements indicative of a [racially] discriminatory motive," *see id.* at 527, but neither has been made, or claimed, here. Accordingly, the fact that Walker or the unidentified employee was retained fails to establish a disputed fact regarding whether Henning was singled out because of her race. *See id.* at 528 ("Thompson does not claim that her qualifications were superior to [a nonprotected retained employee's], nor does she present other evidence of discriminatory motive related to [a protected class]. Thus, the fact that [the nonprotected employee] was retained does not establish a dispute of fact regarding whether Thompson was singled out because of her [protected status].").

Absent an essential element of her racial discrimination claim, the prima facie case has not been shown and the claim must fail.

Retaliation

Plaintiff alleged in her complaint that the City retaliated against her "because of her prior protests of employment discrimination" (D.E. 1 at PageID 5), specifically, the 2017 EEOC charge and the April 5, 2020, email. Title VII prohibits an employer from retaliating against an employee because he or she "has opposed any practice made an unlawful employment practice" or "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3(a). Because Henning again relies upon circumstantial evidence of retaliation, the same burden-shifting analysis articulated in *McDonnell Douglas* applies. *See Boshaw v. Midland Brewing Co.*, 32 F.4th 598, 605 (6th Cir. 2022), *reh'g denied*, 2022 WL 2286411 (6th Cir. May 31, 2022). To state a prima facie case of retaliation, the plaintiff must establish that (1) she "engaged in protected activity," (2) "defendant[] knew [she] exercised [her] protected right," (3) "defendant[] subsequently took an adverse employment action against [her]," and (4) "[her] protected activity was the but-for cause of the adverse employment action." *Id.* (internal quotation marks omitted). While the *McDonnell Douglas* analysis is one of shifting burdens, the ultimate burden "remains with the plaintiff to convince the factfinder that the defendant retaliated against her for engaging in protected activity." *Jackson v. Genesee Cty. Rd. Comm'n*, 999 F.3d 333, 344 (6th Cir. 2021).

2017 EEOC Charge.

In its motion, the City maintains that Plaintiff cannot establish a causal connection between the charge and her termination—the fourth element of the retaliation claim. To show causation, "a plaintiff must produce sufficient evidence from which an inference can be drawn that the defendant took the adverse employment action because the plaintiff engaged in protected activity." *Bledsoe v. Tenn. Valley Auth. Bd. of Dir.*, 42 F.4th 568, 2022 WL 2965630, at *13 (6th Cir. July

27, 2022) (quoting *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 563 (6th Cir. 2004)) (brackets and internal quotation marks omitted). "A plaintiff who shows that the adverse action occurred immediately after the protected activity may be able to rely on temporal proximity alone to overcome a motion for summary judgment." *Id.* However, when "some time elapses between when the employer learns of a protected activity and the subsequent adverse employment action," causation can be shown if temporal proximity is coupled with "other evidence of retaliatory conduct to establish causality." *Id.* (quoting *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 525 (6th Cir. 2008)).

It appears from her brief that the only other evidence of retaliatory conduct offered by Plaintiff consists of the fact that Lynn Henning was the HR Director at both the time of the EEOC charge and of her termination. However, it is undisputed that the department heads—in Plaintiff's case, Honeycutt—recommended which employees in their departments should be selected for furlough and termination during the RIF, not the HR Director. No evidence has been presented that Honeycutt had any knowledge of the 2017 EEOC claim. Therefore, the retaliation claim based on the 2017 EEOC charge lacks an essential element of the prima facie claim and must fail.

April 5, 2020, Email.

Defendant also maintains that Henning's April 5, 2020, email cannot form the basis of a retaliation claim because it does not constitute "protected activity" for purposes of establishing a prima facie case. To make this showing, a plaintiff must demonstrate that she "took an overt stand against suspected illegal discriminatory action." *Khalaf v. Ford Motor Co.*, 973 F.3d 469, 489 (6th Cir. 2020) (internal quotation marks omitted), *cert. denied*, 141 S. Ct. 1743 (2021). A vague charge of discrimination in an internal letter or memorandum is insufficient. *Id.* at 489-90; *see*

also Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1304, 1313 (6th Cir. 1989). As the Sixth Circuit explained in *Booker*,

> [o]therwise, 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. In our view, such would constitute an intolerable intrusion into the workplace.

Booker, 879 F.2d at 1313.

In support of the required showing, Plaintiff references her claim in the email that she was being denied "true equality." However, it is unclear from the context in which the term was used whether she meant equality in the sense of being a member of some protected class or whether she perceived that she was unappreciated for some nonprotected reason. In its totality, the email reads as a complaint to Honeycutt that other employees in the department did not like her, that she was not being taken seriously, and that her personal needs for advancement were not being met as quickly as she would have preferred, all of which could have arisen for any number of reasons. Indeed, Plaintiff never mentioned her race, or anyone else's, or suggested that the treatment of which she complained had anything to do with race. While she complained that Walker was shown some favoritism, she offered no indication as to what she considered to be the underlying reason for it. Viewing the proffered evidence in the light most favorable to the nonmovant, the Court finds that the vague intimations contained in the April 5, 2020, email fall short of satisfying the protected activity prong of the prima facie case. *See Khalaf*, 973 F.3d at 491 (appellate court found it questionable that employee's email to employer's HR manager constituted protected activity where it merely catalogued instances of his subordinates' disrespect, poor work, and defensiveness, none of which he explicitly connected to being motivated by any animus toward his race or national origin); *Speck v. City of Memphis*, 370 F. App'x 622, 626 (6th Cir. 2010) (where plaintiff complained of being targeted for unfair treatment, but not of being targeted

because of her protected status, she had failed to establish that she engaged in protected activity); *Fox v. Eagle Distrib. Co., Inc.*, 510 F.3d 587, 588-92 (6th Cir. 2007) (appellate court affirmed district court's grant of summary judgment in favor of employer where plaintiff's statements to customers that employer's "upper management [was] out to get him" and that his superiors had prevented him from being promoted, without mentioning age discrimination, did not amount to protected activity, noting that to decide otherwise would "require [the court] to go beyond drawing a reasonable inference in [plaintiff's] favor" by "reading something into the record that simply is not there"); *Grice v. Jackson-Madison Cty. Gen. Hosp. Dist.*, 981 F. Supp. 2d 719, 737 (W.D. Tenn. 2013) (plaintiff's "general complaints of discrimination, which neither referred to a protected class nor provided facts sufficient to create that inference, are insufficient to constitute" protected activity); *Manstra v. Norfolk S. Corp.*, No 3-10-CV-166, 2012 WL 1059950, at **11-13 (E.D. Tenn. Mar. 28, 2012) (insufficient showing of protected activity where employee failed to allege that harsh and unfair treatment by her supervisors and her failure to receive opportunities equal to those of other trainees were based on her sex or any other matter made unlawful by Title VII); *Longs v. Ford Motor Co.*, 647 F. Supp. 2d 919, 932-33 (W.D. Tenn. 2009) (an employee's complaint to his or her employer "must indicate that discrimination occurred because of sex, race, national origin, or some other protected class"; "[m]erely complaining in general terms of discrimination . . ., without indicating a connection to a protected class or providing facts sufficient to create that inference, is insufficient").

Plaintiff also points to Lynn Henning's response to her email and the statement therein that she was the investigator of complaints against the City for Title VII violations of all kinds. If anything, the email, taken in its entirety, works against the Plaintiff. Although the missive advised Plaintiff that an investigation into her alleged "unfair treatment" would be opened pursuant to City

policy, it was clear from the questions posed in the responsive email that the HR Director could not discern from Plaintiff's communication the basis for any potential Title VII claim. It is worth noting here that Plaintiff does not argue, and the record does not reflect, that she ever complied with Lynn Henning's request for details relative to the complaints made in the April 5, 2020, email.[2] The retaliation claim based on the email fails.

CONCLUSION

For the reasons articulated herein, Defendant's motion for summary judgment is GRANTED and this matter is DISMISSED. The Clerk is DIRECTED to enter judgment in favor of the Defendant and to remove all settings in the case from the Court's calendar.

IT IS SO ORDERED this 25th day of August 2022.

s/ J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE

[2]In her second declaration, a copy of which is attached as an exhibit to the City's reply brief, Lynn Henning stated that Plaintiff never responded to her April 7, 2020, email. (D.E. 33-1 ¶ 3.)

No.

IN THE

SUPREME COURT OF THE UNITED STATES

EUGENIE HENNING,

Petitioner,

v.

CITY OF JACKSON, TN

Respondent,

PROOF OF SERVICE

I, Eugenie Henning, do swear or declare that on this November 12, 2023 as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

JOHN B. BURLESON
MATTHEW COURTNER
RAINEY, KIZER, REVIERE & BELL
209 E. MAIN ST.
JACKSON, TN 38301
(731) 426-8114
CITY OF JACKSON, TN, COUNSEL FOR THE RECORD

Eugenie Henning

Signed on: 11/12/2023